

## ARTICLE

# U.S. Postal Service Announces New Acquisition Regulations

May 27, 2005

## I. Introduction

The U.S. Postal Service (Postal Service) has issued a final rule replacing its Purchasing Manual and all other Postal Service purchasing regulations with provisions that take up only approximately six pages in the Federal Register. See 70 Fed. Reg. 20291 (Apr. 19, 2005). These regulations are designed to make the Postal Service's purchasing practices more like those found in the commercial marketplace. According to the preamble to the regulations, the Postal Service intends to acquire goods and services "in a manner akin to the best commercial practices in the private sector" and to apply "purchasing practices used by leading corporate enterprises." *Id.* at 20292, 20291.<sup>1</sup> In promulgating the final regulations, the Postal Service noted that "very few" of its 25,000 suppliers commented on the proposed regulations, a fact which the Postal Service interpreted as "an indication that the supplier community is satisfied with the proposed regulations and did not have serious reservations" about them. *Id.* The proposed regulations were published at 69 Fed. Reg. 13786 (Mar. 24, 2004).

The Postal Service in the new regulations is seeking to adopt procedures that will promote the acquisition of "the best products and services to meet its needs at fair and reasonable prices." 70 Fed. Reg. at 20291. As otherwise stated by the Postal Service, the regulations seek "to focus upon and to obtain the best value in [Postal Service] acquisitions." *Id.*

The new regulations focus on such issues as Postal Service purchasing authority, "business relationships" between the Postal Service and its suppliers, Postal Service decisions to decline to accept or consider proposals, the new Postal Service position of

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ombudsman, contract claims and disputes, and debarment and suspension. However, the regulations do not address such usual procurement topics as competition, solicitations, proposals or the evaluation of proposals.

These latter issues may be addressed in so-called "Supplying Principles and Practices," which currently are being drafted. Such Supplying Principles are "intended for internal use only" and thus "will not have the force and effect of law" and will not be binding on the Postal Service. *Id.* at 20292. Since the Supplying Principles will be "advisory and illustrative" only, they will "create no rights, substantive or procedural, enforceable against the Postal Service." *Id.* Suppliers will thus have to rely largely on individual solicitations "as to how proposals generally will be evaluated and how the Postal Service will determine best value." *Id.*

## II. Key Provisions

### A. Applicability & Coverage

The final regulations are effective May 19, 2005, and apply to "all Postal Service acquisitions of property (except real property) and services." §601.103.<sup>2</sup> Under the new regulations, all solicitations issued and contracts entered into prior to the May 19 effective date "will be governed by the regulations in effect at the time the contract was signed." *Id.* By focusing on the execution of a *contract*, the foregoing sentence does not address precisely the regulations which apply to *solicitations* but, presumably, solicitations will be governed by the regulations in effect at the time the solicitation was issued.

As noted above, the final regulations revoke and supersede "[a]ll previous Postal Service purchasing regulations." § 601.102. This includes the Postal Contracting Manual, Procurement Manual, the Purchasing Manual (Issues 1, 2 and 3), and procurement handbooks, circulars and instructions. *Id.*

### B. Supply Principles

As characterized by the Postal Service, the new regulations, as well as the forthcoming Supplying Principles, are designed "to permit flexibility to the Postal Service so it may respond to market conditions in acquiring the best property, goods and services it believes meets its needs at a fair and reasonable price." 70 Fed. Reg. at 20291-92.

It is expected that the Supplying Principles currently being drafted will supply many of the missing details, but the regulations provide no target date by which such Principles are expected to be finalized. However, the regulations state that, pending finalization of the new Supplying Principles, a set of "Interim Internal Purchasing Guidelines" will provide "guidance" to Postal Service contracting officers. *Id.* at 20292. Dated May 15, 2005, these Interim Internal Purchasing Guidelines currently are available on the Postal Service's webpage and appear to address many traditional procurement topics.

### C. USPS/Supplier Business Relationships

Central to the new purchasing regime is the Postal Service's expectation that it will be treated by its suppliers as they would treat "other valued customers of similar size and importance." §601.105; *accord*, 70 Fed. Reg. at 20293 (stating Postal Service "expectation that it will be treated by each of its suppliers and prospective suppliers as a valued customer"). Accordingly, in a somewhat unique provision, the Postal Service explicitly "reserves the right to cease accepting or considering proposals from a person or organization when that

person or organization fails to meet reasonable business expectations of high quality, prompt service, and overall professionalism." §601.105; *accord*, 70 Fed. Reg. at 20293.

#### **D. Declining to Accept or Consider Proposals**

To effectuate the foregoing reservation of rights, the regulations provide additional details as to the types of conduct and business practices that it will deem unacceptable and the procedures that will apply to Postal Service decisions not to accept or consider proposals. §601.106(a). First, perhaps in an effort to assuage suppliers as to the exercise of its discretion in this regard, the preamble to the regulations states that only the Vice President of Supply Management-and not contracting officers-is authorized to decide whether to decline to accept or consider proposals from any prospective supplier. 70 Fed. Reg. at 20292. The exercise of this discretion "is expected to be a rare occurrence." *Id.*

Second, the types of activities that will be deemed unacceptable conduct and business practices will be of a lesser nature than the conduct that could lead to debarment or suspension. As the regulations state, such conduct "will not rise to the level of unethical or criminal activities that could lead to the debarment, suspension or ineligibility of a supplier." §601.106(a); *accord*, 70 Fed. Reg. at 20293 ("A decision not to accept or consider proposals may be informed by a supplier's unreasonable or unsatisfactory business practices while debarment is reserved for more egregious forms of supplier misconduct."). The regulations provide the following examples of unacceptable or business practices:

- Marginal or dilatory performance;
- Failure to deliver on promises made in the course of dealings with the Postal Service;
- Providing false or misleading information as to financial condition, ability to perform, or other material matters, including any aspect of performance on a contract; and
- Engaging in other questionable or unprofessional conduct or business practices.

*Id.*

With respect to procedures, if the Postal Service elects to decline to accept or consider a proposal from a person or organization, the Vice President of Supply Management (or his or her designee) will provide written notice to the supplier with an explanation of the reasons for the decision and other information prescribed in the regulations. *Id.* The person or organization whose proposal is not accepted may contest the decision in accordance with the disagreement resolution procedures in the regulations, seek to resolve the matter through alternative dispute resolution, or both. §601.106(c).

#### **E. Initial Disagreement Resolution**

The final regulations codify the Postal Service's commitment to resolving all "potential disagreements by mutual agreement at the contracting officer or appropriate management level." §601.107. Accordingly, the regulations set forth a disagreement resolution process for "all disputes, protests, claims, disagreements or demands of whatsoever nature" against the Postal Service arising "in connection with the purchasing process," except for claims that arise under the Contract Disputes Act (CDA) or claims concerning debarment and suspension. *Id. accord*, 70 Fed. Reg. at 20293 (reiterating Postal Service policy to resolve "all business

disagreements ... quickly and inexpensively" at the contracting officer or management level). Except for these excepted claims, disagreements must be submitted to the contracting officer within 10 days of the date the disagreement arose and, if the matter is not resolved within 10 days following the submission of the dispute, the disagreement may be filed with the ombudsman described below. *Id.*

The regulations prescribe no explicit procedures for the Postal Service to use in attempting to resolve disagreements at the contracting officer or management level. Rather, the regulations direct that the contracting officer and the supplier "consider alternative dispute resolution procedures as a means of resolving such disagreements." 70 Fed. Reg. at 20293. However, such procedures may be used only if agreed to by both parties. §601.107; *accord*, 70 Fed. Reg. at 20293 ("No supplier, however, will be required to use such alternate dispute procedures if the supplier chooses not to do so."). Notwithstanding the requirement for mutual agreement, the Postal Service makes clear in the regulations that it "supports and encourages the use of ADR as an effective way to understand, address, and resolve disagreements and conflicts." §601.107. The alternate dispute resolution methods cited in the regulations include "informal negotiation, mediation by a neutral third party, and any other agree-upon method." *Id.*

#### **F. Ombudsman Disagreement Resolution**

In the event that a disagreement is not resolved at the contracting officer or management level within 10 calendar days, the disagreement may be submitted to an ombudsman who is to follow the "expedited procedure" prescribed by the regulations. §601.108(a); 70 Fed. Reg. at 20293. This expedited ombudsman procedure is intended to "quickly and with finality" resolve any disagreement that could not be resolved at the contracting officer or management level (except, again, for CDA claims and claims concerning debarment or suspension). *Id.*; §601.108(b). This ombudsman procedure is the "sole and exclusive" procedure for the resolution of disagreements not resolved at the contracting officer and management level. *Id.*

Some of the key provisions of the ombudsman procedures are as follows:

- The disagreement must be lodged in writing and state the pertinent factual circumstances, the desired remedy, and the rationale for the disagreement.
- Counsel is not required but may be retained to assist in the process.
- The person or organization submitting the disagreement must indicate whether it is willing to attempt to resolve the matter through alternative dispute resolution.
- A disagreement must be lodged with the ombudsman within 20 calendar days after the time it was presented to the contracting officer under Section 601.107, although the ombudsman may grant an extension of this time.
- The ombudsman will promptly provide a copy of the disagreement to the contracting officer who must promptly notify other interested persons (such as actual or prospective offerors whose direct economic interest would be affected by the award of, or failure to award the contract).
- The ombudsman will consider the written disagreement and any response by other interested persons and appropriate Postal Service officials within a time frame to be established by the ombudsman.

- The ombudsman may meet individually or jointly with the person or organization submitting the disagreement, other interested persons, and/or Postal Service officials.
- The ombudsman may obtain materials, information or advice that may help to resolve the disagreement.
- The person or organization submitting the disagreement, other interested persons, and Postal Service official must promptly provide all relevant, non-privileged materials and other information requested by the ombudsman.

§601.108(d)-(f).

The regulations intend that the ombudsman generally will resolve disagreements within approximately 30 days after the ombudsman receives the disagreement. §601.108(i). However, this time frame may be shortened or lengthened depending on the "complexity of the issues and other relevant considerations." *Id.* The ombudsman's decision is "final and binding" on the person submitting the disagreement, other interested persons, and the Postal Service. §601.108(h). The person or organization that lodged the disagreement or other interested person may appeal the decision to a Federal court with jurisdiction over the claims but only on the grounds that the decision (i) was procured by fraud or other criminal conduct or (ii) was obtained in violation of the regulations or an applicable public law. *Id.*

### **G. Contract Claims and Disputes**

The Postal Service regulations also include a provision that implements the CDA. §601.109. Similar to the disagreement process discussed above (Section E), this section of the regulations articulates the Postal Service's policy "to resolve contractual claims and disputes by mutual agreement at the level of an authorized contracting officer whenever possible" and "supports and encourages alternative dispute resolution as an effective way to understand, address, and resolve conflicts with suppliers." §601.109(b). In this regard, the rule recommends that efforts to resolve differences be made before the issuance of a final decision on a claim and, even when the supplier does not agree to use alternative dispute resolution, the contracting officer "should consider holding informal discussions between the parties in order to resolve the conflict before the issuance of a final decision." *Id.*

Claims are initiated by submission in writing to the contracting officer for final decision. The regulations establish several requirements relating to both supplier and Postal Service claims, including, but not limited to, the following:

- Supplier claims must be submitted within six years after accrual of a claim unless the parties agree to a shorter time period.
- The contracting officer must issue a written decision on any Postal Service claim against a supplier within six years after accrual of a claim, unless the parties agree in writing to a shorter time period.
- Each supplier claim exceeding \$100,000 must be accompanied by a certification in accordance with the supplier's contract.

§601.109(c)-(e). The regulations also set forth various content requirements relating to the contracting officer's decision on claims, including provisions relating to the subject matters to be covered and the wording of the contracting officer's decision, as well as appeal remedies. §601.109(g).

#### **H. Debarment, Suspension, and Ineligibility**

The Postal Service devotes nearly three pages in the Federal Register to provisions addressing debarment, suspension and ineligibility. See §601.113. These provisions in large part reflect comparable sections of the Federal Acquisition Regulation (FAR) in terms of both substance and procedure. See FAR Subpart 9.4.

Thus, the regulations state the basic rule that contracting officers "may not solicit proposals from, award contracts to, or consent to subcontracts with debarred, suspended or ineligible suppliers." §601.113(a). Pursuant to the regulations, the Postal Service Vice President of Supply Management will establish, maintain and distribute to purchasing offices a list of suppliers debarred or suspended by the Postal Service. §601.113(c). Suppliers on this Postal Service list are excluded from receiving contracts and subcontracts, and contracting officers are precluded from soliciting proposals or quotations from, awarding contracts to or, when a contract provides for such consent, consenting to subcontracts with such suppliers. §601.113(d)(2). However, the Vice President of Supply Management, or his or her designee, after consultation with the General Counsel, may approve such action. *Id.* Likewise, Postal Service suppliers on the General Services Administration (GSA) list of excluded entities are similarly prohibited from receiving contracts and subcontracts at the Postal Service. §601.113(d)(3); see FAR § 9.404 (describing GSA's "Excluded Parties List System").

The Vice President of Supply Management, with the concurrence of the General Counsel, may debar a supplier for such causes as the following, many of which reflect the comparable FAR provision:

- Conviction of a criminal offense incidental to obtaining or attempting to obtain contracts or subcontracts, or in the performance of a contract or subcontract;
- Conviction under a Federal anti-trust statute arising out of the submission of bids or proposals;
- Commission of embezzlement, theft, forgery, bribery, falsification or destruction of records, making false statements, tax evasion, or receiving stolen property;
- Violation of a Postal Service contract "so serious as to justify debarment, such as willful failure to perform a Postal Service contract in accordance with the specifications or within the time limit(s) provided in the contract;
- A record of failure to perform or unsatisfactory performance in accordance with the terms of one or more Postal Service contracts occurring within a reasonable period of time preceding the determination to debar;
- Violation of a contractual provision against contingent fees;
- Acceptance of a contingent fee paid in violation of a contractual provision against contingent fees;
- Any other offense indicated a lack of business integrity or business honesty; and
- Any other cause of serious or compelling nature that debarment is warranted.

§601.113(e); see FAR § 9.406-2.

Similar to the FAR, the "criminal, fraudulent, or improper conduct of an individual may be imputed to the firm with which he or she is or has been connected when an impropriety was committed." §601.113(e)(4); FAR §9.406-5(a). The existence of a cause for debarment does not necessarily require that a supplier be debarred; rather, the decision to debar is within the discretion of the Vice President of Supply Management, with the concurrence of the General Counsel. §601.113(f). The regulations identify a number of factors that should be assessed in determining whether a debarment is warranted. See *id.* Except when a specific provision of law applies, Postal Service debarment should be for "a reasonable, period of time, commensurate with the seriousness of the offense or the failure or inadequacy of performance." §601.113(g). In general, however, a period of debarment should not exceed three years. *Id.*

The Vice President of Supply Management also may suspend a supplier for reasons similar to the those warranting debarment. See §601.113(i). The period of suspension will not exceed one year in duration, except that the suspension period may be extended for reasonable periods of time beyond one year. §601.113(j).

The debarment or suspension of a supplier does not automatically affect the rights and obligations of parties to existing contracts. However, the Postal Service may terminate for default a contract with a supplier that is debarred, suspended or determined to be ineligible. §601.113(d)(5).

### III. Conclusion

These new regulations demonstrate the Postal Service's commitment to implementing a modernized and flexible procurement system reflective of the commercial marketplace. Although the regulations do not address many traditional procurement topics, clarifications and additional provisions on many of these topics are addressed in the Interim Internal Purchasing Guidelines and will be further addressed in the forthcoming Supplying Principles and Practices.

### Endnotes:

1. In doing so, the Postal Service has attempted to effectuate both the acquisition portion of its Transformation Plan (April 2002) and the recommendations of the President's Commission on the Postal Service. The Transformation Plan reflected the Postal Service's determination to "revise purchasing regulations [where possible] to allow for the acquisition of goods and services in a manner similar to that followed by businesses." Transformation Plan (April 2002), p. v.; 70 Fed. Reg. 20291. Likewise, the President's Commission recommended that the Postal Service "conduct its procurement with fewer substanti[ve] regulations" pursuant to authority granted by Congress in the Postal Reorganization Act Report (July 2003), p. 94; 70 Fed. Reg. 20291.
2. The new regulations will be codified at Title 39 of the Code of Federal Regulations (CFR). For convenience, this article cites to the sections of 39 CFR where the new provisions will appear.