

acquisition of the assets of Y) is not similar to that of the potential acquisition (funding the acquisition of the assets of X). Therefore, the second public offering is not similar to the potential acquisition.

Example 9. Acquisitions involving public offerings that are close in time. (i) D's managers, directors, and investment banker discuss the possibility of offering D stock to the public for the purpose of raising funds for general corporate purposes. They decide a public offering of 20 percent of D's stock with D as a stand-alone corporation would allow D to raise such funds. One month later, to facilitate a stock offering by D of 20 percent of its stock, D distributes all the stock of C pro rata to D's shareholders. Two months after the distribution, D issues new shares amounting to 20 percent of its stock to the public in a public offering (the first public offering). After the first public offering, D's managers, directors, and investment banker discuss the possibility of another offering of D stock to the public for the purpose of raising additional funds for general corporate purposes. Eight months after the distribution, D issues new shares amounting to ten percent of its stock to the public in a public offering (the second public offering).

(ii) The first public offering is the same as the potential acquisition that D's managers, directors, and investment banker discussed prior to the distribution. The purpose of the second public offering (raising funds for general corporate purposes) is the same as that of the potential acquisition. In addition, the second public offering is close in time to the first public offering. Therefore, the second public offering is similar to the potential acquisition.

Example 10. Acquisitions involving public offerings that are not close in time. The facts are the same as those in *Example 9*, except that the second public offering occurs fourteen months after the distribution. Although the purpose of the second public offering is the same as that of the potential acquisition, the second public offering is not close in time to the first public offering. Therefore, the second public offering is not similar to the potential acquisition.

(k) *Effective dates.* This section applies to distributions occurring after April 19, 2005. For distributions occurring on or before April 19, 2005, and after April 26, 2002, see § 1.355-7T as contained in 26 CFR part 1 revised as of April 1, 2003; however, taxpayers may apply these regulations, in whole, but not in part, to such distributions. For distributions occurring on or before April 26, 2002, and after August 3, 2001, see § 1.355-7T as contained in 26 CFR part 1 revised as of April 1, 2002; however, taxpayers may apply, in whole, but not in part, either these regulations or § 1.355-7T as contained in 26 CFR part 1 revised as of April 1, 2003, to such distributions. For distributions occurring on or before August 3, 2001, and after April 16, 1997, taxpayers may apply, in whole, but not in part, either these regulations or

§ 1.355-7T as contained in 26 CFR part 1 revised as of April 1, 2003, to such distributions.

§ 1.355-7T [Removed]

■ **Par. 4.** Section 1.355-7T is removed.

Cono R. Namorato,

Acting Deputy Commissioner for Services and Enforcement.

Approved: April 13, 2005.

Eric Solomon,

Acting Deputy Assistant Secretary of the Treasury.

[FR Doc. 05-7811 Filed 4-18-05; 8:45 am]

BILLING CODE 4830-01-P

POSTAL SERVICE

39 CFR Parts 211 and 601

Purchasing of Property and Services

AGENCY: Postal Service.

ACTION: Final rule.

SUMMARY: The Postal Service™ is amending its regulations in order to implement the acquisition portions of its *Transformation Plan* (April 2002) and the similar recommendations of the President's Commission on the United States Postal Service (July 2003) as they relate to the acquisition of property, goods and services in accordance with 39 U.S.C. §§ 101, 401, 403, 404, and 410.

DATES: *Effective Date:* May 19, 2005.

FOR FURTHER INFORMATION, CONTACT: Michael J. Harris, (202) 268-5653.

SUPPLEMENTARY INFORMATION:

Background

The Board of Governors of the Postal Service has determined in the *Transformation Plan* that challenging times require the Postal Service to continually improve its business practices to meet the challenge of the future in order to fulfill its charter to serve the American public. As part of that challenge, the Postal Service determined 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.

The President's Commission on the Postal Service also has recommended that the Postal Service exercise the "latitude to conduct its procurement with fewer substanti[ve] regulations" pursuant to authority granted by Congress in the Postal Reorganization Act Report (July 2003), p. 94. The Commission expressed its view that "it is inappropriate to apply regulations * * * aimed at traditional agencies to a

Federal entity required to finance its own multi-billion dollar operations." Rather, the public will benefit greatly if the Postal Service applies purchasing practices used by leading corporate enterprises. In accordance with the *Transformation Plan* and the Commission's recommendations, the Postal Service is replacing all of its current purchasing regulations with those discussed here.

The Postal Service published in the **Federal Register** on March 24, 2004 [Vol. 69, No. 57, pages 13786-13793], proposed rules, invited comments by members of the public on or before April 23, 2004, and received 20 responses and comments, some of which were by membership associations or organizations.

Discussion of Comments

Given that the Postal Service does business with approximately 25,000 suppliers per annum, very few commented on the proposed regulations. We view that as an indication that the supplier community is satisfied with the proposed regulations and did not have serious reservations about the proposed regulations. Some responders expressed positive views of the proposed regulations. The critical comments may generally be placed in three categories, as follows:

1. Revocation of previous purchasing regulations. Several responders expressed a view that revocation of the previous regulations would lead to a lack of transparency and also expressed a view that the Postal Service's non-binding guidelines should be made available to the public, so the public will know more about the Postal Service's acquisition policies and practices.

When Congress passed the Postal Reorganization Act it exempted the Postal Service from most governmental purchasing regulations in order to give it the flexibility to operate in a manner akin to those in the private sector. The Postal Service, in its transformed purchasing regulations, seeks to fulfill that Congressional policy by adopting regulations which will allow it to obtain the best products or services to meet its needs at fair and reasonable prices. In other words, the Postal Service seeks to focus upon and to obtain the best value in its acquisitions. The new regulations, as well as Supplying Principles and Practices now under development, 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 meet its needs at a fair and reasonable

price. Best value and supply-chain management will be most conducive to the mission of the Postal Service and will allow it to continue to serve its customers, the supplier community, and the general public well. These regulations have the force and effect of law. The Supplying Principles and Practices, currently being drafted, will provide flexible, modern supply-chain management throughout the Postal Service. These Principles and Practices will not have the force or effect of law. During the time period between these regulations becoming effective and the completion of the new Supplying Principles and Practices, a set of Interim Internal Purchasing Guidelines will provide guidance to Postal Service contracting officers. The Guidelines will not have the force and effect of law.

Public oversight of the Postal Service will not be diminished, as those charged now with such functions will continue to do so. In addition, the Postal Service has added an ombudsman (discussed further below) to assist it in obtaining the best goods and services to meet its needs at the best prices. Review by the ombudsman will be available to members of the supplier community to resolve any disagreements they are unable to resolve with contracting officers or management.

Some responders asked that internal Postal Service guidelines be made available to the public. Given that much information about the Postal Service is available to the public through the Freedom of Information Act and other means, the Postal Service will place many of its internal processes, including its Supplying Principles and Practices, on its web page. Those materials will not be postal regulations and will not have the force or effect of law, as they are designed to permit flexibility to address changing market conditions. The Supplying Principles and Practices will not be binding regulations of the Postal Service. The public should be guided by and may rely upon the regulations contained herein, 39 CFR Part 601, rather than the Supplying Principles and Practices, which are intended for internal use only to assist the Postal Service in obtaining best value and efficiently conducting its supply chain functions. The Supplying Principles and Practices will be advisory and illustrative of approaches that may generally be used by Postal Service employees, but will be intended to provide for flexibility and discretion in their application to specific business situations. The Supplying Principles and Practices, therefore, will create no rights, substantive or procedural, enforceable against the Postal Service.

Those materials may be altered or superseded at any time without notice.

The supplier community will continue to be notified in individual solicitations as to how proposals generally will be evaluated and how the Postal Service will determine best value. Debriefings will continue to be available upon request.

2. Declining to accept or consider proposals. Several responders expressed the view that those parts of the new regulations dealing with cancellation of business relationships should not be adopted, as existing contracts could be terminated and because Postal Service contracting officers will act arbitrarily to cease doing business with suppliers. We do not believe those concerns are realistic. We are re-naming this section of the regulations to more precisely state that the Postal Service will not accept or consider proposals from persons or organizations that do not meet reasonable business expectations. Declining to accept or consider a proposal should not be confused with cancellation of an existing contract. The Postal Service may continue to terminate a contract for its convenience or for default, as it has done in the past.

Only the vice president of Supply Management (not contracting officers) is authorized to decide that the Postal Service will decline to accept or consider proposals from any prospective supplier, and that is expected to be a rare occurrence that would be made only after careful analysis of the basis of the action.

The purpose of this part of the regulation is to provide the Postal Service with the ability, in a forthright manner, to decline to do business with a company or organization that has demonstrated a record of poor performance. It is not in the best interest of Postal Service customers, the supplier community, or the general public for the Postal Service to acquire property, goods, or services from companies that do not perform adequately.

As a safeguard, any company or organization from which the Postal Service decides not to accept or consider its proposals will receive written notice of the reason(s) why and an opportunity to provide countervailing evidence, justification, or other reasons, e.g., that the problem has been corrected.

3. Ombudsman. Most comments favored adoption of this dispute-resolution mechanism. There was some concern that the ombudsman could not consider the Interim Internal Purchasing Guidelines or the Supplying Principles and Practices, whichever is in effect. Either set of guidelines, however, will

address the process by which the Postal Service seeks suppliers while the ombudsman will focus on the best value considerations and business decisions made by the contracting officer to determine which supplier should be awarded a contract. That is, the organization that offers the best products or services to meet the Postal Service's needs at a fair and reasonable cost will be awarded a contract. Those are best-value considerations that the ombudsman will focus upon in resolving disputes.

Section-by-Section Analysis

Section 211.2(a)(2)

This section describes the regulations of the Postal Service. It is changed to reflect that the Postal Service Purchasing Manual and all other Postal Service purchasing regulations are revoked and replaced by those in Part 601.

Section 601.100 Purchasing Policy

This section describes the policy of the Postal Service to acquire property and services in accordance with all applicable laws enacted by Congress. It is intended that the Postal Service will exercise the full powers granted by Congress to it with respect to the acquisition of property and services and will acquire goods and services in a manner akin to the best commercial practices in the private sector in order to serve the American public.

Section 601.101 Effective Date

So that prospective suppliers and members of the public have sufficient time to become acquainted with the new regulations, the new regulations will become effective thirty days after publication in the **Federal Register**.

Section 601.102 Revocation of Prior Purchasing Regulations

This section specifies that all other regulations dealing with any or all aspects of purchasing are revoked and will be of no further force or effect, excepting only as applied to solicitations issued and contracts signed prior to the effective date of these regulations. Examples of the revoked regulations are given.

Section 601.103 Applicability and Coverage

This section makes it clear that the regulations apply to all acquisitions of property (except real property) and services.

Section 601.104 Postal Purchasing Authority

This section discusses who is authorized to bind the Postal Service with respect to contracts involving the acquisition of property and services. Only certain people legally may bind the Postal Service. Those persons are identified by title or position in the regulations. The regulations also provide that other persons may be given authority by appropriate written delegation to enter into contracts to bind the Postal Service with respect to any and all purchasing matters. Absent specific authority, however, a person may not enter into a contract or commitment on behalf of the Postal Service or otherwise bind the Postal Service.

Section 601.105 Business Relationships

This section states the Postal Service's expectation that it will be treated by each of its suppliers and prospective suppliers as a valued customer. This section also informs the supplier community that the Postal Service may cease accepting or considering proposals from any person or organization that fails to meet the Postal Service's expectations of high quality, prompt service, and overall professionalism.

Section 601.106 Declining To Accept or Consider Proposals

This section states the Postal Service's policy that it may elect not to accept or consider proposals from persons or organizations that do not meet reasonable business expectations or provide a high level of confidence about current and/or future business relationships. Examples of the kind of behavior that may lead the Postal Service to cease considering or accepting proposals from a person or organization are given. The reasons that may cause the Postal Service to cease accepting or considering proposals under § 601.106 with a potential supplier differ from the reasons that may cause the Postal Service to debar a supplier under § 601.113. 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.

This section also provides that when the Postal Service elects to exercise its right to cease accepting or considering proposals from any person or organization, the Postal Service will notify that person or organization, state

the reason(s) it has taken that action, and give the person or organization an opportunity to question the Postal Service's actions. Dispute-resolution procedures have been created in the regulations to resolve disagreements over such decisions as well as some other matters.

Section 601.107 Initial Disagreement Resolution

This section states the Postal Service's policy to initially attempt to address and resolve all business disagreements that arise between suppliers or potential suppliers and the Postal Service regarding all aspects of solicitations, awards of contracts, and related matters quickly and inexpensively, at the contracting officer or management level. Time lines have been established concerning the lodging of disagreements and their resolution.

The Postal Service contracting officer must consider alternative dispute resolution procedures as a means of resolving such disagreements, which may be used if agreed to by both parties. Illustrations of various types of dispute resolution procedures are listed. No supplier, however, will be required to use such alternate dispute procedures if the supplier chooses not to do so.

This section also provides that it does not apply to disputes arising under the Contract Disputes Act or with respect to disputes about debarment, suspension, and ineligibility from government contracting under § 601.113.

Section 601.108 Ombudsman Disagreement Resolution

This section states that if resolution of disagreements between a person or organization and the contracting officer or appropriate management level does not occur within ten calendar days, the disagreement may then be presented, addressed and resolved by an ombudsman appointed by the Postal Service. An expedited procedure is provided to resolve any such disagreements quickly and with finality. The ombudsman is expected to give a written decision within 30 days after receiving notice of a disagreement from a supplier or prospective supplier. Decisions of the ombudsman will be final and binding, with limited exceptions specified in this section of the regulations.

This section also provides that it does not apply to disputes arising under the Contract Disputes Act or with respect to disputes about debarment, suspension, and ineligibility from government contracting under § 601.113.

Section 601.109 Contract Claims and Procedures

This section implements the Contract Disputes Act. The section is very similar to the current regulations regarding contract disputes and it does not reflect substantive changes.

Section 601.113 Debarment, Suspension, and Ineligibility

This section sets forth the Postal Service's policies and practices regarding debarment, suspension, and ineligibility from contracting with the Postal Service. Debarment generally is considered for very serious offenses. Examples of such offenses are given in this section. Procedures to be followed by the Postal Service regarding debarment, suspension, and ineligibility are given in this section.

Debarment is applicable to more serious instances of supplier misconduct as compared to a cessation of business relationships under § 601.106, which is akin to decisions by private organizations to choose not to do business with other private organizations for legitimate business reasons.

List of Subjects in 39 CFR Parts 211 and 601

Postal Service.

■ Therefore, for the reasons set forth in the preamble, the Postal Service is amending part 211 and revising 601 as follows:

PART 211—APPLICATION OF REGULATIONS

■ 1. The authority citation for part 211 continues to read as follows:

Authority: 39 U.S.C. 201, 202, 401(2), 402, 403, 404, 410, 1001, 1005, 1209.

■ 2. Revise § 211.2(a)(2) to read as follows:

§ 211.2 Regulations of the Postal Service.

(a) * * *

(2) The *Mailing Standards of the United States Postal Service, Domestic Mail Manual*; the *Postal Operations Manual*; the *Administrative Support Manual*; the *Employee and Labor Relations Manual*; the *Financial Management Manual*; the *International Mail Manual*; and those portions of Chapter 2 of the former *Postal Service Manual* and chapter 7 of the former *Postal Manual* retained in force.

* * * * *

PART 601—PURCHASING OF PROPERTY AND SERVICES

■ 3. Revise 601 to read as follows:

PART 601—PURCHASING OF PROPERTY AND SERVICES**Sec.**

- 601.100 Purchasing policy.
- 601.101 Effective date.
- 601.102 Revocation of prior purchasing regulations.
- 601.103 Applicability and coverage.
- 601.104 Postal purchasing authority.
- 601.105 Business relationships.
- 601.106 Declining to accept or consider proposals.
- 601.107 Initial disagreement resolution.
- 601.108 Ombudsman disagreement resolution.
- 601.109 Contract claims and disputes.
- 601.110 Payment of claims.
- 601.111 Interest on claim amounts.
- 601.112 Review of adverse decisions.
- 601.113 Debarment, suspension, and ineligibility.

Authority: 39 U.S.C. 401, 404, 410, 411, 2008, 5001–5605.

§ 601.100 Purchasing policy.

It is the policy of the Postal Service to acquire property and services in accordance with 39 U.S.C. 410 and all other applicable public laws enacted by Congress.

§ 601.101 Effective date.

These regulations are effective May 19, 2005.

§ 601.102 Revocation of prior purchasing regulations.

All previous Postal Service purchasing regulations, including the *Postal Contracting Manual*, *Procurement Manual*, the *Purchasing Manual* (Issues 1, 2 and 3), and procurement handbooks, circulars, and instructions, are revoked and are superseded by the regulations contained in this part, except as provided in § 601.103.

§ 601.103 Applicability and coverage.

The regulations contained in this part apply to all Postal Service acquisition of property (except real property) and services. Solicitations issued and contracts entered into prior to the effective date of the regulations in this part will be governed by the regulations in effect at the time the contract was signed.

§ 601.104 Postal purchasing authority.

Only the Postmaster General/CEO; the Postal Service's vice president of Supply Management; contracting officers with written statements of specific authority; and others designated in writing or listed in this part have the authority to bind the Postal Service with respect to entering into, modifying, or terminating any contract regarding the acquisition of property, services, and related purchasing matters. The Postal

Service's vice president of Supply Management, or his or her designee, may also delegate in writing local buying authority throughout the Postal Service.

§ 601.105 Business relationships.

A person or organization wishing to enjoy a continuing business relationship with the Postal Service in purchasing matters is expected to treat the Postal Service in the same manner as it would other valued customers of similar size and importance. The Postal Service 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.

§ 601.106 Declining to accept or consider proposals.

(a) *General.* The Postal Service may decline to accept or consider proposals from a person or organization that does not meet reasonable business expectations or does not provide a high level of confidence about current or future business relations. Typically, these sorts of unacceptable conduct and business practices will not rise to the level of unethical or criminal activities that could lead to the debarment, suspension, or ineligibility of a supplier. Unacceptable conduct or business practices include, but are not limited to:

- (1) Marginal or dilatory contract performance;
- (2) Failure to deliver on promises made in the course of dealings with the Postal Service;
- (3) 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
- (4) Engaging in other questionable or unprofessional conduct or business practices.

(b) *Notice.* If the Postal Service elects to decline to accept or consider proposals from a person or organization, the vice president of Supply Management, or his or her designee, will provide a written notice to the person or organization explaining:

- (1) The reasons for the decision;
- (2) The effective date of the decision;
- (3) The scope of the decision;
- (4) The duration of the decision (this may be limited to a specified length of time or may extend indefinitely); and
- (5) The supplier's right to contest the decision.

(c) *Contesting Decisions.* If a person or organization believes the decision not to accept or consider proposals is not

merited, it may contest the matter in accordance with the ombudsman and disagreement-resolution procedures contained in this part, seek to resolve the matter by agreement through alternative dispute resolution, or both. The Postal Service may reconsider the matter and, if warranted, rescind or modify the decision to decline to accept or consider proposals.

§ 601.107 Initial disagreement resolution.

It is the policy of the Postal Service and in the interest of suppliers to resolve potential disagreements by mutual agreement at the contracting officer or appropriate management level. Therefore, all disputes, protests, claims, disagreements, or demands of whatsoever nature (hereinafter "disagreements") against the Postal Service arising in connection with the purchasing process, except claims that arise pursuant to a contract under the Contract Disputes Act or claims concerning debarment, suspension, or ineligibility under § 601.113, must be lodged with the responsible contracting officer for resolution within 10 days of the date the disagreement arose. If the matter is not resolved within 10 days following the lodging of the dispute, the disagreement may be lodged with the Ombudsman as described in § 601.108. Alternative dispute resolution (ADR) procedures may be used, if agreed to by both parties. The Postal Service supports and encourages the use of ADR as an effective way to understand, address, and resolve disagreements and conflicts. A person or organization disagreeing with a Postal Service decision and the Postal Service contracting officer must consider the use of ADR to resolve a particular purchasing disagreement, regardless of the nature of the disagreement or when it occurs during the purchasing process. ADR methods include informal negotiation, mediation by a neutral third party, and any other agreed-upon method.

§ 601.108 Ombudsman disagreement resolution.

(a) *Policy.* From time to time, disagreements may arise between suppliers, potential suppliers, and the Postal Service regarding awards of contracts and related matters that are not resolved as set forth in § 601.107. When a disagreement under § 601.107 is not resolved within ten calendar days of when it was lodged with the contracting officer, then the disagreement may be lodged with the ombudsman established in this part for final resolution. The Postal Service desires to resolve all such disagreements quickly and

inexpensively in keeping with the regulations in this part, 39 U.S.C. 410, and all other applicable public laws enacted by Congress. In resolving disagreements, non-Postal Service procurement rules or regulations will not govern.

(b) *Scope and Applicability.* In order to expeditiously resolve disagreements that are not resolved at the contracting officer or appropriate management level, to reduce litigation expenses, inconvenience, and other costs for all parties, and to facilitate successful business relationships with Postal Service suppliers, the supplier community, and other persons, the following procedure is established as the sole and exclusive means to resolve disagreements arising in connection with awards of contracts for the purchase of property (excluding real property) or services and all related matters. All disputes, protests, claims, disagreements, or demands of whatsoever nature (hereinafter "disagreements") against the Postal Service arising in connection with the purchasing process, except claims that arise pursuant to a contract under the Contract Disputes Act or claims concerning debarment, suspension, or ineligibility under § 601.113, will be lodged with and resolved, with finality, by the ombudsman under and in accordance with the sole and exclusive procedure established in this section.

(c) A disagreement may be lodged with the ombudsman by an organization or a person with respect to the Postal Service's decision not to accept or consider business proposals or the award of a contract.

(d) The disagreement must be lodged in writing and must state the factual circumstances relating to it, the remedy sought, and the rationale for the disagreement. Counsel is not required, but may be retained to assist in the disagreement process. The person or organization lodging the disagreement must indicate in the disagreement whether it is willing to attempt to resolve the matter through informal discussions, mediation, or another means of ADR.

(e) A disagreement must be lodged with the ombudsman within twenty calendar days after the time it was presented in § 601.107. The ombudsman may grant an extension of time to lodge a disagreement or to provide supporting information when warranted. Any request for an extension must set forth the reasons for the request, be made in writing, and be delivered to the ombudsman on or before the time to lodge a disagreement lapses. The address of the ombudsman is: Attn:

Ombudsman, United States Postal Service Headquarters, 475 L'Enfant Plaza, SW., Room 4110, Washington, DC 20260-6200.

(f) The ombudsman will promptly provide a copy of a disagreement to the contracting officer, who will promptly notify other interested persons (i.e., actual or prospective offerors whose direct economic interests would be affected by the award of, or failure to award, the contract). The ombudsman will consider a disagreement and any response by other interested persons and appropriate Postal Service officials within a time frame established by the ombudsman. The ombudsman may also meet individually or jointly with the person or organization lodging the disagreement, other interested persons, and/or Postal Service officials, and may undertake other activities in order to obtain materials, information, or advice that may help to resolve the disagreement. The person or organization lodging the disagreement, other interested persons, or Postal Service officials must promptly provide all relevant, nonprivileged materials and other information requested by the ombudsman. After obtaining such information, materials, and advice as may be needed, the ombudsman will promptly issue a decision in writing resolving a disagreement and will deliver the decision to the person or organization lodging the disagreement, other interested persons, and appropriate Postal Service officials. If confidential or privileged material is needed in order to reach a decision, the ombudsman will notify the appropriate party to provide such material to the ombudsman only. The confidential material will be held in confidence by the ombudsman and will be returned to the party upon request at the conclusion of the matter.

(g) In considering and in resolving a disagreement, the ombudsman will be guided by the regulations contained in this part and all applicable public laws enacted by Congress. Non-Postal Service procurement rules or regulations and revoked Postal Service regulations will not apply or be taken into account in resolving disagreements. Failure of any party to provide promptly requested information may be taken into account by the ombudsman in the decision.

(h) A decision of the ombudsman will be final and binding on the person or organization lodging the disagreement, other interested persons, and the Postal Service. However, the person or organization that lodged the disagreement or another interested person may appeal the decision to a federal court with jurisdiction over such

claims, but only on the grounds that the decision:

(1) Was procured by fraud or other criminal misconduct; or

(2) Was obtained in violation of the regulations contained in this part or an applicable public law enacted by Congress.

(i) It is intended that this procedure generally will resolve disagreements within approximately 30 days after the ombudsman receives the disagreement. The time may be shortened or lengthened depending on the complexity of the issues and other relevant considerations.

§ 601.109 Contract claims and disputes.

(a) *General.* This section implements the Contract Disputes Act of 1978, as amended (41 U.S.C. 601-613).

(b) *Policy.* It is Postal Service policy to resolve contractual claims and disputes by mutual agreement at the level of an authorized contracting officer whenever possible. In addition, the Postal Service supports and encourages the use of alternative dispute resolution as an effective way to understand, address, and resolve conflicts with suppliers. Efforts to resolve differences should be made before the issuance of a final decision on a claim, and even when the supplier does not agree to use ADR, the contracting officer should consider holding informal discussions between the parties in order to resolve the conflict before the issuance of a final decision.

(c) *Contractor Claim Initiation.* Supplier claims must be submitted in writing to the contracting officer for final decision. The contracting officer must document the contract file with evidence of the date of receipt of any submission that the contracting officer determines is a claim. Supplier claims must be submitted within 6 years after accrual of a claim unless the parties agreed to a shorter time period. The 6-year time period does not apply to contracts awarded prior to October 1, 1995.

(d) *Postal Service Claim Initiation.* The contracting officer must issue a written decision on any Postal Service claim against a supplier, within 6 years after accrual of a claim, unless the parties agreed in writing to a shorter time period. The 6-year time period does not apply to contracts awarded prior to October 1, 1995, or to a Postal Service claim based on a supplier claim involving fraud.

(e) *Certified Claims.* Each supplier claim exceeding \$100,000 must be accompanied by a certification in accordance with the supplier's contract.

(f) When the contracting officer determines that the supplier is unable to support any part of the claim and there is evidence or reason to believe the inability is attributable to either misrepresentation of fact or fraud on the supplier's part, the contracting officer must deny that part of the claim and refer the matter to the Office of Inspector General.

(g) *Decision and Appeal.* (1) *Contracting Officer's Authority.* A contracting officer is authorized to decide or settle all claims arising under or relating to a contract subject to the Contract Disputes Act, except for:

(i) Claims or disputes for penalties or forfeitures prescribed by statutes or regulation that a Federal agency administers; or

(ii) Claims involving fraud.

(2) *Contracting Officer's Decision.* The contracting officer must review the facts pertinent to the claim, obtain assistance from assigned counsel and other advisors, and issue a final decision in writing. The decision must include a description of the claim or dispute with references to the pertinent contract provisions, a statement of the factual areas of agreement and disagreement, and a statement of the contracting officer's decision with supporting rationale.

(3) *Insufficient Information.* When the contracting officer cannot issue a decision because the supplier has not provided sufficient information, the contracting officer must promptly request the required information. Further failure to provide the requested information is an adequate reason to deny the claim.

(4) *Furnishing Decisions.* The contracting officer must furnish a copy of the decision to the supplier by Certified Mail, return receipt requested, or by any other method that provides evidence of receipt.

(5) *Decisions on Claims for \$100,000 or Less.* If the supplier has asked for a decision within 60 days, the contracting officer must issue a final decision on a claim of \$100,000 or less within 60 calendar days of its receipt. The supplier may consider the contracting officer's failure to issue a decision within the applicable time period as a denial of its claim, and may file a suit or appeal on the claim.

(6) *Decisions on Certified Claims.* For certified claims over \$100,000, the contracting officer must either issue a final decision within 60 calendar days of their receipt or notify the supplier within the 60-day period of the time when a decision will be issued. The time period established must be reasonable, taking into account the size

and complexity of the claim, the adequacy of the supplier's supporting data, and any other relevant factors.

(7) *Wording of Decisions.* The contracting officer's final decision must contain the following paragraph: "This is the final decision of the contracting officer pursuant to the Contract Disputes Act of 1978 and the clause of your contract entitled Claims and Disputes. You may appeal this decision to the Postal Service Board of Contract Appeals by mailing or otherwise furnishing written notice (preferably in triplicate) to the contracting officer within 90 days from the date you receive this decision. The notice should identify the contract by number, reference this decision, and indicate that an appeal is intended.

Alternatively, you may bring an action directly in the United States Court of Federal Claims within 12 months from the date you receive this decision.

(8) *Additional Wording for Decisions of \$50,000 or Less.* When the claim or claims denied total \$50,000 or less, the contracting officer must add the following to the paragraph: "In taking an appeal to the Board of Contract Appeals, you may include in your notice of appeal an election to proceed under the Board's small claims (expedited) procedure, which provides for a decision within approximately 120 days, or an election to proceed under the Board's accelerated procedure, which provides for a decision within approximately 180 days. If you do not make an election in the notice of appeal, you may do so by written notice anytime thereafter."

(9) *Additional Wording for Decisions Over \$50,000 Up to \$100,000.* When the claim or claims denied total \$100,000 or less, but more than \$50,000, the contracting officer must add the following to the paragraph: "In taking an appeal to the Board of Contract Appeals, you may include in your notice of appeal an election to proceed under the Board's accelerated procedure, which provides for a decision within approximately 180 days. If you do not make an election in the notice of appeal, you may do so by written notice anytime thereafter."

(10) Contracting officers must have sufficient information available at the time a final decision is issued on a claim so resolution of an appeal within the period set for an expedited disposition will not be delayed. Once an appeal is docketed, and expedited disposition is elected, contracting officers must devote sufficient resources to the appeal to ensure the schedule for resolution is met. Nothing in this part precludes an effort by the parties to

settle a controversy after an appeal has been filed, although such efforts to settle the controversy will not suspend processing the appeal, unless the Board of Contract Appeals so directs.

§ 601.110 Payment of claims.

Any claim amount determined in a final decision to be payable, less any portion previously paid, should be promptly paid to the supplier without prejudice to either party in the event of appeal or action on the claim. In the absence of appeal by the Postal Service, a board or court decision favorable in whole or in part to the supplier must be implemented promptly. In cases when only the question of entitlement has been decided and the matter of amount has been remanded to the parties for negotiation, a final decision of the contracting officer must be issued if agreement is not reached promptly.

§ 601.111 Interest on claim amounts.

Interest on the amount found due on the supplier's claim must be paid from the date the contracting officer received the claim (properly certified, if required) or from the date payment would otherwise be due, if that date is later, until the date of payment. Simple interest will be paid at the rate established by the Secretary of the Treasury for each 6-month period in which the claim is pending. Information on the rate at which interest is payable is announced periodically in the *Postal Bulletin*.

§ 601.112 Review of adverse decisions.

Any party may seek review of an adverse decision of the Board of Contract Appeals in the Court of Appeals for the Federal Circuit or in any other appropriate forum.

§ 601.113 Debarment, suspension, and ineligibility.

(a) *General.* Except as provided otherwise in this part, contracting officers may not solicit proposals from, award contracts to, or consent to subcontracts with debarred, suspended, or ineligible suppliers.

(b) *Definitions.* (1) *Affiliate.* A business, organization, person, or individual connected by the fact that one controls or has the power to control the other or by the fact that a third party controls or has the power to control both. Factors such as common ownership, common management, and contractual relationships may be considered. Franchise agreements are not conclusive evidence of affiliation if the franchisee has a right to profit in proportion to its ownership and bears the risk of loss or failure.

(2) *Debarment*. An exclusion from contracting and subcontracting for a reasonable, specified period of time commensurate with the seriousness of the offense, failure, or inadequacy of performance.

(3) *General Counsel*. This includes the General Counsel's authorized representative.

(4) *Indictment*. Indictment for a criminal offense. An information or other filing by competent authority charging a criminal offense is given the same effect as an indictment.

(5) *Ineligible*. An exclusion from contracting and subcontracting by an entity other than the Postal Service under statutes, executive orders, or regulations, such as the Davis Bacon Act, the Service Contract Act, the Equal Employment Opportunity Acts, the Walsh-Healy Public Contracts Act, or the Environmental Protection Acts and related regulations or executive orders, to which the Postal Service is subject or has adopted as a matter of policy.

(6) *Judicial Officer*. This includes the acting Judicial Officer.

(7) *Suspension*. An exclusion from contracting and subcontracting for a reasonable period of time due to specified reasons or the pendency of a debarment proceeding.

(8) *Supplier*. For the purposes of this part, a supplier is any individual, person, or other legal entity that:

(i) Directly or indirectly (*e.g.*, through an affiliate) submits offers for, is awarded, or reasonably may be expected to submit offers for or be awarded, a Postal Service contract, including a contract for carriage under Postal Service or commercial bills of lading, or a subcontract under a Postal Service contract; or

(ii) Conducts business or reasonably may be expected to conduct business with the Postal Service as a subcontractor, an agent, or as a representative of another supplier.

(c) *Establishment and Maintenance of Lists*. (1) The vice president of Supply Management will establish, maintain, and distribute to purchasing offices a list of suppliers debarred or suspended by the Postal Service.

(2) The General Services Administration (GSA) compiles and maintains a consolidated list of all persons and entities debarred, suspended, proposed for debarment, or declared ineligible by Federal agencies or the Government Accountability Office. GSA posts the list on the Internet and publishes a hardcopy of the list.

(3) The vice president of Supply Management will notify the GSA of any Postal Service debarment, suspension, and change in the status of suppliers,

including any of their affiliates, on the Postal Service list.

(d) *Treatment of Suppliers on Postal Service or GSA Lists*. (1) Contracting officers will review the Postal Service and GSA lists before making a contract award.

(2) Suppliers on the Postal Service list are excluded from receiving contracts and subcontracts, and contracting officers may not solicit proposals or quotations from, award contracts to, or, when a contract provides for such consent, consent to subcontracts with such suppliers, unless the vice president of Supply Management, or his or her designee, after consultation with the General Counsel, has approved such action. Suppliers on the Postal Service list may not provide goods or services to other persons or entities for resale, in whole or part, to the Postal Service and such other persons or entities are obligated to obtain and review the Postal Service list in order to exclude debarred or suspended suppliers from performing any part of a Postal Service contract.

(3) Suppliers on the GSA list are assigned a code by GSA which is related to the basis of ineligibility. The vice president of Supply Management maintains a table describing the Postal Service treatment assigned to each code. Suppliers on the GSA list who are coded as ineligible are excluded from receiving contracts and subcontracts, and contracting officers may not solicit proposals or quotations from, award contracts to, or, when the contract provides for such consent, consent to subcontracts with such suppliers, unless the vice president of Supply Management, or designee, after consultation with the General Counsel, has approved such action. Suppliers on the GSA list may not provide goods or services to other persons or entities for resale, in whole or part, to the Postal Service and such other persons or entities are obligated to obtain and review the GSA list in order to exclude debarred or suspended suppliers from performing any part of a Postal Service contract.

(4) Suppliers on the GSA list are assigned codes for which the table provides other Postal Service guidance, and are considered according to that guidance. When so indicated on the table, contracting officers must obtain additional information from the entity responsible for establishing the supplier's ineligibility, if such information is available.

(5) The debarment, suspension, or ineligibility of a supplier does not, of itself, affect the rights and obligations of the parties to any valid, pre-existing

contract. The Postal Service may terminate for default a contract with a supplier that is debarred, suspended, or determined to be ineligible. Except for service changes under mail transportation contracts, contracting officers may not add new work to the contract by supplemental agreement, by exercise of an option, or otherwise, except with the approval of the vice president of Supply Management or designee.

(e) *Causes for Debarment*. (1) The vice president of Supply Management, with the concurrence of the General Counsel, may debar a supplier, including its affiliates, for cause such as the following:

(i) Conviction of a criminal offense incidental to obtaining or attempting to obtain contracts or subcontracts, or in the performance of a contract or subcontract.

(ii) Conviction under a Federal antitrust statute arising out of the submission of bids or proposals.

(iii) Commission of embezzlement, theft, forgery, bribery, falsification or destruction of records, making false statements, tax evasion, or receiving stolen property.

(iv) 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 of 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 (except that failure to perform or unsatisfactory performance caused by acts beyond the control of the supplier may not be considered a basis for debarment); violation of a contractual provision against contingent fees; or acceptance of a contingent fee paid in violation of a contractual provision against contingent fees.

(v) Any other offense indicating a lack of business integrity or business honesty.

(vi) Any other cause of a serious and compelling nature that debarment is warranted.

(2) The existence of a conviction in paragraph (e)(1)(i) or (ii) of this section can be established by proof of a conviction in a court of competent jurisdiction. If appeal taken from such conviction results in a reversal of the conviction, the debarment may be removed upon the request of the supplier, unless another cause or another basis for debarment exists.

(3) The existence of any of the other causes in paragraphs (e)(1)(iii), (iv), (v), or (vi) of this section can be established by a preponderance of the evidence, either direct or indirect, in the judgment of the debarment official.

(4) 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. Likewise, when a firm is involved in criminal, fraudulent, or other improper conduct, any person who participated in, knew of, or had reason to know of the impropriety may be debarred.

(5) The fraudulent, criminal, or other improper conduct of one supplier participating in a joint venture or similar arrangement may be imputed to other participating suppliers if the conduct occurred for or on behalf of the joint venture or similar arrangement, or with the knowledge, approval, or acquiescence of the supplier.

Acceptance of the benefits derived from the conduct will be evidence of such knowledge, approval, or acquiescence.

(f) *Mitigating Factors.* (1) The existence of any cause for debarment does not necessarily require that a supplier be debarred. The decision to debar is within the discretion of the vice president of Supply Management, with the concurrence of the General Counsel, and must be made in the best interest of the Postal Service. The following factors may be assessed in determining the seriousness of the offense, failure, or inadequacy of performance, and may be taken into account in deciding whether debarment is warranted:

(i) Whether the supplier had established written standards of conduct and had published internal control systems at the time of the activity that constitutes cause for debarment or had adopted such procedures prior to any Postal Service investigation of the activity cited as a cause for debarment.

(ii) Whether the supplier brought the activity cited as a cause for debarment to the attention of the Postal Service in a prompt, timely manner.

(iii) Whether the supplier promptly and fully investigated the circumstances involving debarment and, if so, made the full results of the investigation available to appropriate officials of the Postal Service.

(iv) Whether the supplier cooperated fully with the Postal Service during its investigation into the matter.

(v) Whether the supplier paid or agreed to pay all criminal, civil, and administrative liability and other costs arising out of the improper activity, including any investigative or administrative costs incurred by the

Postal Service, and made or agreed to make full restitution.

(vi) Whether the supplier took appropriate disciplinary action against the individual(s) responsible for the activity that could cause debarment.

(vii) Whether the supplier implemented and/or agreed to implement remedial measures, including those identified by the Postal Service.

(viii) Whether the supplier instituted and/or agreed to institute new and/or revised review and control procedures and ethics programs.

(ix) Whether the supplier had adequate time to eliminate circumstances within the supplier's organization that could lead to debarment.

(x) Whether the supplier's senior officers and mid-level management recognize and understand the seriousness of the misconduct giving rise to debarment.

(2) The existence or nonexistence of mitigating factors or remedial measures such as those above is not determinative whether or not a supplier should be debarred. If a cause for debarment exists, the supplier has the burden of demonstrating, to the satisfaction of the vice president of Supply Management that debarment is not warranted or necessary.

(g) *Period of Debarment.* (1) When an applicable statute, executive order, or controlling regulation of other agencies provides a specific period of debarment, that period applies. In other cases, debarment by the Postal Service should be for a reasonable, definite, stated period of time, commensurate with the seriousness of the offense or the failure or inadequacy of performance. Generally, a period of debarment should not exceed 3 years. When debarment for an additional period is deemed necessary, notice of the proposed additional period of debarment must be furnished to the supplier as in the case of original debarment.

(2) Except as precluded by an applicable statute, executive order, or controlling regulation of another agency, debarment may be removed or the period may be reduced by the vice president of Supply Management when requested by the debarred supplier and when the request is supported by a reasonable justification, such as newly discovered material evidence, reversal of a conviction, bona fide change of ownership or management, or the elimination of the causes for which debarment was imposed. The vice president of Supply Management may, at his or her discretion, deny any request or refer it to the Judicial Officer

for a hearing and for findings of fact, which the vice president of Supply Management will consider when deciding the matter. When a debarment is removed or the debarment period is reduced, the vice president of Supply Management must state in writing the reason(s) for the removal of the debarment or the reduction of the period of debarment.

(h) *Procedural Requirements for Debarment.* (1) After securing the concurrence of the General Counsel, the vice president of Supply Management will initiate a debarment proceeding by sending the supplier a written notice of proposed debarment. The notice will be served by sending it to the last known address of the supplier by Certified Mail, return receipt requested. A copy of the notice will be furnished to the Office of Inspector General. The notice will state that debarment is being considered; the reason(s) for the proposed debarment; the anticipated period of debarment and the proposed effective date; and, within 30 days of the notice, the supplier may submit, in person or in writing, or through a representative, information and argument in opposition to the proposed debarment. In the event a supplier does not submit information or argument in opposition to the proposed debarment to the vice president of Supply Management within the time allowed, the debarment will become final with no further review or appeal.

(2) If the proposed debarment is based on a conviction or civil judgment, the vice president of Supply Management with the concurrence of the General Counsel, may decide whether debarment is merited based on the conviction or judgment, including any information received from the supplier. If the debarment is based on other circumstances or if there are questions regarding material facts, the vice president of, Supply Management may seek additional information from the supplier and/or other persons, and may request the Judicial Officer to hold a fact-finding hearing on such matters. The hearing will be governed by rules of procedure promulgated by the Judicial Officer. The vice president of Supply Management may reject any findings of fact, in whole or in part, when they are clearly erroneous.

(3) When the vice president of Supply Management proposes to debar a supplier already debarred by another government agency for a period concurrent with such debarment, the debarment proceedings before the Postal Service may be based entirely upon the record of evidence, facts, and proceedings before the other agency,

upon any additional facts the Postal Service deems relevant, or on the decision of another government agency. In such cases, the findings of facts by another government agency may be considered as established, but, within 30 days of the notice of proposed debarment, the supplier may submit, in person or in writing, or through a representative, any additional facts, information, or argument to the vice president of Supply Management, and to explain why debarment by the Postal Service should not be imposed.

(4) Questions of fact to be resolved by a hearing before the Judicial Office will be based on the preponderance of the evidence.

(5) After consideration of the circumstances and any information and argument submitted by the supplier, the vice president of Supply Management, with the concurrence of the General Counsel, will issue a written decision regarding whether the supplier is debarred, and, if so, for the period of debarment. The decision will be mailed to the supplier by Certified Mail, return receipt requested. A copy of the decision will be furnished to the Office of the Inspector General. The decision will be final and binding, unless:

(i) The decision was procured by fraud or other criminal misconduct or
(ii) The decision was obtained in violation of the regulations contained in this part or an applicable public law enacted by Congress.

(i) *Causes for Suspension.* The vice president of Supply Management may suspend any supplier, including any of its affiliates, if:

(1) The supplier commits, is indicted for, or is convicted of fraud or a criminal offense incidental to obtaining, attempting to obtain, or performing a government contract, violates a Federal antitrust statute arising out of the submission of bids and proposals, or commits or engages in embezzlement, theft, forgery, bribery, falsification or destruction of records, receipt of stolen property, or any other offense indicating a lack of business integrity or business honesty; or

(2) If the Postal Service has notified a supplier of its proposed debarment under this Part.

(j) *Period of Suspension.* A suspension will not exceed 1 year in duration, except a suspension may be extended for reasonable periods of time beyond 1 year by the vice president of Supply Management. The termination of a suspension will not prejudice the Postal Service's position in any debarment proceeding. A suspension will be superseded by a decision rendered by the vice president of

Supply Management, under paragraph (h)(5) of this section.

(k) *Procedural Requirements for Suspension.* (1) The vice president of Supply Management will notify a supplier of a suspension or an extension of a suspension and the reason(s) for the suspension or extension in writing sent to the supplier by Certified Mail, return receipt requested, within 10 days after the effective date of the suspension or extension. A copy of the notice will be furnished to the Office of the Inspector General.

(2) The notice will state the cause(s) for the suspension or extension.

(3) Within 30 days of notice of suspension or an extension, a supplier may submit to the vice president of Supply Management in writing, any information or reason(s) the supplier believes makes a suspension or an extension inappropriate, and the vice president of Supply Management in consultation with the General Counsel, will consider the supplier's submission, and, in their discretion, may revoke a suspension or an extension of a suspension. If a suspension or extension is revoked, the revocation will be in writing and a copy of the revocation will be sent to the supplier by Certified Mail, return receipt requested. A copy of the revocation will be furnished to the Office of the Inspector General.

Stanley F. Mires,
Chief Counsel, Legislative.

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DEPARTMENT OF HOMELAND SECURITY

Federal Emergency Management Agency

44 CFR Part 64

[Docket No. FEMA-7875]

Suspension of Community Eligibility

AGENCY: Federal Emergency Management Agency, Emergency Preparedness and Response Directorate, Department of Homeland Security.

ACTION: Final rule.

SUMMARY: This rule identifies communities, where the sale of flood insurance has been authorized under the National Flood Insurance Program (NFIP), that are scheduled for suspension on the effective dates listed within this rule because of noncompliance with the floodplain management requirements of the program. If the Federal Emergency

Management Agency (FEMA) receives documentation that the community has adopted the required floodplain management measures prior to the effective suspension date given in this rule, the suspension will not occur and a notice of this will be provided by publication in the **Federal Register** on a subsequent date.

DATES: Effective Dates: The effective date of each community's scheduled suspension is the third date ("Susp.") listed in the third column of the following tables.

ADDRESSES: If you wish to determine whether a particular community was suspended on the suspension date, contact the appropriate FEMA Regional Office or the NFIP servicing contractor.

FOR FURTHER INFORMATION CONTACT: Michael M. Grimm, Mitigation Division, 500 C Street, SW.; Room 412, Washington, DC 20472, (202) 646-2878.

SUPPLEMENTARY INFORMATION: The NFIP enables property owners to purchase flood insurance which is generally not otherwise available. In return, communities agree to adopt and administer local floodplain management aimed at protecting lives and new construction from future flooding. Section 1315 of the National Flood Insurance Act of 1968, as amended, 42 U.S.C. 4022, prohibits flood insurance coverage as authorized under the National Flood Insurance Program, 42 U.S.C. 4001 *et seq.*; unless an appropriate public body adopts adequate floodplain management measures with effective enforcement measures. The communities listed in this document no longer meet that statutory requirement for compliance with program regulations, 44 CFR part 59 *et seq.* Accordingly, the communities will be suspended on the effective date in the third column. As of that date, flood insurance will no longer be available in the community. However, some of these communities may adopt and submit the required documentation of legally enforceable floodplain management measures after this rule is published but prior to the actual suspension date. These communities will not be suspended and will continue their eligibility for the sale of insurance. A notice withdrawing the suspension of the communities will be published in the **Federal Register**.

In addition, the Federal Emergency Management Agency has identified the special flood hazard areas in these communities by publishing a Flood Insurance Rate Map (FIRM). The date of the FIRM if one has been published, is indicated in the fourth column of the table. No direct Federal financial