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FEATURE COMMENT: New USPS Procurement Rules—Are The Guidelines Really Non-Binding?

Sweeping changes occurred on May 19, 2005, when the U.S. Postal Service revoked its 523-page *USPS Purchasing Manual* (PM) and replaced it with just six pages of new procurement regulations. Unlike the PM, which was the USPS equivalent of the Federal Acquisition Regulation, the new regulations are silent on how USPS will buy goods and services. Instead, the agency's purchasing policies are now set out in a new publication called the *Interim Internal Purchasing Guidelines*. Because USPS did not issue the *Guidelines* as regulations, the agency believes they are non-binding and cannot be relied on by third parties.

This FEATURE COMMENT describes the changes to the Postal Service's purchasing regulations and argues that several key sections are legally unenforceable. This COMMENT also argues that the new *Guidelines* are the agency's de facto purchasing policies and, ultimately, will be found to have binding effect.

Background on USPS Procurement Regulations—When USPS was created, Congress exempted it from bedrock federal procurement rules such as the Competition in Contracting Act and the FAR. See 39 USCA § 410(a). But not all procurement laws. Congress made many of the most comprehensive and regulation-intensive federal procurement laws applicable to USPS. For example, USPS must comply with the Service Contract Act, Davis Bacon Act, Prompt Payment Act and Contract Disputes Act. 39 USCA § 410(b).

Federal courts have long taken jurisdiction over challenges to the propriety of USPS purchasing decisions. See *Emery Worldwide Airlines, Inc. v. U.S.*, 264 F.3d 1071 (Fed. Cir. 2001). Congress has also taken a continuing interest in USPS purchasing decisions, and the Government Accountability Office has issued dozens of reports on postal procurement issues. Thus, while Congress afforded USPS substantial flexibility in conducting its procurements, it simultaneously reflected an intention to keep postal purchases within the sphere of federal contracting.

Initially, USPS did not take full advantage of its exemption from most federal procurement laws and issued purchasing rules that were similar to those of other federal agencies. Starting in 1987, USPS took greater advantage of its flexibility by issuing purchasing rules that combined aspects of public and commercial-sector buying practices. This process began in earnest with the issuance of the *USPS Procurement Manual*, which replaced the former *Postal Contracting Manual*. The process was continued further by the Jan. 31, 1997 issuance of the PM.

The USPS continued to modify the PM to incorporate new and improved buying practices, reissuing the manual three times. The most recent edition, *USPS Purchasing Manual, Issue 3*, was issued on Dec. 25, 2003. Until now, these purchasing regulations were incorporated by reference in the Code of Federal Regulations, and had the full force and effect of law. See *DeMatteo Constr. Co. v. U.S.*, 600 F.2d 1384, 1391 (Ct. Cl. 1979); and *Modern Sys. Technology Corp. v. U.S.*, 24 Cl. Ct. 360 (1991).

USPS Implements New Regulations and Guidelines—The agency's new procurement regulations and the new *Interim Internal Purchasing Guidebook* became effective on May 19, 2005. The new regulations are sparse and cover only the following topics: (a) declining to accept proposals from contractors, (b) new procedures for resolving disagreements concerning the purchasing process, (c) institution of an ombudsman procedure for resolving protests, (d) regulations implementing the CDA and (e) debarment and suspension procedures.

Unlike the PM, the new regulations contain no statements concerning core purchasing concepts such as: (1) when and how the agency will publicize purchase opportunities; (2) when the agency will use competitive versus noncompetitive purchasing methods; (3) how the agency will conduct procurements, evaluate proposals and make contract award decisions; and (4) what information the agency will provide offerors in postaward debriefings. Similarly, the new regulations do not contain any guidance on contract administration policies such as payment withholding and contract termination.

These and other purchasing policies are, instead, described in the *Interim Internal Purchasing Guidelines*, which are nearly identical to the regulations that were contained in the now abolished PM. While they have the look and feel of regulations, USPS considers the *Guidelines* to be non-binding, internal guidance only.

Summary of the New Regulations—The new regulations introduce three new concepts: (a) declining to accept or consider proposals, (b) initial disagreement resolution and (c) ombudsman disagreement resolution.

Declining to Accept or Consider Proposals: Under a section entitled “Declining to accept or consider proposals,” USPS may refuse to accept proposals from an entity without invoking suspension and debarment procedures. 39 CFR § 601.106. USPS may refuse to accept proposals from an entity that does not meet “reasonable business expectations” or does not provide a “high level of confidence about current or future business relations.” Unacceptable business practices include:

- marginal or dilatory contract performance;
- failure to deliver on promises made in the course of dealings with USPS;
- 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.

The duration of this status may be limited to a specified time period or may be extended indefinitely. USPS must provide the entity with written notice explaining the reasons for, and duration of, the action. Entities may contest the action under the new ombudsman procedure, but the regulations

state that appeal of the ombudsman’s decision to federal court is limited. Are these new disqualification rules enforceable?

Disqualification from Government contracting is a very serious matter, as it subjects businesses to economic losses, professional indignities and injuries to their reputation. See *Sloan v. HUD*, 231 F.3d 10, 17 (D.C. Cir. 2000). Contractors have a liberty interest under the Due Process Clause of the Fifth Amendment to the Constitution to be free from stigmatizing governmental defamation having an immediate and tangible effect on its ability to do business. See *Old Dominion Dairy Prods., Inc. v. Secretary of Defense*, 631 F.2d 953, 961 (D.C. Cir. 1980). Thus, an agency may not impose even a temporary suspension without providing the core due process requirements of adequate notice and a meaningful hearing. *Sloan*, 231 F.3d at 18.

Legal questions are thus bound to arise from this new regulation, which allows the agency to effectively debar a contractor for a potentially unlimited duration without invoking suspension and debarment procedures. Questions likely to arise include: (1) Does invocation of this new procedure trigger the same Fifth Amendment due process protections that would apply to a suspension or debarment? (2) Does the ombudsman procedure provide a meaningful and sufficient opportunity for a contractor to rebut the charges brought against it, as required by the Fifth Amendment? (3) What acts are sufficient to constitute “unprofessional conduct or business practices” that allow the agency to reject all proposals from an entity? (4) Will a court enforce the narrow limits on appeal of the ombudsman’s decision that are set out in the new regulations? Time will tell.

Initial Disagreement Resolution: The new regulations also revamp the internal bid protest process. While postal procurements never were subject to GAO protest jurisdiction, the agency maintained its own internal bid protest adjudication process. That procedure has been abolished, and protests are now called “disagreements.” Resolution of disagreements proceed under a new two-tier approach, with the first tier called “Initial disagreement resolution.” 39 CFR § 601.107. All disagreements concerning the purchasing process must be lodged with the Contracting Officer within 10 days of the disagreement arising. Alternative dispute resolution procedures may be used to resolve disagreements. If the matter is not resolved within 10 days, the disagreement

may be lodged next with the ombudsman. The process is not to be used for claims filed pursuant to the CDA.

Ombudsman Disagreement Resolution: Disagreements that are lodged with the CO, but not resolved in 10 days, may be lodged with the ombudsman, who is expected to resolve the matter within 30 days. 39 CFR § 601.108. Although the text of the regulations does not describe how the ombudsman will resolve protests, the preface to the regulations states that the ombudsman “will focus on the best value considerations and business decisions made by the contracting officer.” 70 Fed. Reg. 20292 (April 19, 2005). This focus is potentially a wider scope of review than was provided under the now-revoked internal bid protest process.

The regulations state that the ombudsman process is the “sole and exclusive procedure” for resolving disagreements arising in connection with the purchasing process. 39 CFR § 601.108(b). The ombudsman’s decision is also considered final and may not be reviewed by a court, except on the grounds that the decision was “procured by fraud” or “obtained in violation of the regulations ... or an applicable public law.” 39 CFR § 601.108(h). Will these limitations on a court’s review of a USPS contract award be upheld?

Federal courts have long held that they have jurisdiction to review the propriety of USPS purchasing decisions, with no requirement that an entity first exhaust its administrative remedies. See *Emery Worldwide Airlines, Inc. v. U.S.*, 49 Fed. Cl. 211, aff’d 264 F.3d 1071 (2001). Thus, it seems unlikely that an entity which bypasses these new disagreement resolution procedures would be barred from having its protest heard in federal court. Similarly, the agency’s attempt to limit an “appeal” of the ombudsman’s decision, unless it was procured by fraud or is in violation of law, is unlikely to be enforced.

Non-Binding Guidelines?—The Postal Service’s purchasing policies are now set out in a newly created document called the *Interim Internal Purchasing Guidelines*, which are nearly identical to the predecessor regulations in the PM. Unlike the PM, however, the *Guidelines* state that they are “not binding,” “for internal use only” and “do not create any right ... enforceable against the Postal Service.” *Guidelines*, ¶ 1.1.1.2 and 1.3. But are they really unenforceable?

Certainly, cases exist where courts have treated manuals and guidelines as non-binding. See, e.g., *Kugel v. U.S.*, 947 F.2d 1504, 1507 (D.C. Cir. 1991). An oft-cited test is that an agency statement, when not issued as a formal regulation, binds the agency only if the agency intended it to be binding. See, e.g., *Farrell v. Dept. of the Interior*, 314 F.3d 584 (Fed. Cir. 2002), citing *Vitarelli v. Seaton*, 359 U.S. 535, 539 (1959). The *Guidelines* are replete with statements providing that they are “not binding regulations,” “for internal use only,” and “create no rights, substantive or procedural, enforceable against the Postal Service.” *Guidelines*, ¶ 1.1.1.2; 70 Fed. Reg. 20292 (April 19, 2005). Since USPS has stated in multiple ways that the *Guidelines* are not meant to serve as binding regulations, hasn’t it clearly passed this test?

Not necessarily. An agency will be bound by its internal policies or guidelines if they tend to narrowly limit administrative discretion and set out substantive requirements. *Guardian Fed. Savings & Loan Assoc. v. Fed. Savings & Loan Ins. Corp.*, 589 F.2d 658, 666-67 (D.C. Cir. 1978). See *South Dakota v. Ubbelohde*, 330 F.3d 1014 (8th Cir. 2003); and *McLouth Steel Prods. Corp. v. Thomas*, 838 F.2d 1317 (D.C. Cir. 1988). Courts will thus look past an agency’s characterization of a document and examine the nature of the document itself to determine whether it binds the agency.

This is exactly what happened in *Ubbelohde*. The Army Corps of Engineers argued that it was not bound by its *Master Manual* on flood control policy because it was not issued as a regulation and was not meant to be binding. But the court examined the manual and found that it was intended to be followed by agency personnel. Thus, notwithstanding what the agency said, the court held that the manual had regulatory effect.

Similarly, the binding status of the Environmental Protection Agency’s *Periodic Monitoring Guidance* on air pollution monitoring was at issue in *Appalachian Power Co. v. EPA*, 208 F.3d 1015, 1020-21 (D.C. Cir. 2000). The EPA *Guidance* specifically stated that it was “intended solely as guidance” and could not be relied upon to create any rights enforceable by any party. *Id.* at 1023. But the court examined the *Guidance* and deemed it a ukase—“it commands, it requires, it orders, it dictates.” Thus, the court held that the *Guidance* would be treated as binding. *Id.* The court then set the

Guidance aside, finding that it conflicted with the statute it was interpreting.

An examination of the Postal Service's *Guidelines* along these lines should yield a similar result. Postal procuring officials are required to follow the policies set out in the *Guidelines*—they are not free to apply these policies willy-nilly. For example, the *Guidelines* require COs to obtain a deviation from higher-level officials if they wish to act contrary to its requirements. The *Guidelines* also speak of what “is,” “will” and “must” be done. The *Guidelines* do not merely give advice to COs, they direct what shall be done, and there is no indication that a procuring official is free to ignore such direction. These same factors caused the *Ubbelohde* and *Appalachian* courts to find that the agency document in question had binding effect.

There is also past precedent establishing that postal officials regard certain documents as binding procurement regulations, even though not issued as regulations. A senior postal official testified that various handbooks, management instructions, circulars and other directives—none of which were issued as regulations—were considered by agency personnel as binding regulations. See *Edwards v. U.S.*, 22 Cl. Ct. 411, 418 n. 8, (1991).

Conclusion—Those portions of the Postal Service's new purchasing regulations that seek to limit court challenges to the agency's procurement decisions are likely to be held unenforceable. It remains an open question whether the new rules on disqualifying contractors without benefit of the debarment regulations will meet due process standards. And there is good reason to believe that the *Guidelines*, which contain actual purchasing policies, will, eventually, be held as binding on the agency. Thus, practitioners faced with any of these issues should not assume that the new regulations are binding, or conversely assume that the new *Guidelines* are not binding.



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