

the amendment is treated in the same manner as an amendment that limits the retirement-type subsidy to benefits that accrue before the applicable amendment date (as defined at § 1.411(d)-3(f)(2) of this chapter) with respect to each participant or alternate payee to whom the reduction is reasonably expected to apply.

(d) *Example.* The following examples illustrate the rules in this Q&A-8:

*Example 1.* (i) *Facts.* Pension Plan A is a defined benefit plan that provides a rate of benefit accrual of 1% of highest-five years' pay multiplied by years of service, payable annually for life commencing at normal retirement age (or at actual retirement age, if later). Plan A is amended on August 1, 2007, effective January 1, 2008, to provide that any participant who separates from service after December 31, 2007, and before January 1, 2013, will have the same number of years of service he or she would have had if his or her service continued to December 31, 2012.

(ii) *Conclusion.* While the amendment will result in a reduction in the annual rate of future benefit accrual from 2009 through 2012 (because under the amendment, benefits based upon an additional five years of service accrue on January 1, 2008, and no additional service is credited after January 1, 2008 until January 1, 2013), the amendment does not result in a reduction that is significant because the amount of the annual benefit commencing at normal retirement age (or at actual retirement age, if later) under the terms of the plan as amended is not under any conditions less than the amount of the annual benefit commencing at normal retirement age (or at actual retirement age, if later) to which any participant would have been entitled under the terms of the plan had the amendment not been made.

*Example 2.* (i) *Facts.* The facts are the same as in *Example 1*, except that the 2008 amendment does not alter the plan provisions relating to a participant's number of years of service, but instead amends the plan's provisions relating to early retirement benefits. Before the amendment, the plan provides for distributions before normal retirement age to be actuarially reduced, but, if a participant retires after attainment of age 55 and completion of 10 years of service, the applicable early retirement reduction factor is 3% per year for the years between age 65 and 62 and 6% per year for the ages from 62 to 55. The amendment changes these provisions so that an actuarial reduction applies in all cases, but, in accordance with section 411(d)(6)(B), provides that no participant's early retirement benefit will be less than the amount provided under the plan as in effect on December 31, 2007 with respect to service before January 1, 2008. For participant X, the reduction is significant.

(ii) *Conclusion.* The amendment will result in a reduction in a retirement-type subsidy provided under Plan A (i.e., Plan A's early retirement subsidy). Section 204(h) notice must be provided to participant X and any other participant for whom the reduction is significant and the notice must be provided at least 45 days before January 1, 2008 (or by

such other date as may apply under Q&A-9 of this section).

*Example 3.* (i) *Facts.* The facts are the same as in *Example 2*, except that, for participant X, the change does not go into effect for any annuity starting date before January 1, 2009. Participant X continues employment through January 1, 2009.

(ii) *Conclusion.* The conclusion is the same as in *Example 2*. Taking into account the rule in the second sentence of Q&A-8(c) of this section, the reduction that occurs for participant X on January 1, 2009, is treated as the same reduction that occurs under *Example 2*. Accordingly, section 204(h) notice must be provided to participant X at least 45 days before January 1, 2008 (or by such other date as may apply under Q&A-9 of this section).

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**Mark E. Matthews,**

*Deputy Commissioner for Services and Enforcement.*

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## POSTAL SERVICE

### 39 CFR Part 601

#### Purchasing of Property and Services

**AGENCY:** Postal Service.

**ACTION:** Proposed rule with request for comments.

**SUMMARY:** The Postal Service™ proposes to amend its regulations in order to implement the acquisition portions of its *Transformation Plan* (April 2000) 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 and services in accordance with 39 U.S.C. 101, 401, 403, 404, and 410.

**DATES:** Written comments must be received on or before April 23, 2004.

**ADDRESSES:** Written comments should be mailed to Michael J. Harris, Supply Management Infrastructure, United States Postal Service, 475 L'Enfant Plaza, SW., Room 4130, Washington, DC 20260-6201. Copies of all written comments will be available for inspection and photocopying between 9 a.m. and 4 p.m., Monday through Friday, at the Library, United States Postal Service, 475 L'Enfant Plaza, SW., Room 11800, Washington, DC 20260, (202) 268-2900.

**FOR FURTHER INFORMATION, CONTACT:** Michael J. Harris, (202) 268-3569.

**SUPPLEMENTARY INFORMATION:** The Board of Governors of the Postal Service has determined in the *Transformation Plan* that challenging times require the Postal Service to change its business model

and 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 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 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 by leading corporate enterprises. In accordance with the *Transformation Plan* and the Commission's recommendations, the Postal Service proposes to replace all of its current purchasing regulations with those discussed here.

#### Section-by-Section Analysis

##### *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 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*

The effective date of the new regulations will be set at some point in the future after consideration is given to public comments and the final regulations have been published. Sufficient time will be provided to prospective suppliers and members of the public to become acquainted with the new regulations.

##### *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 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 doing business with any person or organization that fails to meet the Service's expectations of high quality, prompt service, and overall professionalism.

### *Section 601.106 Canceling Business Relationships*

This section states the Postal Service's policy that it may elect not to do business with 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 doing business with a person or organization are given. The reasons that may cause the Postal Service to cease doing business under § 601.106 with a potential supplier differ from the reasons that may cause the Postal Service to debar a supplier under § 601.113. Cessation 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 doing business with 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 contest 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 Alternative Dispute Resolution*

This section states the Postal Service's policy to try to resolve disputes through alternative dispute resolution procedures, if possible. Whenever a person disputes a Postal Service decision under these regulations, the Postal Service contracting officer must consider alternative dispute procedures as a means of resolving the disagreement with the supplier. Illustrations of various types of dispute resolution procedures are listed. No supplier, however, will be required to use such procedures if the supplier chooses not to do so.

### *Section 601.108 Ombudsman and Dispute Resolution*

This section states the Postal Service's policy that all disagreements that arise between suppliers or potential suppliers and the Postal Service regarding all aspects of solicitations, awards of contracts, and related matters should be resolved quickly and inexpensively, preferably through alternative dispute resolution, but if not, 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 to 60 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 and agencies of the Federal Government, and related matters. 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 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.

In view of the matters discussed above, although exempt from the notice and comment requirements of the Administrative Procedure Act (5 U.S.C. 553 (b)(c)) regarding proposed rulemaking by 39 U.S.C. 410 (a), the Postal Service invites comments on the following proposed amendments to part 601 of title 39, Code of Federal Regulations.

### **List of Subjects in 39 CFR Part 601**

Postal Service.

1. Revise 601 to read as follows:

### **PART 601—PURCHASING OF PROPERTY AND SERVICES**

Sec.	
601.100	Purchasing policy.
601.101	Effective date.
601.102	Prior purchasing regulations.
601.103	Applicability and coverage.
601.104	Postal purchasing authority.
601.105	Business relationships.
601.106	Canceling business relationships.
601.107	Alternative dispute resolution.
601.108	Ombudsman and dispute 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 on and after [reserved].

#### **§ 601.102 Prior purchasing regulations.**

This part revokes, replaces, and supersedes all previous postal

purchasing regulations, including the *Postal Contracting Manual*, *Procurement Manual*, the *Purchasing Manual* (Issue 2 and Issue 3), and procurement handbooks, circulars, and instructions 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. 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 Postal Service's vice president, 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, Supply Management, or his or her designee, may also delegate 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 business relations with a person or organization when that person or organization fails to meet reasonable business expectations of high quality, prompt service, and overall professionalism. In addition to terminating existing contracts for its convenience or for default, the Postal Service may cease or cancel a business relationship or it may undertake debarment, suspension, and ineligibility proceedings as provided in this part.

**§ 601.106 Canceling business relationships.**

(a) *General.* The Postal Service may cancel its business relationship or decline to enter into a business relationship with a person or organization that does not meet reasonable business expectations or that 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) Spurious, frivolous, or bad-faith litigation and/or claims;
- (4) Failure to respond promptly and completely to Postal Service inquiries and requests for information, without inadvertence or good reason;
- (5) Negotiating or dealing in bad faith with the Postal Service, including engaging in uncooperative practices;
- (6) 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
- (7) Engaging in other questionable or unprofessional conduct or business practices.

(b) *Notice.* If the Postal Service elects to cancel its business relationship with a person or organization, the vice president, Supply Management, or his or her designee, will provide a written notice to the person or organization explaining:

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

(c) *Contesting cancellations.* If a person or organization believes the cancellation is not merited, it may contest the matter in accordance with the ombudsman and supplier dispute-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 cancellation.

**§ 601.107 Alternative dispute resolution.**

It is the policy of the Postal Service to resolve purchasing disagreements through the use of alternative disputes resolution (ADR), whenever possible. 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 disputing 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, facilitation by the supplier ombudsman, and any other agreed-upon method.

**§ 601.108 Ombudsman and dispute resolution.**

(a) *Policy.* From time to time, disagreements arise between suppliers, potential suppliers, and the Postal Service regarding solicitations, awards of contracts, and related matters. 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 and internal Postal Service purchasing guidelines will not apply or be taken into account.

(b) *Scope and applicability.* In order to resolve disagreements and demands expeditiously, 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 or services and all related matters. All disputes, protests, claims, disagreements, demands, or grievances 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 Contracts Disputes Act or claims concerning debarment, suspension, or ineligibility under § 601.113 of this part, will be presented and resolved, with finality, under and in accordance with the sole and exclusive procedure established in this section.

(c) A disagreement may be lodged by an organization or a person with respect to the cancellation of a business relationship, the terms of a Postal Service solicitation, the award of a contract, and/or related issues in regard to the purchasing process.

(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. 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) The disagreement must be delivered to the ombudsman for the Postal Service within 15 calendar days of the time the grounds for the disagreement arose. The ombudsman may grant an extension of time to deliver 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 deliver a disagreement lapses. The address of the ombudsman is [reserved].

(f) The ombudsman will promptly provide a copy of a disagreement to the contracting officer, who will promptly deliver a copy to 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, revoked Postal Service regulations, and internal Postal Service purchasing guidelines will not apply or be taken into account in resolving disagreements.

(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 was procured by fraud or other criminal misconduct or was obtained in violation of the regulations contained in this part or an applicable public law enacted by Congress. Any such appeal must be filed with the clerk of court and a copy of the appeal must be delivered to the ombudsman within 15 calendar days of the date of receipt of the decision, or the appeal is waived.

(i) It is intended that this procedure generally will resolve disagreements within approximately 30 to 60 days after the ombudsman receives the disagreement.

#### **§ 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) *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."

#### **§ 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, 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 General Accounting Office. GSA posts the list on the Internet and publishes a hardcopy of the list.

(3) The vice president, 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, 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, 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, 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, Supply Management, or designee.

(e) *Causes for debarment.* The vice president, Supply Management, with the concurrence of the General Counsel,

may debar a supplier, including its affiliates, for cause such as the following:

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

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

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

(4) 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.

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

(i) The existence of a conviction in paragraph (e)(1) or (2) of this section may 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.

The existence of any of the other causes in paragraphs (e)(1), (2), (3), (4), or (5) of this section may be established by a preponderance of the evidence, either direct or indirect, in the judgment of the debarring official.

(ii) 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.

(iii) 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, Supply Management, 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 in paragraph (f)(1) of this section 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 debarring official, 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, 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, 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, Supply Management, will consider when deciding the matter. When a debarment is removed or the debarment period is reduced, the vice president, 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) The vice president, 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 receipt 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, 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, Supply Management, 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, 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, Supply Management, may reject any findings of fact, in whole or in part, when they are clearly erroneous.

(3) When the vice president, 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 other 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, Supply Management, and/or the Judicial Officer 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, Supply Management, in

consultation with 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 (a) the decision was procured by fraud or other criminal misconduct or (b) 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, 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, Supply Management. The termination of a suspension will not prejudice the Postal Service's position in any debarment proceeding. A suspension will be superceded by a decision rendered by the vice president, Supply Management, under paragraph (h)(5) of this section.

(k) *Procedural requirements for suspension.* (1) The vice president, 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 reason(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, Supply Management, in writing, any information or reason(s) the supplier believes makes a suspension or an extension inappropriate, and the vice

president, 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.

**Neva Watson,**

*Attorney, Legislative.*

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## ENVIRONMENTAL PROTECTION AGENCY

### 40 CFR Part 52

[DE 070-1043b; FRL-7639-5]

#### Approval and Promulgation of Air Quality Implementation Plans; Delaware; Amendments to Regulation 24, Section 10—Aerospace Coatings

**AGENCY:** Environmental Protection Agency (EPA).

**ACTION:** Proposed rule.

**SUMMARY:** EPA proposes to approve a revision to the State of Delaware State Implementation Plan (SIP). The revision corrects the definition of the term "Fire-Resistant (interior) Coating" in Delaware's regulation to control volatile organic compound (VOC) emissions from aerospace coatings operations. The correction to the definition makes it consistent with EPA's Control Technique Guideline (CTG) for this VOC source category. In the Final Rules section of this **Federal Register**, EPA is approving the State's SIP submittal as a direct final rule without prior proposal because the Agency views this as a noncontroversial submittal and anticipates no adverse comments. A detailed rationale for the approval is set forth in the direct final rule. If no adverse comments are received in response to this action, no further activity is contemplated. If EPA receives adverse comments, the direct final rule will be withdrawn and all public comments received will be addressed in a subsequent final rule based on this proposed rule. EPA will not institute a second comment period. Any parties interested in commenting on this action should do so at this time.

**DATES:** Comments must be received in writing by April 23, 2004.

**ADDRESSES:** Comments may be submitted either by mail or

electronically. Written comments should be mailed to Makeba Morris, Chief, Air Quality Planning Branch, Mailcode 3AP21, U.S. Environmental Protection Agency, Region III, 1650 Arch Street, Philadelphia, Pennsylvania 19103. Electronic comments should be sent either to [morris.makeba@epa.gov](mailto:morris.makeba@epa.gov) or to <http://www.regulations.gov>, which is an alternative method for submitting electronic comments to EPA. To submit comments, please follow the detailed instructions described in the Supplementary Information section. Copies of the documents relevant to this action are available for public inspection during normal business hours at the Air Protection Division, U.S. Environmental Protection Agency, Region III, 1650 Arch Street, Philadelphia, Pennsylvania 19103; the Air and Radiation Docket and Information Center, U.S. Environmental Protection Agency, 1301 Constitution Avenue, NW., Room B108, Washington, DC 20460; and Delaware Department of Natural Resources & Environmental Control, 89 Kings Highway, P.O. Box 1401, Dover, Delaware 19903.

**FOR FURTHER INFORMATION CONTACT:**

Janice Lewis, (215) 814-2185, or by e-mail at [lewis.janice@epa.gov](mailto:lewis.janice@epa.gov).

**SUPPLEMENTARY INFORMATION:** For further information, please see the information provided in the direct final action, with the same title, that is located in the "Rules and Regulations" section of this **Federal Register** publication.

You may submit comments either electronically or by mail. To ensure proper receipt by EPA, identify the appropriate rulemaking identification number DE 070-1043 in the subject line on the first page of your comment. Please ensure that your comments are submitted within the specified comment period. Comments received after the close of the comment period will be marked "late." EPA is not required to consider these late comments.

1. *Electronically.* If you submit an electronic comment as prescribed below, EPA recommends that you include your name, mailing address, and an e-mail address or other contact information in the body of your comment. Also include this contact information on the outside of any disk or CD ROM you submit, and in any cover letter accompanying the disk or CD ROM. This ensures that you can be identified as the submitter of the comment and allows EPA to contact you in case EPA cannot read your comment due to technical difficulties or needs further information on the substance of your comment. EPA's policy is that EPA

will not edit your comment, and any identifying or contact information provided in the body of a comment will be included as part of the comment that is placed in the official public docket. If EPA cannot read your comment due to technical difficulties and cannot contact you for clarification, EPA may not be able to consider your comment.

i. *E-mail.* Comments may be sent by electronic mail (e-mail) to [morris.makeba@epa.gov](mailto:morris.makeba@epa.gov), attention MD145/54-3104. EPA's e-mail system is not an "anonymous access" system. If you send an e-mail comment directly without going through [Regulations.gov](http://www.regulations.gov), EPA's e-mail system automatically captures your e-mail address. E-mail addresses that are automatically captured by EPA's e-mail system are included as part of the comment that is placed in the official public docket.

ii. *Regulations.gov.* Your use of [Regulation.gov](http://www.regulations.gov) is an alternative method of submitting electronic comments to EPA. Go directly to <http://www.regulations.gov>, then select "Environmental Protection Agency" at the top of the page and use the "go" button. The list of current EPA actions available for comment will be listed. Please follow the online instructions for submitting comments. The system is an "anonymous access" system, which means EPA will not know your identity, e-mail address, or other contact information unless you provide it in the body of your comment.

iii. *Disk or CD ROM.* You may submit comments on a disk or CD ROM that you mail to the mailing address identified in the **ADDRESSES** section of this document. These electronic submissions will be accepted in WordPerfect, Word or ASCII file format. Avoid the use of special characters and any form of encryption.

2. *By Mail.* Written comments should be addressed to the EPA Regional office listed in the **ADDRESSES** section of this document.

For public commenters, it is important to note that EPA's policy is that public comments, whether submitted electronically or in paper, will be made available for public viewing at the EPA Regional Office, as EPA receives them and without change, unless the comment contains copyrighted material, confidential business information (CBI), or other information whose disclosure is restricted by statute. When EPA identifies a comment containing copyrighted material, EPA will provide a reference to that material in the version of the comment that is placed in the official public rulemaking file. The entire printed comment, including the