

in accordance with 33 CFR 117.5, but this temporary deviation will allow the bridge to remain in the closed-to-navigation position from 8 a.m. on October 22, 2007 through 8 p.m. on October 26, 2007. BNSF will provide an opening from 8 a.m. till 11 a.m. every day starting October 23, 2007. An alternate route is available through the Berwick Locks. The bridge provides 10 feet of vertical clearance in the closed-to-navigation position. Navigation on the waterway consists of tugs with tows, fishing vessels and recreational craft including sailboats and powerboats. Due to prior experience, as well as coordination with waterway users, and an alternate route through Berwick Locks it has been determined that this closure will not have a significant effect on these vessels.

In accordance with 33 CFR 117.35(e), the drawbridge must return to its regular operating schedule immediately at the end of the designated time period. This deviation from the operating regulations is authorized under 33 CFR 117.35.

Dated: October 2, 2007.

**David M. Frank,**

*Bridge Administrator.*

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## POSTAL SERVICE

### 39 CFR Part 601

#### Purchasing of Property and Services

**AGENCY:** Postal Service.

**ACTION:** Final rule.

**SUMMARY:** The Postal Service™ is making several minor revisions to its regulations governing the purchasing of property and services to comply with certain findings and suggestions of the Government Accountability Office, and to clarify a variety of procedural matters.

**DATES:** This final rule is effective November 14, 2007.

**FOR FURTHER INFORMATION CONTACT:** Paul McGinn, (202) 268-4638, or Syvera O'Pharrow, (202) 268-8110.

**SUPPLEMENTARY INFORMATION:** The Postal Service is making several minor revisions to its regulations governing the purchasing of property and services in order to (1) comply with some of the findings in the Government Accountability Office's (GAO) report, GAO-06-190, *U.S. Postal Service: Purchasing Changes Seem Promising, but Revisions to Ombudsman Position are Needed*, and (2) clarify some procedural matters. In its report, GAO

stated that the Postal Service's Ombudsman regulatory provisions and guidance contained in 39 CFR Part 601 were inconsistent with leading Ombudsman principles and practices. In response, the Postal Service benchmarked its supplier disagreement resolution process against a variety of private sector companies, and found that the process conforms to leading business principles and practices. We do agree with GAO that the use of the term Ombudsman is inaccurate, however, and therefore have changed the term to Supplier Disagreement Resolution Official (SDR Official). In addition, several minor procedural changes have been made to the regulations and business processes published in May of 2005, and these are explained in more detail below.

#### Explanation of Changes

##### *Section 601.100 Purchasing Policy*

This section has been revised for clarity, specifically by stating that the Postal Service acquires property and services pursuant to the authority of 39 U.S.C. 410.

##### *Section 601.101 Effective Date*

This section has been revised to state that the revised regulations will take effect thirty days after publication.

##### *Section 601.102 Revocation of Prior Purchasing Regulations*

The reference to section 601.103 has been deleted due to a revision to that section.

##### *Section 601.103 Applicability and Coverage*

This section has been revised to state that these regulations apply to all Postal Service acquisitions of property (except real property) and services.

##### *Section 601.104 Postal Purchasing Authority*

This section has not been changed.

##### *Section 601.105 Business Relationships*

In paragraph (a), the last sentence of the text has been revised to make it clear that the Postal Service reserves the right to decline to accept or consider proposals from a person or organization when that person or organization fails to meet reasonable business expectations. Previous section 601.106 has been revised and included in this section as a new paragraph (b). The first sentence in the new paragraph (b) has been revised for clarity by indicating under what circumstances the Postal Service reserves the right to decline to accept or consider proposals. Paragraph (c) has

been revised to state that written notices must be by certified mail, return receipt requested. Subparagraph (c)(4) has been revised to require that the written notice to the supplier establish the period of time during which the decision to decline to accept or consider proposals is in effect. Paragraph (d) has been revised to provide a cross-reference to section 601.108.

##### *Section 601.106 Reserved*

As discussed above, the previous text in this section has been combined into a new paragraph (b) of section 601.105.

##### *Section 601.107 Initial Disagreement Resolution*

This section includes a new paragraph (a) "Definitions", that provides definition for certain terms that appear throughout the regulations. Paragraph (b) has been revised to state that all disagreements lodged with the contracting officer must be in writing and to describe the methods in which a person or organization may lodge a business disagreement with the contracting officer and to delineate the timeframe a person or organization has to lodge a disagreement. This section has also been revised to state that the contracting officer's manager may help to resolve the disagreement and that at the conclusion of the ten day resolution period, the contracting officer must communicate, in writing, to the supplier his or her resolution of the disagreement. This section has been further revised by moving the text discussing disagreements not resolved within 10 days to section 601.108(a). The text regarding alternative dispute resolution has been retained and codified in paragraph (c).

##### *Section 601.108 SDR Official Disagreement Resolution*

The Ombudsman has been given a new title: Supplier Disagreement Resolution Official ("SDR Official"), and this term is used throughout the regulations. Text regarding disagreements not resolved within 10 days has been moved from section 601.107 to this section under paragraph (a). Because neither 39 U.S.C. 410 nor other public laws apply to the Postal Service's administrative resolution of supplier disagreements, the previous reference to "39 U.S.C. 410, and all other applicable public laws enacted by Congress" has been deleted. The definition of disagreements in paragraph (b) has been deleted and is now included in the "Definitions" paragraph discussed above. Paragraph (c) has been expanded to include the address for submitting supplier disagreements. In

paragraph (d), new text has been added delineating the timeframes that apply for lodging a disagreement with the SDR Official, and new text has also been added addressing the supplier's filing of a request for an extension of time. Paragraph (e) has been revised to incorporate guidance on the submission of confidential information. The term "interested parties" now defined in paragraph 601.107(a), replaces "interested persons" throughout section 601.108.

#### *Section 601.109 Contract Claims and Disputes*

Paragraph (a) has been revised to give the supplier the option of using the SDR Official as a mediator for contract performance disagreements prior to bringing a contract claim or dispute under this section. Paragraph (g)(3) has been revised to give the contracting officer the option to request additional information prior to making a decision.

#### *Section 601.110 Payment of Claims;* *Section 601.111 Interest on Claim* *Amounts; Section 601.112 Review of* *Adverse Decisions*

These sections have not been changed.

#### *Section 601.113 Debarment,* *Suspension, and Ineligibility*

Paragraph (a) has been revised to be consistent with the discussion of the same matter in subparagraph (d)(2). The definition of "Affiliate" under subparagraph (b)(1) has been revised to clarify the definition of control. The definition of "Judicial Officer" originally set forth in subparagraph (b)(6) has been deleted. Subparagraph (c)(1) has been revised because the Postal Service no longer distributes a hardcopy of the list of debarred and suspended suppliers to contracting officers; the list is maintained electronically and is available internally on the Postal Service's Supply Management Web site. Subparagraph (c)(2) has been revised because the original regulations only considered hardcopy versions; GSA no longer publishes hardcopies and the list is maintained electronically on GSA's Web site. Subparagraph (d)(2) has been revised to state clearly that the supplier must review the consolidated GSA list in order to exclude suppliers debarred or suspended by the Postal Service from performing part of a Postal Service contract (the Postal Service list is available internally only). Subparagraph (d)(3) has been changed for consistency with the previous subparagraph. The words "insignificant or significant minor service changes" have been

added in subparagraph (d)(5); this requires only major service changes to be approved by the vice president of Supply Management. In subparagraph (e)(3) the term "debarred official" has been replaced with the term "vice president of Supply Management" for consistency.

A new subparagraph (e)(v) has been included as a basis for debarment.

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

Government procurement, Postal Service.

■ Accordingly, 39 CFR part 601 is revised 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	Reserved.
601.107	Initial disagreement resolution.
601.108	SDR Official 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.**

The Postal Service acquires property and services pursuant to the authority of 39 U.S.C. 410.

#### **§ 601.101 Effective date.**

These regulations are effective November 14, 2007. Solicitations issued and resulting contracts entered into prior to that date will be governed by the regulations in effect at the time the solicitation was issued.

#### **§ 601.102 Revocation of prior purchasing regulations.**

All previous postal 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.

#### **§ 601.103 Applicability and coverage.**

The regulations contained in this part apply to all Postal Service acquisition of property (except real property) and services.

#### **§ 601.104 Postal purchasing authority.**

Only the Postmaster General/CEO; 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 in writing local buying authority throughout the Postal Service.

#### **§ 601.105 Business relationships.**

(a) *General.* A person or organization wishing to have 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 decline to accept or consider proposals from a person or organization when that person or organization fails to meet reasonable business expectations or provide a high level of confidence regarding quality, prompt service, and overall professionalism.

(b) *Declining to accept or consider proposals.* The Postal Service may decline to accept or consider proposals when a person or organization exhibits unacceptable conduct or business practices that do not meet reasonable business expectations or does not provide a high level of confidence about the entity's current or future business relations. 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 regarding 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.

(c) *Notice.* If the Postal Service elects to decline to accept or consider proposals from a person or organization, the vice president, Supply Management, or his or her designee, will provide a written notice to the person or organization by *Certified Mail, return receipt requested*, explaining:

- (1) The reasons for the decision;
- (2) The effective date of the decision;
- (3) The scope of the decision;

(4) The period of time the decision will be in effect, (a matter at the Postal Service's discretion consistent with the circumstances); and

(5) The supplier's right to contest the decision.

(d) *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 § 601.108. The Postal Service may reconsider the matter and, if warranted, rescind or modify the decision to decline to accept or consider proposals.

#### **§ 601.106 [Reserved]**

#### **§ 601.107 Initial disagreement resolution.**

##### *(a) Definitions.*

(1) *Days.* Calendar days; however, any time period will run until a day which is not a Saturday, Sunday, or legal holiday.

(2) *Disagreements.* All disputes, protests, claims, disagreements, or demands of whatsoever nature arising in connection with the acquisition of property and services within the scope of § 601.103, above, except those:

(i) That arise pursuant to a contract under the Contract Disputes Act under § 601.109;

(ii) That concern debarment, suspension, or ineligibility under § 601.113; or

(iii) That arise out of the non-renewal of transportation contracts containing other provisions for the review of such decisions.

(3) *Interested parties.* Actual or prospective offerors whose direct economic interests would be affected by the award of, or failure to award, the contract.

(4) *Lodge.* A disagreement is lodged on the date it is received by the Contracting Officer or the Supplier Disagreement Resolution Official, as appropriate.

(5) *SDR Official.* The Supplier Disagreement Resolution Official, an individual designated by the Postal Service to perform the functions established under § 601.108.

(b) *Policy.* It is the policy of the Postal Service and in the interest of its suppliers to resolve disagreements by mutual agreement between the supplier and the responsible contracting officer. All disagreements arising in connection with the purchasing process must be lodged with the responsible contracting officer in writing via facsimile, e-mail, hand delivery, or U.S. Mail, within ten days of the date the supplier received notification of award or ten days from the date the supplier received a debriefing. During the supplier-

contracting officer ten-day resolution period, the responsible contracting officer's management may help to resolve the disagreement. At the conclusion of the ten-day resolution period, the contracting officer must communicate, in writing, to the supplier his or her resolution of the disagreement.

##### *(c) Alternative dispute resolution.*

Alternative dispute resolution (ADR) procedures may be used, if agreed to by all interested parties. The use of ADR to resolve the disagreement must be considered, regardless of the nature of the disagreement or when it occurred during the purchasing process. If the use of ADR is agreed upon, the ten-day limitation is suspended; if the parties cannot reach an agreement under ADR, the supplier has ten days to lodge its disagreement with the SDR Official.

#### **§ 601.108 SDR Official disagreement resolution.**

(a) *General.* 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 above. If a disagreement under § 601.107 is not resolved within ten days after it was lodged with the contracting officer, if the use of ADR fails to resolve it at any time, or if the supplier is not satisfied with the contracting officer's resolution of the disagreement, or if the decision not to accept or consider proposals under § 601.105 is contested, the SDR Official is available to provide final resolution of the matter. The Postal Service desires to resolve all such disagreements quickly and inexpensively in keeping with the regulations in this part. In resolving disagreements, non-Postal Service procurement rules or regulations will not govern.

(b) *Scope and applicability.* In order to resolve expeditiously disagreements that are not resolved at the responsible contracting officer 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. All disagreements will be lodged with and resolved, with finality, by the SDR Official under and in accordance with the sole and exclusive procedure established in this section.

(c) *Lodging a disagreement.* The disagreement must be lodged in writing and must state the factual circumstances

relating to it, the scope and outcome of the initial disagreement resolution attempt with the contracting officer, and the remedy sought. The address of the SDR Official is: Room 4130 (Attn: SDR Official), United States Postal Service Headquarters, 475 L'Enfant Plaza, SW., Washington, DC 20260-4130. E-mail Address: [SDROfficial@usps.gov](mailto:SDROfficial@usps.gov). Fax Number: (202) 268-6234.

(d) *Lodging timeframes.* If a supplier wishes the SDR Official to consider any of the matters identified in § 601.108(a) disagreements must be lodged with that official within the following timeframes:

(1) Disagreements under § 601.107 not resolved with the contracting officer must be lodged with the SDR Official within twenty days after they were lodged with the contracting officer (unless ADR had been used to attempt to resolve them);

(2) Disagreements under § 601.107 for which ADR had been agreed to be used must be lodged with the SDR Official within ten days after the supplier knew or was informed by the contracting officer or otherwise that the matter was not resolved;

(3) Disagreements under § 601.107 resolved by the contracting officer as to which the supplier is unhappy with the resolution must be lodged with the SDR Official within ten days after the supplier first receives notification of the contracting officer's resolution; and

(4) Contests of decisions under § 601.105 to decline to accept or consider proposals must be lodged with the SDR Official within ten days of the supplier's receipt of the written notice explaining the decision.

(5) The SDR Official 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 SDR Official on or before the time to lodge a disagreement lapses.

(e) *Decision process.* The SDR Official will promptly provide a copy of a disagreement to the contracting officer, who will promptly notify other interested parties. The SDR Official will consider a disagreement and any response by other interested parties and appropriate Postal Service officials within a time frame established by the SDR Official. The SDR Official may also meet individually or jointly with the person or organization lodging the disagreement, other interested parties, 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 parties, or Postal Service officials must promptly provide all relevant, nonprivileged materials and other information requested by the SDR Official. If a submission contains trade secrets or other confidential information, it should be accompanied by a copy of the submission from which the confidential matter has been redacted. The SDR Official will determine whether any redactions are appropriate and will be solely responsible for determining the treatment of any redacted materials. After obtaining such information, materials, and advice as may be needed, the SDR Official will promptly issue a written decision resolving the disagreement and will deliver the decision to the person or organization lodging the disagreement, other interested parties, and appropriate Postal Service officials.

(f) *Guidance.* In considering and in resolving a disagreement, the SDR Official 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 requested information may be taken into account by the SDR Official in the decision.

(g) *Binding decision.* A decision of the SDR Official will be final and binding on the person or organization lodging the disagreement, other interested parties, and the Postal Service. However, the person or organization that lodged the disagreement or another interested person may appeal the decision of the SDR Official 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.

(h) *Resolution timeframe.* It is intended that this procedure generally will resolve disagreements within approximately thirty days after the receipt of the disagreement by the SDR Official. 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). If ADR is used, the SDR official may serve as a mediator for contract performance

disagreements prior to bringing a contract claim or dispute under this part.

(b) *Policy.* It is the Postal Service's intent 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) *Supplier 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 six 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) *Misrepresentation or fraud.* 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, and may 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 may 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 sixty days, the contracting officer must issue a final decision on a claim of \$100,000 or less within sixty 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 sixty 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 ninety 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 twelve 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) *Information and resources.* 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, when a contract provides for such consent, 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. Indications of control include, but are not limited to, interlocking management or ownership, identity of interests among family members, shared facilities and equipment, contractual relationships, common use of employees, or a business entity organized following the debarment, suspension, or proposed debarment of a supplier which has the same or similar management, ownership, or principal employees as the supplier that was debarred, suspended, or proposed for debarment. 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) *Suspension.* An exclusion from contracting and subcontracting for a reasonable period of time due to specified reasons or the pendency of a debarment proceeding.

(7) *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 make available a list of suppliers debarred or suspended by the Postal Service to contracting officers.

(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.

(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 review the consolidated GSA list in order to exclude suppliers debarred or suspended by the Postal Service 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 review the consolidated 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. Contracting officers may not add new work to any contract with a supplier that is debarred, suspended, or determined to be ineligible by supplemental agreement, by exercise of an option, or otherwise (unless the work is classified as an insignificant or significant minor service change to a mail transportation

contract), except with the approval of the vice president, Supply Management, or designee.

(e) *Causes for debarment*—(1) 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:

(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 vice president of Supply Management.

(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, 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, 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 three 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) After securing the concurrence of the General Counsel, 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 that, within thirty 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, 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, 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, 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 government agency may be considered as established, but, within thirty 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 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 Officer 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, 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 the decision was procured by fraud or other criminal misconduct, or 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:

(1) If 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, or receipt of stolen property, or any other offense indicating a lack of business integrity or business honesty;

(2) For any other cause of such serious and compelling nature that suspension is warranted; or

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

(j) *Period of suspension*. A suspension will not exceed one year in duration, except a suspension may be extended for reasonable periods of time beyond one 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 superseded 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 ten 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 thirty 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.

**Stanley F. Mires,**

*Chief Counsel, Legislative.*

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## DEPARTMENT OF COMMERCE

### National Oceanic and Atmospheric Administration

#### 50 CFR Part 660

[Docket No. 0612243162-7541-02; I.D. 032607A]

**RIN 0648-AU77**

#### Fisheries Off West Coast States; Highly Migratory Species Fisheries

**AGENCY:** National Marine Fisheries Service (NMFS), National Oceanic and Atmospheric Administration (NOAA), Commerce.

**ACTION:** Final rule.

**SUMMARY:** NMFS issues a final rule to implement daily bag limits for sport-caught albacore tuna (*Thunnus alalunga*) and bluefin tuna (*Thunnus orientalis*) in the Exclusive Economic Zone (EEZ) off California under the Fishery Management Plan for U.S. West Coast Fisheries for Highly Migratory Species (HMS FMP). This final rule is implemented as a conservation measure as part of the 2007-2009 biennial management cycle as established in the HMS FMP Framework provisions for changes to routine management measures.

**DATES:** This final rule is effective November 14, 2007.

**ADDRESSES:** Rodney R. McInnis, Regional Administrator, Southwest Region, NMFS, 501 West Ocean Blvd., Suite 4200, Long Beach, CA 90802 4213.

**FOR FURTHER INFORMATION CONTACT:** Craig Heberer, Sustainable Fisheries Division, NMFS, 760-431-9440, ext. 303.

**SUPPLEMENTARY INFORMATION:** On April 7, 2004, NMFS published a final rule to implement the HMS FMP (69 FR 18444) that codified annual specification guidelines at 50 CFR 660.709. These guidelines establish a process for the Pacific Fishery Management Council (Council) to take final action at its regularly-scheduled November meeting on any necessary harvest guideline, quota, or other management measure and recommend any such action to NMFS. At their November 12-17, 2006, meeting, the Council adopted a recommendation to establish daily bag limits for sport-caught albacore and bluefin tuna harvested in the EEZ off of California as a routine management measure for the 2007-2009 biennial management cycle. Based in part on the Council's recommendation, NMFS published a proposed rule on June 27, 2007, to establish daily bag limits for albacore and bluefin tuna harvested by recreational fishing in the U.S. EEZ off the coast of California (72 FR 35213).

NMFS is implementing this final rule pursuant to procedures established at 50 CFR 660.709(a)(4) of the implementing regulations for the HMS FMP. This final rule establishes a daily bag limit of 10 albacore tuna harvested by recreational fishing in the U.S. EEZ south of Point Conception (34° 27' N. latitude) to the U.S.-Mexico border and a daily bag limit of 25 albacore tuna harvested by recreational fishing in the U.S. EEZ north of Point Conception to the California-Oregon border. This rule also establishes a daily bag limit of 10 bluefin tuna harvested by recreational fishing in the U.S. EEZ off the entire California coast. The two bag limits for albacore tuna are intended to accommodate differences in fishing opportunity in the two regions south and north of Point Conception. The 25 fish albacore tuna bag limit north of Point Conception is consistent with the current albacore tuna bag limit established by the State of Oregon for recreational fisheries in its waters and recognizes the more frequent weather-related loss of fishing opportunity in these waters compared to waters south of Point Conception.

California State regulations allow, by special permit, the retention of up to

three daily bag limits for a trip occurring over multiple, consecutive days.

California State regulations also allow for two or more persons angling for finfish aboard a vessel in ocean waters off California to continue fishing until boat limits are reached. NMFS and the Council consider these additional state restrictions to be consistent with Federal regulations implementing the HMS FMP, including this final rule. The final rule has been modified to clarify that recreational fisherman are generally subject to the same daily bag limits (10 or 25 albacore tuna south or north of Point Conception; 10 bluefin tuna off California) regardless of the number of days a fishing trip lasts unless operating under a California multi-day possession permit, in which case the daily bag limits may be multiplied pursuant to the restrictions of that program. Language has also been added to the final rule to clarify that a fisherman must comply with the most strict bag limit applicable to all areas fished during a given trip (e.g., if any part of a fishing trip takes place in the EEZ south of Point Conception, the 10-albacore bag limit applies even if the port of departure and landing or fishing takes place north of Point Conception).

The designation of paragraphs in 50 CFR 660.721 has been revised from the proposed rule to reduce complexity and make the regulations easier to read.

This final rule will stay in effect until such time as the Council and/or NMFS proposes further modifications as part of the HMS FMP biennial management cycle process. The State of California has informed NMFS that it intends to implement companion regulations to impose daily albacore and bluefin bag limits applicable to recreational angling and possession of fish in state waters (0-3 nm).

#### Comments and Responses

During the comment period for the proposed rule, NMFS received two comments.

*Comment 1:* The Science and Policy Coordinator for the Tag-A-Giant Foundation wrote in support of the proposed rule to implement a bag limit for Pacific bluefin tuna off the California coast but requested that NMFS reduce the bag limit from the proposed 10 fish per day to six fish per day. The stated rationale for the reduced daily bag limit request was to prevent expansion of the recreational fishery and potential overfishing that could result. The Coordinator also requested the daily bag limit be consistently applied in federal waters off the coasts of Oregon and Washington as well given the documented presence of bluefin tuna in