Dear Mr. Harris:

On behalf of the Section of Public Contract Law of the American Bar Association ("the Section"), I am submitting comments on the above-referenced matter.1 The Section consists of attorneys and associated professionals in private practice, industry and Government service. The Section’s governing Council and substantive committees have members representing these three segments to ensure that all points of view are considered. By presenting their consensus view, the Section seeks to improve the process of public contracting for needed supplies, services, and public works.

The Section is authorized to submit comments on acquisition regulations under special authority granted by the ABA’s Board of Governors. The views expressed herein have not been approved by the House of Delegates or the Board of Governors.

1 The Honorable Mary Ellen Coster Williams, Daniel L. Gordon, and Robert A. Burton, Council members of the Public Contract Law Section, did not participate in the Section’s consideration of these comments, and they abstained from the voting to approve this letter.

Via UPS Overnight

Mr. Michael J. Harris
Supply Management Infrastructure
United States Postal Service
475 L’Enfant Plaza, S.W., Room 4130
Washington, D.C. 20260-6201

Re: United States Postal Service Proposed Rule
Purchasing of Property and Services

April 22, 2004
Governors of the American Bar Association and, therefore, should not be construed as representing the policy of the American Bar Association.

Introduction

The proposed rule ("Proposed Rule") requests comments on a proposal by the United States Postal Service ("Postal Service" or "USPS") to amend its procurement regulations. The Proposed Rule states that the Postal Service is revising its regulations to acquire goods and services in a manner similar to that followed by businesses. In essence, however, the Proposed Rule will revoke, replace, and supersede all of the Postal Service’s existing procurement regulations, policy, and procedure and replace them with a simple statement of policy that the Postal Service will acquire property and services in accordance with applicable law. The Proposed Rule also includes policy and procedure in three areas: canceling business relationships, claims and dispute resolution, and debarment and suspension.

Although the Section recognizes that the Postal Service is a unique government entity and appreciates that it is trying to conduct its activities more like a business, the Section has grave concern with the Postal Service proposal to abolish all of its existing procurement regulations. The Section also has concerns with some of the regulations proposed for the three specific areas (canceling relationships, claims and dispute resolution, and debarment and suspension), particularly the policy and procedure for canceling business relationships. The Section does not believe that the Proposed Rule will serve the Postal Service, its suppliers, and its customers well, or help to achieve the additional goals of oversight and accountability. The Section’s concerns and recommendations are set forth below.

The Proposed Rule

The Proposed Rule states that the Postal Service is amending its regulations in order to implement the acquisition portions of its Transformation Plan (April 2000) and the similar recommendations in the Report of the President’s Commission on the United States Postal Service (July 2003) ("President’s Commission"). The Postal Service states that, as part of its Transformation Plan, it has determined to revise its purchasing regulations to allow for the acquisition of goods and services in a manner similar to that followed by businesses. The Postal Service states that the President’s Commission has recommended that the Postal Service exercise the "latitude to conduct its procurement with fewer substanti[ve] regulations" pursuant to authority granted by Congress in the Postal Reorganization Act, and that 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.” 69 Fed. Reg. 13786 (quoting President’s Commission).

The Proposed Rule would be published in Title 39 of the Code of Federal Regulations, Part 601, and is comprised of the following sections: § 601.100 Purchasing policy; § 601.101 Effective date; § 601.102 Prior purchasing regulations; § 601.103 Applicability and coverage; § 6.104 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; and § 601.113 Debarment, suspension, and ineligibility.

The purchasing policy in § 601.100 states that the Postal Service will acquire property and services in accordance with 39 U.S.C. § 410 and other applicable laws enacted by Congress. Section 601.102 states that Part 601 would revoke, replace, and supersede all previous purchasing regulations, including the Postal Service’s Contracting, Procurement, and Purchasing Manuals, and its procurement handbooks, circulars, and instructions.

The Postal Service’s current Purchasing Manual contains over 500 pages of procurement policies, procedures, solicitation provisions, and contract clauses. It is estimated that other manuals, handbooks, circulars, and instructions consist of over 1000 additional pages of procurement policy and procedure. The remaining sections of Part 601, dealing primarily with canceling business relationships, claims and dispute resolution, and debarment and suspension would replace and supersede these documents.

The Postal Service

The Postal Service is unique as a government organization, having been created by Congress as an “independent establishment of the executive branch” by the Postal Reorganization Act of 1970 (Pub. L. 91-375, August 12, 1970; 39 U.S.C. § 201). The Postal Service, however, is not exempt from all procurement statutes. See 39 U.S.C. § 410 (referenced in proposed § 601.100, Purchasing policy). Indeed, some of the most comprehensive federal procurement laws do apply to the Postal Service, such as the Davis-Bacon Act, the Miller Act, the Walsh-Healy Act, the Service Contract Act, the Prompt Payment Act, the Program Fraud and Civil Remedies Act, the Inspector General Act of 1978, and the Contract Disputes Act. See 39 U.S.C. § 410(b); U.S. Postal Service v. Flamingo Industries (USA) Ltd., 124 S. Ct. 1321, 1325-26 (2004) (“[T]he Postal Service has significant governmental
powers, consistent with its status as an independent establishment of the Executive Branch. It was exempted from many, though not all, statutes governing federal agencies, and specifically subjected to some others. §§409–410.

The Postal Service is also not covered by the Federal Acquisition Regulation ("FAR"). Nevertheless, the Postal Service has implemented many of the statutes that do apply to it, as well as other fundamental procurement policies, in its purchasing manuals and handbooks. Should these manuals, handbooks, and other procurement policies be revoked, replaced, and superseded by the proposed regulations, the Postal Service will no longer have any published rules implementing procurement statutes that are applicable to the Postal Service, or procurement policies that govern the way any government or quasi-government organization acquires goods and services. There will no longer be any rules governing such basic procurement procedures as publicizing procurement opportunities, soliciting proposals, evaluating proposals, and awarding and administering contracts.

The fact that the Postal Service must finance its own operations, and does not obtain federal appropriations, does not mean that the Postal Service is not a government entity. See U.S. Postal Service v. Flamingo Industries, 124 S. Ct. at 1328 ("The statutory designation of the Postal Service as an “independent establishment of the executive branch of the Government of the United States” is not consistent with the idea that it is an entity existing outside the Government. The statutory instruction that the Postal Service is an establishment “of the executive branch of the Government of the United States” indicates just the contrary.").

The Postal Service has stated a desire to “acquire goods and services in a manner akin to best commercial practices in the private sector.” 69 Fed. Reg. 13,786. This is a laudable goal, one that is pursued by most government entities. Yet the Postal Service must recognize that it is a government entity and not a private corporation. In fact, it is not even a government corporation. ("Congress, however, declined to create the Postal Service as a Government corporation, opting instead for an independent establishment. The choice of words likely was more informed than unconsidered, because Congress debated proposals to make the Postal Service a Government corporation before it enacted the PRA. See H. R. Rep. No. 91–1104, p. 6 (1970."); U.S. Postal Service v. Flamingo, 124 S. Ct. at 1328.

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2 The FAR covers acquisitions by all executive agencies. See FAR 1.101. “Executive agency” is defined by the FAR to include independent establishments, but only those within the meaning of 5 U.S.C. §§ 101, 102, and 104(1). See FAR 2.101. The definition does not cover independent establishments as defined in 5 U.S.C. § 105.
Our conclusion is consistent with the nationwide, public responsibilities of the Postal Service. The Postal Service has different goals, obligations, and powers from private corporations. Its goals are not those of private enterprise. The most important difference is that it does not seek profits, but only to break even, 39 U. S. C. § 3621, which is consistent with its public character. It also has broader obligations, including the provision of universal mail delivery, the provision of free mail delivery to the certain classes of persons, §§3201-3405, and, most recently, increased public responsibilities related to national security. Finally, the Postal Service has many powers more characteristic of Government than of private enterprise, including its state- conferred monopoly on mail delivery, the power of eminent domain, and the power to conclude international postal agreements.

*U.S. Postal Service v. Flamingo*, 124 S. Ct. at 1329.

As an independent establishment of the executive branch of the federal government, it is also a "federal agency" for purposes of government bid protest jurisdiction by the United States Court of Federal Claims. *See Emery Worldwide Airlines, Inc. v. U.S.*, 264 F.3d 1071, 1080-84 (Fed. Cir. 2001) ("Consequently, the USPS is an agency and a federal agency for purposes of 28 U.S.C. § 1491(b)(1). ... Accordingly, the Court of Federal Claims possesses jurisdiction over the USPS in government procurement protest suits." (emphasis added)).

3 In commenting on whether the Administrative Procedures Act should apply to bid protests at the Court of Federal Claims, the Court of Appeals for the Federal Circuit said:

Application of APA review is in step with Congress's vision of the public character of the USPS and with its desire for uniformity in government contract procurement protest law. H.R. Rep. No. 91-1104, at 19-20 (1970) ("The Postal Service is--first, last and always--a public service."); Sen. Rep. No. 91-912, at 3 (1970) ("[T]he system will work only if the public interest is kept as the paramount criterion in every decision made."); *Butz*, 499 F.2d at 623 ("The relevant legislative history indicates that ... Congress ... in no way intended to strip an overhauled [Post Office Department] of its public service character. Nowhere is mention made of decreased legal responsibility of the United States as a result of postal service revision."); 142 Cong. Rec. S6156 (daily ed. June 12, 1996) (statement of Sen. Cohen) ("Consolidation of jurisdiction in the Court of Federal Claims is necessary to develop a uniform national law on bid protest issues...").

The President's Commission felt that the Postal Service should remain a public institution. *President's Commission* at ix. ("The Commission believes an abrupt privatization of the Postal Service is far too risky and would unnecessarily destabilize universal mail service.")

**Procurement Regulations**

The Postal Service spent nearly $12.4 billion in 2002, purchasing everything from supplies and equipment, to rent and fuel, to construction and mail transport services. *President's Commission* at 94. There are certain fundamental principles that are central to the effective operation of any government, or quasi-government, procurement process, much less one that spends over $12 billion a year to provide service to the American public. These principles would encompass the concepts of transparency, predictability, competition, dispute resolution, and integrity. See the American Bar Association, *The 2000 Model Procurement Code for State and Local Governments* (2000); Principles of Public Procurement adopted by the American Bar Association (Principles of Competitions, Resolution of Controversies, and Risk Allocation Principle) available at http://www.abanet.org/contract/admin/draftres.html; and 2002 *Public Procurement Law Review No. 2, "Special Issue: Drafting a Government Procurement Law: Lessons Learned from the United States"* (2002).

To achieve efficiency, foster the confidence of its suppliers, have the respect of its customers, and avoid corruption, a government procurement system should, at a minimum, contain these core concepts. With the exception of dispute resolution, the Proposed Rule does not address any of these core tenets of a government procurement process. By revoking, replacing, and superseding all existing procurement manuals, handbooks, and other procurement policy documents, and by not replacing them with other rules or regulations addressing these core concepts, the Postal Service could easily lose the confidence of its suppliers and the support of its customers. Suppliers could become less interested in pursuing business opportunities with an organization that declares itself free from the rules that ensure fairness, equal treatment, and consistency in dealing with those suppliers. Suppliers may see this rule-free process as an opportunity to play favorites with some contractors and exact retribution on others. Finally, the public may suffer, because there will be no way to assure that the Postal Service is employing best commercial purchasing practices and delivering best value.

The President's Commission recommended that the Postal Service "revise its purchasing regulations to maximize the flexibility given to it under current law and to reflect commercial best practices." The President's Commission's
recommendation, however, was that the agency “revise” its regulations to reflect best commercial practices – not that it abolish its regulations. One of the hallmarks of the Report of the President’s Commission was “the need for enhanced managerial accountability and public-policy oversight.” See President’s Commission, Chapter 4. Abolishing purchasing regulations would seem to be counterproductive to achieving the accountability and public-policy oversight envisioned by the President’s Commission.

The Commission’s recommendations provide no basis for concluding that the Postal Service should operate free from procurement rules. The Postal Service, as part of the federal government, must comply with many wide-ranging purchasing laws; and its purchases and purchasing procedures have been the frequent subject of General Accounting Office and Congressional review. Purchasing rules also aid the internal management of a large entity’s operations and its purchasing function. Without standard purchasing rules, there will be inconsistent and contradictory positions taken by individual contracting officers, employing their own ad hoc rules and procedures. Purchasing rules are needed not only for meaningful oversight within the Postal Service by its own Office of Inspector General, but for oversight by the General Accounting Office and Congress as well. The proposed abolishment of essentially all of the Postal Service’s purchasing regulations is thus at odds with the Commission’s recommendations, the Postal Service’s long-standing and well-established federal government relationship, and the continuing interest of Congress.

Abolishment of all purchasing regulations is also inconsistent with best practices in the commercial sector. Commercial entities that buy billions of dollars a year in goods and services -- and those that buy far less -- typically have specific, detailed written purchasing procedures that govern the manner in which their personnel initiate, consummate, document, and oversee their purchases and supplier relationships. These procedures enable commercial buyers to ensure compliance, consistency, accountability and fair dealing; and to the extent that the procedures are reflected in purchase order terms and conditions, they provide commercial sellers with a measure of transparency, predictability, and integrity.

The Postal Service need not abolish its purchasing rules to implement the best purchasing practices of the commercial sector. The Postal Service need only identify the best practices of the commercial sector and incorporate those practices into its purchasing regulations. This would fulfill both the President’s Commission’s recommendation that the Postal Service revise its purchasing regulations to employ best practices and its recommendation that the Postal Service enhance its accountability and public-oversight. If desired, the Section can work with the Postal Service to identify those best commercial practices.
Dispute Resolution

The Proposed Rule does address dispute resolution and is laudable for its encouragement of the use of alternative dispute resolution as an effective way to understand, address, and resolve disagreements and conflicts, and its statement of policy to resolve purchasing disagreements through the use of alternative disputes resolution, whenever possible (§ 601.107); and its encouragement of the use of alternative disputes resolution as an effective way to understand, address, and resolve conflicts with suppliers, particularly before the issuance of a final decision. (§ 601.109(b)). The Section supports the Proposed Rule’s policy and encouragement for the use of alternative disputes resolution.

The Proposed Rule also recognizes that the Postal Service is covered by the Contract Disputes Act of 1978, as amended (41 U.S.C. §§ 601-613) and provides a process for resolving contract claims to include a decision by a contracting officer with right of appeal to a Postal Service Board of Contract Appeals or to the United States Court of Federal Claims, as anticipated by the Contract Disputes Act. § 601.109.

Bid Protests

Other controversies, including “disagreements” with respect to the cancellation of a business relationship, or the terms of a solicitation, the award of a contract, or related issues in regard to the purchasing process may be “lodged” with an ombudsman. § 601.108(c). The ombudsman is to provide a copy of the disagreement to other interested persons; consider responses from interested persons; may meet individually or jointly with the person lodging the disagreement and/or Postal Service officials; and issue a decision in writing. § 601.108(f). This is said to be the sole and exclusive means to resolve disagreements in connection with awards of contracts, and that all disagreements in connection with the purchasing process resolved in accordance with the procedure are final. §§ 601.108(b) and (h).

Currently, protests against Postal Service contracting procedures and awards are resolved by either the contracting officer or by the Postal Service General Counsel. See United States Postal Service Purchasing Manual, Issue 3, December 25, 2003, para. 3.6. The viability of the new contract award and procurement process resolution procedures will depend on the authority and capabilities of the ombudsman. In order for the process to be effective and have the support of Postal Service suppliers and customers, the ombudsman should be
independent of Postal Service program and procurement organizations and have the authority to impose meaningful corrective action, when warranted. The Section also believes that there should be a process for resolving contract award and procurement process disputes, or protests, that is separate from the process for resolving other disputes, such as the cancellation of business relationships.

Because the rules describing the Postal Service procurement process will be revoked, replaced and superseded, and the new regulations contained in Part 601 do not describe the Postal Service procurement process, it will be difficult for anyone to raise an issue regarding the procurement process. The lack of rules describing the Postal Service procurement process will also make it difficult for the ombudsman to apply any standards in resolving procurement disputes. Prior Postal Service procurement decisions and General Accounting Office precedent previously relied upon by the Postal Service in resolving procurement protests will be of no avail. These are additional reasons for revising the current procurement procedures, rather than abolishing them.

There also appear to be some fundamental problems with the proposed dispute resolution procedures, particularly as they apply to bid protests. The Proposed Rule states that the person that lodged the disagreement or another interested person may appeal the decision of the ombudsman 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 of applicable public law enacted by Congress.” § 601.108(h). This statement of limited federal court review seems to ignore the clear statements of the Federal Circuit Court of Appeals that the Court of Federal Claims has jurisdiction over all protests of Postal Service procurement actions. See Emery v. U.S., 264 F.3d at 1084. The Proposed Rule also purports to limit any such review by a federal court to an appeal that is filed within 15 calendar days of receipt of the ombudsman’s decision. Such a limit, however, may be of no avail, in light of the Court of Federal Claims holding that it will determine the timeliness under the typical factors for deciding whether to issue a temporary restraining order. Software Testing Solutions, Inc. v. U.S., 58 Fed. Cl. 533 (2003). Should the Postal Service decide to adopt any of the procedures in the proposed regulations, the Section recommends that these provisions be eliminated.

Canceling Business Relationships

Another troubling aspect of the regulations contained in the Proposed Rule is the purported ability of the Postal Service to “cease business relations with a person or organization when that person or organization fails to meet reasonable
business expectations or high quality, prompt service, and overall professionalism” (§ 601.105) and to “cancel its business relationship or decline to enter 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” (§ 601.106(a)). The Proposed Rule includes several examples of unacceptable conduct, but the Rule indicates that this conduct is not likely to rise to the level of activities that could lead to debarment or suspension.

This new regulation essentially creates a “blacklisting” scheme. The criteria for refusing to do business with a contractor are much too broad and subjective. For example, a contractor can be blacklisted for “engaging in uncooperative practices” during negotiation. § 601.106(a)(5). During a negotiation, one party often feels the other party is being “uncooperative,” even in cases where the parties eventually do reach agreement. Also, a contractor can be blacklisted for failing to “respond promptly and completely to Postal Service inquiries and requests for information, without inadvertence or good reason.” § 601.106(a)(4). Under this grounds, a supplier could be blacklisted for an action that is completely unrelated to its performance under a postal contract. Another ground permitting blacklisting is a “failure to deliver on promises made in the course of dealings with the Postal Service.” § 601.106(a)(2). Again, such “promises” might be completely unrelated to a supplier’s contract performance obligations. The regulation also provides no stated exception for excusable failures to deliver on a promise.

The blacklisting rule is so broad and subjective, and has such potentially drastic consequences, suppliers might be reluctant to begin a relationship with the Postal Service at all. Those suppliers who continue to do business with the Postal Service will need to factor this contingency into their relationship with the Postal Service. One bad relationship with an individual contracting officer could result in a blacklisting. If the supplier can be blacklisted so readily and subjectively, an existing supplier will be motivated to leave nothing “on the table,” because the supplier might not be at the table for future contracts. Suppliers would have also less reason to make investments that would allow them to do business with the Postal Service.

Such a rule appears to be unprecedented in government contracting – on any level, federal, state, or local government. The Postal Service should be reluctant to pursue such a rule without a much greater explanation why it is needed. Even then, it should be revised to be made much less broad and subjective. The blacklisting rule will, in essence, make obsolete the debarment and suspension procedures. Since the agency can achieve the same goals under the blacklisting rule as it could under its suspension and debarment rules, it would have no
incentive to invoke the latter, which have a much higher standard and which afford the supplier additional due process rights.

Although the rule purports to provide notice and an opportunity to contest such a blacklisting, it does not provide the procedural rights and safeguards inherent in the federal government procurement debarment and suspension process set forth in FAR Subpart 9.4. The federal procurement debarment and suspension process, however, was designed to provide procedural safeguards, including those necessary to protect a liberty interest under the constitution, when the government seeks to protect itself from unacceptable conduct by refusing to business with someone. See Gonzalez v. Freeman, 334 F. 2d 570 (D.C. Cir. 1964); Horn Brothers, Inc. v. Laird, 463 F. 2d 1268 (D.C. Cir. 1972); Old Dominion Dairy v. Secretary of Defense, 631 F. 2d 953 (D.C. Cir. 1980); American Bar Association, Section of Public Contract Law, Committee on Debarment and Suspension, The Practitioner’s Guide to Suspension and Debarment, Third Edition, 2002.

The blacklisting rule is all the more mystifying, in light of the fact that the Proposed Rule does include a section on Debarment, suspension, and ineligibility (§ 601.113) that is modeled after the process in FAR Subpart 9.4. The Section recommends that the Postal Service use its debarment and suspension procedures whenever canceling a business relationship or declining to enter into a business relationship with a supplier in connection with more than a single contract.

Summary

In summary, the Section is concerned about the Postal Service’s proposal to revoke, replace, and supersede its existing procurement policies, procedures, and processes. Such a step is highly unprecedented by government at any level or by any large organization, much less one that spends over $12 billion a year. The lack of any defined purchasing policies or procedures in a large government organization would lead to inconsistent and contradictory practices, and could easily result in fraud, waste, and abuse. The Section believes that the Postal Service would be better served by amending its regulations to incorporate best practices, and by continuing to make that process available to its purchasing officials and suppliers.

The Section is also extremely concerned with the proposed policy on canceling and refusing to enter into business relationships. The Section believes that the policy, with its broad, subjective, and vague criteria for refusing to do business with a supplier, amounts to an inappropriate blacklisting scheme and should be deleted. The Section also believes that several of the other proposed regulatory provisions should be deleted, changed, or strengthened, as stated herein.
The Section appreciates the opportunity to provide these comments and is available to provide additional information or assistance as you may require.

Sincerely,

Hubert J. Bell, Jr.
Chair, Section of Public Contract Law

cc: Patricia H. Wittie
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