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PUBLICATION OF AGENCY PROCUREMENT PROCEDURES, POLICIES, AND GUIDANCE

A number of federal executive agencies have recently undertaken efforts to remove their procurement policies, procedures, and guidance from their Federal Acquisition Regulation ("FAR") supplements. For example, the National Aeronautics and Space Administration ("NASA") on April 22, 2004, published a final rule amending the NASA FAR Supplement ("NFS") "by removing from the Code of Federal Regulations those portions of the NFS containing information that consists of internal Agency administrative procedures and guidance that does not control the relationship between NASA and contractors or subcontractors." 69 *Fed. Reg.* 21764 (Apr. 22, 2004). Similarly, the Department of Defense ("DoD") on February 23, 2004, published a proposed rule to remove from the Defense Federal Acquisition Regulation Supplement ("DFARS") everything other than "requirements of law, DoD-wide policies, delegations of FAR authorities, deviations from FAR requirements, and policies/procedures that have a significant effect beyond the internal operating procedures of DoD or a significant cost or administrative impact on contractors or offerors." 69 *Fed. Reg.* 8145 (Feb. 23, 2004). At the same time, DoD proposed to establish a "DFARS companion resource" known as Procedures, Guidance, and Information ("PGI") that will contain "mandatory and non-mandatory internal DoD procedures, non-mandatory guidance, and supplemental information."

At the Spring Meeting of the American Bar Association Section of Public Contract Law, the officers and Council expressed concern about the practical and policy implications of this trend in agency procurement rulemaking. This paper discusses the rules that govern the publication of agency procurement policies, procedures and guidance. It then analyzes agencies'

compliance with these rules in selected instances in which agencies have removed information from their FAR supplements.

I. LEGAL ANALYSIS

Two different statutes impose publication requirements for procurement policies, procedures and guidance: (1) the Office of Federal Procurement Policy Act ("OFPPA"), 41 U.S.C. § 418b, requires that certain types of information be published for public comment in the *Federal Register*; and (2) the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552, requires that certain types of information be published in the *Federal Register* for the guidance of the public, and that certain other types of information be made publicly available electronically. As discussed in greater detail below, these requirements serve distinct public interests, both of which are important to the government contracting community.

A. Publication for Public Comment

The FAR and other agency procurement regulations are exempt from the rulemaking requirements of the Administrative Procedure Act ("APA"). *See* 5 U.S.C. § 553(a)(2) (exempting from rulemaking requirements of § 553 any matter relating to contracts). Instead, the OFPPA imposes its own publication requirement. The OFPPA provides that, except in unusual circumstances justifying a waiver,

> no procurement policy, regulation, procedure, or form (including amendments or modifications thereto) relating to the expenditure of appropriated funds that has (1) a significant effect beyond the internal operating procedures of the agency issuing the procurement policy, regulation, procedure or form, or (2) a significant cost or administrative impact on contractors or offerors, may take effect until 60 days after the procurement policy, regulation, procedure, or form is published for public comment in the *Federal Register* pursuant to [41 U.S.C. § 418b)b].

41 U.S.C. § 418b(a).

The OFPPA's publication for public comment requirement is broader in coverage than the APA rulemaking requirements. The APA applies only to "substantive" or "legislative-type" rules, and not "to interpretative rules, general statements of policy, or rules of agency

organization, procedure, or practice." 5 U.S.C. § 553(b)(A). The United States Supreme Court has described a substantive rule "as one 'affecting individual rights and obligations.'" *Chrysler Corp. v. Brown*, 441 U.S. 281, 302 (1979) (quoting *Morton v. Ruiz*, 415 U.S. 199, 236 (1974)). Properly promulgated substantive rules have the force and effect of federal law. 441 U.S. at 301-02. By contrast, an interpretative rule "simply indicates an agency's reading of a statute or a rule." *Paralyzed Veterans of Am. v. West*, 138 F.3d 1434, 1436 (Fed. Cir. 1998). An interpretative rule "does not intend to create any new rights or duties, but only reminds affected parties of existing duties." *Id*. Courts and agency boards of contract appeals need not give effect to interpretative rules. Interpretative rules lack the force and effect of law, and are entitled to deference "only to the extent that those interpretations have the 'power to persuade.'" *Christensen v. Harris County*, 529 U.S. 576, 587 (2000) (quoting *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944)); *see also Batterston v. Francis*, 432 U.S. 416, 425 n.9 (1977) (interpretative rules are entitled to varying degrees of deference "based on such factors as the timing and consistency of the agency's position, and the nature of its expertise"). The Final Report of the Attorney General's Committee on Administrative Procedure similarly distinguished between substantive and interpretative rules as follows:

> Administrative rule-making, in any event, includes the formulation of both legally binding regulations and interpretative regulations. The former receive statutory force upon going into effect. The latter do not receive statutory force and their validity is subject to challenge in any court proceeding in which their application may be in question. The statutes themselves and not the regulations remain in theory the sole criterion of what the law authorizes or compels and what it forbids. An interpretive regulation even of long standing will be rejected if it is deemed to be in conflict with a clear and unambiguous statute.

Final Rep. of the Attorney General's Comm. on Admin. Proc. at 100 (1941).

General statements of policy are entitled to even less deference. A general statement of policy "is merely an announcement to the public of the policy which the agency hopes to implement in future rulemakings or adjudications." *Pacific Gas & Elec. Co. v. Federal Power Comm'n*, 506 F.2d 33, 38 (D.C. Cir. 1974). "The agency cannot apply or rely upon a general

statement of policy as law because a general statement of policy only announces what the agency seeks to establish as policy…. When the agency applies the policy in a particular situation, it must be prepared to support the policy just as if the policy statement had never been issued." *Id.* Finally, a rule of agency organization, procedure or practice is a "technical regulation of the form of agency action and proceedings." *Pickus v. United States Board of Parole*, 507 F.2d 1107, 1113 (D.C. Cir. 1974). It does not "include any action which goes beyond formality and substantially affects the rights of those over those whom the agency exercises authority." *Id.*

In contrast to the APA rulemaking requirements, the OFPPA publication for public comment requirement applies to *both* substantive rules *and* interpretative rules, general statements of policy, and rules of agency organization, procedure, or practice (*i.e.*, to any "procurement policy, regulation, procedure, or form … relating to the expenditure of appropriated funds"), provided the policy, regulation, procedure or form has either a significant effect beyond the internal operating procedures of the issuing agency or a significant cost or administrative impact on contractors or offerors. On the other hand, the APA's rulemaking requirements are more procedurally exacting than the OFPPA requirements. As one court aptly observed:

> [T]he OFPPA publication for comment requirement does not reach the standard of APA "rulemaking." 41 U.S.C. § 418b(b), (c). The OFPPA does not require statements of basis and purpose to justify a final rule nor does it involve such an expansive level of public participation as rulemaking under the APA, which affords the right "to petition for the issuance, amendment, or repeal of a rule." 5 U.S.C. § 553 (c), (d).

American Moving & Storage Assoc., Inc. v. United States, 91 F. Supp. 2d 132, 135 (D.D.C. 2000) (footnote omitted).

The legislative history of the OFPPA makes clear that Congress intentionally excluded government procurement regulations from the rigors of APA rulemaking. The Senate Report's section-by-section analysis for Section 6(c)(7) explains that:

> Under this subsection, the Administrator is to establish procedures for public participation in procurement rule-making. These would apply to any policy or

> regulation issued by the Office [of Federal Procurement Policy], the Federal Procurement Regulations (FPR), Armed Services Procurement Regulation (ASPR), the primary regulations of other agencies, and lower level regulations as determined by the Administrator. Existing agency practices range from ad hoc solicitations of public comment to those approaching the fairly welll-developed procedures of the Department of Defense. To provide greater flexibility and accommodate the special needs of parties with an interest in procurement, the responsibility for developing rule-making procedures is assigned to the Administrator, in lieu of simply removing the present exemption of contracts from the rule-making requirements of the Administrative Procedure Act, 5 U.S.C. § 553(a)(2). The emphasis here is on the timely and effective solicitation of the viewpoints of all interested parties on policies and regulations of general application.

S. Rep. No. 93-692 (Feb. 26, 1974), reprinted in 1974 U.S.C.C.A.N. 4589, 4601-02.

Although not as procedurally exacting as APA rulemaking, the OFPPA publication for public comment requirement nevertheless serves a similar purpose, namely, that of ensuring the agency considers the views of all interested parties before promulgating polices and regulations of general application. *See, e.g., National Labor Relations Board v. Wyman-Gordon Co.*, 394 U.S. 759, 754 (1969) (APA rulemaking provisions "were designed to assure fairness and mature consideration of rules of general application"); *Texaco, Inc. v. Federal Power Comm'n*, 412 F.2d 740, 744 (3d Cir. 1969) (observing that 5 U.S.C. § 553 "enables the agency promulgating the rule to educate itself before establishing rules and procedures which have a substantial impact on those regulated").

An agency's failure to comply with applicable procedural requirements in promulgating a policy or procedure renders the rule invalid and unenforceable. *See, e.g., National Org. of Veterans' Advocates v. Department of Veterans Affairs*, 260 F.3d 1365, 1375 (Fed. Cir. 2000) ("Failure to allow notice and comment, where required, is grounds for invalidating the rule.") (citations omitted); *McDonnell Douglas Corp.*, ASBCA No. 19842, 80-2 B.C.A. (CCH) ¶ 14,508 (holding that Cost Accounting Standards Board's Interpretation No. 1 to Cost Accounting Standard 403 was neither "binding [nor] determinative as to the proper interpretation of the standard" because in promulgating the interpretation, the CAS Board failed to comply with the procedures required by its enabling statute).

Relatively few cases have analyzed under what circumstances the OFPPA publication for public comment requirements apply. Recently, however, several decisions from the United States Court of Federal Claims have relied on 41 U.S.C. § 418b in holding invalid a class deviation for the Defense Energy Support Center's use of a non-standard economic price adjustment clause for jet fuel. *See Tesoro Hawaii Corp. v. United States*, 58 Fed. Cl. 65, 72 (2003); *LaGloria Oil & Gas Co. v. United States*, 56 Fed. Cl. 211, 220 (2003); *accord, Sunoco, Inc. v. United States*, 59 Fed. Cl. 390, 396 (2004); *Navajo Refining Co. v. United States*, 58 Fed. Cl. 200, 208-209 (2003). Although the FAR does not specifically require publication of class deviations, these cases held that publication for public comment was required by the OFPPA. For example, the *LaGloria* court reasoned that:

> Section 22 of the OFPP Act does not specifically address class deviations but contains publication requirements for certain categories of procurement changes, in particular, changes in "procurement policy, regulation, procedure or form." … The court believes that there is some argument for placing a class deviation in all of these categories, but it surely involves a change in "regulation," that is, the plan to deviate immediately from FAR § 16.203, as well as a change in a "form," that is the approval of the immediate use of the non-standard EPA Clause B19.33.

LaGloria, 56 Fed. Cl. at 220. As noted above, the OFPPA publication for public comment requirement applies only when the procurement policy, regulation, procedure or form has either a significant effect beyond the internal operating procedures of the issuing agency, or a significant cost or administrative impact on contractors or offerors. 41 U.S.C. §418b(a). The *Tesoro* court provided a somewhat better explanation of why DESC's class deviation has the requisite significant effect:

> We agree with the *LaGloria* court's finding that the class deviation at issue here, permitting the government to significantly alter the form and operation of EPA clauses contained within fuel contracts, would indeed have a significant impact on the contractors and the government. For that reason, we find that DESC was required to publish notice of the class deviation and provide a 60 day window to allow for public comment.

Tesoro, 58 Fed. Cl. at 72. The other two cases simply followed the rationale and holding of *LaGloria*, and, consequently, do not further illuminate the meaning of a "significant effect" or

"significant cost or administrative impact." *See Sunoco*, 59 Fed. Cl. at 396; *Navajo*, 58 Fed. Cl. at 208-209.

B. Publication for Public Guidance or Information

Even when the OFPPA *publication for public comment* requirement does not apply, *publication* may nevertheless be required. The Freedom of Information Act requires agencies to "separately state and currently publish in the *Federal Register* for the guidance of the public" several categories of information, including among others: (1) "rules of procedure, descriptions of forms available or the places at which forms may be obtained, and instructions as to the scope and contents of all papers, reports, or examinations;" (2) "substantive rules of general applicability adopted as authorized by law, and statements of general policy or interpretations of general applicability and adopted by the agency;" and (3) "each amendment, revision, or repeal of the foregoing." 5 U.S.C. §§ 552(a)(1)(C) – 552(a)(1)(E). In addition, agencies are required to make publicly available through computer telecommunications or other electronic means several categories of information, including: (1) "those statements of policy and interpretations which have been adopted by the agency and are not published in the *Federal Register*;" and (2) "administrative staff manuals and instructions to staff that affect a member of the public." *Id.*, §§ 552(a)(2)(B) – 552(a)(2)(C). Accordingly, even when an agency's procurement policy, regulation, procedure or form does not have a significant effect or significant cost or administrative impact, it must nevertheless be made publicly available through electronic means if it has *any effect* on a member of the public. When the actions of one of the two signatories to a government contract (*i.e.*, the contracting officer) are governed – or even guided – by an agency's procurement policy, regulation, procedure or form, it will invariably have some affect on the other contracting party (*i.e.*, the contractor). Therefore, even purely internal guidance may be subject to the publication requirement if it affects agency contracting personnel in their dealings with contractors.

II. AGENCY PRACTICES

A. Department of Defense

DoD has proposed as part of its DFARS Transformation Initiative to implement more than 80 changes to DFARS. The DFARS Transformation is . . .

> a major DoD initiative to dramatically change the purpose and content of the DFARS. The transformed DFARS will contain requirements of law, DoD-wide policies, delegations of FAR authorities, deviations from FAR requirements, and policies/procedures that have a significant effect on the public. Our objective is to improve the efficiency and effectiveness of the acquisition process, while allowing the acquisition workforce the flexibility to innovate. Additional information on the DFARS Transformation initiative is available at http://www.acq.osd.mil/dpap/dfars/transf.htm.

The DFARS Transformation Initiative is under the cognizance of the Director, Defense Procurement & Acquisition Policy. Highlighted among these transformation initiatives is DoD's promulgation of a companion resource to DFARS entitled "Procedures, Guidance and Information." As a companion to DFARS, PGI would be administered by DoD's DAR Council, which also administers the DFARS. The stated intention of PGI is to supplement and streamline the DFARS so that the DFARS will

> contain only requirements of law, DoD-wide policies, delegation of FAR authorities, deviations from FAR requirement, and policies/procedures that have a significant effect beyond the internal operation procedures of DoD or a significant cost or administrative impact on contractors of offerors.

69 Fed. Reg. 8145 (Feb. 23, 2004). The language quoted above from the *Federal Register* narrative was repeated in the proposed DFARS change to DFARS § 201.301. PGI will be available on the DFARS website (http://www.acq.osd.mil/dpap/dfars/htm) and will be electronically linked to the DFARS sections which the PGI supplements. Public comment on the PGI initiatives was closed on April 23, 2004. A review of the public comments shows only minor comments by the U.S. Air Force and no private industry comments. There has been no further regulatory guidance from DoD on PGI.

The implementation of PGI is consistent with the philosophy of the DAR Council, which states in part:

> The following concepts reflect our current drafting philosophy. . . .
>
> - Minimize the amount of guidance and avoid issuing regulations unless there is a compelling need to do so.
>
> * * * *
>
> - Avoid imposing requirements on contractors unless laws, sound business practices, or the protection of the Government's contractual interests require imposing such requirements. Assume that defense contractors are honest and want to perform their contractual responsibilities in a capable and efficient manner.

DPAP Operating Guide. The DAR Council correctly states the legal standard for differentiating between procurement-related regulatory promulgation in DFARS and PGI guidance, which is the OFPPA standard. Public notice and comment under the OFPPA is required for procurement-related policies, regulations, procedures, or forms that have either:

(1) A significant effect beyond the internal operating procedures of the agency, or

(2) A significant cost or administrative impact on contractors or offerors.

41 U.S.C. § 418b(a). The DAR Council's familiarity with the legal standard is to be expected. However, at this stage it is not known how the DAR Council will interpret this standard. With a philosophic predisposition to avoid regulatory promulgation, the movement of large portions of DFARS into PGI and the future use of PGI on a no-notice/no-comment basis give cause for concern to interested areas of private industry; *e.g.*, trade associations, law firms, defense contractors, and offerors.

However, a review of a sample of PGI content shows initial compliance with the OFPPA standard. The PGI content on "Contractors Accompanying a Force Deployed" (DFARS Subpart 225.74) shows text on internal DoD coordination and a list of potential support functions for deployed contractors to be provided by DoD. These same functions are listed in several other DoD publications. Another PGI review was made of the "Payment and Billing Instructions" (DFARS Subpart 204.2). The PGI portion was limited to "Administrative Matters" such as internal DoD contract copy distribution and generic guidance on numbering contract line items

and subline items. Although close scrutiny will need to be maintained, these initial examples appear to be in conformity with the stated intent for PGI.

Additionally, ease of use will be a public concern. As initially set up in its "interim" format, PGI presents some difficulty to use. It has limited capability for search by subject and it is necessary to know the DFARS reference in order to find subject information. The only way to access specific PGI information is through links provided in the DFARS text. There is no way to access the PGI as an integrated document. This issue has already been raised with DoD officials but has not received a favorable response as DoD has stated in effect that since PGI is for internal DoD guidance, why would industry be concerned. Industry has the right to monitor how PGI is implemented and has the right to access Government guidance even if the guidance does not rise to the regulatory level. For those reasons, these initial access concerns must be addressed by DoD.

In order to assuage public fears on use of PGI and to assist the DAR Council in meeting its stated PGI objectives, some degree of added care must be applied in the initial use of PGI. Otherwise, as case-law supports and as noted in the DPAP Operating Guide, failure to follow OFPPA requirements when notice and comment are necessary will have unwanted consequences for the DAR Council. To this end it is noted that DoD/DPAP meet with defense industry representatives on a periodic basis through Defense Acquisition Excellence Council ("DAEC"). During the most recent meeting in April 2004, PGI was briefed to the Council. For information purposes, the attendees at the April meeting were the following:

Department of Defense Attendees:

Dr. Tom Killion for Honorable Claude Bolton (SAE, Army)
RADM Marty Brown for Honorable John Young (SAE, Navy)
Ms. Virginia Williamson for Honorable Marvin Sambur (SAE, Air Force)
Ms. Deidre Lee (DPAP)
Mr. Dave Ricci for BGen Darryl Scott (DCMA)
Col Mike Kalna for Ms. Scottie Knott (Senior Acquisition Executive, DLA)
Mr. Frank Ramos (Dir, DoD Small Business)

Mr. Terry Schneider for Mr. Bill Reed (Dir, DCAA)

Mr. Brad Berkson (Dep Dir, L&MR)

Industry Attendees:

Mr. Ted Sheridan for Mr. Mark Adams (President, Portal Dynamics, representing Electronic Industries Alliance)

Honorable John Douglass (President and CEO, Aerospace Industries Association)

Ms. Eleanor Aldridge for Mr. Cort Durocher (Executive Director, American Institute of Aeronautics

and Astronautics)

Mr. Mark Wagner of Johnson Controls for Mr. Chris Jahn (President, Contract Services Association)

Mr. John Harris (Vice President and Corporate Director of Contracts, Raytheon)

Mr. Tim Malishenko (Vice President of Contracts and Pricing for The Boeing Company)

LTGen Larry Farrell (USAF Ret) (President, National Defense Industrial Association)

Mr. John Young (Vice President of Contracts and Pricing, Northrop Grumman)

Mr. Alan Chvotkin (Senior Vice President, Professional Services Council)

Ms. Eleanor Spector (Vice President of Contracts, Lockheed Martin)

Ms. Karen Wilson (Director, Acquisition Policy and Industrial Affairs, The Boeing Company,

representing the Council of Defense and Space Industry Associations)

Ms. Claudine Martinez and Mr. Bill Lewandowski representing Industry Small Business Interests

Mr. Frank Losey (representing American Shipbuilding Association)

Mr. Herm Reininga (Senior Vice-President for Special Projects, Rockwell Collins)

Mr. Bob Spreng (Executive Director, Integrated Dual-Use Commercial Companies)

The DAEC might make PGI a standing agenda item for the next two years to provide industry insight and comment on this important DFARS Transformation Initiative. Otherwise, DoD/DPAP may elect to establish a separate public/private entity to monitor PGI implementation.

B. National Aeronautics and Space Administration

NASA's procurement regulatory scheme consists of a Supplement to the FAR provisions and clauses, NASA center-unique provisions and clauses, NASA Policy Directives, and NASA specific representations and certifications. These documents are all accessible to the general public except for the NASA Policy Directives. They are most easily viewed on the NASA Acquisition Internet Service ("NAIS"). NASA procurement policies and procedures, including internal operational guidance, have historically been maintained in the NASA FAR Supplement ("NFS"). Historically, changes to these provisions were subject to review by the Office of Information and Regulatory Affairs ("OIRA") within the Office of Management and Budget ("OMB"), and publication in the Federal Register for comment by the public.

NASA has announced in a series of proposed and final rules beginning in November 17, 2003 (68 Fed. Reg. 64847) that it is changing its approach to which provisions in the NFS must be published for public comment in the Federal Register. This process was completed on July 27, 2004 (69 Fed. Reg. 44609) when the last of the proposed rules, the Re-Issuance of NASA FAR Supplement Subchapter G. was published in the Federal Resister as a final rule.

NASA noted in the background to the May 21, 2004 proposed rule for Subchapter G (69 Fed. Reg. 29256) that the NASA FAR Supplement contains two types of provisions:

1. "NASA policies, procedures, contract provisions, and forms that govern the contracting relationship between NASA and its contractors and prospective contractors," and

2. "internal Agency administrative procedures and guidance that does not control the relationship between NASA and contractors or prospective contractors."

NASA's past practice was to treat all changes to the NFS the same, regardless of the category of information, and submit each to OMB for publication in the Federal Register for public comment. However, NASA indicated that the FAR does not require this in every instance, citing to FAR 1.101 that the "the FAR System does not include internal guidance of the type described in 1.301(a)(2)." FAR 1.301(a)(2) states in part that "an agency head may issue or authorize the issuance of internal agency guidance at any organizational level (*e.g.*, designations

and delegations of authority, assignments of responsibilities, work-flow procedures, and internal reporting requirements." FAR 1.301(a)(2). NASA has concluded that it is not required to publish internal guidance for public comment. Rather, it will only publish for public comment those provisions of the NFS that are required by 41 U.S.C. § 418, cited above. Provisions that must be published must have a "significant effect beyond the internal operation procedures of the Agency" or have a "significant cost or administrative impact" on contractors. *See also* NPS 1801.301. This effectively translates into the first category of NFS provisions identified by NASA.

Changes to provisions that require publications will be processed, reviewed, and published under existing OMB procedures and public consent will be published in Chapter 18 of Title 48 CFR. Those portions of the NFS that do not require public comment will be removed from the CFR. Not requiring publication of this second category of documents will eliminate unnecessary time and effort to publish changes to these provisions as proposed rules and evaluating public comment. This approach also gives NASA increased flexibility to change this internal guidance. However, unlike the approach taken by the Department of Defense, these portions of the NFS requiring publication will be combined with those that do not require public comment in one integrated regulation that will be maintained on the NASA internet site for access by the public and NASA personnel (http://www.hq.nasa.gov/office/procurement/regs/nfstoc.htm). Changes to this document would be effected through Procurement Notices ("PN").

There are several advantages to this approach over the system proposed for DoD. First, since NASA procurement personnel will be bound by both categories of provisions, this approach will provide them single location to check both internal guidance and guidance which impacts the relationship between NASA and its contractors. Second, since this website is also accessible by the public, it provides generally the same level of transparency that was enjoyed under the old regulatory scheme. What is missing in both the DoD and NASA approaches is the

ability of the public to comment on proposed regulations and have input into the rule-making process.

Several questions remain from this approach. There may be some continuing questions as to exactly what changes to the NFS will be considered to be subject to public comment and which will not. Just where that line is drawn may be critical. While NASA has attempted to set clear guidelines, some potential problems are highlighted by the examples cited by NASA in NFS 1801.301(b)(ii) as items not subject to public comment:

> (A) Security procedures for identifying and badging contractor personnel to obtain access at a NASA installation.
>
> (B) A one-time requirement in a construction contract for the contractor to develop a placement plan and for inspection prior to any concrete being placed. (This is part of the specification or statement of work.)
>
> (C) A policy that requires the NASA installation to maintain copies of unsuccessful offers.

The first two appear to be simply administrative or internal in nature. However, arguably the third example could potentially impact the rights of the submitters of those proposals. If this is the case then these provisions should be subject to public comments. In such a situation, transparency may matter little if the public is not able to raise question to NASA that may result in a more properly worded provision.

It seems likely that a number of changes will involve some aspects that are subject to public comment and those that do not. In such a situation, only a part of the procedures may be subject to public comment. Portions of changes that relate exclusively to internal implementing procedures, which may be key to how policies will be enforced, will not be subject to comment. Additionally, if the internal procedures regarding a particular change are not made available to the public concurrent with the publication for public comment, contractors may not be in a position to fully understand how the proposed changes will work.

Notwithstanding NASA's desire to place all procedures and rules in one integrated document it appears that NASA will continue to internally disseminate procurement related

directives "not suitable for inclusion in the NFS" through Procurement Information Circulars ("PIC"). Currently, NASA has on its website a link termed Policy Directions. This link cannot be accessed by the public and presumably only by NASA employees. It is not clear what will fall within this category of information. For example, internal source selection guidance could generally be the type of information that would clearly not be suitable for public dissemination. However, what else is included in this category is yet to be determined. Because there is no method to publish these PICs these would not be subject to public review and comment.

In sum, the NASA approach attempts to retain the transparency of its entire regulatory scheme, both documents subject to public comments and those internal procedures that are not, while also providing increased flexibility to change purely internal guidance. Unlike DOD, the NASA approach will make available to NASA and the public a single integrated regulation. While this does provide access to the public, the limited opportunity for public comment may generate problems for both contactors and NASA officials.

C. General Services Administration

The General Services Administration ("GSA") internal acquisition policy is not published for public comment; however, policies and procedures that impact contractors (with the exception of the Federal Supply Schedule ("FSS") program) are treated as regulations, and internal acquisition policy directives are published together with regulations in an acquisition manual that is readily accessible to contractors.

1. General Services Administration Acquisition Manual

The General Services Administration Acquisition Manual ("GSAM") incorporates the General Services Administration Regulations ("GSAR") as well as internal agency acquisition policy into one document. The GSAM is located on-line at the GSA website. The GSAM contains an index of the combined regulatory and internal materials by subject area. Within the GSAM, however, all GSAR material is shaded in order to help users identify those portions that

are regulatory from those that apply internally to GSA.[1] Thus, the GSAM provides a single location for all regulations and internal GSA acquisition policy, with clear differentiation between the two. At the same location on the website as the GSAM, GSA provides a link to all GSAM Proposed/Interim Rules and public comments.

GSA first published the GSAM on September 1, 1999. Since then, GSA has published eight (8) different changes to the GSAM. These changes are also included in the GSAM and marked where appropriate to indicate when they became effective.[2] The changes are located on the website at the same location as the GSAM. The first change was published on September 30, 1999 and the most recent on April 13, 2004.

In addition to internal policy and regulatory material, the GSAM includes two "Acquisition Letters" concerning procurement administration directives from the senior GSA procurement policy administrator. The first document is an approval of a class deviation and authorization to deviate from the FAR in order to implement the electronic communications option required by the Government Paperwork Elimination Act through use of secured Public Key Infrastructure technology. The second document is a memorandum to GSA contracting activities notifying them of a change in the GSAM concerning uniform procurement instrument identification numbers in accordance with the FAR and guidelines established by a Joint Financial Management Improvement Project, and the code for the contracting office location. It is unclear why this memorandum has not been issued as a GSA Order with instructions for updating the affected GSAM pages at Section 504.7001-3. For purposes of this task report; however, what is important is that the memorandum is limited to internal administrative matters that do not affect contractor rights and obligations. Although it is impossible to determine if GSA has issued any other Acquisition Letters that are not included in the GSAM; it appears that

[1] In the GSAM index, I highlighted the subsections that contain internal GSA material, i.e. non-regulatory.

[2] *See* subsections 501.170 (GSA Acquisitions Management System), 501.171-1 (GSA Orders and Handbooks) and 501.171-2 (Acquisition Letters) for a complete discussion of the intent of the GSAM system, as well as scope of its various parts.

GSA's modifications of acquisition policy and its use of class deviation authority have been sparingly applied.

2. Federal Register Publication Requirement

The GSAM indicates that, pursuant to 41 U.S.C. § 418b, all regulatory (non-internal policy) procurement policy must be published in the Federal Register. Section 418b provides that no agency procurement policy, regulation, procedure or form (including amendments or modifications thereto) relating to the expenditure of appropriated funds that has a significant effect beyond internal operating procedures of the issuing agency or a significant cost or administrative impact on contractors or offerors may take effect except until 60 days after publication in the Federal Register, unless waived in accordance with the waiver provisions set forth in the statute. Consistent with the requirements of Section 418b, internal GSA procurement policy is not published in the Federal Register.

In the Introduction to the GSAM, GSA distinguishes the shaded regulatory material from the non-shaded material on the following basis. The rules published for comment in the Federal Register and codified in the Code of Federal Regulations are "(1) Those that affect GSA's business partners (e.g., prospective offerors, contractors);" and "(2) Those that apply to acquisition of leasehold interests in real property." Although the FAR does not apply to real property leasing actions, the latter category is included because GSA establishes regulations for lease of real property under the authority of 40 U.S.C. § 490 note. Thus, GSA has sought to comply with public notice and comment requirements, while simultaneously acknowledging the benefits of separating regulatory material from internal operational directives. In addition, by consolidating the regulatory and non-regulatory material in a single document that is published on its internet site, GSA has eliminated the burden on its contracting personnel of checking multiple sources and provided more transparency for its business partners.

In general, the non-regulatory material included in the GSAM concerns instructional material to the Contracting Officer. It is of a administrative nature and focuses on the

Contracting Officer's duties. For example, Section 503.303, entitled "Reporting Suspected Antitrust Violations," states that the contracting officer should "[r]eport evidence of suspected antitrust violations in acquisitions to the Assistant Inspector General for Investigations or the Regional Inspector General for Investigations…." A review of the non-shaded sections of the GSAM indicate this material is of a similar type.

3. Federal Supply Schedule Program

The once exception to the GSA acquisition practices described above that deserves attention is the method followed for inserting special contract clauses applicable to the FSS program. Part 538 of the GSAM covers FSS contracting and contains supplemental GSA regulations applicable to FSS contracts, and the text of unique or supplemental GSA clauses used in FSS contracting are included in Part 552 of the GSAM, such as the Price Reduction clause. However, there are at least 16 standard FSS clauses designated with the prefix A-I followed by "FSS" and a number that are not published and are not readily accessible. Neither the clauses themselves nor the rationale or authority for their use can be found in the GSAM or the FSS Contractor Guide, which is also published on the GSA web site. Yet these standard, mandatory clauses, which are not always incorporated in full text, affect contractor rights and obligations. For example, Clause D-FSS-477 "Transhipments (APR 1984)" requires contractors to complete certain Department of Defense standard forms when shipping chemicals and dangerous cargo with instructions on how to complete the forms, where to ship them, prohibitions against co-mingling cargo, and notice that failure to follow these provisions will result in rejection of shipment. Similarly, Clause G-FSS-910 "Deliveries Beyond the Contractual Period - Placing of Orders (OCT 1988) obligates the contractor to treat any order mailed to the contractor on or before the expiration date but not received by the contractor as a valid order if it provides for delivery within the number of days specified in the contract.

In addition, internal policies with respect to FSS contracts are not included in the GSAM. Some policies can be found in the FSS Contractor Guide, such as special ordering

procedures that GSA has established pursuant to the authority of FAR 8.403. In that case, the Contractor Guide reflects the provision of FAR 8.403 that these procedures take precedence over procedures in FAR 8.405, but they are not published as supplemental regulations and are not the subject of an acquisition letter contained in the GSAM. For this reason, special ordering clauses that impact substantive contract rights or otherwise exceed the limited authority for their use may improperly be inserted in contracts without publication. Consequently, there is an internal inconsistency between general GSA acquisition practices and those for the FSS program. GSA acquisition practices for the FSS program should be consistent with the rest of the agency's acquisition practices. Regulatory material should be published and non-regulatory material should be more readily accessible.

D. Department of Veterans Affairs

The Department of Veterans Affairs ("VA") does not consistently publish rules implementing procurement policy that has a cost or administrative impact on its contractors. The VA operates the largest integrated health care system in the country and procures goods and services in support of that system. The VA is also responsible for administering the Federal Supply Schedules for medical supplies, pharmaceuticals, and health care professional services for use by all eligible users of the FSS, including the Department of Defense, under a delegation of authority from the General Services Administration.

In addition to the laws and regulations governing procurements by civilian agencies, title 38 of the U.S. Code is replete with special statutory provisions impacting the VA's procurement authority. For example, the VA has special authority to procure prosthetic appliances without regard to any other provision of law, 38 U.S.C. § 8123, and the Veterans Health Care Act imposes price ceilings on procurements of pharmaceuticals by four federal agencies, 38 U.S.C. § 8136. With some exceptions discussed below, rules governing procurements conducted under the Federal Property and Administrative Services Act and rules promulgated by the Office of Federal Procurement Policy are contained within the FAR System, *i.e.*, the FAR, the VA

Acquisition Regulation ("VAAR") supplementing the FAR (including Acquisition Circulars), and Approved Class Deviations to the VAAR. However, rules implementing special procurement statutes are frequently not published for comment and are not readily available to the public.

1. Rules Affecting Contractors Are Contained in Handbooks and Information Letters and Are Not Always Readily Ascertainable

The VAAR is published in the Code of Federal Regulations. VA's official web site also has a link to the agency's acquisition policies and regulations. The VAAR and Acquisition Circulars, which update the regulations, are indexed and available in their entirety through the agency's web site. In addition to the regulations, the agency posts documents referred to as "Directives," "Handbooks," and "Information Letters." There is no explanation given as to the criteria used for determining whether a mandatory policy or procedure should be published for comment and codified as a supplemental regulation. According to the site, Directives are mandatory acquisition policies, Handbooks contain mandatory procedures implementing the policies set forth in the Directives, and Information Letters release non-directive information to acquisition personnel, presumably of a non-binding nature. A review of these letters, however, reveals that they are used not only to provide internal clarity and guidance respecting acquisition policies and procedures, but sometimes are the source of the procedures. The Directives, Handbooks, and Information Letters are often cover the same subjects, but are not well indexed. Thus, it is a cumbersome process to search for the agency's internal policies and procedures covering a particular topic.

The following are examples of inconsistencies in use of internal guidance by the VA. Some Information Letters are used to announce changes to the VAAR, such as supplemental guidelines for special contracting methods and procedures for service and performance based service contract options exceeding five years. Others incorporate standards set by other agencies after publication which will be incorporated into VA contracts. Others,

however, provide acquisition guidance and procedures that affect contractor rights. For example, IL 90-01-6 (July 16, 2001) purports to provide guidance on the acquisition process relating to background investigation requirements for contractor personnel, but states VA policy in terms of contract requirements and the substance of the letter affects contractor obligations and responsibilities. Related directives and handbooks on this topic require solicitations and contracts that require sensitive computer systems include a section on security requirements and further require the cost of background investigations be borne by contractors.

Likewise, most Handbooks address agency personnel and provide guidance and instructions with respect to internal operating procedures. However, there are inconsistencies here as well. For example, VA Handbook 7433.3 (February 24, 1998) implements the agency's ADR policy and updates its ADR procedures. Again, though the Handbook purports to be guidance for Acquisition ADR, it mandates what the parties must do to use ADR to resolve procurement disputes. The "guidance" specifies what steps the contracting officer must take in the exercise of his or her authority to use ADR, what the VABCA must do in implementing ADR, and how the ADRA confidentiality provisions shall be applied. These provisions affect the contractors' rights and thus cannot be characterized as mere internal guidance on the conduct of ADR.

2. Rules Implementing Special Procurement Statutes Are Not Published And Are Difficult to Locate.

As discussed, the VA has special procurement authority peculiar to the acquisition of medical supplies and services under various statutes. Rules applicable to procurements governed by these statutes are sometimes buried in internal directives or published as informal guidance. For example, as noted, section 8123 of title 38 authorizes the VA to procure prosthetics appliances without regard to any other provision of law. VAAR 806.302-5 imposes certain restrictions on a contracting officer's exercise of this authority for purchases over the simplified acquisition threshold, as well as similar authority to use other than competitive procedures under Title 38. However, the VA has issued no regulation specifying the circumstances under which it

would exercise its authority to disregard procurement law that would otherwise apply to suppliers of prosthetic devices. Yet, the agency has issued internal policies and procedures for procurements of these items under the $100,000 threshold. Veterans Health Administration ("VHA") Directive 2003-037 (July 16, 2003), states that the special statutory authority in section 8123 may only be implemented under conditions specified in the directive and then sets forth the situations in which VA purchasing personnel may exercise this authority under a delegation from the Secretary. As these conditions permit procurement without use of normal competitive acquisition requirements, thereby affecting prospective contractors' rights and remedies, they should be published as part of the regulation on this subject.

By far the most problematic use of guidance by the VA to regulate procurement is the agency's administration of the VHCA through informal letters to contractors. The VHCA makes it mandatory for manufacturers of innovator (non-generic) drugs to sign a Master Agreement with the VA in which they agree to make their covered drugs available for procurement by the federal government under an FSS contract as a condition of coverage by the Medicaid program. The statute also imposes a ceiling on the price that manufacturers can charge ordering agencies for covered drugs procured under the contract, under a complicated statutory formula. Accordingly, the VA developed a Master Agreement and special rules applicable to pharmaceutical procurements that implement the statutory price controls through the FSS contract program. However, the terms of the standard Master Agreement that all covered drug contractors must sign is not incorporated in any rule or posted on the web site, even though these terms are incorporated into the FSS contract. Further, the rules governing price reporting and the calculation of contract ceiling prices have never been subject to notice and comment procedures or published as regulations. They have been released to affected contractors through letters, which are now posted on the VA's web site, but not under the link to acquisition policies and regulations. The letters are difficult to find and poorly indexed. Yet, the VA's Office of Inspector General treats the "guidance" in these letters as rules to which the contractors must comply.

In sum, the VA should consistently consider the cost or administrative impact of its procurement policies and procedures on contractors or offerors and abide by the requirements of 41 U.S.C. § 418b, as applicable, before putting such policies and procedures into effect.

III. CONCLUSION AND RECOMMENDATIONS

Notwithstanding the recent trend in agency procurement rulemaking, it appears that agencies generally are complying with the requirements of the OFPPA. However, in evaluating an agency's compliance with these requirements, it is important to look beyond the title of the provision and examine its substance. Agencies should carefully consider and apply the criteria for publication for comment. Some agencies are not doing as well as others in meeting the Freedom of Information Act publication requirements. It is important for agencies to recognize the need for public accessibility, even for what the agency may view as purely internal guidance. NASA and GSA have adopted a particularly useful, transparent and publicly-accessible approach. They have combined their regulatory guidance with internal guidance into a single integrated document that is available to the public. Other agencies should consider this approach as a "best practice" for publication of material that they choose to remove from their procurement regulations.

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