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MISADDRESSED REFORM: THE U.S. POSTAL SERVICE'S NEW PROCUREMENT GUIDELINES

By

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Relying on the theory *if corporations don't need them, we don't need them*, the U.S. Postal Service recently converted its purchasing regulations into “non-binding” guidelines. 70 Fed. Reg. 20291 (Apr. 19, 2005). What had been 266 pages of far-sighted purchasing rules which had the force and effect of law have been downgraded into non-binding guidelines. This LEGAL BACKGROUNDER examines whether the rationale for taking this action is justified, whether the guidelines really are “non-binding,” and what the likely impact will be.

USPS's Unique Purchasing Environment. When Congress created the Postal Service 35 years ago as an independent establishment of the executive branch, it exempted the new agency from many federal procurement laws. See 39 U.S.C. § 402. At the same time, however, Congress made other federal procurement laws specifically applicable to the agency (e.g., the Service Contract Act, the Davis Bacon Act, the Prompt Payment Act, and the Contract Disputes Act). Similarly, Congress vested the U.S. Court of Federal Claims with jurisdiction to hear protests against Postal Service procurements. *Emery Worldwide Airlines, Inc. v. United States*, 49 Fed. Cl. 211, 219 – 220, *affirmed* 264 F.3d 1071 (Fed. Cir. 2001). While Congress afforded the Postal Service substantial procurement flexibility, it also kept the agency within the sphere of federal contracting and public policy principles.

Initially, the Postal Service employed purchasing rules that were quite similar to those of other federal agencies. In 1987, the Postal Service overhauled its purchasing regulations to combine the most advantageous aspects of public and commercial sector buying practices, and has revised these regulations numerous times since. In each instance, the Postal Service announced that its revised regulations streamlined the procurement process and incorporated best commercial purchasing practices. And in each case, the Postal Service's purchasing rules were issued as regulations and incorporated by reference in the U.S. Code of Federal Regulations, affording them the full force and effect of law. See *DeMatteo Construction Co. v. U.S.*, 220 Ct. Cl. 579, 592, 600 F.2d 1384, 1391; *Modern Systems Technology Corp. v. U.S.*, 24 Cl. Ct. 360 (1991). The most recent edition, the *USPS Purchasing Manual, Issue 3*, was issued on December 25, 2003.

Justifications Given for Downgrading Regulations to Guidelines. Instead of trying to improve its purchasing regulations further, on May 19, 2005 the Postal Service dispensed with them almost entirely. The agency kept the same purchasing policies it had previously used, but demoted them to “non-binding” guidelines. The Postal Service justified its action with the following reasons:

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1. The Presidential Commission on the U.S. Postal Service recommended that we take such action.

The Commission in fact recommended that the agency “revise its regulations” to incorporate best commercial practices, not demote them to non-binding guidelines:

The Commission is encouraged to note that the Postal Service is currently working to *revise its purchasing regulations* to maximize the flexibility provided to it under the current law and to reflect commercial best practices. ... The Postal Service should *revise its purchasing regulations* to take full advantage of the flexibility given to under current law.

Report of the President’s Commission on the United States Postal Service, July 31, 2003, at 95 (emphasis added). Four months after this report was issued, the Postal Service did revise its purchasing regulations by issuing the *USPS Purchasing Manual, Issue 3* on December 25, 2003. These rules, like all prior purchasing rules, were issued as binding regulations. It was not until several months later that the agency first proposed that its purchasing regulations be converted into non-binding guidelines.

Moreover, converting the agency’s purchasing regulations into non-binding guidelines did nothing to advance the Commission’s recommendation that the Postal Service revise its procurement rules “to more closely mirror corporate best practices.” The purchasing guidelines do not include any new purchasing practices and are essentially identical to the previous purchasing regulations. See “Highlights of USPS’s Interim Internal Purchasing Guidelines,” *The Star Carrier*, July 2005, reprinted at <http://www.wickwire.com/files/thelegalcorner07-05.pdf>.

2. Converting our regulations into non-binding guidelines is necessary “to replace rigid, government-based processes with successful private-sector processes.” See Oct. 21, 2004 letter, USPS Vice President for Supply Management, reprinted at <http://www.wickwire.com/files/102104.pdf>. The conversion of its purchasing regulations into guidelines, however, did not replace “rigid, government-based processes with successful private-sector processes.” Instead of reforming its purchasing policies, the Postal Service took essentially the same purchasing policies it had previously used and simply called them “guidelines” instead of regulations. Thus, if the Postal Service’s prior purchasing regulations contained “rigid, government-based processes” then the new guidelines have the same problem.

3. Private-sector companies do not face the restrictions imposed by binding purchasing regulations, so why should the Postal Service? This is likely the real reason for the action taken. Although the Postal Reorganization Act does not actually use the word “businesslike,” see 39 U.S.C. §101 *et. seq.*, the Postal Service strives to act in a “businesslike” fashion. Since private companies do not have binding purchasing regulations, why should the Postal Service? There are a number of good reasons why.

First, the binding nature of the Postal Service’s purchasing regulations actually made the agency a more attractive opportunity for would-be suppliers than private companies. That’s because the Postal Service’s purchasing regulations required as a matter of law that the agency treat offerors fairly and equally. The agency’s regulations set out this requirement through written and binding standards of fair treatment. By contrast, private companies are not legally bound to treat suppliers fairly, nor are they required to evaluate proposals in an impartial and unbiased way. Thus, suppliers show greater competitive interest in Postal Service procurements than those of private companies. This greater level of interest is achieved despite the strict, and sometimes onerous, contract clauses that the Postal Service insists upon in nearly all of its contracts — clauses that are more restrictive and demanding than those in commercial contracts. Throwing out the legally binding assurances of fairness and equal opportunity set out in its purchasing regulations, and converting them into non-binding guidelines, makes the Postal Service a less trusted and trustworthy acquisition partner. In the long term, suppliers will find this out, and the Postal Service will be considered a less desirable customer than it is today.

Second, the justification is specious because corporations are private entities and thus cannot have legally binding procurement regulations. If corporations were able to have legally binding purchasing rules, perhaps many *would* chose that option — or their shareholders or Board of Directors would make them do so. Legally

binding regulations ensure that an entity's purchasing agents will employ what the organization has identified are the most effective purchasing practices — and not slip into other practices out of administrative convenience, bias, laziness, or for other inappropriate reasons. Moreover, the Postal Service is not a corporate entity and thus its officials are not rewarded or held accountable in the same way as corporate procurement officers.

Third, these same successful corporations whose purchasing practices USPS would like to emulate do not believe that the Postal Service should convert its purchasing regulations into non-mandatory guidelines. The comments submitted by USPS's suppliers were overwhelmingly against this change. *See* collection of public comments at: <http://www.wickwire.com/lawyer-attorney-1042900.html>. It cannot be inferred, as USPS has done, that those who did not comment support the plan, particularly when USPS's largest suppliers did comment and nearly unanimously did not support the conversion.

Fourth, converting its purchasing regulations into non-binding guidelines increases the opportunity and likelihood for purchases to be conducted improperly, especially in a large and decentralized organization like the Postal Service. Converting the rules into guidelines increases a procuring official's "flexibility" to do the easy thing, not necessarily the right thing. Rather than conduct a competitive procurement, it is easier for a procuring official to award a contract non-competitively, to extend and expand an existing contract, and to limit the field of suppliers for a new purchase. Rather than take the time to construct a meaningful solicitation and carefully evaluate proposals, it is easier to shortcut the process. When the rules governing such decisions are considered non-binding guidelines, procuring officials will have greater flexibility to opt for the easier course rather than the more difficult, but ultimately more beneficial, course.

Fifth, the Postal Service is a federal government entity intended by Congress to remain within the sphere of laws relating to government purchasing, and whose procurements are subject to federal court review. *See Emery Worldwide Airlines, Inc. v. United States*, 49 Fed. Cl. 211, 219 — 220, *affirmed* 264 F.3d 1071 (Fed. Cir. 2001). While the Postal Service need not employ the same purchasing rules as the rest of the federal government, it still has an obligation to conduct its purchases with fairness, integrity, and in the public interest. Declaring itself free from binding purchasing rules does not comport with this obligation.

Are the Guidelines Really Non-Binding? The Postal Service thinks so, as the new *Interim Internal Purchasing Guidelines* state that they are "not binding," "for internal use only" and "do not create any right ... enforceable against the Postal Service." *Guidelines*, ¶ 1.1.1.2 and 1.3. Whether the *Guidelines* are afforded binding effect, however, depends not on how the Postal Service characterizes it but on the nature of the document itself.

An agency will be bound by its internal policies or guidelines if they tend to narrowly limit administrative discretion and set out substantive requirements. *Guardian Fed. Savings & Loan Assoc. v. Fed. Savings & Loan Ins. Corp.*, 589 F.2d 658, 66-67 (D.C. Cir. 1978). *See South Dakota v. Ubbelohde*, 330 F.3d 1014 (8th Cir. 2003); and *McLouth Steel Products Corp. v. Thomas*, 838 F.2d 1317 (D.C. Cir. 1988). Courts will thus look past an agency's characterization of a document and examine the nature of the document itself to determine whether it binds the agency.

This is exactly what happened in *South Dakota v. Ubbelohde*, 330 F.3d 1014, 1028 (8th Cir. 2003). The Army Corps of Engineers argued that it was not bound by its *Master Manual* on flood control policy because it was not issued as a regulation and was not meant to be binding. But the court examined the manual and found that it was intended to be followed by agency personnel. Thus, the court held it did have regulatory effect.

Similarly, a court held that the Environmental Protection Agency's *Periodic Monitoring Guidance* was binding on the agency even though it stated it was "intended solely as guidance." *See Appalachian Power Co., et al. v. EPA*, 208 F.3d 1015, 1020-23 (D.C. Cir. 2000). The court examined the *Guidance* and deemed it a ukase — "it commands, it requires, it orders, it dictates." Thus, the court held that the *Guidance* would be treated as binding. *Id.*

Examining the nature of the *Guidelines* along these lines should yield a similar result. The *Guidelines*

require that procuring officials follow its dictates, describing what “is,” “will,” and “must” be done. The *Guidelines* do not merely give advice to procuring officials, they direct what shall be done and do not allow procuring officials to ignore such direction. These same factors caused the *Ubbelohde* and *Appalachian* courts to find that the agency document in question had binding effect.

There is also precedent establishing that postal officials regard certain documents as binding procurement regulations, even though not issued as regulations. A senior postal official testified that various handbooks, management instructions, circulars and other directives — none of which were issued as regulations — were considered by agency personnel as binding regulations. See *Edwards v. U.S.*, 22 Cl. Ct. 411, 418 n. 8, (1991). Thus, it is questionable whether a court would treat the *Guidelines* as non-binding if it were called upon to address this issue.

Ironically, should the question ever be presented before a court — most likely in the context of a bid protest action — the Postal Service might be better off contending that the *Guidelines* do have binding effect. The *Guidelines* provide a great deal of purchasing flexibility to the Postal Service. If the *Guidelines* were considered non-binding, however, a court might apply other, more taxing procurement principles and standards of fairness than those set out in the *Guidelines*.

The Likely Impact. The conversion of the Postal Service’s purchasing regulations into “non-binding” guidelines will not help the agency lower procurement costs or obtain better goods and services. No “rigid” purchasing methods were eliminated and no new commercial purchasing methods were added. Thus, real purchasing reform has not yet occurred.

But conversion of the agency’s regulations into guidelines will have a substantial impact, albeit a negative one. When its purchasing rules are no longer considered mandatory, it will be easier for procurement officers to make purchasing decisions on the basis of administrative convenience, favoritism, and expediency, rather than best value. Internally, achieving consistency in procurement practices among far-flung offices will also become more difficult. And the opportunity to steer contracts to certain suppliers for improper purposes, and cover up such conduct under the cloak of “flexibility” and “discretion,” increases tremendously.

Employing the same rules, but treating them as “non-binding,” also makes the Postal Service a less desirable source of business for suppliers. With mandatory standards of fair and equal treatment discarded, suppliers will eventually become less interested in USPS procurements and fewer suppliers will participate in them. This, in turn, will lead to less competition and less competitively priced proposals. Similarly, existing suppliers who become aware of the agency’s ability to ignore its own rules will be less likely to make investments in support of their postal contracts. If USPS wants to reduce its procurement costs, and outsource more work, it needs to make itself into a more attractive source of business for suppliers. The message that this action sends — “we don’t have to follow our rules” — is not a message that exudes fairness, integrity, and equal opportunity to potential suppliers.

By downgrading its purchasing policies into guidelines, the agency also discards the single most effective method of ensuring that its purchases are conducted properly — the watchful eye and effective remedies of competing suppliers. No one has greater motivation to ensure that a procurement is conducted properly than a supplier who could be financially impacted by an unfair practice. This external monitoring by private attorneys-general serves the public interest. See Professor Stephen L. Schooner, *Fear of Oversight: the Fundamental Failure of Businesslike Government*, 50 AM. UNIV. L. R. 627, Feb. 2001. “When the public loses insight into how the government spends its money, when contracts are awarded or administered based upon friendships rather than the rules, or when competing firms lack confidence that they stand on an equal footing with incumbent contractors, the system suffers.” *Id.* at 710. By taking the teeth out of its purchasing policies, the Postal Service has done more harm than good.

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