

BRIEFING PAPERS[®] SECOND SERIES

PRACTICAL TIGHT-KNIT BRIEFINGS INCLUDING ACTION GUIDELINES ON GOVERNMENT CONTRACT TOPICS

CONTRACTING WITH THE U.S. POSTAL SERVICE / EDITION III

By David P. Hendel*

Totaling about \$13 billion per year,¹ none of the purchases by the U.S. Postal Service uses appropriated funds or is conducted under the Federal Acquisition Regulation (FAR). Created by Congress to operate in a businesslike manner, the Postal Service is self-funded and exempt from many federal procurement laws. Postal Service procurements are instead conducted under the agency's own *Supplying Principles and Practices* (SPP)² manual, which combines commercial purchasing strategies with hybrid Government purchasing rules.

This BRIEFING PAPER describes the Postal Service's unique procurement environment and highlights the key aspects of its purchasing and contract administration regulations. Specifically, after describing the creation and organizational structure and operation of the Postal Service, this PAPER discusses (1) the federal laws and rules that do, and do not, apply to the Postal Service, (2) distinctive aspects the Postal Service's special procurement procedures, (3) unique administrative procedures established for Postal Service protests, (4) contract administration issues that frequently arise on postal contracts, and (5) claims procedures applicable to Postal Service contracts.

Background

Creation Of The U.S. Postal Service

One of the few federal agencies that can trace its existence directly to the U.S. Constitution³, the U.S. Postal Service is proud of its long history and core mission of binding the nation together.⁴ Notable employees include Benjamin Franklin as the first Postmaster General, Abraham Lincoln and Harry Truman as postmasters, Bing Crosby and Knute Rockne as mail clerks, Walt Disney as a letter carrier, and Charles Lindbergh as an air mail pilot.⁵

In the 1960s, years of financial neglect, fragmented control, inadequate facilities, highly subsidized postal rates, and political cronyism caused major problems and led mail delivery to grind to a halt for nearly a week in Chicago. Seeking to remedy these ills, Congress enacted and President Nixon signed the Postal Reorganization Act of 1970. The Act replaced the Cabinet-level Post Office Department with a new self-sufficient, independent nonpolitical agency

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IN THIS ISSUE:

Background	1
Applicable Federal Laws & Rules	3
Inapplicable Federal Laws & Rules	5
Special Postal Service Purchasing Rules	7
Disagreements & Protests	11
Contract Administration	13
Claims	14
Guidelines	16



called the U.S. Postal Service.⁶ Commencing operations on July 1, 1971, the Postal Service⁷—though still technically a federal agency⁸—was charged with operating in a business-like fashion and exempted from many federal laws. The Act proclaimed that the Postal Service’s mission was “to bind the Nation together through the personal, educational, literary, and business correspondence of the people [by providing] prompt, reliable, and efficient services to patrons in all areas.”⁹

Management Structure

The head of the Postal Service is the Postmaster General, who is appointed by (and can be discharged by) a nine-member Board of Governors.¹⁰ The Governors are appointed by the President and confirmed by the U.S. Senate, and no more than five can be of the same political party.¹¹ In addition to the Governors, the Postmaster General and Deputy Postmaster General are voting members of the board for most matters.¹² The Board of Governors functions much like a corporation’s board of directors. The board is responsible for overseeing Postal Service operations and performance, including approving the annual plan of capital investments in equipment and facilities.¹³ Because it is subject to the Government in the Sunshine Act,¹⁴ the board holds monthly meetings that are open to the public, but many key decisions are made behind closed doors.¹⁵

The Postal Service’s management structure consists of a Headquarters office in Washington, D.C., and seven Area Offices that have purview over regional operations. While most large purchasing projects are conducted from the Headquarters Supply Management office, regional Supply Management offices will occasionally take responsibility for conducting and administering nationwide procurement programs. Purchasing authority is limited to the Postmaster General, the Vice President for Supply Management, Contracting Officers (COs) with written statements of

specific authority, and others designated in writing.¹⁶ This later group currently includes Postal Service Officers/Vice Presidents, certain plant managers, Postal Career Executive Service (PCES) Postmasters, and Inspectors in Charge, who all have purchasing authority up to \$10,000. In addition, Postmasters and Vehicle Maintenance Facility Managers have local purchasing authority with limits between \$2,000 and \$1,000.¹⁷

Further reflecting the agency’s goal of operating like a business, the Postal Service’s officials have corporate titles. The Postmaster General is thus also the Chief Executive Officer, and other top leaders have titles of Chief Operating Officer, Chief Financial Officer, Chief Marketing Officer, Executive Vice President, Senior Vice President, and Vice President.¹⁸

Budget & Operating Authority

The Postal Service has wide authority over its operations and budget, which is off-budget from that of the rest of the Federal Government.¹⁹ Since the Postal Service’s operating budget comes from postal revenues, not appropriations, Congress has less sway over Postal Service finances than other federal agencies. Still, several congressional committees and subcommittees have purview over postal operations and top postal officials are regularly called as witnesses at their hearings.²⁰

The Postal Service receives no Government funding for operating expenses and relies on the sale of postage, products, and service to fund its operations. The Postal Service has substantial freedom to manage its own affairs and is one of the few federal agencies that can sue and be sued in its official name.²¹ While the Postal Service has wide-ranging operational authority, it does not have unfettered authority to set or change postal rates. Postage rates are set separately for “market dominant” products (such as First Class Mail,

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Periodicals, and Standard Mail) and “competitive” products (such as Priority Mail, Priority Mail Express, and Commercial Package Services). Rates for market-dominant products must be set at no higher than the annual increase in the Consumer Price Index. Rates for competitive products must cover attributable cost and contribute a designated margin beyond that. While the Postal Service has the power to initially set rates for these products, the rates are subject to review by the Postal Regulatory Commission to ensure statutory and regulatory compliance.²²

Purchasing Freedoms

Chief among the federal laws that do not apply to the Postal Service are those dealing with public contracts.²³ Although freed from most federal procurement constraints by the Postal Reorganization Act of 1970, the Postal Service initially did not stray far from the purchasing rules employed by other federal agencies. Over time, the Postal Service began to take greater advantage of its procurement freedoms.²⁴ In 1987, the Postal Service issued the *USPS Procurement Manual*, which replaced the *Postal Contracting Manual* with “plain English” text.²⁵ This manual sought to create a balanced set of procurement rules that ensured fairness to contractors but allowed COs to exercise greater business judgment. The highlights of this manual were described extensively in a previous BRIEFING PAPER.²⁶

In 1997, the Postal Service replaced these regulations with the *USPS Purchasing Manual*, which included still more commercial purchasing concepts and continued down the road toward providing greater flexibility and discretion to COs.²⁷ In January 2002, as discussed in-depth in another BRIEFING PAPER,²⁸ the Postal Service again revised its purchasing regulations, further distancing its procurement rules from typical federal agency regulations and relying increasing on commercial buying practices.²⁹

Another major change occurred in 2005, when the Postal Service issued a new manual called the *Interim Internal Purchasing Guidelines* (IIPG), which was later replaced by the *Supplying Principles and Practices* (SPP) manual.³⁰ Unlike its previous procurement policies, these manuals were not issued as regulations.³¹ The Postal Service also rescinded all previous purchasing regulations, leaving only 12 pages of purchasing-related regulations that cover mostly tangential matters and do not describe how the agency conducts its procurements.³²

Since the Postal Service’s current purchasing rules were not issued as regulations, enforceability is an open question.

When issued as a regulation, the Postal Service’s former procurement rules had the force and effect of law.³³ Since the SPP—the agency’s current procurement rules—were not issued as a regulation, the SPP does not have the force and effect of law.³⁴ The Postal Service, however, may still be legally bound to comply with the SPP. Although the SPP states it is “intended for internal use only” and is “advisory and illustrative,”³⁵ it is the agency’s final and official statement of its purchasing policies. The SPP is also written as if it is meant to be followed by purchasing officials, with the word “must” appearing over 1,700 times—almost three times per page. In these circumstances, a court could conclude that the SPP constitutes the Postal Service’s *de facto* regulations and the agency is thus legally obligated to follow them.³⁶

Purchasing Offices

All Postal Service procurement authority emanates from the Supply Management office based at Postal Service Headquarters in Washington, D.C. The Supply Management office is headed by the Vice President, Supply Management, who reports to the Postal Service Chief Financial Officer. The procurement function of the Supply Management office is organized into five separate groups, called “Portfolios”—Transportation, Technology Infrastructure, Mail and Operational Equipment, Commercial Products and Services, and Facilities. Each Portfolio is further broken down into Category Management Centers (CMCs), which focus on subgroups of procurement within the CMC.

While the Supply Management office is headquartered in Washington, D.C., some Portfolios and CMCs are conducted out of regional Supply Management offices. For example, the Mail and Operational Equipment Portfolio is based in Merrifield, Virginia and the Vehicles and Delivery/Industrial Equipment CMC is based in Philadelphia, Pennsylvania. Supply Management also has separate offices responsible for policy, compliance, planning, asset management, and outreach.³⁷

Applicable Federal Laws & Rules

Although exempt from most federal laws and rules, Postal Service purchasing is still subject to a handful of important and far-reaching federal laws.³⁸

Contract Disputes Act

Claims and disputes proceed in accordance with the Contract Disputes Act (CDA),³⁹ the same dispute resolution

method that governs other federal agencies. As discussed in more detail later in this BRIEFING PAPER, the Postal Service Board of Contract Appeals (PSBCA) is the only remaining federal board of contract appeals dedicated to hearing disputes arising from the contracts of a single agency.⁴⁰

Freedom Of Information Act

As with other federal agencies, the Postal Service is subject to the Freedom of Information Act (FOIA).⁴¹ Under FOIA, you may request records maintained by the Postal Service, and such records (including electronic records) must be provided to you unless a FOIA exemption applies.⁴² The Postal Service must also respond to your request within 20 business days after receipt.⁴³ Typical FOIA exemptions include records containing “confidential commercial or financial information” or “trade secrets,”⁴⁴ so you will not be provided with the portions of a document that contain this type of information.

Unlike other federal agencies, the Postal Service has an additional “good business practice” exemption. Under this special exemption, the Postal Service is not required to release “information of a commercial nature, including trade secrets. . . which under good business practice would not be publicly disclosed.”⁴⁵ This is potentially a broad exemption. The U.S. Court of Appeals for the Fourth Circuit upheld a withholding of information on this ground when the Postal Service demonstrated that commercial entities do not disclose the material being requested (spreadsheets detailing contract quantity and pricing information).⁴⁶ By contrast, a federal district court held that the good business practice exemption was “not so vague as to leave a Postmaster General with unfettered discretion as to what may be withheld from disclosure.” The court thus found that the good business practice exemption was an insufficient basis, by itself, to withhold information (names and duty stations of Postal Service employees) that was not “commercial” information, even though of a type a private corporation might not disclose.⁴⁷ And when the Postal Service sought to employ the good business practice exemption to justify the withholding of a contractual agreement with a delivery partner, the district court rejected the contention and held that the entire agreement must be released under FOIA. The court found that if Congress had intended to exempt from disclosure contractual agreements between the Postal Service and private entities, it would have so stated.⁴⁸

Because information you submit to the Postal Service could become the subject of a FOIA request, when submit-

ting documents that contain confidential information you should identify the documents with the legend “Privileged Business Information—Do Not Release.” The use of this legend requires the Postal Service to notify you promptly when the information is sought by a FOIA requester and provide you with an opportunity to state the information should not be released. If you object to disclosure, you should demonstrate why the information sought is considered confidential or otherwise exempt from disclosure. Whenever possible, such statements should be supported by a certification from an authorized company officer.⁴⁹

Labor Policies

Although the Postal Service is charged with operating in a business-like fashion, it is not exempt from the Service Contract Act,⁵⁰ the Davis-Bacon Act,⁵¹ and the Walsh-Healey Public Contracts Act.⁵² Thus, the Postal Service must ensure that its contractors and subcontractors pay their service employees and construction workers the prevailing wage rate and fringe benefits. Some Postal Service contracts, however, are exempt from these requirements. For example, contracts with common carriers for mail transportation on regularly scheduled runs over established routes and contracts for mail service with an individual owner/operator are exempt from the Service Contract Act.⁵³

In addition, the Miller Act⁵⁴ applies to the Postal Service. It requires for all fixed-price construction contracts in excess of \$100,000, that the prime contractor furnish a performance bond and a payment bond ensuring payment to the persons supplying labor and materials in the course of performance of the contract.⁵⁵

Prompt Payment Act

The Prompt Payment Act⁵⁶ requires the Postal Service to make timely payment to you on your invoices and imposes an interest penalty for noncompliance. Under the Act, if no payment date is specified in the contract, the Postal Service must pay you no later than 30 days after receipt of a proper invoice (assuming delivery, inspection, and acceptance have occurred). If payment is not made within 30 days, or shorter period for progress payments under a construction contract, the Postal Service must automatically include interest in its late payment. If the Postal Service fails automatically to include interest on its late payment to you and you bring this failure to the agency’s attention, you are then entitled to receive double interest.⁵⁷

Contract Fraud

The independent U.S. Postal Service Office of Inspector

General (OIG) regularly issues reports on the Postal Service's contracting activity and also investigates contract fraud. In 2009, the OIG established the Major Fraud Investigations Division (MFID), which investigates fraud allegations under contracts valued at \$250,000 or more. The MFID also investigates allegations that become national in scope or multi-jurisdictional.⁵⁸

The Postal Service is specifically covered under the Program Fraud Civil Remedies Act,⁵⁹ which allows the agency to bring actions against contractors for false claims that amount to less than \$150,000 per instance. While the Program Fraud Civil Remedies Act was specifically made applicable to Postal Service, it is open to question whether the civil False Claims Act⁶⁰ applies. Since the False Claims Act is a statute that deals with contracts and funds, and the Act is not specifically made applicable to the Postal Service,⁶¹ it could be inapplicable under the general exemption in the Postal Reorganization Act.⁶² Under similar reasoning, the Anti-Assignment Act⁶³ and Antideficiency Act⁶⁴ have been found to be inapplicable to the Postal Service.⁶⁵

Special federal criminal laws apply to anyone who tampers with the mail, and these laws are not limited solely to postal employees. Thus, if your work for the Postal Service brings you in contact with the mail, be aware that it is a crime to steal, delay, destroy, or desert the mail.⁶⁶

Standards Of Conduct

The Standards of Ethical Conduct for Employees of the Executive Branch issued by the Office of Government Ethics⁶⁷ specifically apply to the Postal Service.⁶⁸ The Standards of Conduct prohibit postal employees from soliciting or accepting a gift from a "prohibited source."⁶⁹ If you have a Postal Service contract, you are a "prohibited source" to your CO and other postal officials.⁷⁰ While postal officials cannot accept gifts from you, there is a de minimis exception that allows unsolicited gifts valued at \$20 or less.⁷¹ Under this exemption, postal officials could accept an offer of lunch during a meeting with you, but they will typically ask to pay for their fair share of any such expense. The Standards of Conduct also place restrictions on the activities of postal officials who are in the midst of employment discussions with contractors and place some restrictions on the activities they may engage in when employed by contractors.⁷²

Inapplicable Federal Laws & Rules

Competition In Contracting Act

The Competition in Contracting Act of 1984,⁷³ which applies to both military and civilian agency acquisitions, imposes the requirement for "full and open" competition in Government procurement and provides a statutory framework for implementing that requirement. CICA requires that competitive procedures be used whenever possible with the objective that "full and open competition" be achieved.⁷⁴ In CICA, Congress changed the statutory preference from formal advertising to competitive procurement and made the use of negotiated procurement an acceptable competitive procedure. CICA also limits the circumstances for noncompetitive (sole-source) procurement and requires advance approval for each use.⁷⁵ In addition, the statute requires that agencies use advanced planning and market research to facilitate full and open competition⁷⁶ and prohibits agencies from entering into noncompetitive contracts because of insufficient planning.⁷⁷ None of these CICA requirements applies to the Postal Service.⁷⁸

Federal Acquisition Regulation

The FAR⁷⁹ is the single Government-wide regulation for use by military and nearly all civilian agencies in their acquisition of supplies and services with appropriated funds. While individual agencies can supplement the FAR, their own regulations must be limited to coverage of the specific needs of the agency that are not addressed in or inconsistent with the general guidelines of the FAR. Otherwise, agencies must obtain authorized deviations from the FAR.⁸⁰ The FAR does not apply to the Postal Service,⁸¹ but some of its concepts have found their way into the Postal Service's purchasing rules.

Cost Accounting Standards

The Cost Accounting Standards (CAS) are uniform cost accounting standards for use in all military and civilian negotiated contracts and subcontracts above certain dollar thresholds.⁸² These standards and the regulations of the CAS Board do not apply to Postal Service contracts.⁸³ The Postal Service occasionally employs the Defense Contract Audit Agency or other consultants to perform financial or contract audits. They may be unaware that the CAS do not apply to your Postal Service contract, which could incorrectly lead them to conclude that the accounting records for your postal contract are inadequate.

Administrative Procedure Act

The Administrative Procedure Act (APA)⁸⁴ sets minimum standards of administrative procedure that federal agencies must follow. Although the APA is generally inapplicable to the exercise of the powers of the Postal Service,⁸⁵ federal courts may still have the power to review certain Postal Service actions on the basis of other statutes or through federal common law or to apply APA standards of review to challenged Postal Service actions.⁸⁶

Truth In Negotiations Act

The Truth in Negotiations Act (TINA) (also referred to as the “truthful cost or pricing data” statute)⁸⁷ requires federal agencies to obtain cost and pricing data from offerors under any contract expected to exceed \$750,000 unless an exemption applies. Contractors are also required to certify the accuracy, currency, and completeness of cost and pricing data and may be liable for defective pricing claims if that information is later found to be insufficient.⁸⁸

TINA does not apply to the Postal Service—at least by statute. Similar TINA principles can be made applicable to your contract by the clause entitled “Price Reduction for Defective Cost or Pricing Data (March 2006).”⁸⁹ The Postal Service may use this clause whenever price analysis or other techniques are insufficient to determine price reasonableness. Unlike other federal agencies, there is no minimum dollar threshold for its application or statutory exemptions governing its use. Contractor certifications of cost or pricing data are required for all noncompetitive contract actions valued at \$1 million or more and in other circumstances.⁹⁰ If a contractor refuses to provide requested cost or pricing data, the CO must withhold award and refer the matter to a higher level official.⁹¹

Small Business Act

The Small Business Act⁹² was designed to assist small business concerns and small business concerns owned and controlled by socially and economically disadvantaged individuals. It is administered by the Small Business Administration. A common method by which the Government gives preferences to small business concerns under the Act is by setting aside or reserving all or a portion of a proposed procurement for exclusive participation by small business firms. Extensive regulations have been promulgated that establish standards on whether a particular business qualifies for a set-aside procurement. While the Act does not apply to the Postal Service, the agency encourages

awards to small businesses and requires large businesses holding contracts over \$1 million to have subcontracting plans and issue quarterly reports.⁹³

Office Of Federal Procurement Policy Act

The Office of Federal Procurement Policy Act established the Office of Federal Procurement Policy (OFPP) with the authority to direct federal procurement policy. The intent of Congress in enacting this legislation was to provide an economical and efficient system of procurement, use of Government property, disposal of surplus property, and records management.⁹⁴ The OFPP has no authority over the Postal Service.

Procurement Integrity Act

The Procurement Integrity Act⁹⁵ (1) prohibits knowingly disclosing or obtaining contractor bid or proposal information or source selection information before contract award, (2) requires agency officials to report contacts by bidders or offerors relating to nonfederal employment and to reject such possibility or disqualify themselves from further work on the procurement, and (3) prohibits certain agency officials who have participated in contract actions over \$10 million from accepting compensation from the contractor for one year after their participation. Neither the Act nor its implementing FAR provisions⁹⁶ apply to the Postal Service. Keep in mind, however, that many of the activities prohibited by the Act are similarly prohibited by other statutes or regulations that do apply to the Postal Service.

Voluntary Compliance

Although under no statutory obligation to do so, the Postal Service has occasionally complied with statutes and regulations on Government procurement that are not expressly applicable to it. For example, the Postal Service’s procurement policies state a preference for domestic end products, but the agency is not obligated to comply with the Buy American Act.⁹⁷ The Postal Service is included in the World Trade Organization Government Procurement Agreement (WTO GPA) and Free Trade Agreement (FTA), which treats a wide variety of foreign countries as equivalent to domestic.⁹⁸ At one time the Postal Service voluntarily complied with the Drug-Free Workplace Act,⁹⁹ but now no longer does so.

The Postal Service also voluntarily complies with the Anti-Assignment Act,¹⁰⁰ which restricts your ability to assign a federal contract and claims arising under it to a third party. While the Postal Service is exempt from this Act,¹⁰¹

Postal Service contracts typically contain similar restrictions on assignment.¹⁰² Because the Postal Service is exempt from the Act, however, it may withhold payments on one contract as a set-off for amounts that are owed on other contracts.¹⁰³

Special Postal Service Purchasing Rules

Few Remaining Regulations

When the Postal Service issued the IIPG, later supplanted by the SPP, it revoked all prior purchasing regulations, handbooks, circulars, and instructions.¹⁰⁴ That left a mere 12 pages of regulations that touch upon procurement. These remaining regulations cover the following topics: (a) business relationships, (b) disagreement procedures (similar to agency level protests) (c) claims and disputes, (d) interest on claims, and (e) suspension and debarment.¹⁰⁵ All other Postal Service procurement policies are set out only in the SPP.

Notable among these remaining regulations is the Postal Service's ability to decline to accept or consider proposals from a person or organization that "fails to meet reasonable business expectations or provide a high level of confidence regarding quality, prompt service, and overall professionalism."¹⁰⁶ Such action may be taken without instituting suspension and debarment procedures, but the disqualified entity may contest the action before the agency's Supplier Disagreement Resolution Official (SDRO).¹⁰⁷ Since such action is tantamount to a debarment, any entity so disqualified would have a protectable liberty interest under the due process clause of the Fifth Amendment to the U.S. Constitution.¹⁰⁸

Supplying Principles & Practices Manual

The Postal Service's purchasing policies and contract clauses are contained in the SPP manual, which was first issued in May 2006 and is revised annually.¹⁰⁹ These policies were not issued as regulations, so they are not binding on contractors unless specifically referenced in your contract.

As the name suggests, the SPP manual consists of two components: *Supplying Principles* and *Supplying Practices*. The eight Supplying Principles are Authority and Responsibility, Best Value, Ethics and Social Responsibility, People and Culture, Planning and Strategies, Statutory and Regulatory Requirements, Supplier Relations, and Technology. These principles set out the agency's strategic purchasing elements and overarching principles.¹¹⁰

(1) *Supplying Principles*. While the Supplying Principles encompass only nine pages, they contain some fundamental and intriguing concepts. Best value is the basis for all purchasing decisions.¹¹¹ Sustainability and environmental responsibility is encouraged, though the emphasis is on cost-effective purchases and sustainability that produces long-term cost reductions. Leveraging the agency's purchasing power through centralized procurement is another principle.¹¹² Suppliers are considered "essential and valued business partners," and the Postal Service will treat its suppliers "in a fair, objective, and business-like manner."¹¹³ But all suppliers are not created equal. The Postal Service will manage its supplier relationships based on the potential impact that the supplier's performance will have on the agency's operational and financial position.¹¹⁴ Diversification of the supplier base is another principle, but the Postal Service achieves this without set-aside programs.¹¹⁵

(2) *Supplying Practices*. The Supplying Practices portion of the SPP is more extensive, encompassing 430 pages, and is broken down into the following topics:¹¹⁶

- General Practices
- Process Step 1: Identify Needs
- Process Step 2: Evaluate Sources
- Process Step 3: Select Suppliers
- Process Step 4: Deliver and Receive Requirements
- Process Step 5: Measure and Manage Supply
- Process Step 6: End of Life
- Commodity Specific

The SPP also sets out the Postal Service's standard solicitation provisions and contract clauses. While many of these clauses are similar to FAR clauses, most have subtle—and often not so subtle—differences.¹¹⁷ The most important differences between the procurement policies expressed in the SPP and those in the FAR are discussed below.

Single Procurement Method

Under the FAR, there are two main types of competitive procedures: (1) soliciting sealed bids (also known as "formal advertising") and (2) requesting competitive proposals (also known as "negotiated procurement")¹¹⁸ The Postal Service, however, employs only one procedure for soliciting and awarding contracts: negotiated procurement.¹¹⁹ Thus, the

Postal Service need never reject your proposal on the basis that it is nonresponsive because it has the freedom to ask questions concerning your proposal and to ask you to revise your proposal. Also, because the Postal Service employs only negotiated procurement techniques, there is no public bid opening at which all bid prices are revealed. Thus, you may be left guessing about the prices proposed by unsuccessful offerors.

The Postal Service frequently uses reverse action techniques, but these are also considered negotiated procurements. While the supplier with the lowest bid in a reverse auction typically wins, the CO must still consider all applicable business conditions and apply any stated evaluation factors. In addition, the CO may enter into discussions or negotiations following acceptance of a winning bid to ensure the Postal Service receives best value.¹²⁰

Competition

Unlike federal agencies governed by the FAR, under the SPP there is no requirement that the Postal Service seek “full and open competition.”¹²¹ Rather, when the Postal Service employs competitive purchase procedures, it need only seek “adequate competition whenever feasible.” Adequate competition means the solicitation of a sufficient number of the best qualified suppliers to ensure the required quality of goods and services are obtained and the price is fair and reasonable.¹²² The mere *solicitation* of a sufficient number of suppliers is considered sufficient to achieve adequate competition. Nonetheless, the SPP recognizes that best value is generally achieved through competition,¹²³ and 80% of Postal Service contracting actions were awarded competitively in fiscal year 2015, amounting to \$8 billion of the nearly \$10 billion total contract actions.¹²⁴

Noncompetitive Purchases

The Postal Service has broad authority to make noncompetitive purchases, but also has strict procedures that govern how such determinations are made. The SPP lists four general “business scenarios” in which noncompetitive purchasing would be appropriate:¹²⁵

- (1) *Sole Source*. When only one supplier exists that is capable of satisfying a requirement.
- (2) *Industry Structure or Practice*. When the industry producing or supplying the required goods or services is structured in a way that renders competition ineffective (e.g., regulated industries, educational institutions, nonprofits, and utilities.)

- (3) *Compelling Business Interests*. When there is a business interest so compelling that purchasing noncompetitively outweighs the benefits of competition. Examples include an urgent requirement and a supplier innovation that promotes the Postal Service’s objectives.
- (4) *Superior Performance*. When a supplier’s superior performance and its contributions to the Postal Service’s business merit a noncompetitive award. As an example, when a supplier has performed at a “high level” or provided “superior performance” that has benefited Postal Service operations, the supplier’s contract may be extended or expanded.

If one of these scenarios is met, and the requiring activity or Purchase Team wishes to proceed noncompetitively, it must submit a Noncompetitive Purchase Request (NPR) to the CO. The NPR must set out the noncompetitive justification, the market research performed, the estimated cost, and whether future purchases may be made noncompetitively. The NPR requesters must also certify that they have no financial interest or conflict of interest with any party interested in the purchase.¹²⁶ Contract modifications that are outside the scope of the contract are also subject to the noncompetitive purchase review process.¹²⁷

All noncompetitive procurement requests above \$10,000 must be approved by the appropriate Supply Management group manager. If the estimated value of the purchase is expected to exceed \$250,000, the Postal Service Vice President of the requesting office must sign the NPR. Noncompetitive purchases valued at \$10 million or more, and noncompetitive purchases of professional, technical, and consulting services valued at \$1 million or more, must be reviewed and approved by the Vice President, Supply Management.¹²⁸

For purchases expected to exceed \$1 million, the NPR must also be submitted to the Postal Service Competition Advocate for an independent review. The Competition Advocate will review the NPR justification and consider a variety of factors. Some of these factors include whether the specifications are too restrictive, whether the NPR reflects commercial best practices, whether future competition of the requirement is achievable, and the impact on supplier diversity. The Competition Advocate provides recommendations to the CO, who must address each one in writing and work collaboratively to resolve any remaining differences.¹²⁹ The Competition Advocate also issues an annual report on noncompetitive purchasing activity.¹³⁰

Publicizing Purchase Opportunities

Whether and how to publicize a purchase opportunity is left to the judgment of the Purchase Team and is not based on monetary thresholds. For a competitive purchase opportunity, if there is any doubt that an already identified pool of sources are the most capable sources or will lead to adequate competition, the SPP instructs that the Purchase Team should publicize. Like other federal agencies, one method of publication is the Government Point of Entry (GPE), online at www.fedbizopps.gov. The Postal Service also publicizes its purchase opportunities in other media.¹³¹ The only publication event based on a monetary threshold is the requirement that all noncompetitive contract awards valued at \$1 million or more be publicized in the GPE.¹³²

The Postal Service occasionally posts a presolicitation “sources sought” notice to identify potential suppliers. Potential suppliers must respond to this notice by the due date to ensure inclusion on the solicitation mailing list, as there may be no other notice of the opportunity.¹³³ Similarly, the Postal Service often limits purchase opportunities to suppliers that have been prequalified, so potential suppliers should look for and respond to prequalification notices.¹³⁴

Prequalification

Prequalification is the upfront identification of the most highly qualified suppliers and the process is regularly used by the Postal Service. Prequalification may be used for commercially available goods or services purchased routinely or for an individual purchase or series of purchases.¹³⁵ While prequalification opportunities are not automatically publicized, if the agency has any doubt that the identified pool of sources has the most capable suppliers or will lead to adequate competition, the opportunity should be publicized.¹³⁶ When a purchase is limited to prequalified offerors, you must successfully make it through the prequalification process to participate in the competition for the purchase.¹³⁷

Suppliers are evaluated for prequalification opportunities by applying evaluation factors that concentrate on past performance and supplier capability. The Postal Service may also examine a supplier’s financial records and conduct an on-site survey.¹³⁸ When there is a large group of suppliers that meet prequalification requirements, the Postal Service may prequalify only the most qualified suppliers.¹³⁹ All suppliers that responded to the prequalification announcement must be notified of whether they were included or excluded and a debriefing is available to those that have not been selected.¹⁴⁰

The SPP does not prescribe a length of time in which a prequalification list remains in effect, but it does provide that the agency should periodically reassess prequalified suppliers to ensure they remain qualified and accessible. The Postal Service should also consider whether new suppliers should be included on the list. The Postal Service may remove a supplier from the list for “good business reasons,” but must inform the supplier and provide an explanation for the decision.¹⁴¹

Solicitation & Proposal Evaluation

As with other federal agencies, Postal Service solicitations must include a description of the evaluation factors that will be considered, their weights, how they will be evaluated, and the relative importance of price to other factors.¹⁴² The relationship of cost/price factors to other evaluation factors should be stated in general terms, and no solicitation should establish a strict mechanical relationship between the cost/price factors and any other factors.¹⁴³ Past performance and supplier capability must always be included as evaluation factors, and the risk of successful performance should always be considered.¹⁴⁴

When competitive purchase procedures are used, the Postal Service’s Proposal Evaluation Team will compare the relative value offered by each proposal to the competition. This comparison is considered extremely important. It must describe not just the differences between proposals, but assess the value of the differences or the impact the differences will have on the Postal Service. The Proposal Evaluation Team then scores and ranks proposals by the value they offer the Postal Service. These findings are presented to the Purchase Team with narrative statements identifying major strengths and weaknesses of the various proposals. The Purchase Team may then use this report to conduct discussions and potential negotiations.¹⁴⁵

Late proposals and modifications—proposals submitted after a specifically established deadline—may be considered by the Postal Service if determined to be in the best interests of the Postal Service. Normally, the Postal Service will consider late proposals when doing so would not cause a delay in the evaluation process, or the proposal was late because of mishandling, or the proposal offers a significant cost, quality or technical benefit. If a late proposal or modification is not considered, the Postal Service must so notify the supplier.¹⁴⁶

Preaward Discussions & Negotiations

The Postal Service has more freedom to communicate

with offerors during a procurement than other federal agencies. Under the SPP, the term “discussions” includes all communications between the Postal Service and its suppliers during the purchasing process.¹⁴⁷ There is thus no need to distinguish between “discussions” and “clarifications” as any communication with an offeror is encompassed within the term “discussions.”¹⁴⁸

The Postal Service is not required to engage in equal discussions with all offerors. Thus, if the Postal Service holds discussions with one offeror, or a set of offerors, it is not required to hold discussions with other offerors if there is no business necessity for doing so. The Postal Service may also set different deadlines for various offerors to revise their proposals as long as the time provided to them is reasonable in view of the complexity and extent of issues discussed. Notwithstanding this flexibility, the Postal Service must still treat all suppliers fairly.¹⁴⁹ And when the Postal Service does engage in discussions with an offeror, it is obliged to allow that offeror sufficient time to revise its proposal in light of those discussions.¹⁵⁰ Even if you are not given notice of a specific opportunity to revise your proposal, you still may modify or withdraw your proposal at any time before the contract is awarded.¹⁵¹

Once the Postal Service has determined which offeror is the likely awardee, it may commence negotiations with that offeror to come to final agreement on contract terms and price. Before opening negotiations, the Purchase Team is instructed to categorize its negotiation objectives into *must* or *give* points. The SPP describes a scenario where the selected offeror has a proven record of on-time delivery but is proposing a price higher than the target price recommended by the pricing analyst. In a compromise, the Postal Service would agree to a higher price than recommended by the pricing analyst but lower than the price offered in the original proposal.¹⁵² Although not mentioned in the SPP, in this scenario the offeror could similarly seek a concession from the Postal Service in return for its lower price.

While the SPP affords the Postal Service flexibility to engage in post-selection negotiations with the selected offeror, there is a limit to how far the parties can go in agreeing to changes in contract terms. The changes cannot be so extensive that they would vitiate the rationale for the original determination that the selected offeror’s proposal was the best value proposal. In that case, other offerors could contend that the selection basis was no longer valid and they should be given the same opportunity to revise their proposals to address the new requirements.

While the Postal Service is permitted to make an award without engaging in discussions or negotiations, the SPP contemplates that this would be a “rare instance.” The SPP notes that it is always prudent to hold discussions with offerors for reasons of clarification and post-selection negotiations with the selected offeror can improve the value of the offer.¹⁵³

Best Value

Best value decisionmaking is the hallmark of Postal Service purchasing and all contract awards are based on this selection principle. While often an elusive concept, best value is defined as the outcome that provides the optimal combination of lowest total cost of ownership, technology, innovation and efficiency, assurance of supply, and quality that meets the Postal Service’s needs.¹⁵⁴ Postal Service requests for proposals must fully identify the best value criteria that will be considered in the ultimate award determination.¹⁵⁵

After proposal evaluation, comparative analysis, ranking of proposals, and any discussions or negotiations with selected suppliers, the CO makes an award recommendation to the Purchase Team. In determining which proposal presents the best value, the Purchase Team must consider the relative value offered by each supplier in relation to the competition and whether a lower cost proposal is worth the lesser technical value or higher risk. These judgments must be consistent with the relative significance of the evaluation factors and the relationship between cost and other factors described in the solicitation.¹⁵⁶

Unlike other federal agencies, the CO is ultimately responsible for making the source selection decision. While the entire Purchase Team is expected to participate in this process and reach a consensus on the selection decision, if consensus cannot be reached, the CO must ultimately make the best value decision.¹⁵⁷

If a newly awarded contract exceeds \$500,000 and is deemed to have significant subcontracting opportunities, the award is normally published at <http://www.fedbizopps.gov>. All noncompetitive contract awards valued at \$1 million or more must also be publicized.¹⁵⁸ If a contract award exceeds \$5 million, or if deemed to be highly visible or sensitive, one-day advance notice of the anticipated award date is given to various high level postal officials, and this notice may in turn be passed along to members of Congress.¹⁵⁹

Multiyear Procurement

In contrast to the rest of the Federal Government, where agencies rely on annual appropriations, the Postal Service collects its own revenues and receives no funding from Congress (except for revenue foregone and various reimbursements). Thus, Postal Service procurements are not affected by the congressional appropriations process and Postal Service contracts do not contain a “Limitation on Funding” clause.

Socioeconomic Programs

Unlike the rest of the Federal Government, the Postal Service does not set-aside purchases for small businesses or participate in the Small Business Administration’s 8(a) program to award contracts to specified disadvantaged business concerns.¹⁶⁰ The Postal Service does, however, encourage the participation in its purchases of “small, minority, and woman-owned businesses” as prime contractors and subcontractors.¹⁶¹

To this end, the Postal Service participates in various outreach programs, makes available a formal registration process for potential suppliers,¹⁶² staffs a supplier diversity office, and includes a variety of socioeconomic-based provisions in its contracts. Each supplier that has a contract valued in excess of \$500,000 is thus required by contract provision to submit quarterly reports on its subcontracting under that contract. For contracts valued over \$1 million, suppliers must prepare a contract-specific plan for subcontracting, and that plan must be agreed to before contract award.¹⁶³

Intellectual Property

Like other federal agencies, the Postal Service has similar concepts of unlimited rights, limited rights, and restricted rights in data.¹⁶⁴ But unlike other federal agencies, the Postal Service may obtain title—not just unlimited rights—to intellectual property. Reasons for doing so include ensuring the ability to maintain, repair, or modify equipment; recouping development costs; developing or enhancing equipment for Postal Service use; protecting its position in the competitive marketplace; and ensuring competition for spare parts. When seeking title instead of unlimited rights, the Postal Service must give full consideration to the costs and benefits of the chosen approach.¹⁶⁵

The SPP recognizes that suppliers that develop intellectual property at private expense may not wish to part with such rights or would only do so at a substantial cost to the

agency.¹⁶⁶ In this regard, the Postal Service has a special solicitation provision under which suppliers may propose alternate intellectual property rights.¹⁶⁷ Discussions over intellectual property rights can involve the discussion of proprietary information and the Postal Service will agree to keep such information confidential by entering into nondisclosure agreements.¹⁶⁸

Postemployment Restrictions

Unique among federal agencies, the Postal Service has two standard contract terms that impose restrictions and reporting requirements relating to a contractor’s employment of former Postal Service employees. One of these provisions requires a supplier to identify any former Postal Service employee that the supplier proposes to engage, directly or indirectly, in performing the contract. This provision also gives the Postal Service the right to require the supplier to replace the proposed individual with an equally qualified individual.¹⁶⁹ On occasion, this requirement has been waived by the Postal Service upon a supplier’s request and showing that compliance would impose a substantial burden. Not mentioned in the clause itself, but presumably implied by law, the CO must have a reasonable basis to reject a supplier’s proposed use of a former postal employee.

A separate provision also prohibits suppliers from contracting with former high level Postal Service officials (former officers or PCES level officials) as key personnel, experts, or consultants. The prohibition lasts for one year after the former official’s retirement from the Postal Service and only applies if the official would be performing substantially the same duties as they performed during their Postal Service career.¹⁷⁰

It is arguable that these clauses are unenforceable on the grounds that the Postal Service lacks authority to impose postemployment restrictions beyond those that Congress created.¹⁷¹

Disagreements & Protests

Postal Service procurements are not subject to Government Accountability Office (GAO) bid protest jurisdiction.¹⁷² After its creation, the Postal Service had its own internal bid protest adjudication process that roughly approximated GAO’s process. That process was discontinued in 2005 and replaced with a two-step internal “disagreement” process in which the final decision is issued by the SDRO. The disagreement process covers any challenge arising from the Postal Service’s acquisition of property or

services.¹⁷³ Alternatively, protests can be filed in the U.S. Court of Federal Claims.¹⁷⁴ Disagreements generally fall into two categories: (1) those arising from the issuance of a solicitation or prequalification procedure, and (2) those arising from the award, or proposed award, of a contract. A disagreement is commenced by sending a written communication describing the nature of the complaint to the CO in charge of the challenged procurement. Deadlines are tight, so disagreements should be filed as early as possible. For disagreements that concern alleged improprieties in a solicitation, the CO must receive the disagreement before offers are due. For disagreements that concern the award of a contract, the disagreement must be filed within 10 calendar days of the date the supplier received notice of award or 10 calendar days from the date of a debriefing, whichever is later. The CO has 10 calendar days to respond to your disagreement.¹⁷⁵ If your disagreement is filed before the contract has been awarded, award will not be made while the disagreement is pending unless “compelling circumstances so require.”¹⁷⁶

If you are not satisfied with the CO’s response, or you do not receive a response within 10 calendar days, you may then lodge the disagreement with the SDRO.¹⁷⁷ There are two separate deadlines you must meet. First, if you received a response by the CO, you must file your disagreement with the SDRO within 10 calendar days from that response. Second, regardless of whether you receive a CO’s response, your disagreement must also be lodged with the SDRO within 20 calendar days from when you originally filed the disagreement with the CO.¹⁷⁸ If you miss one of these deadlines, the SDRO has the discretion to hear an untimely filing, particularly if there are extenuating circumstances that justify the delay in filing.¹⁷⁹

A disagreement is lodged with the SDRO by sending an email to SDROfficial@usps.gov. Your disagreement should include a copy of the original disagreement to the CO, the CO’s response (if any), the factual circumstances relating to the disagreement, and the remedy sought.¹⁸⁰ Keep in mind that, unlike in a GAO protest, the SDRO is not independent of the Postal Service’s procurement function. The SDRO is appointed by, and reports to, the Postal Service Vice President of Supply Management.¹⁸¹

Once your disagreement is received, the SDRO will provide a copy to the CO, who is to notify other interested parties about it. The SDRO may meet individually with you or any other interested party, including the CO, and may request the submission of additional material. If any mate-

rial you provide contains confidential or proprietary information, you should advise the SDRO so that appropriate redactions are made.¹⁸² While the SDRO will likely request and obtain additional information and material from the CO, this information is typically viewed only by the SDRO and not released to the supplier or any other party. This is quite different from the GAO bid protest process, in which the CO’s report is provided to all parties and any confidential material can be viewed by party representatives under a protective order.¹⁸³

The SDRO is expected to issue a decision resolving the disagreement within 30 days after it is filed, though this period can be shortened or lengthened depending on the circumstances.¹⁸⁴ The regulations state that references to non-Postal Service procurement rules or regulations will not be taken into account.¹⁸⁵ As to what arguments are most likely to be considered, the SDRO “will focus on the best value considerations and business decisions made by the [CO].”¹⁸⁶ Thus, suppliers that file a disagreement should explain why the challenged conduct prevented the Postal Service from arriving at a best value decision. The SDRO has the authority to direct the Postal Service to terminate the contract award and issue a new solicitation, to recompet the requirement, or to reevaluate the current award.¹⁸⁷

While the disagreement process provides a relatively quick and efficient process for challenging a procurement decision, there are substantial drawbacks. Unlike the GAO process, you will not be provided with the CO’s report and neither you nor your attorney will have access to the administrative record. The SDRO is not an attorney, does not engage in an adjudicative fact-finding process, and is not likely to be swayed by legal arguments. The SDRO is also not independent from the procurement function, as the position reports to the Vice President of Supply Management¹⁸⁸ and has other duties within that office. Thus, if your challenge involves a procurement of significant size, requires the resolution of legal issues, or would benefit from viewing the procurement record, you may be better served bringing your protest in federal court.

Protests In Federal Court

Protests challenging a Postal Service procurement action may be brought at the U.S. Court of Federal Claims. Federal courts have long held that they have jurisdiction to review the propriety of Postal Service purchasing decisions and there is no requirement that an offeror first exhaust its administrative remedies by filing a disagreement with the

CO.¹⁸⁹ A court challenge provides you an independent federal judge and an opportunity to obtain documents relating to the protest issues. Court challenges, however, are much more costly to pursue than using the agency's disagreement process.

In a protest brought in federal court, the Postal Service will be required to provide the court and all parties' access to an extensive administrative record of all material related to the procurement. If the record produced by the Postal Service is inadequate, or further explanation is needed, the court may allow supplementation of the record, including and the taking of depositions. To prevail in a protest, the protester must show that the Postal Service's procurement actions were "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." The court will typically afford the Postal Service a wide degree of discretion on issues of technical judgment and will not overturn a procurement decision unless the protester can show it lacked a rational basis or there is a prejudicial violation of regulation or procedure.¹⁹⁰

Contract Administration

Just as the Postal Service solicitation process differs from the procedures normally encountered by contractors, the Postal Service contract administration process is also significantly different. The Postal Service frequently uses economic incentives and disincentives to encourage timely performance and may rely on Uniform Commercial Code principles in administering contracts. In the claims area, Postal Service COs have greater flexibility in negotiating changes and settling claims than found in many other federal agencies.

Similar to other Government contracts, Postal Service contracts require that a variety of clauses be modified and flowed down to subcontractors. But contractors should not rely on forms developed for other federal agency contracts because Postal Service clauses are often different from their FAR counterparts. Contractors also need to ensure that their own subcontract terms and conditions do not conflict with the Postal Service's flowdown requirements.

Authorized COs

The CO who awarded your contract will likely remain the CO on your contract for the duration of the contract. You should accept direction on contract performance only from the CO or authorized Contracting Officer Representatives (CORs). CORs are typically appointed to perform day-

to-day contract administration duties, including inspection and acceptance. The scope of the COR's authority will be described in the "Letter of Appointment" you receive from the CO.¹⁹¹

Importantly, only the CO has authority to make changes to a Postal Service contract, and the Postal Service may not be bound by contractual commitments arising from an employee who does not have contractual authority.¹⁹² In some cases, a course of dealing between the contactor and Postal Service representatives can lead to imputed knowledge by the CO and thus considered authorized action. For example, the widespread and long-time practice of paying a warehouse contractor for supplies used in authorized repackaging activity was imputed to the CO and thus became compensable.¹⁹³ Also, if a postal employee causes you to provide goods or perform services that you would not otherwise have provided, the action can become a binding contractual commitment if ratified by a CO. The Postal Service has special procedures for ratifying such unauthorized contractual commitments.¹⁹⁴

Postal Service contracts typically require the contractor to obtain written authorization from the CO before proceeding with additional work caused by a change or constructive change, but this requirement can be waived by the parties' course of dealing. In one case, the Postal Service's architect instructed the contractor to perform additional work on a project. The Postal Service later objected to paying for the additional work, relying on a contract clause requiring advance written authorization from the CO. The PSBCA rejected the Postal Service's argument, holding that a course of dealing during performance sufficiently established that the requirement for written authorization had been waived.¹⁹⁵

Adequate Assurance Of Performance

When the Postal Service is concerned that you are failing to make satisfactory progress or that some other failure is cause for concern, the CO may issue a written "demand for adequate assurance." You will then have 10 days (or longer, if necessary) to assure the Postal Service of your ability to perform and of the steps you will take to cure any performance failures.¹⁹⁶ Failure to provide adequate assurance is grounds for default termination, so it is important that you timely respond to any such demand. If you provide a reasonable and detailed response in a timely fashion, a default termination can be avoided.

Inspection & Acceptance

The Postal Service employs a variety of different inspection and acceptance clauses based on the nature of the contract.¹⁹⁷ Contractors must be given a notice of rejection promptly, with an explanation for the rejection.¹⁹⁸ If your performance is rejected but is capable of being corrected, you must be given an opportunity to do so if it can be accomplished within the delivery schedule. In such case, the Postal Service may charge you for reinspection costs. If correction is not possible, the Postal Service may provide you with an opportunity to provide a suitable substitute.¹⁹⁹ The CO can accept also your performance if nonconformance is only “minor” or, if non-minor, at a reduced price.²⁰⁰

Acceptance of your goods or services is important because it is usually a prerequisite for payment and it normally starts the running of any warranty period. Acceptance may take place before delivery, at delivery, or after delivery, depending on the contract’s provisions.²⁰¹ The responsibility for acceptance is often delegated to the COR or other representatives.²⁰² Acceptance can be also based upon your certification of compliance if you have an established record of successful past performance and only minimal loss would be sustained in the event of a defect.²⁰³

Normally, acceptance by the Postal Service is conclusive and final. The Postal Service must make payment on performance that it has accepted unless the Postal Service can prove the existence of latent defects, fraud, or gross mistakes amounting to fraud. Thus, claims brought by the Postal Service based on alleged performance failures will generally not succeed if you can show that the Postal Service has accepted your performance.²⁰⁴ The Postal Service may revoke its acceptance (1) if acceptance was based on a reasonable assumption that a nonconformance would be corrected, but it was not corrected, or (2) if a nonconformance could not have been discovered before acceptance because of the difficulty of discovery or the supplier’s assurances.²⁰⁵

Claims

Contractor Claims

While postal reform legislation in 2006²⁰⁶ may have given the Postal Service the ability to opt out of the CDA, the Postal Service had long been subject to the CDA and continues to implement it. Claims and disputes under Postal Service contracts are governed by the same procedures that apply to other federal agencies.²⁰⁷ The Postal Service is unique, however, in being the only federal civilian agency

that still has its own board of contract appeals—the Postal Service Board of Contract Appeals (PSBCA).²⁰⁸

As with other federal agencies, the first step in the disputes resolution process is the contractor’s submission in writing of a claim, in an exact amount, to the CO. In certain cases, you may also bring a claim that seeks a contract interpretation or other nonmonetary relief.²⁰⁹ If your claim exceeds \$100,000, it must be certified by an authorized official within your company. The certification must state that the claim is made in good faith, that the supporting data are accurate and complete to the best of the your knowledge and belief, and that the amount requested accurately reflects the contract adjustment for which you believe the Postal Service is liable. You must also state that you are authorized to certify the claim on behalf of your company.²¹⁰

Within 60 days after you submit a claim, the CO must either issue a final decision on your claim or notify you when a final decision will be issued.²¹¹ If the CO does not provide a final decision within 60 days of receipt, you may deem the claim denied.²¹² You may then appeal the CO’s denial, or deemed denial, of your claim to either the PSBCA (within 90 days after receipt of a final decision) or the U.S. Court of Federal Claims (within one year).²¹³ You may similarly appeal a CO’s final decision that asserts a claim against you.²¹⁴ If you do not appeal a CO’s final decision within these timelines, it will become binding and conclusive on you.²¹⁵ Alternative dispute resolution procedures are available upon mutual consent, but the contractor must first certify its claim, regardless of dollar value.²¹⁶ If your claim is pending at the PSBCA, you and the Postal Service may agree to a settlement at any time.²¹⁷ However, if the case is pending at the U.S. Court of Federal Claims, the Department of Justice will usually take over the case and the Postal Service will no longer have unilateral control over settlement.

In any proceeding on your claim, you will have the burden of proving *both* your right to obtain compensation (“entitlement”) and the amount due (“quantum” or “damages”). While your goal should be to prove quantum with mathematical precision, it is generally sufficient if the evidence produced permits a fair and reasonable approximation of the quantum owed.²¹⁸ Ordinarily, a claim will not be rejected simply because damages cannot be proved precisely. If sufficient evidence exists, the PSBCA can address damages on a “jury verdict” basis, and thereby determine what portion of the contractor’s costs are recoverable.²¹⁹

Postal Service Board Of Contract Appeals

With the consolidation of civilian agency boards of contract appeals into the Civilian Board of Contract Appeals in 2007,²²⁰ the PSBCA is the only remaining board of contract appeals that hears cases limited to a single federal agency.²²¹ Unique among boards of contract appeals, you may appeal a CO's final decision by submitting a notice of appeal to the CO for filing with the board.²²² Alternatively, you may file your appeal directly with the board.²²³

If you appeal to the PSBCA and your claim is less than \$100,000, you may elect to proceed under the board's Accelerated Procedure rules, which provide that a decision will be issued within 180 days after the board's receipt of your claim.²²⁴ If your claim is \$50,000 or less, or if you are a small business and your claim is \$150,000 or less, you may proceed under the PSBCA's Small Claims (Expedited) Procedure. Under these rules, discovery is limited or eliminated and a decision is provided within 120 days after the board's receipt of your claim.²²⁵

In 2015, the PSBCA implemented a new electronic filing system, which can be found at <https://uspsjoe.justware.com>. Registration is required to use the system. All filings must be made using the electronic filing system unless the board permits otherwise.²²⁶

Subcontractor Claims

Because subcontractors lack privity with the Postal Service, they normally are unable to bring suit directly against the Postal Service; instead, claims attributable to actions taken by the Postal Service must pass through the prime contractor. In certain limited circumstances, subcontractors may have direct access against the Postal Service in federal district court. For example, in one case, a subcontractor was permitted to place an equitable lien on a newly built post office on which it had performed work. The subcontractor had first tried to recover payment from the prime contractor, but the prime was in financial difficulty and the surety refused to pay.²²⁷

Tort Claims

Typical tort claims against the Postal Service are governed by the Federal Tort Claims Act (FTCA).²²⁸ Tort claims relating to a contract, however, are generally considered excluded from coverage by the FTCA. The traditional rule is that where the "tort" complained of is based entirely upon the Government's breach of a promise made by it in a contract, such that the claim is in substance a breach of

contract claim, and only incidentally and conceptually also a tort claim, it does not come within the ambit of the FTCA.²²⁹

There may be greater ability to bring a tort claim against the Postal Service than other federal agencies. A federal appeals court has held that the FTCA provides an exclusive remedy against the Postal Service only for torts to which the FTCA applies.²³⁰ The FTCA would thus not preclude a common-law tort action against the Postal Service for torts that are not specifically covered by the FTCA. If this line of reasoning is followed by other federal appellate courts, it could open the Postal Service to many types of tort claims that could not be brought against other federal agencies.

Recovery Of Attorney Fees

If you prevail in litigation with the Postal Service, you may be able to recover a portion of your attorney fees and expenses under the Equal Access to Justice Act (EAJA).²³¹ To be eligible to recover under EAJA, the net worth of your business (measured when the litigation began) must be no more than \$7 million, and you must have no more than 500 employees. For individuals, the net worth limit is \$2 million. If you meet these eligibility requirements, you are a "prevailing party" in the litigation, and the Postal Service's position was not "substantially justified," then you are entitled to recover your attorney fees and expenses, within certain rate ceilings and limits.²³² When a contractor prevails on some issues, but not others, the contractor is still eligible to recover attorney fees attributable to work on the prevailing issues. The PSBCA will award attorney fees on the portion of the action where the contractor prevailed.²³³

Currently, in cases brought before the PSBCA, contractors may recover attorney fees for work related to up to a rate of \$125 per hour;²³⁴ the allowable rate is slightly higher for claims litigated at the U.S. Court of Federal Claims, which applies a cost-of-living adjustment.²³⁵ In addition to recovery of attorney fees, the EAJA affords recovery of various expenses incurred in the litigation, including paralegal fees, expert witness fees, and various other expenses.²³⁶

Contractors can recover attorney fees at market rate when litigating in federal court if the agency acted in bad faith during the course of the litigation.²³⁷ One such case involved a mail delivery contract in which the sole proprietor's access to the mail had been rescinded because of security concerns. After the case was filed, the agency offered to restore the contractor's access to the mail if she agreed to waive her right to recover attorney fees. The court held that

such tactic was bad faith conduct, because the moment the Postal Service determined that her access to the mail should be restored it was no longer justified in contesting the case. The court thus awarded attorney fees at the market rate for all attorney work performed after the agency had made this offer.²³⁸

Guidelines

These *Guidelines* are intended to assist you in understanding the differences between contracting with the Postal Service and other federal agencies. They are not, however, a substitute for professional representation in any specific situation.

1. While the Postal Service is a federal agency, it was created by Congress to operate in a *business-like* manner. Postal officials often try to emulate private sector operations and behaviors, and many have corporate-type titles, so do not treat the agency like just another Government agency.
2. When referring to the Postal Service, do *not* call it the “Post Office.” The term “Post Office” means an individual post office, not the organization as a whole.
3. Not all Postal Service procurement opportunities are posted on FedBizOpps.gov, so make sure you are on the agency’s radar screen. If you see a notice describing a Postal Service purchase opportunity that may be available in the future, *reply immediately* no matter how tentative the notice appears. Once a “sources sought” notice is publicized, the Postal Service need not publicize the purchase opportunity later, such as upon issuance of a solicitation.
4. When the Postal Service acquires goods or services that incorporate *intellectual property*, it may seek to acquire *title* to intellectual property, not just unlimited rights. If you will be developing intellectual property under a Postal Service contract, and that intellectual property also has commercial applications, you may wish to seek an alternative arrangement in which you retain such rights. COs have the *discretion* to take less than title if they believe it is in the best interests of the Postal Service to do so.
5. Protests are called *disagreements* and the Postal Service has a special internal process for considering them. Act *quickly* to preserve your rights to file a disagreement if you have concerns over how a procurement is being conducted, as strict timeframes apply. If your challenge to a procurement action would benefit from an independent decision-maker or access to agency records, your better option may be filing a protest at the U.S. Court of Federal Claims.
6. If you do file a disagreement with the Postal Service, explain how the issue will prevent the Postal Service from obtaining the best proposals and making a best value award decision. The Postal Service can be receptive to concerns that its procurements are inconsistent with *commercial buying practices* and *supply chain management principles*.
7. Do *not* assume that the postal representative who is administering your contract, inspecting your products, or auditing your records has any *contracting authority*—or is even a postal employee. If you have not already received one, ask for a *letter* setting out the *delegation of authority* for the various postal representatives with whom you will be dealing.
8. Place the legend “Privileged Business Information—Do Not Release” on each page of your business correspondence containing *confidential information*. If you do, the Postal Service must *notify* you of any requests it receives for disclosure of such information and provide you with an opportunity to explain why it should not be released.
9. Do not assume that the *standard terms and conditions* that appear in a Postal Service solicitation or contract are the same as those that appear in other federal agency contracts. In addition to having its own purchasing rules, the Postal Service has its own solicitation provisions and contract clauses. Some of these terms are negotiable.
10. Bedrock rules such as the *Cost Accounting Standards* and the *Federal Acquisition Regulation* do not apply to the Postal Service, but outside parties—including other Government agencies investigating or auditing postal contracts—are often not aware of this. You may need to educate these entities on the different standards applied by the Postal Service.
11. If you receive a letter from the Postal Service requesting *adequate assurance of performance*, make sure that your reply is timely and fully responsive. Failure to provide adequate assurance is grounds to *terminate your contract for default*.
12. While the *USPS Supplying Principles and Practices* (SPP) manual reads like a regulation, it was not issued as a regulation. Therefore, aside from any portions of the SPP that have been incorporated into your contract, these rules do not have the force and effect of law on you. But because the SPP is the Postal Service’s final written statement of its purchasing policies, the SPP likely does bind the agency.

ENDNOTES:

¹According to the USPS Supply Management Statistical Summary Report for Fiscal Year 2015, USPS spent a total of \$12.5 billion on outside purchases in the following categories: \$6.5 billion on Transportation; \$1.7 billion on Mail & Operational Equipment; \$1.5 billion on Technology Infrastructure; \$1.4 billion on Facilities; and \$1.2 billion on Commercial Products & Services (subtotals do not equal total due to rounding).

²The Supplying Principles and Practices (SPP) manual is available online at <http://about.usps.com/manuals/spp/html/welcome.htm>. As of the date of this Briefing Paper, the most current version is dated August 7, 2015. All SPP cites in this Briefing Paper are to that version.

³U.S. Const. art. I, § 8, cl. 7.

⁴39 U.S.C.A. § 101(a).

⁵USPS Publication 100, *The United States Postal Service, An American History 1775–2006* (Nov. 2012), <https://about.usps.com/publications/pub100/welcome.htm>.

⁶Pub. L. No. 91-375, 84 Stat. 719 (1970) (codified as amended at 39 U.S.C.A. § 101 et. seq.)

⁷Pub. L. No. 91-375, § 15(a), 84 Stat. 719, 787 (1970); Postal Service Board of Governors Resolution No. 71-9.

⁸See *Fed. Express Corp. v. U.S. Postal Serv.*, 959 F. Supp. 832 (W.D. Tenn. 1997).

⁹39 U.S.C.A. § 101(a).

¹⁰39 U.S.C.A. §§ 202 and 203. Under a draft bill released by the House Committee on Oversight and Government Reform in June 2016, this could change. The Postmaster General and Deputy Postmaster General would be appointed by the President, with the advice and consent of the Senate, and serve for 4 years. Text of the draft bill is at: <https://oversight.house.gov/wp-content/uploads/2016/06/Discussion-Draft-Postal-Service-Reform-Act.pdf>.

¹¹39 U.S.C.A. § 202(a).

¹²39 U.S.C.A. § 202(c), (d).

¹³39 C.F.R. § 3.3.

¹⁴39 U.S.C.A. § 410(b)(1) (providing that 5 U.S.C.A. § 552b (open meetings) applies to the Postal Service).

¹⁵See 39 C.F.R. pts 6, 7.

¹⁶39 C.F.R. § 601.104.

¹⁷USPS Handbook AS-709, *Local Buying and Purchase Card Policies and Procedures*, Exhibit 1-3, “Local Buying Authority” (Jan. 2014).

¹⁸39 C.F.R. § 221.4.

¹⁹39 U.S.C.A. § 2009a.

²⁰Committees include the House Committee on Oversight and Government Reform, House Subcommittee on Government Operations, and the Senate Committee on Homeland Security and Governmental Affairs.

²¹39 U.S.C.A. § 401(1).

²²39 U.S.C.A. ch. 36.

²³See 39 U.S.C.A. § 410(a).

²⁴GAO, *GAO-06-190, U.S. Postal Service: Purchasing Changes Seem Promising, But Ombudsman Revisions and Continued Oversight Are Needed 6–8* (Dec. 15, 2005).

²⁵USPS Publication No. 41 (incorporated by reference at 39 C.F.R. § 601.100 (1988)) (archived version available at <http://about.usps.com/publications/pub41/pub41toc.htm>).

²⁶Hendel & Hurlbut, “Contracting With the U.S. Postal Service,” Briefing Papers No. 93-9 (Aug. 1993).

²⁷U.S. Postal Service Purchasing Manual (Issue 1, Jan. 31, 1997), available at <http://about.usps.com/manuals/pm/html/welcome.htm>.

²⁸Hendel & Hurlbut, “Contracting With the U.S. Postal Service/Edition II,” Briefing Papers No. 02-9 (Aug. 2002).

²⁹U.S. Postal Service Purchasing Manual (Issue 2, Jan. 31, 2002) (incorporated by reference at 39 C.F.R. pt. 601 (2002), available at <http://about.usps.com/manuals/pm2/html/welcome.htm>).

³⁰As of the date of this Briefing Paper, the most current version of the SPP was issued on August 7, 2015, and is available online at <https://about.usps.com/manuals/spp/spp.pdf>.

³¹*Asia Pac. Airlines, Inc. v. United States*, 68 Fed. Cl. 8, 21 n.13 (2005).

³²See 39 C.F.R. pt. 601.

³³See *Asia Pac. Airlines*, 68 Fed. Cl. at 21–22; *DeMatteo Constr. Co. v. United States*, 220 Ct. Cl. 579, 591, 600 F.2d 1384, 1391 (1979); *Modern Sys. Tech. Corp. v. United States*, 24 Cl. Ct. 360, 362 (1991).

³⁴See *Tromel Constr. Corp.*, PSBCA No. 6303, 13 BCA ¶ 35,346 (since the SPP and other postal handbooks were not issued as regulations, USPS cannot impose definitions from those manuals into contract).

³⁵SPP at 1.

³⁶See Hendel, “Misaddressed Reform: The U.S. Postal Service’s New Procurement Guidelines,” 21 No. 1 Wash. Legal Foundation Legal Backgrounder 1 (Jan. 13, 2006).

³⁷USPS Supply Management Organization Chart (Oct. 31, 2015).

³⁸See 39 U.S.C.A. § 410; SPP § 7-7.1.

³⁹41 U.S.C.A. §§ 7101–7109.

⁴⁰41 U.S.C.A. § 7105.

⁴¹U.S.C.A. § 552; 39 C.F.R. pt. 265. See generally Meagher & Bareis, “The Freedom of Information Act,” Briefing Papers No. 10-12 (Nov. 2010).

⁴²The Postal Service’s website has its own FOIA section at <https://about.usps.com/who-we-are/foia/welcome.htm>.

⁴³39 C.F.R. § 265.7(b).

⁴⁴39 C.F.R. § 265.6(b)(2), (3).

⁴⁵39 U.S.C.A. § 410(c)(2).

⁴⁶*Wickwire Gavin v. U.S. Postal Service*, 356 F.3d 588 (4th Cir. 2004).

⁴⁷Nat'l W. Life Ins. Co. v. United States, 512 F. Supp. 454 (N.D. Tex. 1980); see also Carlson v. U.S. Postal Serv., 504 F.3d 1123 (9th Cir. 2007).

⁴⁸Piper & Marbury, LLP v. U.S. Postal Serv., No. 99-2383, 2001 WL 214217 (D.D.C. Mar. 6, 2001).

⁴⁹39 C.F.R. § 265.8.

⁵⁰41 U.S.C.A. §§ 6701–6707. See generally Donohue & Goddard, “Complying With the Service Contract Act,” Briefing Papers No. 01-9 (Aug. 2001).

⁵¹40 U.S.C.A. §§ 3141–3148.

⁵²41 U.S.C.A. §§ 6501–6511.

⁵³SPP § 7-7.1.1.2.b.

⁵⁴40 U.S.C.A. §§ 3131–3134.

⁵⁵40 U.S.C.A. § 3131.

⁵⁶31 U.S.C.A. §§ 3901–3907.

⁵⁷31 U.S.C.A. §§ 3901–3907; see SPP § 5-12.5.

⁵⁸<https://www.uspsaig.gov/investigations/major-fraud-investigations-division>.

⁵⁹39 U.S.C.A. § 410(b); 31 U.S.C.A. § 3801(a)(1)(D).

⁶⁰31 U.S.C.A. §§ 3729–3733.

⁶¹See 39 U.S.C.A. § 410(b).

⁶²39 U.S.C.A. § 410(a).

⁶³41 U.S.C.A. § 6305.

⁶⁴31 U.S.C.A. § 1341.

⁶⁵See Spodek v. United States, 46 Fed. Cl. 819 (2000); U.S. Postal Serv. Office of Inspector Gen.—Implementation of Postal Accountability and Enhancement Act Section 603, Part 1, Comp. Gen. Dec. B-317022, 2008 WL 4444085 (Sept. 25, 2008).

⁶⁶18 U.S.C.A. § 1700 et seq.

⁶⁷5 C.F.R. pt. 2635; see 5 C.F.R. pt. 7001 (Postal Service supplemental standards).

⁶⁸See 5 C.F.R. § 2635.102(a).

⁶⁹5 C.F.R. § 2635.202.

⁷⁰5 C.F.R. § 2635.203(d).

⁷¹5 C.F.R. § 2635.204(a).

⁷²5 C.F.R. §§ 2635.601–2635.606.

⁷³10 U.S.C.A. § 2302 et seq.; 41 U.S.C.A. § 3301 et seq.

⁷⁴10 U.S.C.A. § 2304(a)(1); 41 U.S.C.A. § 3301(a).

⁷⁵10 U.S.C.A. § 2304; 41 U.S.C.A. § 3304.

⁷⁶10 U.S.C.A. § 2305(a)(1)(A)(ii); 41 U.S.C.A. § 3306(a)(1)(B).

⁷⁷10 U.S.C.A. § 2304(f)(4)(A); 41 U.S.C.A. § 3304(e)(5)(A)(i).

⁷⁸39 U.S.C.A. § 410(b).

⁷⁹48 C.F.R. ch. 1.

⁸⁰See FAR subpt. 1.4.

⁸¹See On Time Postal Servs., Inc., PSBCA No. 2528, 90-3 BCA ¶ 23,113.

⁸²48 C.F.R. ch. 99.

⁸³SPP § 7-7.

⁸⁴5 U.S.C.A. § 551 et seq.

⁸⁵Carlin v. McKean, 823 F.2d 620, 622 (D.C. Cir. 1987), cert. denied, 484 U.S. 1046 (1987) (court had no power to review propriety of dismissal of former Postmaster General).

⁸⁶See Village of Palatine v. U.S. Postal Serv., 742 F. Supp. 1377 (N.D. Ill. 1990); see also Carter Chevrolet Agency, Inc. v. U.S. Postal Serv., 19 F. Supp. 2d 1246 (W.D. Okla. 1997) (when the Postal Service enacts its own rules and regulations, APA review in the federal courts is available to ensure that Postal Service does follow them). But see Pitney Bowes Inc. v. U.S. Postal Serv., 27 F. Supp. 2d 15, 20 (D.D.C. 1998) (congressional intent to remove the power of judicial review over the Postal Service regulations).

⁸⁷10 U.S.C.A. § 2306a; 41 U.S.C.A. §§ 3501–3509; see FAR 15.403-4.

⁸⁸10 U.S.C.A. § 2306a(a)(2), (e); 41 U.S.C.A. §§ 3502(b), 3506.

⁸⁹SPP ch. 10, Clause 5-1.

⁹⁰SPP § 2-34.14.

⁹¹SPP § 2-34.13.

⁹²15 U.S.C.A. § 631 et seq. See generally Hewitt, “Small Business Contracting Programs: An Update,” Briefing Papers No. 12-8 (July 2012); Hewitt, Williams & Alba, “Small Business Contracting Programs—Part II,” Briefing Papers No. 10-13 (Dec. 2010); Hewitt, Williams & Alba, “Small Business Contracting Programs—Part I,” Briefing Papers No. 10-11 (Oct. 2010);

⁹³SPP § 2-39.

⁹⁴41 U.S.C.A. § 101 et seq.

⁹⁵41 U.S.C.A. §§ 2101–2107. See generally Briggerman & Bateman, “Handling Procurement Information,” Briefing Papers No. 05-9 (Aug. 2005); Goddard, “Business Ethics in Government Contracting—Part II,” Briefing Papers No. 03-7 (June 2003); Goddard, “Business Ethics in Government Contracting—Part I,” Briefing Papers No. 03-6 (May 2003); Irwin, “Ethics in Government Procurement/Edition III,” Briefing Papers No. 99-8 (July 1999).

⁹⁶See FAR 3.104.

⁹⁷41 U.S.C.A. §§ 8301–8305.

⁹⁸SPP § 2-36.

⁹⁹41 U.S.C.A. § 8101–8106.

¹⁰⁰41 U.S.C.A. § 6305; 31 U.S.C.A. § 3727.

¹⁰¹See Spodek v. United States, 46 Fed. Cl. 819 (2000).

¹⁰²SPP § 5-8.15 & ch. 10, Clause 4-1, “General Terms and Conditions,” ¶ b.

¹⁰³See Spodek, 46 Fed. Cl. 819.

¹⁰⁴39 C.F.R. § 601.102.

¹⁰⁵See 39 C.F.R. pt. 601.

¹⁰⁶39 C.F.R. § 601.105(a).

- ¹⁰⁷39 C.F.R. § 601.105(d); see 39 C.F.R. § 601.108.
- ¹⁰⁸See *Old Dominion Dairy Prods., Inc. v. Sec’y of Defense*, 631 F.2d 953, 961 (D.C. Cir 1980).
- ¹⁰⁹See <http://about.usps.com/manuals/spp/html/welcome.htm>.
- ¹¹⁰SPP at iii, 3–11.
- ¹¹¹SPP at 5.
- ¹¹²SPP at 9, “Leveraging Spend.”
- ¹¹³SPP at 9.
- ¹¹⁴SPP at 10.
- ¹¹⁵SPP at 10.
- ¹¹⁶SPP at 13–444.
- ¹¹⁷SPP at 445–678.
- ¹¹⁸See FAR pts. 14, 15.
- ¹¹⁹SPP § 2-2.
- ¹²⁰SPP § 2-28.
- ¹²¹See FAR pt. 6.
- ¹²²SPP § 2-10.2.
- ¹²³SPP at 5.
- ¹²⁴U.S. Postal Service Competition Report Fiscal Year 2015, at 4, available at <https://about.usps.com/suppliers/competition-advocate.htm>.
- ¹²⁵SPP § 2-10.3.2.
- ¹²⁶SPP § 2-10.3.3.
- ¹²⁷USPS Management Instruction SP-S2-2015-1, “Non-competitive Purchases” (Aug. 7, 2015), available at http://about.usps.com/publications/fy2014compreport/html/2014compreport__appe.htm (Appendix E).
- ¹²⁸USPS Management Instruction SP-S2-2015-1, “Non-competitive Purchases” (Aug. 7, 2015), available at http://about.usps.com/publications/fy2014compreport/html/2014compreport__appe.htm (Appendix E).
- ¹²⁹SPP §§ 2-10.3.4 to 2-10.3.6.
- ¹³⁰See U.S. Postal Service Competition Report Fiscal Year 2015, available at <https://about.usps.com/suppliers/competition-advocate.htm>.
- ¹³¹SPP § 2-27.1.
- ¹³²SPP § 2-10.3.8.
- ¹³³SPP § 2-27.5.
- ¹³⁴SPP § 2-22.
- ¹³⁵SPP § 2-22.
- ¹³⁶SPP § 2-27.1.
- ¹³⁷SPP § 2-22.
- ¹³⁸SPP § 2-22.2.
- ¹³⁹SPP § 2-22.3.
- ¹⁴⁰SPP § 2-22.4.
- ¹⁴¹SPP § 2-22.5.
- ¹⁴²SPP §§ 2-26.8.2, 2-43.5.2.
- ¹⁴³SPP § 2-26.3.1
- ¹⁴⁴SPP § 2-26.2.
- ¹⁴⁵SPP § 2-31.3.
- ¹⁴⁶SPP § 2-30.2.
- ¹⁴⁷SPP § 2-37.1.
- ¹⁴⁸Compare SPP § 2-37.1 and FAR 15.306.
- ¹⁴⁹SPP at 6, 9.
- ¹⁵⁰SPP § 2-37.1.
- ¹⁵¹SPP § 2-30.1.
- ¹⁵²SPP § 2-38.1.
- ¹⁵³SPP § 2-38.1.
- ¹⁵⁴SPP at 5.
- ¹⁵⁵SPP § 1-14.4.
- ¹⁵⁶SPP § 2-40.2.1.
- ¹⁵⁷SPP § 2-40.1.
- ¹⁵⁸SPP § 3-2.2.
- ¹⁵⁹SPP § 3-2.1.
- ¹⁶⁰See FAR pt. 19.
- ¹⁶¹SPP at 10 & § 2-39.
- ¹⁶²<https://uspsourcing.emptoris.com/sso/jsp/login.jsp>.
- ¹⁶³SPP § 2-39.
- ¹⁶⁴SPP § 2-14.2.
- ¹⁶⁵SPP § 2-14.1.
- ¹⁶⁶SPP § 2-14.1.
- ¹⁶⁷SPP ch. 9, Provision 8-1, “Alternate Intellectual Property Rights Proposals (March 2006).”
- ¹⁶⁸SPP § 2-14.13.
- ¹⁶⁹SPP § 7-12.3, ch. 9, Provision 1-5, “Proposed Use of Former Postal Service Employees (March 2006),” ch. 10, Clause 1-12, “Use of Former Postal Service Employees (March 2016).”
- ¹⁷⁰SPP § 7-12.2, ch. 9, Provision 1-4, “Prohibition Against Contracting With Former Postal Service Officers or PCES Executives (March 2006),” ch. 10, Clause 1-11, “Prohibition Against Contracting With Former Postal Service Officers or PCES Executives (March 2006).”
- ¹⁷¹See 18 U.S.C.A. § 207; 5 C.F.R. pt. 2641.
- ¹⁷²*Falcon Sys., Inc., Comp. Gen. Dec. B-222549*, 65 Comp. Gen. 584, 86-1 CPD ¶ 462, *aff’d on recons.*, Comp. Gen. Dec. B-222549.2, 86-1 CPD ¶ 526 (GAO does not have jurisdiction to hear USPS protests under CICA).
- ¹⁷³39 C.F.R. § 601.107.
- ¹⁷⁴See, e.g., *Banknote Corp. of Am. v. United States*, 365 F.3d 1345 (Fed. Cir. 2004); *Asia Pac. Airlines v. United States*, 68 Fed. Cl. 8 (2005),
- ¹⁷⁵39 C.F.R. § 601.107(b).
- ¹⁷⁶SPP § 7-4.4.
- ¹⁷⁷29 C.F.R. § 601.108(a).

- ¹⁷⁸29 C.F.R. § 601.108(d).
- ¹⁷⁹Phelan & Sons Co., Case No. SDR08SR-04 (Mar. 4, 2008), available at <https://about.usps.com/suppliers/disagreement-decisions/welcome.htm>.
- ¹⁸⁰29 C.F.R. § 601.108(c).
- ¹⁸¹SPP § 7-4.1.
- ¹⁸²29 C.F.R. § 601.108(e).
- ¹⁸³See 4 C.F.R. pt. 21.
- ¹⁸⁴39 C.F.R. § 601.108(i).
- ¹⁸⁵39 C.F.R. § 601.108(f).
- ¹⁸⁶70 Fed. Reg. 20291, 20292 (Apr. 19, 2005); SPP § 7-4.3.
- ¹⁸⁷39 C.F.R. § 601.108(g).
- ¹⁸⁸SPP § 7-4.1.
- ¹⁸⁹See *Emery Worldwide Airlines, Inc. v. United States*, 49 Fed. Cl. 211, *aff'd*, 264 F.3d 1071 (Fed Cir. 2001); *Banknote Corp. of Am. v. United States*, 365 F.3d 1345 (Fed. Cir. 2004); *Asia Pac. Airlines v. United States*, 68 Fed. Cl. 8 (2005).
- ¹⁹⁰*Asia Pac. Airlines v. United States*, 68 Fed. Cl. 8, 17–20 (2005).
- ¹⁹¹SPP § 3-5.
- ¹⁹²See *SAE Americon*, PSBCA No. 3866, 00-1 BCA ¶ 30,867; *Richard A. Ferrara*, PSBCA No. 4286 et al., 00-1 BCA ¶ 30,847.
- ¹⁹³*Overflo Public Warehouse, Inc.* PSBCA No. 4531 et al., 04-1 BCA ¶ 32,488
- ¹⁹⁴SPP § 7-5.1 & USPS Management Instruction AS-710-1992-2, “Unauthorized Contractual Commitments” (Feb. 8, 1999).
- ¹⁹⁵*City Window & Constr. Co.*, PSBCA No. 4563, 02-1 BCA ¶ 31,706.
- ¹⁹⁶SPP § 5-13.2.3.
- ¹⁹⁷SPP ch. 10, Clause 2-1, “Inspection and Acceptance (March 2006); Clause 4-1, “General Terms and Conditions (July 2007), ¶ a; Clause 4-5, “Inspection of Professional Services (March 2006)””; Clause 4-9, “Inspection and Acceptance—Systems (March 2006).”
- ¹⁹⁸SPP § 4-4.7.
- ¹⁹⁹SPP § 4-4.8.
- ²⁰⁰SPP §§ 4-4.9, 4-4.10.
- ²⁰¹SPP § 4-4.
- ²⁰²SPP 4-4.1.
- ²⁰³SPP § 4-4.2.
- ²⁰⁴*D.L. Kaufman, Inc.*, PSBCA No. 4159 et al., 00-1 BCA ¶ 30,846.
- ²⁰⁵SPP § 4-4.3.
- ²⁰⁶See *Postal Accountability and Enhancement Act of 2006*, Pub. L. No. 109-435, 120 Stat. 3198 (2006).
- ²⁰⁷*Anselma Crossing, L.P. v. United States*, 637 F.3d 238, 244–46 (3d Cir. 2011); 39 C.F.R. § 601.109(a).
- ²⁰⁸See 41 U.S.C.A. § 7105(d); 39 C.F.R. pt. 955.
- ²⁰⁹*Emery Worldwide Airlines, Inc. v. United States*, 47 Fed. Cl. 461, 468 (2000).
- ²¹⁰SPP ch. 10, Clause B-9, “Claims and Disputes (March 2006),” ¶ d; 41 U.S.C.A. § 7103(b); 39 C.F.R. § 601.109(e).
- ²¹¹41 U.S.C.A. § 7103(f)(1), (2); 39 C.F.R. § 601.109(g)(5), (6).
- ²¹²41 U.S.C.A. § 7103(f)(5); 39 C.F.R. § 601.109(g)(5), (6).
- ²¹³41 U.S.C.A. § 7104; 39 C.F.R. § 601.109(g)(7).
- ²¹⁴41 U.S.C.A. § 7104; 39 C.F.R. § 601.109(g)(7).
- ²¹⁵41 U.S.C.A. § 7103(g).
- ²¹⁶41 U.S.C.A. § 7103(h); SPP ch. 10, Clause B-9, “Claims and Disputes (March 2006),” ¶ g.
- ²¹⁷39 C.F.R. § 601.109(g)(10).
- ²¹⁸See *Richard R. Wilson*, PSBCA No.4104, 99-1 BCA ¶ 30,212 (citing *West Coast Builders*, PSBCA No. 3378, 93-3 BCA ¶ 26,195; *Specialty Assembling & Packing Co. v. United States*, 174 Ct. Cl. 153, 184, 355 F.2d 554, 572–73 (1966); *Kings Elecs. Co. v. United States*, 169 Ct. Cl. 433, 444, 341 F.2d 632, 639 (1965)).
- ²¹⁹See *Barsh Co.*, PSBCA No. 4481, 00-2 BCA ¶ 30,917.
- ²²⁰See generally *Schaengold & Brams*, “A Guide to the Civilian Board of Contract Appeals,” Briefing Papers No. 07-8 (July 2007).
- ²²¹See 41 U.S.C.A. § 7105(d); 39 C.F.R. pt. 955.
- ²²²39 C.F.R. § 955.4.
- ²²³39 C.F.R. § 955.2.
- ²²⁴39 C.F.R. § 955.13(b).
- ²²⁵39 C.F.R. § 955.13(a).
- ²²⁶39 C.F.R. § 955.1(c)(4).
- ²²⁷*Wright v. United States*, 29 F.3d 1426 (9th Cir. 1994).
- ²²⁸See 28 U.S.C.A. §§ 1346(b), 2401–2402, 2671–2680.
- ²²⁹*Woodbury v. United States*, 313 F.2d 291, 295–96 (9th Cir. 1963). But see *Love v. United States*, 944 F.2d 632, 636 (9th Cir. 1991).
- ²³⁰*United States v. Q Int’l Courier, Inc.*, 131 F.3d 770 (8th Cir. 1997); see also *Fed. Express v. U.S. Postal Serv.*, 959 F. Supp. 832 (W.D. Tenn. 1997) (allowed Federal Express to bring suit against Postal Service under the Lanham Act for claims of false advertising).
- ²³¹5 U.S.C.A. § 504; 28 U.S.C.A. § 2412. See generally *Whalen*, “Equal Access to Justice Act: Recent Developments,” Briefing Papers No. 02-5 (Apr. 2002). See also 39 C.F.R. pt. 960.
- ²³²5 U.S.C.A. § 504; 28 U.S.C.A. § 2412.
- ²³³*JM Carranza Trucking Co.*, PSBCA No. 6354 et al., 15-1 BCA ¶ 35,994.
- ²³⁴39 C.F.R. §§ 960.6, 960.7.

²³⁵28 U.S.C.A. § 2412.

²³⁶5 U.S.C.A. § 504; 28 U.S.C.A. § 2412; see Karcher
Envtl., Inc., PSBCA No. 4085 et al., 02-1 BCA ¶ 31,787.

²³⁷28 U.S.C.A. § 2412(b).

²³⁸Joyce v. Potter, No. 5:06-cv-339-Oc-10GRJ, 2007
WL 2050955 (July 16, 2007 M.D. Fla.).

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BRIEFING PAPERS