

SUBJECT: Commerce Business Daily Internet Postings

PURPOSE: To discuss the legal effect of posting notices on the Commerce Business Daily internet site.

The Commerce Business Daily (CBD) provides an internet site for posting of notices required by the Federal Acquisition Regulation (FAR)--CBDNet. Most of our procurement offices post CBD notices electronically because it is quicker and cheaper. The CBD also sends a reply message to the submitter acknowledging that the notice was accepted on a specific day and time. Our contracting officers have routinely filed the CBD acceptance notice in the contract file and used it as evidence of publication in the CBD.

In a sole source procurement, this is very helpful because publication in the CBD starts the clock running on Note 22 -a mandatory notice affording potential offerors 45 days in which to submit proposals for the Government's review.

The General Accounting Office (GAO) will not hear a protest unless the protestor has submitted a proposal to the Government within 45 days and received a negative response. This prerequisite for filing allows the Government the opportunity to reconsider its sole-source decision in light of a serious offeror's preliminary proposal, while limiting challenges to the sole-source decision to diligent potential offerors.

The contracting officer does not receive confirmation of the hard copy publication of the CBD notice. The CBD internet site advises that CBD electronic postings appear in the hard copy publication of the CBD in approximately 2 business days after the post date. FAR 5.203(g) advises contracting officers to presume that the CBD notice has been published in the hard copy 6 days following electronic submission to the CBD, unless there exists evidence to the contrary.

Which publication of the CBD notice is the official notice? Which publication date governs for the application of our regulatory requirements?

The Court of Federal Claims, in *FNMI v. U.S.*, No. 98-447C, 30 Jun 98, held that the hard copy publication date is the official date by which to measure all of our regulatory time requirements.

The court reviewed 41 U.S.C. 416, which imposes the publication requirement in the CBD, and determined that "publication" could only mean publication in the printed version of the CBD and not through its electronic equivalents.

The court's view was bolstered by the Commerce Department's interpretation that "publication" requires publication in the printed version of CBD. The Commerce Department does not believe that one hundred percent of federal contracting offices have access to electronic means of submitting notices, nor do one hundred percent of potential offerors, especially small businesses, have access to electronic means.

In light of the court's holding, the Commerce Department has clarified its instructions to Government personnel on its internet site by stating that:

Notices appearing in CBDNet do not satisfy the requirement of FAR Part 5 until they appear in the printed CBD.

BOTTOM LINE:

Although cumbersome, contracting officers may not rely on the acceptance notice from CBDNet as the official publication date. In procurement actions dependent upon the official publication date, the contracting officer may either search the printed versions of the CBD for the notice or presume that the notice was published 6 days after electronic submission.

The best source of information is to search for the CBDNet posting after a few days. It will provide the electronic posting date and the printed issue date.

The court's holding does not affect electronic commerce in any other manner.

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