

DEPARTMENT OF DEFENSE**GENERAL SERVICES
ADMINISTRATION****NATIONAL AERONAUTICS AND
SPACE ADMINISTRATION****48 CFR Parts 4, 12, 13, 23, and 52**

[FAC 2005–25; FAR Case 2005–039; Item IV; Docket 2007–0001; Sequence 2]

RIN 9000–AK69

Federal Acquisition Regulation; FAR Case 2005–039, Use of Products Containing Recovered Materials in Service and Construction Contracts

AGENCIES: Department of Defense (DoD), General Services Administration (GSA), and National Aeronautics and Space Administration (NASA).

ACTION: Final rule.

SUMMARY: The Civilian Agency Acquisition Council and the Defense Acquisition Regulations Council (Councils) have agreed on a final rule amending the Federal Acquisition Regulation (FAR) to clarify language within the FAR on the use of products containing recovered materials, pursuant to the Resource Conservation and Recovery Act of 1976, and Executive Order 13101 “Greening the Government Through Waste Prevention, Recycling, and Federal Acquisition.”

DATES: *Effective Date:* May 22, 2008.

FOR FURTHER INFORMATION CONTACT: Mr. William Clark, Procurement Analyst, at (202) 219–1813 for clarification of content. For information pertaining to status or publication schedules, contact the FAR Secretariat at (202) 501–4755. Please cite FAC 2005–25, FAR case 2005–039.

SUPPLEMENTARY INFORMATION:**A. Background**

DoD, GSA, and NASA published a proposed rule in the **Federal Register** at 72 FR 24554, May 3, 2007, to clarify language within the FAR regarding the use of products containing recovered materials, pursuant to the Resource Conservation and Recovery Act of 1976, and Executive Order 13101 “Greening the Government Through Waste Prevention, Recycling, and Federal Acquisition.” This rule revises Subpart 23.4 and associated provisions and clauses in Part 52, with conforming changes in FAR Parts 4, 12, and 13, to—

(1) Provide for consistency when referring to products containing recovered materials;

(2) Clarify that the requirement for products containing recovered materials

applies (a) when agencies require the delivery or specify the use of Environmental Protection Agency (EPA)-designated items, and (b) when agencies award contracts for services or construction unless the service or construction contract will not involve the use of such items;

(3) Prescribe a new clause for use in service and construction contracts when appropriate; and

(4) Revise the Recovered Material Certification provision to reflect the changes of this rule.

No comments were received for the proposed rule.

Note: Since the publication of the proposed rule, the FAR has already been amended to include a number of the changes proposed under this rule (see FAR Case 2004–032, Biobased Products Preference Program, (72 FR 63040, November 7, 2007)).

This is not a significant regulatory action and, therefore, was not subject to review under Section 6(b) of Executive Order 12866, Regulatory Planning and Review, dated September 30, 1993. This rule is not a major rule under 5 U.S.C. 804.

B. Regulatory Flexibility Act

The Regulatory Flexibility Act, 5 U.S.C. 601, *et seq.*, applies to this final rule. Small business concerns and other interested parties were invited to submit comments concerning the affected FAR Parts. No comments were received. The Councils prepared a Final Regulatory Flexibility Analysis (FRFA), and it is summarized as follows:

This final rule amends and clarifies language within the FAR on the use of products containing recovered materials pursuant to the Resource Conservation and Recovery Act (RCRA) of 1976, and Executive Order 13101 “Greening the Government Through Waste Prevention, Recycling, and Federal Acquisition. Although the statute applies to all contracts, the Office of the Federal Environmental Executive advised that language at FAR Subpart 23.4 has not been consistently implemented by Government agencies in service and construction acquisitions. The Councils recognize that the rule may affect small entities performing contracts for those agencies that have not fully implemented the program in service and construction contracts; the number of entities affected, and the extent to which they will be affected, may be significant. The rule may affect the types of products these businesses use during contract performance. Assistance is available to all firms at the Environmental Protection Agency (EPA) Comprehensive Procurement Guidelines website, <http://www.epa.gov/cpg>. EPA provides guidance on identifying products containing recovered materials, including Product Fact Sheets and a Supplier Database. Options to comply with the requirements of the rule can be as simple as

purchasing products made with recovered materials to be used in service and construction contracts. The rule does not impose new requirements that impose a burden on contractors.

The rule revises text at FAR Subpart 23.4 to clarify that the requirement for use of products containing recovered materials applies when agencies purchase EPA-designated items, and when purchasing services (including construction) that could include the use of such items. The objective of this rule is to ensure that contractors deliver and make maximum use of products containing recovered materials in contracts for services and construction.

This final rule applies to all small business entities that contract with the Federal Government for delivery of EPA-designated items or performance of services or construction contracts that involve the use of EPA-designated items. The final rule allows for procurement exemptions.

The rule does not impose any new reporting, recordkeeping, or compliance requirements.

Interested parties may obtain a copy of the FRFA from the FAR Secretariat. The FAR Secretariat has submitted a copy of the FRFA to the Chief Counsel for Advocacy of the Small Business Administration.

C. Paperwork Reduction Act

The Paperwork Reduction Act does apply; however, these changes to the FAR do not impose additional information collection requirements to the paperwork burden previously approved under OMB Control Number 9000–0134.

List of Subjects in 48 CFR Parts 4, 12, 13, 23, and 52

Government procurement.

Dated: April 4, 2008.

Al Matera,

Director, Office of Acquisition Policy.

■ Therefore, DoD, GSA, and NASA amend 48 CFR parts 4, 12, 13, 23, and 52 as set forth below:

■ 1. The authority citation for 48 CFR parts 4, 12, 13, 23, and 52 continues to read as follows:

Authority: 40 U.S.C. 121(c); 10 U.S.C. chapter 137; and 42 U.S.C. 2473(c).

PART 4—ADMINISTRATIVE MATTERS

■ 2. Amend section 4.1202 by removing from paragraph (t) “Products” and adding “Items” in its place.

**PART 12—ACQUISITION OF
COMMERCIAL ITEMS**

■ 3. Amend section 12.301 by revising paragraph (e)(3) to read as follows:

12.301 Solicitation provisions and contract clauses for the acquisition of commercial items.

* * * * *

(e) * * *

(3) The contracting officer may use the provisions and clauses contained in Part 23 regarding the use of products containing recovered materials and biobased products when appropriate for the item being acquired.

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PART 13—SIMPLIFIED ACQUISITION PROCEDURES

13.006 [Amended]

■ 4. Amend section 13.006 by removing from paragraph (g) "Products" and adding "Items" in its place.

PART 23—ENVIRONMENT, ENERGY AND WATER EFFICIENCY, RENEWABLE ENERGY TECHNOLOGIES, OCCUPATIONAL SAFETY, AND DRUG-FREE WORKPLACE

23.000 [Amended]

■ 5. Amend section 23.000 by removing from paragraph (d) "that use" and adding "containing" in its place.

■ 6. Amend section 23.401 by revising paragraph (a)(2) to read as follows:

23.401 Definitions.

* * * * *

(a) * * *

(2) For which EPA has provided purchasing recommendations in a related Recovered Materials Advisory Notice (RMAN) (available at <http://www.epa.gov/epaoswer/non-hw/procure/backgrnd.htm>).

* * * * *

23.405 [Amended]

■ 7. Amend section 23.405 by removing from paragraph (a)(1) "<http://www.epa.gov/cpg/>" and adding "<http://www.epa.gov/cpg/products.htm>" in its place.

■ 8. Amend section 23.406 by revising paragraphs (c) and (d), and adding paragraph (e) to read as follows:

23.406 Solicitation provisions and contract clauses.

* * * * *

(c) Insert the provision at 52.223-4, Recovered Material Certification, in solicitations that—

(1) Require the delivery or specify the use of EPA-designated items; or

(2) Include the clause at 52.223-17, Affirmative Procurement of EPA-designated Items in Service and Construction Contracts.

(d) Insert the clause at 52.223-9, Estimate of Percentage of Recovered Material Content for EPA-designated Items, in solicitations and contracts exceeding \$100,000 that are for, or specify the use of, EPA-designated items

containing recovered materials. If technical personnel advise that estimates can be verified, use the clause with its Alternate I.

(e) Insert the clause at 52.223-17, Affirmative Procurement of EPA-designated Items in Service and Construction Contracts, in service or construction solicitations and contracts unless the contract will not involve the use of EPA-designated items.

PART 52—SOLICITATION PROVISIONS AND CONTRACT CLAUSES

■ 9. Amend section 52.212-5 by revising the date of the clause and paragraph (b)(25) to read as follows:

52.212-5 Contract Terms and Conditions Required to Implement Statutes or Executive Orders—Commercial Items.

* * * * *

CONTRACT TERMS AND CONDITIONS REQUIRED TO IMPLEMENT STATUTES OR EXECUTIVE ORDERS—COMMERCIAL ITEMS (MAY 2008)

* * * * *

(b) * * *

(25)(i) Estimate of Percentage of Recovered Material Content for EPA-Designated Items (MAY 2008) (42 U.S.C. 6962(c)(3)(A)(ii)).

(ii) Alternate I (MAY 2008) of 52.223-9 (42 U.S.C. 6962(i)(2)(C)).

* * * * *

■ 10. Amend section 52.223-4 by revising the date of the provision and the provision to read as follows:

52.223-4 Recovered Material Certification.

* * * * *

RECOVERED MATERIAL CERTIFICATION (MAY 2008)

As required by the Resource Conservation and Recovery Act of 1976 (42 U.S.C. 6962(c)(3)(A)(i)), the offeror certifies, by signing this offer, that the percentage of recovered materials content for EPA-designated items to be delivered or used in the performance of the contract will be at least the amount required by the applicable contract specifications or other contractual requirements.

(End of provision)

■ 11. Amend section 52.223-9 by—

■ a. Revising the section heading;

■ b. Revising the heading and the date of clause;

■ c. Revising paragraph (b)(1); and

■ d. In Alternate I by—

■ 1. Revising the date of Alternate I; and

■ 2. Revising the introductory paragraph of the certification in paragraph (b).

■ The revised text reads as follows.

52.223-9 Estimate of Percentage of Recovered Material Content for EPA-Designated Items.

* * * * *

ESTIMATE OF PERCENTAGE OF RECOVERED MATERIAL CONTENT FOR EPA-DESIGNATED ITEMS (MAY 2008)

* * * * *

(b) * * *

(1) Estimate the percentage of the total recovered material content for EPA-designated item(s) delivered and/or used in contract performance, including, if applicable, the percentage of post-consumer material content; and

* * * * *

Alternate I (MAY 2008). * * *

(b) * * *

CERTIFICATION

I, _____ (name of certifier), am an officer or employee responsible for the performance of this contract and hereby certify that the percentage of recovered material content for EPA-designated items met the applicable contract specifications or other contractual requirements.

* * * * *

■ 12. Add section 52.223-17 to read as follows:

52.223-17 Affirmative Procurement of EPA-designated Items in Service and Construction Contracts.

As prescribed in 23.406(e), insert the following clause:

AFFIRMATIVE PROCUREMENT OF EPA-DESIGNATED ITEMS IN SERVICE AND CONSTRUCTION CONTRACTS (MAY 2008)

(a) In the performance of this contract, the Contractor shall make maximum use of products containing recovered materials that are EPA-designated items unless the product cannot be acquired—

(1) Competitively within a timeframe providing for compliance with the contract performance schedule;

(2) Meeting contract performance requirements; or

(3) At a reasonable price.

(b) Information about this requirement is available at EPA's Comprehensive Procurement Guidelines web site, <http://www.epa.gov/cpg/>. The list of EPA-designated items is available at <http://www.epa.gov/cpg/products.htm>.

(End of clause)

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