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Office of Federal Procurement Policy
Office of Management and Budget
Room 9013, 725 17th Street, NW
Washington DC, 20503

Comments on the Proposed OFPP Policy Letter on the acquisition of green products and services, December 28, 2007.

Dear Sir or Madam:

Please accept these comments on the Office of Federal Procurement Policy proposed policy letter on the acquisition of green products and services which appeared in the Federal Register on December 28, 2007. This letter would provide comprehensive guidance to federal agencies on green purchasing policies and strategies.

Background

The federal government is the largest energy consumer in the United States and spends about \$5.5 billion annually on facility energy bills and emits close to 12 million metric tons of carbon equivalent (almost 43 million metric tons of carbon dioxide) from its facilities per year. Ensuring that federal agencies purchase energy-efficient products could realize literally hundreds of millions of dollars in savings to American taxpayers and huge reductions in greenhouse gas emissions.

While the Alliance recognizes that the energy-efficient purchasing requirement from the Energy Policy Act of 2005 (EPAAct 2005) is but one of several green procurement policies agencies must follow, the savings that would result from compliance with this policy are impressive enough to warrant special mention.

Overall, the Alliance supports the intent of the policy letter, and especially welcomes certain provisions included in the letter, notably the clarification in Section (8)(B) of the relationship between green purchasing requirements and other socio-economic programs, and the reiteration in Section (8)(C)(2) that agencies must purchase Energy Star qualified or Federal Energy Management Program (FEMP)-designated products for all covered categories unless the head of the agency provides written justification for the non-compliant purchase.

However, the Alliance has also identified several points in the proposed letter that, if modified, would reflect more closely the mandate of EPAAct 2005 and would facilitate compliance with those requirements.

This is especially important in light of the recent findings of a report written by the Alliance regarding federal agency compliance with the energy-efficient purchasing requirement showing shockingly low compliance levels across the federal government. The Alliance's research showed, for instance, that only seven percent of solicitations for covered products on FedBizOpps, a website that lists government solicitations of \$25,000 or more, were compliant with the energy-efficient procurement regulations from EPAAct 2005.

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Similarly low compliance was found on the General Service Administration and Defense Logistics Agency supply websites, which failed to list a single compliant product for 65 percent (GSA) and 80 percent (DLA) of the covered product categories. And only two of the 25 federal purchasing agents whom we talked to were familiar with the energy-efficiency purchasing requirements and accepted responsibility for complying.

Recommended Semantic Changes

The Alliance recommends that the wording be clarified throughout the letter to distinguish statutory mandates from policy preferences, starting with Section 1 (“Purpose”). The Alliance recommends replacing “...shall enhance and, where appropriate, mandate the purchase...” with “... shall enhance and, where required by law or where otherwise appropriate, mandate the purchase...”

Absent this important wording change (and similar changes identified below) the OFPP policy letter may be interpreted by some procurement officials as a policy directive that weakens rather than reinforces the explicit statutory provisions in EAct 2005. This is not legally permissible, nor do we believe it is the intent of OFPP, in the context of setting forth a comprehensive green purchasing policy.

Wording changes throughout the policy letter should more accurately mirror EAct 2005, which requires government agencies to purchase Energy Star qualified or FEMP-designated products where cost-effective and reasonably available to meet the functional requirement of the agency. Agencies may only purchase non-compliant products when they obtain a written exception signed by the agency head. In contrast to other environmentally preferred products, federal agencies do not have a “preference” for energy-efficient equipment, they must identify and select such equipment.

Therefore, in the Supplementary Information section of the letter the Alliance recommends replacing: “require the agencies to give preference to the acquisition of green products” with: “require the agencies to acquire energy-efficient products as mandated by law, and give preference to the acquisition of green products in all other cases.” Several other similar instances of language weaker than the legislative language appear throughout the letter, including in sections 8(A)(4)(b), 8(F), 8(F)(5), and 10(A)(4).

Recommended Content Edits, Clarifications and Additions

The Alliance welcomes the requirement in the letter for GSA, DLA and other supply agencies to phase out competing non-green products from their catalogs and on-line ordering systems. However, the letter should explicitly state that federal supply agencies must phase out those products that do not qualify for Energy Star or meet the FEMP-designated product specifications, as Congress has directed in both EAct 2005 and the Energy Independence and Security Act of 2007 (EISA). The letter should also state explicitly that this requirement applies to products covered by the GSA Multiple Award Schedules, since GSA has in the past taken the position that it is not responsible for the energy performance of such products since it does not “supply” them, but merely negotiates prices and contract terms for federal agencies to acquire them directly from vendors. Specifically, we recommend deleting the word “provide” and inserting “list” in Section (8)(C)(2). The Multiple Award Schedules include many energy using/saving products covered under Section 104 of EAct 2005.

Furthermore, the letter currently recommends a phase-out deadline of January 1, 2010. For energy-efficient products, this date should be changed to August 19, 2008 to reflect the deadline found in

Section 525 of EISA. This is especially important since this phase-out requirement has been in force since the passage of EAct 2005 in August of 2005.

The Alliance recommends that the acquisition and contracting mechanisms included in Section 7 (“Policy”) should also refer specifically to acquisitions made through construction, renovation, equipment and building leases. Again, this would follow the statutory language and intent of EAct 2005.

The proposed letter directs GSA and DLA to create automatic substitution policies and specifies office products and paper products. The Alliance urges that the two supply agencies be directed to identify which Energy Star qualified and FEMP-designated products can also be subject to automatic substitution procedures.

The Alliance recommends that OFPP add further clarifying language in Section (8)(A)(2) to define the terms “experts,” “managers,” “technical personnel” and “major acquisitions.”

The Alliance applauds the guidance provided by the proposed letter on the agencies’ affirmative procurement plan (APP) development process. The letter would require APPs “to provide for annual compliance monitoring, corrective action, and/or auditing as appropriate” and to provide mechanisms that would allow agencies to demonstrate compliance. The Alliance would enthusiastically support inclusion of these provisions in agency APPs, but it encourages OFPP to provide recommendations or guidance to the agencies on how to achieve these administratively daunting goals. Further details would help clarify these requirements and facilitate agency compliance.

The Alliance recommends changes in the language requiring that agency APPs include a provision for green product preferences in their contracts. In the case of energy-efficient products, this language should include a requirement – not a preference – for contractors and subcontractors to comply, to reflect the mandatory nature of the statutory requirement in EAct 2005, as discussed above.

The proposed letter recommends that APPs address contractors’ adherence to the green requirements of previous contracts. While the Alliance supports this provision, detailed guidance on how agencies should evaluate previous contracts and what constitutes adequate levels of compliance should be included. The Alliance also recommends that OFPP support inter-agency communication regarding their respective evaluation results, as many contractors work with more than one agency.

The Alliance welcomes the requirement for data collection by OFPP on compliance-related issues in Sections (10)(A) and (B). The Alliance believes that further clarification of this process would be helpful, including an explanation of how these data will be collected and whether they will be publicly available. The Alliance also recommends requiring agencies to report on the number, total costs, and product type of any written exceptions submitted by agencies for purchases of non-compliant energy-using products.

Conclusion

In sum, while the Alliance is highly supportive of the intent of the OFPP policy letter, there are enough inconsistencies and loopholes, as currently written, that agencies looking to avoid complying with their procurement regulations could find ways to do so. We believe that the recommendations given above would help to minimize this risk.

Please feel free to contact us if you have any questions or wish to discuss these comments.

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