

and other directive material contained in FAC 2005–52 is effective May 31, 2011, except for Items II and V which are effective June 30, 2011.

Dated: May 18, 2011.

Shay D. Assad,

Director, Defense Procurement and Acquisition Policy.

Dated: May 17, 2011.

Joseph A. Neurauter,

Senior Procurement Executive/Deputy CAO, Office of Acquisition Policy, U.S. General Services Administration.

Dated: May 17, 2011.

William P. McNally,

Assistant Administrator for Procurement, National Aeronautics and Space Administration.

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DEPARTMENT OF DEFENSE

GENERAL SERVICES ADMINISTRATION

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

48 CFR Parts 1, 2, 4, 5, 7, 11, 12, 13, 23, 36, 37, 39, and 52

[FAC 2005–52; FAR Case 2010–001; Item I; Docket 2010–0001, Sequence 1]

RIN 9000–AL96

Federal Acquisition Regulation; Sustainable Acquisition

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

ACTION: Interim rule.

SUMMARY: DoD, GSA, and NASA are issuing an interim rule amending the Federal Acquisition Regulation (FAR) to implement Executive Order 13514, Federal Leadership in Environmental, Energy, and Economic Performance, and Executive Order 13423, Strengthening Federal Environmental, Energy, and Transportation Management. This interim rule requires Federal agencies to leverage agency acquisitions to foster markets for sustainable technologies, materials, products, and services. Federal agencies are additionally required to implement high-performance sustainable building design, construction, renovation, repair, commissioning, operation and maintenance, management, and deconstruction practices in applicable acquisitions. Contractors will be required to support the goals of an

agency's environmental management system.

DATES: *Effective Date:* May 31, 2011.

Comment Date: Interested parties should submit written comments to the Regulatory Secretariat on or before August 1, 2011 to be considered in the formulation of a final rule.

ADDRESSES: Submit comments identified by FAC 2005–52, FAR Case 2010–001, by any of the following methods:

- *Regulations.gov:* <http://www.regulations.gov>. Submit comments via the Federal eRulemaking portal by inputting “FAR Case 2010–001” under the heading “Enter Keyword or ID” and selecting “Search.” Select the link “Submit a Comment” that corresponds with “FAR Case 2010–001.” Follow the instructions provided at the “Submit a Comment” screen. Please include your name, company name (if any), and “FAR Case 2010–001” on your attached document.

- *Fax:* (202) 501–4067.

- *Mail:* General Services

Administration, Regulatory Secretariat (MVCB), ATTN: Hada Flowers, 1275 First Street, NE., 7th Floor, Washington, DC 20417.

Instructions: Please submit comments only and cite FAC 2005–52, FAR Case 2010–001, in all correspondence related to this case. All comments received will be posted without change to <http://www.regulations.gov>, including any personal and/or business confidential information provided.

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 Regulatory Secretariat at (202) 501–4755. Please cite FAC 2005–52, FAR Case 2010–001.

SUPPLEMENTARY INFORMATION:

I. Background

In the face of changing environmental circumstances and our Nation's heightened energy demands, the Federal Government must lead by example to create a clean energy economy that will increase prosperity, promote energy security, protect the interests of taxpayers, and safeguard the health of our environment. Executive Order 13514 (E.O. 13514), Federal Leadership in Environmental, Energy, and Economic Performance, was signed on October 5, 2009 (74 FR 52117, October 8, 2009). It requires Federal agencies to leverage agency acquisitions to foster markets for sustainable technologies and materials, products, and services. The head of each agency shall advance

sustainable acquisition by ensuring that 95 percent of new contract actions, including task and delivery orders, for products and services, with the exception of acquisition of weapon systems, are energy-efficient (Energy Star or Federal Energy Management Program (FEMP)-designated), water-efficient, biobased, environmentally preferable (e.g., Electronic Product Environmental Assessment Tool (EPEAT)-registered), non-ozone depleting, contain recycled content, or are non-toxic or less toxic alternatives, where such products and services meet agency performance requirements. Federal agencies are also required to design, construct, maintain and operate high-performance sustainable buildings in sustainable locations.

Similarly, recognizing the long-term impact that Federal environmental management can have on national health and security, Executive Order 13423 (E.O. 13423), Strengthening Federal Environmental, Energy, and Transportation Management, was signed on January 24, 2007 (72 FR 3919, January 26, 2007). E.O. 13423 establishes the policy that Federal agencies shall conduct their environmental, transportation, and energy-related activities in an environmentally, economically, and fiscally sound, integrated, continuously improving, efficient, and sustainable manner.

The authorities throughout the applicable FAR parts are updated to include E.O. 13423 and E.O. 13514. Additionally, authorities throughout the applicable FAR parts are updated to delete references to E.O. 13101, E.O. 13123, and E.O. 13148, because the Executive orders were revoked by E.O. 13423.

Under FAR part 2, the definitions for “renewable energy” and “United States” are revised to reflect the latest definitions of the terms in E.O. 13514. A new definition for “sustainable acquisition,” derived from the definition of “sustainable” in E.O. 13514, is added to FAR part 2. The definition of “water consumption intensity” is also added to FAR part 2 from E.O. 13514.

FAR part 4 changes include revisions to the policy for contractor submission of paper documents to the Government and updating the general description of the Federal Procurement Data System (FPDS). In efforts to reduce or prevent waste and meet the intent of the agencies' requirement to purchase at least 30 percent postconsumer fiber content paper as directed in both E.O. 13423 and E.O. 13514, contractors are required, if not using electronic commerce methods, to submit paper

documents to the Government on double-sided 30 percent post-consumer fiber paper, whenever practicable. This is a change from the current regulations that only encourage the submission of paper documents on recycled paper. The general description of FPDS is revised to reflect that the Web-based tool will be a means of collecting sustainable acquisition data.

FAR parts 5, 7, and 11 are revised to ensure agencies are including or considering sustainable acquisition requirements in their synopses, acquisition planning documents and functions, and descriptions of agency needs.

Conforming changes are made to FAR parts 12 and 13.

FAR part 23 is revised to ensure that the policy of "leading by example" is followed by Federal agencies. This includes fostering markets for sustainable technologies, materials, products, and services, as a goal of agency acquisitions.

FAR 23.001 is amended to add new definitions for "environmental," "greenhouse gases," and "United States." All the definitions derive from E.O. 13514. FAR 23.002 is added to implement a policy, derived from E.O. 13423 sections 3(e) and (f), which requires that contracts for contractor operation of a Government-owned or -leased facility and contracts for support services at a Government-owned or -operated facility include provisions that obligate the contractor to comply with the requirements of the order to the same extent as the agency would be required to comply if the agency operated or supported the facility. Compliance includes developing programs to promote and implement cost-effective waste reduction.

A new FAR subpart 23.1, Sustainable Acquisition, is added to implement section 2(h) and section 18 of E.O. 13514. Federal agencies, with certain exceptions or exemptions, are required to advance sustainable acquisition by ensuring that 95 percent of new contract actions (including those for construction) contain requirements for products that are designated as energy-efficient, water-efficient, biobased, environmentally preferable (e.g., EPEAT-registered, non-toxic or less toxic alternatives), non-ozone depleting, or those that contain recovered materials. A new definition for "contract action" is added to the new FAR subpart 23.1.

Changes to FAR subpart 23.2, Energy and Water Efficiency and Renewable Energy, include updates to the authorities and policy. Sections 2(d) and 14 of E.O. 13514, relating to the use

and management of water through water-efficient means, are implemented in FAR subpart 23.2.

FAR 23.403 is revised to require agencies to purchase recycled content and biobased products or require them in the acquisition of services; the delivery, use, or furnishing of such products, which must meet, but may exceed, the minimum recycled or biobased content of a United States Environmental Protection Agency (EPA)- or United States Department of Agriculture-designated product.

Under FAR subpart 23.8, agencies are required to substitute safe alternatives to ozone-depleting substances. This subpart is revised to inform agencies that EPA's Significant New Alternatives Policy (SNAP) program (available at <http://www.epa.gov/ozone/snap>) has a list of safe alternatives to ozone-depleting substances.

DoD, GSA, and NASA deleted the content of FAR subpart 23.9, which required contractors to report to agencies compliance with the toxic chemical release reporting. E.O. 13148 required contractors to affirm compliance with toxic chemical release reporting requirements. E.O. 13148 was revoked by E.O. 13423. The associated clauses at FAR 52.223-13 and 52.223-14 are also deleted. Toxic chemical release reporting remains a requirement under environmental statutes and regulations, but the coverage in the FAR and the contract clauses are being deleted. FAR subpart 23.9 now requires contractor compliance with an agency's environmental management system. A new clause is prescribed to meet this requirement for contractor operation of Government-owned or -leased facilities in the United States, unless the agency head determines that use of the clause is in the interest of the facilities not located in the United States.

The requirement to implement high-performance sustainable building design, construction, renovation, repair, operation, and management stated in E.O. 13514 is included in FAR 36.104. In addition, new definitions are added at FAR 36.001, and a Web site is provided for accessing the "Guiding Principles for Federal Leadership in High Performance and Sustainable Buildings."

This interim rule adds language at FAR 37.102 requiring agencies to ensure that service contracts that require the delivery, use, or furnishing of products are consistent with FAR part 23.

To promote electronics stewardship, the policy at FAR 39.101 implements provisions of section 2(i) of E.O. 13514 to require agencies to enable power management, double-sided printing, and

other energy-efficient or environmentally preferable features on all agency electronic products. The policy also requires agencies to employ best management practices for energy-efficient management of servers and Federal data centers.

FAR part 52 is revised to incorporate the policies reflected in E.O. 13514 and E.O. 13423. The modified clauses include—

- FAR 52.204-4, Printed or Copied Double-Sided Postconsumer Fiber Paper;
- FAR 52.204-8, Annual Representations and Certifications;
- FAR 52.213-4, Terms and Conditions—Simplified Acquisitions (Other Than Commercial Items);
- FAR 52.223-5, Pollution Prevention and Right-to-Know Information; and
- FAR 52.223-10, Waste Reduction Program.

Additionally, DoD, GSA, and NASA added the clause at FAR 52.223-19 to address contractor compliance with environmental management systems.

II. Executive Orders 12866 and 13563

Executive Orders (E.O.s) 12866 and 13563 direct agencies to assess all costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distributive impacts, and equity). E.O. 13563 emphasizes the importance of quantifying both costs and benefits, of reducing costs, of harmonizing rules, and of promoting flexibility. This is a significant regulatory action and, therefore, was subject to review under section 6(b) of E.O. 12866, Regulatory Planning and Review, dated September 30, 1993. This rule is not a major rule under 5 U.S.C. 804.

III. Regulatory Flexibility Act

DoD, GSA, and NASA do not expect this interim rule to have a significant economic impact on a substantial number of small entities within the meaning of the Regulatory Flexibility Act, 5 U.S.C. 601, *et seq.*, because it is only emphasizing existing requirements. The majority of the requirements of E.O. 13423 and E.O. 13514 have been implemented through previous Executive orders, laws, and sustainable programs. DoD, GSA, and NASA recognize that the rule may have overall pluses that create opportunities for niche products for small businesses because agencies have to ensure that 95 percent of new contract actions advance sustainable acquisition, but the number

of entities affected, and the extent to which they will be affected, is not expected to be significant. The clause requiring contractors to comply with an agency's environmental management system was required through E.O. 13148. DoD, GSA, and NASA believe that this requirement may affect small entities performing contracts for those agencies that have not fully implemented an environmental management system, but the number of entities affected, and the extent to which they will be affected, is not expected to be significant. Therefore, an Initial Regulatory Flexibility Analysis has not been performed.

DoD, GSA, and NASA invite comments from small business concerns and other interested parties on the expected impact of this rule on small entities.

DoD, GSA, and NASA will also consider comments from small entities concerning the existing regulations in subparts affected by this rule in accordance with 5 U.S.C. 610. Interested parties must submit such comments separately and should cite 5 U.S.C. 610 (FAR Case 2010-001) in all correspondence.

IV. Paperwork Reduction Act

The Paperwork Reduction Act does apply because this interim rule removes the requirement that governed contractor compliance with toxic chemical release reporting. Provisions relevant to toxic chemical release reporting have been deleted from the FAR by deleting FAR clauses 52.223-13 and 52.223-14. A change notice will be submitted to cancel this requirement under OMB Clearance 9000-0139. The collection requirements remain unchanged for FAR clause 52.223-5, covered by OMB Clearance 9000-0137, Pollution Prevention and Right-to-Know Information.

V. Determination to Issue an Interim Rule

A determination has been made under the authority of the Secretary of Defense (DoD), the Administrator of General Services (GSA), and the Administrator of the National Aeronautics and Space Administration (NASA) that urgent and compelling reasons exist to promulgate this interim rule without prior opportunity for public comment. This action is necessary because this rule implements E.O. 13514 and E.O. 13423, already in effect. However, pursuant to 41 U.S.C. 1707 and FAR 1.501-3(b), DoD, GSA, and NASA will consider public comments received in response to this interim rule in the formation of the final rule.

List of Subjects in 48 CFR Parts 1, 2, 4, 5, 7, 11, 12, 13, 23, 36, 37, 39, and 52

Government procurement.

Dated: May 18, 2011.

Millisa Gary,

Acting Director, Office of Governmentwide Acquisition Policy.

Therefore, DoD, GSA, and NASA amend 48 CFR parts 1, 2, 4, 5, 7, 11, 12, 13, 23, 36, 37, 39, and 52 as set forth below:

- 1. The authority citation for 48 CFR parts 1, 2, 4, 5, 7, 11, 12, 13, 23, 36, 37, 39, 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 1—FEDERAL ACQUISITION REGULATIONS SYSTEM

1.106 [Amended]

- 2. Amend section 1.106, in the table following the introductory text, by removing FAR segments "23.9", "52.223-13", and "52.223-14" and their corresponding OMB Control Number "9000-0139".

PART 2—DEFINITIONS OF WORDS AND TERMS

- 3. Amend section 2.101 in paragraph (b)(2) by—
 - a. Revising the definition "Renewable energy";
 - b. Adding, in alphabetical order, the definition "Sustainable acquisition";
 - c. In the definition "United States" redesignating paragraphs (7), (8), and (9) as paragraphs (8), (9), and (10), respectively; and adding a new paragraph (7); and
 - d. Adding, in alphabetical order, the definition "Water consumption intensity."

The revised and added text reads as follows:

2.101 Definitions.

* * * * *

(b) * * *
(2) * * *

Renewable energy means energy produced by solar, wind, geothermal, biomass, landfill gas, ocean (including tidal, wave, current, and thermal), municipal solid waste, or new hydroelectric generation capacity achieved from increased efficiency or additions of new capacity at an existing hydroelectric project (Energy Policy Act of 2005, 42 U.S.C. 15852).

* * * * *

Sustainable acquisition means acquiring goods and services in order to create and maintain conditions—

- (1) Under which humans and nature can exist in productive harmony; and

- (2) That permit fulfilling the social, economic, and other requirements of present and future generations.

* * * * *

United States * * *

- (7) For use in part 23, see definition at 23.001.

* * * * *

Water consumption intensity means water consumption per square foot of building space.

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PART 4—ADMINISTRATIVE MATTERS

- 4. Revise section 4.302 to read as follows:

4.302 Policy.

(a) Section 3(a) of E.O. 13423, Strengthening Federal Environmental, Energy, and Transportation Management, directs agencies to implement waste prevention. In addition, section 2(e) of E.O. 13514, Federal Leadership in Environmental, Energy, and Economic Performance, directs agencies to eliminate waste. Electronic commerce methods (see 4.502) and double-sided printing and copying are best practices for waste prevention.

(b) When electronic commerce methods (see 4.502) are not used, agencies shall require contractors to submit paper documents to the Government relating to an acquisition printed or copied double-sided on at least 30 percent postconsumer fiber paper whenever practicable. If the contractor cannot print or copy double-sided, it shall print or copy single-sided on at least 30 percent postconsumer fiber paper.

- 5. Amend section 4.602 by removing from paragraph (a)(2) "contract; and" and adding "contract;" in its place; redesignating paragraph (a)(3) as paragraph (a)(4); and adding a new paragraph (a)(3) to read as follows:

4.602 General.

(a) * * *

(3) A means of measuring and assessing the effect of Federal contracting for promoting sustainable technologies, materials, products, and high-performance sustainable buildings. This is accomplished by collecting and reporting agency data on sustainable acquisition, including types of products purchased, the purchase costs, and the exceptions used for other than sustainable acquisition; and

* * * * *

4.1202 [Amended]

- 6. Amend section 4.1202 by removing paragraph (u); and redesignating

paragraphs (v) through (cc) as paragraphs (u) through (bb), respectively.

PART 5—PUBLICIZING CONTRACT ACTIONS

■ 7. Amend section 5.207 by redesignating paragraphs (c)(11) through (c)(18) as paragraphs (c)(12) through (c)(19), respectively; and adding a new paragraph (c)(11) to read as follows:

5.207 Preparation and transmittal of synopses.

* * * * *

(c) * * *

(11) Sustainable acquisition requirements (or a description of high-performance sustainable building practices required, if for design, construction, renovation, repair, or deconstruction) (see parts 23 or 36).

* * * * *

PART 7—ACQUISITION PLANNING

■ 8. Amend section 7.103 by revising paragraph (p) to read as follows:

7.103 Agency-head responsibilities.

* * * * *

(p) Ensuring that agency planners—

(1) Specify needs for printing and writing paper consistent with the 30 percent postconsumer fiber minimum content standards specified in section 2(d)(ii) of Executive Order 13423 of January 24, 2007, Strengthening Federal Environmental, Energy, and Transportation Management, and section 2(e)(iv) of Executive Order 13514 of October 5, 2009 (see 11.303);

(2) Comply with the policy in 11.002(d) regarding procurement of: biobased products, products containing recovered materials, environmentally preferable products and services (including Electronic Product Environmental Assessment Tool (EPEAT)-registered electronic products, nontoxic or low-toxic alternatives), ENERGY STAR® and Federal Energy Management Program-designated products, renewable energy, water-efficient products, and non-ozone depleting products;

(3) Comply with the Guiding Principles for Federal Leadership in High-Performance and Sustainable Buildings (Guiding Principles), for the design, construction, renovation, repair, or deconstruction of Federal buildings. The Guiding Principles can be accessed at http://www.wbdg.org/pdfs/hpsb_guidance.pdf; and

(4) Require contractor compliance with Federal environmental requirements, when the contractor is operating Government-owned facilities

or vehicles, to the same extent as the agency would be required to comply if the agency operated the facilities or vehicles.

* * * * *

7.105 [Amended]

■ 9. Amend section 7.105 by removing from paragraph (b)(17) “contracts.” and adding “contracts (see 11.002 and 11.303).” in its place.

PART 11—DESCRIBING AGENCY NEEDS

■ 10. Amend section 11.002 by revising paragraphs (d)(1) and (d)(2) introductory text to read as follows:

11.002 Policy.

* * * * *

(d)(1) When agencies acquire products and services, various statutes and executive orders (identified in part 23) require consideration of sustainable acquisition (see subpart 23.1) including—

(i) Energy-efficient and water-efficient services and products (including products containing energy-efficient standby power devices) (subpart 23.2);

(ii) Products and services that utilize renewable energy technologies (subpart 23.2);

(iii) Products containing recovered materials (subpart 23.4);

(iv) Biobased products (subpart 23.4);

(v) Environmentally preferable products and services, including EPEAT-registered electronic products and non-toxic or low-toxic alternatives (subpart 23.7); and

(vi) Non-ozone depleting substances (subpart 23.8).

(2) Unless an exception applies and is documented by the requiring activity, Executive agencies shall, to the maximum practicable, require the use of products and services listed in paragraph (d)(1) of this section when—

* * * * *

■ 11. Revise section 11.303 to read as follows:

11.303 Special requirements for paper.

(a) The following applies when agencies acquire paper in the United States (as defined in 23.001):

(1) Section 2(d)(ii) of Executive Order 13423, Strengthening Federal Environmental, Energy, and Transportation Management, establishes a 30 percent postconsumer fiber content standards for agency paper use. Section 2(d)(ii) requires that an agency’s paper products must meet or exceed the minimum content standard.

(2) Section 2(e)(iv) of Executive Order 13514 requires acquisition of uncoated

printing and writing paper containing at least 30 percent postconsumer fiber.

(b) *Exceptions.* If paper under paragraphs (a)(1) or (a)(2) of this section containing at least 30 percent postconsumer fiber is not reasonably available, does not meet reasonable performance requirements, or is only available at an unreasonable price, then the agency must purchase—

(1) Printing and writing paper containing no less than 20 percent postconsumer fiber; or

(2) Paper, other than printing and writing paper, with the maximum practicable percentage of postconsumer fiber that is reasonably available at a reasonable price and that meets reasonable performance requirements.

PART 12—ACQUISITION OF COMMERCIAL ITEMS

■ 12. Amend section 12.102 by revising paragraph (c) to read as follows:

12.102 Applicability.

* * * * *

(c) Contracts for the acquisition of commercial items are subject to the policies in other parts of the FAR. When a policy in another part of the FAR is inconsistent with a policy in this part, this part 12 shall take precedence for the acquisition of commercial items.

* * * * *

PART 13—SIMPLIFIED ACQUISITION PROCEDURES

■ 13. Amend section 13.201 by revising paragraph (f) to read as follows:

13.201 General.

* * * * *

(f) The procurement requirements in subparts 23.1, 23.2, 23.4, and 23.7 apply to purchases at or below the micro-purchase threshold.

* * * * *

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

■ 14. Revise section 23.000 to read as follows:

23.000 Scope.

This part prescribes acquisition policies and procedures supporting the Government’s program for ensuring a drug-free workplace, for protecting and improving the quality of the environment, and to foster markets for sustainable technologies, materials,

products, and services, and encouraging the safe operation of vehicles by—

(a) Reducing or preventing pollution;
(b) Managing efficiently and reducing energy and water use in Government facilities;

(c) Using renewable energy and renewable energy technologies;

(d) Acquiring energy-efficient and water-efficient products and services, environmentally preferable (including EPEAT-registered, and non-toxic and less toxic) products, products containing recovered materials, non-ozone depleting products, and biobased products;

(e) Requiring contractors to identify hazardous materials;

(f) Encouraging contractors to adopt and enforce policies that ban text messaging while driving; and

(g) Requiring contractors to comply with agency environmental management systems.

■ 15. Revise section 23.001 to read as follows:

23.001 Definitions.

As used in this part—

Environmental means environmental aspects of internal agency operations and activities, including those aspects related to energy and transportation functions.

Greenhouse gases means carbon dioxide, methane, nitrous oxide, hydrofluorocarbons, perfluorocarbons, and sulfur hexafluoride.

Toxic chemical means a chemical or chemical category listed in 40 CFR 372.65.

United States, except as used in subpart 23.10, means—

- (1) The fifty States;
- (2) The District of Columbia;
- (3) The commonwealths of Puerto Rico and the Northern Mariana Islands;
- (4) The territories of Guam, American Samoa, and the United States Virgin Islands; and
- (5) Associated territorial waters and airspace.

■ 16. Add section 23.002 to read as follows:

23.002 Policy.

Executive Order 13423 sections 3(e) and (f) require that contracts for contractor operation of a Government-owned or -leased facility and contracts for support services at a Government-owned or -operated facility include provisions that obligate the contractor to comply with the requirements of the order to the same extent as the agency would be required to comply if the agency operated or supported the facility. Compliance includes developing programs to promote and

implement cost-effective waste reduction.

■ 17. Add subpart 23.1 to read as follows:

Subpart 23.1—Sustainable Acquisition Policy

Sec.

- 23.101 Definition.
23.102 Authorities.
23.103 Sustainable acquisitions.
23.104 Exceptions.
23.105 Exemption authority.

Subpart 23.1—Sustainable Acquisition Policy

23.101 Definition.

As used in this subpart—

Contract action means any oral or written action that results in the purchase, rent, or lease of supplies or equipment, services, or construction using appropriated dollars, including purchases below the micro-purchase threshold. Contract action does not include grants, cooperative agreements, other transactions, real property leases, requisitions from Federal stock, training authorizations, or other non-FAR based transactions.

23.102 Authorities.

(a) Executive Order 13423 of January 24, 2007, Strengthening Federal Environmental, Energy, and Transportation Management.

(b) Executive Order 13514 of October 5, 2009, Federal Leadership in Environmental, Energy, and Economic Performance.

(c) All of the authorities specified in subparts 23.2, 23.4, 23.7, 23.8, 23.9, and 23.10.

23.103 Sustainable acquisitions.

(a) Federal agencies shall advance sustainable acquisition by ensuring that 95 percent of new contract actions for the supply of products and for the acquisition of services (including construction) require that the products are—

- (1) Energy-efficient (ENERGY STAR® or Federal Energy Management Program (FEMP)-designated);
- (2) Water-efficient;
- (3) Biobased;
- (4) Environmentally preferable (*e.g.*, EPEAT-registered, or non-toxic or less toxic alternatives);
- (5) Non-ozone depleting; or
- (6) Made with recovered materials.

(b) The required products in the contract actions for services include products that are—

- (1) Delivered to the Government during performance;
- (2) Acquired by the contractor for use in performing services at a Federally-controlled facility; or

(3) Furnished by the contractor for use by the Government.

(c) The required products in the contract actions must meet agency performance requirements.

(d) For purposes of meeting the 95 percent sustainable acquisition requirement, the term “contract actions” includes new contracts (and task and delivery orders placed against them) and new task and delivery orders on existing contracts.

23.104 Exceptions.

This subpart does not apply to the following acquisitions:

(a) Contracts performed outside of the United States, unless the agency head determines that such application is in the interest of the United States.

(b) Weapon systems.

23.105 Exemption authority.

(a) The head of an agency may exempt—

(1) Intelligence activities of the United States, and related personnel, resources, and facilities, to the extent the Director of National Intelligence or agency head determines it necessary to protect intelligence sources and methods from unauthorized disclosure;

(2) Law enforcement activities of that agency and related personnel, resources, and facilities, to the extent the head of an agency determines it necessary to protect undercover operations from unauthorized disclosure;

(3) Law enforcement, protective, emergency response, or military tactical vehicle fleets of that agency; and

(4) Agency activities and facilities in the interest of national security.

(b) If the head of the agency issues an exemption under paragraph (a) of this section, the agency must notify the Chair of the Council on Environmental Quality in writing within 30 days of the issuance of the exemption.

(c) The agency head may submit through the Chair of the Council on Environmental Quality a request for exemption of an agency activity other than those activities listed in paragraph (a) of this section and related personnel, resources, and facilities.

■ 18. Revise section 23.201 to read as follows:

23.201 Authorities.

(a) Energy Policy and Conservation Act (42 U.S.C. 6361(a)(1)) and Resource Conservation and Recovery Act of 1976 (42 U.S.C. 6901, *et seq.*).

(b) National Energy Conservation Policy Act (42 U.S.C. 8253, 8259b, 8262g, and 8287).

(c) Section 706 of Division D, Title VII of the Omnibus Appropriations Act, 2009 (Pub. L. 111–8).

(d) Title VI of the Clean Air Act, as amended (42 U.S.C. 7671, *et seq.*).

(e) Executive Order 11912 of April 13, 1976, Delegations of Authority under the Energy Policy and Conservation Act.

(f) Executive Order 13221 of July 31, 2001, Energy-Efficient Standby Power Devices.

(g) Executive Order 13423 of January 24, 2007, Strengthening Federal Environmental, Energy, and Transportation Management.

(h) Executive Order 13514 of October 5, 2009, Federal Leadership in Environmental, Energy, and Economic Performance.

■ 19. Revise section 23.202 to read as follows:

23.202 Policy.

(a) *Introduction.* The Government's policy is to acquire supplies and services that promote a clean energy economy that increases our Nation's energy security, safeguards the health of our environment, and reduces greenhouse gas emissions from direct and indirect Federal activities. To implement this policy, Federal acquisitions will foster markets for sustainable technologies, products, and services. This policy extends to all acquisitions, including those below the simplified acquisition threshold and those at or below the micro-purchase threshold (including those made with a Government purchase card).

(b) *Water-efficient.* In accordance with Executive Order 13514, dated October 5, 2009, Federal Leadership in Environmental, Energy, and Economic Performance, it is the policy and objective of the Government to use and manage water through water-efficient means by—

(1) Reducing potable water consumption intensity to include low-flow fixtures and efficient cooling towers;

(2) Reducing agency, industry, landscaping, and agricultural water consumption; and

(3) Storm water management in accordance with section 438 of the Energy Independence and Security Act of 2007 (42 U.S.C. 17094) as implemented in <http://www.epa.gov/nps/lid/section438>.

■ 20. Amend section 23.205 by revising paragraph (a) to read as follows:

23.205 Energy-savings performance contracts.

(a) Agencies should make maximum use of the authority provided in the National Energy Conservation Policy Act (42 U.S.C. 8287) to use an energy-savings performance contract (ESPC), when life-cycle cost-effective, to reduce

energy use and cost in the agency's facilities and operations.

* * * * *

■ 21. Amend section 23.402 by revising paragraphs (c) and (d) and adding paragraph (e) to read as follows:

23.402 Authorities.

* * * * *

(c) Executive Order 13423 of January 24, 2007, Strengthening Federal Environmental, Energy, and Transportation Management.

(d) The Energy Policy Act of 2005, Public Law 109–58.

(e) Executive Order 13514 of October 5, 2009, Federal Leadership in Environmental, Energy, and Economic Performance.

■ 22. Revise section 23.403 to read as follows:

23.403 Policy.

Government policy on the use of products containing recovered materials and biobased products considers cost, availability of competition, and performance. Agencies shall purchase these products or require in the acquisition of services, the delivery, use, or furnishing (see 23.103(b)) of such products. Agency contracts should specify that these products are composed of the highest percent of recovered material or biobased content practicable, or at least meet, but may exceed, the minimum recovered materials or biobased content of an EPA- or USDA-designated product. Agencies shall purchase these products to the maximum extent practicable without jeopardizing the intended use of the product while maintaining a satisfactory level of competition at a reasonable price. Such products shall meet the reasonable performance standards of the agency and be acquired competitively, in a cost-effective manner. Except as provided at 23.404(b), virgin material shall not be required by the solicitation (see 11.302).

■ 23. Amend section 23.702 by removing paragraphs (d), (e), and (f); redesignating paragraphs (g), (h), and (i) as paragraphs (d), (e), and (f), respectively; and adding a new paragraph (g) to read as follows:

23.702 Authorities.

* * * * *

(g) Executive Order 13514 of October 5, 2009, Federal Leadership in Environmental, Energy, and Economic Performance.

23.704 [Removed]

■ 24. Remove section 23.704.

23.705 and 23.706 [Redesignated as 23.704 and 23.705]

■ 25a. Redesignate sections 23.705 and 23.706 as sections 23.704 and 23.705, respectively.

23.705 [Amended]

■ 25b. In newly redesignated section 23.705, remove from paragraph (b)(1) “23.705(c)” and add “23.704(c)” in its place.

■ 26. Revise section 23.801 to read as follows:

23.801 Authorities.

(a) Title VI of the Clean Air Act (42 U.S.C. 7671, *et seq.*).

(b) Section 706 of Division D, Title VII of the Omnibus Appropriations Act, 2009 (Pub. L. 111–8).

(c) Executive Order 13423 of January 24, 2007, Strengthening Federal Environmental, Energy, and Transportation Management.

(d) Executive Order 13514 of October 5, 2009, Federal Leadership in Environmental, Energy, and Economic Performance.

(e) Environmental Protection Agency (EPA) regulations, Protection of Stratospheric Ozone (40 CFR Part 82).

■ 27. Amend section 23.803 by revising paragraphs (b)(1) and (2) to read as follows:

23.803 Policy.

* * * * *

(b) * * *

(1) Comply with the requirements of Title VI of the Clean Air Act, Section 706 of Division D, Title VII of Public Law 111–8, Executive Order 13423, Executive Order 13514, and 40 CFR 82.84(a)(2), (3), (4), and (5); and

(2) Substitute safe alternatives to ozone-depleting substances, as identified under 42 U.S.C. 7671k, to the maximum extent practicable, as provided in 40 CFR 82.84(a)(1), except in the case of Class I substances being used for specified essential uses, as identified under 40 CFR 82.4(r). EPA's Significant New Alternatives Policy (SNAP) program (available at <http://www.epa.gov/ozone/snap>) has a list of safe alternatives to ozone-depleting substances.

■ 28. Revise subpart 23.9 to read as follows:

Subpart 23.9—Contractor Compliance With Environmental Management Systems

Sec.

23.900 Scope.

23.901 Authority.

23.902 Policy.

23.903 Contract clause.

Subpart 23.9—Contractor Compliance With Environmental Management Systems

23.900 Scope.

This subpart implements the environmental management systems requirements for contractors.

23.901 Authority.

(a) Executive Order 13423 of January 24, 2007, Strengthening Federal Environmental, Energy, and Transportation Management.

(b) Executive Order 13514 of October 5, 2009, Federal Leadership in Environmental, Energy, and Economic Performance.

23.902 Policy.

(a) Agencies shall implement environmental management systems (EMS) at all appropriate organizational levels. Where contractor activities affect an agency's environmental management aspects, EMS requirements shall be included in contracts to ensure proper implementation and execution of EMS roles and responsibilities.

(b) The contracting officer shall—

- (1) Specify the EMS directives with which the contractor must comply; and
- (2) Ensure contractor compliance to the same extent as the agency would be required to comply, if the agency operated the facilities or vehicles.

23.903 Contract clause.

The contracting officer shall insert the clause at 52.223–19, Compliance With Environmental Management Systems, in all solicitations and contracts for contractor operation of Government-owned or -leased facilities or vehicles, located in the United States. For facilities located outside the United States, the agency head may determine that use of the clause is in the best interest of the Government.

■ 29. Amend section 23.1001 by revising paragraph (c); and adding paragraph (d) to read as follows:

23.1001 Authorities.

* * * * *

(c) Executive Order 13423 of January 24, 2007, Strengthening Federal Environmental, Energy, and Transportation Management.

(d) Executive Order 13514 of October 5, 2009, Federal Leadership in Environmental, Energy, and Economic Performance.

23.1003 [Amended]

■ 30. Amend section 23.1003 by removing the definition “Priority chemical”.

■ 31. Revise section 23.1004 to read as follows:

23.1004 Requirements.

(a) Federal facilities are required to comply with—

(1) The emergency planning and toxic release reporting requirements in EPCRA and PPA; and

(2) The toxic chemical, and hazardous substance release and use reduction goals of sections 2(e) and 3(a)(vi) of Executive Order 13423.

(b) Pursuant to EPCRA, PPA, E.O. 13423, and any agency implementing procedures, every new contract that provides for performance on a Federal facility shall require the contractor to provide information necessary for the Federal agency to comply with the—

(1) Requirements in paragraph (a) of this section; and

(2) Requirements for EMSs and FCAs if the place of performance is at a Federal facility designated by the agency.

PART 36—CONSTRUCTION AND ARCHITECT-ENGINEER CONTRACTS

■ 32. Add section 36.001 to read as follows:

36.001 Definitions.

As used in this part—

Construction and demolition materials and debris means materials and debris generated during construction, renovation, demolition, or dismantling of all structures and buildings and associated infrastructure.

Diverting means redirecting materials that might otherwise be placed in the waste stream to recycling or recovery, excluding diversion to waste-to-energy facilities.

■ 33. Revise section 36.104 to read as follows:

36.104 Policy.

(a) Unless the traditional acquisition approach of design-bid-build established under the Brooks Architect-Engineers Act (40 U.S.C. 1101 *et seq.*) or another acquisition procedure authorized by law is used, the contracting officer shall use the two-phase selection procedures authorized by 10 U.S.C. 2305a or 41 U.S.C. 253m when entering into a contract for the design and construction of a public building, facility, or work, if the contracting officer makes a determination that the procedures are appropriate for use (see subpart 36.3). Other acquisition procedures authorized by law include the procedures established in this part and other parts of this chapter and, for DoD, the design-build process described in 10 U.S.C. 2862.

(b) Agencies shall implement high-performance sustainable building

design, construction, renovation, repair, commissioning, operation and maintenance, management, and deconstruction practices so as to—

(1) Ensure that all new construction, major renovation, or repair and alteration of Federal buildings complies with the Guiding Principles for Federal Leadership in High-Performance and Sustainable Buildings (available at http://www.wbdg.org/pdfs/hpsb_guidance.pdf);

(2) Pursue cost-effective, innovative strategies, such as highly reflective and vegetated roofs, to minimize consumption of energy, water, and materials;

(3) Identify alternatives to renovation that reduce existing assets' deferred maintenance costs;

(4) Ensure that rehabilitation of Federally-owned historic buildings utilizes best practices and technologies in retrofitting to promote long-term viability of the buildings; and

(5) Ensure pollution prevention and eliminate waste by diverting at least 50 percent of construction and demolition materials and debris by the end of Fiscal Year 2015.

PART 37—SERVICE CONTRACTING

■ 34. Amend section 37.102 by adding paragraph (i) to read as follows:

37.102 Policy.

* * * * *

(i) Agencies shall ensure that service contracts that require the delivery, use, or furnishing of products are consistent with part 23.

PART 39—ACQUISITION OF INFORMATION TECHNOLOGY

■ 35. Amend section 39.101 by revising paragraph (b)(1) to read as follows:

39.101 Policy.

* * * * *

(b)(1) In acquiring information technology, agencies shall identify their requirements pursuant to—

(i) OMB Circular A–130, including consideration of security of resources, protection of privacy, national security and emergency preparedness, accommodations for individuals with disabilities, and energy efficiency;

(ii) Electronic Product Environmental Assessment Tool (EPEAT) standards (see 23.704);

(iii) Policies to enable power management, double-sided printing, and other energy-efficient or environmentally preferable features on all agency electronic products; and

(iv) Best management practices for energy-efficient management of servers and Federal data centers.

PART 52—SOLICITATION PROVISIONS AND CONTRACT CLAUSES

36. Revise section 52.204-4 to read as follows:

52.204-4 Printed or Copied Double-Sided on Postconsumer Fiber Content Paper.

As prescribed in 4.303, insert the following clause:

Printed or Copied Double-Sided on Postconsumer Fiber Content Paper (May 2011)

(a) Definitions. As used in this clause— Postconsumer fiber means—(1) Paper, paperboard, and fibrous materials from retail stores, office buildings, homes, and so forth, after they have passed through their end-use as a consumer item, including: used corrugated boxes; old newspapers; old magazines; mixed waste paper; tabulating cards; and used cordage; or

(2) All paper, paperboard, and fibrous materials that enter and are collected from municipal solid waste; but not

(3) Fiber derived from printers' over-runs, converters' scrap, and over-issue publications.

(b) The Contractor is required to submit paper documents, such as offers, letters, or reports that are printed or copied double-sided on paper containing at least 30 percent postconsumer fiber, whenever practicable, when not using electronic commerce methods to submit information or data to the Government.

(End of clause)

37. Amend section 52.204-8 by revising the date of the provision; removing paragraph (c)(2)(vi); and redesignating paragraphs (c)(2)(vii) and (viii) as paragraphs (c)(2)(vi) and (vii), respectively.

The revised text reads as follows:

52.204-8 Annual Representations and Certifications.

Annual Representations and Certifications (May 2011)

38. Amend section 52.213-4 by revising the date of the clause and paragraph (b)(1)(vii) to read as follows:

52.213-4 Terms and Conditions—Simplified Acquisitions (Other Than Commercial Items).

Terms and Conditions—Simplified Acquisitions (Other Than Commercial Items) (May 2011)

- (b) * * *
(1) * * *

(vii) 52.223-5, Pollution Prevention and Right-to-Know Information (May 2011) (E.O. 13423) (Applies to services performed on Federal facilities).

39. Amend section 52.223-5 by—

- a. Revising the date of the clause;
b. Removing from paragraph (a) the definition "Priority chemical";
c. Revising paragraphs (b) and (c)(6);
d. Revising the date of Alternate I and paragraph (c)(7); and
e. Revising the date of Alternate II and paragraph (c)(7).

The revised text reads as follows:

52.223-5 Pollution Prevention and Right-to-Know Information.

Pollution Prevention and Right-to-Know Information (May 2011)

(b) Federal facilities are required to comply with the provisions of the Emergency Planning and Community Right-to-Know Act of 1986 (EPCRA) (42 U.S.C. 11001-11050), and the Pollution Prevention Act of 1990 (PPA) (42 U.S.C. 13101-13109).

(6) The toxic chemical and hazardous substance release and use reduction goals of section 2(e) of Executive Order 13423 and of Executive Order 13514.

Alternate I (May 2011). (c)(7) The environmental management system as described in section 3(b) of E.O. 13423 and 2(j) of E.O. 13514.

Alternate II (May 2011). (c)(7) The facility compliance audits as described in section 3(c) of E.O. 13423.

40. Amend section 52.223-10 by revising the introductory paragraph, the date of the clause, and the first sentence of paragraph (b) to read as follows:

52.223-10 Waste Reduction Program.

As prescribed in 23.705(a), insert the following clause:

Waste Reduction Program (May 2011)

(b) Consistent with the requirements of section 3(e) of Executive Order 13423, the Contractor shall establish a program to promote cost-effective waste reduction in all operations and facilities covered by this contract.

52.223-13 and 52.223-14 [Removed and Reserved]

- 41. Remove and reserve sections 52.223-13 and 52.223-14.
42. Amend section 52.223-16 by revising the introductory paragraph, and the introductory paragraph of Alternate I to read as follows:

52.223-16 IEEE 1680 Standard for the Environmental Assessment of Personal Computer Products.

As prescribed in 23.705(b)(1), insert the following clause:

Alternate I (Dec 2007). As prescribed in 23.705(b)(2), substitute the following paragraph (b) for paragraph (b) of the basic clause:

43. Add section 52.223-19 to read as follows:

52.223-19 Compliance with Environmental Management Systems.

As prescribed in 23.903, insert the following clause:

Compliance With Environmental Management Systems (May 2011)

The Contractor's work under this contract shall conform with all operational controls identified in the applicable agency or facility Environmental Management Systems and provide monitoring and measurement information necessary for the Government to address environmental performance relative to the goals of the Environmental Management Systems.

(End of clause)

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DEPARTMENT OF DEFENSE

GENERAL SERVICES ADMINISTRATION

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

48 CFR Parts 4, 42, and 52

[FAC 2005-52; FAR Case 2008-020; Item II; Docket 2009-0031, Sequence 1]

RIN 9000-AL43

Federal Acquisition Regulation; Contract Closeout

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

ACTION: Final rule.

SUMMARY: DoD, GSA, and NASA are issuing a final rule amending the Federal Acquisition Regulation (FAR) procedures for closing out contract files. This case revises procedures for clearing final patent reports and quick-closeout procedure, and sets forth a description of an adequate final indirect cost rate proposal and supporting data.

DATES: Effective Date: June 30, 2011.

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