

research, marketing research and development, and promotional activities; reporting requirements for collection and dissemination of production, shipment, and other marketing information; and quality control, including inspection requirements.

The volume control provisions of the order have helped stabilize supplies and prices of tart cherries. Recently, a generic domestic promotion program has been implemented with the intent of increasing consumer demand. The compilation and dissemination of aggregate statistical information collected from handlers is used by the industry to make informed production and marketing decisions.

Minimum quality standards and inspection requirements, and production and marketing research, have not been implemented by the industry but the marketing order contains provisions for such programs should the industry determine it would be beneficial to implement them. Funds to administer the marketing order are obtained from handler assessments.

Based on the potential benefits of the marketing order to producers, handlers, and consumers, AMS has determined that the order should continue without change.

In regard to complaints or comments received from the public regarding this review, USDA has not received any comments from interested parties on this action.

In considering the order's complexity, AMS has determined that the marketing order is not unduly complex.

During the review, the order was also checked for duplication and overlap with other regulations. AMS did not identify any relevant Federal rules, or State and local regulations that duplicate, overlap, or conflict with the marketing order for tart cherries.

The marketing order was established in 1996. Since its inception, AMS and the tart cherry industry have continuously monitored its operations. Changes in regulations have been implemented to reflect current industry operating practices, and to solve marketing problems as they occur. The goal of these evaluations is to assure that the order and the regulations implemented under it fit the needs of the industry and are consistent with the Act.

The Board meets whenever needed, but at least bi-annually, to discuss the marketing order and the various regulations issued thereunder, and to determine if, or what, changes may be necessary to reflect current industry practices. As a result, numerous

regulatory changes have been made over the years to address industry operation changes and to improve program administration. The marketing order has been amended three times since its inception and several changes to the administrative rules and regulations have been implemented over the years to ensure the program continues to meet the industry's needs.

Accordingly, AMS has determined that the tart cherry marketing order should be continued. The marketing order was established to help the tart cherry industry work with USDA to solve marketing problems. The marketing order continues to be beneficial to producers, handlers, and consumers.

AMS will continue to work with the tart cherry industry in maintaining an effective program.

Dated: April 27, 2007.

Lloyd C. Day,

Administrator, Agricultural Marketing Service.

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DEPARTMENT OF DEFENSE

GENERAL SERVICES ADMINISTRATION

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

48 CFR Parts 12, 23, 42, and 52

[**FAR Case 2005-039; 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: Proposed rule.

SUMMARY: The Civilian Agency Acquisition Council and the Defense Acquisition Regulations Council (Councils) are proposing to amend 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: Interested parties should submit written comments to the FAR Secretariat on or before July 2, 2007 to be considered in the formulation of a final rule.

ADDRESSES: Submit comments identified by FAR case 2005-039 by any of the following methods:

<bullet> Federal eRulemaking Portal: <http://www.regulations.gov>. Search for any document by first selecting the proper document types and selecting "Federal Acquisition Regulation" as the agency of choice. At the "Keyword" prompt, type in the FAR case number (for example, FAR Case 2006-001) and click on the "Submit" button. Please include any personal and/or business information inside the document.

You may also search for any document by clicking on the "Advanced search/document search" tab at the top of the screen, selecting from the agency field "Federal Acquisition Regulation", and typing the FAR case number in the keyword field. Select the "Submit" button.

<bullet> Fax: 202-501-4067.

<bullet> Mail: General Services Administration, Regulatory Secretariat (VIR), 1800 F Street, NW, Room 4035, ATTN: Laurieann Duarte, Washington, DC 20405.

Instructions: Please submit comments only and cite FAR case 2005-039 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 FAR Secretariat at (202) 501-4755. Please cite FAR case 2005-039.

SUPPLEMENTARY INFORMATION:

A. Background

DOD, GSA, and NASA propose to amend 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." The Councils are aware that Executive Order 13423, "Strengthening Federal Environmental, Energy, and Transportation Management," revoked E.O. 13101; however, E.O. 13101 is not eliminated from Subpart 23.4 under this rule, as other conforming changes will

be required. A future FAR case will make the conforming changes as a result of the E.O. 13423.

This rule proposes to revise Subpart 23.4, Use of Products Containing Recovered Materials, and associated provisions and clauses in FAR Part 52, with conforming changes in FAR Parts 12, 23, and 42, to—

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

(2) Clarify that the requirement for products containing recovered materials applies when agencies require the delivery or specify the use of EPA-designated items, and 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 proposed by this rule.

The Resource Conservation and Recovery Act (RCRA) was enacted by Congress in 1976 to establish a system for managing non-hazardous and hazardous solid wastes in an environmentally sound manner. Specifically, it provides for the management of hazardous wastes from the point of origin to the point of final disposal. RCRA also promotes resource recovery and waste minimization. RCRA is designed to protect human health and the environment; reduce or eliminate the generation of hazardous wastes; and conserve energy and natural resources. Section 6002 of the RCRA acknowledges the importance of recycling by mandating that government agencies increase their purchases of products containing recovered materials.

RCRA also specifies that the Environmental Protection Agency (EPA) develop and issue procurement guidelines that designate specific items made with recovered materials. EPA-designated items containing recovered materials are items listed by EPA in a procurement guideline, and for which EPA has provided purchasing recommendations in a related Recovered Materials Advisory Notice (RMAN). Agencies shall purchase and require maximum use of EPA-designated items, taking into consideration competition, price, availability, and performance.

Other RCRA sections mandate the revision of specifications requiring the exclusive use of virgin materials (RCRA Section 6002(d)), and the development of an affirmative procurement program (RCRA Section 6002(i)) that sets forth

each agency's policies and procedures for implementing the requirements of Section 6002 of RCRA. Under the EPA program, Federal agencies may choose not to acquire (or require the use of) products containing recovered materials if they are not available in a reasonable timeframe, not reasonably priced, or do not meet performance standards. 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.

Solicitation of Public Comment. The Councils, along with the Office of Federal Procurement Policy (OFPP), wish to ensure that the EPA preference program includes the acquisition of products and services (including construction). In furtherance of its responsibility under section 6002, OFPP seeks to better understand the application of acquisition of services coverage and welcomes feedback. In commenting, please include citations, as appropriate, to relevant sources of information that may be used to substantiate the basis for your comments.

B. Regulatory Flexibility Act

This proposed rule may 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 the proposed rule prescribes a new clause when agencies purchase Environmental Protection Agency (EPA)-designated items, and when purchasing services (including construction) that could include the use of such items. The proposed rule applies to all small business entities who 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 Councils recognize that the EPA preference program has not been consistently implemented by Government agencies in services and construction acquisitions. However, with some exceptions, many agencies have fully implemented the program. To assess the impact of the rule, the Councils requested information and assistance from the Office of the Federal Environmental Executive (OFEE). The Councils considered the information provided by OFEE in preparation of the Initial Regulatory Flexibility Analysis (IRFA), the content of which is summarized as follows:

Executive Order (E.O.) 13101 requires that agencies track and report annually to OFEE

on their environmental accomplishments in waste prevention, recycling, and acquisition. Reporting is required on solid waste prevention practices, recycling and waste minimization goals and practices, implementation of environmentally preferable purchasing programs, contract compliance information, management controls, goals for training, auditing, purchasing and waste diversion, and purchases of EPA-designated recycled-content products. In addition, Section 6002 of the Resource Conservation and Recovery Act (RCRA) requires the Office of Federal Procurement Policy to report to Congress every two (2) years on the actions taken by the Federal agencies to implement the statute.

Information obtained from OFEE indicates that many agencies have fully implemented the recovered material content program. The content of the RCRA reports, combined with (1) an OFEE baseline study conducted on Federal agency green building activities, (2) annual White House Closing the Circle Awards nominations in the green purchasing, green building, and pollution/waste prevention categories, and (3) discussions with agencies (including tours of facilities and reviews of training programs), indicates that most agencies have been incorporating the requirement to use products with recycled content in services and construction contracts for some time.

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 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 FAR Secretariat has submitted a copy of the IRFA to the Chief Counsel for Advocacy of the Small Business Administration. Interested parties may obtain a copy from the FAR Secretariat. We invite comments from small business concerns and other interested parties on this issue. The Councils will consider comments from small entities concerning the affected FAR parts 12, 23, 42, and 52 in accordance with 5 U.S.C. 610. Interested parties must submit such comments separately and should cite 5 U.S.C. 601, *et seq.* (FAR case 2005-039), in correspondence.

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 on January 4, 2005.

List of Subjects in 48 CFR Parts 12, 23, 42, and 52

Government procurement.

Dated: April 24, 2007.

Al Matera,

Acting Director, Contract Policy Division.

Therefore, DoD, GSA, and NASA propose amending 48 CFR parts 12, 23, 42, and 52 as set forth below:

1. The authority citation for 48 CFR parts 12, 23, 42, 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 12—ACQUISITION OF COMMERCIAL ITEMS

2. 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 when appropriate for the item being acquired.

* * * * *

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

23.000 [Amended]

3. Amend section 23.000 by removing from paragraph (d) “that use” and adding “containing” in its place.

4. Revise Subpart 23.4, consisting of sections 23.400 through 23.406, to read as follows:

SUBPART 23.4—USE OF PRODUCTS CONTAINING RECOVERED MATERIALS

23.400 Scope of subpart.

(a) The procedures in this subpart apply to all agency acquisitions of an Environmental Protection Agency (EPA)-designated item, if—

(1) The price of a designated item exceeds \$10,000; or

(2) The aggregate amount paid for designated items, or for functionally-equivalent designated items, in the preceding fiscal year was \$10,000 or more.

(b) While micro-purchases are included in determining the aggregate amount paid under paragraph (a)(2) of this section, it is not recommended that an agency track micro-purchases when—

(1) The agency anticipates the aggregate amount paid will exceed \$10,000; or

(2) The agency intends to establish or continue an affirmative procurement program in the following fiscal year.

23.401 Definition.

As used in this subpart—

EPA-designated item means a product that is or can be made with recovered material—

(1) That is listed by EPA in a procurement guideline (40 CFR part 247); and

(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>).

23.402 Authorities.

(a) The Resource Conservation and Recovery Act of 1976 (RCRA), 42 U.S.C. 6962, requires agencies responsible for drafting or reviewing specifications used in agency acquisitions to—

(1) Eliminate from those specifications any requirement excluding the use of recovered materials or requiring products to be manufactured from virgin materials; and

(2) Require, for EPA-designated products, using recovered materials to the maximum extent practicable without jeopardizing the intended end use of the item.

(b) RCRA also requires—

(1) EPA to prepare guidelines on the availability, sources, and potential uses of recovered materials and associated products, including solid waste management services; and

(2) Agencies to develop and implement affirmative procurement programs for EPA-designated products within 1 year after EPA’s designation.

(c) Executive Order 13101 requires that the agency head—

(1) Work to increase and expand markets for recovered materials through greater Government preference and demand for such products consistent with the demands of efficiency and cost-effectiveness; and

(2) Develop and implement affirmative procurement programs in accordance with direction in RCRA and the Executive order.

23.403 Policy.

Government policy on the use of products containing recovered materials

considers cost, availability of competition, and performance. Agencies shall assure the use of products containing recovered materials 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).

23.404 Agency affirmative procurement programs.

(a) An agency must establish an affirmative procurement program for EPA-designated items if the agency’s purchases of the designated items exceed the threshold set forth in 23.400.

(1) Agencies have a period of 1 year to revise their procurement program(s) after the designation of any new item by EPA.

(2) Technical or requirements personnel and procurement personnel are responsible for the preparation, implementation, and monitoring of affirmative procurement programs.

(3) Agency affirmative procurement programs must include—

(i) A recovered materials preference program;

(ii) An agency promotion program;

(iii) A program for requiring reasonable estimates, certification, and verification of recovered material used in the performance of contracts; and

(iv) Annual review and monitoring of the effectiveness of the program.

(b) Agency affirmative procurement programs must require that 100 percent of purchases of EPA-designated items contain recovered material, unless the item cannot be acquired—

(1) Competitively within a reasonable timeframe;

(2) Meeting reasonable performance standards; or

(3) At a reasonable price.

(c) Agency affirmative procurement programs must provide guidance for purchases of EPA-designated items at or below the micro-purchase threshold.

(d) Agencies may use their own specifications or commercial product descriptions when procuring products containing recovered materials. The contract should specify that the product—

(1) Contains the highest percent of recovered materials practicable; or

(2) Meets the minimum content standards in accordance with the recommendations in EPA's Recovered Materials Advisory Notices.

23.405 Procedures.

(a) *Designated items and procurement guidelines.* Contracting officers should refer to EPA's list of EPA-designated items (available via the Internet at <http://www.epa.gov/cpg/products.htm>) and to their agencies' affirmative procurement programs when purchasing products that contain recovered material, or services or construction that could include the use of products that contain recovered material.

(b) *Procurement exemptions.* (1) Once an item has been designated by EPA, agencies shall purchase conforming products unless it is determined that conforming products cannot be acquired—

- (i) Competitively within a reasonable timeframe;
- (ii) Meeting reasonable performance standards; or
- (iii) At a reasonable price.

(2) When an exemption is used for an EPA-designated item or the procurement of a product containing recovered material specifies a content level lower than the EPA recommended recovered materials content levels, the contracting officer shall place a written justification in the contract file.

23.406 Solicitation provision and contract clauses.

(a) 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-XX, Affirmative Procurement of EPA-designated Items In Service and Construction Contracts.

(b) 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 include the provision at 52.223-4. If technical personnel advise that estimates can be verified, use the clause with its Alternate I.

(c) Insert the clause at 52.223-XX, 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 42—CONTRACT ADMINISTRATION AND AUDIT SERVICES

5. Amend section 42.302 by revising paragraph (a)(68)(ii) to read as follows:

42.302 Contract administration functions.

(a) * * *

(68) * * *

(ii) Monitoring contractor compliance with specifications or other contractual requirements requiring the delivery or use of environmentally preferable products, energy-efficient products, and products containing recovered materials. This must occur as part of the quality assurance procedures set forth in Part 46; and

* * * * *

PART 52—SOLICITATION PROVISIONS AND CONTRACT CLAUSES

6. Revise the provision in section 52.223-4 to read as follows:

52.223-4 Recovered Material Certification.

* * * * *

RECOVERED MATERIAL CERTIFICATION (DATE)

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)

7. Amend section 52.223-9 by—

- a. Revising the section heading;
- b. Revising the clause heading;
- 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 (DATE)

* * * * *

(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 postconsumer material content; and

* * * * *

Alternate I (Date). * * *

(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.

* * * * *

8. Add section 52.223-XX to read as follows:

52.223-XX Affirmative Procurement of EPA-designated Items In Service and Construction Contracts.

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

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

(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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