

amending the definition "Cost of components" in paragraph (1) by removing "end product" and adding "construction material" in its place. The revised text reads as follows:

52.225-9 Buy American Act—Balance of Payments Program—Construction Materials.

* * * * *

Buy American Act—Balance of Payments Program—Construction Materials (Feb 2002)

(a) * * *

Component means an article, material, or supply incorporated directly into a construction material.

* * * * *

8. Amend section 52.225-11 by revising the date of the clause and the definition "Component"; and by amending the definition "Cost of components" in paragraph (1) by removing "end product" and adding "construction material" in its place. The revised text reads as follows:

52.225-11 Buy American Act—Balance of Payments Program—Construction Materials Under Trade Agreements.

* * * * *

Buy American Act—Balance of Payments Program—Construction Materials Under Trade Agreements (Feb 2002)

(a) * * *

Component means an article, material, or supply incorporated directly into a construction material.

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DEPARTMENT OF DEFENSE

GENERAL SERVICES ADMINISTRATION

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

48 CFR Parts 2, 11, 15, 23, and 42

[FAC 2001-02; FAR Case 1999-011; Item II]

RIN 9000-A171

Federal Acquisition Regulation; Energy-Efficiency of Supplies and Services

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 implement Executive Order (E.O.) 13123 of June 3, 1999, Greening the Government through Efficient Energy Management.

DATES: *Effective Date:* February 19, 2002.

FOR FURTHER INFORMATION CONTACT: The FAR Secretariat, Room 4035, GS Building, Washington, DC, 20405, (202) 501-4755, for information pertaining to status or publication schedules. For clarification of content, contact Ms. Laura Smith, Procurement Analyst, at (202) 208-7279. Please cite FAC 2001-02, FAR case 1999-011.

SUPPLEMENTARY INFORMATION:

A. Background

DoD, GSA, and NASA published a proposed rule in the **Federal Register** at 65 FR 30310, May 10, 2000. The proposed rule—

1. Defined in Subpart 2.1, Definitions—

a. "Energy-efficient product" (relocated and revised from FAR 23.704);

b. "Energy-savings performance contract" (ESPC); and

c. "Renewable energy" and "renewable energy technology";

2. Revised the policies and sources of authority in Part 11;

3. Revised Part 15 to alert agencies to the special procedures at 10 CFR 436.33(b) that agencies must use when evaluating unsolicited proposals for ESPCs;

4. Revised and relocated guidance on energy-efficient products and services from Subpart 23.7 to Subpart 23.2 so that Subpart 23.7 would focus on environmentally preferable products and services;

5. Revised Subpart 23.2 by—

a. Renaming the subpart "Energy and Water Efficiency and Renewable Energy" to reflect its expanded subject area;

b. Deleting outdated definitions and guidance;

c. Adding guidance on energy- and water-efficient products (e.g., ENERGY STAR®) and services, and ESPCs; and

d. Directing contracting officers to sources for more detailed guidance and information; and

6. Made a number of editorial changes. Seven respondents submitted public comments on the proposed rule. The Councils considered all comments when developing this final rule. The major changes between the final rule and the proposed rule are that the final rule—

a. Provides additional emphasis on water conservation at FAR 11.002(d)(2), 23.000(d), and 23.703;

b. Deletes E.O. 12902 of March 8, 1994, Energy Efficiency and Water Conservation at Federal Facilities, at FAR 23.702(e) since this E.O. was revoked by Section 604 of E.O. 13123; and

c. Revises 42.302(a)(68) to better reflect the current practices of the contract administration office.

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 Department of Defense, the General Services Administration, and the National Aeronautics and Space Administration certify that this final rule will not 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 this rule simply provides additional guidance to Government contracting and technical personnel with respect to the Government's preference, currently set forth in FAR Subpart 23.7, for buying environmentally preferable and energy-efficient products and services. This rule requires a contracting officer, when acquiring an energy-using product, to purchase an energy-efficient product (where life-cycle cost-effective and available), *i.e.*, a product that is in the upper 25 percent of energy efficiency as designated by the Department of Energy's (DOE's) Federal Energy Management Program or that meets DOE and Environmental Protection Agency (EPA) criteria for use of the "ENERGY STAR®" trademark label. The 25 percent benchmark for determining energy efficiency is currently addressed at FAR 23.704. Small entities that offer products to the Government may use the ENERGY STAR® label, if the product meets DOE and EPA criteria. The rule also provides guidance to contracting officers on the use of energy-savings performance contracts as alternatives to the traditional method of financing energy efficiency improvements.

C. Paperwork Reduction Act

The Paperwork Reduction Act does not apply because the changes to the FAR do not impose information collection requirements that require the approval of the Office of Management

and Budget under 44 U.S.C. 3501, *et seq.*

List of Subjects in 48 CFR Parts 2, 11, 15, 23, and 42

Government procurement.

Dated: December 5, 2001.

Al Matera,

Director, Acquisition Policy Division.

Therefore, DoD, GSA, and NASA amend 48 CFR parts 2, 11, 15, 23, and 42 as set forth below:

1. The authority citation for 48 CFR parts 2, 11, 15, 23, and 42 continues to read as follows:

Authority: 40 U.S.C. 486(c); 10 U.S.C. chapter 137; and 42 U.S.C. 2473(c).

PART 2—DEFINITIONS OF WORDS AND TERMS

2. In section 2.101, revise the definition "Energy-efficient product," and add, in alphabetical order, the definitions, "Energy-savings performance contract," "Renewable energy," and "Renewable energy technology" to read as follows:

2.101 Definitions.

* * * * *

Energy-efficient product means a product that—

(1) Meets Department of Energy and Environmental Protection Agency criteria for use of the Energy Star trademark label; or

(2) Is in the upper 25 percent of efficiency for all similar products as designated by the Department of Energy's Federal Energy Management Program.

Energy-savings performance contract means a contract that requires the contractor to—

(1) Perform services for the design, acquisition, financing, installation, testing, operation, and where appropriate, maintenance and repair, of an identified energy conservation measure or series of measures at one or more locations;

(2) Incur the costs of implementing the energy savings measures, including at least the cost (if any) incurred in making energy audits, acquiring and installing equipment, and training personnel in exchange for a predetermined share of the value of the energy savings directly resulting from implementation of such measures during the term of the contract; and

(3) Guarantee future energy and cost savings to the Government.

* * * * *

Renewable energy means energy produced by solar, wind, geothermal, and biomass power.

Renewable energy technology means—

(1) Technologies that use renewable energy to provide light, heat, cooling, or mechanical or electrical energy for use in facilities or other activities; or

(2) The use of integrated whole-building designs that rely upon renewable energy resources, including passive solar design.

* * * * *

PART 11—DESCRIBING AGENCY NEEDS

3. In section 11.002, revise paragraph (d) to read as follows:

11.002 Policy.

* * * * *

(d)(1) The Resource Conservation and Recovery Act of 1976 (42 U.S.C. 6901, et seq.), Executive Order 13101 of September 14, 1998, Greening the Government through Waste Prevention, Recycling, and Federal Acquisition, and Executive Order 13123 of June 3, 1999, Greening the Government through Efficient Energy Management, establish requirements for acquiring

(i) Products containing recovered materials;

(ii) Environmentally preferable products and services;

(iii) Energy-efficient products and services; and

(iv) Products and services that utilize renewable energy technologies.

(2) Executive agencies must consider use of recovered materials, energy- and water-efficient products and services, environmentally preferable purchasing criteria developed by the EPA, and environmental objectives (see subparts 23.2 and 23.4 and 23.703(b)) when

(i) Developing, reviewing, or revising Federal and military specifications, product descriptions (including commercial item descriptions) and standards;

(ii) Describing Government requirements for supplies and services; and

(iii) Developing source-selection factors.

* * * * *

4. In section 11.101, revise paragraph (b) to read as follows:

11.101 Order of precedence for requirements documents.

* * * * *

(b) Agencies must prepare requirements documents to achieve maximum practicable—

(1) Energy efficiency, including using renewable energy technologies; and

(2) Use of recovered material, other materials that are environmentally

preferable, energy- and water-efficient products, and renewable energy technologies (see subparts 23.2, 23.4, and 23.7).

* * * * *

PART 15—CONTRACTING BY NEGOTIATION

5. In section 15.603, add paragraph (e) to read as follows:

15.603 General.

* * * * *

(e) Agencies must evaluate unsolicited proposals for energy-savings performance contracts in accordance with the procedures in 10 CFR 436.33(b).

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

6. Revise the heading of Part 23 to read as set forth above.

7. Revise the heading and text of 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 and for protecting and improving the quality of the environment by

(a) Controlling pollution;

(b) Managing energy and water use in Government facilities efficiently;

(c) Using renewable energy and renewable energy technologies;

(d) Acquiring energy- and water-efficient products and services, environmentally preferable products, and products that use recovered materials; and

(e) Requiring contractors to identify hazardous materials.

8. Revise the heading and text of Subpart 23.2 to read as follows:

Subpart 23.2—Energy and Water Efficiency and Renewable Energy

Table with 2 columns: Sec. and Description. Rows include 23.200 Scope, 23.201 Authorities, 23.202 Policy, 23.203 Energy-efficient products, and 23.204 Energy-savings performance contracts.

23.200 Scope.

(a) This subpart prescribes policies and procedures for—

(1) Acquiring energy- and water-efficient products and services, and products that use renewable energy technology; and

(2) Using an energy-savings performance contract to obtain energy-efficient technologies at Government facilities without Government capital expense.

(b) This subpart applies to acquisitions in the United States, its possessions and territories, Puerto Rico, and the Northern Mariana Islands. Agencies conducting acquisitions outside of these areas must use their best efforts to comply with this subpart.

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, 8262g, and 8287).

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

(d) Executive Order 13123 of June 3, 1999, Greening the Government through Efficient Energy Management.

23.202 Policy.

The Government's policy is to acquire supplies and services that promote energy and water efficiency, advance the use of renewable energy products, and help foster markets for emerging technologies. This policy extends to all acquisitions, including those below the simplified acquisition threshold.

23.203 Energy-efficient products.

(a) If life-cycle cost-effective and available—

(1) When acquiring energy-using products, contracting officers must purchase ENERGY STAR® or other energy-efficient products designated by the Department of Energy's Federal Energy Management Program (FEMP); or

(2) When contracting for services that will include the provision of energy-using products, including contracts for design, construction, renovation, or maintenance of a public building, the specifications must require that the contractor provide ENERGY STAR or other energy-efficient products.

(b) Information is available via the Internet on—

(1) ENERGY STAR® at <http://www.energystar.gov/>; and

(2) FEMP at <http://www.eren.doe.gov/femp/procurement>.

23.204 Energy-savings performance contracts.

(a) Section 403 of Executive Order 13123 of June 3, 1999, Greening the Government through Efficient Energy Management, requires an agency to 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.

(b)(1) Under an ESPC, an agency can contract with an energy service company for a period not to exceed 25 years to improve energy efficiency in one or more agency facilities at no direct capital cost to the United States Treasury. The energy service company finances the capital costs of implementing energy conservation measures and receives, in return, a contractually determined share of the cost savings that result.

(2) Except as provided in 10 CFR 436.34, ESPC's are subject to subpart 17.1.

(c) To solicit and award an ESPC, the contracting officer—

(1) Must use the procedures, selection method, and terms and conditions provided in 10 CFR part 436, subpart B; at <http://www.eren.doe.gov/femp/resources/legislation.html>; and

(2) May use the "Qualified List" of energy service companies established by the Department of Energy and other agencies.

Subpart 23.7—Contracting for Environmentally Preferable Products and Services

9. Revise the heading of subpart 23.7 to read as set forth above.

10. Revise section 23.700 to read as follows:

23.700 Scope.

This subpart prescribes policies for acquiring environmentally preferable products and services.

11. Amend section 23.702 by removing paragraph (e), redesignating (f) as (e), and adding a new paragraph (f) to read as follows:

23.702 Authorities.

* * * * *

(f) Executive Order 13123 of June 3, 1999, Greening the Government through Efficient Energy Management.

12. Amend section 23.703 by revising paragraphs (a) and (b)(2) to read as follows:

23.703 Policy

* * * * *

(a) Implement cost-effective contracting preference programs promoting energy-efficiency, water conservation, and the acquisition of environmentally preferable products and services; and

(b) * * *

(2) Promote energy-efficiency and water conservation.

* * * * *

PART 42—CONTRACT ADMINISTRATION AND AUDIT SERVICES

13. In section 42.302, revise paragraph (a)(68) to read as follows:

42.302 Contract administration functions.

(a) * * *

(68) Monitor the contractor's environmental practices for adverse impact on contract performance or contract cost, and for compliance with environmental requirements specified in the contract. ACO responsibilities include—

(i) Requesting environmental technical assistance, if needed;

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

(iii) As required in the contract, ensuring that the contractor complies with the reporting requirements relating to recovered material content utilized in contract performance (see subpart 23.4).

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DEPARTMENT OF DEFENSE

GENERAL SERVICES ADMINISTRATION

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

48 CFR Parts 2, 32, and 52

[FAC 2001-02; FAR Case 1999-023; Item III]

RIN 9000-A189

Federal Acquisition Regulation; Prompt Payment and the Recovery of Overpayment

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