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PRACTICAL TIGHT-KNIT BRIEFINGS INCLUDING ACTION GUIDELINES ON GOVERNMENT CONTRACT TOPICS

THE GREENING OF GOVERNMENT PROCUREMENT

By J. Catherine Kunz

Environmental issues are increasingly receiving media attention, influencing business and Government decisions and affecting people's daily lives. Thus, it is no surprise that U.S. Government procurement has recently received attention for its environmentally sustainable, or "green," practices. Since the end of 2007, there has been increased media coverage of the Government's green purchasing achievements and plans. For example, news reports have covered the Environmental Protection Agency's determination that the U.S. Air Force is the Government's largest purchaser of green power, purchasing more than 899 kilowatt-hours of power annually from renewable sources,¹ the EPA's announced plans to extend its ENERGY STAR[®] program, which promotes energy efficiency in commercial products and buildings, to provide guidelines for Government data centers,² and the General Services Administration's efforts to identify vendors of green products and services on its information technology schedule and to incorporate requirements for green products into contracts.³

IN BRIEF

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To assist it in pursuing green purchasing initiatives, the Government has adopted a number of new environmentally focused procurement regulations that place obligations both on the procuring agencies and on the contractors to ensure the Government increases its acquisition of green products and services. Not surprisingly, since the Federal Government is a tremendous consumer of energy, several of the new regulations require the

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Government to meet certain energy efficiency goals when making procurement decisions. These new regulations complement the previously existing environmentally focused regulations in the Federal Acquisition Regulation and together provide the Government with mechanisms to achieve improved energy efficiency and more environmentally sustainable purchasing practices. They also offer contractors both expanded business opportunities as well as additional contracting requirements and compliance risks.

This BRIEFING PAPER discusses the Government's "green" procurement regulations governing the acquisition of energy-efficient products, the use of energy-savings performance contracts, and the operation of the procurement preference for biobased and recovered materials products.⁴ It also considers the potential future direction of "green" procurement, as indicated by a recent Executive Order issued by the President⁵ and a proposed policy letter published by the Office of Federal Procurement Policy.⁶

"Green" Procurement Regulations

FAR Part 23, titled "Environment, Energy and Water Efficiency, Renewable Energy Technologies, Occupational Safety, and Drug-Free Workplace," contains the environment-related procurement regulations. Part 23 falls within the "Socioeconomic Programs" Subchapter of the FAR. Until recently, most of the regulations in Part 23 were primarily some form of reporting requirement for contractors, such as the requirement to submit Material Safety Data Sheets reporting hazardous materials, the requirement to notify the Government before delivery of radioactive material, and the require-

ment to certify the filing of a Toxic Chemical Release Inventory Form.⁷ In the latter part of 2007, a number of new regulations were added to Part 23 that place affirmative obligations on agencies to make environment-related procurement decisions and on contractors to comply with environment-related contract requirements.

Acquisition Of Energy-Efficient Products

There are now several regulations in FAR Part 23 designed to improve the Government's energy efficiency through proactive procurement decisions. FAR Subpart 23.2 addresses the acquisition of energy-efficient products and the use of energy-savings performance contracts. These regulations were promulgated in 2001 in response to Executive Order 13123 of June 3, 1999, "Greening the Government Through Efficient Energy Management,"⁸ and were substantially revised with respect to the acquisition of energy-efficient products in 2007 in response to § 104 of the Energy Policy Act of 2005.⁹ Section 104 requires that all acquisitions of energy-consuming products and all contracts that involve the furnishing of energy-consuming products require acquisition of ENERGY STAR® or Federal Energy Management Program-designated products.¹⁰ It also resulted in the promulgation in 2007 of a regulation found at FAR 23.705 specific to the Government's acquisition of energy-efficient electronic products.

■ Acquisition Of ENERGY STAR®-Qualified Or FEMP-Designated Products

The Government must purchase energy-efficient products unless certain exemptions



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are met. Specifically, FAR 23.203 provides that when an agency is acquiring energy-consuming products that are listed in the ENERGY STAR® Program or Federal Energy Management Program (FEMP), the agency must purchase ENERGY STAR®-qualified or FEMP-designated products.¹¹ It also requires agencies, when acquiring products that consume power in a standby mode and are listed on FEMP's Low Standby Power Devices product listing, to purchase items that meet FEMP's standby power wattage recommendation or items that use one watt or the lowest wattage practicable while in standby mode.¹² The regulation further requires agencies to specify products that comply with the above requirements when contracting for certain services or construction work.¹³

ENERGY STAR® is a voluntary labeling program that was started by the EPA in 1992 and is now co-administered by the EPA and the U.S. Department of Energy.¹⁴ These agencies identify and qualify energy-efficient products by establishing energy efficiency specifications for particular categories of products, such as office equipment, heating and cooling equipment, major appliances, lighting products, and commercial food service products.¹⁵ Manufacturers can then determine whether any of their products meet the energy efficiency specifications and can affix the ENERGY STAR® logo to those products that meet or exceed the applicable specification.¹⁶ Most qualifying products are listed on the EPA website.¹⁷

FEMP, established at the DOE in 1973, promotes energy efficiency and the use of renewable energy sources at Federal Government facilities by assisting agencies with new construction, building retrofits, equipment procurements, operations and maintenance, and utility management.¹⁸ As part of its charter, FEMP issues purchasing specifications for energy-efficient products as well as guidance on technology selection, equipment installation, and efficient use of the product.¹⁹ The types of products designated as energy-efficient by FEMP are similar to, and often overlap with, those qualified under the ENERGY STAR® program.²⁰ Both ENERGY STAR®-qualified and FEMP-designated products fall in the top 25% of energy efficiency for their category of product.²¹

The regulations identify two exemptions from the requirement to purchase ENERGY STAR® or FEMP-designated products. These are (1) if no ENERGY STAR® or FEMP-designated product is reasonably available that meets the functional requirements of the agency or (2) if no ENERGY STAR® or FEMP-designated product is cost effective over the life of the product taking energy cost savings into account.²² The December 2006 proposed rule amending FAR Subpart 23.2 to implement § 104 of the Energy Policy Act of 2005 included language stating that only rarely should there be a determination that an ENERGY STAR® or FEMP-designated product is not cost effective over the life of the product because the criteria used to evaluate whether a product receives an ENERGY STAR® qualification or FEMP designation in the first instance include a life-cycle cost effectiveness assessment.²³ However, the November 2007 final rule deleted this language due to concerns that it was overly broad and would not be accurate with respect to every product that is ENERGY STAR® qualified or FEMP-designated.²⁴

The 2007 revision to FAR Subpart 23.2 added a requirement for inclusion of a new contract clause at FAR 52.223-15, "Energy Efficiency in Energy-Consuming Products," in solicitations and contracts involving energy-consuming products.²⁵ FAR 52.223-15 effectively places the responsibility on contractors to ensure delivery and/or use of compliant energy-consuming products when performing relevant contracts. Specifically, it requires contractors to ensure that energy-consuming products are ENERGY STAR® or FEMP-designated products at the time of contract award for products that are delivered, acquired by the contractor for use in performing services at Government facilities, furnished by the contractor for use by the Government, or specified in the design of a building or work or incorporated during its construction, renovation, or maintenance.²⁶ Thus, FAR 52.223-15 makes clear that the energy-efficiency requirements are not limited to end products delivered to the Government but apply as well to energy-consuming products used by the contractor while providing services to or engaging in construction work for the Government. Contractors are permitted to use non-ENERGY STAR® or FEMP-designated products only if the required energy-consuming product is not listed in the ENERGY STAR® Program or FEMP or

the contractor obtains approval in writing from the Contracting Officer.²⁷ The preamble to the final rule justified the shifting of the burden of complying with the energy-efficient regulations from agencies to contractors based on the finding that agencies often overlooked the requirement to acquire energy-efficient products when drafting specifications, particularly in service and construction contracts.²⁸

These regulations do recognize that the energy efficiency of products can decrease over the lifetime of the product and that Government changes to delivered products can alter the energy efficiency such that the product, as changed, is no longer in compliance with the ENERGY STAR® rating or FEMP designation. The preamble states that any change to a product after the Government takes possession will have no impact on the contractor with respect to compliance with FAR 52.223-15.²⁹ Also, the discussion in the preamble to the final rule makes clear that as long as the product is ENERGY STAR®-qualified or FEMP-designated at the time of contract award, then delivery or furnishing of that product will be acceptable for the life of the contract.³⁰ However, changes in a product's energy efficiency may still affect option exercises and follow-on contract specifications. Thus, a contractor will have to remain vigilant over products' energy efficiency ratings and cannot assume that the product sold to the Government or used by the contractor during performance of the first contract will necessarily be acceptable for future options or follow-on contracts.

■ Acquisition Of EPEAT-Registered Products

An entirely new energy-focused acquisition regulation is found in FAR Subpart 23.7, "Contracting for Environmentally Preferable Products and Services." FAR 23.705, implemented effective December 26, 2007,³¹ and authorized by the Energy Policy Act of 2005³² and Executive Order 13423 of January 24, 2007, "Strengthening Federal Environmental, Energy, and Transportation Management,"³³ requires agencies to meet at least 95% of their annual acquisition requirements for electronic products with Electronic Product Environmental Assessment Tool (EPEAT)-registered products, unless an EPEAT standard for such products is unavailable.³⁴ The regulation was implemented as an interim rule with

immediate effect because Executive Order 13423 required use of EPEAT when acquiring personal computer products. (See further discussion of Executive Order 13423 below.)³⁵

Although this regulation would appear to be extremely broad-based, currently, the only products for which there is an EPEAT standard are computer desktops, laptops, and monitors.³⁶ EPEAT is a tool to help purchasers, both private and public, evaluate, compare, and select desktops, laptops, and monitors based on their environmental attributes.³⁷ EPEAT uses the Institute of Electrical and Electronics Engineers (IEEE) 1680 American National Standard for the Environmental Assessment of Personal Computer Products, which identifies 23 required environmental performance criteria and 28 optional criteria, to rate the computer products.³⁸ If EPEAT verifies that a product meets the 23 required criteria, it labels the product as an EPEAT Bronze product.³⁹ A product meeting the 23 required criteria and at least 14 of the optional criteria will be assigned an EPEAT Silver status, and if the product meets the 23 required criteria and at least 21 of the optional criteria, it is assigned an EPEAT Gold status.⁴⁰

FAR 23.705 recognizes that personal computer products are rated by EPEAT,⁴¹ and FAR 23.701 defines "personal computer product" to include a notebook computer, desktop computer, computer monitor, and any peripheral equipment that is integral to the operation of the computer or monitor, such as a keyboard, mouse, and power cord.⁴² The definition specifically excludes printers, copiers, and fax machines from the definition of "personal computer product."⁴³ By setting the requirement to purchase EPEAT-registered electronic products at 95% of the agency's annual acquisitions, the regulation provides agencies with the ability to grant exceptions to the requirement on a limited (5%) basis. The regulation identifies examples of when an exception might be merited, such as if an agency determines that none of the EPEAT-registered products meets agency requirements or the EPEAT-registered product will not be cost effective over the product's life-cycle.⁴⁴

Similar to the regulation requiring the Government's purchase of energy-efficient products, the EPEAT regulation added a new contract clause to

be included in relevant solicitations and contracts at FAR 52.223-16, “IEEE 1680 Standard for the Environmental Assessment of Personal Computer Products.”⁴⁵ Like the energy-efficient product contract clause, FAR 52.223-16 holds contractors responsible for delivering qualifying products. The clause requirements apply only to personal computer products and specify that contractors must deliver, furnish for Government use, or furnish for contractor use at a Government-owned facility only EPEAT Bronze or higher registered personal computer products.⁴⁶ The clause contains the same definition of “personal computer product” as FAR 23.701 and likewise provides definitions of “computer monitor,” “desktop computer,” and “notebook computer.”⁴⁷ The EPEAT registration of the personal computer product must exist at the time of proposal submission, even if the standard has changed between the offer and delivery.⁴⁸ Thus, this clause, too, recognizes, and does not hold the contractor accountable for, changes in energy usage and efficiencies of products over time.

Unlike the energy-efficient product clause, however, FAR 52.223-16 does not identify any exemptions from the requirement to deliver EPEAT-registered personal computer products. Thus, if this clause is included in the contract and the contract requires the delivery of personal computer products to the Government or the furnishing of such products for use by the Government or by the contractor at a Government-owned facility, the contractor will not have any “out” from compliance.

Energy-Savings Performance Contracts

While not a new, or recently revised, regulation, FAR 23.205 governs energy-savings performance contracts (ESPCs). This section requires an agency to make maximum use of the authority provided in the National Energy Conservation Policy Act⁴⁹ to use ESPCs to reduce energy use and cost in an agency’s facilities and operations.⁵⁰ An ESPC is a long-term contracting vehicle (up to 25 years) that allows an agency to engage an energy service company to improve energy efficiency in one or several agency facilities with no capital costs incurred by the federal agency.⁵¹ Instead, the

contractor finances the costs of implementing energy conservation measures and, to the extent the measures are successful, receives a contractually determined share of the cost savings.⁵²

The usual process for establishing an ESPC involves an energy audit by the contractor that identifies areas of improvement in energy utilization for the agency, followed by design and implementation of projects to achieve greater energy efficiency. The contractor arranges for private financing of the energy projects. It also assumes the risk that the improvements will generate sufficient savings to pay for the projects during the contract term. After the contract ends, all savings associated with the projects accrue to the agency.⁵³

Several agencies, including the DOE, have established “super ESPCs,” which are indefinite-delivery, indefinite-quantity contracts under which certain energy service companies are prequalified to sell energy equipment and services to federal agencies.⁵⁴ Generally agencies can implement a “super ESPC” in less time than a regular ESPC due to the streamlining attributes of using an umbrella-type contract vehicle.⁵⁵

Procurement Preference For Biobased & Recovered Materials Products

■ Biobased Products

In addition to recent regulatory action focused on the Government’s procurement of energy-using products, there has been recent revision to FAR Subpart 23.4, which now requires that a procurement preference be given to biobased products as well as to products using recovered materials.⁵⁶ A “biobased product” is defined in the FAR as “a product determined by the U.S. Department of Agriculture to be a commercial or industrial product (other than food or feed) that is composed, in whole or in significant part, of biological products, including renewable domestic agricultural materials (including plant, animal, and marine materials) or forestry materials.”⁵⁷ The procurement preference for biobased products was added to the FAR, effective December 7, 2007, to implement the requirement in the Farm Security and Rural Investment Act of

2002⁵⁸ for federal agencies to give a preference to biobased products, as designated by the USDA, when procuring certain types of items.⁵⁹

The USDA did not issue until 2006 its first set of designations of biobased items, which included mobile equipment hydraulic fluids, roof coatings, water tank coatings, diesel fuel additives, penetrating lubricants, and bedding, bed linens, and towels.⁶⁰ Since then, it has designated 27 additional categories of items, including insulating foam, hand cleaners and sanitizers, fertilizers, glass cleaners, and metal-working fluids.⁶¹ These designations establish the minimum biobased content for each of the item categories. Manufacturers of products falling within the item categories can voluntarily identify their products as meeting the biobased content requirements.⁶²

■ Recovered Materials Products

The second preference program in FAR Subpart 23.4 is for use of products containing recovered materials. "Recovered material" is defined in the FAR as "waste materials and by-products recovered or diverted from solid waste, but the term does not include those materials and by-products generated from, and commonly reused within, an original manufacturing process."⁶³ The EPA is required by the Resource Conservation and Recovery Act to designate products that are or can be made with recovered materials.⁶⁴ The EPA issued its first set of designations in 1995 and has issued four additional sets of designations since then.⁶⁵ To accompany the product designations, the EPA issues Recovered Materials Advisory Notices (RMANS) that recommend recycled content ranges for the designated products.⁶⁶ Because the RMANS are based on the commercial availability of the recycled content items, they are revised as marketplace conditions change. To date, the products designated by the EPA include construction products such as carpet and roofing materials; nonpaper office products such as furniture, desk accessories, and trash bags; paper products; and vehicular products such as coolants and lubricating oils.⁶⁷ Once a product is designated, manufacturers can self-identify their products as meeting the EPA's recovered materials standards.⁶⁸

■ Agency Affirmative Procurement Programs

To implement the procurement preferences, FAR Subpart 23.4 requires agencies to establish an affirmative procurement program for USDA- and EPA-designated items if the agency's purchase of a designated item exceeds \$10,000 or the aggregate amount paid for designated items in the preceding fiscal year was \$10,000 or more.⁶⁹ The affirmative procurement program must include four elements: (1) a recovered materials and biobased products preference program; (2) an agency promotion program that promotes the use of recovered materials and biobased products; (3) for EPA-designated items only, a program for requiring estimates, certification, and verification of recovered material used in the performance of contracts; and (4) annual review and monitoring of the effectiveness of the program.⁷⁰ An agency's affirmative procurement program must ensure that all purchases of USDA- and EPA-designated items contain biobased products or recovered material content unless the purchase meets one of the three exceptions: (a) biobased or recovered material products cannot be competitively acquired within a reasonable time frame; (b) these products do not meet reasonable performance standards; or (c) these products cannot be acquired at a reasonable price.⁷¹ Also, both the USDA and the EPA can establish categorical exemptions for items they designate. For example, certain biobased products, such as mobile equipment hydraulic fluids, diesel fuel additives, and penetrating lubricants, are excluded from the preferred procurement requirement when these items are to be used for spacecraft system and launch support equipment and military equipment.⁷²

Because both the USDA and the EPA can add designated items to their respective programs, agencies are given a year to revise their affirmative procurement programs after a new item is designated.⁷³ In situations when both a USDA- and EPA-designated item will be used for the same purpose, and both meet the agency's need, the FAR directs that the agency purchase the product containing recovered materials rather than the biobased product.⁷⁴ Finally, the FAR permits agencies to use their own product specifications or descriptions when procuring

biobased products or products containing recovered materials, provided that such specifications or descriptions meet or exceed the relevant agency's requirements for the product.⁷⁵

In addition to placing affirmative requirements on agencies, FAR Subpart 23.4 creates obligations for contractors. First, when a procurement requires the use of biobased or recovered materials products, contractors must certify, by signing their offer, that the relevant products to be used in performance of the contract will comply with the applicable specifications.⁷⁶ Second, for service and construction contracts where products designated by the USDA or the EPA will be used, contractors must make maximum use of such biobased or recovered materials products unless the products cannot be acquired competitively within the required time frame, do not meet contract performance requirements, or cannot be acquired at a reasonable price.⁷⁷ Third, for contracts exceeding \$100,000 that are for, or specify the use of, EPA-designated products, contractors must submit a second certification upon completion of the contract concerning the percentage of total recovered material that was used during contract performance.⁷⁸

The Future Direction Of "Green" Procurement

■ Executive Order 13423

A recent Executive Order addressing environment-focused procurement goals and practices has set in motion the potential for additional procurement regulations to be added to FAR Part 23 in the future. Executive Order 13423, "Strengthening Federal Environmental, Energy, and Transportation Management," was issued January 24, 2007, and sets goals for federal agencies to improve energy efficiency, increase the use of renewable energy sources, reduce water consumption intensity, incorporate sustainable environmental practices in acquisitions of goods and services, reduce the quantity of toxic and hazardous chemicals and materials acquired, ensure that new building construction and major renovations comply with certain "green" guidelines, reduce fleet vehicle consumption of petroleum products, and ensure that EPEAT-registered electronic products are

acquired.⁷⁹ The provision applicable to agency acquisition of goods and services specifically provides that agencies must acquire "biobased, environmentally preferable, energy-efficient, water efficient, and recycled content products" and require "use paper of at least 30 percent post-consumer fiber content."⁸⁰ Executive Order 13423 requires that agencies' implementation of the substantive requirements of the Order will be monitored and evaluated, and it also provides for amendments to the FAR as necessary to implement the Order.⁸¹ Already, one new regulation, the EPEAT regulation at FAR 23.705, discussed above, has been promulgated in response, in part, to Executive Order 13423.⁸²

■ Proposed OFPP Policy Letter

Following the issuance of Executive Order 13423, the Office of Federal Procurement Policy published on December 28, 2007, a proposed policy letter on "green" procurement policies and strategies for the acquisition, use, and disposition of environmentally friendly products and services.⁸³ The policy letter states that "[a]cquiring green products and services is a key element of successfully implementing E.O. 13423" and explains that its purpose is to provide agencies with guidance for implementing the acquisition requirements established by Executive Order 13423.⁸⁴ The proposed policy letter identifies eight general requirements for agencies to meet. First, they must identify opportunities for and give preference to the acquisition of alternative fuels and alternative fuel vehicles, biobased products, ENERGY STAR[®] and FEMP-designated products, environmentally preferable products and services,⁸⁵ EPEAT-registered electronics, low or no toxic or hazardous chemicals or materials, non-ozone depleting substances, recycled content products, renewable energy, and water efficient products.⁸⁶ Second, agencies must include environmental and energy experts, managers, or technical personnel on integrated procurement teams and consider sustainable design practices, life cycle cost, product or packaging take back, and maximization of energy and resource recovery in solid waste management.⁸⁷

The third and fourth goals are the incorporation of green purchasing requirements in agency

environmental management systems and the development and implementation of a formal affirmative procurement program, or green purchasing plan, for all products and services covered by the policy letter.⁸⁸ The policy letter sets forth extensive requirements for the affirmative procurement program or green purchasing plan, including establishing preference programs for green products and services, requiring the flow-down of the preference programs to subcontractors, and ensuring past performance evaluation of contractors' adherence to green contracting principles.⁸⁹ Fifth, the policy letter requires agencies to work with private standard-setting organizations and participate in the development of voluntary standards and specifications for green products, practices, and services.⁹⁰ Sixth and seventh, agencies must develop and require training on green product and service acquisition, and conduct pilot projects to test and measure results from the purchase and use of green products and services.⁹¹ Finally, the eighth requirement addresses the purchase of EPEAT-registered electronics that is now implemented as a procurement regulation at FAR 23.705.⁹²

The policy letter also requires agencies to implement automatic substitution policies that would allow for the substitution of functionally equivalent green products and services for non-green products and services.⁹³ The automatic substitution policy would be implemented with assistance from the General Services Administration and Defense Logistics Agency. The GSA and the DLA are also tasked with prominently identifying green products and services in fed-

eral catalogs and on-line ordering systems.⁹⁴ The policy letter further contains provisions specific to service contracting, stating that agencies must include requirements and preferences for the use of green products in all new and re-competed service contracts to the extent green products can be substituted for non-green products.⁹⁵ Finally, it sets forth the conditions necessary for there to be an exemption from the requirements in the policy letter.⁹⁶

A number of comments to the green purchasing policy letter have been submitted to the OFPP. Most commenters have agreed with the general policy goal of "green procurement" but have voiced concern about the impact of the policy on federal procurement practices and the need for greater expertise amongst procurement officials to implement the policy's goals.⁹⁷ When a final version of the green purchasing policy letter will be issued is not clear, nor is the practical effect it might have on agencies' procurement practices. More important, whether additional green procurement regulations will be promulgated in FAR Part 23 as a result of Executive Order 13423 and/or the OFPP policy letter is not definite, but given the increasing focus on environmental issues, in general, and the cost-savings to be gained by implementing more sustainable business practices and more efficient energy use, in particular, it would not be surprising to see more environmental-focused procurement regulations proposed and finalized for incorporation into FAR Part 23 or agency supplements to Part 23 in the coming years.

GUIDELINES

These *Guidelines* highlight the "green" procurement regulations in FAR Part 23. They are not, however, a substitute for professional representation in any specific situation.

1. Recognize new business opportunities in selling to the Federal Government resulting from the Government's heightened focus on improving its energy efficiency. Particularly if energy costs continue to increase, procuring agencies will actively seek to acquire energy efficient products and services, and contractors with suitable products and services will be well positioned to

increase their sales to the Government. However, be aware that the Government's increased focus on "green purchasing" of products and supplies entails additional compliance obligations for contractors.

2. If the clause at FAR 52.223-15, "Energy Efficiency in Energy-Consuming Products," is incorporated into your contract, make certain that energy-consuming products provided to the Government or used in services or construction for the Government are ENERGY STAR®-qualified or FEMP-designated products unless one of

the two exemptions is met. Also, regularly check the list of products approved for ENERGYSTAR® ratings or FEMP designation on the respective agency's website since additional products will likely be added on a routine basis.

3. Similarly, if the clause at FAR 52.223-16, "IEEE 1680 Standard for the Environmental Assessment of Personal Computer Products," is incorporated into your contract, ensure that the personal computer products used or delivered under the contract are registered at least as EPEAT Bronze products. While this clause currently addresses only personal computer products, if the EPEAT program establishes standards for other products, the clause could be revised to apply to additional products.

4. For contracts involving the possible use of biobased products or recovered material

content, look for the clauses at FAR 52.223-1, "Biobased Product Certification, FAR 52.223-4, "Recovered Material Certification, and FAR 52.223-9, "Estimate of Percentage of Recovered Material Content for EPA-Designated Items," and ensure any certification or submission of information is accurate and truthful. Also, remember that an affirmative obligation is placed on contractors performing certain service and construction contracts to make maximum use of biobased and recovered materials products.

5. Be aware that additional environment-focused regulations may be added to FAR Part 23. Executive Order 13423 and the OFPP proposed policy letter provide a basis for the promulgation of new regulations requiring green purchasing practices by Government agencies.

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- 35/ 72 Fed. Reg. at 73216.
- 36/ See <http://www.epeat.net/faq.aspx#1>.
- 37/ See <http://www.epeat.net/faq.aspx#1>.
- 38/ See <http://www.epeat.net/faq.aspx#1>.
- 39/ See <http://www.epeat.net/faq.aspx#1>.
- 40/ See <http://www.epeat.net/faq.aspx#1>.
- 41/ FAR 23.705(b).
- 42/ FAR 23.701.
- 43/ FAR 23.701
- 44/ FAR 23.705(c).
- 45/ FAR 23.706(b)(1).
- 46/ FAR 52.223-16, para. (b). Alternative I to the clause sets the level of EPEAT-registration at EPEAT Silver or higher. FAR 23.706(b)(2) states that agencies may use Alternate I when there are sufficient EPEAT Silver registered products available to meet agency needs.
- 47/ FAR 52.223-16, para. (a).
- 48/ FAR 52.223-16, para. (b).
- 49/ 42 U.S.C.A. § 8287.
- 50/ FAR 23.205(a).
- 51/ FAR 23.205(b)(1).
- 52/ FAR 23.205(b)(1).
- 53/ See <http://www1.eere.energy.gov/femp/financing/superespcs.html>.
- 54/ See <http://www1.eere.energy.gov/femp/financing/superespcs.html>.
- 55/ See <http://www1.eere.energy.gov/femp/financing/superespcs.html>.
- 56/ FAR. 23.404.
- 57/ FAR 2.101.
- 58/ 7 U.S.C.A. § 8102.
- 59/ 72 Fed. Reg. 63040 (Nov. 7, 2007).
- 60/ 71 Fed. Reg. 13686 (Mar. 16, 2006).
- 61/ 73 Fed. Reg. 27928, 27958, 27978 (May 14, 2008); see 7 C.F.R. pt. 2902, subpt. B.

- 62/ See <http://www.biopreferred.gov/FAQ.aspx>.
- 63/ FAR 2.101.
- 64/ 42 U.S.C.A. §§ 6912(a), 6962.
- 65/ 60 Fed. Reg. 21370 (May 1, 1995); 62 Fed. Reg. 60962 (Nov. 13, 1997); 65 Fed. Reg. 3070 (Jan. 19, 2000); 69 Fed. Reg. 24028 (Apr. 30, 2004); 72 Fed. Reg. 52475 (Sept. 14, 2007); see 40 C.F.R. pt. 247, subpt. B.
- 66/ 60 Fed. Reg. 21386 (May 1, 1995); 62 Fed. Reg. 60976 (Nov. 13, 1997); 65 Fed. Reg. 3082 (Jan. 19, 2000); 69 Fed. Reg. 24039 (Apr. 20, 2004); 72 Fed. Reg. 52561 (Sept. 14, 2007).
- 67/ <http://www.epa.gov/epaoswer/non-hw/procure/products.htm>.
- 68/ <http://www.epa.gov/epaoswer/non-hw/procure/database.htm>.
- 69/ FAR 23.400(a), 23.404(a).
- 70/ FAR 23.404(a)(3).
- 71/ FAR 23.404(b)(1).
- 72/ FAR 23.404(b)(2).
- 73/ FAR 23.404(a)(1).
- 74/ FAR 23.405(c).
- 75/ FAR 23.404(d).
- 76/ FAR 52.223-1, 52.223-4.
- 77/ FAR 23.406(b), (e), 52.223-2, 52.223-17.
- 78/ FAR 23.406(d), 52.223-9.
- 79/ 72 Fed. Reg. 3919 (Jan. 26, 2007).
- 80/ 72 Fed. Reg. 3919.
- 81/ 72 Fed. Reg. at 3920–21.
- 82/ 72 Fed. Reg. 73215 (Dec. 26, 2007).
- 83/ 72 Fed. Reg. 73904 (Dec. 28, 2007).
- 84/ 72 Fed. Reg. at 73906.
- 85/ “Environmentally preferable” is defined as “products and services that have a lesser or reduced effect on human health and the environment when compared with competing products or services that serve the same purpose. This comparison may consider raw materials acquisition, products, manufacturing, packaging, distribution, reuse, operation, maintenance, or disposal of the product or service.” See 72 Fed. Reg. at 73905.
- 86/ 72 Fed. Reg. at 73906.
- 87/ 72 Fed. Reg. at 73906.
- 88/ 72 Fed. Reg. at 73906.
- 89/ 72 Fed. Reg. at 73906–07.
- 90/ 72 Fed. Reg. at 73907.
- 91/ 72 Fed. Reg. at 73907.
- 92/ 72 Fed. Reg. at 73907.
- 93/ 72 Fed. Reg. at 73907.
- 94/ 72 Fed. Reg. at 73907.
- 95/ 72 Fed. Reg. at 73907–08.
- 96/ 72 Fed. Reg. at 73908.
- 97/ See www.whitehouse.gov/omb/procurement/green/green_comments.html. See generally Nadler & Berger, “Feature Comment: OFPP Evaluating Proposed Policy on Procurement of “Green” Products and Services,” 50 GC ¶ 207 (June 11, 2008); 50 GC ¶ 127.

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