

DEPARTMENT OF DEFENSE**GENERAL SERVICES
ADMINISTRATION****NATIONAL AERONAUTICS AND
SPACE ADMINISTRATION****48 CFR Parts 2, 11, 15, 23, and 42****[FAR Case No. 1999-011]****RIN 9000-AI71****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: 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 implement Executive Order (E.O.) 13123 of June 3, 1999, Greening the Government through Efficient Energy Management.

DATES: Interested parties should submit comments in writing on or before July 10, 2000 to be considered in the formulation of a final rule.

ADDRESSES: Submit written comments to: General Services Administration, FAR Secretariat (MVRs), 1800 F Street, NW., Room 4035, ATTN: Laurie Duarte, Washington, DC 20405.

Submit electronic comments via the Internet to: farcase.1999-011@gsa.gov. Please submit comments only and cite FAR case 1999-011 in all correspondence related to this case.

FOR FURTHER INFORMATION CONTACT: The FAR Secretariat, Room 4035, GS Building, Washington, DC 20405, at (202) 501-4755 for information pertaining to status or publication schedules. For clarification of content, contact Mr. Paul Linfield, Procurement Analyst, at (202) 501-1757. Please cite FAR case 1999-011.

SUPPLEMENTARY INFORMATION:**A. Background**

This proposed rule amends the FAR to implement E.O. 13123. The proposed rule—

1. Defines in subpart 2.1, Definitions—

(a) “Energy-efficient product” (relocated and revised from FAR 23.704);

(b) “Energy-savings performance contract” (see 10 CFR 436, Subpart B); and

(c) “Renewable energy” and “renewable energy technology” (see sections 710 and 711 of E.O. 13123);

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

3. Revises part 15 to alert agencies to the special procedures at 10 CFR 436.33(b) that agencies must use when evaluating unsolicited proposals for energy-savings performance contracts (ESPCs);

4. Revises and relocates guidance on energy-efficient products and services from subpart 23.7 to subpart 23.2 so that subpart 23.7 now focuses exclusively on environmentally preferable products and services;

5. Revises 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. Makes a number of editorial changes.

The Councils proposed in FAR case 1998-015 other FAR amendments to Subpart 23.7 to implement E.O. 13101 of September 14, 1998, Greening the Government through Waste Prevention, Recycling, and Federal Acquisition. The Councils published a proposed rule on FAR case 1998-015 in the **Federal Register** on September 23, 1999 (64 FR 51656). After comments have been reconciled, the Councils will publish a final rule on these other changes to Subpart 23.7.

This rule was not subject to Office of Management and Budget 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 Councils do not expect this proposed 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 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.

An Initial Regulatory Flexibility Analysis has, therefore, not been performed. We invite comments from small businesses and other interested parties. The Councils will consider comments from small entities concerning the affected FAR subparts 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 1999-011), in correspondence.

C. Paperwork Reduction Act

The Paperwork Reduction Act does not apply because the proposed 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: May 4, 2000.

Edward C. Loeb,

Director, Federal Acquisition Policy Division.

Therefore, DoD, GSA, and NASA propose that 48 CFR parts 2, 11, 15, 23, and 42 be amended 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, add, in alphabetical order, the definitions “Energy-efficient product,” “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.

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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.

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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 efficiency, 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.

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

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PART 15—CONTRACTING BY NEGOTIATION

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

15.603 General.

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(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, CONSERVATION, OCCUPATIONAL SAFETY, AND DRUG-FREE WORKPLACE

6. 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-efficient products and services, environmentally preferable products, and products that use recovered materials; and

(e) Requiring contractors to identify hazardous materials.

7. Revise subpart 23.2 to read as follows:

Subpart 23.2—Energy and Water Efficiency and Renewable Energy

Sec.

23.200 Scope.

23.201 Authorities.

23.202 Policy.

23.203 Energy-efficient products.

23.204 Energy-savings performance contracts (ESPC).

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.

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 design, construction, renovation, or maintenance of a public building that will include energy-using products, the design specification must specify or the agency 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 (ESPC).

(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 ESPC, when life-cycle cost-effective, to reduce energy use and cost in the agency's facilities and operations.

(b) 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.

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

(1) Must use the procedures, selection method, and terms and conditions provided at 10 CFR part 436, subpart B; 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

8. Revise the heading of Subpart 23.7 to read as set forth above.

9. Revise section 23.701 to read as follows:

23.701 Applicability.

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

10. Amend section 23.702 by revising paragraph (f) to read as follows:

23.702 Authorities.

* * * * *

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

23.703 [Removed]**23.704 through 23.706 [Redesignated as 23.703 through 23.705]**

11. Remove section 23.703 and redesignate sections 23.704 through

23.706 as sections 23.703 through 23.705, respectively.

12. In addition to the changes above, in newly redesignated section 23.703, remove paragraph (b)(2) and redesignate paragraphs (b)(3) through (b)(6) as paragraphs (b)(2) through (b)(5), respectively.

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) Ensure contractor environmental practices are evaluated for possible adverse impact on contract performance or cost, and, as part of quality assurance procedures (part 46), monitor contractor compliance with environmental requirements specified in the contract. ACO responsibilities include, but are not limited to—

(i) Requesting environmental technical assistance, if needed; and

(ii) Ensuring that the contractor complies with—

(A) Specifications requiring the use of environmentally preferable products, energy-efficient products, and materials or delivery of end items with specified recovered material content; and

(B) Reporting requirements relating to recovered material content utilized in contract performance (see subpart 23.4).

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