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DEPARTMENT OF DEFENSE

GENERAL SERVICES ADMINISTRATION

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

48 CFR Parts 2, 4, 7, 11, 23, 36, 39, 42, and 52

[FAR Case 2015-033; Docket No. 2015-0033; Sequence No. 1]

RIN: 9000-AN28

Federal Acquisition Regulation: Sustainable Acquisition

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

ACTION: Proposed rule.

SUMMARY: DoD, GSA, and NASA are proposing to amend the Federal Acquisition Regulation (FAR) to implement Executive Order, Planning for Federal Sustainability in the Next Decade, and the biobased product acquisition provisions of the Agricultural Act of 2014 (also known as the 2014 Farm Bill).

DATES: Interested parties should submit written comments to the Regulatory Secretariat Division at one of the addresses shown below on or before **[Insert date 60 days after publication in the FEDERAL REGISTER]** to be considered in the formation of the final rule.

ADDRESSES: Submit comments in response to FAR Case 2015-033 by any of the following methods:

- Regulations.gov: <http://www.regulations.gov>.

Submit comments via the Federal eRulemaking portal by searching for "FAR Case 2015-033". Select the link "Comment Now" that corresponds with "FAR Case 2015-033." Follow the instructions provided on the screen. Please include your name, company name (if any), and "FAR Case 2015-033" on your attached document.

- Mail: General Services Administration, Regulatory Secretariat, ATTN: Ms. Flowers, 1800 F Street, NW, 2nd floor, Washington, DC 20405.

Instructions: Please submit comments only and cite "FAR Case 2015-033" 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. To confirm receipt of your comment(s), please check www.regulations.gov, approximately two to three days after submission to verify posting (except allow 30 days for posting of comments submitted by mail).

FOR FURTHER INFORMATION CONTACT: Mr. Charles Gray, Procurement Analyst, at 703-795-6328 for clarification of content. For information pertaining to status or publication schedules, contact the Regulatory Secretariat Division at 202-501-4755. Please cite "FAR Case 2015-033."

SUPPLEMENTARY INFORMATION:

I. Background

DoD, GSA, and NASA are proposing to revise the FAR to implement policy that will improve agencies' environmental performance and Federal sustainability. Federal agencies have been the leaders in reducing building and fleet energy use, using renewable energy, and buying more sustainable products and services as the United States works to build a clean energy economy. Building on the progress achieved to date, President Obama issued Executive Order (E.O.) 13693, *Planning for Federal Sustainability in the Next Decade*, on March 19, 2015, published in the Federal Register at 80 FR 15869, on March 25, 2015, to plan for and further expand agency progress in reducing greenhouse gas emissions over the next decade.

The changes made in this proposed rule continue the improvements made by the Federal Government to lead by example in protecting the health of our environment by purchasing sustainable products and services. This rule promotes the acquisition of sustainable products, services, and construction methods in order to reduce energy and water consumption, reliance on natural resources, and enhance pollution prevention, within the Federal Government. While the anticipated costs associated with this rule are not quantified in dollar amounts, the

Councils anticipate that any such impact will be outweighed by the expected benefits of this rule.

This rule advances the policies put into effect by an interim rule issued under FAR case 2010-001, "Sustainable Acquisition" (published in the Federal Register at 76 FR 31395, and May 31, 2011), which established a culture within the Federal acquisition community to "leverage agency acquisitions to foster markets for sustainable technologies and materials, products and services." The comments received on the interim rule will be addressed along with any comments received in response to this rule, in the formulation of the final rule.

The E.O. directs Federal agencies to continue their leadership in sustainable acquisition in order to drive national greenhouse gas reductions and support preparations for the impacts of climate change. The E.O. directs agencies, where life-cycle cost-effective, to promote sustainable acquisition and procurement by ensuring that environmental performance and sustainability factors are included to the maximum extent practicable for all applicable procurements. These factors include—

(1) Statutory mandates for purchase preferences for recycled content products, energy and water efficient products and services (e.g., ENERGY STAR® certified and

Federal Energy Management Program (FEMP)-designated products, and biobased products;

(2) Sustainable products and services identified by the Environmental Protection Agency's (EPA) Significant New Alternatives Policy (SNAP), WaterSense®, Safer Choice, and SmartWay® Transport Partners Programs; and

(3) EPA-recommended specifications, standards, or labels for environmentally preferable products or products meeting environmental performance criteria developed by voluntary consensus standards bodies consistent with the National Technology Transfer and Advancement Act and Office of Management and Budget (OMB) Circular A-119.

In addition to the changes to sustainable acquisition requirements made by E.O. 13693, this proposed rule implements sections 9001 and 9002(a) of the Agricultural Act of 2014, Public Law 113-79 (also known as the 2014 Farm Bill), which revised the definition of "biobased product." (See 7 U.S.C. 8101 and 8102.)

II. Discussion and Analysis

The initiatives conveyed in E.O. 13693 and reflected in this proposed rule build on the policies and procedures set in motion by earlier E.O.s, namely E.O. 13423, "Strengthening Federal Environmental, Energy, and Transportation Management," and E.O. 13514, "Federal

Leadership in Environmental, Energy, and Economic Performance," so as to further promote sustainable acquisition practices throughout the Federal Government. Both of these E.O.s were revoked upon issuance of E.O. 13693.

A summary of the proposed changes is as follows:

A. Definitions.

In FAR parts 2 and 23, several new definitions are added and existing definitions are revised, pursuant to E.O. 13693 and, in certain instances, the 2014 Farm Bill.

Under FAR subpart 2.1, the definitions of "biobased product," "environmentally preferable," and "sustainable acquisition" are revised to reflect the definitions in the 2014 Farm Bill and E.O. 13693. A new definition for the term "environmentally sustainable electronic product" is added and the definition for "renewable energy" has been removed.

A definition of "sustainable products and services" is added to FAR subpart 2.1. This definition includes the expanded scope of Federal sustainable requirements listed in the sustainable acquisition section of the E.O. (section 3(i)). E.O. section 3(i)(i) through (iii) also provides that sustainable products and services include products that meet EPA recommendations for the use of

specifications, standards, and labels or, in the absence of EPA recommendations, other specifications, standards, and labels developed by voluntary consensus standards bodies. The definition of "sustainable products and services" reflects these new provisions.

The following definitions have been added or moved to FAR part 23:

The E.O. 13693 definitions of "clean energy," "alternative energy" (along with definitions for specific types of alternative energy such as "active capture and storage", "combined heat and power," "fuel cell energy systems," and "thermal renewable energy technologies"), and "renewable electric energy" are added to the FAR.

A definition of "life-cycle cost-effective" is added, based on the definition of that term in E.O. 13693 and the discussion of life-cycle costs in the E.O. 13693 implementing instructions.

The definition for "water consumption intensity" while unchanged, has been moved from FAR subpart 2.1 to FAR 23.001 because this term is used only in FAR part 23, as opposed to multiple areas of the FAR.

The definition of the term "contract action" at FAR subpart 23.1 is revised to specify that the term includes

task and delivery orders placed against both new contracts and existing contracts.

A definition of life-cycle cost is added, which echoes the definition at FAR 7.101.

Finally, the definitions at FAR 23.701, which were related to the "Electronic products environmental assessment tool" (EPEAT®), have been removed. This topic is discussed further at section II C. of this preamble.

B. FAR parts 7 and 11.

FAR parts 7 and 11 are updated to reflect the sustainability factors to be considered in acquisitions. The website URL for accessing the Guiding Principles for Sustainable Federal Buildings and Associated Instructions is updated in FAR 7.103(p)(3). At FAR 7.105(b)(17) and 11.002, agencies and contractors are referred to GSA's Green Procurement Compilation, which consolidates all Federal designations of sustainable products and services into one tool. Also, in FAR 11.002, guidance is added to ensure agencies are aware they must acquire sustainable products and services to the maximum extent practicable.

C. FAR part 23.

The scope of FAR part 23 is revised to note that the sustainable acquisition prescriptions apply to construction and services contracts that require the supply or use of

products falling within the sustainable products categories.

FAR 23.100 is revised to reflect the policy established in E.O. 13693 to build a clean energy economy, drive national greenhouse gas emissions reductions, and support preparations for the impacts of climate change. The policy continues to apply to contractors operating Government buildings and is amended to provide that it applies to contractors operating Government fleet vehicles, in accordance with the requirement in E.O. 13693.

FAR 23.103 is revised to reflect the E.O. 13693 requirement that agencies shall advance sustainable acquisition to the maximum extent practicable. This is a change from E.O. 13514, which required that 95 percent of acquisitions include applicable sustainable product requirements, and is consistent with statutory requirements in the Resource Conservation and Recovery Act and the Farm Security and Rural Investment Act that agencies purchase recycled content and biobased products, respectively, to the maximum extent practicable.

The exceptions in FAR 23.104 are updated to reflect the exceptions provided under E.O. 13693. The methodology for determining whether a product or service is life-cycle cost-effective is provided at FAR 23.104(b).

At FAR 23.106, a prescription is added for the new contract clause at FAR 52.223-XX, Sustainable Products and Services Requirements, which replaces multiple individual clauses.

FAR subpart 23.2 is amended to implement the energy and water efficiency, and clean energy acquisition requirements of E.O. 13693. In particular, FAR 23.202 now focuses on agencies' obligation to improve water use efficiency and management through the acquisition of water efficient products and employing water conservation strategies. Since there will now be one contract clause for sustainable products and services, the energy-efficient product specific clause prescription in FAR 23.206 has been removed because it is no longer needed.

In FAR subpart 23.4, the URL for the U.S. Department of Agriculture's BioPreferred website is updated. One requirement from the 2014 Farm Bill was added: agencies must add to their affirmative procurement programs provisions for reporting the quantities and types of biobased products purchased. Additionally, the prescription to use the clause at FAR 52.223-17, Affirmative Procurement of EPA-designated Items in Service and Construction Contracts, is removed. FAR 23.000 now specifies that sustainable acquisition applies to construction and

services contracts and the new clause at FAR 52.223-XX, Sustainable Products and Services Requirements, covers products and services furnished for Government use, incorporated into the construction of a public building or public work, or furnished for contractor use at a Federally-controlled facility, so the clause at FAR 52.223-17 is no longer needed.

FAR subpart 23.7 is revised to reflect the new requirements in E.O. 13693. FAR 23.704, formerly titled "Electronic products environmental assessment tool" (EPEAT®), required agencies to purchase EPEAT®-registered electronic products; however, the Office of Management and Budget, Office of Federal Procurement Policy has more recently determined that references to proprietary programs such as EPEAT® should be removed from the FAR. Furthermore, E.O. 13693 directs agencies to purchase "environmentally sustainable electronic products" and does not address EPEAT®-registered products. Accordingly, the definitions at FAR 23.701 are removed and FAR 23.703 and 23.704 are ~~is~~ updated to reiterate the environmentally preferable products and services acquisition requirements in E.O. 13693, and require purchase of "environmentally sustainable electronic products" unless an exception or an exemption applies. In addition, new direction has been

placed in FAR 23.703 to require that the item being purchased must meet or exceed the applicable specifications, standards, or labels that are recommended by the U.S. Environmental Protection Agency. On September 25, 2015, published in the Federal Register at 80 FR 57809, EPA issued interim recommendations for non-Federal standards (e.g., state or local Government or third-party source) and labels for Federal purchasers to use to identify and procure environmentally preferable products. EPA recommends that agencies procure EPEAT®-registered computers, imaging equipment, and televisions. It is possible that in the future other options may be developed that align with EPA Guidelines and support the electronic stewardship mandates of E.O. 13693, section 3(1).

FAR 23.705 is amended to remove the requirements to insert the EPEAT® clauses. Whether an agency continues to purchase electronics listed on the EPEAT® registry, or purchases products verified to meet EPA recommended specifications, standards, or labels, it will be able to use the new, single sustainable products and services clause.

D. FAR part 36.

FAR 36.104 previously required agencies to divert at least 50 percent of their construction and demolition

debris by the end of fiscal year (FY) 2015, in keeping with E.O. 13514. E.O. 13693 requires agencies to consistently meet the 50 percent diversion goal annually, rather than by a specific year. Accordingly, FAR 36.104 is revised to delete the FY 2015 date for meeting the construction and demolition debris diversion goal. The updated website URL for accessing the Guiding Principles for Sustainable Federal Buildings and Associated Instructions also is provided.

E. FAR part 39.

FAR 39.101 is amended to delete the reference to EPEAT® and substitute EPA-recommended specifications, standards, or labels for environmentally sustainable electronic products. A new paragraph has been added, directing agencies to consider climate change-related risks when acquiring information technology. This guidance supports the requirement in section 13 of E.O. 13693, for agencies to identify and address the projected impacts of climate change in mission critical operations, such as communication.

F. FAR part 52.

FAR part 52 is revised to update E.O. references and incorporate the policies reflected in E.O. 13693. The modified clauses include—

- FAR 52.212-5, Contract Terms and Conditions Required to Implement Statutes or Executive Orders— Commercial Items – deletion of references to the EPEAT® clauses and addition of the new clause for sustainable products and services requirements;
- FAR 52.213-4, Terms and Conditions—Simplified Acquisitions (Other Than Commercial Items) – amendment of E.O. reference, addition of the new FAR clause 52.223-XX Sustainable Products and Services Requirements is added, and deletion of FAR 52.223-15;
- FAR 52.223-1, Biobased Product Certification – updated statutory reference
- FAR 52.223-2, Affirmative Procurement of Biobased Products Under Service and Construction Contracts – revised the title to reflect the clause focus on contractor reporting of biobased products supplied or used under service and construction contracts;
- FAR 52.223-5, Pollution Prevention and Right-to-Know Information – amendment of E.O. reference; and
- FAR 52.223-10, Waste Reduction Program – amendment of E.O. reference.

To address the removal of references to EPEAT from the FAR and move to a new single clause for sustainable

products and services, the following FAR clauses are deleted:

FAR 52.223-13, Acquisition of EPEAT®-Registered Imaging Equipment.

FAR 52.223-14, Acquisition of EPEAT®-Registered Televisions.

FAR 52.223-15, Energy Efficiency in Energy-Consuming Products.

FAR 52.223-16, Acquisition of EPEAT®-Registered Personal Computer Products.

FAR 52.223-17, Affirmative Procurement of EPA-designated Items in Service and Construction Contracts.

A new clause at FAR 52.223-XX, Sustainable Products and Services Requirements, is added to implement E.O. 13693's expanded list of environmental and sustainability programs that agencies shall consider when purchasing products and services. Rather than adding new clauses when EPA recommends additional specifications, standards, and labels, this clause refers to GSA's Green Procurement Compilation for the current requirements and recommendations for purchasing sustainable products and services.

III. Applicability to Contracts at or Below the Simplified Acquisition Threshold and for Commercial Items, Including Commercially Available Off-the-Shelf Items

This rule proposes to add a new clause at FAR 52.223-XX, Sustainable Products and Services Requirements, which requires contractors performing on Federal contracts to furnish or incorporate into the performance of a service or construction of a public building or public work or use, in connection with the contractors' performance at a Federally-controlled facility, sustainable products and services. Application of this clause to solicitations and contracts at or below the simplified acquisition threshold (SAT) and to the acquisition of commercial items, including commercially available off-the-shelf (COTS) items, is necessary in order to comply with the Executive Order.

41 U.S.C. 1905 through 1907 make certain provisions of law inapplicable to solicitations and contracts at or below the simplified acquisition threshold (SAT) and to the acquisition of commercial items, including commercially available off-the-shelf (COTS) items, unless the FAR Council/Administrator for Federal Procurement Policy determine that such exemption from the statute would not be in the best interest of the Federal Government. However,

41 U.S.C. 1905 through 1907 are only applicable to statutory provisions, not Executive orders.

IV. Executive Orders 12866 and 13563

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

V. Regulatory Flexibility Act

The proposed rule may have 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. The Initial Regulatory Flexibility Analysis (IRFA) is summarized as follows:

The requirements for this proposed rule may impact acquisitions covering a wide array of the products and services and related industry sectors within the Federal supplier base including information technology and telecommunications, managerial and administrative support services, installation, maintenance, repair, and rebuilding

of equipment, janitorial, construction, manufacturing, and energy. However, Federal contractors have already been required to provide products, services, and construction effort that meet the majority of sustainable acquisition requirements of E.O. 13693, under previous E.O.s, laws, and sustainability programs.

Some sustainable products, such as energy and water-efficient products and services, are less expensive than conventional options while other products and services will realize cost savings over the lifecycle of the product. The latter grouping of products and service may require a higher start-up investment on the part of the contractor, but as demand for products with reduced environmental and human health impacts grows, prices of greener products will decrease. In addition, the rule may have net benefits for small businesses by creating opportunities for them to supply sustainable products and services.

Federal Procurement Data System (FPDS) data obtained on June 21, 2016, reveals that approximately 112,150 unique contractors were awarded Federal contracts during fiscal year (FY) 2015. Of the total number of vendors that received contracts in FY 2015, approximately 75,000 or 67 percent were unique small business concerns. Based on this information, it is estimated that in future years, a similar number of small business concerns will receive contracts subject to the requirements of this rule.

This proposed rule does not include any new reporting, recordkeeping, or other compliance requirements for small businesses. The proposed rule does not duplicate, overlap, or conflict with any other Federal rules.

The Regulatory Secretariat Division has submitted a copy of the IRFA to the Chief Counsel for Advocacy of the Small Business Administration. A copy of the IRFA may be obtained from the Regulatory Secretariat Division. DoD, GSA and NASA invite comments from small business concerns and other interested parties on the expected impact of this rule on small entities.

DoD, GSA, and NASA will also consider comments from small entities concerning the existing regulations in

subparts affected by the rule consistent with 5 U.S.C. 610. Interested parties must submit such comments separately and should cite 5 U.S.C. 610 (FAR Case 2015-033), in correspondence.

VI. Paperwork Reduction Act

The Paperwork Reduction Act (44 U.S.C. chapter 35) does apply; however, the proposed changes to the FAR do not impose additional information collection requirements to the paperwork burden. The pertinent, previously approved OMB control numbers include 9000-0147, "Pollution Prevention and Right-to-Know Information," and 9000-0180, "Biobased Procurements."

List of Subjects in 48 CFR Parts 2, 4, 7, 11, 23, 36, 39, 42, and 52

Government procurement.

Dated: January 5, 2017

William F. Clark,
Director,
Office of Government-wide
Acquisition Policy,
Office of Acquisition Policy,
Office of Government-wide Policy.

Therefore, DoD, GSA, and NASA are proposing to amend 48 CFR parts 2, 4, 7, 11, 23, 36, 39, 42, and 52 as set forth below:

1. The authority citation for 48 CFR parts 2, 4, 7, 11, 23, 36, 39, 42, and 52 continues to read as follows:

Authority: 40 U.S.C. 121(c); 10 U.S.C. chapter 137; and 51 U.S.C. 20113.

PART 2—DEFINITIONS OF WORDS AND TERMS

2. Amend section 2.101, in paragraph (b) (2), by—

a. Revising the definitions “Biobased product”, and “Environmentally preferable”;

b. Adding, in alphabetical order, the definition “Environmentally sustainable electronic product”;

c. Removing the definition “Renewable energy”;

d. Revising the definition “Sustainable acquisition”;

e. Adding, in alphabetical order, the definition “Sustainable products and Services”; and

f. Removing the definition “Water consumption intensity”.

The revisions and additions read as follows:

2.101 Definitions.

(b) * * *

(2) * * *

Biobased product means 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 and forestry materials or that is an intermediate ingredient or feedstock. The term includes, with respect to forestry materials, forest products that meet biobased content requirements, notwithstanding the market share the product holds, the age of the product, or whether the market for the product is new or emerging.

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Environmentally preferable means that products or services 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, production, manufacturing, packaging, distribution, reuse, operation, maintenance, or disposal related to the product or service.

Environmentally sustainable electronic product means an electronic product that is ENERGY STAR® certified or Federal Energy Management Program (FEMP) designated, as

applicable, and meets or exceeds the applicable specifications, standards, or labels that are recommended by the U.S. Environmental Protection Agency, (see <https://www.epa.gov/greenerproducts>).

* * * * *

Sustainable acquisition means ensuring that environmental performance and other sustainability requirements, as prescribed in part 23, are included to the maximum extent practicable in the planning, award, and execution phases of acquisitions.

Sustainable products and services means products and services, including construction, that—

(1) Meet statutory mandates for purchasing—

(i) Recycled content products designated by the U.S. Environmental Protection Agency (EPA) under the Comprehensive Procurement Guidelines;

(ii) Energy and water efficient products such as ENERGY STAR® certified and Federal Energy Management Program (FEMP)-designated products identified by EPA and the U.S. Department of Energy; and

(iii) Biobased content products meeting the content requirement of the U.S. Department of Agriculture under the BioPreferred® program;

(2) Are identified by EPA programs, including—

(i) Significant New Alternatives Policy (SNAP) chemicals or other alternatives to ozone-depleting substances, and products and services that minimize or eliminate, when feasible, the use, release, or emission of high global warming potential hydrofluorocarbons, such as by using reclaimed instead of virgin hydrofluorocarbons;

(ii) WaterSense® certified products and services (water efficient products);

(iii) Safer Choice Certified products (chemically intensive products that contain safer ingredients); and

(iv) SmartWay® Transport partners and SmartWay® products (fuel efficient products and services); or

(3) Are environmentally preferable products or services that—

(i) Meet or exceed specifications, standards, or labels recommended by EPA, ([see https://www.epa.gov/greenerproducts](https://www.epa.gov/greenerproducts)); or

(ii) Where there is no specification, standard, or label recommended by EPA for a specific product or service category, meet environmental performance criteria developed or adopted by voluntary consensus standards bodies consistent with section 12(d) of the National Technology Transfer and Advancement Act of 1995 (Public Law 104-113) and Office of Management and Budget Circular A-119).

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PART 4—ADMINISTRATIVE MATTERS

3. Amend section 4.302 by revising paragraph (a) to read as follows:

4.302 Policy.

(a) Section 3(j) of Executive Order 13693 of March 19, 2015, Planning for Federal Sustainability in the Next Decade, directs agencies to reduce and prevent waste. Electronic commerce methods (see 4.502) and double-sided printing and copying are examples of best practices for waste prevention.

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PART 7—ACQUISITION PLANNING

4. Amend section 7.103 by revising paragraphs (p) (1) through (p) (3) to read as follows:

7.103 Agency-head responsibilities.

* * * * *

(p) Ensuring that agency planners—

(1) Specify needs for uncoated printing and writing paper containing 30 percent postconsumer recycled content or higher, consistent with section 3(i) (v) of Executive Order 13693 of March 19, 2015, Planning for Federal Sustainability in the Next Decade;

(2) Comply with the policy in 11.002(d) regarding procurement of sustainable products and services (as defined in 2.101);

(3) Comply with the Guiding Principles for Sustainable Federal and Associated Instructions (Guiding Principles), for the design, construction, renovation, repair, or deconstruction of Federal buildings. The Guiding Principles can be accessed at <https://www.wbdg.org/references/fhpsb.php>; and

* * * * *

4. Amend section 7.105 by revising paragraph (b) (17) to read as follows:

7.105 Contents of written acquisition plans.

* * * * *

(b) * * *

(17) Environmental and energy conservation objectives. Discuss—

(i) The applicable environmental and energy conservation objectives associated with the acquisition (see part 23);

(ii) The applicability of an environmental assessment or environmental impact statement (see 40 CFR 1502);

(iii) The proposed resolution of environmental issues;

(iv) Any environmentally-related requirements to be included in solicitations and contracts (see 11.002 and 11.303); and

(v) The requirements for the acquisition or use of sustainable products and services (as defined in 2.101). A compilation of the Federal sustainability criteria for various products and services is found on GSA's Green Procurement Compilation at <https://www.sftool.gov/greenprocurement/>. The EPA's recommendations for specifications, standards or labels that can be used for purchasing sustainable products and services are available at <https://www.epa.gov/greenerproducts>.

* * * * *

PART 11—DESCRIBING AGENCY NEEDS

5. Amend section 11.002 by revising paragraph (d) (1) and the introductory text of paragraph (d) (2) to read as follows:

11.002 Policy.

* * * * *

(d) (1) Statutes and Executive orders identified in part 23 require agencies to acquire sustainable products

and services (as defined in 2.101) to the maximum extent practicable. To find sustainable products and services, visit GSA's Green Procurement Compilation at <https://www.sftool.gov/greenprocurement>.

(2) Unless an exception applies and is documented by the requiring activity, Executive agencies shall, to the maximum extent practicable, require the use of sustainable products and services when—

* * * * *

6. Amend section 11.303 by removing paragraphs (a) and (b); and adding a new introductory paragraph to read as follows:

11.303 Special requirements for paper.

When purchasing uncoated printing and writing paper (e.g., copier paper, envelopes, etc.), or products printed on uncoated printing and writing paper, agencies shall require that the paper contain at least 30 percent postconsumer recycled content or higher (Executive Order 13693 of March 19, 2015, Planning for Federal Sustainability in the Next Decade).

7. Amend part 23 by revising the part heading to read as follows:

PART 23—ENVIRONMENT, ENERGY, OCCUPATIONAL SAFETY, AND DRUG-FREE WORKPLACE

8. Revise section 23.000 to read as follows:

23.000 Scope.

This part prescribes acquisition policies and procedures supporting the Government's program for ensuring a drug-free workplace, for protecting and improving the quality of the environment, and to acquire and foster markets for sustainable technologies, materials, products, and services, including construction, (see GSA's Green Procurement Compilation at <https://sftool.gov/greenprocurement>) and encouraging the safe operations of vehicles by-

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9. Amend section 23.001 by-

a. Adding, in alphabetical order, the definitions "Active capture and storage", "Alternative energy", "Clean energy", "Combined heat and power", and "Fuel cell energy systems";

b. Revising the definition "Greenhouse gases"; and

c. Adding, in alphabetical order, the definitions "Life-cycle cost", "Life-cycle cost effective", "Renewable electric energy", "Thermal renewable energy technologies", and "Water consumption intensity".

The additions and revision read as follows:

23.001 Definitions.

* * * * *

Active capture and storage means a set of technologies that captures carbon dioxide from power plants, transports the captured carbon dioxide to a sequestration well, and injects the carbon dioxide into the sequestration well in a way that prevents the gas from escaping from the well and back into the atmosphere. These technologies are also referred to as carbon capture and storage technologies.

Alternative energy means energy generated from technologies and approaches that advance renewable heat sources, including biomass, solar thermal, geothermal, waste heat, and renewable combined heat and power processes; combined heat and power; fuel cell energy systems; and energy generation, where active capture and storage of carbon dioxide emissions associated with that energy generation is verified.

Clean energy means renewable electric energy and alternative energy.

Combined heat and power means systems that capture energy that is normally lost in centralized power generation and convert that energy to provide heating and cooling. They are also known as co-generation systems.

* * * * *

Fuel cell energy systems means stationary or distributed generation projects used for baseload power, backup power, power for remote locations, and cogeneration. Stationary fuel cells typically use natural gas, or a renewable energy equivalent such as biogas, to produce either electricity or combined heat and electricity.

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

Life-cycle cost means the total cost to the Government of acquiring, operating, supporting, and (if applicable) disposing of the items being acquired.

Life-cycle cost-effective means that the life-cycle costs of a product are estimated to be equal to or less than the base case (i.e., current or standard practice or product). In some cases, a life-cycle cost-effective product may result in a higher up front cost with lower operations or maintenance costs or longer life.

Renewable electric energy means energy produced by solar, wind, biomass, landfill gas, ocean (including tidal, wave, current, and thermal), geothermal, geothermal heat pumps, microturbines, municipal solid waste, or new hydroelectric generation capacity achieved from increased efficiency or additions of new capacity at an existing

hydroelectric project (Executive Order 13693 of March 19, 2015, Planning for Federal Sustainability in the Next Decade).

Thermal renewable energy technologies means solar, wood, biomass, and landfill gas systems that exclusively produce non-electric energy (i.e., heating or cooling).

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

23.002 [Reserved]

10. Remove and reserve section 23.002.

11. Add section 23.100 to read as follows:

23.100 Policy.

(a) This subpart prescribes the policies and procedures for the acquisition of sustainable products and services. The Government's policy is to build a clean energy economy that will sustain the environment for generations to come. Federal leadership in sustainable acquisition will continue to drive national greenhouse gas reductions and support preparations for the impacts of climate change.

(b) Except as provided at 23.104 and 23.105 of this subpart, the Government's policy on sustainable acquisition applies to—

(1) All acquisitions, including those using part 12 procedures and those at or below the micro-purchase threshold; and

(2) Contractors operating Government buildings and vehicles. Executive Order 13693 of March 19, 2015, Planning for Federal Sustainability in the Next Decade, section 7(d), requires that leases and contracts for lessor or contractor operation of Government-owned buildings or vehicles facilitate the agency's compliance with the Executive Order.

12. Amend section 23.101 by revising the first sentence of the definition "Contract action" to read as follows:

23.101 Definition.

* * * * *

Contract action means any oral or written action, including task and delivery orders, that results in the purchase, rent, or lease of supplies or equipment, services, or construction using appropriated dollars, including purchases below the micro-purchase threshold.

* * *

13. Revise section 23.102 to read as follows:

23.102 Authorities.

(a) Executive Order 13693 of March 19, 2015, Planning for Federal Sustainability in the Next Decade.

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

14. Amend section 23.103 by—

a. Revising the section heading and paragraph (a);
and

b. Removing paragraph (d).

The revisions read as follows:

23.103 Acquisition of sustainable products and services.

(a) Federal agencies shall advance sustainable acquisition by ensuring that new contract actions for the supply of products and for the acquisition of services (including construction) require sustainable products and services (as defined in 2.101) to the maximum extent practicable (see GSA's Green Procurement Compilation at <https://www.sftool.gov/greenprocurement>).

* * * * *

15. Revise section 23.104 to read as follows:

23.104 Exceptions.

(a) This subpart does not apply to the following acquisitions:

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

(2) Acquisition of sustainable products or services that are not considered practicable due to one or more of the following conditions—

(i) A product or service cannot be acquired that meets reasonable performance requirements;

(ii) A product or service cannot be acquired competitively within the required delivery or performance schedule;

(iii) A product or service cannot be acquired at a reasonable price, i.e., life-cycle cost-effective (see paragraph (b)); or

(iv) An ENERGY STAR® certified product or FEMP-designated product is not life-cycle cost-effective (see section 23.204).

(b) (1) The price shall be deemed unreasonable when the total life-cycle costs are significantly higher for the sustainable product or service compared to the non-sustainable product or service.

(2) Life-cycle costs are determined by combining the purchase price of a product or service with any net costs

or savings revenues generated from that product or service during its life.

(c) If at any point during the acquisition it is determined that a contract action cannot comply with the sustainable requirements for one of the reasons listed in paragraph (a)(2) of this section, the contracting officer shall obtain the documented rationale from the requiring activity and ensure that this documentation is maintained in the contract file.

16. Add section 23.106 to read as follows:

23.106 Contract clause.

When purchasing sustainable products or services, except as provided at 23.104 and 23.105, insert the clause at 52.223-XX, Sustainable Products and Services Requirements, in solicitations and contracts.

SUBPART 23.2—ENERGY EFFICIENT PRODUCTS, WATER EFFICIENT PRODUCTS AND SERVICES, RENEWABLE ELECTRIC ENERGY, AND ALTERNATIVE ENERGY

17. Revise subpart heading 23.2 as set forth above.

18. Amend section 23.201 by revising paragraphs (g) and (h) to read as follows:

23.201 Authorities.

* * * * *

(g) Executive Order 13693 of March 19, 2015, Planning for Federal Sustainability in the Next Decade.

(h) Section 438 of the Energy Independence and Security Act of 2007 (42 U.S.C. 17094).

19. Revise section 23.202 to read as follows:

23.202 Water efficient products and services.

Agencies shall improve water use efficiency and management, including stormwater management by-

(a) Reducing potable water consumption intensity by purchasing WaterSense® and other water efficient products and implementing water efficient strategies;

(b) Purchasing and installing water meters and water loss monitoring services; and

(c) Purchasing and installing appropriate green infrastructure features on Federally owned property to help with stormwater and wastewater management in accordance with section 438 of the Energy Independence and Security Act of 2007 (42 U.S.C. 17094). (See <https://www.epa.gov/greeningepa/technical-guidance-implementing-stormwater-runoff-requirements-federal-projects> for additional information regarding green infrastructure.)

20. Amend section 23.203 by revising paragraph (b) (2) to read as follows:

23.203 Energy-efficient products.

* * * * *

(b) * * *

(2) FEMP at <http://energy.gov/eere/femp/energy-and-water-efficient-products>.

23.206 [Reserved]

21. Remove and reserve section 23.206.

22. Amend section 23.401 by revising paragraph (b) (2)

to read as follows:

23.401 Definitions.

* * * * *

(b) * * *

(2) For which USDA has provided purchasing recommendations available at <http://www.biopreferred.gov/BioPreferred/faces/Welcome.xhtml>
1.

23. Amend section 23.402 by revising paragraphs (c) and (d); and removing paragraph (e).

The revisions read as follows:

23.402 Authorities.

* * * * *

(c) The Energy Policy Act of 2005, Pub. L. 109-58.

(d) Executive Order 13693 of March 19, 2015, Planning for Federal Sustainability in the Next Decade.

24. Amend section 23.404 by—

- a. Removing from paragraph (a) (3) (iii) the word “and”;
- b. Redesignating paragraph (a) (3) (iv) as paragraph (a) (3) (v); and
- c. Adding a new paragraph (a) (3) (iv).

The revision and addition read as follows:

23.404 Agency affirmative procurement programs.

(a) * * *

(3) * * *

(iv) For USDA-designated items only, provisions for reporting quantities and types of biobased products purchased by the Federal agency; and

* * * * *

23.405 [Amended]

25. Amend section 23.405 by removing from paragraph (a) (2) “<http://www.biopREFERRED.gov>” and adding “<https://www.biopREFERRED.gov/BioPreferred/>” in its place.

26. Amend section 23.406 by revising paragraphs (b) and (c); and removing paragraph (e) to read as follows:

23.406 Solicitation provisions and contract clauses.

* * * * *

(b) Insert the clause at 52.223-2, Reporting of Biobased Products Under Service and Construction Contracts,

in service or construction solicitations and contracts, unless the contract will not involve the use of USDA-designated items at <https://www.biopreferred.gov/BioPreferred/> or 7 CFR part 3201.

(c) Except for the acquisition of commercially available off-the-shelf items, insert the provision at 52.223-4, Recovered Material Certification, in solicitations that require the delivery or specify the use of EPA-designated items.

* * * * *

27. Revise 23.700 to read as follows:

23.700 Scope.

This subpart prescribes policies for acquiring environmentally preferable products and services, including environmentally sustainable electronic products.

23.701 [Reserved]

28. Remove and reserve section 23.701.

29. Amend section 23.702 by removing paragraphs (f) and (g); and adding a new paragraph (f) to read as follows:

23.702 Authorities.

* * * * *

(f) Executive Order 13693 of March 19, 2015, Planning for Federal Sustainability in the Next Decade.

30. Revise section 23.703 to read as follows:

23.703 Policy.

Agencies must-

(a) Purchase environmentally preferable products or services that-

(1) Meet or exceed specifications, standards, or labels recommended by EPA (see <https://www.epa.gov/greenerproducts/>); or

(2) If no EPA recommendations are available for the product or service the agency is procuring, meet environmental performance criteria developed or adopted by voluntary consensus standards bodies consistent with section 12(d) of the National Technology Transfer and Advancement Act of 1995 (Pub. L. 104-113) and the Office of Management and Budget (OMB) Circular A-119; and

(b) Realize life-cycle cost savings.

31. Revise section 23.704 to read as follows:

23.704 Environmentally sustainable electronic products.

(a) Agencies shall procure environmentally sustainable electronic products (as defined in 2.101), unless an exception in 23.104 or an exemption in 23.105 applies. The website at <https://www.epa.gov/greenerproducts/> identifies a registry of environmentally sustainable products that meet the EPA's recommended specifications, standards, or

labels. The award of a contract to satisfy an agency's requirement for an electronic product must be made to a contractor that offers products currently listed on the registry.

(b) This section applies to acquisitions of electronic products to be used in the United States, unless otherwise provided by agency procedures. When acquiring electronic products to be used outside the United States, agencies must use their best efforts to comply with this section.

23.705 [Amended]

32. Amend section 23.705 by redesignating paragraph (a) as the introductory paragraph; and removing paragraphs (b) through (d).

33. Revise section 23.901 to read as follows:

23.901 Authority.

Executive Order 13693 of March 19, 2015, Planning for Federal Sustainability in the Next Decade.

34. Amend section 23.1001 by revising paragraph (c) and removing paragraph (d).

The revision reads as follows:

23.1001 Authorities.

* * * * *

(c) Executive Order 13693 of March 19, 2015, Planning for Federal Sustainability in the Next Decade.

35. Amend section 23.1004 by—
- a. Revising paragraph (a) (2); and
 - b. Removing from paragraph (b), introductory text, “E.O. 13423” and adding “E.O. 13693” in its place.

The revisions read as follows:

23.1004 Requirements.

(a) * * *

(1) * * *

(2) The toxic chemical and hazardous substance release and use reduction goals of sections 3(j) and (7) (d) of Executive Order 13693.

* * * * *

PART 36—CONSTRUCTION AND ARCHITECT-ENGINEER CONTRACTS

36. Amend section 36.104 by revising paragraphs (b) (1) and (5) to read as follows:

36.104 Policy.

* * * * *

(b) * * *

(1) Ensure that all new construction, major renovation, or repair and alteration of Federal buildings complies with the Guiding Principles for Sustainable Federal Buildings and Associated Instructions (available at <http://www.wbdg.org/references/fhpsb.php>);

* * * * *

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

PART 39—ACQUISITION OF INFORMATION TECHNOLOGY

37. Amend section 39.101 by revising paragraph (a) (1) (ii); and adding paragraph (a) (1) (v) to read as follows:

39.101 Policy.

(a) (1) * * *

(ii) Specifications, standards, or labels for environmentally sustainable electronic products recommended by the U.S. Environmental Protection Agency (see 23.704);

* * * * *

(v) Policies to prepare for climate change-related risks (such as increased frequency of extreme weather events, increases in maximum temperatures, and sea level rise), including risk to mission critical communications, such as telecommunications and data centers.

* * * * *

38. Amend section 39.102 by revising paragraph (b) to read as follows:

39.102 Management of risk.

* * * * *

(b) Types of risk may include schedule risk, risk of technical obsolescence, cost risk, risk implicit in a particular contract type, technical feasibility, dependencies between a new project and other projects or systems, the number of simultaneous high risk projects to be monitored, funding availability, program management risk, and projected impacts of climate change.

* * * * *

PART 42—CONTRACT ADMINISTRATION AND AUDIT SERVICES

39. 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 sustainable products and services (as defined in 2.101). This must occur as part of the quality assurance procedures set forth in Part 46; and

* * * * *

PART 52—SOLICITATION PROVISIONS AND CONTRACT CLAUSES

40. Amend section 52.204-8 by—

a. Revising the date of the provision;

b. Removing from paragraph (c) (1) (xvi) "Affirmative Procurement" and adding "Reporting" in its place.

The revision reads as follows:

52.204-8 Annual Representations and Certifications.

* * * * *

ANNUAL REPRESENTATIONS AND CERTIFICATIONS (DATE)

* * * * *

41. Amend section 52.212-5 by-

a. Revising the date of the clause and paragraph (b) (40);

b. Removing paragraphs (b) (41) through (43); and

c. Redesignate paragraphs (b) (44) through (60) as paragraphs (b) (41) through (b) (57), respectively.

The revisions read as follows:

52.212-5 Contract Terms and Conditions Required to Implement Statutes or Executive Orders-Commercial Items.

* * * * *

CONTRACT TERMS AND CONDITIONS REQUIRED TO IMPLEMENT STATUTES OR EXECUTIVE

ORDERS-COMMERCIAL ITEMS (DATE)

* * * * *

(b) * * *

___(40) 52.223-XX Sustainable Products and Services Requirements (DATE) (E.O. 13693).

* * * * *

42. Amend section 52.213-4 by revising the date of the clause, paragraphs (b) (1) (x) and (b) (1) (xiii) to read as follows:

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

* * * * *

TERMS AND CONDITIONS-SIMPLIFIED ACQUISITIONS (OTHER THAN COMMERCIAL
ITEMS) (DATE)

* * * * *

(b) * * *

(1) * * *

(x) 52.223-5, Pollution Prevention and Right-to-Know Information (DATE) (E.O. 13693) (Applies to services performed on Federal facilities).

* * * * *

(xiii) 52.223-XX, Sustainable Products and Services Requirements (DATE) (E.O. 13693) (Applies to acquisitions for sustainable products and services).

* * * * *

43. Amend section 52.223-1 by—
a. Revising the date of the provision; and
b. Removing from the provision “(7 U.S.C. 8102(c) (3))” and adding “(7 U.S.C. 8102(a) (2) (F))” in its place.

The revision reads as follows:

b. Removing from paragraph (c), introductory text, "all information" and adding "the following information as" in its place;

c. Revising paragraph (c) (6);

d. Revising the date of Alternate I and paragraph (c) (7);

e. Revising the date of Alternate II and paragraph (c) (7).

The revisions read as follows:

52.223-5 Pollution Prevention and Right-to-Know

Information.

* * * * *

POLLUTION PREVENTION AND RIGHT-TO-KNOW INFORMATION (DATE)

* * * * *

(c) * * *

(6) The toxic chemical and hazardous substance release and use reduction goals of section 3(j) of Executive Order 13693.

* * * * *

Alternate I (DATE). * * *

(c) (7) The facility environmental management system.

Alternate II (Date). * * *

(c) (7) The facility compliance audits.

46. Amend section 52.223-10 by-

- a. Removing from the introductory paragraph "23.705(a)" and adding "23.705" in its place;
- b. Revising the date of the clause;
- c. Revising the first sentence of paragraph (b).

The revisions read as follows:

52.223-10 Waste Reduction Program.

* * * * *

WASTE REDUCTION PROGRAM (DATE)

* * * * *

(b) Consistent with the requirements of sections 3(j) and 7(d) of Executive Order 13693, the Contractor shall establish a program to promote cost-effective waste reduction in all operations and facilities covered by this contract. * * *

* * * * *

52.223-13 thru 52.223-17 [Reserved]

47. Remove and reserve sections 52.223-13 thru 52.223-17.

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

52.223-XX Sustainable Products and Services Requirements

As prescribed in 23.106, insert the following clause,

SUSTAINABLE PRODUCTS AND SERVICES REQUIREMENTS (DATE)

(a) Definitions. As used in this clause-

Green Procurement Compilation, means a public website that identifies Federal sustainable acquisition requirements and provides other guidance for the purchase of sustainable products and services.

Sustainable products and services means products and services, including construction, that—

(1) Meet statutory mandates for purchasing—

(i) Recycled content products designated by the U.S. Environmental Protection Agency (EPA) under the Comprehensive Procurement Guidelines;

(ii) Energy and water efficient products such as ENERGY STAR® certified and Federal Energy Management Program (FEMP)-designated products identified by EPA and the U.S. Department of Energy; and

(iii) Biobased content products meeting the content requirement of the U.S. Department of Agriculture under the BioPreferred® program;

(2) Are identified by EPA programs, including—

(i) Significant New Alternatives Policy (SNAP) chemicals or other alternatives to ozone-depleting substances, and products and services that minimize or eliminate, when feasible, the use, release, or emission of high global warming potential hydrofluorocarbons, such as by using reclaimed instead of virgin hydrofluorocarbons;

(ii) WaterSense® certified products and services (water efficient products);

(iii) Safer Choice Certified products (chemically intensive products that contain safer ingredients); and

(iv) SmartWay® Transport partners and SmartWay® products (fuel efficient products and services); or

(3) Are environmentally preferable products or services that—

(i) Meet or exceed specifications, standards, or labels recommended by EPA, (see <https://www.epa.gov/greenerproducts>); or

(ii) Where there is no specification, standard, or label recommended by EPA for a specific product or service category, meet environmental performance criteria developed or adopted by voluntary consensus standards bodies consistent with section 12(d) of the National Technology Transfer and Advancement Act of 1995 (Public Law 104-113) and Office of Management and Budget Circular A-119.

(b) Unless approved in writing by the Contracting Officer, in the performance of this contract, the Contractor shall-

(1) Deliver, furnish for Government use;

(2) Incorporate into the construction of a public building or public work; or

(3) Furnish for Contractor use at a Federally-controlled facility sustainable products and services as specified in the contract.

(c) Sustainable products and services must meet the applicable standard, specifications, or other program requirements at the time of submission of an offer or a quote.

(d) Visit the Green Procurement Compilation at <https://www.sftool.gov/greenprocurement> for a comprehensive list of Federal Governmentwide sustainable product and service requirements.

End of clause

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