

Proposed Rule Would Require Acquisition of Sustainable Products and Services to the Maximum Extent Practicable





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The Federal Acquisition Regulation (“FAR”) Council recently issued a proposed rule regarding “sustainable procurement” (the “Proposed Rule”), in which it seeks to update the FAR to “focus on current environmental and sustainability matters and to implement a requirement for agencies to procure sustainable products and services to the maximum extent practicable.” The requirement that sustainable products and services be procured to the maximum extent practicable applies to all federal agencies, and a new contract clause would require, in certain situations, contractors to deliver and use sustainable products under their contracts.

The Proposed Rule represents a significant development for contractors as it outlines the future of “sustainable procurement” in federal acquisition and applies to a broad and growing range of sustainable products and services designated by the U.S. Environmental Protection Agency (“EPA”). The Proposed Rule also establishes a demanding threshold for an agency to demonstrate that the procurement of sustainable products and services is not practicable.

This article provides background information on the Proposed Rule and an overview of the proposed changes, with a focus on the proposed requirement that agencies procure sustainable products and services to the maximum extent practicable. The article also discusses key takeaways and practicable considerations for contractors.

Background

On August 3, 2023, the FAR Council issued the Proposed Rule.¹ Comments on the Proposed Rule are currently due by October 2, 2023.

The Proposed Rule is based on Section 208(a) of Executive Order 14057, “Catalyzing Clean Energy Industries and Jobs Through Federal Sustainability,” which the Biden Administration issued on December 8, 2021. Section 208(a) states that federal agencies are to reduce emissions, promote environmental stewardship, and incentivize markets for sustainable products and services by taking a number of actions, including, “to the maximum extent practicable, purchasing sustainable products and services identified or recommended by the Environmental Protection Agency.” (emphasis added). The “maximum extent practicable” requirement was also included in Memorandum M-22-06 that was jointly issued by Office of Management and Budget, Council

on Environmental Quality, and Climate Policy Office, as well as the Implementing Instructions for Executive Order 14057.

Overview of Changes

A. Sustainable Products and Services

The Proposed Rule would require all federal agencies to “procure sustainable products and services to the maximum extent practicable.” This requirement would apply to “all contract actions,” including acquisitions for commercial products and services and commercially available off-the-shelf items.

The Proposed Rule defines “sustainable products and services” as products and services that are subject to certain purchasing programs. The statutory and EPA purchasing programs that are covered by the Proposed Rule, along with the types of products and services that would be affected, are set forth below.²

Program	Type of Program	Examples of Covered Products/Services
Comprehensive Procurement Guideline Program	Statutory	Certain construction products, landscaping products, non-paper office products, paper and paper products, park and recreation products, transportation products, vehicular products, and miscellaneous products (<i>e.g.</i> , pallets, bike racks).
U.S. Department of Agriculture’s BioPreferred Program	Statutory	A commercial or industrial product (other than food or feed) that is either composed, at least in a significant part, of biological products or an intermediate ingredient or feedstock.
ENERGY STAR or Federal Energy Management Program (“FEMP”)	Statutory	Energy-efficient and water-efficient products, including appliances, electronics, lighting, heating and cooling, and certain commercial products.
Significant New Alternatives Policy (“SNAP”) Program	Statutory	Products that have historically used ozone-depleting substances (<i>e.g.</i> , refrigeration and air conditioning, cleaning solvents, adhesives).
WaterSense	EPA Purchasing Program	Water-efficient products, including toilets, showerheads, faucets, sprinklers, and irrigation controllers.
Safer Choice	EPA Purchasing Program	Wide range of products that perform and contain ingredients that are safer for human health and the environment, including all-purpose cleaners, degreasers, and odor removers.
EPA Recommendations of Specifications, Standards, and Ecolabels for Federal Purchasing (“Recommendations Program”)	EPA Purchasing Program	Variety of products that fall within the following categories: cafeteria, construction, custodial, electronics and associated services, grounds/landscaping, machine shop operations, and office/furniture.

In short, if a federal agency needs a product or service that is subject to one of the statutory or EPA purchasing programs identified above, the agency will be required to procure, to the maximum extent practicable, a product or service that meets the requirements of the applicable purchasing program. In fact, the Proposed Rule directs contracting officers to prioritize “multi-attribute sustainable products and services,” which are products or services that meet the requirements of both a statutory purchasing program and an EPA purchasing program.

The sustainable products and services requirement will, subject to the exceptions and exemptions discussed below, be applied to contractors through a new FAR clause, FAR 52.223-XX, titled “Sustainable Products and Services,” which will be included in all solicitations and contracts. The new clause will require contractors to: (1) deliver and furnish sustainable products and services for Government use, including use at Government-owned contractor-operated facilities; (2) incorporate sustainable products and services into the construction of a public building or public works; and (3) furnish sustainable products and services for use in performing services under a contract, where the cost of the products is a direct cost to this contract.

The Proposed Rule states that procuring sustainable products and services will be considered practicable unless an agency cannot: (1) acquire a sustainable product or service within a reasonable performance schedule; (2) acquire a sustainable product or service that meets reasonable performance requirements; or (3) acquire a sustainable product or service at a reasonable price. For ENERGY STAR or FEMP-designated products, an agency’s price reasonableness analysis must consider any energy cost savings that will be provided throughout the lifecycle of the

subject product. A contracting officer may consider the procurement of sustainable products or services to be not practicable based on a written justification from the requirements official that explains why it is impractical to acquire a sustainable product or service. The justification may be issued for a specific product or service or for the entire procurement. Additionally, a determination that it is not practicable to acquire sustainable products will apply to a contractor when it otherwise would be required to provide sustainable products under the Proposed Rule.

There also are a number of exceptions and potential exemptions to the sustainable products and services requirement. Contracts performed outside of the United States, weapon systems, energy-consuming products used for combat or combat-related missions, and biobased products used in military equipment, spacecraft systems, or launch support equipment are generally excepted from the sustainable products and services requirement. The proposed exemptions include allowing agency heads to exempt certain acquisitions and the Director of National Intelligence to exempt certain intelligence activities. Agency heads also may exempt supplies or services that are to be used in response to a cyber, nuclear, biological, chemical, or radiological attack; for the provision of international disaster assistance; or in support of a response to an emergency or major disaster.

B. FAR Part 23 Restructuring and Consolidation

The Proposed Rule proposes to restructure FAR part 23, currently titled “Environment, Energy and Water Efficiency, Renewable Energy Technologies, Occupational Safety, and Drug-Free Workplace,” to exclusively address environmental matters, sustainable acquisition, and

material safety. FAR subpart 23.5, “Drug-Free Workplace,” and subpart 23.11, “Encouraging Contractor Policies to Ban Text Messaging While Driving,” will be transferred to FAR part 26, “Other Socioeconomic Programs.” The restructured FAR part 23 will be titled “Environment, Sustainable Acquisition, and Material Safety.”

The Proposed Rule proposes to consolidate existing purchasing requirements into the sustainable products and services requirement discussed above in Section II.A. For example, existing purchasing requirements for water efficiency and recovered materials will be covered by the sustainable products and services requirement. The Proposed Rule includes changes relating to the streamlining and removal of clauses that are subsumed or affected by the sustainable products and services requirement. Additionally, the Proposed Rule provides for consolidation of requirements relating to hazardous and radioactive materials, as well as requirements relating to federal facilities.

Key Takeaways for Contractors

The Proposed Rule reflects a major step toward the mandatory use of sustainable products and services in federal procurement. While the Rule will undoubtedly be revised in the coming year in response to public comments, there are several key takeaways for federal contractors.

A. Increase in the Frequency of Sustainable Procurements

Although there are existing requirements in the FAR relating to sustainability (*e.g.*, requirements relating to procurement of energy-efficient and water-efficient products), the Proposed Rule will increase the volume of sustainable products and services obtained by the Govern-

ment. According to the Proposed Rule, the new “Sustainable Products and Services” FAR clause, FAR 52.223-XX, will “enable agencies to communicate requirements for sustainable products and services in a uniform manner and to better enforce the requirement to procure sustainable products and services as a standard term and condition of a contract.” Additionally, the Proposed Rule indicates that the volume of sustainable products and services that agencies procure will increase because the Proposed Rule clearly defines the limited instances when it is not practicable for an agency to acquire sustainable products and services. Agencies, therefore, will have less discretion when deciding whether to procure sustainable products or services.

The “maximum extent practicable” language also is a significant change in terms of existing FAR requirements for sustainable products and services. In the past, when interpreting a requirement that an agency perform an action “to the maximum extent practicable” in other contexts, tribunals have stated that the requirement cannot be “ignored” and that agencies cannot “superficially comply with the requirement” as the language “instructs agencies to make serious and genuine efforts to” comply with the requirement.³ Those decisions indicate that agencies will need to undertake meaningful acquisition planning and market research in order to justify a determination that it is not practicable to acquire sustainable products or services for a given procurement.

Additionally, it is important to note that the number of sustainable products and services designated by the EPA will increase in the future. On August 3, 2023 (*i.e.*, the same day that the FAR Council issued the Proposed Rule), the EPA issued a notice that it was expanding its Recommendations Program, which is one of the

EPA purchasing programs included in the proposed FAR definition of sustainable products and services. In the notice, the EPA stated that it was seeking to expand the Recommendations Program to cover products and services in the following categories: building/construction; infrastructure; landscaping; food and cafeteria services; uniforms/clothing; professional services; and laboratories and healthcare.

When the standards for those categories are finalized, agencies will be required to procure products and services that meet the new standards to the maximum extent practicable, and products and services that do not meet the standards will not qualify as sustainable products and services. Thus, as the EPA's Recommendations Program expands, so will the reach of the Proposed Rule. Indeed, in a White House announcement issued in connection with the Proposed Rule, the Biden Administration stated that the EPA's notice of expansion of the Recommendations Program was issued "in conjunction" with the FAR Council's Proposed Rule and indicated that federal agencies would be required to purchase products and services that meet the new EPA recommendations when finalized.

Notably, the proposed definition of sustainable products and services in the Proposed Rule does not limit the definition to those products and services covered under the identified statutory and EPA purchasing programs as of a certain date. By not limiting the definition to a certain date, the Proposed Rule allows the scope of the sustainable products and services requirement to increase without the FAR Council having to undertake a new rulemaking process. Contractors, therefore, will need to monitor announcements, notices, and rules relating to sustainable products and services that are issued by both the FAR

Council and EPA.

As the Proposed Rule acknowledges, the sustainable products and services requirement will impact the supply chain of contractors that offer or use products and services that are subject to the identified statutory or EPA purchasing programs. The Proposed Rule suggests that, to the extent that those contractors are not offering products and services that comply with applicable purchasing program requirements, the contractors may wish to familiarize themselves with the applicable requirements and adjust their internal processes and supply chains, as necessary, to ensure that they are delivering sustainable products and services. Contractors who are already meeting those requirements, or are in the process of becoming compliant, will benefit from the Proposed Rule as currently written.

B. Federal Government's Sustainability Agenda

The Proposed Rule makes clear that the requirement for procurement of sustainable products and services is part of the Biden Administration's broader sustainability agenda, and the White House announcement issued in connection with the Proposed Rule specifically states that it is "part of President Biden's Federal Sustainability Plan." The Proposed Rule also describes the reorganization of FAR part 23 as "the first step to focus the messaging in FAR part 23 on the environment and sustainable acquisition," which suggests that additional environmental and sustainability requirements may be forthcoming, such as those relating to the proposed rule regarding disclosure of greenhouse gas ("GHG") emissions and the open FAR case regarding the consideration of the social cost of GHG emissions in procurement decisions.

The underlying purpose of the Proposed Rule is consistent with statements that agency officials have made regarding forthcoming sustainable procurement practices. For instance, earlier this year, the Senior Procurement Executives for the U.S. Department of State and the U.S. General Services Administration (“GSA”) spoke candidly about how their respective agencies are going to use the procurement process to further the Biden Administration’s climate change goals. The State Department’s Senior Procurement Executive explained that State is developing new standard operating procedures on sustainable procurement that would provide contracting officers with guidance regarding how sustainability considerations should be included as evaluation factors in solicitations and incorporated into best-value tradeoff decisions, as well as how life-cycle costs associated with GHG emissions should be factored into price evaluations. Both Executives said that the new procedures would be enterprise-wide endeavors and are part of a broader effort to build sustainability into State’s and GSA’s cultures.

Additionally, in May 2023, the GSA Acquisition Policy Federal Advisory Committee approved the following six recommendations to be submitted to the GSA Administrator: (1) implement a change acceleration strategy for implementing sustainability acquisition practices; (2) make sustainability a core, foundational capability across the acquisition workforce; (3) create sustainability experts through a new sustainability certification; (4) identify, engage, and onboard innovative entrants specializing in leading-edge sustainable products and services; (5) sponsor maturity models for embedding sustainability and climate risk mitigation; and (6) reduce single-use plastics and packaging. Those recommendations are notable, as they reflect a

commitment from GSA to accelerate the adoption of sustainable procurement policies and procedures, as well as a commitment to expand procurement opportunities for companies that are providing sustainable products and services.

The Proposed Rule, as well as the other recent proposed FAR rules and agency-specific policies regarding sustainability and climate change, indicate that contractors who do business with federal agencies should think strategically about how the new rules and procedures would affect future solicitations, including the evaluation factors for future awards. Although the Proposed Rule will take time to finalize and implement, there are a number of sustainability and climate-related policies and procedures that are currently being developed and that may be implemented in the near future. Furthermore, the Biden Administration has repeatedly touted its perceived status as the leading government implementer of sustainable procurement policies and practices, and it likely will continue to leverage the federal procurement process to advance its sustainability goals.

C. Potential for Disputes

The requirement that sustainable products and services be procured to the maximum extent practicable may create both pre-award and post-award disputes.

For example, in the pre-award context, a contractor could protest an agency’s decision that it is practicable, or that it is not practicable, to procure sustainable products or services. Such a protest may turn on whether a procuring agency adequately engaged in acquisition planning and market research with respect to sustainable products or services, or whether it reasonably determined, and sufficiently documented, a decision that it was, or was not, practicable to pro-

cure sustainable products or services.

In the context of contract performance, a contractor, as discussed above, will be required to procure sustainable products in certain situations unless the procuring agency determines that it is not practicable to do so. However, the Proposed Rule does not set forth a procedure for a contractor to dispute an agency determination that it is practicable to acquire sustainable products and services under the contract in the event that the contractor disagrees with the agency's determination.

Additionally, there may potentially be instances in which a contractor and agency disagree as to (1) whether the contractor is providing products or services that meet the applicable purchasing program requirements, (2) whether

the contractor has properly prioritized the different categories of sustainable products and services, as set forth in the new contract clause, or (3) whether the contractor has properly balanced, where appropriate, potential conflicts with domestic manufacturing and content requirements, such as the Buy American statute and the Berry Amendment.

IV. Conclusion

As stated above, comments on the Proposed Rule are currently due by October 2, 2023. We are closely monitoring the Proposed Rule, including the comments that are submitted, as well as related developments in this area. If you have any questions or are interested in submitting comments, please contact the authors.

Footnotes

1 Federal Acquisition Regulation: Sustainable Procurement, 88 Fed. Reg. 51672 (proposed Aug. 3, 2023).

2 The EPA's SmartWay Program, which focuses on freight transportation and sustainability in supply chains, is excluded from the Proposed Rule. The Proposed Rule states that procurement requirements for the SmartWay Program will be addressed in a separate FAR rulemaking.

3 See, e.g., *Palantir USG, Inc. v. United States*, 129 Fed. Cl. 218, 269 (2016), *aff'd*, 904 F.3d 980 (Fed. Cir. 2018).

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This publication provides an overview of a specific issue related to government contract law. It is not intended to provide legal advice.

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