

conditions based on lack of SAFETY Act designation (or certification); or

(ii) At the sole option of the Government, terminate this contract for the convenience of the Government in place of an equitable adjustment.

(3) A failure of the parties to agree on the equitable adjustment will be considered to be a dispute in accordance with the "Disputes" clause of this contract.

(4) Unless first terminated, the Contractor shall continue contract performance during establishment of any equitable adjustment.

(End of clause)

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## DEPARTMENT OF DEFENSE

### GENERAL SERVICES ADMINISTRATION

### NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

48 CFR Parts 2, 4, 7, 11, 12, 13, 23, 42, 45, and 52

[FAC 2005-21; FAR Case 2004-032; Item II; Docket 2006-020; Sequence 13]

RIN 9000-AK65

### Federal Acquisition Regulation; FAR Case 2004-032, Biobased Products Preference Program

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

**ACTION:** Final rule.

**SUMMARY:** The Civilian Agency Acquisition Council and the Defense Acquisition Regulations Council (Councils) have agreed on a final rule amending the Federal Acquisition Regulation (FAR) to implement 7 U.S.C. 8102, as enacted by section 9002 of the Farm Security and Rural Investment Act of 2002 (FSRIA) (Pub. L. 107-171), and amended by sections 205 and 943 of the Energy Policy Act of 2005 (Pub. L. 109-58). Entitled "Federal Procurement of Biobased Products," 7 U.S.C. 8102 requires that a procurement preference be afforded biobased products within items designated by the Secretary of Agriculture.

**DATES:** *Effective Date:* December 7, 2007.

**FOR FURTHER INFORMATION CONTACT:** Mr. William Clark, Procurement Analyst, at (202) 219-1813 for clarification of content. For information pertaining to status or publication schedules, contact the FAR Secretariat at (202) 501-4755.

Please cite FAC 2005-21, FAR case 2004-032.

#### SUPPLEMENTARY INFORMATION:

##### A. Background

The United States Department of Agriculture (USDA) published regulations at 7 CFR 2902: 70 FR 1792, January 11, 2005; 71 FR 13686, March 16, 2006; 71 FR 42572, July 27, 2006; and 71 FR 67031, November 20, 2006.

DoD, GSA, and NASA published a proposed rule in the **Federal Register** at 71 FR 77360, December 26, 2006. The comment period closed on February 26, 2007. Six respondents submitted comments on the proposed rule. The comments are available at <http://www.regulations.gov>. A discussion of the comments and the changes made to the rule are provided below.

##### Public Comments

###### Provide coverage for products that use biobased products.

*Comment:* One respondent recommends that the FAR should include a preference for products that use biobased products. The example proffered was diesel engine generator sets that perform with biobased fuels.

*Response:* Extending coverage as suggested would exceed the congressional mandate, codified at 7 U.S.C. 8102, to procure designated biobased items. The comment is therefore beyond the scope of this case. It applies to the scope of the biobased product program, which was established by Congress.

###### Interface between the proposed contract clause and the order of precedence clause.

*Comment:* One respondent expresses concern with the interface between the contract clause and the order of precedence clause (FAR 52.215-8). The subject proposed rule includes a requirement to use a contract clause, specifically FAR 52.223-XX (now FAR 52.223-2), to make maximum use of biobased products in contracts for services, rather than the normal needs analysis and specification process embodied in Part 11, Describing Agency Needs. The subject clause is proposed to go into all service contracts (as well as construction), unless the contract will not involve the use of USDA-designated items. The respondent believes this unusual approach to describing contractual requirements is inappropriate in contracts for services because it creates a potential ambiguity. The respondent is concerned that in the order of precedence clause, contract clauses take precedence over specifications. As stated by the respondent, "It is not clear that the

exemption in the clause regarding 'meeting contract performance requirements' in paragraph (a)(2) applies to named products such as those on qualified product lists (QPLs), because of the order of precedence clause, 52.215-8, that already goes into all negotiated contracts." The respondent is concerned that, according to this rule of interpretation, the clause requirement to use a designated biobased hydraulic fluid or lubricant, for example, might be required over a QPL or other contractually specified product. This is a matter of concern to the respondent when acquiring services in support of complex systems, engineering services, and other contracts for services when multi-tiered subcontracting is involved.

The respondent suggests two alternatives—

- Include the requirement for biobased products in FAR Part 11 rather than in a contract clause; or
- Exempt products on QPLs.

*Response:* Review of the proposed contract clause and FAR 52.215-8 reveals that the two clauses can be harmonized in a manner that furthers the Congressional objective when read together. In accordance with the proposed contract clause and the provisions of 7 U.S.C. 8102, any entity contracting with any Federal agency is required to use designated biobased items (absent one of the statutory exemptions) in performance of the contract. As mandated in 7 U.S.C. 8102(d), Federal agencies have one year after designation of a product to modify specifications which they have the responsibility for drafting or reviewing, in order to ensure that such specifications require the use of biobased products unless an exemption applies. The proposed alternatives are addressed as follows:

- *Put the requirement in Part 11.* Regardless of where the requirement is incorporated into the FAR, the requirement must be incorporated into the contract to bind a contractor. The statute mandates: "Except as provided in subsection (c), each procuring agency shall comply with the requirements set forth in this section and any regulations issued under this section..." (7 U.S.C. 8102(a)). "Procuring agency" is defined in 7 U.S.C. 8101(4) as—

—Any Federal agency that is using Federal funds for procurement; or  
—Any person contracting with any Federal agency with respect to work performed under the contract.

To implement 7 U.S.C. 8102, a contract clause is required. Absent a contract clause, the contractor is not bound to follow the mandates of 7

U.S.C. 8102. For a performance-based contract, there may be no specifications.

- **Exemption for Products on QPLs.**

The exemptions are listed in the proposed and final rules at FAR 23.404(b), 23.405(b), and in the clause at 52.223-2(a). There is an exemption that covers situations in which the product fails to meet performance requirements. If there is a qualification requirement applicable to an acquisition, it will be unknown whether a product meets performance requirements until it has been evaluated for addition to the QPL. Either the product will meet the requirements and be added to the QPL, or the product will not meet the requirements, and need not be purchased. In any case, the QPL will control until the product is tested. Federal agencies should, however, expedite the qualification process. Congress has directed Federal agencies to revise specifications which they are responsible for drafting or reviewing within one year after the date of publication of the guidelines on designated products. Therefore, such exclusion for all products on QPLs would be inconsistent with 7 U.S.C. 8102(d).

- **Include a categorical exemption for spacecraft or combat systems in the clause.**

*Comment:* One respondent expressed concern that "...fabricators and operators working under large mission support services contracts, especially at the component subcontract level, might not be aware that spacecraft are exempt from some biobased requirements unless that specific exception is added to paragraph (a) of the clause."

*Response:* The USDA designation of some items (e.g., mobile equipment hydraulic fluids, diesel fuel additives, and penetrating lubricants, see 7 CFR 2902.10 *et seq.*) provides exemption from the preferred procurement requirement for the application of the designated item to one or both of the following:

- (i) Spacecraft system and launch support equipment.
- (ii) Military equipment: Product or system designed or procured for combat or combat-related missions.

These exemptions were initiated in response to public comments on the USDA proposed rule designating the first 6 biobased items for Federal procurement (70 FR 38612, July 5, 2005 and 71 FR 13685, March 16, 2006). USDA believed that the situations described were of sufficient concern that it was appropriate to provide specific exemptions for certain designated items when used in military equipment in combat or combat-related

missions and spacecraft and their launch support equipment where failures could have catastrophic consequences.

The Councils have included these exemptions with the other exemptions at FAR 23.404(b) and in the clause at FAR 52.223-2, because these exemptions may impact more than just one agency. The clause prescription has not been modified, because an exemption may apply to one USDA-designated item to be used in the performance of the contract, but not other USDA-designated items, or even the same item with a different application.

- **Inconsistent with performance-based service contracting policy.**

*Comment:* One respondent comments that the proposed contract clause approach is unnecessary and inconsistent with performance-based service contracting policy.

*Response:* Requiring a preference for biobased products does not impinge upon a contractor's discretion of determining work processes. Rather, once a contractor delineates a process, the contract clause only requires that if the process selected by the contractor involves the use of USDA-designated products, the contractor shall use biobased products, absent an applicable exception. The contractor may select another process that does not involve the use of any USDA-designated products.

- **Limit the use of the clause to contracts for commercial services with an estimated value in excess of \$100,000.**

*Comment:* One respondent recommends that the purpose of the new clause can still be achieved if the prescription were not as inclusive. Having a narrower prescription would balance the needs of USDA with the requirements of the rest of the procurement community. The respondent recommends limiting the use of the clause to contracts for commercial type services with an estimated value above \$100,000.

*Response:* Such action would be inconsistent with 7 U.S.C. 8102(a). That statutory provision requires compliance where the purchase price of the item exceeds \$10,000 or "where the quantity of such items or of functionally equivalent items purchased or acquired in the course of the preceding fiscal year was \$10,000 or more."

- **Delete coverage for micro-purchases.**

*Comment:* One respondent suggests deletion of coverage for micro-purchases at FAR 13.201(f). Justification for this recommendation is to enhance the simplicity of awarding micro-purchases,

reduce the burden on agencies for training individuals executing such purchases, and the decreased time for processing associated paperwork.

*Response:* The requirements of 7 U.S.C. 8102 are specifically applicable to any purchase once the statutory threshold has been met (i.e., the quantity of such items purchased by the agency the preceding year was \$10,000 or more).

- **Continue to meet contract performance requirements.**

*Comment:* One respondent suggests a change to proposed FAR clause 52.223-XX (now 52.223-2). The respondent suggests that (a)(2) of the proposed clause be changed from "meeting contract performance requirements; or" to "and continue to meet contract performance requirements; or."

*Response:* Absent a change in specification, a product that meets contract specifications at time of award will continue to meet such specifications subsequent to contract award. Therefore, no change to the proposed clause is required.

- **Include the certification in ORCA.**

*Comment:* Include the certification in Online Representations and Certifications Application (ORCA).

*Response:* The Councils agree with this comment and have added the FAR clause 52.223-1 to the list of clauses at FAR 4.1202.

- **Objection to requirement for minimum biobased contents for lubricants.**

*Comment:* One respondent objects "to the USDA's proposal requiring minimum biobased contents in order for lubricants to qualify for Federal agency procurement preference." A variety of reasons are provided, including cost and performance.

*Response:* With respect to the comments involving cost or performance, Federal agencies are not required to procure such products if the product cannot be procured at a reasonable price or it does not meet requirements. The remaining comments relating to USDA's designation of products are beyond the scope of this case and need to be directed to the USDA.

- **Project officers will need to be trained.**

*Comment:* One respondent comments that contracting officer technical representatives (project officers) will need to be trained.

*Response:* Program training will need to be conducted on an individual Federal agency basis, since preference programs are Federal agency specific. Therefore, training is most appropriately

addressed in conjunction with each Federal agency's procurement program.

**Life-cycle cost information will be prohibitive for small businesses.**

*Comment:* One respondent states that Life-cycle cost information will be prohibitive for many small businesses and should not be routinely requested from vendors since price, availability and functionality are generally the most important factors in most acquisition.

*Response:* The rule does not require routine collection of this data from vendors. It is permissive ("may request"), and is necessary to implement 7 CFR 2902.8, which requires that manufacturers and vendors must provide information on life cycle costs and environmental and health benefit tests, when requested by Federal agencies.

**Need for Budget Object Code.**

*Comment:* The respondent also comments that it will be difficult for agencies to capture data regarding affected procurements and a Budget Object Code is needed.

*Response:* This comment is outside the scope of this case.

**Other Revisions to the Proposed Rule.**

• **Definitions.** The proposed rule cited the statutory definition of "Biobased product" (7 U.S.C. 8101(2)), however, the definition conflicts with the intent of the rule that biobased products from certain designated countries must be treated by procuring agencies as eligible for the procurement preference under FSRIA. The revised definition deletes the statutory reference and encompasses biobased products composed of renewable agricultural materials or forestry materials from "designated countries," as defined in FAR 25.003. Therefore, provided that those products otherwise meet all requirements for participation in the preference program, they will be entitled to receive the procurement preference.

• **Certification.** The Councils concluded that the certification in the proposed rule was unnecessarily burdensome, requiring submission of a separate signed certification. This certification was erroneously patterned after FAR clause 52.223-9, Estimate of Recovered Material Content for EPA-Designated Products, Alternate I, which is a requirement for a certification at the end of the contract performance. The more appropriate model is the pre-award Recovered Material Certification at FAR 52.223-4, in which the offeror provides certification by signing the offer. In this way, the estimated paperwork burden associated with the proposed rule is eliminated. In addition, the wording "other than biobased products that are not purchased by the

offeror as a direct result of this contract" has been included in the certification to implement 7 CFR 2902.3(c), as amended by the USDA interim final rule of 71 FR 42572, July 27, 2006, which clarified the USDA intent to exclude from the preferred procurement program biobased products that are merely incidental to Federal funding. This clarification was necessary after the definition of "procuring agency" was expanded to include contractors.

• **Duplication of exemptions.** The proposed rule duplicated the statement of exemptions at FAR 23.404(b) and 23.405(b). The Councils provide a cross-reference at FAR 23.405(b) to 23.404(b), rather than a restatement of the exemptions.

• **Title of 52.223-9.** The Councils corrected the title of FAR 52.223-9 in the clause prescription at FAR 23.406(d) in the final rule.

This is not a significant regulatory action and, therefore, was not subject to review under Section 6(b) of Executive Order 12866, Regulatory Planning and Review, dated September 30, 1993. This rule is not a major rule under 5 U.S.C. 804.

**B. Regulatory Flexibility Act**

The Department of Defense, the General Services Administration, and the National Aeronautics and Space Administration certify that this final rule will not have a significant economic impact on a substantial number of small entities within the meaning of the Regulatory Flexibility Act, 5 U.S.C. 601, *et seq.*, because it implements in the FAR the USDA rule at 7 CFR Part 2902. Furthermore, USDA has certified that its designation of biobased items will not have a significant economic impact on a substantial number of small entities (71 FR 13685 at 13704, March 16, 2006). In support of this certification, USDA stated in the **Federal Register** that it anticipates that this program will affect entities, both large and small, that manufacture or sell biobased products. For example, the designation of items for preferred procurement will provide additional opportunities for businesses to manufacture and sell biobased products to Federal agencies and their contractors. Similar opportunities will be provided for entities that supply biobased materials to manufacturers. Conversely, the biobased procurement program may decrease opportunities for businesses that manufacture or sell non-biobased products or provide components for the manufacturing of such products. However, this rule will not affect existing purchase orders and it will not preclude procuring agencies

from continuing to purchase non-biobased items under certain conditions relating to the availability, performance, or cost of biobased items. This rule will also not preclude businesses from modifying their product lines to meet new specifications or solicitation requirements for these products containing biobased materials. Because biobased products represent a small emerging market, only a small percentage of all manufacturers, large or small, are expected to develop and market biobased products. Thus, the number of small businesses affected is not expected to be substantial. The only comment received with regard to impact of the proposed rule on small business is addressed in the response to public comments.

**C. Paperwork Reduction Act**

The Paperwork Reduction Act does not apply because the changes to the FAR do not impose information collection requirements that require the approval of the Office of Management and Budget under 44 U.S.C. 3501, *et seq.* The estimated burden of 18,000 hours per year associated with the proposed rule provision at FAR 52.223-1, has been eliminated in the final rule.

**List of Subjects in 48 CFR Parts 2, 4, 7, 11, 12, 13, 23, 42, 45, and 52**

Government procurement.

Dated: October 31, 2007.

**Al Matera,**

*Director, Office of Acquisition Policy.*

■ Therefore, DoD, GSA, and NASA amend 48 CFR parts 2, 4, 7, 11, 12, 13, 23, 42, 45, and 52 as set forth below:

■ 1. The authority citation for 48 CFR parts 2, 4, 7, 11, 12, 13, 23, 42, 45, and 52 continues to read as follows:

**Authority:** 40 U.S.C. 121(c); 10 U.S.C. chapter 137; and 42 U.S.C. 2473(c).

**PART 2—DEFINITIONS OF WORDS AND TERMS**

■ 2. Amend section 2.101 in paragraph (b)(2) by adding, in alphabetical order, the definition "Biobased product" to 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 (including plant,

animal, and marine materials) or forestry materials.  
\* \* \* \*

**PART 4—ADMINISTRATIVE MATTERS**

■ 3. Amend section 4.1202 by redesignating paragraphs (r) through (z) as (s) through (aa) respectively, and adding a new paragraph (r) to read as follows:

**4.1202 Solicitation provision and contract clause.**

\* \* \* \* \*  
(r) 52.223–1, Biobased Product Certification.  
\* \* \* \*

**PART 7—ACQUISITION PLANNING**

■ 4. Amend section 7.103 by revising paragraph (n)(2) to read as follows:

**7.103 Agency-head responsibilities.**

\* \* \* \* \*  
(n) \* \* \*  
(2) Comply with the policy in 11.002(d) regarding procurement of biobased products, products containing recovered materials, and environmentally preferable and energy-efficient products and services.  
\* \* \* \*

**PART 11—DESCRIBING AGENCY NEEDS**

■ 5. Amend section 11.002 by revising paragraph (d) to read as follows:

**11.002 Policy.**

\* \* \* \* \*  
(d)(1) When agencies acquire products and services, various statutes and executive orders (identified in Part 23) require consideration of—  
(i) Energy-efficient products and services (Subpart 23.2);  
(ii) Products and services that utilize renewable energy technologies (Subpart 23.2);  
(iii) Products containing energy-efficient standby power devices (Subpart 23.2);  
(iv) Products containing recovered materials (Subpart 23.4);  
(v) Biobased products (Subpart 23.4); and  
(vi) Environmentally preferable products and services (Subpart 23.7).  
(2) Executive agencies shall consider maximum practicable use of products and services listed in paragraph (d)(1) of this section when—  
(i) Developing, reviewing, or revising Federal and military specifications, product descriptions (including commercial item descriptions) and standards;

(ii) Describing Government requirements for products and services; and  
(iii) Developing source-selection factors.  
\* \* \* \*

**11.101 [Amended]**

■ 6. Amend section 11.101 by removing paragraph (b) and redesignating paragraph (c) as (b).

■ 7. Amend section 11.302 by revising paragraph (c) to read as follows:

**11.302 Policy.**

\* \* \* \* \*  
(c)(1) When the contracting officer needs additional information to determine whether supplies meet minimum recovered material or biobased standards stated in the solicitation, the contracting officer may require offerors to submit additional information on the recycled or biobased content or related standards. The request for the information must be included in the solicitation. When acquiring commercial items, limit the information to the maximum extent practicable to that available under normal commercial practices.

(2) For biobased products, the contracting officer may require vendors to provide information on life cycle costs and environmental and health benefits in accordance with 7 CFR 2902.8.

**PART 12—ACQUISITION OF COMMERCIAL ITEMS**

■ 8. Amend section 12.301 by revising paragraph (e)(3) to read as follows:

**12.301 Solicitation provisions and contract clauses for the acquisition of commercial items.**

\* \* \* \* \*  
(e) \* \* \*  
(3) The contracting officer may use the provisions and clauses contained in Part 23 regarding the use of recovered material and biobased products when appropriate for the item being acquired.  
\* \* \* \*

**PART 13—SIMPLIFIED ACQUISITION PROCEDURES**

■ 9. Amend section 13.201 by revising paragraph (f) to read as follows:

**13.201 General.**

\* \* \* \* \*  
(f) The procurement requirements in Subparts 23.2, 23.4, and 23.7 apply to purchases at or below the micro-purchase threshold.  
\* \* \* \*

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

■ 10. Amend section 23.000 by revising paragraph (d) to read as follows:

**23.000 Scope.**

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

■ 11. Revise Subpart 23.4 to read as follows:

**Subpart 23.4—Use of Recovered Materials and Biobased Products**

Sec.	
23.400	Scope of subpart.
23.401	Definitions.
23.402	Authorities.
23.403	Policy.
23.404	Agency affirmative procurement programs.
23.405	Procedures.
23.406	Solicitation provisions and contract clauses.

**23.400 Scope of subpart.**

(a) The procedures in this subpart apply to all agency acquisitions of an Environmental Protection Agency (EPA) or United States Department of Agriculture (USDA)-designated item, if—

- (1) The price of the designated item exceeds \$10,000; or
- (2) The aggregate amount paid for designated items, or for functionally equivalent designated items, in the preceding fiscal year was \$10,000 or more.

(b) While micro-purchases are included in determining the aggregate amount paid under paragraph (a)(2) of this section, it is not recommended that an agency track micro-purchases when—

- (1) The agency anticipates the aggregate amount paid will exceed \$10,000; or
- (2) The agency intends to establish or continue an affirmative procurement program in the following fiscal year.

**23.401 Definitions.**

As used in this subpart—  
(a) *EPA-designated item* means a product that is or can be made with recovered material—

- (1) That is listed by EPA in a procurement guideline (40 CFR part 247); and
- (2) For which EPA has provided purchasing recommendations in a

related Recovered Materials Advisory Notice (RMAN).

(b) *USDA-designated item* means a generic grouping of products that are or can be made with biobased materials—

(1) That is listed by USDA in a procurement guideline (7 CFR part 2902, subpart B); and

(2) For which USDA has provided purchasing recommendations.

#### 23.402 Authorities.

(a) The Resource Conservation and Recovery Act of 1976 (RCRA), 42 U.S.C. 6962.

(b) The Farm Security and Rural Investment Act of 2002 (FSRIA), 7 U.S.C. 8102.

(c) Executive Order 13101 of September 14, 1998, Greening the Government Through Waste Prevention, Recycling, and Federal Acquisition.

(d) The Energy Policy Act of 2005, Public Law 109–58.

#### 23.403 Policy.

Government policy on the use of products containing recovered materials and biobased products considers cost, availability of competition, and performance. Agencies shall assure the use of products containing recovered materials and biobased products to the maximum extent practicable without jeopardizing the intended use of the product while maintaining a satisfactory level of competition at a reasonable price. Such products shall meet the reasonable performance standards of the agency and be acquired competitively, in a cost-effective manner. Except as provided at FAR 23.404(b), virgin material shall not be required by the solicitation (see 11.302).

#### 23.404 Agency affirmative procurement programs.

(a) An agency must establish an affirmative procurement program for EPA and USDA-designated items if the agency's purchases of designated items exceed the threshold set forth in 23.400.

(1) Agencies have a period of 1 year to revise their procurement program(s) after the designation of any new item by EPA or USDA.

(2) Technical or requirements personnel and procurement personnel are responsible for the preparation, implementation, and monitoring of affirmative procurement programs.

(3) Agency affirmative procurement programs must include—

(i) A recovered materials and biobased products preference program;

(ii) An agency promotion program;

(iii) For EPA-designated items only, a program for requiring reasonable estimates, certification, and verification

of recovered material used in the performance of contracts. Both the recovered material content and biobased programs require preaward certification that the products meet EPA or USDA recommendations. A second certification is required at contract completion for recovered material content; and

(iv) Annual review and monitoring of the effectiveness of the program.

(b) *Exemptions.* (1) Agency affirmative procurement programs must require that 100 percent of purchases of EPA or USDA-designated items contain recovered material or biobased content, respectively, unless the item cannot be acquired—

(i) Competitively within a reasonable time frame;

(ii) Meeting reasonable performance standards; or

(iii) At a reasonable price.

(2) EPA and USDA may provide categorical exemptions for items that they designate, when procured for a specific purpose. For example, some USDA-designated items such as mobile equipment hydraulic fluids, diesel fuel additives, and penetrating lubricants (see 7 CFR 2902.10 *et seq.*) are excluded from the preferred procurement requirement for the application of the USDA-designated item to one or both of the following:

(i) Spacecraft system and launch support equipment.

(ii) Military equipment, *i.e.*, a product or system designed or procured for combat or combat-related missions.

(c) Agency affirmative procurement programs must provide guidance for purchases of EPA-designated items at or below the micro-purchase threshold.

(d) Agencies may use their own specifications or commercial product descriptions when procuring products containing recovered materials or biobased products. When using either, the contract should specify—

(1) For products containing recovered materials, that the product is composed of the—

(i) Highest percent of recovered materials practicable; or

(ii) Minimum content standards in accordance with EPA's Recovered Materials Advisory Notices; and

(2) For biobased products, that the product is composed of—

(i) The highest percentage of biobased material practicable; or

(ii) USDA's recommended minimum contents standards.

(e) Agencies shall treat as eligible for the preference for biobased products, products from "designated countries," as defined in 25.003, provided that those products—

(1) Meet the criteria for the definition of biobased product, except that the products need not meet the requirement that renewable agricultural materials (including plant, animal, and marine materials) or forestry materials in such product must be domestic; and

(2) Otherwise meet all requirements for participation in the preference program.

#### 23.405 Procedures.

(a) *Designated items and procurement guidelines.*

(1) *Recovered Materials.* Contracting officers should refer to EPA's list of EPA-designated items (available via the Internet at <http://www.epa.gov/cpg/>) and to their agencies' affirmative procurement program when purchasing products that contain recovered material, or services that could include the use of products that contain recovered material.

(2) *Biobased products.* Contracting officers should refer to USDA's list of USDA-designated items (available through the Internet at <http://www.usda.gov/biopreferred>) and to their agencies' affirmative procurement program when purchasing supplies that contain biobased material or when purchasing services that could include supplies that contain biobased material.

(b) *Procurement exemptions.*

(1) Once an item has been designated by either EPA or USDA, agencies shall purchase conforming products unless an exemption applies (see 23.404(b)).

(2) When an exemption is used for an EPA-designated item or the procurement of a product containing recovered material does not meet or exceed the EPA recovered material content guidelines, the contracting officer shall place a written justification in the contract file.

(c) *Program priorities.* When both the USDA-designated item and the EPA-designated item will be used for the same purposes, and both meet the agency's needs, the agency shall purchase the EPA-designated item.

#### 23.406 Solicitation provisions and contract clauses.

(a) Insert the provision at 52.223–1, Biobased Product Certification, in solicitations that—

(1) Require the delivery or specify the use of USDA-designated items; or

(2) Include the clause at 52.223–2.

(b) Insert the clause at 52.223–2, Affirmative Procurement 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 <http://>

[www.usda.gov/biopreferred](http://www.usda.gov/biopreferred) or 7 CFR Part 2902.

(c) Insert the provision at 52.223-4, Recovered Material Certification, in solicitations that are for, or specify the use of, EPA-designated items.

(d) Insert the clause at 52.223-9, Estimate of Percentage of Recovered Material Content for EPA-Designated Products, in solicitations and contracts exceeding \$100,000 that are for, or specify the use of, EPA-designated products containing recovered materials. If technical personnel advise that estimates can be verified, use the clause with its Alternate I.

**23.701 [Removed]**

■ 12. Remove and reserve section 23.701.

■ 13. Amend section 23.702 by adding paragraph (g) to read as follows:

**23.702 Authorities.**

\* \* \* \* \*

(g) Farm Security and Rural Investment Act of 2002 (FSRIA) (7 U.S.C. 8102).

■ 14. Amend section 23.703 by revising paragraph (b)(7); and adding paragraph (b)(8) to read as follows:

**23.703 Policy.**

\* \* \* \* \*

(b) \* \* \*  
(7) Promote the use of biobased products.

(8) Purchase only plastic ring carriers that are degradable (7 USC 8102(c)(1), 40 CFR part 238).

**PART 42—CONTRACT ADMINISTRATION AND AUDIT SERVICES**

■ 15. 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 environmentally preferable products, energy-efficient products, products containing recovered materials, and biobased products. This must occur as part of the quality assurance procedures set forth in Part 46; and

\* \* \* \* \*

**PART 45—GOVERNMENT PROPERTY**

**45.103 [Amended]**

■ 16. Amend section 45.103 by removing from paragraph (a)(1) “11.101(c)” and adding “11.101(b)” in its place.

**PART 52—SOLICITATION PROVISIONS AND CONTRACT CLAUSES**

■ 17. Add sections 52.223-1 and 52.223-2 to read as follows:

**52.223-1 Biobased Product Certification.**

As prescribed in 23.406(a), insert the following provision:

BIOBASED PRODUCT CERTIFICATION [December 7, 2007]

As required by the Farm Security and Rural Investment Act of 2002 and the Energy Policy Act of 2005 (7 U.S.C. 8102(c)(3)), the offeror certifies, by signing this offer, that biobased products (within categories of products listed by the United States Department of Agriculture in 7 CFR part 2902, subpart B) to be used or delivered in the performance of the contract, other than biobased products that are not purchased by the offeror as a direct result of this contract, will comply with the applicable specifications or other contractual requirements.

(End of provision)

**52.223-2 Affirmative Procurement of Biobased Products Under Service and Construction Contracts.**

As prescribed in 23.406(b), insert the following clause:

AFFIRMATIVE PROCUREMENT OF BIOBASED PRODUCTS UNDER SERVICE AND CONSTRUCTION CONTRACTS [December 7, 2007]

(a) In the performance of this contract, the contractor shall make maximum use of biobased products that are United States Department of Agriculture (USDA)-designated items unless—

- (1) The product cannot be acquired—
  - (i) Competitively within a time frame providing for compliance with the contract performance schedule;
  - (ii) Meeting contract performance requirements; or
  - (iii) At a reasonable price.
- (2) The product is to be used in an application covered by a USDA categorical exemption (see 7 CFR 2902.10 *et seq.*). For example, some USDA-designated items such as mobile equipment hydraulic fluids, diesel fuel additives, and penetrating lubricants are excluded from the preferred procurement requirement for the application of the USDA-designated item to one or both of the following:
  - (i) Spacecraft system and launch support equipment.
  - (ii) Military equipment, *i.e.*, a product or system designed or procured for combat or combat-related missions.

(b) Information about this requirement and these products is available at <http://www.usda.gov/biopreferred>.

(End of clause)

**52.223-4 [Amended]**

■ 18. Amend section 52.223-4 by removing from the prescription “23.406(a)” and adding “23.406(c)” in its place.

**52.223-9 [Amended]**

■ 19. Amend section 52.223-9 by removing from the prescription and Alternate I “23.406(b)” and adding “23.406(d)” respectively, in its place. [FR Doc. 07-5478 Filed 11-6-07; 8:45 am]

BILLING CODE 6820-EP-S

**DEPARTMENT OF DEFENSE**

**GENERAL SERVICES ADMINISTRATION**

**NATIONAL AERONAUTICS AND SPACE ADMINISTRATION**

**48 CFR Parts 2, 3, 12, 15, 18, 19, 27, 33, and 52**

[FAC 2005-21; FAR Case 1999-402; Item III; Docket 2007-0001; Sequence 7]

RIN 9000-AJ64

**Federal Acquisition Regulation; FAR Case 1999-402, FAR Part 27 Rewrite in Plain Language**

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

**ACTION:** Final rule.

**SUMMARY:** The Civilian Agency Acquisition Council and the Defense Acquisition Regulations Council (Councils) have agreed on a final rule amending the Federal Acquisition Regulation (FAR) to clarify, streamline, and update text and clauses on Patents, Data, and Copyrights (FAR Part 27).

**DATES:** *Effective Date:* December 7, 2007.

**FOR FURTHER INFORMATION CONTACT:** Mr. Ernest Woodson, Procurement Analyst, at (202) 501-3775 for clarification of content. For information pertaining to status or publication schedules, contact the FAR Secretariat at (202) 501-4755. Please cite FAC 2005-21, FAR case 1999-402.

**SUPPLEMENTARY INFORMATION:**

**A. Background**

This final rule is a “plain language” rewrite of FAR Part 27 and its associated clauses in Part 52. Part 27 implements a number of statutes and executive orders pertaining to patents, data, and copyrights. This effort focused on clarifying, streamlining, and updating the text, with the ultimate goal of making the policies and procedures