



PUBLIC
CONTRACTING
INSTITUTE

PILIERO
MAZZA

Sustainable Procurement: A Closer Look at the New Federal Acquisition Regulation (FAR)

Katherine Burrows
Partner
Government Contracts
PilieroMazza PLLC

Eric Valle
Associate
Government Contracts
PilieroMazza PLLC

August 8, 2024

Katherine Burrows



Katherine Burrows
Partner
Government Contracts
Pilieromazza PLLC
410.500.5551
kburrows@pilieromazza.com

As a government contracts lawyer and litigator, Katie counsels and represents government contractors in bid protests, requests for equitable adjustment, external investigations, qui tam suits under the False Claims Act, contract claims, including terminations for convenience and default, and disputes between subcontractors and prime contractors. Bid protests are a significant part of Katie's practice. She represents government contractors before the Government Accountability Office, the U.S. Court of Federal Claims, the U.S. Court of Appeals for the Federal Circuit, and numerous federal and state agencies.



Eric Valle



Eric Valle
Associate
Government Contracts
PilieroMazza PLLC
202.857.1000
evalle@pilieromazza.com

Eric focuses his practice on all aspects of doing business with and litigating against the federal government. His focuses include bid protests, contract claims and appeals, regulatory compliance, suspension and debarment, False Claims Act litigation, cost accounting, data rights and intellectual property, subcontractor and teaming agreements, and small business issues and size protests.

About PilieroMazza

PilieroMazza—a business law firm—serves as a strategic partner to government contractors and commercial businesses from across the United States.

We deliver results for our clients by implementing legal and business solutions that take the client's best interests into consideration. Moreover, PilieroMazza's efficient operational structure and lean approach to staffing matters translates into competitive pricing for our clients, while providing the highest standard of client service and legal acumen.

PilieroMazza is privileged to represent clients in the following areas:

- Audits & Investigations
- Bid Protests
- Business & Transactions
- Business Succession Planning
- Construction
- Corporate and Organizational Governance
- Cybersecurity & Data Privacy
- Debt Financing
- Employee Incentive and Bonus Plans
- False Claims Act
- Fund Formation & Structuring
- Government Contracts
- Government Contract Claims & Appeals
- Intellectual Property & Technology Rights
- Labor & Employment
- Litigation & Dispute Resolution
- Mergers & Acquisitions
- Native American Law & Tribal Advocacy
- Nonprofits
- Private Equity & Venture Capital

Sign up for receive our content at www.pilieromazza.com.



Overview

Background on sustainable procurement

What changes have been made to the FAR

How the new rule effects contractors

Challenges and opportunities posed by the new rule

Final thoughts



Background on Sustainable Procurement

In December 2021, President Biden announced an Executive Order on Catalyzing Clean Energy Industries and Jobs Through Federal Sustainability.

One of President Biden's overarching goals was to achieve net-zero emissions from federal procurement by 2050 while increasing the sustainability of federal supply chains.

The new FAR rule represents one of the largest steps taken towards meeting this goal.



Background on Sustainable Procurement

On April 22, 2024, the FAR Council published FAR Subpart 23.1—Sustainable Products and Services which became effective on May 22, 2024

The new FAR rule was created to “amend the FAR to restructure and update FAR part 23 to focus on current environmental and sustainability matters, implement a requirement for agencies to procure sustainable products and services to the maximum extent practicable, and update requirements for construction and architect-contracts.”

What Changes Did the New FAR Rule Make?

Dedicates FAR part 23 to environmental matters by moving content related to drug-free workplaces and encouraging contractors to ban texting while driving to FAR part 26.

Adds a definition of “sustainable products and services” in FAR 2.101.

Consolidates and updates statutory and other environmental purchasing program requirements in FAR subpart 23.1, Sustainable Products and Services.

Creates a new omnibus contract clause at FAR 52.223-23, Sustainable Products and Services, to uniformly communicate the Government's requirements for sustainable products and services.

Dedicates FAR subpart 23.2 to energy savings performance contracts.

Consolidates requirements related to hazardous and radioactive material in FAR subpart 23.3.



What Changes Did the New Rule Make? (Cont.)

- Consolidates and updates Federal facility and pollution prevention requirements in FAR subpart 23.4.
- Redesignates the remaining content at FAR subpart 23.8 as FAR subpart 23.5.
- Makes other conforming changes throughout the FAR to align with the revision in FAR part 23.
- Updates agency requirements for construction and architect-engineer contracts at FAR 36.104(b)(1) to align with the CEQ's Guiding Principles for Sustainable Federal Buildings and Associated instructions.
- Removes certain contractor reporting requirements in the clauses at FAR clauses 52.223-11, Ozone-Depleting Substances and High Global Warming Potential Hydrofluorocarbons; 52.223-12, Maintenance, Service, Repair, or Disposal of Refrigeration Equipment and Air Conditioners; and the alternates to FAR clause 52.223-5, Pollution Prevention and Right-to-Know Information.
- Finalizes the interim rule published under FAR Case 2010-001 (see 76 FR 31395, May 31, 2011).



What is “Sustainable Procurement”?

FAR 2.101 states “Sustainable acquisition means acquiring products and services in order to create and maintain conditions-

- (1) Under which humans and nature can exist in productive harmony; and
- (2) That permit fulfilling the social, economic, and other requirements of present and future generations.”

Effects of the New Rule

Policies and procedures established by the new rule apply to “all contract actions, including those using part 12 procedures for the acquisition of commercial products, including commercially available off-the-shelf (COTS) items, and commercial services and acquisitions valued at or below the micro-purchase threshold.”



Effects of the New Rule

Certain contracts are exempt from the requirement to procure sustainable products and services:

- Contracts performed or supplies delivered outside of the United States, unless the agency head determines that such application is in the interest of the United States;
- Contracts for weapon systems;
- Contracts for energy consuming products or systems designed or procured for combat or combat-related missions;
- Contracts for Biobased products to be used in military; equipment (products or systems designed or procured for combat or combat-related missions), spacecraft systems, or launch support equipment.



Effects of the New Rule

In accordance with the new rule agencies “shall procure sustainable products and services (as defined in [FAR] 2.101) to the maximum extent practicable.”

It is assumed procuring sustainable products and/or services is practicable unless the agency cannot acquire sustainable products and/or services:

- Competitively within a reasonable performance schedule;
- That meet reasonable performance requirements;
- At a reasonable price

Effects of the New Rule

A requiring activity may submit a written justification to the contracting officer stating that procuring sustainable products or services is not practicable based on one or more of the three criteria listed in the prior slide.

A written justification may be for a specific product or service, or at the line item or contract level.



Effects of the New Rule

Solicitations and Contracts subject to the new rule on sustainable procurement will contain FAR 52.223-23 Sustainable Products and Services.

FAR 52.223-23 requires that “[t]he sustainable products and services, including the purchasing program and type of product or service, that are applicable to this contract, and any products or services that are not subject to this clause, will be set forth in the statement of work or elsewhere in the contract.”

Effects of the New Rule

In addition, FAR 52.223-23 requires contractors to ensure sustainable products and services required by their contract are:

- Delivered to the Government;
- Furnished for use by the Government;
- Incorporated into the construction of a public building or public work; and
- Furnished for use in performing services under the contract where the cost of the products is a direct cost to this contract.



Effects of the New Rule

The final requirement under FAR 52.223-23 states:

- Sustainable products and services must meet the applicable standards, specifications, or other program requirements at time of quote or offer submission; and
- Sustainable products and services must meet the EPA Recommendations of Specifications, Standards, and Ecolabels in effect as of October 2023.
 - Per FAR 52.223-23(b)(1) agencies are required to identify the purchasing program and type of product or services that are applicable to the contract.

What Are “Sustainable Products and Services”?

Under FAR 2.101 sustainable products and services are those “that are subject to and meet applicable statutory mandates and directives for purchasing.”

Examples of products subject to statutory purchasing programs include:

- Products containing recovered material designated by the U.S. Environmental Protection Agency (EPA) under the Comprehensive Procurement Guidelines.
- Energy- and water-efficient products that are ENERGY STAR® certified or Federal Energy Management Program (“FEMP”)-designated products.
- Biobased products meeting the content requirement of the U.S. Department of Agriculture under the BioPreferred® program.



What Are “Sustainable Products and Services”?

Examples of products and services subject to required EPA purchasing programs include:

- WaterSense® labeled (water efficient) products and services.
- Safer Choice-certified products (products that contain safer chemical ingredients).
- Products and services that meet EPA Recommendations of Specifications, Standards, and Ecolabels in effect as of October 2023.

What Are “Sustainable Products and Services”?

Under the definition of “Sustainable Products and Services” FAR 2.101 FAR provides links to websites that contain information on the relevant purchasing programs and allows contractors to search for products that comply with that program.

For example, the FAR provides a link to the USDA’s BioPreferred® program website that allows contractors to search for BioPreferred® compliant products by product category.

Potential Challenges

Increased costs to implement sustainability measures.

Additional resources and labor dedicated to compliance with sustainable procurement programs.

Supply chain disruptions.

For small businesses, there may be higher relative compliance costs compared to larger businesses due to limited resources.



Potential Opportunities

Access to new markets for sustainable products and services.

Long term investment in sustainable products and services can deliver long term cost savings.



Final Thoughts

Be proactive in checking whether the products and services you offer are sustainable.

If you advertise your products or services as sustainable, check to make sure they align with the relevant EPA or USDA standards.

Review the General Services Administration's Green Procurement Compilation website for more information what products and services qualify as sustainable.



Questions?



Katherine Burrows
Partner
Government Contracts
PilieroMazza PLLC
410.500.5551
kburrows@pilieromazza.com



Eric Valle
Associate
Government Contracts
PilieroMazza PLLC
202.857.1000
evalle@pilieromazza.com

Disclaimer

This communication does not provide legal advice, nor does it create an attorney-client relationship with you or any other reader. If you require legal guidance in any specific situation, you should engage a qualified lawyer for that purpose. Prior results do not guarantee a similar outcome.

Attorney Advertising

It is possible that under the laws, rules, or regulations of certain jurisdictions, this may be construed as an advertisement or solicitation.

© 2024 PilieroMazza PLLC
All rights reserved.

