DEPARTMENT OF DEFENSE

GENERAL SERVICES ADMINISTRATION

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

48 CFR Parts 7, 23, and 52

[FAC 2005-84; FAR Case 2013-016; Item I; Docket 2013-0016, Sequence 1]

RIN 9000-AM71

Federal Acquisition Regulation; EPEAT Items

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

ACTION: Final rule.

SUMMARY: DoD, GSA, and NASA are adopting as final, with changes, an interim rule amending the Federal Acquisition Regulation (FAR) to implement changes in the Electronic Product Environmental Assessment Tool (EPEAT®) registry.

DATES: Effective: **[Insert date 30 days after date of publication in the FEDERAL REGISTER].**

FOR FURTHER INFORMATION CONTACT: Mr. Charles Gray, Procurement Analyst, at 202-208-6726, for clarification of content. For information pertaining to status or publication schedules, contact the Regulatory Secretariat at 202-501-4755. Please cite FAC 2005-84, FAR Case 2013-016.

SUPPLEMENTARY INFORMATION:

I. Background

DoD, GSA and NASA published an interim rule in the Federal Register at 79 FR 35859 on June 24, 2014, to expand the Federal requirement to procure EPEAT®-registered products beyond personal computer products to cover imaging equipment (i.e., copiers, digital duplicators, facsimile machines, mailing machines, multifunction devices, printers, and scanners) and televisions and modify the existing FAR requirements to recognize the revised standard applicable to computer products. One respondent submitted public comments on the interim rule. Comments were also received informally from within the Government.

II. Discussion and Analysis

The Civilian Agency Acquisition Council and the Defense Acquisition Regulations Council (the Councils) reviewed the comments in the development of the final rule. A discussion of the comments is provided as follows:

A. Summary of significant changes in response to public comments.

There is no significant change in the final rule in response to the public comments received.

B. Analysis of Public Comments.

1. EPEAT® issues.

Comment: The respondent expressed concern about the use of EPEAT® standards because it is a registered trademark and manufacturers must purchase an annual license. The respondent also expressed concern over the use of a private entity as a source of standards for Government purchasing. The respondent recommended that the Government rely on the underlying ANSI-accredited technical standards used by EPEAT®, such as the IEEE 1680™ family of standards, and accept third party certification of conformance to the IEEE 1680™ family of standards. The respondent recommended issuing further guidance clarifying the reliance on the IEEE 1680™ family of standards when new product categories are added.

Response: The requirement to purchase "EPEAT®-registered" electronic products was established under the interim rule for FAR Case 2006-030 which was published in the Federal Register at 72 FR 73215 on December 26, 2007. The FAR case implemented section 2(h) of Executive Order (E.O.) 13423, Strengthening Federal Environmental, Energy, and Transportation Management. Subsequently, E.O. 13514, Federal Leadership in Environmental, Energy, and Economic Performance, directed agencies to purchase EPEAT®-registered products as part of a broader goal to advance sustainable acquisition. Although E.O.s 13423 and 13514

have now been superseded by E.O. 13693, Planning for Federal Sustainability in the Next Decade, this final rule does not change the requirement to purchase EPEAT®-registered products. The FAR will be revised to be consistent with the new E.O. 13693, which does not endorse any private labels. It does, however, clearly require in section 3(l) that Federal agencies ensure a procurement preference for environmentally sustainable electronic products. EPEAT® continues to be an important tool for agencies to utilize to comply with the electronic stewardship goals that are required by E.O. 13693.

2. Interim Rule.

Comment: The respondent stated that the decision to publish this rule as an interim rule misapplied the "urgent and compelling" exception to the standard notice and comment process.

Response: This action was appropriate because imaging equipment and television items have already been added to the EPEAT® registry. Therefore, under the requirements of E.O.s 13423 and 13514, agencies are already required to fulfill at least 95 percent of their annual acquisition requirement for electronic products with EPEAT®-registered electronic products.

C. Other Changes.

Based on informal comments from within the Government, the final rule amends FAR 23.704(a) to reflect more clearly the language in E.O. 13423 as it pertains to the requirement for agencies, when acquiring electronic product, to meet at least 95 percent of those requirements with an EPEAT®- registered electronic product. The exceptions to this requirement are also amended to align with both E.O.s. Products that fall within the exceptions in FAR paragraphs 23.704(a)(1)(i) through (iii) are not included when calculating the achievement of the 95 percent goal. A determination by the agency head is not required if no EPEAT®-registered product meets agency requirements, but the agency head may provide an exemption in accordance with FAR 23.105.

However, a determination is required, in accordance with agency procedures, if the agency decides not to acquire an EPEAT®-registered product because the product will not be cost effective over the life of the product (FAR 23.704(a)(2)). Because the E.O.s do not provide an exception based on cost, such an acquisition would be included as noncompliant, when calculating achievement of the 95 percent goal.

III. Executive Orders 12866 and 13563

Executive Orders (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 not a significant regulatory action and, therefore, was not 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.

IV. Regulatory Flexibility Act

DoD, GSA, and NASA have prepared a Final Regulatory Flexibility Analysis (FRFA) consistent with the Regulatory Flexibility Act, 5 U.S.C. 601, et seq. The FRFA is summarized as follows:

> Executive Order 13423 (signed January 24, 2007, and published in the Federal Register at 72 FR 3919 on January 26, 2007) requires Federal agencies to satisfy at least 95 percent of their requirements for electronic products with EPEAT®-registered electronic products unless there is not an EPEAT® standard for such product. As of today, products must conform to the IEEE 1680TM family of standards in order to be listed on the EPEAT® product registry. The EPEAT® requirement, including a specific requirement for the purchase of EPEAT®-registered personal computer products, was added to the FAR by FAR Case 2006-030. Since that final rule was issued on January 15, 2009, the IEEE has published an updated standard for personal computer

products and two additional standards, for imaging equipment and televisions, and these standards have been added to the EPEAT® system. The objective of this final rule is to implement the changes to the EPEAT® registry.

No comments were raised by the public in response to the initial regulatory flexibility analysis.

Searching within the EPEAT® registry on October 1, 2014, the following numbers of products were listed as registered in the United States:

Product Category	Bronze	Silver	Gold	Total
Personal computer products	12	321	1,182	1,515
Imaging equipment	263	450	81	794
Televisions	1	205	37	243

These numbers refer to products, not individual companies. However, most (90-100 percent) of the companies with products listed on the EPEAT® registry are large businesses. These companies pay an annual fee, based on a sliding scale determined by the firm's revenue for that product the previous year, in order to be able to list the products on the EPEAT® registry.

However, purchasers often procure EPEAT®-registered products through resellers or distributors rather than directly from the manufacturers. These resellers are often small businesses. EPA's Office of Small Business Programs stated that the majority of the resellers and distributors for EPEAT®-registered products are categorized as small businesses. Further, only the actual manufacturer pays to list products on the EPEAT® registry. The resellers or distributors pay no fees but reap the benefit of the EPEAT® categorization. Therefore, there will be little or no impact on small businesses due to this rule.

There are no reporting, recordkeeping, or other compliance requirements associated with this rule. The only requirement is that businesses submitting proposals to the Government be aware of the EPEAT® registry and website and refer to it during the preparation of proposals. Small entities can comply with the requirements either as manufacturers, resellers, or distributors.

Interested parties may obtain a copy of the FRFA from the Regulatory Secretariat. The Regulatory Secretariat has submitted a copy of the FRFA to the

Chief Counsel for Advocacy of the Small Business Administration.

V. Paperwork Reduction Act

The rule does not contain any information collection requirements that require the approval of the Office of Management and Budget under the Paperwork Reduction Act (44 U.S.C. chapter 35).

List of Subjects in 48 CFR Parts 7, 23, and 52

Government procurement.

Dated: August 26, 2015.

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

INTERIM RULE ADOPTED AS FINAL WITH CHANGES

Accordingly, the interim rule amending 48 CFR parts 7, 23, and 52, which was published in the Federal Register at 79 FR 35859 on June 24, 2014, is adopted as a final rule with the following changes:

1. The authority citation for 48 CFR parts 7, 23, 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 7—ACQUISITION PLANS

7.103 [Amended]

2. Amend section 7.103 by removing from paragraph (p)(2) "non-ozone depleting" and adding "non-ozone-depleting" in its place.

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

23.000 [Amended]

3. Amend section 23.000 by removing from paragraph (d) "non-ozone depleting" and adding "non-ozone-depleting" in its place.

4. Amend section 23.704 by revising paragraph (a) and removing from paragraph (b)(1)(iii) "Meets EPA" and adding "Meet EPA" in its place, the revised text reads as follows:

23.704 Electronic products environmental assessment tool.

(a) General. (1) As required by E.O.s 13423 and 13514, agencies, when acquiring an electronic product to meet their requirements, shall meet at least 95 percent of those requirements with Electronic Product Environmental Assessment Tool (EPEAT®)-registered electronic products, unless—

(i) There is no EPEAT® standard for such product;

(ii) No EPEAT®-registered product meets agency requirements; or

(iii) The agency head has provided an exemption in accordance with 23.105.

(2) Contracting officers, when acquiring an electronic product, except as specified in paragraphs (a)(1)(i), (ii), or (iii) of this section, shall acquire an EPEAT®-registered electronic product, unless the agency determines, in accordance with agency procedures, that the EPEAT®-registered product will not be cost effective over the life of the product.

(3) 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.

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PART 52—SOLICITATION PROVISIONS AND CONTRACT CLAUSES

5. Amend section 52.212-5 by revising the date of the clause, paragraphs (b)(36)(ii) and (b)(39)(i), to read as follows:

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

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CONTRACT TERMS AND CONDITIONS REQUIRED TO IMPLEMENT STATUTES OR EXECUTIVE ORDERS–COMMERCIAL ITEMS (**[INSERT THE ABBREVIATED MONTH AND YEAR 30 DAYS AFTER PUBLICATION IN THE FEDERAL REGISTER]**)

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(b) * * *

__(36)(i) * * *

(ii) Alternate I (**[INSERT THE ABBREVIATED MONTH AND YEAR 30 DAYS AFTER PUBLICATION IN THE FEDERAL REGISTER]**) of 52.223-13.

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__(39)(i) 52.223-16, Acquisition of EPEAT®-Registered Personal Computer Products (**[INSERT THE ABBREVIATED MONTH AND YEAR 30 DAYS AFTER PUBLICATION IN THE FEDERAL REGISTER]**) (E.O.s 13423 and 13514).

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6. Amend section 52.223-13 by revising the date of the Alternate I; and removing from paragraph (b) of

Alternate I "EPEAT" and adding "EPEAT®" in its place. The revised text reads as follows:

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

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Alternate I ([**INSERT THE ABBREVIATED MONTH AND YEAR 30 DAYS AFTER PUBLICATION IN THE FEDERAL REGISTER**]) * * *

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7. Amend section 52.223-16 by revising the date of the clause; and removing from paragraph (c) "EPEAT" and adding "EPEAT®" in its place. The revised text reads as follows:

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

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ACQUISITION OF EPEAT®-REGISTERED PERSONAL COMPUTER PRODUCTS ([**INSERT THE ABBREVIATED MONTH AND YEAR 30 DAYS AFTER PUBLICATION IN THE FEDERAL REGISTER**])

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[BILLING CODE 6820-EP]

[FR Doc. 2015-21746 Filed: 9/2/2015 08:45 am; Publication Date: 9/3/2015]