

## New Interim Rule Requires Changes To Bring About More Green Contracting

Author: Lorraine Mullings Campos, Partner, Washington, D.C.

Author: Amy S. Koch, Partner, Washington, D.C.

**Publication Date: June 27, 2011**

On May 31, 2011, the Department of Defense ("DoD"), General Services Administration ("GSA"), and National Aeronautics and Space Administration ("NASA") issued an interim rule amending the Federal Acquisition Regulation ("FAR") by implementing Executive Orders 13514 ("E.O. 13514") and 13423 ("E.O. 13423"). 76 Fed. Reg. 31395-402 (May 31, 2011). The aim of the interim rule is to require federal agencies to leverage agency acquisitions to foster markets for sustainable technologies, materials, products, and services by ensuring that 95 percent of new contract actions, including task and delivery orders, for products and services are energy-efficient, water-efficient, biobased, environmentally preferable, non-ozone depleting, contain recycled content, or are non-toxic or less-toxic alternatives. Federal agencies are additionally required to implement high-performance sustainable building design, construction, renovation, repair, commissioning, operation and maintenance, management, and deconstruction practices. **Parties interested in submitting comments to be considered in the formulation of the new rule must do so no later than August 1, 2011.**

E.O. 13423 was signed January 24, 2007, and it requires federal agencies to conduct their environmental, transportation, and energy-related activities in an environmentally, economically, and fiscally sound, integrated, continuously improving, efficient, and sustainable manner. Among the requirements of E.O. 13423 were greenhouse gas emissions goals lowering or eliminating emissions from sources owned or controlled by federal agencies.

Building on the policy goals of E.O. 13423, E.O. 13514 was signed October 5, 2009, and it set parameters around what federal agencies are required to do in an effort to create a "clean energy economy," and measure, manage, and reduce greenhouse gas emissions toward agency-defined targets. Additionally, E.O. 13514 calls for the head of each federal agency to advance sustainable acquisition by "ensuring that 95 percent of new contract actions, including task and delivery orders for products and services, are energy-efficient, water-efficient, biobased, environmentally preferable, non-ozone depleting, contain recycled content, or are

non-toxic or less toxic alternatives, where such products and services meet agency performance requirements." The interim rule lists ENERGY STAR® and EPEAT-registered as options for energy-efficient and environmentally preferable products, respectively. Further, E.O. 13514 mandates that federal agencies design, construct, maintain, and operate high-performance sustainable buildings in sustainable locations.

The interim rule issued by DoD, GSA, and NASA only seeks to implement the requirements and measures of the aforementioned Executive Orders by amending the FAR, set forth in Title 48 of the Code of Federal Regulations ("C.F.R."). Among the changes to Title 48 of the C.F.R., particularly noteworthy for contractors are the changes that require: (1) 95 percent of new contract actions (as well as new task and delivery orders on existing contracts) - any oral or written action 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 - for the supply of products and for the acquisition of services to use environmentally sound materials and supplies, 48 C.F.R. § 23.1 (2011); (2) contractor activities to comply with federal agency environmental management systems, 48 C.F.R. § 23.9 (2011); (3) federal agencies to implement high-performance sustainable building design, construction, renovation, repair, commissioning, operation and maintenance, management, and deconstruction practices, 48 C.F.R. § 36.104 (2011); (4) contractors to submit paper documents on paper containing at least 30 percent postconsumer fiber whenever practicable and when not using electronic methods to submit information or data to the government, 48 C.F.R. § 52.204-4 (2011); and (5) contractors to establish a program to promote cost-effective waste reduction in all operations, 48 C.F.R. § 52.223-10 (2011).

It should also be noted that the interim rules revises the definition of "renewable energy" contained in Part 1, Section 2.101 of the FAR regulations to match the definition created in the Energy Policy Act of 2005, 42 U.S.C. § 15852. "Renewable energy" is now defined as "energy produced by solar, wind, geothermal, biomass, landfill gas, ocean (including tidal, wave, current and thermal), municipal solid waste, or new hydroelectric generation capacity achieved from increased efficiency or additions of new capacity at an existing hydroelectric project." Hydroelectric energy from existing facilities is not considered "renewable energy" for the purposes of this program.



The interim rule should further open up opportunities for contractors with sustainable technologies, materials, products, and services to sell to federal agencies. Contractors with strong views on these FAR changes should prepare comments and submit them prior to August 1, 2011, to ensure that their views are considered. Reed Smith attorneys are tracking changes to the FAR as they evolve.

### **About Reed Smith**

Reed Smith is a global relationship law firm with more than 1,600 lawyers in 22 offices throughout the United States, Europe, Asia and the Middle East.

The information contained herein is intended to be a general guide only and not to be comprehensive, nor to provide legal advice. You should not rely on the information contained herein as if it were legal or other professional advice.

The business carried on from offices in the United States and Germany is carried on by Reed Smith LLP of Delaware, USA; from the other offices is carried on by Reed Smith LLP of England; but in Hong Kong, the business is carried on by Reed Smith Richards Butler. A list of all Partners and employed attorneys as well as their court admissions can be inspected at the website <http://www.reedsmith.com/>.

© Reed Smith LLP 2011. All rights reserved.