

include subcontract flow down of Affirmative Procurement Program requirements in certain limited circumstances.

Subsequent to the publication of the Notice of Proposed Rulemaking, a separate final rule was published December 22, 2000, 65 FR 80994, amending the DEAR. That final rule amended the numbering structure of Part 970, Management and Operating Contracts. As a result of that final rule, the clause at 970.5204–39 in the proposed rule was redesignated 970.5223–2.

## II. Discussion of Public Comments

Five organizations submitted comments in 9 areas as discussed below.

1. 923.405, Procedures [DOE supplemental coverage—paragraph (e)]. The Department had proposed that the percentage of recovered/recycled content, recommended by the Environmental Protection Agency (EPA) in their Recovered Materials Advisory Notices (RMANs) be specified in the solicitation as the minimum percentage of recycled content.

*Comment:* One reviewer suggested that this created a problem as the EPA RMANs often do not specify a specific content but rather a range of content as the content sometimes varies by geographical area.

*Response:* The Department agrees with this comment and has added the phrase “or range of content” at 923.405(e).

2. 923.705, Contract clause, specifies the use of the clause at FAR 52.223–10.

*Comment:* A reviewer did not believe the meaning of the phrase “prime support service awards being performed at Government-owned or Government-leased facilities” was clear. The same reviewer suggested the word “awards” was unnecessary in the same phrase.

*Response:* The Department has chosen not to finalize proposed section 923.705 because it would be unnecessarily duplicative of existing FAR coverage at 23.705.

3. 936.601–3, Applicable contract procedures. The Department had proposed to add a new Section 936.601 addressing topics that requirements personnel should consider when designing and constructing or modifying facilities. No comments were received but the Department has chosen to delete the addition of a section 936.601–3 from this rule as it is unnecessarily duplicative of existing FAR coverage at 36.601–3.

4. 970.5223–2, Affirmative Procurement Program. The rule would

extend the Affirmative Procurement Program to certain subcontracts.

*Comment:* A reviewer suggested that flow down would be contrary to other DOE efforts to implement more economical and efficient commercial procurement practices. The reviewer suggested this would entail substantial cost to implement on the part of subcontractors who would have to develop additional compliance procedures, including an inspection program.

*Response:* The Department disagrees. The Resource Conservation and Recovery Act of 1976, 42 U.S.C. 6962, as amended, and EPA regulations, found at 40 CFR part 247, require Federal agencies to acquire products with recovered/recycled content which have been designated by EPA in the Comprehensive Procurement Guidelines. Executive Order 13101, *Greening the Government Through Waste Prevention, Recycling, and Federal Acquisition*, Section 701, requires contracts for contractor operation of a Government-owned or Government-leased facility to include provisions that obligate the contractor to comply with the requirements of the Executive Order. The result of the statute, EPA regulations, and the Executive Order are that this portion of the operation of a Federal facility cannot be operated as though it were a commercial facility. Disregarding these requirements when a subcontractor operates a portion of a Government facility would be contrary to the intent of the requirements. The purpose of this rulemaking is not to flow down the Affirmative Procurement Program to all subcontracts. The purpose of the rulemaking is to capture those instances in which a facility management contractor subcontracts for a significant portion of the operation of the Government facility which involves acquisition of items designated in EPA's Comprehensive Procurement Guidelines that Federal agencies and their contractors are to acquire with recovered/recycled content. The flow down applies only to such subcontracts not to all subcontracts. The reviewer is concerned that our flow down in this limited area will include extensive certifications or inspections. The Department has chosen not to flow down this level of detailed guidance. The contractor and subcontractor may agree on what degree of detail is appropriate to the circumstance. No inspection programs are contemplated or mandated by this rulemaking.

5. 970.5223–2, Affirmative Procurement Program. The Department had proposed changing the clause title

from “Acquisition and Use of Environmentally Preferable Products and Services” to “Affirmative Procurement Program.”

*Comment:* A reviewer asked the origin of the title of the clause. The same reviewer suggested we add “for EPA Designated Products.” Another reviewer suggested “environmentally preferable” should be retained in the title as the program guidance materials address this topic.

*Response:* The title “Affirmative Procurement Program” is the title used by the Resource Conservation and Recovery Act, 42 U.S.C. 6962, to describe a preference program for Federal acquisition of products with recovered/recycled content. The DOE Affirmative Procurement Program Guidance materials do include consideration of environmentally preferable aspects of procurement; however, the primary focus of the program is products with recycled content. Environmentally preferable procurement is generally viewed as a separate program area which seeks to acquire products and services that have a lesser or reduced effect on human health and the environment when compared with competing products or services that serve the same purpose. Accordingly, the Department is not accepting the suggestion that we retain “environmentally preferable” in the title. The suggestion that we add “for EPA designated products” is not adopted as the Department prefers the shorter title.

6. 970.5223, Affirmative Procurement Program. Paragraph (a) advises the reader that the Department's Affirmative Procurement Program Guidance is available on the Internet.

*Comment:* Two reviewers questioned the meaning of this. They were concerned that posting the guidance on the Internet would allow the Government to revise the Guidance without notice.

*Response:* The guidance provided at the DOE Executive Order 13101 home page is extensive and includes Federal, EPA and DOE regulatory materials, Executive Orders, strategic plans, and related information. The specific portion considered to be the DOE Affirmative Procurement Program Guidance, for purposes of compliance with the clause at 970.5223–2, is entitled *DOE's Affirmative Procurement Program Guidance*. It was developed after extensive coordination within the Department. It is the same guidance referred to in current contracts and it is posted on the Internet only for the convenience of all. Any changes will be coordinated within the Department.