

Posting the Guidance on the Internet is only for the convenience of all parties and will have no effect on the formal means through which revisions may be made.

7. 970.5223-2, Affirmative Procurement Program. Paragraph (c) addresses submission of contract reports.

Comment: A reviewer suggested that the requirement for the submission of subcontract reports at the "conclusion of each fiscal year" would be problematic for supply item subcontracts in particular since a set delivery date generally would not cross fiscal years. The reviewer suggested that it be revised to read "at the end of the Federal fiscal year and the end of the contract."

Response: The intent of this suggestion has been adopted but the text has been included at paragraph (d) for clarity since paragraph (d) addresses subcontract matters. The added text allows submission of the report upon completion of the subcontract unless the subcontract term is multiple year, in which case it provides that the parties will agree to an annual report submission schedule.

8. 970.5223-2, Affirmative Procurement Program. Paragraph (d) addresses applicability to subcontracts.

Comment: A reviewer suggested that the facility management contractor be allowed to flow down a clause substantially the same as that at 970.5223-2. The reviewer suggested it might be easier to accomplish the intent of the instruction if it is possible to tailor the clause to the circumstances of the subcontract situation. The reviewer also suggested that there was no reason to flow down the clause if the parties can determine the amount of products with recycled content that will be acquired under the subcontract at the time of the subcontract award.

Response: The Department agrees. The instructions, at 970.2304-2, and in paragraph (d) of the clause, have been revised to allow use of a clause substantially the same as the 970.5223-2 clause. Additionally, the instructions, at 970.2304-2, and in paragraph (d) of the clause, have been revised to provide that in situations in which the facility management contractor can reasonably determine the amount of products with recovered/recycled content that will be acquired under the subcontract, the facility management contractor may include such quantities in its own report and only flow down a requirement that the subcontractor will procure such products with recovered/recycled content. When it is not possible to determine the amount to be

acquired under the subcontract, such as an "as required" supply or service subcontract, the clause should be included in the subcontract.

9. 970.5223-2, Affirmative Procurement Program. Paragraph (e) concerns terminology to be used when the clause is used in a subcontract.

Comment: A reviewer questioned whether all facility management contractors have a recycling coordinator.

Response: Yes, all DOE facility management contractors have a recycling coordinator.

III. Section-by-Section Analysis

The Department of Energy amends the regulation as follows:

1. The authority citation for Parts 923 and 936 is revised.

2. A new section 923.405, Procedures, is being added to note that the recommended percentage of recycled content or range of recycled content included in the EPA Recovered Materials Advisory Notices (RMANs) is to be specified in the solicitation and contract as the minimum recycled content or range of content.

3. Section 923.471, Policy, is being deleted as unnecessarily duplicative of FAR coverage at 23.403.

4. Section 936.602-70 is modified by the addition of a new paragraph (a)(8) regarding consideration of the Architect-Engineer firm's experience in energy efficiency, pollution prevention, waste reduction, and the use of recovered and environmentally preferable materials when performing Architect-Engineer evaluations.

5. Section 970.2304 is being updated to include reference to 48 CFR (FAR) 23.4 and 23.704 and is revised to provide guidance concerning circumstances under which the clause at 970.5223-2 should be included in subcontracts. The list of circumstances under which recycled content products need not be purchased is revised to conform to the wording of the Federal Acquisition Regulation.

6. The clause at 970.5223-2 is being updated and revised to include guidance concerning circumstances under which the clause should be included in certain subcontracts. The list of circumstances under which recycled content products need not be purchased is revised to conform to the wording of the Federal Acquisition Regulation.

IV. Procedural Requirements

A. Review Under Executive Order 12866

Today's regulatory action has been determined not to be a "significant

regulatory action" under Executive Order 12866, "Regulatory Planning and Review" (58 FR 51735, October 4, 1993). Accordingly, this rule is not subject to review under that Executive Order by the Office of Information and Regulatory Affairs of the Office of Management and Budget (OMB).

B. Review Under Executive Order 12988

With respect to the review of existing regulations and the promulgation of new regulations, section 3(a) of Executive Order 12988, "Civil Justice Reform," 61 FR 4729 (February 7, 1996), imposes on Executive agencies the general duty to adhere to the following requirements: (1) Eliminate drafting errors and ambiguity; (2) write regulations to minimize litigation; and (3) provide a clear legal standard for affected conduct rather than a general standard and promote simplification and burden reduction. With regard to the review required by section 3(a), section 3(b) of Executive Order 12988 specifically requires that Executive agencies make every reasonable effort to ensure that the regulation: (1) Clearly specifies the preemptive effect, if any; (2) clearly specifies any effect on existing Federal law or regulation; (3) provides a clear legal standard for affected conduct while promoting simplification and burden reduction; (4) specifies the retroactive effect, if any; (5) adequately defines key terms; and (6) addresses other important issues affecting clarity and general draftsmanship under any guidelines issued by the Attorney General. Section 3(c) of Executive Order 12988 requires Executive agencies to review regulations in light of applicable standards in section 3(a) and section 3(b) to determine whether they are met or it is unreasonable to meet one or more of them. DOE has completed the required review and determined that, to the extent permitted by law, this final rule meets the relevant standards of Executive Order 12988.

C. Review Under the Regulatory Flexibility Act

This final rule has been reviewed under the Regulatory Flexibility Act, 5 U.S.C. 601 *et seq.*, which requires preparation of an initial regulatory flexibility analysis for any rule that is likely to have significant economic impact on a substantial number of small entities. This rule, which would implement provisions of Executive Order 13101 concerning the use of recycled materials, would not have a significant economic impact on small entities. While rule requirements may flow down to subcontractors in certain