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BUYING "GREEN": IMPLEMENTATION OF ENVIRONMENTALLY-SOUND
PURCHASING REQUIREMENTS IN DEPARTMENT OF DEFENSE PROCUREMENTS

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CONTENTS

INTRODUCTION.....	1
CHAPTER 1: OVERVIEW OF APPLICABLE REQUIREMENTS.....	4
A. The Noise Control Act of 1972.....	4
B. Energy Policy and Conservation Act of 1975.....	9
C. The Resource Conservation and Recovery Act of 1976.....	11
1. Recovered Materials Purchasing Requirements.....	11
A. Overview.....	11
B. EPA Implementation.....	16
C. Federal Acquisition Regulation Implementation.....	23
D. Executive Agency Implementation.....	24
2. Compliance With State Solid and Hazardous Waste Management Requirements.....	27
D. Department of Defense Directive (DoDD) 4210.15.....	29
E. Pollution Prevention Act of 1990.....	31
F. Clean Air Act Amendments of 1990.....	32
1. Clean-Fuel Vehicle Program Purchasing Requirements.....	32
2. Phase-Out of Ozone Depleting Chemicals.....	33
3. "Blacklisting" of Violators of Clean Air and Clean Water Standards.....	34
G. National Energy Policy Conservation and Energy Policy Acts of 1992.....	35
H. Office of Federal Procurement Policy Letter 92-4....	38
I. FY-1993 Department of Defense Authorization Act....	42
CHAPTER 2: PREFERRING ENVIRONMENTALLY-SOUND PRODUCTS AND SERVICES.....	43
A. Restricting Competition In The Interest of The Environment.....	43
1. "Green" Restrictions: How Far Can You Go?.....	44
2. Contracting Officer's Authority Over Specifications.....	52
B. Increasing Competition and Promoting Environmentally- Sound Alternatives.....	53
1. Use of Market Research and Market Surveys.....	54
2. Strategic Environmental Research and Development Program (SERDP).....	55
3. Use of Performance Specifications.....	56
4. Two-Step Sealed Bidding.....	61
C. Preferring "Green" Performance.....	63
CHAPTER 3: PRICING THE PREFERENCES.....	66
A. The Case for Price Preferences.....	66
B. Environmental Price Related Factors.....	72
1. Recovered Materials Content As A Price Related Factor.....	73
2. "Least-Cost" Pricing to Reflect Negative Environmental Externalities.....	74

C.	Use of Life-Cycle Costing.....	77
1.	Life-Cycle Costs As An Evaluation Factor.....	77
2.	Potential Remedial Action and Liability As Life-Cycle Cost Evaluation Factors.....	80
CHAPTER 4:	PURCHASING ENVIRONMENTAL RESPONSIBILITY.....	87
A.	Environmental Responsibility Determinations.....	88
1.	Gathering Information.....	89
2.	Past Environmental Performance.....	91
3.	Environmental Business Integrity and Ethics....	94
4.	Responsibility Factors v. Evaluation Factors...	97
B.	Developing Environmental Responsibility/Evaluation Factors For Business Integrity and Ethics.....	105
1.	What To Consider.....	105
2.	Suggested Environmental Responsibility Factors.....	110
CHAPTER 5:	FUTURE GROWTH OF BUYING "GREEN".....	112
A.	The FAR Changes Subcommittee Report.....	113
1.	FAR Part 23-Environment, Conservation, Occupational Safety and Drug-Free Workplace...	113
2.	FAR Part 7-Acquisition Planning.....	118
3.	FAR Part 10-Specifications, Standards, and Other Purchase Descriptions.....	119
4.	FAR Part 11-Acquisition and Distribution of Commercial Products.....	119
5.	FAR Part 15-Contracting By Negotiation.....	120
6.	FAR Part 36-Construction and Architect- Engineer Contracts.....	121
7.	FAR Part 42-Contract Administration.....	122
B.	Resource Conservation and Recovery Act Reauthorization.....	123
1.	RCRA Section 6002(a).....	124
2.	RCRA Section 6002(c)(1).....	124
3.	New RCRA Section 6002(j).....	126
C.	Proposed Executive Orders.....	126
CHAPTER 6:	THE FUTURE OF BUYING "GREEN".....	128

INTRODUCTION

Most environmental legislation which impacts the procurement process is not specifically directed at Government contracts but at Federal actions in general.¹ Consequently, these laws are not intended to use the procurement process to further environmental protection, but to ensure that Federal contracts do no harm. The implementation of these laws in Government contracts is usually referred to as "environmental considerations".²

There is, however, an existing and growing body of requirements that seek to use the Federal procurement process as an instrument to do some good for the environment. These requirements fall into two broad categories. First, those that require the purchase of certain environmentally sound goods and services to create markets for them and, second, those that restrict purchases of environmentally harmful goods and services in order to limit or phase out their use in the Federal sector. The implementation of this body of requirements into Government contracts could rightly be called "considering the environment."

The use of the Federal procurement process to advance

¹See for example Clean Water Act § 404(a) (33 U.S.C. § 1344(a)); Endangered Species Act of 1973 (16 U.S.C. §§ 1531-1543); National Historic Preservation Act of 1966 (16 U.S.C. § 470 as amended Pub. L. 96-515 (1980)).

²For example see "Environmental Considerations," 86-12 Construction Briefings 427 and 1988 Revision Note (overview of the impacts of environmental laws on construction contracts).

socioeconomic policies is nothing new.³ The Small Business Act,⁴ the Buy American Act,⁵ and Executive Order 12138,⁶ are notable examples. However, much of the implementation of policies to advance environmental protection via the Federal procurement system is relatively new. There are now numerous environmental purchasing requirements applicable to Department of Defense (DoD) procurement.

This paper will serve as a primer for environmental and Government contract law practitioners to aid in implementing "green"⁷ procurement requirements by reviewing current laws,

³When promulgating its proposed regulations for the use of fly ash in concrete, the Environmental Protection Agency observed:

The use of Federal procurement as a tool in accomplishing social, environmental, and economic goals is not new. Federal laws provide procurement preferences for:

- Small business concerns;
- Labor surplus area concerns;
- Low-noise-emission products;
- American-made products.

Other laws prohibit Federal purchases of products from firms which are in violation of pollution regulations. (45 Fed. Reg. 76906 (November 20, 1980)).

⁴15 U.S.C. § 631 et. seq.

⁵41 U.S.C. § 10a-d.

⁶44 Fed. Reg. 29637 (May 18, 1979) as implemented by Office of Federal Procurement Policy Letter 80-4 (45 Fed. Reg. 31033), mandates creation of procedures to encourage Federal contractors to award subcontracts to women owned businesses.

⁷"Green" means many things to many people. It has been used as a synonym for "environmentally-sound" (see *Buying "Green": Federal Purchasing Practices and the Environment, 1991: Hearing Before the Subcomm. on Oversight of Government Management of the Senate Comm. on Governmental Affairs*, 102d

regulations, and DoD Directives dealing with the use of DoD procurement to advance various environmental protection goals. Currently used or available, procurement practices to effectuate these "green" purchasing requirements will then be examined along with contract issues arising from their use. Finally, the continuing development and possible future of environmentally sound purchasing practices will be discussed.

Cong., 1st Sess. 11 (1991), 2 *hereinafter* S. Hrg. 102-563 (statement of Senator Carl Levin); as a description for activities that reduce waste and maximize resource efficiency (see Joel Makower, *The E Factor: The Bottom-line Approach to Environmentally Responsible Business*, 5 (Times Books, 1993); and as a label for an almost anthropopathic philosophy/religion of nonexploitation of natural resources and absolute protection of the environment from the "depredations" of man (i.e. "tree-hugging"). This paper will use "green" as a synonym for the term environmentally-sound (See note 164 *infra* for definition of environmentally-sound).

CHAPTER 1
OVERVIEW OF APPLICABLE REQUIREMENTS

A. The Noise Control Act of 1972⁸

This legislation creates a preference for "low-noise emission" products.⁹ The Environmental Protection Agency (EPA) is given responsibility for determining which products qualify as "low-noise emission products."¹⁰ The product must

⁸42 U.S.C. § 4901 *et. seq.*

⁹42 U.S.C. § 4914(a)(3) defines a low-noise emission product as: "[A]ny product which emits noise in amounts significantly below the levels specified in noise emission standards under regulations applicable under section 4905 of this title at the time of procurement to that type of product."

¹⁰42 U.S.C. § 4914(5) establishes the following procedures for product certification:

(A) Any person seeking to have a class or model of product certified under this section shall file a certification application in accordance with regulations prescribed by the Administrator.

(B) The Administrator shall publish in the Federal Register a notice of each application received.

(C) The Administrator shall make determinations for the purpose of this section in accordance with procedures prescribed by him by regulation.

(D) The Administrator shall conduct whatever investigation is necessary, including actual inspection of the product at a place designated in regulations prescribed under subparagraph (A).

(E) The Administrator shall receive and evaluate written comments and documents from interested persons in support of, or in

be determined to be a "suitable substitute" for a currently procured item and the General Services Administration (GSA) must determine that the cost of the product is no more than 125% of the retail cost of the product for which it is a substitute. Once these determinations are made, Federal agencies must procure these items in preference to their non-certified substitutes.¹¹ Congress in section 4914(5)(e)

opposition to, certification of the class or model of product under consideration.

(F) Within ninety days after the receipt of a properly filed certification application the Administrator shall determine whether such product is a low-noise-emission product for purposes of this section. If the Administrator determines that such product is a low-noise-emission product, then within one hundred and eighty days of such determination the Administrator shall reach a decision as to whether such product is a suitable substitute for any class or classes of products presently being purchased by the Federal Government for use by its agencies.

(G) Immediately upon making any determination or decision under subparagraph (F), the Administrator shall publish in the Federal Register notice of such determination or decision, including reasons therefor.

¹¹42 U.S.C. § 4914(c) and (d) establishes the procurement preference for certified low-noise emission products:

(c) Federal procurement of low-noise-emission products

(1) Certified low-noise-emission products shall be acquired by purchase or lease by the Federal Government for use by the Federal Government in lieu of other products if the Administrator of General Services determines that such certified products have procurement costs which are no more than 125 per centum of the retail price of the least expensive type of product for which they are certified

specifically waived any statutory price limitations for low-noise products.¹² The additional cost of low-noise products was financed by supplemental appropriations until the end of fiscal year 1977.¹³

The Environmental Protection Agency (EPA) has promulgated

substitutes.

(2) Data relied upon by the Administrator in determining that a product is a certified low-noise-emission product shall be incorporated in any contract for the procurement of such product.

(d) Product selection

The procuring agency shall be required to purchase available certified low-noise-emission products which are eligible for purchase to the extent they are available before purchasing any other products for which any low-noise-emission product is a certified substitute. In making purchasing selections between competing eligible certified low-noise-emission products, the procuring agency shall give priority to any class or model which does not require extensive periodic maintenance to retain its low-noise-emission qualities or which does not involve operating costs significantly in excess of those products for which it is a certified substitute.

¹²"For the purpose of procuring certified low-noise-emission products any statutory price limitations shall be waived."

¹³ "There are authorized to be appropriated for paying additional amounts for products pursuant to, and for carrying out the provisions of, this section, \$1,000,000 for the fiscal year ending June 30, 1973, and \$2,000,000 for each of the two succeeding fiscal years, \$2,200,000 for the fiscal year ending June 30, 1976, \$550,000 for the transition period of July 1, 1976, through September 30, 1976, and \$2,420,000 for the fiscal year ending September 30, 1977." (42 U.S.C. § 4914(5)(g))

regulations for the low-noise products preference at 40 Code of Federal Regulations section 203. EPA's regulations exempt from its requirements aircraft and certain aircraft components, military weapons designed for combat use, certain National Aeronautics and Space Administration (NASA) rockets, and Government experimental machinery and equipment.¹⁴

The Noise Control Act is fairly moribund, primarily because of inaction in laying the groundwork necessary for product certifications. 40 C.F.R. section 203.4(a)(1) states that before a product can be certified as a low-noise emission product, the product must be one for which low-noise standards have been promulgated under section 6 of the act. To date, only motorcycles, portable air compressors, and heavy and medium duty trucks have promulgated section 6 standards.¹⁵ Section 203.4(b) requires that certifications of specific low-

¹⁴40 C.F.R. § 203.1(a)(4): "Product" means any manufactured article or goods or component thereof; except that such term does not include--

(i) Any aircraft, aircraft engine, propeller or appliance, as such terms are defined in Section 101 of the Federal Aviation Act of 1958; or

(ii)(a) Any military weapons or equipment which are designed for combat use;

(b) any rockets or equipment which are designed for research, experimental or developmental work to be performed by the National Aeronautics and Space Administration; or

(c) to the extent provided by regulations of the Administrator, any other machinery or equipment designed for use in experimental work done by or for the Federal Government.

¹⁵Motorcycles (40 C.F.R. § 205.152); Portable air compressors (40 C.F.R. § 204.52); and Medium and heavy duty trucks (40 C.F.R. § 205.52).

noise emission products be published in the Federal Register. No Noise Act product certifications have been published in the Federal Register, although the noise standards for motorcycles specifically require that motorcycles of an engine displacement of over 170cc purchased by the Federal Government meet specified decibel levels.¹⁶

One of the military departments has formally incorporated the Noise Control Act's low-noise emission products procurement preference into its environmental noise abatement program.¹⁷

¹⁶WESTLAW search 30 March 1993; 40 C.F.R. § 205.152(c). In addition to the failure to promulgate the necessary § 6 standards, the lack of certifications may also be due to the requirement that certifications be initiated by manufacturers. Manufacturers may be reluctant to supply the detailed product information required for certification, particularly after *Worthington Compressors, Inc. v. Costle*, 662 F. 2d 45 (CA DC, 1981) which held that there was no cause of action under the Noise Control Act's citizen suit provision to enjoin EPA's disclosure of certification application information under the Freedom of Information Act. Review of such a decision must be under the Administrative Procedure Act and will be overturned only if an abuse of agency discretion is found.

¹⁷The Army has so implemented the procurement preference in Army Regulation (AR) 200-1 (32 C.F.R. § 650.164):

The Department of the Army will--

(b) Procure commercial equipment and products, or those adapted for military use, that are in compliance with established Federal noise standards and give priority to use of low-noise-emission products within reasonable cost and mission limitations.

(c) Incorporate noise control provisions in the design and procurement of vehicles, aircraft, weapons systems and other military-unique equipment for use in combat operations to the extent that essential operational capabilities are not significantly impaired.

See also 32 C.F.R. § 650.174.

B. Energy Policy and Conservation Act of 1975¹⁸

This act requires the President to:

[E]stablish or coordinate Federal agency actions to develop mandatory standards with respect to energy conservation and energy efficiency to govern procurement policies and decisions of the Federal Government and all Federal agencies, and shall take such steps as are necessary to cause such standards to be implemented...¹⁹

Implementation of the act was accomplished via section 3 of Executive Order 11912,²⁰ section 5 of Executive Order 12759,²¹ and OFPP Policy Letter 76-1, *Federal Procurement Policy Concerning Energy Conservation*. However, OFPP Letter 76-1 was recently superseded and cancelled by the stricter OFPP Letter 94-2.²²

¹⁸42 U.S.C. § 6201 *et. seq.*

¹⁹42 U.S.C. § 6361(a)(1).

²⁰41 Fed. Reg. 15,825 (April 13, 1976).

²¹56 Fed. Reg. 16,257 (April 17, 1991). Section 5 reads:

Procurement of Energy Efficient Goods and Products. In order to assure the purchase of energy efficient goods and products, each agency shall select for procurement those energy consuming goods or products which are the most life cycle cost-effective, pursuant to the requirements of the Federal Acquisition Regulation. To the extent practicable, each agency shall require vendors of goods to provide appropriate data that can be used to assess the life cycle costs of each good or product, including building energy system components, lighting systems, office equipment, and other energy using equipment.

²²57 Fed. Reg. 53,365 (November 9, 1992). Discussed in detail *infra* page 38. OFPP Letter 92-4 establishes a Federal government policy to prefer energy-efficient products and services by means of "cost effective procurement preference

Energy conservation requirements in Federal procurement are currently implemented through FAR Subpart 23.2 (October, 1991).²³ FAR 23.203 sets forth the policy that energy conservation and efficiency criteria be applied to acquisitions "whenever the results would be meaningful, practical, and consistent with agency programs and needs..." Agencies are required to consider energy conservation and efficiency criteria "along with price and other relevant factors" when preparing specifications and making awards.²⁴ When acquiring "covered products"²⁵, agencies must consider energy use and efficiency labels and energy efficiency

programs favoring the purchase" of such items.

²³See page 116 *infra* for a discussion of proposed changes to the FAR Subpart 23.2 to implement OFPP Letter 92-4 and other recent statutory requirements.

²⁴FAR 23.203(a).

²⁵FAR 23.202 defines a "covered product" as:

...a consumer product of one of the following types:

- (a) Central air conditioners.
- (b) Clothes dryers.
- (c) Clothes washers.
- (d) Dishwashers.
- (e) Freezers.
- (f) Furnaces.
- (g) Home heating equipment, not including furnaces.
- (h) Humidifiers and dehumidifiers.
- (i) Kitchen ranges and ovens.
- (j) Refrigerators and refrigerator-freezers.
- (k) Room air conditioners.
- (l) Television sets.
- (m) Water heaters.

(n) Any other type of product that the Secretary of Energy classifies as a covered product under 42 U.S.C. 6292(b).

standards.²⁶

The energy-efficient purchasing requirements of OFPP Letter 92-4 and the procurement requirements of the Energy Policy Act of 1992, both of which expand these requirements, are discussed in greater detail *infra*.

C. The Resource Conservation and Recovery Act of 1976

As part of the 1976 Resource Conservation and Recovery Act (RCRA) amendments to the Solid Waste Disposal Act, Congress imposed upon the Federal sector and its contractors a requirement to purchase or use in contract performance, items containing recovered or recycled materials²⁷ and to comply with state solid and hazardous waste management "requirements."²⁸ This law and its implementing guidance currently have the greatest impact on Federal purchasing.

1. Recovered Materials Purchasing Requirements

A. Overview

Congress's purpose in enacting section 6002 was to reduce the amount of solid and hazardous waste subject to disposal by utilizing the substantial purchasing power of the Federal Government to create a market for goods manufactured from

²⁶FAR 23.203(b).

²⁷42 U.S.C. § 6962.

²⁸42 U.S.C. § 6961.

recovered material.²⁹ This goal and strategy remain operative today. Richard Morgenstern, EPA Acting Administrator for Policy, Planning and Evaluation, testified before the Senate Governmental Affairs Subcommittee on Oversight of Government Management in November, 1991, that the nation produces over 180 million tons of solid waste annually and "one of the most powerful tools" available for stimulating the recovered materials market is a procurement system that encourages products made from recovered materials.³⁰

In section 6002, Congress requires procuring agencies, including state agencies using Federal appropriated funds and their contractors,³¹ to purchase "items composed of the highest percentage of recovered materials³² practicable...

²⁹"If...resource recovery...is to be used as a strategy for reducing the volume of waste which must be disposed of, adequate markets for the recovered materials must be established...The Committee believes that the use of Federal purchasing power to provide that stimulus represents a constructive use of Government power..." 1976 U.S. Cong. Ad. News 6289.

³⁰*Buying "Green": Federal Purchasing Practices and the Environment, 1991: Hearing Before the Subcomm. on Oversight of Government Management of the Senate Comm. on Governmental Affairs, (statement of Richard Morgenstern, Acting Administrator for Policy, Planning and Evaluation, EPA).*

³¹42 U.S.C. § 6903(17) defines "procuring agency" as "[A]ny Federal agency, or any State agency or agency of a political subdivision of a State which is using appropriated Federal funds for such procurement, or any person contracting with any such agency with respect to work performed under such contract."

³²42 U.S.C. § 6903(19) defines a "recovered material" to be: "[W]aste material and byproducts which have been recovered or diverted from solid waste, but such term does not include those materials and byproducts generated from, and

consistent with maintaining a satisfactory level of competition..."³³ The requirement applies when the purchase price of the item exceeds \$10,000 or when the quantity of such items procured in the preceding fiscal year was \$10,000 or more.³⁴

Recognizing that items using recovered materials were not available or adequate for all government needs, Congress allowed agencies to disregard the purchasing requirements of section 6002(c)(1) upon determining that recovered material items: "A) are not reasonably available within a reasonable period of time; B) fail to meet the performance standards set forth in the applicable specifications or fail to meet the reasonable performance standards of the procuring agencies; or C) are only available at an unreasonable price."³⁵ When items containing recovered material are to be purchased, contracting officers must have vendors certify that the percentage of recovered materials used will be at least the amount required by the contract and to estimate the percentage of the total material used in performance of the contract that was

commonly reused within, an original manufacturing process." Section 6962(h) sets forth an additional definition of "recovered materials" in the case of paper products.

³³42 U.S.C. § 6962(c)(1).

³⁴42 U.S.C. § 6962(a).

³⁵42 U.S.C. § 6962(c)(1)(A)-(C). Determinations under subparagraph (B) must be made on the basis of National Institute of Standards and Technology guidelines if the material in question is covered by a NIST guideline.

recovered material.³⁶

To overcome institutional preferences for virgin materials, section 6002 required that by no later than May 8, 1986 agencies remove from their contract specifications any provisions that excluded recovered materials or required that virgin materials be used in manufacturing items.³⁷ Within one year after publication of EPA guidelines concerning a particular recovered material, agency contract specifications are to require the use of the guideline recovered material "to the maximum extent possible without jeopardizing the intended end use of the item."³⁸

Congress gave EPA, in consultation with the General Services Administration, the task of promulgating guidelines designating those items that are or can be produced with recovered materials; setting forth recommended practices for procuring recovered materials; and providing information concerning the availability, price, and performance of such materials and items.³⁹ The Office of Federal Procurement

³⁶42 U.S.C. § 6962(c)(3)(A).

³⁷42 U.S.C. § 6962(d)(1)(A),(B). Exclusions of recovered materials by specifications often occurs by the inclusion of unattainable performance requirements which are often nonessential to the use of the item i.e. brightness requirements for paper products.

³⁸42 U.S.C. § 6962(d)(2). In 1981, MILSTD 961 which, along with MILSTD 962, forms the basis for developing all DoD issued specifications, was amended to include this requirement.

³⁹42 U.S.C. § 6962(e)(1),(2).

Policy (OFPP) was charged with coordinating section 6002 implementation with other Federal procurement policies so as to maximize use of recovered materials.⁴⁰ Beginning in 1984 and every two years thereafter, OFPP was to report to Congress on agency implementation actions including agency compliance with the revamping of contract specifications required by subsection (d).⁴¹

In an effort to establish proactive agency procedures, section 6002 required each agency to establish an affirmative procurement program (APP) to ensure that items composed of recovered materials are purchased to the maximum extent practicable.⁴² Each APP must establish sub-programs for recovered materials preference; agency promotion of the preference; and procedures to determine, certify, and verify the percentages of recovered materials used in performance of a contract.⁴³ In developing preference programs agencies must adopt one of two statutorily prescribed methods.⁴⁴ The first

⁴⁰42 U.S.C. § 6962(g).

⁴¹*Ibid.* OFPP's biennial reports were criticized by the GAO as not containing "sufficient information to assess overall program effectiveness." (*Progress in Implementing the Federal Program to Buy Products Containing Recovered Materials*, testimony before the House Subcomm. on Transportation and Hazardous Materials, Comm. on Energy and Commerce (1992), 6 (GAO/T-RCED-92-42) hereinafter GAO Testimony)

⁴²42 U.S.C. § 6962(i)(1).

⁴³42 U.S.C. § 6962(i)(2)(A)-(C).

⁴⁴42 U.S.C. § 6962(i)(3).

is the "Case-by-Case Policy Development" alternative.⁴⁵ This is a policy of awarding contracts to the "vendor offering an item composed of the highest percentage of recovered materials practicable..."⁴⁶

The other alternative, "Minimum Content Standards," requires the use of specifications containing a minimum recovered materials content that assures that the content required is the maximum available.⁴⁷

B. EPA Implementation

By 1980, EPA had not issued any guidelines. Consequently, Congress amended section 6002 to require publication of certain guidelines by 1981 and 1982.⁴⁸ When these deadlines were missed, Congress in 1984 required issuance of the first guideline, paper and paper products, by May 8, 1985 with three more, including used tires, due by October 1, 1985.⁴⁹ When these later deadlines were also missed, the National Recycling Council and others sued to

⁴⁵42 U.S.C. § 6962(i)(3)(A).

⁴⁶*Ibid.*

⁴⁷42 U.S.C. § 6962(i)(3)(B). This option is the most used and leads to one of those unusual results for which environmental laws are noted; the minimum becomes the maximum and the maximum becomes the minimum!

⁴⁸Solid Waste Disposal Act Amendments of 1980, Pub. L. No. 96-482, § 22, 94 Stat. 2347 (1980).

⁴⁹Hazardous and Solid Waste Amendments of 1984, Pub. L. No. 98-616, § 501(e), 98 Stat. 3221 (1984).

compel compliance. On April 11, 1988 EPA agreed in a consent decree to publish a final guideline for re-refined oil by June 24, 1988, for tires by November 10, 1988, and for insulation by February 8, 1989.⁵⁰

In the meantime, EPA issued its first RCRA guideline on January 28, 1983⁵¹ covering the use of fly ash, the residue of burned coal trapped in stack scrubbers, in concrete production.⁵² This first guideline, however, did not set minimum content standards for fly ash in cement and concrete products.⁵³ The guideline also exempted what were termed "incidental" purchases.⁵⁴

EPA issued its proposed guidelines for paper and paper

⁵⁰Environmental Defense Fund v. Thomas, No. 87-CV-3212-SS (D.D.C. 1988).

⁵¹40 C.F.R. § 249.

⁵²40 C.F.R. § 249.02. "Cement and concrete, including concrete products such a pipe and block, containing fly ash is hereby designated by EPA as a product area for which affirmative procurement actions are required on the part of procuring agencies, under the requirements of Section 6002 of RCRA."

⁵³40 CFR § 249.13(a). " This guideline does not specify a minimum or maximum level of fly ash content for any uses, due to variations in fly ash, cement, strength requirements, costs, construction practices, etc..."

⁵⁴40 C.F.R. § 249.03(d). "The guideline does not apply to purchases of cement and concrete which are unrelated to or incidental to Federal funding, i.e., not the direct result of a contract, grant, loan, funds disbursement, or agreement with a procuring agency."

products on April 9, 1985,⁵⁵ however, final guidelines were not published until June 22, 1988.⁵⁶ EPA was promptly sued by the National Recycling Coalition and the Environmental Defense Fund over perceived inadequacies of that guideline.

In *National Recycling Coalition, Inc. v. Reilly*,⁵⁷ the plaintiffs challenged the paper guideline on three grounds. First, the plaintiff's disagreed with EPA's interpretation of the "unreasonable price" exception of section 6002(c)(1)(C) as allowing agencies to refuse to purchase recovered materials items if they cost any more than alternatives made of virgin materials. Second, the plaintiff's alleged the guideline was deficient because it excluded certain "incidental purchases" from the procurement requirements. Finally, plaintiffs argued that EPA failed to fulfill its statutory obligation under section 6002(e)(2) to provide information about the availability, relative price, and performance of recycled paper products in the guideline.

EPA responded that RCRA granted no statutory authority to order price preferences for recycled paper; that plaintiffs had waived their objection to the "incidental purchase" exemption of the guideline by not raising it during the comment period; and that the availability, price, and

⁵⁵50 Fed. Reg. 14,076 (April 9, 1985).

⁵⁶53 Fed. Reg. 23,546 (June 22, 1988); 40 C.F.R. § 250.

⁵⁷884 F. 2d 1431 (D.C. Cir. 1989) *reh. den.* 890 F. 2d 1242 (1989).

performance information concerning recycled paper products changed often and publishing such information in the guideline itself would be impracticable.

The court agreed with EPA's arguments and upheld the guidelines.⁵⁸

During the pendency of *NRC v. Reilly*, EPA promulgated three additional guidelines to fulfill its obligation under the consent decree of *EDF v. Thomas*⁵⁹: lubricating oils (40 C.F.R. § 252, June 30, 1988)⁶⁰; retreaded tires (40 C.F.R. §

⁵⁸On the issue of price preferences, the majority applied a *Chevron* (*Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-844 (1984)) standard of review since RCRA was not clear concerning Congress' intended meaning of the words "unreasonable price." Under *Chevron*, when a statute is not clear on its face, a reasonable agency interpretation is entitled to great deference. The majority found EPA's interpretation of RCRA to be reasonable. A well-reasoned dissent by Chief Judge Wald disagreed that RCRA was unclear on its face arguing that Congress, by using the words "unreasonable price" in the context of § 6002's purpose of increasing the use of recovered materials by the Federal Government, made it clear that it intended more than agencies using recovered material content as a tie-breaker between items of equal price. Wald argued that since EPA's refusal to require a price preference was an erroneous interpretation of the law it was, therefore, not entitled to deference.

⁵⁹See note 50 *supra* and accompanying text.

⁶⁰40 C.F.R. § 252.2 reads in part:

EPA designates lubricating oils as items which are or can be produced with recovered materials (re-refined oil) and whose procurement by procuring agencies will carry out the objectives of section 6002 of RCRA. For purposes of this designation, "lubricating oils" means engine lubricating oils, hydraulic fluids, and gear oils, excluding marine and aviation oils.

253, November 17, 1988)⁶¹; and building insulation products (40 C.F.R. § 248, February 17, 1989)⁶². None of the three established a price preference for the recovered materials or included incidental purchases. All three guidelines were challenged in *National Recycling Coalition v. Browner*.⁶³

The petitioners attack was similar to that of *NRC v. Reilly*⁶⁴ and challenged the guidelines based on inclusion of an incidental purchase exemption; failure to include information concerning price, availability, and performance; and, failure to include minimum content standards for fiberglass building materials.

The NRC alleged that the incidental purchase exemption

⁶¹40 C.F.R. § 253.2 reads:

EPA designates tires as items which are or can be produced with recovered materials (i.e., used tire casings) and whose procurement by procuring agencies will carry out the objectives of section 6002 of RCRA. For purposes of this guideline, the term "tires" does not include airplane tires.

⁶²40 C.F.R. § 248.21 reads in part:

(a)(1) EPA recommends that procuring agencies establish minimum recovered material content standards for building insulation products commercially available with recovered materials content, subject to the limitations described in paragraphs (a)(2) and (c) of this section, so as to achieve procurement of building insulation products containing recovered materials to the maximum extent practicable.

(2) In accordance with RCRA section 6002(i), EPA recommends the establishment of minimum postconsumer recovered paper content standards for building insulation products made with cellulose fiber.

⁶³1993 U.S. App. LEXIS 2303 (D.C. Cir. 1993).

⁶⁴See note 57 *supra* and accompanying text.

violated both RCRA and the Administrative Procedures Act (APA). The court applied a *Chevron*⁶⁵ analysis to resolve the allegation. After examining the language of the statute, the court held that section 6962(a) "does not clearly preclude the interpretation allowing the incidental purchases exception."⁶⁶ The court then examined the reasonableness of EPA's interpretation holding:

The EPA's interpretation...reasonably furthers purposes addressed in the legislative history. While petitioner's interpretation may present a permissible alternative construction of the statute, it is not our task to weigh alternative understandings.⁶⁷

Petitioner's Administrative Procedure Act "arbitrary and capricious" attack also failed:

These explanations in the preamble and final guidelines satisfy the APA's requirement of a "concise general statement of [the rules'] basis and purposes." [citation omitted] This is hardly a case where EPA has failed to explain the legal basis for its actions, nor is judicial review frustrated in this case. In these actions, "the agency's path may be reasonably be discerned," [citation omitted],⁶⁸ and the guidelines will therefore be upheld.

Finally, the court found adequate support for EPA's decision not to include minimum content standards for

⁶⁵*Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-844 (1984).

⁶⁶1993 U.S. App. LEXIS 2303, *20.

⁶⁷*Id.* at *23.

⁶⁸*Id.* at *29.

fiberglass building insulation.⁶⁹

EPA has been Congressionally chastised for its slowness in issuing the guidelines. Former Senator Carl Levin, then Chairman of the Senate's Subcommittee on Oversight of Government Management, said in a November, 1991 hearing that he didn't believe that "five guidelines in 15 years is good performance at all."⁷⁰ In response, EPA's Richard Morgenstern noted that in 1992 proposed guidelines would be issued for recycled plastic pipe, fiberboard from recycled paper products, and hydraulic mulch from used paper products.⁷¹ Contrary to Mr. Morgenstern's representation, no new guidelines were proposed in 1992.⁷²

⁶⁹"The NRC's assertion that quantities of solid waste have increased, while presumably true, is not responsive to the problems of fitness of the available glass stock. We are satisfied that the EPA's determination that adequate supplies of usable recovered materials do not exist to warrant establishing a minimum content standard for fiberglass building insulation is reasonable and supported by the record." *Id.* at *36.

⁷⁰S. Hrg. 102-563 at 20.

⁷¹*Ibid* at 11.

⁷²LEXIS and WESTLAW searches 12 March 1993 in Federal Register and Code of Federal Regulations. Not every recovered material will be the subject of an EPA guideline. EPA uses the following criteria to aid in the selection of product areas for which guidelines would be prepared:

- (1) The waste material must constitute a significant solid waste management problem due either to volume, degree of hazard or difficulties in disposal;
- (2) Economic methods of separation and recovery must exist;
- (3) The material must have technically proven uses; and
- (4) Federal purchasing power for the final product must be substantial. (cited at 45 Fed. Reg. 76,906 (November 20, 1980))

C. Federal Acquisition Regulation Implementation

Federal Acquisition Regulation (FAR) Part 23.4 (April 1984) implements the RCRA section 6002 program and contains guidance and some clauses for the use of recovered materials in Federal procurement. FAR 23.402, in part, defines recovered materials to mean:

[M]aterials that have been collected or recovered from solid waste.

Solid waste means (a) any garbage, refuse, or sludge from a waste treatment plant, or air pollution control facility; and (b) other discarded material, including solid, liquid, semisolid, or contained gaseous material resulting from, industrial, commercial, mining, and agricultural operations, and community activities...

FAR 23.403 states:

The Government's policy is to acquire items composed of the highest percentage of recovered materials practicable, consistent with maintaining a satisfactory level of competition, without adversely affecting performance requirements or exposing suppliers' employees to undue hazards from recovered materials.

While FAR 23.403 appears to allow the contracting officer to waive the requirement for recycled goods in the interest of worker safety, FAR 23.404 lists only the three grounds for waiver contained in RCRA section 6002(c)(1)(A)-(C).⁷³ It is questionable that a contracting officer could grant a waiver based on worker safety given the specific waivers set forth in RCRA, to do so would require some stretch of logic in construing section 6002(c)(1)(A)-(C). For example it could be

⁷³See note 35 *supra* and accompanying text.

argued that if a recovery or recycling process unduly endangered workers, that endangerment would result in additional insurance, medical or other costs so that the "price" of the recovered materials goods would be so high as to make them "unreasonable" or, due to the potential liability of the manufacturer, the sources of the goods so few as to result in inadequate competition.

FAR 23.401(b) advises contracting officers that agencies must draft specifications to require the use of recovered materials to the maximum extent possible and eliminate exclusion of recovered materials and requirements for virgin materials. FAR 23.405 requires the use of the recovered materials content certification clause found at FAR 52.223-4⁷⁴ in all solicitations requiring the use of recovered materials.

D. Executive Agency Implementation

To give executive agencies new impetus to comply with RCRA, President Bush on October 31, 1991, issued Executive Order 12780 establishing requirements for Federal executive agency recycling and creating the Council on Federal Recycling and Procurement Policy.⁷⁵ A stated purpose of the order was

⁷⁴The Recovered Materials Certification Clause reads:

The offeror certifies, by signing this offer, that recovered materials as defined in section 23.402 of the Federal Acquisition Regulation, will be used as required by the applicable specifications.

⁷⁵56 Fed. Reg. 56,289 (October 31, 1991). The Council was created for a five-year period.

to "encourage economically efficient market demand for designated items produced using recovered materials by directing immediate implementation of cost-effective Federal procurement preference programs favoring the purchase of such items."⁷⁶ One of the tasks of the Council was to review Federal agency specifications and standards and make recommendations for changes to "enhance Federal procurement of products made from recycled and recyclable materials taking into account the costs and the performance requirements of each agency."⁷⁷ Agencies were directed to report to EPA within 180 days the status of their RCRA mandated Affirmative Procurement Programs.⁷⁸

Touted as "a major commitment by the administration to do more,"⁷⁹ Congress criticized the order as adding nothing that was not already required by RCRA.⁸⁰ This was a valid criticism. However, the order did have the effect of spurring somewhat quicker Executive agency compliance with section 6002's requirements.⁸¹

⁷⁶EO 12780 § 101(b).

⁷⁷*Ibid.* §603(b)(2).

⁷⁸*Ibid* § 501.

⁷⁹S. Hrg. 102-563, 8 (testimony of Allan V. Burman, Administrator, Office of Federal Procurement Policy).

⁸⁰S. Hrg. 102-563, 28 (statement of Sen. Carl Levin).

⁸¹For example, on 25 September 1992, Secretary of the Air Force Donald B. Rice and Chief of Staff General Merrill A. McPeak, issued a letter establishing an Air Force policy to purchase recovered material items covered by the EPA

Implementation of section 6002 within Executive branch departments and agencies has progressed in fits and starts with some agencies farther along than others. In April 1992, the General Accounting Office (GAO) reported "limited progress" in Executive agency implementation of a Federal procurement program for recovered materials products.⁸² Of 17 Executive branch agencies, the GAO reported that only the Government Printing Office had all of the elements of an Affirmative Procurement Program in place.⁸³ Of the remainder, only EPA and the General Services Administration's Federal Supply Service had at least some of the required program elements in place.⁸⁴ At least one agency claimed ignorance of the EPA guidelines 8 years after the first one was issued!⁸⁵

guidelines. Also, that same month, the Under Secretary of Defense for Acquisition issued a memorandum with DoD-wide application, requiring the purchase of only paper and paper products in compliance with the EPA guideline. Both letters cited Executive Order 12780.

⁸²GAO Testimony, 1.

⁸³*Ibid.*

⁸⁴*Ibid.*

⁸⁵S. Hrg. 102-563 (letter, Stephen B. Kelmar, Ass't Sec. for Legislation, Health and Human Services, September 25, 1991). A good overview of where Federal agencies were as of the autumn of 1991 can be had by reading the responses to inquiries to the Senate Subcommittee on Oversight of Government Management at *Id.* 273-393.

2. Compliance With State Solid and Hazardous Waste Management "Requirements"

RCRA also impacts Federal procurement in the area of solid and hazardous waste disposal.⁸⁶ Section 6001 requires Federal departments:

"[H]aving jurisdiction over any solid waste management facility⁸⁷ or disposal site, or engaged in any activity resulting, or which may result, in the disposal or management of solid and hazardous waste shall be subject to, and comply with, all Federal, State, interstate, and local requirements, both substantive and procedural...respecting control and abatement of solid waste or hazardous waste disposal in the same manner, and to the same extent, as any person is subject to such requirements, including the payment of reasonable service charges.

The Comptroller General has held that applicable local and state requirements under section 6001, such as a requirement that a certain specified contractor be used for installation waste disposal, must be followed in the procurement of such services unless the installation qualifies

⁸⁶42 U.S.C. § 6961.

⁸⁷RCRA § 1004(29) defines "solid waste management facility" to include:

- (A) any resource recovery system or component thereof,
- (B) any system, program, or facility for resource conservation, and
- (C) any facility for collection, source separation, storage, transportation, transfer, processing, treatment or disposal of solid wastes, including hazardous wastes, whether such facility is associated with facilities generating such wastes or otherwise.

as a "major Federal facility" under 40 C.F.R Part 255.⁸⁸ If the installation is not a major Federal facility, a determination that hinges on its size and function, the affected service must be noncompetitively acquired and constitutes an exception to the Competition in Contracting Act (CICA) requirement for competitive contract awards.⁸⁹

⁸⁸*Monterey City Disposal Service, Inc.*, Comp. Gen. Dec. B-218624, 85-2 CPD ¶ 261 (1985). In *Parola v. Weinberger*, 848 F.2d 956 (9th Cir. 1988), the Court of Appeals refused to defer to the Comptroller General's interpretation of RCRA, but after analysis held that the City of Monterey's franchise to Parola for waste removal must be honored by the Army and Navy in contracting for garbage collection since it was part of a program respecting control and abatement of solid waste. In cases since *City of Monterey*, the Comptroller General has retreated somewhat from the rule set forth in that decision. In *Solano Garbage Co.* (66 Comp. Gen. 237 (1987), 87-1 CPD ¶ 125), *Oakland Scavenger Co.* (Comp. Gen. Dec. B-241577, 91-1 CPD ¶ 166 (1991)), *Waste Management of North America, Inc.* (70 Comp. Gen. ___, Comp. Gen. Dec. B-241067, 91-1 CPD ¶ 59 (1991)); and *Concord Disposal, Inc.*, Comp. Gen. Dec. B-246441, 92-2 CPD ¶ 24 (1992) the Comptroller held that since 40 C.F.R. Part 255 states that major Federal facilities are to be treated as incorporated municipalities, such facilities do not have to comply with local city ordinances requiring the use of particular contractors for waste disposal. If a Federal facility is by size and function a major Federal facility, then it has the same right to contract for its waste disposal as enjoyed by any other separate municipality.

Query what effect § 6001 and these decisions would have on enforcement against the Federal Government of state (as opposed to municipal) procurement programs to abate or control solid waste (i.e. recovered materials purchasing requirements not preempted by an EPA guideline) given that the definition of solid waste management facility (see note 87 *supra*), which gives the state its control over a Federal facility, includes a program for resource conservation which in turn includes "utilization of recovered resources" (RCRA § 1004(21)), which each Federal agency is required to do under § 6002.

⁸⁹10 U.S.C. § 2304(c)(5).

D. Department of Defense Directive (DoDD) 4210.15

DoDD 4210.15, *Hazardous Material Pollution Prevention* (July 27, 1989) establishes policy and procedures for hazardous materials pollution prevention (HMPP). The policy established by the Directive is to ensure that:

hazardous material shall be selected, used, and managed over its life-cycle so that the Department of Defense incurs the lowest cost required to protect human health and the environment...Emphasis must be on less use of hazardous materials in processes and products, as distinguished from end-of-pipe management of hazardous waste.⁹⁰

The procurement process is specifically impacted by the requirements of paragraph F(4)(b)-(d) that the heads of DoD components revise documents requiring the use of a hazardous material⁹¹ when a less hazardous alternative⁹² is, or could

⁹⁰DoDD 4210.15 ¶ (D). Pub. L. 101-189, 103 Stat. 1424 as amended Pub. L. 102-190, 105 Stat. 1340 required DoD to establish a hazardous materials use and hazardous waste reduction program. DoD has had such a program in place since approximately 1987 and has succeeded in reducing hazardous waste by 40% between 1987 and 1990 (S. Hrg. 102-563, 15 (testimony of David J. Berteau, Principal Asst. Sec'y. of Defense, Production and Logistics)).

⁹¹"Hazardous Material. Anything that due to its chemical, physical, or biological nature causes safety, public health, or environmental concerns that result in an elevated level of effort to manage it." DoDD 4210.15, Encl. 1, ¶ 6.

⁹²"Alternatives. Ways of reducing the adverse effects of hazardous materials

a. Alternatives, as applied to hazardous material decision-making, include, but are not limited to, such possibilities as substituting less hazardous or nonhazardous material; redesigning a component such that hazardous material is not needed in its manufacture, use, or maintenance; modifying processes or procedures...use of waste as raw material in other manufacturing; and combinations of those factors.

be, available; evaluate hazardous materials decisions by economic analysis techniques that consider cost factors⁹³ and intangible factors⁹⁴; and begin economic analysis at the

b. Alternatives are to be analyzed in a "could cost" approach. The decision-maker should consider what would be the lowest amount the decision could cost by overcoming barriers to getting the job done and at the same time ensuring protection of human health and the environment." DoDD 4210.15, Encl. 1, ¶ 1.

⁹³"Cost Factors. The expenses and cost avoidances associated with hazardous material that may be reduced to monetary terms, which includes future liability.

a. Cost factors refer to the direct and indirect costs attributable to hazardous material that are encountered in operations such as acquisition, manufacture, supply, use, storage, inventory control, treatment, recycling, emission control, training, work place safety, labeling, hazard assessments, engineering controls, personal protective equipment, medical monitoring, regulatory overhead, spill contingency, disposal, remedial action, and liability.

b. Accounting in current decisions for potential future liability, such as might accrue because of a decision to landfill a hazardous waste, requires application of risk and uncertainty analysis. Potential future cost may be expressed as an expected present value or analyzed by sensitivity techniques. That does not mean an organization must stop lawful disposal until a major risk study is performed. However, current decisions should maximally consider the effects future environmental problems might have on future costs and defense performance." DoDD 4210.15, Encl. 1, ¶ 2.

⁹⁴"Intangible Factors. Influences bearing on the use or effects of hazardous material, which may not be reduced to monetary terms.

a. The quality of defense and the quality of environment both have intangible characteristics that are not mutually exclusive but which could be overriding factors in a hazardous material issue. Other intangible factors include public emotion and potential legislation [litigation?].

b. Factors that may not be reduced to monetary terms should be limited, in decision analysis, and then considered as appropriate." DoDD 4210.15, Encl. 1, ¶ 7.

earliest possible stage of the life-cycle⁹⁵. Purchasing less hazardous materials has become especially important in light of the recent passage of the Federal Facility Compliance Act.⁹⁶

The Armed Services have integrated 4210.15 into their activities through various regulations.⁹⁷

E. Pollution Prevention Act of 1990⁹⁸

A relatively recent law that could have great impacts

⁹⁵"Life Cycle of a Hazardous Material. The period starting when the use or potential use of a hazardous material is first encountered and extending as long as the actual material or its after effects, such as discarded residual in a landfill, have a bearing on cost." DoDD 4210.15, Encl. 1, ¶ 8

⁹⁶P.L. 102-386 (October 6, 1992). The Federal Facility Compliance Act expressly waives sovereign immunity under the Resource Conservation and Recovery Act (RCRA) for imposition of both Federal and State civil penalties. Agents, employees, and officers of the United States are subject to criminal liability for RCRA violations but will not be held personally liable for civil penalties for acts or omissions occurring within the scope of their official duties. The Presidential Signing Statement accompanying the bill directs civil penalties to be paid from the violator's operation and maintenance account and not the central judgement fund.

The General Accounting Office has estimated that the more than 1,000 military installations in the United States generate about 400,000 tons of hazardous waste per year. *Environment '90: The Legislative Agenda*, Congressional Quarterly at 47.

⁹⁷Navy: OP-NAVINST 4110.2 Hazardous Material Control and Management; Air Force: Program Action Directive 90-1 Hazardous Materials Integrated Management Program; Defense Logistics Agency: Regulation 4210.4 Comprehensive Hazardous Material Management Program. The Army has developed a five year Hazardous Material/Hazardous Waste Management Plan.

⁹⁸42 U.S.C. §§ 13101-13109.

upon Federal procurement is the Pollution Prevention Act. Section 6604(b)(11) requires EPA to "identify opportunities to use Federal procurement to encourage source reduction."⁹⁹ EPA has yet to make any recommendations, but its mandate is certainly broad enough to encompass both recommendations for additional legislation directed at requiring or restricting purchases as well as utilizing Federal procurement to discourage environmentally harmful performance or production practices.

F. Clean Air Act Amendments of 1990¹⁰⁰

1. Clean-Fuel Vehicle Program Requirements

Beginning in automobile model year 1998, in those ozone and carbon monoxide nonattainment areas where State Implementation Plans require a clean-fuel fleet vehicle program, section 248 of the Clean Air Act requires the Federal government to participate in the state program by purchasing clean-fuel vehicles.¹⁰¹ Congress has authorized additional funding to cover the cost of Federal agency compliance.¹⁰²

⁹⁹42 U.S.C. § 13103(b)(11).

¹⁰⁰Pub. L. 101-549, 104 Stat. 2399 (November 15, 1990).

¹⁰¹42 U.S.C. § 7588. The clean-fuels vehicle requirements apply to vehicle fleets of 10 or more vehicles capable of being centrally fueled. (42 U.S.C. § 7581(5) and (6))

¹⁰²42 U.S.C. § 7588(g). The funds appropriated under this section are limited to covering the additional cost of acquisition, maintenance of clean fuel vehicles; the additional costs of fuel storage and dispensing equipment which exceeds the costs of similar facilities for

There is a national security exemption to this requirement that may be invoked by the Secretary of Defense.¹⁰³

2. Phase-out of Ozone Depleting Chemicals

Of greater impact on DoD procurement is section 613's requirement that the Federal Government gradually phase out the use of chlorofluorocarbons (CFCs) by revising its procurement regulations to require the purchase of safe alternatives.¹⁰⁴

The phasing out of ozone depleting chemicals throughout DoD is a monumental task. Such chemicals are used in fire suppression systems, air conditioners, and cleaning solvents to name just a few items. DoD has begun the long process of reviewing the approximately 50,000 Active Standardization

conventionally fueled vehicles, and; to cover that portion of the acquisition costs of clean fuel vehicles which represents a reduction in revenue from the disposal of such vehicles. (CAA § 248(c)(1)-(3))

¹⁰³42 U.S.C. § 7588(e).

¹⁰⁴42 U.S.C. § 76711 reads:

Not later than 18 months after the enactment of the Clean Air Act Amendments of 1990, the Administrator of the General Services Administration and the Secretary of Defense, shall promulgate regulations requiring each department, agency, and instrumentality of the United States to conform its procurement regulations to the policies and requirements of this subchapter and to maximize the substitution of safe alternatives identified under section 7671k of this title for class I and class II substances. Not later than 30 months after enactment of the Clean Air Act Amendments of 1990, each department, agency, and instrumentality of the United States shall so conform its procurement regulations and certify to the President that its regulations have been modified in accordance with this section.

Documents (such as Federal or Military Specifications and Standards) to remove requirements for ozone depleting chemicals. By late 1991, DoD had identified 3,309 specifications or standards involving either direct or indirect use of CFC's; 2,336 involving halon; and, 4,010 involving chlorinated solvents. Section 613 will, therefore, require the redrafting of 9,665 specifications or standards!¹⁰⁵

3. "Blacklisting" of Violators of Clean Air and Clean Water Standards

Both the Clean Air and Clean Water Acts deny Federal contracts to environmental violators by "blacklisting" them.¹⁰⁶ Under these acts, the EPA is required to list those facilities or individuals convicted of certain criminal violations of clean air and clean water standards. This is known as a mandatory listing. The EPA Administrator has discretionary authority to list facilities or individuals for civil violations. Once listed, the offending facility, or, at the Administrator's discretion the entire corporation if

¹⁰⁵DOD Report to Congress, *Environmental Considerations During Weapons Systems Acquisition*, September 1991, Enclosure 2.

¹⁰⁶Clean Air Act § 306 (42 U.S.C. § 7606); Clean Water Act § 508 (33 U.S.C. § 1368).

convicted of a violation of the Clean Air Act,¹⁰⁷ may not be awarded or used to perform a Government contract.

While these provisions do not directly impact what DoD purchases, they do restrict from whom it can be purchased in the interest of the environment. These provisions are implemented at FAR Part 23.1.¹⁰⁸

G. National Energy Policy Conservation and Energy Policy Acts of 1992¹⁰⁹

Unlike the largely ineffective procurement preference program established by its 1975 predecessor, section 8262g of the National Energy Policy Conservation Act¹¹⁰ requires that GSA, DoD, and the Defense Logistics Agency in consultation with the Department of Energy (DoE) establish a program to identify and designate energy efficient products and include

¹⁰⁷This authority to bar all of an offender's facilities for convictions under § 113(c) of the Clean Air Act was added by the 1990 amendments. The Clean Water Act does not contain similar authority.

¹⁰⁸FAR 23.103(b) provides: "Except as provided in 23.104, executive agencies shall not enter into, renew, or extend contracts with firms proposing to use facilities listed by EPA (40 CFR Part 15) as violating facilities under the Air Act or Water Act." FAR 23.104 exempts contracts \$100,000 or under, unless the facility is on the list because of a conviction under either act, and classes of contracts deemed to be in the "paramount interests of the United States."

¹⁰⁹Pub. L. 102-486, 106 Stat. 2843 (October 24, 1992).

¹¹⁰This section was enacted as part of the Energy Policy Act of 1992, and not as part of the National Energy Conservation Policy Act, however, it is codified in the latter act.

those products in their procurement and supply functions.¹¹¹

The Administrator of Federal Procurement Policy is tasked to establish guidelines encouraging agencies to procure the items identified.¹¹² Not later than December 31, 1993 and

¹¹¹The relevant provision of § 8262g provides:

Procurement and identification of energy efficient products

(a) Procurement

The Administrator of General Services, the Secretary of Defense, and the Director of the Defense Logistics Agency, each shall undertake a program to include energy efficient products in carrying out their procurement and supply functions.

(b) Identification program

The Administrator of General Services, the Secretary of Defense, and the Director of the Defense Logistics Agency, in consultation with the Secretary of Energy, each shall implement, in conjunction with carrying out their procurement and supply functions, a program to identify and designate those energy efficient products that offer significant potential savings, using, to the extent practicable, the life cycle cost methods and procedures developed under section 8254 of this title. The Secretary of Energy shall, to the extent necessary to carry out this section and after consultation with the aforementioned agency heads, provide estimates of the degree of relative energy efficiency of products.

Another procurement related provision is 42 U.S.C. 8287. This section authorizes agencies to enter into energy savings performance contracts at no cost to the Government "for the purpose of achieving energy savings and benefits ancillary to that purpose." Section 8287(a)(1) provides:

Each such contract may, notwithstanding any other provision of law, be for a period not to exceed 25 years. Such contract shall provide that the contractor shall incur costs of implementing energy savings measures, including at least the costs (if any) incurred in making energy audits, acquiring and installing equipment, and training personnel, in exchange for a share of any energy savings directly resulting from implementation of such measures during the term of the contract.

¹¹²42 U.S.C. 8262g(c) provides:

The Administrator for Federal Procurement Policy, in

each year thereafter, the tasked agencies must report to Congress concerning the progress, status, and results of the procurement programs.¹¹³

Section 13212 of the Energy Policy Act of 1992 requires the Federal government to procure 5,000 alternative fueled (e.g. natural gas, electric) vehicles in 1993.¹¹⁴ Purchase of the vehicles will be phased so that by 1999, 75% of Federal fleet acquisitions must be alternative fueled vehicles.¹¹⁵

consultation with the Administrator of General Services, the Secretary of Energy, the Secretary of Defense, and the Director of the Defense Logistics Agency, shall issue guidelines to encourage the acquisition and use by all Federal agencies of products identified pursuant to this section. The Secretary of Defense and the Director of the Defense Logistics Agency shall consider, and place emphasis on, the acquisition of such products as part of the Agency's ongoing review of military specifications.

¹¹³*Ibid* § 8262g(d).

¹¹⁴42 U.S.C. § 13212.

¹¹⁵Section 13212(a) establishes the following requirements:

(1) The Federal Government shall acquire at least--

(A) 5,000 light duty alternative fueled vehicles in fiscal year 1993;

(B) 7,500 light duty alternative fueled vehicles in fiscal year 1994; and

(C) 10,000 light duty alternative fueled vehicles in fiscal year 1995.

(2) The Secretary shall allocate the acquisitions necessary to meet the

requirements under paragraph (1).

(b) Percentage requirements

(1) Of the total number of vehicles acquired by a Federal fleet, at least--

(A) 25 percent in fiscal year 1996;

(B) 33 percent in fiscal year 1997;

(C) 50 percent in fiscal year 1998; and

These vehicle requirements apply to Federal fleets of 20 or more light duty motor vehicles located in metropolitan statistical areas or consolidated metropolitan statistical areas with a 1980 population of over 250,000.¹¹⁶ An exemption from the requirements for military vehicles for national security reasons may be invoked by a Secretary of Defense certification

H. Office of Federal Procurement Policy Letter 92-4

Although Office of Federal Procurement Policy (OFPP) Letter 92-4 implements RCRA section 6002 and the Energy Policy and Conservation Policy Act of 1975, it has greatly broadened "green" procurement policies and, therefore, deserves separate treatment.

OFPP has also been criticized for allowing implementation of Section 6002's requirements to become a low agency priority.¹¹⁷ OFPP's first guidance on section 6002 was issued in 1977.¹¹⁸ That guidance remained in effect for almost 16 years until it was replaced and canceled on November 2, 1992 by OFPP Policy Letter 92-4, *Procurement of*

(D) 75 percent in fiscal year 1999 and thereafter, shall be alternative fueled vehicles.

¹¹⁶*Ibid* § 13212(b)(3).

¹¹⁷GAO Testimony, 1; S. Hrg. 102-563, 3 (statement of Senator Levin).

¹¹⁸OFPP Policy Letter 77-1, *Procurement of Products that Contain Recycled Material*, February 22, 1977.

*Environmentally-Sound and Energy-Efficient Products and Services.*¹¹⁹

OFPP Letter 92-4 sets forth a broad mandate for purchase of "environmentally-sound, energy-efficient" products and services¹²⁰ and has the potential, if properly implemented, to redirect the Federal procurement program onto an environmentally proactive path.¹²¹

The policy letter states, "In its day-to-day operations, the Federal Government has the opportunity and obligation to be environmentally and energy conscious in its selection and use of needed services and products."¹²² The letter declares a Federal policy of Executive agency implementation of "cost-effective procurement preference programs favoring the purchase of environmentally-sound, energy-efficient products and services."¹²³ The requirements of the letter pertaining to the purchase of recovered materials covered by

¹¹⁹57 Fed. Reg. 53,362 (Nov. 9, 1992).

¹²⁰Paragraph 4(e) defines environmentally-sound as: "[A] product or service that minimizes damage to the environment and is less harmful to the environment to use, maintain and dispose of in comparison to a competing product or service."

¹²¹OFPP Policy Letter 92-4 ¶ 6b states:

Executive agencies shall give preference in their procurement programs to practices and products that conserve natural resources and protect the environment...Environmental factors will be considered, along with estimated costs and other relevant factors, in the development of purchase requests, invitations for bids, and solicitation for offers.

¹²²OFPP Letter 92-4, ¶ 5.

¹²³OFPP Letter 92-4, ¶ 6.

EPA guidelines, apply only to purchases above the RCRA section 6002 \$10,000 threshold.¹²⁴ The broader requirements for environmentally-sound purchases have no price threshold.

Environmental factors and energy efficiency must be considered in drafting purchase requests, invitations for bids (IFB) and requests for proposals (RFP). The policy set forth in 94-2 on energy efficiency requires:

Executive agencies shall consider energy conservation and efficiency factors in the procurement of property and services...Energy conservation and efficiency data will be considered, along with estimated cost and other relevant factors, in the development of purchase requests, invitations for bids and solicitation for offers.¹²⁵

Executive agencies are further required to utilize:

product descriptions and specifications that reflect cost-effective use of recycled products, recovered materials, water efficiency devices, remanufactured products and energy-efficient products, materials, and practices.¹²⁶

The use of "life cycle cost analysis, whenever feasible and appropriate, to assist in making product and service

¹²⁴*Ibid* ¶ 7c(3). During the comment period on the letter, OFPP received recommendations that the dollar threshold be raised to \$25,000, the small purchase threshold. OFPP agreed with these suggestions, but noted that Congressional action would be required to raise the RCRA threshold. OFPP did note that the \$10,000 threshold applied only to products covered by an EPA guideline. (Supplementary Information, ¶ 7, 57 Fed. Reg. 53,363).

¹²⁵OFPP Policy Letter 92-4 ¶ 6a.

¹²⁶*Ibid* ¶ 7a(4); 57 Fed. Reg. 53,365 (November 9, 1992).

selections" is also required.¹²⁷

However, 92-4 has somewhat limited its own impact by making its preferences inapplicable to sealed bid procurement and by failing to provide for a price preference for environmentally-sound, energy-efficient products, restrictions that may not have been necessary as discussed *infra*. In the latter area, consistent with EPA's position in *NRC v. Reilly*, OFPP has cited lack of a "legal mandate for such preference."¹²⁸ Also consistent with the EPA guidelines, the preference for recovered, recycled, of environmentally-sound products and services is applicable only "when two products or services are equal in performance characteristics and price..."¹²⁹

Despite resistance by the contracting community, 92-4 does task the FAR Councils¹³⁰ to fully incorporate the letter's policies into the FAR within 210 days of the publication of the letter.¹³¹

¹²⁷*Ibid* ¶ 7(a)(3); 57 Fed. Reg. 53,365 (November 9, 1992).

¹²⁸Supplementary Information ¶ 14, 57 Fed. Reg. 53364. The issue of price preferences will be discussed in Chapter 3 *infra*.

¹²⁹OFPP Policy Letter 92-4, ¶ 4f and g.

¹³⁰The Defense Acquisition Regulatory Council and the Civilian Agency Acquisition Council.

¹³¹OFPP Letter 92-4 ¶¶ 8 and 11. The resistance arises over conflicting views over whose responsibility it is to ensure that recovered materials products are utilized. The contracting community sees it as a user responsibility to be implemented through the specifications, while the users believe that the contracting community should ensure their

I. FY-1993 DoD Authorization Act¹³²

The FY-1993 DoD Authorization Act implements the chlorofluorocarbons (CFCs) phase-out requirements of the Clean Air Act¹³³ by requiring the inventory and gradual elimination of all non-mission essential ozone-depleting chemicals.¹³⁴ All contracts awarded after June 1, 1993 will require the approval of the "Senior Acquisition Official" before specifications or standards mandating the use of Class-I ozone depleting chemicals may be included.¹³⁵ Contracts in excess of \$10 million modified or extended after that date will also require such approval. Approval may be granted only if the technical representative of the Senior Acquisition Official certifies that use of a Class-I substance is the only economically feasible way of satisfying the requirement.¹³⁶

compliance through FAR provisions. See Chapter 5 *infra* for an examination of the recently proposed FAR changes to implement OFPP Letter 92-4.

¹³²Pub. L. 102-484 (October 23, 1992).

¹³³See pages 33 and 34 *supra*.

¹³⁴Pub. L. 102-484 § 325. Congress had previously focused on CFC use in the DoD via Pub.L. 101-189, Div. A, Title III, § 356, Nov. 29, 1989, 103 Stat.1425, which mandated a complete study of DoD CFC use along with a search for CFC and halon substitutes.

¹³⁵Pub. L. 102-484 § 326(a).

¹³⁶*Ibid*.

CHAPTER 2

PREFERRING ENVIRONMENTALLY-SOUND PRODUCTS AND SERVICES

Congress and the Department of Defense have decided to use the Federal procurement process to improve the environment by requiring or restricting certain purchases. To implement this mandate, DoD contracts must prefer or exclude certain products or services while still ensuring adequate competition in meeting the needs of the Department. As will be seen, these goals do not have to be mutually exclusive.

A. Restricting Competition In The Interest of The Environment

The easiest way to comply with the various environmental purchasing preference requirements is to utilize specifications that restrict competition to only those who can supply items meeting the mandated requirements. Balanced against this strategy is the legal rule that Government contract specifications cannot unduly restrict competition.¹³⁷ If a protestor challenges the contract

¹³⁷The Competition in Contracting Act (41 U.S.C. § 253a(a)(2) and 10 U.S.C. § 2305(a)(1)(B)) establishes the following requirements for specifications:

Each solicitation under this title shall include specifications which-

(A) consistent with the provisions of this title, permit full and open competition;

(B) include restrictive provisions or conditions only to the extent necessary to satisfy the needs of the executive agency or as authorized by law.

specifications on this basis, the Comptroller General requires the procuring agency to furnish *prima facie* evidence that the restrictions are reasonably related to the agency's minimum needs.¹³⁸ Once the agency makes this showing, the Comptroller General will not second guess the agency's determination of its needs.¹³⁹ However, the Comptroller General has held that to implement a collateral policy (such as environmental protection) that limits those eligible for award of contracts, an agency needs a clear grant of authority from Congress.¹⁴⁰

1. "Green" Restrictions: How Far Can You Go?

In *American Can*,¹⁴¹ one of the first environmentally restrictive specification cases, the Comptroller General was faced with the question whether contract provisions that required bidders to certify that the paper products offered

¹³⁸*Pitney Bowes, Inc.*, Comp. Gen. Dec. B-200288, 81-1 CPD ¶ 171 (1981).

¹³⁹"[W]e will not question an agency's determination of what its minimum needs are unless there is a clear showing that the determination has no reasonable basis..." *Lanier Business Products, Inc.*, Comp. Gen. Dec. B-193693, 79-1 CPD ¶ 232 *aff'd*, 79-2 CPD ¶ 78.

¹⁴⁰10 Comp. Gen. 249 (1931); 42 Comp. Gen. 1 (1962). These cases, though venerable, are still good law (see John Cibinic, Jr. and Ralph C. Nash, Jr. *Formation of Government Contracts, Second Edition*, George Washington University, 1986 at 943, hereinafter Nash and Cibinic).

¹⁴¹Comp. Gen. Dec. B-187381, B-187658, 77-1 CPD ¶ 196, 1977 WL 13179 (C.G.).

would contain recycled materials, unduly restricted competition. American Can protested the requirement alleging that the recovered materials requirement adversely affected competition and the procuring agency lacked statutory authority to exempt itself from the statutory requirement for "full and free" competition.¹⁴² The agency relied on Executive "mandates" and the provisions of the Solid Waste Disposal Act of 1965 that directed an investigation and study to determine "the use of Federal procurement to develop market demand for recovered resources."¹⁴³

The Comptroller agreed that statutory authority was required to exempt an agency from the "full and free" competition requirement, but in upholding the challenged specifications, he widened the definition of "statutory authority":

[T]hese general rules are not applicable to terms and conditions, although not specifically authorized or required by statute, which reasonably implement a public policy embodied in a statute. For example, we have sanctioned a procurement policy preference for labor surplus area concerns, even though such preference has its origin in the "policies" declared in the Defense Production Act of 1950 [citation omitted], and in various Executive Orders and supplementing directives issued to implement the policy, and not in any specific statutory authorization.¹⁴⁴

¹⁴²41 U.S.C. § 253 (1970).

¹⁴³42 U.S.C. § 3253(A).

¹⁴⁴1977 WL 13179, *3 (C.G.).

In *American Management Enterprises, Inc.*,¹⁴⁵ a bidder protested a Government Printing Office solicitation for paper that required a minimum 50% recovered materials content. In upholding the specifications the Comptroller General found:

[N]othing improper in the agency mandating a specific wastepaper content requirement for a particular procurement as a means of implementing the recommendation of the EPA guideline. We point out in this regard that competition was not unduly restricted as evidenced by the fact that a total of 12 firms submitted bids.¹⁴⁶

In *Trilectron*,¹⁴⁷ the Comptroller General indicated that he is willing to tolerate restrictions on competition which, while not mandated by law, nevertheless seek to address perceived environmental problems. In question were Air Force specifications requiring zero ozone depletion potential for air conditioner refrigerant. Trilectron challenged the ozone depletion potential requirement as unduly restrictive of competition because the R-22 refrigerant (a Clean Air Act Class II ozone depleting chemical) used in its equipment met current and environmental standards; the Clean Air Act did not prohibit the use of Class II chemicals until January 1, 2015; and the specified R-134a refrigerant was 10 times more expensive than R-22. The Comptroller General held the

¹⁴⁵Comp. Gen. Dec. B-238134, 90-1 CPD ¶ 234 (1990), 1990 WL 277747 (C.G.).

¹⁴⁶1990 WL 277747, *2.

¹⁴⁷Comp. Gen. Dec. B-248475, 7 CGEN ¶ 106,864 (August 27, 1992).

challenged requirement to be reasonably related to the agency's minimum needs. In upholding the restriction, the Comptroller indicated that he would give agencies great latitude in dealing with environmental problems:

The Air Force's focus on the well-documented ozone-depletion problem in fashioning its specification reflects a policy decision to address that problem. This approach is consistent with--even if not currently mandated by--the Clean Air Act and, we think, clearly is unobjectionable...[W]e see no reason why the Air Force may not prohibit the use of R-22 under this solicitation and thereby immediately implement the policy underlying the [Clean Air Act]. The fact that a deadline for implementing a policy aimed at a current problem has not arrived does not preclude an agency from adopting a procurement approach to immediately implement the policy, even where doing so may limit competition.¹⁴⁸

Once the Government decides to restrict competition based on its consideration of the environment, the Comptroller General will normally not disturb the Government's decision even when a protestor alleges that the required product or service is actually harmful to the environment.

*Integrated Forest Management*¹⁴⁹ involved a challenge to Forest Service specifications requiring aerial application of herbicides as restrictive of competition and in violation of environmental requirements. The protestor desired to open the solicitation to companies, such as it, that control plant growth through manual removal. On the environmental issue,

¹⁴⁸7 CGEN ¶ 106,864.

¹⁴⁹Comp. Gen. Dec. B-204106, 82-1 CPD ¶ 6 (1982), 1982 U.S. Comp. Gen. LEXIS 1629.

the Forest Service noted that it had completed an Environmental Impact Statement (EIS) that considered aerial and ground application of herbicides, hand cutting and manual removal and no action and decided that aerial herbicide application was the preferred alternative.

Noting that the protestor bears the burden of proving that the agency's restrictions are not reasonably related to its needs, the Comptroller General dismissed the protest and found that:

IFM has not met its burden of proof. The Forest Service determined, in accordance with the NEPA [National Environmental Policy Act] and implementing agency regulations, that aerial application of herbicide was the most effective method for the districts concerned. That determination is reasonably related to the agency's stated need to obtain maximum control over competing plant growth in order to promote growth of the fir trees, set forth in the solicitations. Although IFM obviously disagrees with the method selected by the agency, we have held that a protestor's disagreement with the agency's opinion does not invalidate that opinion.¹⁵⁰

In *Trilectron Industries, Inc.*,¹⁵¹ Trilectron alleged that the specified R-134a refrigerant violated the Clean Air Act's requirement that Class I and Class II ozone depleting chemicals be replaced only by substances that reduce overall risks to human health and the environment.¹⁵² According to Trilectron, R-134a created a significant risk of contributing

¹⁵⁰1982 U.S. Comp. Gen. LEXIS 1629, *5.

¹⁵¹See note 147 *supra*.

¹⁵²42 U.S.C. § 7671k(a).

to global warming due its carbon dioxide releases and had an unknown toxicity level whereas R-22, the refrigerant Trilectron desired to use, had lower carbon dioxide releases and an acknowledged low toxicity.

The Comptroller General held that Trilectron failed to prove that requiring the R-134a was inconsistent with the Air Force's goal of safely reducing ozone depletion:

The protestor has provided no evidence in support of its assertion that air conditioners using R-134a create a significantly greater risk of global warming than those using R-22...In contrast, the relative effect of R-22 and R-134a on ozone depletion--the latter having no negative effect--is clear. The agency also reports that it has not received any negative information regarding the toxicity of R-134a and fully expects it to comply with all toxicity requirements. We conclude that the protestor has not shown that the use of R-134a instead of R-22 is inconsistent with the Clean Air Act or its underlying policies.¹⁵³

The flip side of unduly restrictive specifications has arisen where the solicitation has not restricted competition to only those products containing recovered materials. This basis of protest is a species of unduly restrictive specifications and the same analysis is used by the Comptroller.

While generally the Comptroller General will not consider a protest arguing that the agency should use a more

¹⁵³7 CGEN ¶ 106,865.

restrictive specification to meet its minimum needs,¹⁵⁴ especially in cases where recovered materials are involved the protestor has a clear statutory and regulatory basis for its argument to restrict competition. Nevertheless, the Comptroller General has upheld specifications that effectively precluded the offering of products manufactured in part from recovered materials.

The Comptroller General considered the permissibility of specifications that establish standards that cannot be met by recovered materials in a series of protests brought by Sunbelt Industries. The cases involved a GSA solicitation for aluminum oxide abrasive grain for paint stripping with a limit on trace metals contamination that in effect excluded recycled aluminum oxide.

In *Sunbelt I*,¹⁵⁵ the Comptroller General upheld GSA's specifications against a charge that they were unduly restrictive and violated RCRA section 6002's policy favoring recovered materials. In so holding, the Comptroller held that section 6002's policy favoring agency purchases of items composed of the highest percentage of recovered materials did not apply when no EPA guidelines had been issued. It was also noted that the GSA had not specifically excluded recycled

¹⁵⁴*Trimble Navigation Ltd.*, Comp. Gen. Dec. B-247913, 92-2 CPD ¶ 17 (1992); *Container Products Corp.*, Comp. Gen. Dec. B-232953, 89-1 CPD ¶ 117 (1989).

¹⁵⁵Comp. Gen. Dec. B-214414, 85-1 CPD ¶ 113 (1985), 1985 WL 52218 (C.G.).

aluminum oxide but had, rather, imposed performance criteria GSA had shown were reasonable and necessary to meet its needs, a statutory exception to section 6002's requirements.¹⁵⁶ The same reasoning was used to uphold the specifications against similar attacks in *Sunbelt II*¹⁵⁷ and *Sunbelt III*¹⁵⁸.

As in unduly restrictive specification cases, had the Government failed to show that the restrictions were reasonably related to its minimum needs, the protest would have been sustained on the basis of an undue restriction on competition as well as violation of section 6002's requirements.

RCRA section 7002 contains a citizen's suit provision that authorizes citizen suits against the United States or any other Governmental instrumentality or agency for violation of "any permit, standard, regulation, condition, requirement, prohibition, or order which has become effective pursuant to this chapter."¹⁵⁹ This provision seems to establish an independent basis for challenging an agency's decision not to procure items with recovered materials content. Notwithstanding section 6002's policy to maximize use of recovered materials and the breadth of section 7002 even in

¹⁵⁶ See note 35 *supra* and accompanying text.

¹⁵⁷ Comp. Gen. Dec. B-245780, 91-2 CPD ¶ 399, 1991 WL 237774 (1991).

¹⁵⁸ Comp. Gen. Dec. B-246850, 1992 WL 77767 (1992).

¹⁵⁹ 42 U.S.C. § 6972(a)(1)(A).

the absence of an EPA guideline for the material in question, there appear to be no cases that have so used section 7002¹⁶⁰.

It is well settled that if the agency requires items meeting particular environmental specifications, bids offering items not meeting that requirement, even if all other requirements are met, may be properly rejected as nonresponsive.¹⁶¹ This is true even if the bid is the low bid in a sealed bid procurement.¹⁶²

A strategy of restricting competition based on environmental considerations is workable and it appears that the Comptroller General will grant agencies great latitude when the purpose of the restriction has some statutory basis, albeit attenuated, and is directed at addressing environmental problems or concerns.

2. Contracting Officer's Authority Over Specifications

In the area of recovered materials, the contracting

¹⁶⁰At least one environmental group has recommended that Congress amend § 7002 to make it explicitly applicable to Federal procurement see S. Hrg. 145 (testimony of Joe Schwartz, Legislative Counsel, Environmental Action).

¹⁶¹For example see *Kirkland Sales, Inc.*, Comp. Gen. Dec. B-249090, 92-2 CPD ¶ 278 (1992); *G.S. Link & Associates*, Comp. Gen. Dec. B-238600, 90-1 CPD ¶ 479 (1990), 1990 WL 278014 (C.G.); *Victor Graphics, Inc.*, Comp. Gen. Dec. B-238290, 69 Comp. Gen. 410 (1990); *American Management Enterprises, Inc.*, Comp. Gen. Dec. 238134, 90-1 CPD ¶ 234 (1990), 1990 WL 277747 (C.G.).

¹⁶²See for example *Victor Graphics* *infra* note 197.

officer has implicit authority to require justification for specifications that do not utilize EPA guideline materials to the maximum extent practicable. FAR 23.403 sets forth the Government policy to "acquire items composed of the highest percentage of recovered materials practicable."¹⁶³ FAR 23.404 lists the exceptions of RCRA section 6002(c)(1)(A)-(C) as the exceptions to the policy set forth in FAR 23.403. Contracting officers should require users to justify one of these exceptions for any specifications that do not comply with the FAR 23.403 policy.

Under OFPP Letter 92-4, when environmentally-sound¹⁶⁴ alternatives are available, contracting officers should also require users to justify any specifications that do not require their use and explain why available environmentally-sound substitute products or services are not being purchased.

B. Increasing Competition and Promoting Environmentally-Sound Alternatives

When the existence of environmentally-sound products is unknown or where better alternatives exist, the use of restrictive specifications may actually hamper the Government's ability to purchase and use environmentally-sound

¹⁶³ *Supra* page 23.

¹⁶⁴ Although "environmentally-sound" is given a specific definition in OFPP Letter 92-4, for purposes of this paper, the term "environmentally-sound" will encompass recovered materials, low-noise products, energy-efficient products and services, non-hazardous substitutes for hazardous materials and environmentally safe methods of contract performance.

products and services. There are contracting alternatives that avoid restricting competition and the offeror's options while enabling the Government to consider a wider range of environmentally-sound products and services to meet its needs.

1. Use of Market Research and Market Surveys

One way to make sure the Government can increase its options is to periodically conduct market research to find environmentally-sound alternative products. Market research involves collecting and analyzing information about the market available to meet the agency's needs.¹⁶⁵ The contracting officer should obtain information on: 1) the availability of products suitable for meeting a particular need; 2) the terms under which commercial sales of the product are made; 3) legal and regulatory requirements; 4) sales data to provide reasonable assurance that a product is reliable; 5) distribution and support capabilities of potential suppliers; and 6) the potential cost of modifying a commercial product to meet the Government's needs.¹⁶⁶ Market research can be used to discover environmentally-sound, non-hazardous substitutes for currently procured items and determine their suitability for procurement. Contacting various clearinghouses or hotlines, for example the Center for Earth Resource Management (CERMA) and its Recycled Product Information Hotline, as well

¹⁶⁵FAR 10.001.

¹⁶⁶FAR 11.004.

as examining various trade journals, should be a part of the market research.

Once market research discloses the existence of environmentally-sound products, it may be necessary to determine the existence of sources for those products by means of a market survey.¹⁶⁷ Market surveys can be informal, such as telephonic surveys of Federal or civilian experts, to a more formal Commerce Business Daily (CBD) or scientific journal "sources sought" announcements. Solicitations for planning purposes can also be utilized.¹⁶⁸

2. Strategic Environmental Research and Development Program

While not a direct tool for use by acquisition planners to identify environmentally-sound products and substitutes, the Strategic Environmental Research and Development Program (SERDP) will be the source of much information as well as the mechanism for promoting the use of alternative environmentally-sound products and services.

¹⁶⁷FAR 7.101.

¹⁶⁸FAR 15.405-1 allows the use of such solicitations "when information necessary for planning purposes cannot be obtained from potential sources by more economical and less formal means." The solicitation must be approved at a level higher than the contracting officer. When solicitations for planning purposes are used, FAR 15.405-2 requires that the Solicitation for Information for Planning Purposes provision in FAR 52.215.3 be included in the solicitation. This clause puts potential respondents on notice of the purpose of the solicitation and that no contract will be awarded and no payment made for the information solicited except to cover bid and proposal costs in accordance with FAR 31.205-18.

The SERDP was the product of the *National Defense Authorization Act* for FY 91.¹⁶⁹ The program is intended to address environmental matters of concern to DoD and DoE by fostering shared research and data collection. The SERDP is conducted as a tri-agency program among DoD, DoE and EPA.

Part of the SERDP's mandate is to support research, development and demonstration of technologies to identify "nonhazardous, nontoxic, nonpolluting, and other environmentally sound materials and substances" that can be used as substitutes for current environmentally-unsound materials.¹⁷⁰ The SERDP is also to identify "military specifications that prevent or limit the use of environmentally beneficial technologies, materials, and substances in the performance of Department of Defense contracts and recommend changes to such specifications."¹⁷¹

3. Use of Performance Specifications

Another method to enhance competition and provide for the use of the latest environmentally-sound technology is to make maximum use of performance specifications¹⁷² setting forth

¹⁶⁹Pub. L. 101-510 codified at 10 U.S.C. § 2902.

¹⁷⁰10 U.S.C. § 2902(e)(4)(C).

¹⁷¹10 U.S.C. § 2902(e)(9).

¹⁷²Performance specifications are defined as: Technical requirements that set forth the operational characteristics desired for an item. They tell the contractor what the final product must be capable of accomplishing rather than describing how the product is to be built...When the contract

both performance and environmental criteria so that bidders may propose any items meeting those criteria.

OFPP Policy Letter 91-2, requires maximum use of performance specifications for service contracts.¹⁷³ The letter makes it the policy of the Federal Government to use performance-based contracting methods "to the maximum extent practicable" in acquiring services, and to carefully select acquisition and contract administration strategies and techniques that best accommodate this requirement.

Use of performance specifications more readily allow bidders to propose environmentally-sound processes and products without fear of being held nonresponsive. Although less likely to be held unduly restrictive, performance specifications can be so if any restrictions are not reasonably related to the agency's minimum needs.¹⁷⁴ However, as noted *supra* the Comptroller General will grant broad latitude to environmentally related restrictions in

contains performance specifications, the contractor accepts general responsibility for product design and engineering and for achievement of the stated performance requirements. (Ralph C. Nash, Jr. and Steven L. Schooner, *The Government Contracts Reference Book*, The George Washington University, 1992 at 295).

¹⁷³56 Fed. Reg. 15,112 (April 5, 1991). DoD published its proposed FAR changes to implement OFPP Letter 91-2 on July 30, 1992 at 57 Fed. Reg. 33,702 (July 30, 1992).

¹⁷⁴See for example, *Sun Refining & Mktg. Co.*, Comp. Gen. Dec. B-239973, 90-2 CPD ¶ 305 (1990) (requirement for delivery of oil products by pipeline rather than truck); *Southern Technologies, Inc.*, Comp. Gen. Dec. B-239431, 90-2 CPD ¶ 191 (1990) (unnecessary requirement that product be designed, manufactured, and delivered by a single contractor).

specifications.

Solicitations for products and services should express a preference for environmentally-sound products or services that meet the Government's performance standards. Stories, some no doubt apocryphal, abound about manufacturers proposing environmentally-sound products only to be turned away by prime contractors or Government agencies because it's not what's required by the specifications.¹⁷⁵

Invitations for Bid (IFBs) should expressly permit the bidder to bid based on using environmentally-sound, non-hazardous materials, products, or services and to offer environmentally-sound alternative products and services that meet the Government's requirements. Otherwise a bidder in a sealed bid procurement runs the risk of being held nonresponsive even if it is taking exception to the specifications based on environmental concerns and proposing a safer product or method of performance to meet the Government's needs.

In *Southwest Marine of San Francisco, Inc.*,¹⁷⁶ the protestor's bid was rejected as nonresponsive for making what the agency held to be a counter-offer on an specified method of performance and disclaiming liability for any environmental damage caused by following the specifications in the IFB. The

¹⁷⁵ See for example S. Hrg. 102-563, 5 (statement of Sen. Cohen).

¹⁷⁶ 66 Comp. Gen. 22; 86-2 CPD ¶ 388 (1986); 1986 Comp. Gen. LEXIS 422.

specifications required paint-stripping of a ship using abrasive grit blasting. Southwest Marine was concerned about possible environmental violations for contaminating the water with grit, rust, and paint flakes by using the abrasive grit procedure and in its bid proposed using "hydroblast, mechanical cleaning and feather edging of paint" at an unspecified price.¹⁷⁷

Southwest Marine did, however, agree to use the specified abrasive grit method and to take every possible precaution to avoid water contamination. However, it would not agree to assume the risk of liability and included the following statement in its bid:

In the event the EPA finds our procedures not acceptable, we consider APL [American President Lines, the Government's contracting agent] to be the responsible party due to the fact that the specifications mandate this type of procedure.¹⁷⁸

APL found the bid to be nonresponsive because the proposal to perform in an alternate manner and the disclaimer of liability constituted a counter-offer.¹⁷⁹

Before the Comptroller General, APL argued that it was the bidder's responsibility to obtain the necessary California permits and the bidder would, therefore, be responsible for

¹⁷⁷1986 Comp. Gen. LEXIS 422, *5.

¹⁷⁸*Ibid.*

¹⁷⁹*Id.* at *4. The bid was also held nonresponsive because Southwest Marine proposed to begin work on a date other than that specified.

containing any contamination and that Southwest Marine's attempt to disclaim liability rendered its bid nonresponsive.

The Comptroller agreed, finding that Southwest Marine's attempted disclaimer fell squarely under FAR 14.404-2(d) which requires rejection of any bid that "imposes conditions that would modify requirements of the government or limit the bidder's liability to the government."

While the decision was based primarily on the liability disclaimer aspect, the proposal to use hydroblast would not "conform to the applicable specifications" and would have also resulted in rejection of the bid under FAR 14.404-2(b) since the IFB did not authorize the submission of alternate bids.¹⁸⁰

A caveat in using specifications that facilitate the use or offer of environmentally-sound alternatives is that the specifications cannot be open or indefinite. The extent to which bidders may deviate from the specifications or propose alternatives must be defined so bidders are competing on a common basis.¹⁸¹

The reluctance to grant price preferences for environmentally-sound products and services, however, may

¹⁸⁰ See also *NR Vessel Corporation*, Comp. Gen. Dec. B-250925, 93-1 CPD ¶ 128 (1993). FAR 14.404-2(b) states:

Any bid that does not conform to the applicable specifications shall be rejected unless the invitation authorized the submission of alternate bids and the supplies offered as alternates meet the requirements specified in the invitation.

¹⁸¹ 39 Comp. Gen. 570 (1960); 51 Comp. Gen. 518 (1972).

limit the ability to use IFBs authorizing alternate bids since environmentally-sound products will usually cost more than their environmentally-unsound substitutes.¹⁸² Unless environmental considerations are used as price related factors, the "green" bidder will probably not be the low bidder.¹⁸³

Agencies are also limited by the requirement of FAR 10.006 that applicable General Services Administration (GSA) specifications listed in the *GSA Index of Federal Specifications, Standards and Commercial Item Descriptions* and military specifications (MILSPECS) and military standards (MILSTDS) in the *DoD Index of Specifications* (DoDISS) must be used unless an exception exists or a deviation is granted. As noted *supra*, many of the MILSPECS and MILSTDS are not environmentally-sound.¹⁸⁴

4. Two-Step Sealed Bidding

FAR Subpart 14.5 establishes procedures for the use of two-step sealed bidding. Two-step sealed bidding is a hybrid method of procurement that combines the benefits of sealed

¹⁸²See Chapter 3 *infra*.

¹⁸³For a more thorough discussion of the price preference issue see Chapter 3 *infra*.

¹⁸⁴DoD is in the process of reviewing all MILSTDS and MILSPECS with the goal of eliminating requirements for the use of hazardous materials when environmentally-sound alternatives exist (S. Hrg. 102-563, 15, testimony of David J. Berteau, Principal Ass't Sec'y of Defense for Production and Logistics).

bids with the flexibility of negotiations. The benefit of two-step sealed bidding is that it may enhance competition by prompting a bidder who otherwise might refuse to compete on the basis of strict specifications under sealed bidding, to compete in a two-step procurement encouraging alternative approaches to the specifications.

Step one of two-step sealed bidding is similar to a negotiated procurement in that the agency requests technical proposals by means a Request for Technical Proposals (RFTP), without prices, and may conduct discussions. Step two consists of a price competition conducted in accordance with sealed bid procedures, except that the competition is limited to those firms that submitted acceptable proposals under step one.¹⁸⁵

FAR 14.502(a) establishes five criteria for the use of two-step sealed bidding:

- 1) the available specifications are not definite or complete or may be too restrictive without technical evaluation or discussions;

- 2) definite criteria exist for evaluating the proposals;

- 3) adequate competition, defined as more than one technically acceptable source, is expected;

- 4) sufficient time is available to use the two-step method; and

- 5) a firm-fixed-price or fixed-price with economic price adjustment contract will be

¹⁸⁵ A.R.E. Manufacturing Co., Inc., B-224086, 86-2 CPD ¶ 395 (1986).

used.

The Comptroller General accords an agency broad discretion in deciding whether to use two-step sealed bidding.¹⁸⁶ Also, since there are no objective standards to determine whether specifications are indefinite, incomplete or too restrictive to use sealed bidding from those sufficiently definite to permit evaluation of proposals under two-step, the Comptroller General grants the agency wide discretion in this area.¹⁸⁷

C. Preferring "Green" Performance

The language of OFPP Letter 92-4 seems to require that environmentally-sound practices be preferred and utilized in the performance of service contracts. Paragraph 4e defines "environmentally-sound" to be "a product or service that *minimizes damage to the environment* and is less harmful to the environment to use, maintain and dispose of in comparison to a competing product or service" (emphasis added). While OFPP Letter 92-4 specifically declined to set policy for manufacturing processes as part of the pollution prevention

¹⁸⁶50 Comp. Gen. 346 (1970); 40 Comp. Gen. 514 (1961).

¹⁸⁷40 Comp. Gen. Dec. 514 (1961); 50 Comp. Gen. 346 (1970); 52 Comp. Gen. 854 (1973). Practically the only restriction the Comptroller General has placed on the agency's decision in this regard is that lack of experience in procuring the particular item is, by itself, insufficient justification for using two-step if the specification was sufficiently detailed to permit sealed bidding (*ALS Electronics Corp.*, Comp. Gen. Dec. B-181731, 74-2 CPD ¶ 214 (1974)).

effort,¹⁸⁸ the above language seems to mandate some environmental restrictions in the performance of service contracts.

One example of how this preference applies to service contracts is in an installation custodial services contract. If a potential contractor proposes using biodegradable cleansers, recycling used paper towels, and supplying recycled paper towels, that offeror should be preferred over another contractor who does not propose to perform in this manner.

This issue can also arise in more technically complex service contracts, such as those for environmental remediation. These actions, however, often require Environmental Assessments/Environmental Impact Statements under the National Environmental Policy Act (NEPA)¹⁸⁹ or

¹⁸⁸Specifically, Supplementary Information, ¶ 22 (57 Fed. Reg. 53,364 (November 9, 1992)) states:

One comment suggested that the Policy Letter address pollution prevention, particularly pollution generated in the manufacture of an item...the Policy Letter is not intended to dictate manufacturing...practices. The suggestions were considered to be outside the scope of the Policy Letter.

EPA has a mandate under the Pollution Prevention Act of 1990 to recommend uses of the Federal procurement systems in the source reduction effort. Also, some pollution prevention control over contract performance is possible under the language of OFPP Letter 92-4 and, as discussed in Chapter 4 *infra*, necessary to protect the Government's interest.

¹⁸⁹42 U.S.C. § 4332(2)(C) (NEPA § 102(2)(C)).

comparable environmental analysis.¹⁹⁰ In these actions, the NEPA-type analysis will identify the environmentally-sound alternative. Once identified, NEPA does not require that the environmentally-sound alternative be adopted, however. OFPP Letter 92-4, on the other hand, would arguably require that the environmentally-sound alternative be preferred in any subsequent services contract.

¹⁹⁰For example, the preliminary assessment/site investigation (PA/SI) and remedial investigation/feasibility study (RI/FS) processes required for hazardous waste cleanups by the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA).

CHAPTER 3

PRICING THE PREFERENCES

Most environmental purchasing requirements are designed to prefer certain products. Yet, with the exception of the early days of the low-noise emissions products program, Congress has never explicitly authorized the payment of a price premium to effectuate the preference.

Although OFPP Letter 92-4 takes a conservative approach in the area of sealed bidding and relegates preferences for environmentally-sound products and services to the acquisition planning process or to use as a "tie-breaker" when costs are equal, there is an argument that price preferences can be implemented in sealed bid procurement under the FAR and the case law without additional statutory or Executive authority. Other environmentally-sound products can clearly be preferentially priced through the use of life-cycle cost analysis as a price related factor. In competitively negotiated procurements, it appears that an agency has broad latitude to pay more for environmentally-sound products and services.

A. The Case for Price Preferences

EPA and OFPP have refused to establish price preferences for recovered materials and environmentally-sound or energy-efficient products and services. This refusal evolved from

EPA's interpretation that RCRA does not require price preferences. Based on EPA's action, OFPP has pleaded lack of a "legal mandate" for price preferences.¹⁹¹ It is worth noting that the court in *NRC v. Reilly* did not say that a price preference for recovered materials was prohibited by RCRA section 6002; it merely held that EPA's interpretation was reasonable.¹⁹² In fact, the dissent made a good case that Congress must have intended a price preference for recovered materials or else the mandated preference was ineffective. Despite EPA's and OFPP's interpretation, however, the Department of Defense has decided to establish a price "differential" for paper products.¹⁹³

The use of new technology, such as that involved in producing most environmentally-sound products, generally results in a higher cost product until economies of scale caused by increased markets allow for price reductions.¹⁹⁴

¹⁹¹ *Supra* note 128 and accompanying text.

¹⁹² *Supra* note 58.

¹⁹³ See memorandum of Under Secretary of Defense for Acquisitions, "Preference for Recycled Paper," 3 February 1993. This memorandum establishes a 10% price differential for recycled paper products when determining whether the cost of such products is unreasonable.

¹⁹⁴ For example, GSA's rate in FY 91 for recycled copier paper was 1.16% higher than its virgin counterpart. In DOD alone this represented an estimated cost increase of \$1.3 million per year if it purchased recycled copier paper for only 50% of its requirements. However, DoD observed: "We believe that the price of recycled paper will decrease as demand increases." Fact sheet, "DoD Copier Paper Statistics," undated.

The recycling industry, for instance, has uniformly maintained that price preferences are needed until wider markets have been created for recycled materials.¹⁹⁵

Price preferences, when they exist, are not applied as price related factors in sealed bid procurements. Rather, they are generally used in acquisition planning to determine when recovered materials items do not have to be purchased because they "are only available at an unreasonable cost."¹⁹⁶

There is some authority to argue, however, that the Government has the ability to pay more for environmentally-sound products and services even if sealed bidding is used. The issue of price preferences has been addressed by the Comptroller General and the District Court for the District of Columbia.

In *Victor Graphics*¹⁹⁷ the Comptroller General was faced with a Government Printing Office (GPO) printing contract that required a specified minimum recycled paper content. Victor submitted the low bid but did not meet the minimum recycled content standard. Victor's bid was rejected as nonresponsive

¹⁹⁵"How Effective Are Federal Procurement Policies?" *BioCycle*, September 1991, 47 at 48. Americans have embraced recycling, however, recyclers do not have large enough markets to justify the expense of recycling facilities, especially those to deink paper. Consequently, much of what is collected for recycling does not get recycled. See Bruce Van Voorst, "The Recycling Bottleneck," *Time*, September 14, 1992.

¹⁹⁶42 U.S.C. § 6962(c)(1)(C). See also note 193 *supra*.

¹⁹⁷Comp. Gen. Dec. B-238290, 69 Comp. Gen. 410, 1990 WL 293749 (C.G.).

and award was made to United Book Press, the next low bidder meeting the recycled content requirement. Victor protested the award on several grounds, one of which dealt with the higher price the Government was paying for a printing job based solely on the recycled content criteria and that this was, according to the EPA paper guideline, unreasonable.

The Comptroller dismissed the protest, observing on the issue of higher cost that although the EPA guideline narrative indicates that paying a higher price for paper meeting a minimum content requirement is unreasonable, neither the statute nor the guideline prohibits paying a higher price.¹⁹⁸

On the issue of whether an agency could give a price preference to recovered materials, the Comptroller General specifically found that:

Although Federal Acquisition Regulation § 14.407-2 requires a contracting officer to make a determination of price reasonableness before awarding a contract, in view of the solicitation requirement for immediate delivery and the statutory policy in favor of procuring products with recovered materials (42 U.S.C. § 6962), we find no basis for objecting to payment of an 11.5 percent premium for paper with recovered materials as unreasonable.¹⁹⁹

At the other end of the spectrum, in *Freedom Graphic*

¹⁹⁸The Comptroller specifically noted that EPA at 53 Fed. Reg. 23,559 stated "each procuring agency may decide whether a 'reasonable price' includes a price preference."

¹⁹⁹1990 WL 293749, *3 (C.G.).

*System, Inc. V. United States*²⁰⁰, the District Court for the District of Columbia was faced with a protest on an invitation for bid (IFB) that expressed a "strong preference" for recycled paper but allowed bidders to submit bids based on either recycled or virgin paper. Freedom Graphic was one of six bidders and the only one to offer recycled paper. The contracting officer awarded to Fry Communications, whose bid was over \$25,000 less.

Freedom Graphic moved for a preliminary injunction of the award arguing that since the costs of recycled paper are more than virgin paper, bids offering recycled paper are reasonable even when they are higher than bids offering virgin paper. In determining whether Freedom Graphic had demonstrated a substantial likelihood for success on the merits, the court looked at section 6002's "unreasonable price" exception and the interpretation of it in *NRC v. Reilly*²⁰¹. The court then denied the injunction because EPA interpreted unreasonable to mean merely more expensive and it had not been shown that GPO had established a price preference for recovered or recycled materials.²⁰²

²⁰⁰No. 91-0023, 1991 WL 16769 (D.D.C. Jan. 25, 1991)(mem.).

²⁰¹*Supra* note 58.

²⁰²The court's reasoning seems to indicate that if an agency had established a price preference for recycled or recovered materials, in a solicitation where either recycled or virgin materials goods were offered, the agency could award to a higher priced, recycled materials bid. The court never mentioned the statutory and regulatory requirements (10 U.S.C.

In *Trilectron*²⁰³, a negotiated procurement, the Comptroller General decided that it was not unreasonable for the agency to pay 10 times more for a non-ozone depleting substitute for R-22 refrigerant. The Comptroller General held:

[T]he fact that R-134a is more expensive than R-22 does not render the agency's judgement unreasonable; the agency reasonably could determine that the need to prevent further depletion of the earth's ozone layer outweighs any resulting higher cost for the air conditioners.²⁰⁴

These cases indicate that although a price preference for environmentally-sound products is not required, there appears to be no prohibition against granting one if the agency so desires.

Despite the apparent ability of agencies to grant price preferences, the whole issue may now be only an interesting academic exercise since the time for price preferences, at least from the agencies' standpoints, may have passed. Paying more for goods and services to further an intangible goal like protecting the environment is not likely to be popular with cash-starved agencies. As one DoD official noted, even before the huge defense cuts proposed by the Clinton administration:

[T]he dramatic budget reductions being

§ 2305(b)(3); 41 U.S.C. § 253a(C); and FAR Part 14 see note 206 *infra* and accompanying text) to award a sealed bid contract to the lowest, responsive, responsible bidder.

²⁰³ *Supra* note 147.

²⁰⁴ 7 CGEN ¶ 106,865.

experienced by the Department will lessen our perceived capability to "drive" markets. These budgetary pressures will also impact our ability to support pricing differentials for products with recycled materials.²⁰⁵

B. Environmental Price Related Factors

The reluctance to grant price preferences for environmentally-sound products and services does not necessarily mean that in a sealed bid procurement the Government must always award to an environmentally-unsound, lower priced bid. "Green" bids can be competitive if their true cost advantages can be captured by price related factors.

The Competition in Contracting Act (CICA) as implemented at FAR 14.407-1, directs that award be made to "the responsible bidder whose bid...is most advantageous to the United States, considering only price and the other price-related factors included in the solicitation."²⁰⁶

FAR 14.201-8 lists the following examples of price related factors: transportation, taxes, advantages to the Government from making multiple awards, changes made by the bidder which do not render the bid nonresponsive, and Buy America Act. Although this list is not all inclusive, its common thread is that a price related factor must be something that directly affects the cost to the Government or, as with the Buy American Act, a mandatory adjustment to the bidder's

²⁰⁵S. Hrg. 102-563, 123 (statement of David J. Berteau, Principal Deputy Ass't. Secretary (Production & Logistics)).

²⁰⁶10 U.S.C. § 2305(b)(3) and 41 U.S.C. § 253b(c).

bid. In this regard, the Comptroller General has defined price related factors to be "objectively determinable elements of costs."²⁰⁷

1. Recovered Materials Content As A Price Related Factor

In *Emerson Electric Co., Environmental Products Division*²⁰⁸, the IFB encouraged bidders to furnish recovered materials content information "to provide a basis for making future determinations as to percentages of recovered materials..."²⁰⁹ Emerson's bid proposed supplying fans with 10% recovered materials content. However, Patton Electric bid on virgin material fans at a slightly cheaper cost to the Government.

Emerson protested arguing that its bid was most advantageous to the Government considering price and other price-related factors. Emerson maintained that RCRA and the solicitation required that the percentage of recovered materials offered be considered in bid evaluation. The Comptroller held that neither the "encouragement" in the solicitation to indicate a recovered materials content percentage nor RCRA imposed such a "requirement."

On the question of whether recovered materials content

²⁰⁷ *Envirotronics, Inc.*, Comp. Gen. Dec. B-215622, 84-2 CPD ¶ 18.

²⁰⁸ Comp. Gen. Dec. B-209272, 82-2 CPD ¶ 409, 1982 U.S. Comp. Gen. LEXIS 248 (1982).

²⁰⁹ 1982 U.S. Comp. Gen. LEXIS 248, *2, 82-2 CPD ¶ 409.

itself could be used as a price-related factor, the Comptroller noted:

[I]n the context of a formally advertised procurement, "other factors" are objectively determinable elements of cost identified in the solicitation as factors to be evaluated in the selection of a contractor. Since usage of recovered materials was not an objectively determinable element of cost identified as a factor to be evaluated here, it could not properly be taken into consideration in determining the most advantageous bid.²¹⁰

However, if recovered materials content, or any other environmentally related requirement, can be reduced to "an objectively determinable element of cost" identified in the solicitation, similar to the Buy American Act preference,²¹¹ there would be appear to be no prohibition, given the decisions discussed *supra*²¹², against including it as a FAR 14.101 price-related factor without further authorization.

2. "Least-Cost" Pricing To Reflect Negative Environmental Externalities

An interesting issue arises when one considers whether

²¹⁰1982 U.S. Comp. Gen. LEXIS 248, *3, 82-2 CPD ¶ 409.

²¹¹41 U.S.C. §§ 10a-d. Like RCRA, the Buy American Act does not apply if an agency determines that a domestic product's price is unreasonable, nor does it establish a price preference for domestic products. The 6% price "add-on" for foreign products is a creation of Executive Order 10582 (19 Fed. Reg. 8723 (1954)) as implemented by FAR 25.105. Given the similarities in the preference language, there is no reason why the President could not establish a similar preference for recovered materials, or any of the other preferences which have arisen from RCRA implementation.

²¹²See notes 197, 200, and 203 *supra* and accompanying text.

instead of giving environmentally-sound products preferential pricing, the negative environmental externalities of less environmentally-sound competing products, especially virgin materials products, could be considered as a price related factor.

The argument, and statutory basis, for considering these costs as price related factors is based on the Government's duty under RCRA to both compel and cooperate in the conservation of the Nation's resources,²¹³ as well as the preferences mandated by Executive Order 12780 and OFPP Letter 92-4. While the Government does not pay the cost of negative environmental externalities directly as it does with the normal price related factors listed in FAR 14.101, both it and the public-at-large pay for them indirectly.

Negative environmental externalities are impacts to the environment that are not easily monetized. For example, the Air Force has estimated that using recycled paper products in just its Pentagon operations would save over 1,300 cubic yards of landfill space; almost 7,300 mature trees; 3 million gallons of water; 162,500 gallons of oil; 1.75 million

²¹³42 U.S.C. §§ 6902, 6962. Additionally, two of DoD's "four pillars" for its environmental policy help bolster this argument. In addition to restoration and compliance, DoD has established a policy of *natural resource stewardship* and *pollution prevention* (presentation of Mr. Thomas Baca, Deputy Ass't. Secretary of Defense (Environment), 22 October 1993). Capturing the cost to the environment of the negative externalities of environmentally-unsound products and services furthers both of these goals and is further justification for the implementation of a "least-cost" pricing scheme.

kilowatts of energy and eliminate 25,600 pounds of air pollutants each year.²¹⁴ The infant but growing field of environmental economics is attempting to monetize considerations such as these, however, a simple mechanism already exists to capture some of the costs of these externalities.

Several states have implemented "least-cost planning" into their regulatory schemes for electric utilities. The goal in least-cost planning is to reduce the direct and indirect costs of meeting society's electrical energy needs. One of the indirect costs considered when deciding whether to reduce demand through energy conservation or meet the demand through the construction of new generation capacity, is the cost of environmental externalities of constructing and operating a power plant. Vermont, for example, seeks to capture these costs by requiring that 5% be added to the cost of new generating capacity when balancing its cost against the cost of energy conservation and demand reduction programs.²¹⁵

Given the Comptroller General's deference to Government efforts to foster environmental protection and

²¹⁴Memorandum, "Air Force Policy on Using Recycled Products," 25 September 1992. The equation is complicated, however by the negative environmental externalities of recycling. For example, the deinking process in paper recycling uses large quantities of chlorine.

²¹⁵Armond M. Cohen, Robert H. Russell, and Jeanne M. Sole, "The Obvious Child: Least-Cost Utility Regulation in New England," *Least-Cost Utility Regulation*, Volume 1, Number 2, 111.

enhancement through the use of its buying power, it is possible that he might find authority in the mandates arising from RCRA for such a least-cost price related factor even in the absence of a Buy American-type Executive Order.

C. Use of Life-Cycle Costing

Although hazardous material substitutes do not enjoy a specific statutory preference, DoDD 4210.15 requires a life-cycle cost analysis for hazardous materials.²¹⁶ OFPP Letter 92-4, which has a much broader scope than DoDD 4210.15 in that it covers environmentally-sound, energy-efficient products and services, also encourages the use of life-cycle cost analysis.²¹⁷

1. Life-Cycle Costs As An Evaluation Factor

Life-cycle cost analysis is generally a part of the acquisition planning process.²¹⁸ Although FAR 15.605(b) requires that price or cost to the Government be an evaluation factor in every competitively negotiated acquisition and

²¹⁶Supra note 95.

²¹⁷Supra note 127. In September 1991, the OFPP Administrator also issued a memorandum on life-cycle costing. The memo encouraged more emphasis on factors such as energy conservation, material recycling and reduction of the waste stream in agency acquisition plans.

²¹⁸FAR 7.105(a)(3)(i). "Life-cycle cost. Discuss how life-cycle cost will be considered. If its not used, explain why. If appropriate, discuss the cost model used to develop life-cycle cost estimates."

7.103(h)(2)(1) requires consideration of life-cycle costs in development and acquisition decisions, neither has been held to require that life-cycle costs be used as a source selection evaluation factor.²¹⁹ The use of life-cycle cost as an evaluation factor is required in Federal Information Processing (FIP) Resources procurement²²⁰, in DoD weapons systems acquisitions²²¹ and in the purchase of energy consuming products.²²²

Although not required, life-cycle costs can be used as price-related or evaluation factors at the contracting officer's discretion in both sealed bid²²³ and negotiated procurement. When the contracting officer decides to so use life-cycle costs, the Comptroller General will not question the decision.²²⁴

²¹⁹See Nash and Cifinich at 544-545.

²²⁰Federal Information Resources Management Regulation (FIRMR) 201-24.208.

²²¹DOD Instruction 5000.2, *Defense Acquisition Management Policies and Procedures*, Part 10, Section B (February 23, 1991).

²²²E.O. 12759, § 5 directs agencies to purchase "those energy consuming goods and products which are the most life cycle cost effective."

²²³See *Mor-Flo Industries, Inc.*, Comp. Gen. Dec. B-192687, 79-1 CPD ¶ 390 (1979) where under the IFB's "method of award" clause, award of a contract for water heaters was to be made to the responsive, responsible bidder offering the lowest life-cycle cost.

²²⁴*Remington Rand Corp.*, Comp. Gen. Dec. B-203084, 82-1 CPD ¶ 408 (1982).

When life-cycle costs are used as an evaluation factor in a negotiated procurement, the case law is unclear whether a broad, general statement in the solicitation is sufficient or whether specific items of cost must be listed.²²⁵ The better practice, however, is to list with as much specificity as practicable, those costs that will be considered as part of the life-cycle cost analysis.

When life-cycle costs are used as price-related factors in sealed bid procurement, they must "be stated with sufficient clarity and exactness to inform each bidder prior to bid opening...of the objectively determinable factors from which the bidder may estimate...the effect of the application of such evaluation factor on his bid..."²²⁶ In other words, the bid price evaluation factors must be made known to bidders in the solicitation so they can be used and considered in the preparation of bids. For example, the cost factors²²⁷ set forth as part of DoDD 4210.15's mandated economic analysis,

²²⁵ Compare *Lanier Business Products, Inc.*, 60 Comp. Gen. 306, 81-1 CPD ¶ 188 (1981) *aff'd on reconsid. ex rel. Dictaphone Corp.*, Comp. Gen. Dec. B-200695.2, 81-2 CPD ¶ 511 (1982) (resolicitation recommended where RFQ informed quoters that life-cycle costs would be an evaluation factor without informing them of the specific factors to be used) and *Southwestern Bell Telephone Co.*, Comp. Gen. Dec. B-200523.3, 82-1 CPD ¶ 203 (1982) (when solicitation states life-cycle costs will be an evaluation factor without qualification, offerors may reasonably expect that all determinable elements will be taken into account).

²²⁶ 56 Comp. Gen. 380 (1956).

²²⁷ *Infra* note 230 and accompanying text. But see *infra* page 80 for a discussion of the problems with use of remedial action and potential liability costs as evaluation factors.

could easily be used as price-related factors to capture the "real" life-cycle cost of hazardous materials.

When the offeror is required to supply information for use in a life-cycle cost analysis, the Comptroller General recommends that the realism of the cost information submitted be evaluated. In *Columbia Investment Group* the Comptroller General observed:

[T]he solicitations stated that the agency would evaluate prices by, in essence, adding the estimated cost of government-paid utilities to an offeror's proposed rental rate. The solicitations stated further that, for purposes of calculating an estimate of the cost of utilities, the agency in effect would accept at face value an offeror's energy efficiency estimates. In our view, however, by using offeror's energy efficiency estimates without determining whether these estimates were realistic, the agency could not conclude with confidence that the figures used in comparing prices were reliable estimates of the total amounts the government actually would pay...[W]e suggest that the agency consider amending this scheme for future procurement of this nature to incorporate some sort of realism evaluation of an offeror's energy efficiency estimate.¹²⁸

2. Potential Remedial Action and Liability As Life-Cycle Cost Evaluation Factors

Life-cycle cost analysis seeks to capture the hidden costs of an item by identifying, at least in the environmental context, the costs of acquisition, use, maintenance, and

¹²⁸Comp. Gen. Dec. B-214324, 34-2 CPD ¶ 632 (1984).

disposal.²²⁹ When such costs are added to the purchase price of an environmentally-unsound item, a truer picture of the real cost, as opposed to merely the purchase cost, is obtained. Often life-cycle costing results in a higher purchase cost, environmentally-sound product actually costing less than a lower purchase cost, environmentally-unsound product over its life-cycle.

DoDD 4210.15 contains good guidance on what costs should be considered as part of the cost of use, maintenance, and disposal in life-cycle costing of hazardous materials:

Cost factors refer to the direct and indirect costs attributable to hazardous material that are encountered in operations such as acquisition, manufacture, supply, use, storage, inventory control, treatment, recycling, emission control, training, work place safety, labeling, hazard assessments, engineering controls, personal protective equipment, medical monitoring, regulatory overhead, spill contingency, disposal, remedial action, and liability.²³⁰

The *pro rata* share of most of these costs can be calculated for a hazardous material since they are either already being incurred or are easily ascertainable.²³¹ However, the costs of remedial action and potential liability are not really susceptible of calculation.

²²⁹FAR 7.101; Supplementary Information ¶ 14, OFPP Policy Letter 92-4; DODD 4210.15, Enclosure 1, ¶ 2 (July 27, 1989).

²³⁰DoDD 4210.15, Encl. 1, ¶ 2.

²³¹For example, Military Standard 1388-1A/2B will require contractors to provide program managers with the environmental, cost, and performance impacts of proposed hazardous material and process alternatives.

One problem with using the costs of potential remedial action and liability as life-cycle cost factors is that they may or may not be incurred. Essentially, the Government is seeking to add to the purchase price the cost of insuring itself against these contingencies throughout the material's life-cycle. In *Southwestern Bell Telephone Co.*²³² the Comptroller held that the cost of Government self-insurance could not be used as an evaluation factor in a lease or build decision because it was "indefinite" and "speculative".²³³

An additional problem in using liability as a life-cycle cost evaluation factor is the broad, perpetual liability potential of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA).²³⁴ CERCLA section 120(a)(1) makes the statute applicable to Federal facilities.²³⁵ Therefore, an installation that arranges for the transportation and disposal of hazardous waste is a potentially responsible party (PRP) for any and all necessary clean-up of any releases to the site to which its waste is.

²³²Supra note 225.

²³³See also *City of Nenana*, Comp. Gen. Dec. B-214269, 85-1 CPD ¶ 708 (1985).

²³⁴42 U.S.C. §§ 9601-9675.

²³⁵42 U.S.C. § 9620(a)(1). In *Pennsylvania v. Union Gas*, 491 U.S. 1, 109 S. Ct. 2273, 105 L.Ed.2d 1 (1989), the Supreme Court held that the language of CERCLA § 120(a)(1) constituted a waiver of the Federal Government's sovereign immunity.

transported.²³⁶ An installation would also be a PRP if the site contained hazardous substances that it generated, even if it was not responsible for having placed them at the site.

CERCLA liability is strict,²³⁷ joint and several.²³⁸ Therefore, one PRP may be responsible for the entire cost to clean-up a site containing hazardous substances that were generated by it. This is the case no matter how small the release²³⁹. The fact that it is not your waste that has been released has been held to be irrelevant to CERCLA liability as long as the release is of the same type of waste as yours.²⁴⁰

The CERCLA liability scheme, therefore, leads to a cost evaluation factor based on perpetual potential liability in

²³⁶This liability, known as "arranger liability" is set forth at CERCLA § 107(a)(3) as follows:

[A]ny person who by contract, agreement, or otherwise arranged for disposal or treatment, or arranged with a transporter for transport for disposal or treatment, of hazardous substances owned or possessed by such person, by any other party or entity, at any facility or incineration vessel owned or operated by another party or entity and containing such hazardous substances...shall be liable... 42 U.S.C. § 9607(a)(3)

²³⁷*Dedham Water Co. v. Cumberland Farms Dairy, Inc.*, 889 F.2d 1146 (1st Cir. 1989); *U.S. v. Monsanto Co.*, 858 F.2d 160 (4th Cir. 1988).

²³⁸*U.S. v. R.W. Meyer, Inc.*, 889 F.2d 1497 (6th Cir. 1989); *U.S. v. Monsanto Co.*, 858 F.2d 160 (4th Cir. 1988).

²³⁹The so-called "molecule rule" inherent in the definition of release as "...any spilling, pouring, emitting, emptying, discharging, injecting, escaping, leaching, dumping, or disposing into the environment..." (emphasis added). CERCLA § 101(22); 42 U.S.C. § 101(22).

²⁴⁰*U.S. v. Wade*, 577 F. Supp. 1326 (E.D. PA 1983).

some unascertainable amount for an event that, should it occur, may not even involve the waste produced by the offeror's hazardous material.

While CERCLA may be unfair, the competitive process is not supposed to be so. Given the practical impossibility of assigning a cost to potential liability, it does not lend itself to use as a life-cycle cost evaluation factor.²⁴¹ Even if the *Southwestern Bell* broad view of specificity of cost evaluation factors is adopted, the elements of cost evaluated must still be "determinable."²⁴² Life-cycle costing of both remedial action and potential liability in the hazardous materials context also essentially involves an effort to determine the cost of Government self-insurance, an "indefinite" and "speculative" cost. Therefore, while evaluation of potential liability is proper as part of the acquisition planning process, its use as a life-cycle cost factor *in the solicitation* should probably be confined to use as a decision factor in those solicitations utilizing the more subjective "best value" source selection technique²⁴³ or as

²⁴¹There are methods to monetize the costs of potential liability, however, they do not yet appear to have the definitiveness and determinability necessary to use them as cost evaluation factors. See Paul E. Bailey, "Life-Cycle Costing and Pollution Prevention," *Federal Facilities Environmental Journal*, Volume 2, Number 2, Summer 1991.

²⁴²*Supra* note 226 and accompanying text.

²⁴³"Best value" is a source selection technique used in negotiated procurements that evaluates factors such as technical expertise, risk, and past performance as equal to, or of greater weight than cost. The best value source

a price related factor to be considered in a "least-cost"

selection technique allows for wide cost-technical trade-offs by the source selection official as long as the trade-offs are consistent with the stated evaluation plan and higher cost can be justified by the additional technical expertise of the offeror.

The "best value" technique has had its greatest application in automatic data processing equipment (ADPE) procurements. In protests of ADPE procurements the General Services Administration Board of Contract Appeals has usually upheld the use of best value source selection (*See Lockheed Missiles & Space Co. and International Business Machines Corp. v. Dept. of Treasury*, GSBGA No. 11776-P (TMAC II), 1992 BPD ¶ 155 (legal standard of GSBGA review of best value determinations is not perfection or accuracy but reasonableness); *TMAC II* (no formulaic methodology for best value determinations; what matters is consistency with terms of solicitation and justification of price premium by specific technical enhancements); *CompuAdd Corp. v. Department of the Air Force*, GSBGA No. 12301-P, 1993 WL 173655 (G.S.B.C.A.) (Government permitted to exercise considerable discretion in conducting trade-off analysis to determine what constitutes "best value").

The Comptroller General has also upheld the use of the best value source selection technique (*See Pannesma Co. Ltd. Comp. Gen. Dec. B-251688*, 1993 WL 126417 (C.G.) (selection of awardee based on its overall technical superiority, notwithstanding higher cost, is unobjectionable where solicitation provided that technical considerations were more important than cost and the agency concluded that technical superiority was worth extra cost); *Herley Industries, Inc.*, Comp. Gen. Dec. B-251792.2 (April 16, 1993) (agency may properly consider risk of technical approach in evaluation even when not a stated evaluation factor since risk involved is inherent in an offeror's technical approach).

Over the last several years, best value has been use in the selection of remedial action and hazardous waste disposal contractors (*See CORVAC Inc. infra* note 271 and accompanying text and *JCI Environmental Services infra* note 268 and accompanying text) *See also* Philip G. Bail, Jr. "'Best Value' Procurement For Hazardous Waste and Remediation Services," *Contract Management*, 22, April 1993 and Gregory L. Fronimos, *Responsibility Determinations On Department of Defense Environmental Cleanup Contractors: Caveat Vendori?* (1993) (unpublished LL.M thesis, The National Law Center. George Washington University).

pricing scheme in sealed bid procurements.²⁴⁴

²⁴⁴The potential cost of remedial action and liability would be suitable factors to be considered as part of a percentage "add-on" to cover negative environmental externalities. As discussed *supra* page 75, the purpose of such a "least-cost" price factor is to reflect the cost of environmental impacts which are not easily monetized.

CHAPTER 4

PURCHASING ENVIRONMENTAL RESPONSIBILITY

All of the Government's environmental consciousness in purchasing goods and services is for naught if it hires an environmentally unconscious contractor to produce the product or perform the service. While OFPP Policy Letter 92-4 specifically states that it is not meant to dictate manufacturing or performance requirements in the interest of pollution prevention, ¶ 6b states, in part: "Executive agencies shall give preference in their procurement programs to practices...that...protect the environment..."(emphasis added) Arguably this language requires some attention to the environmental aspects of contractor performance. Regardless of the interpretation given to this language, potential Government liability for environmental damage caused by its contractors²⁴⁵ and the accompanying negative publicity,

²⁴⁵Recent cases have held customers (including the Government) liable for CERCLA clean-up costs based on the actions of their contractors. See for example *Jones-Hamilton Co. v. Beazer Materials & Services*, 973 F.2d 688 (9th Cir. 1992) (customer who supplied and retained ownership of hazardous materials supplied to contractor for manufacture of wood preservative under contract which contemplated 2% spillage of materials, "arranged for disposal" of those materials under CERCLA); *U.S. v. Velsicol Chemical Corp.*, 701 F. Supp. 140 (W.D. Tenn. 1987) (Velsicol held to have "arranged for disposal" when contractor improperly disposed of hazardous substances generated in the process of producing pesticides from chemicals supplied by Velsicol); *U.S. v. Aceto Agricultural Chemicals Corp.*, 872 F.2d 1373 (8th Cir. 1989) (nearly identical facts as *Velsicol* with similar

provides impetus enough to ensure that the contractor selected to perform the work has a record of environmental compliance and responsibility.

A. Environmental Responsibility Determinations

The first, and most important, step in ensuring "green" contractor performance is to consider the contractor's environmental responsibility as part of the selection process. While FAR 23.103(b) prohibits the award of a contract to a facility on EPA's list of Clean Air and Clean Water Act violators²⁴⁶, this does nothing to ensure the environmental responsibility of unlisted contractors. Consequently, in appropriate situations, environmental factors should be part of the responsibility criteria used to award a contract.

Before awarding a contract, FAR 9.103(b) requires the contracting officer to make an affirmative determination of

conclusion but expansion to include RCRA liability for "contributing to the improper handling or disposal of hazardous waste"); *Dickerson v. Holloway*, 685 F. Supp. 1555 (M.D. Fla. 1988) (Government held liable for negligently failing to supervise a PCB removal contractor which resulted in PCB oil being sold and used in manufacture of road asphalt); *FMC Corp. v. U.S. Dept. of Commerce*, 1992 U.S. Dist. LEXIS 2355 (E.D. Pa. 1992) (Department of Commerce held liable for the disposal of hazardous substances as "operator" of high tenacity rayon yarn manufacturing plant during World War II under its War Production Board authority).

For a discussion of the liability issues in Government Owned-Contractor Operated (GOCO) facilities contracts see E. David Hoard, EPA Enforcement Against Government Owned-Contractor Operated Facilities: Merely Extra Innings or a Whole New Ballgame? (1988) (unpublished LL.M thesis, National Law Center, George Washington University).

²⁴⁶ See pages 34 and 35 *supra*.

contractor responsibility.²⁴⁷ In making this determination the contracting officer must consider the general responsibility criteria set forth in FAR 9.104-1.

1. Gathering Information

Prior to making a determination of responsibility "the contracting officer shall possess or obtain information sufficient to be satisfied that a prospective contractor currently meets the applicable standards in 9.104."²⁴⁸ One mechanism to gather the necessary information is the pre-award survey.

A pre-award survey evaluates "a prospective contractor's capability to perform a proposed contract."²⁴⁹ FAR 9.106-1

²⁴⁷FAR 9.103(b) states in part:

No purchase or award shall be made unless the contracting officer makes an affirmative determination of responsibility.

FAR 9.105-2(a) states that "The contracting officer's signing of a contract constitutes a determination that the prospective contractor is responsible with respect to that contract." The Comptroller General has generally followed this guidance (*See Aesculap Instruments Corp.*, Comp. Gen. Dec. B-208202, 83-2 CPD ¶ 228 (1983); *Pratt & Whitney Aircraft Engines*, Comp. Gen. Dec. B-232190, 89-2 CPD ¶ 275 (1989); *Moheat*, Comp. Gen. Dec. B-239378, 90-1 CPD ¶ 446 (1990)).

Recently, however, one Federal District Court has held, without reference to FAR 9.105-2(a), that a contracting officer's failure to make a required responsibility determination was an error prejudicial to a disappointed bidder allowing reversal of an agency award decision and requiring award to the next lowest, responsive and responsible bidder (*Action Service Corp. v. Garrett*, 790 F. Supp. 1188 (D.P.R. 1992) *reconsid. den.* 797 F. Supp. 82 (D.P.R. 1992)).

²⁴⁸FAR 9.105-1(a).

²⁴⁹FAR 9.101.

states that pre-award surveys are required when there is insufficient information available to make a determination of contractor responsibility.²⁵⁰ Contracting officers request pre-award surveys using the Standard Form (SF) 1403, *Preaward Survey of Prospective Contractor (General)*. Among the areas covered on the form are environmental/energy considerations.²⁵¹ FAR 9.106-2 allows the contracting officer to "identify additional factors about which information is needed" and the SF 1403 permits the contracting officer to list specific areas of inquiry in the remarks section which may include specific areas of environmental responsibility he or she desires to be addressed in the survey.

Although it should, FAR 9.104-1 does not specifically require consideration of environmental factors as part of the affirmative responsibility determination required by FAR 9.103(b). FAR 9.104-1 does, however, require that the offeror's past performance record and record of integrity and

²⁵⁰FAR 9.106-1(a) states that pre-award surveys should not be requested if the contract: "1) will be for \$25,000 or less or 2) will have a fixed price of less than \$100,000 and will involve commercial products (see 11.001) only...unless circumstances justify its cost."

Whether a pre-award survey is conducted is a matter of contracting officer discretion. The Comptroller General has held that pre-award surveys are not required prior to making an affirmative determination of responsibility. He will not review protests based on lack of a pre-award survey unless there is a showing of fraud or bad faith (*Burtek, Inc.*, Comp. Gen. Dec. B-217567, 85-2 CPD § 179).

²⁵¹SF 1403, Block 20(F).

business ethics be considered.²⁵² Environmental factors can certainly be considered in these areas.

2. Past Environmental Performance

Although consideration of the offeror's record of performance is usually directed at ascertaining prior defaults or performance problems experienced by a offeror, the contracting officer can and should, when relevant to the contract at hand, also examine the contractor's record of environmental compliance on previous contracts.

OFPP Policy Letter 92-5 establishes policies that require Executive agencies to prepare evaluations of contractor performance based on Past Performance Information (PPI) on all contracts over \$100,000; to use past performance information in making responsibility determinations in both sealed bid and competitively negotiated procurement; and to specify past performance as an evaluation factor in solicitations for offers for all competitively negotiated contracts expected to exceed \$100,000.²⁵³

OFPP Letter 92-5 defines PPI as including:

[T]he contractor's record of conforming to specifications and to standards of good workmanship; the contractor's record of containing and forecasting costs on any previously performed cost reimbursable contracts; the contractor's adherence to

²⁵²FAR 9.104-1(c) and (d).

²⁵³58 Fed. Reg. 3573 (January 11, 1993).

contract schedules, including the administrative aspects of performance; the contractor's history for reasonable and cooperative behavior and commitment to customer satisfaction; and generally, the contractor's business-like concern for the interest of the customer.²⁵⁴

The policy letter does not define the sort of information to be considered under these criteria, however, observance of environmental standards, minimization of environmental damage and utilization of environmentally-sound materials, processes and performance certainly fall within the scope of "conforming to specifications and to standards of good workmanship."²⁵⁵

OFPP Letter 92-5 will undoubtedly focus more attention on the utilization of past performance in general and perhaps environmental past performance information particularly in

²⁵⁴OFPP Letter 92-5 ¶ 3c. Past performance information must arguably have some relevance to the work to be performed. Otherwise, offerors with performance problems in unrelated work would find themselves permanently disadvantaged for all future contracts. However, requiring past performance information can lead to some unfortunate results.

If for example, a well-established company seeks to branch out into another field, it will lack a performance history. Although OFPP Letter 92-5 ¶ 6(d) establishes a policy to "allow newly established firms to compete for contracts even though they lack a history of past performance," OFPP admitted that "if past performance is specified in the solicitation for offers as an award factor, a firm with a proven performance history generally would be preferred over a firm without a performance history, if all other factors were equal." (Supplementary Information ¶ 9, 58 Fed. Reg. 3573 (January 11, 1993))

²⁵⁵For an example of the use of past performance in a "best value" hazardous waste disposal contract solicitation using a definition of past performance similar to that of OFPP Letter 92-5 see *Federal Environmental Services, Inc.*, Comp. Gen. Dec. B-250135 (May 24, 1993), 1993 WL 188629 (C.G.).

selecting contractors.

Practical problems exist in evaluating past performance, primarily the contracting officer's ability to obtain this information, although OFPP Letter 92-5's requirement for past performance evaluations should help minimize this.²⁵⁶ A centralized data bank on contractor past performance to facilitate contracting officer's research proposed by OFPP has been objected to as possibly resulting in *de facto* debarment without formal due process.²⁵⁷

Another problem arises from the subjectivity of past performance ratings. Contracting officers who have experienced many requests for equitable adjustment, frequent claims, or delays may label a contractor as "bad" even if the contractor's actions were justified. However, the

²⁵⁶ See note 253 *supra* and accompanying text.

²⁵⁷ See Philip G. Bail, Jr. "'Best Value' Procurement For Hazardous Waste And Remediation Services," *Contract Management*, 22, April 1993. OFPP backed-off on this proposal somewhat in its comments accompanying OFPP Letter 92-5:

Many Federal agencies commented that the provisions in the draft Policy Letter that would have required agencies to establish "formal systems" for compiling and using PPI were unnecessary and impractical. The provision was generally interpreted as requiring agencies to fund the establishment of automated systems and central data banks. The agencies indicated in their comments that they did not have funds for this purpose. While automated systems may be appropriate for major contracting centers or in some agencies, the Policy Letter has been changed to only require that PPI be used and that existing systems be reviewed to determine if they can be consolidated. Agency procedures for obtaining and using PPI (including systems, if any) must still comply with the fairness and openness provisions of Paragraph 7. of the Policy Letter.

contractor's ability under OFPP Letter 92-5 to submit statements in response to the contracting officers' past performance evaluation should inject more objectivity into the process.²⁵⁸

A final shortcoming is that past performance generally grades performance only on previous Government contracts and does not necessarily consider a prospective contractor's entire record of environmental violations and the environmental record of the contractor's overall operations and management. This problem too should be eased by OFPP Letter 92-5's guidance that obtaining past performance information should be obtained from past performance assessments by other agencies and private firms.²⁵⁹

3. Environmental Business Integrity and Ethics

Traditionally environmental considerations in responsibility determinations have focused strictly on environmental compliance as part of past performance. The use of an offeror's environmental compliance record as part of determining its business integrity and ethics is still relatively new, but has already withstood Comptroller General scrutiny.

In *Standard Tank Cleaning Corporation*,²⁶⁰ the protestor

²⁵⁸OFPP Letter 92-5 ¶ 7(a)(3).

²⁵⁹OFPP Letter 92-5 ¶ 7(a)7.

²⁶⁰Comp. Gen. Dec. B-245364, 1992 U.S. Comp. Gen. LEXIS 7.

challenged the contracting officer's business integrity and ethics nonresponsibility determination based on past environmental violations. Standard Tank submitted the low bid on a solicitation for tank, bilge and pipe cleaning service, gas freeing, hazardous waste analysis and contaminated liquids and hazardous waste removal from Navy surface ships. During the course of a pre-award survey, the contracting officer discovered that Standard Tank had been cited over 150 times between August 1983 and March 1991 by the New Jersey Department of Environmental Protection (DEP) for environmental violations. Eleven of those cases were still open and another 26 were pending resolution. Standard Tank owed \$101,925 in penalties and the DEP was seeking an additional \$7 million in fines. Several of the violations occurred at the facility Standard Tank proposed to use in performing the contract.

The pre-award survey revealed "an extended and serious history of environmental abuses by Standard Tank and affiliated corporations."²⁶¹ The contracting officer concluded that the evidence revealed "a failure by the firm's management to demonstrate the requisite integrity, responsibility and ability to comply with the solicitation requirements necessary for participation in a Government procurement" and determined Standard Tank to be

²⁶¹1992 U.S. Comp. Gen. LEXIS 7, *2.

nonresponsible.²⁶²

Standard Tank challenged the contracting officer's determination based on the inaccuracy of some the information and on the fact that seven months before the nonresponsibility determination it had taken action to correct its compliance problems. These actions included severing ties with its former president, hiring new management, retaining consultants to ensure environmental compliance, implementing an environmental training program and new procedures, and using new equipment.

Despite Standard Tank's allegations that the contracting officer failed to investigate the circumstances of its past violations, the Comptroller held that the contracting officer's nonresponsibility determination was reasonable:

Under our standard of review, a nonresponsibility determination may be based on the contracting officer's reasonable perception of the contractor's previous performance on government contracts, even where the contractor disputes the agency's interpretation of the facts or has appealed adverse determinations. [citation omitted] We think that this standard should also apply to a case such as this where the determination concerns a firm's integrity as opposed to just its past performance on government contracts because in both instances the agency must consider and evaluate information concerning the firm's past operation.²⁶³

Standard Tank also argued that the contracting officer ignored its efforts to "clean up its act." The Comptroller

²⁶² *Ibid.*

²⁶³ *Id.* at *11.

disagreed, noting that its actions in this regard were taken only seven months before the contracting officer's determination and:

Considering the long history of the firm's serious problems with various environmental enforcement entities, we do not think this relatively short time under the new management combined with at least some continuing problems with the enforcement authorities compels a conclusion that Standard Tank has not shown a current ability and willingness to comply with environmental regulations.²⁶⁴

If environmental responsibility is used as a business integrity or ethics factor, contracting officers must remember that a prospective contractor is, under certain circumstances, entitled to due process before it is determined to be nonresponsible on the basis of integrity alone.²⁶⁵

4. Responsibility Factors v. Evaluation Factors

Environmental factors, particularly past performance, have been used as responsibility factors in both sealed bid and competitively negotiated procurement and as technical evaluation factors in negotiated procurement. The standard of Comptroller General review and the rights of the unsuccessful offeror are different depending on how the environmental

²⁶⁴*Id.* at *17.

²⁶⁵See *Old Dominion Dairy Products, Inc. v. Secretary of Defense*, 631 F.2d 953 (D.C. Cir. 1980). But see *Standard Tank Cleaning* *supra* note 260 (no *de facto* debarment, and no requirement for *Old Dominion* due process, resulted from two other integrity-based nonresponsibility determinations on "virtually contemporaneous" procurements based "upon essentially the same current information").

factors are used.

Generally, the Comptroller General will not disturb the contracting officer's determination of responsibility or nonresponsibility unless he finds fraud, bad faith or a lack of reasonable basis for the determination.²⁶⁶ When reviewing protests under competitive negotiation, the Comptroller General will overturn the source selection official only when the selection has no rational basis or is inconsistent with the stated evaluation criteria.²⁶⁷ The Comptroller General's decisions in several protests involving past environmental performance point out the differences between its use as a responsibility factor or a technical evaluation criteria.

In *JCI Environmental Services*,²⁶⁸ the protestor was unsuccessful in obtaining a Defense Logistics Agency (DLA) contract for removal, transportation, and disposal of approximately 6,450,714 pounds of hazardous wastes from a Defense Reutilization and Marketing (DRMO) location at

²⁶⁶*Action Service Corp.*, Comp. Gen. Dec. B-246413, 1992 WL 55045 (C.G.); *Burtek Inc.*, Comp. Gen. Dec. B-217567, 85-2 CPD ¶ 179; *System Development Corp.*, Comp. Gen. Dec. B-212624, 83-2 CPD ¶ 644; *Decision Sciences Corp.*, Comp. Gen. Dec. B-188454, 77-2 CPD ¶ 188. See also *American Dredging Company*, Comp. Gen. Dec. B-212212, 83-2 CPD ¶ 130, where the Comptroller General refused to consider the protestor's unsubstantiated allegations that the low bidder was nonresponsible for bidding on the basis that no environmental standards would be imposed on performance and for intending to perform the contract in violation of both State and Federal environmental standards.

²⁶⁷*Instrument Control Service, Inc.*, Comp. Gen. Dec. B-247286, 92-1 CPD ¶ 407.

²⁶⁸Comp. Gen. Dec. B-250752, 1993 WL 116094 (C.G.).

Alameda, California and 23 surrounding locations. JCI's proposal was lower rated technically but much lower priced than the awardee's proposal.

The solicitation provided that award was to be made to the offeror whose proposal was technically acceptable and demonstrated the "best value" to the Government in terms of price and past performance. Under the evaluation scheme, price was most important with past performance, though significant, of somewhat less importance.

With respect to past performance, offerors were invited to submit an optional past performance proposal regarding the level of performance, in terms of delivery and quality achieved, under Government or commercial awards for the same or similar services within the last 2 years. The RFP explained that the assessment of past performance would be used as a means of evaluating the relative capability of the offeror and other competitors. Thus, an offeror with an exceptional past performance record could receive a more favorable evaluation than one whose record was acceptable, even though both could have acceptable technical proposals. Among other things, offerors submitting past performance proposals were to address identified deficiencies and explain corrective action taken. Offerors were advised that the agency would consider information in the proposal as well as information obtained from other sources. The offerors assumed all risk associated with the failure to provide the past

performance proposal and any explanation of performance deficiencies.

The evaluators found JCI's technical proposal acceptable as submitted. With regard to past performance, JCI did not submit a proposal, and the evaluators found JCI's only similar experience to be a DLA contract for removal, transportation, and disposal of hazardous waste from installations in and around the DRMO in Colorado Springs, Colorado. Based on JCI's past performance on that contract, which was terminated for default, the evaluators rated JCI's past performance as "marginally acceptable."

In determining which proposal presented the best value, the contracting officer considered the technical proposal, past performance, and price evaluations of all competitive range offerors. The contracting officer found that the third low offeror's proposal, with a past performance rating of "good" and a reasonable price, represented the best value in comparison to JCI's proposal with a performance rating of "marginally acceptable" and a price that was found unreasonably low.

JCI protested the award on several grounds, one of which was the unreasonableness of the award to the third low-bidder given the wide (almost \$4.5 million) disparity in prices. The Comptroller General held that the agency's decision was reasonable and consistent with the stated evaluation criteria and the cost/technical tradeoff done to determine the best

value to the Government was proper since the contracting officer:

noted that before being terminated for default, JCI had violated various EPA regulations and that government hazardous waste had been returned from disposal facilities and other waste was unaccounted for. The contracting officer found that these violations exposed the government to many potential liabilities. He concluded that a potential risk for damage or harm to property and personnel would exist under any contract award to JCI.²⁶⁹

JCI alleged that the contracting officer's marginal technical acceptability rating constituted a determination of nonresponsibility. The Comptroller General disagreed, noting that JCI:

has been considered eligible for award. JCI has not been selected for award because it did not present the best value in part due to the agency's assessment of JCI's past performance. The agency's determinations were based upon technical evaluations, and not responsibility...²⁷⁰

*CORVAC, Inc.*²⁷¹ involved another DLA contract for the removal, transportation and disposal of miscellaneous hazardous items located at installations in and around the Naval Air Station at Corpus Christi, Texas. The RFP explained that proposals would be evaluated on the basis of price and past performance, with price being more important, and that award would be made to the offeror representing the "best

²⁶⁹1993 WL 116094 at *4.

²⁷⁰*Id.* at *5.

²⁷¹Comp. Gen. Dec. B-244766, 91-2 CPD ¶ 454 (1991).

value" to the Government ²⁷²

CORVAC was the second low offeror, with a price of \$3,646,855.40. However, the contracting officer rated CORVAC's past performance as marginally acceptable due to the numerous problems experienced by DLA during CORVAC's performance as the incumbent on the Corpus Christi contract.

The contracting officer decided to award to the third low

²⁷²With respect to past performance, the relevant portions of the RFP stated:

(1) The Government will evaluate the quality of the offeror's past performance. The assessment of the offeror's past performance will be used as a means of evaluating the relative capability of the offeror and the other competitors. Thus, an offeror with an exceptional record of past performance may receive a more favorable evaluation than another whose record is acceptable, even though both may have acceptable technical and management proposals.

(3) Evaluation of past performance will be a subjective assessment based on a consideration of all relevant facts and circumstances. It will not be based on absolute standards of acceptable performance. The Government is seeking to determine whether the offeror has consistently demonstrated a commitment to customer satisfaction and timely delivery of services at fair and reasonable prices. This is a matter of judgment. Offeror's will be given an opportunity to address especially unfavorable reports of past performance, and the offeror's response--or lack thereof--will be taken into consideration....

(4) Past performance will not be scored, but the Government's conclusions about overall quality of the offeror's past performance will be highly influential in determining the relative merits of the offeror's proposal and in selecting the offeror whose proposal is considered most advantageous to the Government.

(5) By past performance, the Government means the offeror's record of conforming to specifications and to standards of good workmanship; the offeror's adherence to contract schedules, including the administrative aspects of performance; the offeror's reputation for reasonable and cooperative behavior and commitment to customer satisfaction; and generally, the offeror's business-like concern for the interest of the customer.

bidder, USPCI, explaining:

I believe that USPCI's proposal represents the optimal combination of performance and cost. The type of past performance problems experienced by CORVAC could potentially cost the Government a lot more financially and otherwise than the price difference between the two offers. It is reasonable to expect from USPCI's very good past performance that these types of problems will not occur if USPCI is awarded the contract ... it is sometimes a false economy to make decisions based solely on low initial price.... Some of the same problem areas cited by TWC [Texas Water Commission], i.e., improper manifesting, improper storage, are problem areas Corvac's performance problems impact.... To pay 29 percent more for a contractor rated very good on past performance over one rated marginally acceptable on past performance is a reasonable investment for the Government on a contract dealing with HW [hazardous waste] removal and disposal and all the environmental risks and potential liabilities such a contract entails.²⁷³

As part of its protest, CORVAC alleged that the contracting officer's determination concerning past performance was really a nonresponsibility determination since it pertained to the company's capability to perform. The Comptroller General disagreed, holding:

Where an offeror is found deficient under criteria specified in the RFP, the matter is one of technical acceptability, not responsibility. While past performance may traditionally be considered a responsibility factor, such factors may be used as technical evaluation criteria in negotiated procurement where the circumstances warrant a comparative assessment of those areas.²⁷⁴

²⁷³1991 WL 251275, *2.

²⁷⁴*Id.* at *3.

Even when the Comptroller disagrees with the agency's evaluation, he will not, based on that disagreement, find the agency's proposal evaluation unreasonable, particularly where highly technical judgments are involved and the procurement is for potentially hazardous services.²⁷⁵

The key to differentiating between past performance as a responsibility factor and a technical evaluation criteria is whether the responsibility-type past performance evaluation factor was used for comparing the merits of the proposals received. If it is not so used, an adverse determination based on poor past performance will likely be seen to be an adverse responsibility determination.²⁷⁶

As noted *supra*, multiple determinations of nonresponsibility that constitute a *de facto* debarment may afford the bidder due process rights not normally granted for nonresponsibility determinations. However, the Comptroller General has uniformly held that multiple award denials based upon poor technical evaluations using traditional responsibility factors such as past performance do not constitute *de facto* debarment or suspensions.²⁷⁷ Nor do such

²⁷⁵ *CORVAC, Inc.*, Comp. Gen. Dec. B-244766, 91-2 CPD ¶ 454 (1991); *Chemical Waste Management, Inc.*, Comp. Gen. Dec. B-232276, 88-2 CPD ¶ 590 (1988).

²⁷⁶ *Sanford and Sons Company*, Comp. Gen. Dec. B-231607, 88-2 CPD ¶ 266 (1988).

²⁷⁷ *JCI Environmental Services*, Comp. Gen. Dec. B-250752, 1993 WL 116094 (C.G.); *Bannum, Inc.*, Comp. Gen. Dec. B-249758, 92-2 CPD ¶ 373 (1992), 1992 WL 346603 (C.G.).

unfavorable evaluations constitute a nonresponsibility determination requiring referral to the Small Business Administration.²⁷⁸

B. Developing Environmental Responsibility/Evaluation Factors For Business Integrity And Ethics

There is a case for expanding the traditional focus on environmental compliance when it comes to the area of environmental business integrity and ethics. Recently, instilling environmental awareness into corporate operations has garnered many advocates and practitioners and is becoming widely accepted in the civilian sector.²⁷⁹ Although corporate environmental awareness is becoming part of many contractor's self-governance programs, there are no established criteria to guide contracting officers in measuring an offeror's environmental integrity and ethics. Three recent initiatives, two private the other Federal, provide some guidance in developing criteria for evaluating contractor environmental responsibility.

1. What To Consider

After the *Exxon Valdez* incident, a group of investment companies and environmental groups developed a list of

²⁷⁸ CORVAC, Inc., Comp. Gen. Dec. B-244766, 91-2 CPD ¶ 454 (1991).

²⁷⁹ See for example Joel Makower, *The E Factor: The Bottom-line Approach to Environmentally Responsible Business*, Times Books, 1993.

environmental factors they would examine in determining whether to invest in a business. Initially known as the Valdez Principles and now known as the CERES Principles, they provide a useful guide for establishing an offeror's environmental responsibility as a function of business integrity and ethics.²⁸⁰

The CERES Principles are:

1. *Protection of the Biosphere:* Companies will minimize the release of any pollutant that may damage the air, water or earth.
2. *Sustainable Use of Natural Resources:* Companies will make sustainable use of renewable natural resources, including protection of wildlife habitats, open spaces and wilderness.
3. *Reductions and Disposal of Waste:* Companies will minimize waste and recycle whenever possible.
4. *Wise Use of Energy:* Companies will use environmentally safe energy sources and invest in energy conservation.
5. *Risk Reduction:* Companies will minimize environmental and health risks to local communities.
6. *Marketing of Safe Products and Services:* Companies will sell products or services that minimize adverse environmental impacts and are safe for consumer use.
7. *Damage Compensation:* Companies will take responsibility through cleanup and compensation for environmental harm.
8. *Disclosure:* Companies will disclose to employees and communities incidents that cause environmental harm or pose health or safety

²⁸⁰ See *A New Face in Corporate Environmental Responsibility: The Valdez Principles*, 18 B.C. Env't'l Aff. L. Rev. 457; *The Valdez Principles: A Corporate Counselor's Perspective*, 26 Wake Forest L. Rev. 11; *The Valdez Principles: A Corporate Self-Governance Code of Environmental Conduct*, 2 GEO. Int'l Env't'l L. Rev. 237. The CERES Factors can be obtained from the Council for Environmentally Responsible Economies (CERES), 711 Atlantic Avenue., 5th Fl., Boston, MA 02111.

hazards.

9. *Environmental Directors:* At least one member of the board of directors will be qualified to represent environmental interests and a senior executive for environmental affairs will be appointed.

10. *Annual Audit:* Companies will conduct annual self-evaluation of progress in implementing these principles and make the results of independent environmental audits available to the public.

Another guide for corporate responsibility is the International Chamber of Commerce's Business Charter for Sustainable Development.²⁸¹ The Business Charter's principles are:

1. *Corporate Priority:* Environmental management should be a corporate priority at the highest levels to include the establishment of policies, programs, and practices to for conducting operations in an environmentally sound manner.

2. *Integrated Management:* Environmental policies, programs, and practices should be integrated into each business as an essential element of management.

3. *Process of Improvement:* Corporate policies, programs, and environmental performance should continually improve as scientific understanding and technical developments change.

4. *Employee Education:* Employees should be educated, trained, and motivated to work in an environmentally responsible manner.

5. *Prior Assessment:* Environmental impacts should be assessed prior to action.

6. *Products and Services:* Develop and provide products or services that have no undue environmental impact.

7. *Customer Advice:* Businesses should advise

²⁸¹The Business Charter for Sustainable Development is championed by the Global Environmental Management Initiative (GEMI) 1828 L. Street NW, Washington DC 20036. GEMI boasts as members some large DOD contractors such as Boeing, DuPont and Dow. GEMI has also developed a Total Quality Environmental Management (TQEM) program for industry.

and educate persons who handle, sell, or use the business' products how to safely use, transport, store and dispose of products.

8. *Facilities and Operations:* Businesses should develop, design and operate facilities and conduct activities taking into consideration the efficient use of energy and materials, the sustainable use of renewable resources, the minimization of adverse environmental impact and waste generation, and the safe and responsible disposal of residual wastes.

9. *Research:* Businesses should support research on the environmental impacts or raw materials, products, processes, emissions and wastes associated with the enterprise and on the means of minimizing such adverse impacts.

10. *Precautionary Approach:* Businesses should seek to modify the manufacture, marketing or use of products or services or the conduct of activities to prevent serious or irreversible environmental degradation.

11. *Contractors and Suppliers:* Businesses should promote adoption of these principles by subcontractors and suppliers.

12. *Emergency Preparedness:* Develop and maintain emergency action plans when significant hazards exist.

13. *Transfer of Technology:* Businesses should contribute to the transfer of environmentally sound technology and management throughout the business and public sectors.

14. *Contributing to the Common Effort:* Businesses should contribute to the development of programs and educational initiatives that will enhance environmental awareness and protection.

15. *Openness to Concerns:* Businesses should foster openness and dialogue with employees and the public about the potential impacts and hazards of their products, operations, services, or wastes.

16. *Compliance and Reporting:* Businesses should measure environmental performance; conduct regular environmental audits and assessments and periodically provide appropriate information to the public and Government.

On December 12, 1991, EPA issued its *Policy Regarding the*

*Role of Corporate Attitude, Policies, Practices and Procedures, in Determining Whether to Remove a Facility From the EPA List of Violating Facilities Following a Criminal Conviction.*²⁸² These guidelines apply to evaluating petitions for removal from companies and facilities that have been mandatorily listed as ineligible to receive contracts because of criminal convictions for violations under section 306 of the Clean Air Act or section 508 of the Clean Water Act. One of the areas examined under the guidelines is whether the owner, operator, or supervisor of a facility has put in place an effective program to prevent and detect environmental problems and violations of the law.

EPA will also consider additional voluntary environmental cleanup, or pollution prevention or reduction measures performed, above and beyond those required by statute or regulation, and voluntary compliance with pending environmental requirements significantly earlier than such compliance is actually required.

While all of the factors in these three initiatives may not be directly applicable to a Federal procurement, they do serve as useful guides for what the private sector is able, and generally willing, to comply with in the area of environmental responsibility. Given the current and growing

²⁸²56 Fed. Reg. 64,785 (December 12, 1991).

corporate focus on being "green,"²⁶³ the time is right for environmental business integrity and ethics to formally take its place in determining offeror responsibility or technical competence.

2. Suggested Environmental Responsibility Factors

The guidance offered by the above initiatives can be distilled to five main criteria that should be required for an affirmative responsibility determination for environmental integrity and ethics: 1) the number and reasons for any Federal or state citations for environmental violations; 2) whether the contractor has any currently unresolved or uncorrected environmental violations whether or not the subject of EPA or state sanctions; 3) whether the prospective contractor's management has exhibited an institutional commitment to protect the environment, for example by appointing a senior company official to be responsible for employee environmental training and overseeing a company-wide environmental compliance program; 4) whether the prospective contractor has implemented an effective pollution prevention, source reduction and emergency response plan; and 5) whether the prospective contractor has at least an annual environmental audit program to identify and correct potential

²⁶³ McDonald's, for example, touts its environmental awareness on its placements, while Chevron pitches its environmental consciousness, not its gasoline, in television commercials.

environmental problems, the most recent copy of which should be made available for contracting officer review prior to award.

Not every contract requires an environmental business integrity and ethics responsibility determination. Generally, such a determination should be made when 1) the contract is a GOCO facility contract (including installation operation and maintenance contracts); 2) the contract will constitute a substantial portion of the contractor's total business; 3) hazardous materials are used or hazardous waste is generated in the performance of the contract; or 4) the contract is for environmental remediation²⁸⁴ or hazardous waste disposal.

Implementing past environmental performance and overall environmental responsibility as part of the business integrity determination, will go far toward ensuring that the Government has not selected an environmentally unconscious contractor to perform its environmentally conscious contract.

²⁸⁴For a detailed discussion of responsibility determinations in remedial action contracts see Gregory L. Fronimos, Responsibility Determinations On Department of Defense Environmental Cleanup Contractors: *Caveat Vendori?* (1993) (unpublished LL.M thesis, The National Law Center George Washington University).

CHAPTER 5

FUTURE GROWTH OF BUYING "GREEN"

There are currently two major shortcomings in the "green" procurement program for Government contracts. First, FAR Part 23 which contains the requirements and guidance for contracting officer's implementation of environmental procurement actions, is very vague and does little more than parrot language from RCRA section 6002. Many of the implementation techniques and strategies discussed *supra*, are not mentioned in the FAR. Even if contracting officer's sought to expand environmentally-sound procurement, the FAR gives them nothing to hang their hats on.

Second, the goals of creating markets for environmentally-sound products and forcing the Government to be a "green" consumer cannot be fully reached unless Congress authorizes the payment of price preferences to overcome bureaucratic discomfort with this issue.

There are currently two regulatory and statutory initiatives that may prove to be remedies for these defects. Additionally, President Clinton, who campaigned as a friend of the environment, has promised action that will continue to grow "green" procurement.

A. The FAR Changes Subcommittee Report²⁸⁵

On March 25, 1993 the FAR Changes Subcommittee²⁸⁶ of the FAR Council recommended changes to the FAR required by OFPP Letter 92-4 ¶ 11. The recommendations were based on 92-4, RCRA, Executive Order 12780 and a survey of the Senior Procurement Executives. Eleven FAR Parts were affected by the subcommittee's recommendations.²⁸⁷ The most important recommendations are discussed *infra*.

1. FAR Part 23-Environment, Conservation, Occupational Safety and Drug-Free Workplace

Since most of the other proposed changes reference Part 23, the extensive rewrite recommended by the Council is the heart of the "greener" FAR.

The proposed Subpart 23.1 greatly expands the limited policy currently set forth in this subpart²⁸⁸ to encompass

²⁸⁵This section is based on an internal copy of the subcommittee's recommendations.

²⁸⁶The subcommittee was made up of representatives from the Department of Commerce, DOD, EPA, the Defense Logistics Agency, the Department of the Treasury, OFPP, NASA and the Department of Transportation.

²⁸⁷Part 2 (Definitions of Words and Terms); Part 7 (Acquisition Planning); Part 8 (Required Sources of Supplies and Services); Part 10 (Specifications, Standards, and Other Purchase Descriptions); Part 11 (Acquisition and Distribution of Commercial Products); Part 15 (Contracting By Negotiation); Part 17 (Special Contracting Methods); Part 23 (Environment, Conservation, Occupational Safety, and Drug-Free Workplace); Part 36 (Construction and Architect-Engineer Contracts); Part 42 (Contract Administration); and Part 52 (Solicitation Provisions and Contract Clauses).

²⁸⁸See page 23 *supra*.

all aspects of environmentally-sound procurement and the goals to be achieved thereby:

It is the Government's intent to improve the nation's environment through its acquisition policies and procedures. Acquisition plans (Part 7), specifications, standards and other purchase descriptions (Part 10), and source selection methods (Part 15) shall be structured to consider:

(a) Preference and promotion of environmentally-sound and energy-efficient products and services;

(b) Fostering pollution prevention;

(c) Reducing the generation of hazardous waste;

(d) Promoting the use of nonhazardous and recovered materials;

(e) Achieving environmental compliance and improvement by:

(1) Creating environmentally beneficial plans, drawings, specifications, standards, and other purchase descriptions that include the means to achieve benefits such as allowing material substitutions, extensions of shelf-life, and process improvements;

(2) Using evaluation factors which accord higher evaluative weight to offerors submitting environmentally superior proposals, e.g., proposals offering nontoxic substitutes for toxic materials, process improvements to reduce pollution o[r] the use of recovered materials;²⁸⁹

²⁸⁸The part of the paragraph dealing with process improvements appears to encourage reduction in the use of recovered materials. In addition to a typographical error which rendered "or" as "ot", it seems the clause is poorly worded. To be consistent with the overall program to reduce

(3) Otherwise employing acquisition strategies that affirmatively implement the environmental responsibilities and objectives set forth in the subparts herein;

(f) Realizing life-cycle cost savings.

Subpart 23.3, *Energy Conservation*, has been rewritten to incorporate Executive Orders 12759 and 12780, OFPP Policy Letter 92-4 and the Energy Policy Act of 1992. The proposed subpart will require the consideration of energy-efficiency in the procurement of products and services and in the development of plans, drawings, specifications, and other products descriptions.

Subpart 23.5, *Use of Recovered Materials*, will now specifically incorporate the requirements of RCRA § 6002(d) regarding contract specifications promoting the use of recovered materials.²⁹⁰ The requirements of EO 12780 and OFPP Letter 92-4 mandating preferences for recovered materials are now specifically listed. However, FAR 23.502 adopts the OFPP Letter 92-4 definition of preference thereby limiting their use to situations where products and services are equal in performance characteristics and price.

The committee's proposed Subpart 23.504 broadens the scope of the recovered materials program to encompass both Government and contractor purchases of EPA guideline materials

pollution and increase the use of recovered materials, the clause should probably read "reduce pollution by the use of recovered materials."

²⁹⁰ See notes 37 and 38 *supra*.

as well as "items for which there are no EPA procurement guidelines, but for which agencies may establish their own methods to purchase to the *maximum* extent practicable, items composed of recovered materials."

Subpart 23.504-1 establishes the following procedures to implement the preference for recovered materials:

Solicitations shall state a preference for products that are manufactured using recovered materials. While offers of products which do not contain recovered materials may be submitted, these offers will only be considered if--

(a) No responsive bid or technically acceptable offer from a responsible offeror is received offering products manufactured using recovered materials;

(b) Responsible offerors do not offer a sufficient quantity to meet the Government's requirements; or

(c) The price offered by a responsible bidder or technically acceptable offeror is determined by the contracting officer not to be fair and reasonable or the most advantageous using the techniques described at FAR 14.201-8 [Price-Related Factors] or 15.805. A comparison with proposed prices of products which do not contain recovered materials, by itself, shall not be a sufficient basis to conclude a higher price for a product manufactured using recovered material is not fair and reasonable or the best value. (emphasis added)

The above language seems to be a repudiation of EPA's interpretation of "unreasonable" price for recovered materials products being a price that is *any* higher than the price of its virgin counterpart.²⁹¹ It also specifically precludes

²⁹¹ See page 18 *supra*.

the competitive negotiation price comparison technique authorized at FAR 15.805-2(a).

However, since the committee proposed no further guidance on the mechanics of applying FAR 23.504-1(c), just what a contracting officer is to consider in evaluating sealed bids is puzzling. Simply applying the price-related factors of FAR 14.201-8²⁹² to both bids is unlikely to raise the price of the virgin product above that of the recovered materials product. Also, in the event of a tie bid, the committee has stated in a proposed Federal Acquisition Circular (FAC) that the mere fact that one of the bids proposes recovered material cannot be used as a tie breaker. The same proposed FAC makes clear that there is no price preference for recovered materials.²⁹³

Since only "price and the price-related factors included in the solicitation"²⁹⁴ can be considered in determining which bid is most advantageous to the Government, one could conclude that the committee intends to give contracting officers the ability to establish additional price related-factors in solicitations with recovered materials contents

²⁹²See page 73 *supra*.

²⁹³"A price preference has not been introduced by statute, Executive Order or Executive Branch policy. As such, the preference for the acquisition of environmentally-sound (ES), energy efficient (EE) products, services, and products manufactured with recovered materials would appear in the plans, drawings, statements of work, specifications or other product description."

²⁹⁴FAR 14.101(e).

requirements.

Also, of interest is the fact that offerors who submit bids not meeting the recovered materials preference are not necessarily nonresponsive. Their bids can be considered under the circumstances listed.

New procedures for determining when the RCRA waiver requirements for recovered materials²⁹⁵ applies are proposed as FAR 23.505. The procedures specifically require that the contracting officer's determination that a waiver is applicable "shall be in writing, signed and dated, and be maintained in the contract file."

2. FAR Part 7-Acquisition Planning

The committee has proposed adding as paragraph (n) to Subpart 7.103, a requirement that agency heads ensure:

[T]hat agency planners specify needs and develop plans, drawings, statements, specifications or other product descriptions promoting the use of environmentally-sound and energy-efficient (ES & EE) products and services (e.g., favoring the use of recovered material content), and that these are considered in the evaluation and award of contracts (see FAR Part 23).

3. FAR Part 10-Specifications, Standards, and Other Purchase Descriptions

The committee proposed the addition of a paragraph (e) to the policy provisions of FAR 10.002 to require agencies to

²⁹⁵See note 35 *supra* and accompanying text.

comply with the requirements of Part 23 when "drafting plans, drawings, specifications, standards (including voluntary standards),²⁹⁶ and purchase descriptions..."

FAR 10.004(a)(3)(ii) on tailoring specifications and standards will include requirements that product descriptions will be tailored "to achieve maximum practicable use of recovered and recycled materials" and that agencies use market research to determine the availability of recovered materials appropriate for tailored product descriptions.

4. FAR Part 11-Acquisition and Distribution of Commercial Products

The proposed amendment of the market research and analysis requirements of Subpart 11.004(b) places the maximum use of recovered materials on the same level as ensuring full and open competition and meeting the Government's minimum needs as market research and analysis goals.

FAR 11.004(c) will require that "the availability of the same or similar products that contain recovered materials" be an area on which information will be obtained during market research. Subparagraph (d) will specifically list the Recycled Products Information Clearinghouse as an information source for market research.

²⁹⁶FAR 10.001 defines a voluntary standard as "a standard established by a private sector body and available for public use. The term does not include private standards of individual firms. For further guidance, see OMB Circular No. A-119, Federal Participation in Development and Use of Voluntary Standards."

5. FAR Part 15-Contracting By Negotiation

Two very important changes are proposed for Part 15. The first is a proposed solicitation notice, applicable to both negotiated and sealed bid procurement but appearing as a preamble to Part 15, to be implemented by a FAC that states, in part:

This solicitation sets forth a minimum bonafide need and/or requirement of the Government. Prospective bidders and offerors are encouraged to include in their bids and/or proposals submitted in response to this solicitation to satisfy the minimum requirements set forth therein, items that are environmentally-sound, energy-efficient, and are composed of the highest percentage of recovered materials practicable without adversely affecting item performance.

Should this proposal be implemented, the gamble of proposing environmentally-sound alternatives to IFB requirements will be gone. Offerors will be free to propose the latest environmentally-safe products or technology for contract performance without fear of being held nonresponsive. However, the cost of those goods and technology may put the offeror at a price disadvantage.

Second, FAR 15.605(b) will require, when appropriate, "consideration of environmental factors. Environmental evaluation factors may be expressed in terms of resource conservation,²⁹⁷ environmental-soundness, energy-efficiency,

²⁹⁷The proposed FAR changes do not define "resource conservation," however, RCRA § 1004(21) defines it as "reduction of the amounts of solid waste that are generated,

and recovered material content." Life-cycle cost analysis is listed as another factor that may be included.

6. FAR Part 36-Construction and Architect-Engineer Contracts

In the past, the Federal "green" procurement program has focused mainly on supply and, to a lesser extent, service contracts. The proposed changes to FAR Part 36 will focus more attention on considering the environment in construction contracts, particularly at the design and contractor selection stages.

An added subparagraph (d) to FAR 36.202 will require that specifications for architect-engineer (A & E) contracts include terms and clauses requiring the A & E contractor to "insert guidelines for use of either the minimum content standards or the maximum practicable amount (whichever is greater) of [EPA guideline recovered materials] in the construction design specifications prepared under these contracts."²⁹⁸

The contracting officer is to obtain, prior to issuing the A & E solicitation, a signed statement from "the project manager, project engineer or other official having responsibility for the facility to be designed," that recovered materials can or cannot be used in construction of
reduction of overall resource consumption, and utilization of recovered resources."

²⁹⁸ Proposed FAR 36.601-3(d).

the facility.²⁹⁹ If the responsible person determines that recovered materials cannot be used, the statement must include a written explanation for that determination.³⁰⁰

The selection of A & E firms will also be impacted by the committee's proposals. FAR 36.602-1 will require that potential A & E contractors be evaluated in terms of their "demonstrated success in prescribing the use of recovered materials and achieving environmental soundness and energy efficiency in facility design." FAR 36.602-3(c) has been amended to require evaluation boards to discuss with the three most highly qualified firms "feasible ways to prescribe the use of recovered materials and achieve environmental soundness and energy efficiency in facility design (see Part 23)."

7. FAR Part 42-Contract Administration

Part 42 is to be amended by the addition of a new subpart entitled *Monitoring Environmental Requirements*. Under this subpart the contracting officer is charged with ensuring that the contractor fully complies with the RCRA requirements in the contract and with those OFPP Letter 92-4 policies that are contractual requirements.

The contracting officer will be responsible for verifying that recovered materials and/or environmentally-sound and energy efficient materials are actually being used and for

²⁹⁹ *Ibid.*

³⁰⁰ *Ibid.*

monitoring contractor reporting requirements. Verification of the contractor's compliance is to be accomplished as part of quality assurance. Final payment is made contingent upon the contractor submitting the reports required by FAR 23.509-5 regarding recovered material content actually used in performance and review and acceptance of the report by the contracting officer.

These proposals bring "green" procurement out of the regulatory shadows and distribute its requirements and impacts throughout the procurement process. How these proposed changes are finally implemented in the FAR depends upon the comments received during the comment period. Undoubtedly, some will feel they go too far and constitute yet another expense to contractors and a burden to contract administrators; others, of course, will feel they don't go far enough.³⁰¹

B. Resource Conservation and Recovery Act Reauthorization

Since the 102d Congress failed to reauthorize RCRA, it is sure to be brought up again in the 103rd. One of the RCRA reauthorization bills introduced in the 102d Congress was S. 976. The bill, introduced by Senator Max Baucus (D-Montana), proposed several important amendments to section 6002.

³⁰¹DoD is already reviewing the proposed FAR changes. In addition to recovered materials and environmentally-sound and energy-efficient products and services, complimentary DFARS changes can be expected to also more fully implement the hazardous materials procurement requirements of DoDD 4210.15.

1. RCRA Section 6002(a)

Frustrated with EPA's slowness in promulgating guidelines, Senator Baucus proposed uncoupling the recovered materials preference program from the guidelines. S.976 proposed adding the following to section 6002(a):

As a general matter, each procuring agency (including any person performing work under a contract with such agency) shall give preference in procurement to items produced with the greatest percentage of recovered materials practicable, regardless of whether there are procurement guidelines applicable to such items.³⁰²

2. RCRA Section 6002(c)(1)

In considering S. 976 the committee noted:

The criteria for determining an unreasonable cost [for a guideline item] is often interpreted to mean that the product containing recovered material must be available at a price comparable to the price of a competing product made of virgin material. Historically, because recycled materials cost more than their virgin counterparts, few recycled goods were purchased by the Federal Government.³⁰³

To rectify this situation and overrule EPA's interpretation of "unreasonable price", section 6002(c)(1) was to be amended by adding the following:

As used in this paragraph, the term "unreasonable price" means a price that exceeds by an amount greater than 10 percent the amount of the price of similar items that do not meet the guidelines... In the case of

³⁰²S. Rep. No. 301, 102d Cong., 2d Sess. 201 (1992).

³⁰³*Id.* at 42.

items that have a difference [sic] expected useful life than the expected life of items that do not meet the guidelines, such comparisons may be made by using the annualized cost of competing items.³⁰⁴

Note that under the proposed FAR 23.505 the definition of "unreasonable price" is only relevant to a contracting officer determination to waive the requirements for using recovered materials.³⁰⁵ Whether such a price differential would be relegated to the acquisition planning process or implemented as a true price preference similar to the Buy American Act would be probably a Presidential decision. Arguably, Congress has given him the power to implement a price preference for recovered materials and it appears that the courts and the Comptroller General would sustain its use.³⁰⁶

3. New RCRA Section 6002(j)

An added subparagraph (j) to section 6002 requires that the Secretary of Defense, in cooperation with the EPA Administrator, review all DoD specifications and "make such modifications as may be necessary in such specifications to eliminate requirements that discriminate against the use or acquisition of items that contain recovered materials."³⁰⁷

The Secretary is to complete review of not less than 40%

³⁰⁴ *Id.* at 201.

³⁰⁵ See note 295 *supra* and accompanying text.

³⁰⁶ See discussion in Chapter 3 *supra*.

³⁰⁷ S. Rep. No. 301, 102d Cong., 2d Sess. 203 (1992).

of the specifications within the first two years after enactment with the remainder not later than five years after enactment.

S.976 was favorably reported out of the Senate Environment and Public Works Committee on June 16, 1992 but was never brought to a vote. Senator Baucus intends to introduce RCRA legislation in the 103rd Congress that will strengthen the Federal recovered materials procurement program.³⁰⁸

C. Proposed Executive Orders

In his first major environmental policy speech on Earth Day 1993, President Clinton announced that he would sign five executive orders directing Federal agencies to take steps to reduce pollution. Four of those Executive Orders promise to impact Federal procurement.

³⁰⁸"Baucus said he is considering several approaches for inclusion in his recycling legislation: establishing minimum content standards, setting waste utilization rates, establishing a waste utilization tax that would decline as recycled content increases, and strengthening federal procurement policies for recycled products.

The legislation, he said, must provide federal leadership, target the worst problems first, guarantee a shared responsibility between government and business, and provide certainty.

To meet those goals, he said, the bill probably would include aggressive federal procurement provisions, standards for packaging and paper, a method of internalizing the cost of recycling into the price of a product, and recycling rates and compliance dates." ("Recycling: Baucus, Swift Back Recycling Legislation, But Say Superfund, Water Act Take Priority," 23 ER 3107 (April 9, 1993)).

Mr. Clinton promised executive orders requiring agencies to use fewer substances harmful to the ozone; to buy thousands more American-made alternate fuel vehicles; to buy and use more recycled products; and to purchase energy-efficient computers.³⁰⁹

³⁰⁹Richard L. Berke, *Clinton Supports Two Major Steps For Environment*, N.Y. Times, April 22, 1993, at A1, A10.

CHAPTER 6

THE FUTURE OF BUYING "GREEN"

The push to turn the Government into a "green" consumer is not going to go away. Both the public and Congress are demanding it and monitoring progress. In fact, the trend, as demonstrated by OFPP Letter 92-4 and DoDD 4210.15, is to expand toward an environmentally proactive procurement system that prevents pollution, minimizes hazardous waste, as well as creates markets for environmentally-sound products and services. However, there are several obstacles that remain to be overcome if Federal procurement are to have an appreciable affect on environmental quality.

The first, and by far the hardest obstacle to overcome, is bureaucratic resistance to the new and untried. Many users, even if they knew that a recovered or recycled materials alternative was available, would be reluctant to purchase it simply because they haven't done so in the past. Also, many users remember the early products utilizing recycled materials which left something to be desired in both cost and performance. As more and more alternatives become commercially available and accepted, however, hopefully this resistance will weaken and disappear.

Second, many users and contracting officers are unaware of the availability of recovered materials products, even those covered by the EPA guidelines. Both need to avail

themselves of the services provided by organizations such as the National Recycling Coalition and the Recycled Products Information Clearinghouse to educate themselves on available products.

Third, the proposed amendments to the FAR should be implemented. The current FAR, beyond a few weak and vague requirements concerning recovered materials, provides absolutely no firm guidance to contracting officers on what "green" purchasing is and how to implement those requirements into contracts. Many of the shortcomings in the FAR will be remedied by the changes subcommittee's recommendations.

Fourth, Congress should clarify the intent and meaning of the § 6002 preference program and the concept of "unreasonable cost" to specifically allow agencies to pay up to a certain percentage more for recovered or environmentally-safe products *even if the bid is higher than a competing bid not offering such products.* It is a market fact that until demand increases, products utilizing new technology will cost more to purchase. This prevent's bidders from proposing new recovered content materials items in a sealed bid solicitation unless they are specifically required by the solicitation and stifles the Government's ability to utilize these products as they become available or to even discover that such alternatives meeting the performance criteria exist.³¹⁰ Even though

³¹⁰Note that this issue can be avoided somewhat by using competitive negotiation. However, negotiation is a slower, more involved process not suitable for all procurement.

there appears to be no prohibition, given the policies of RCRA and the decisions discussed *supra*, against agencies including a price preference percentage as a price-related factor in a sealed bid procurement, Congressional clarification would reduce the current uncertainty. The President could also solve the "problem" by issuing a Buy American-type Executive Order establishing either a price preference for environmentally-sound products and services or a "least cost" pricing "add-on" for those products and services that are environmentally-unsound.

Prices are the issue upon which buying "green" will rise or fall. Senator William S. Cohen (R-Maine) summed up the entire issue in a question he posed to a witness during a Senate committee hearing:

Is it true in a time of declining budgets in which a contract officer [sic] might look at the budget for that year and say, "We've got a problem, we're being cut back. The initial cost for something is lower for one that is less environmentally friendly or energy efficient, so we'll go with the lower-cost item because we don't have any money."³¹¹

This is of course exactly what will happen when the purchaser has discretion to trade-off environmental-soundness for lower cost and this is the situation most often confronted in the area of "green" purchasing. A vicious cycle begins where cash-starved agencies avoid purchasing environmentally-sound products because of the additional cost, the cost of

³¹¹S. Hrg. 102-563, 23.

which could come down if their market was larger. There are several solutions to this dilemma.

First, Congress could remove the purchaser's or contracting officer's discretion by requiring purchase of the environmentally-sound product with cost a secondary factor. This requires a decision by Congress that this is the most efficient use of decreasing defense funds.

Second, Congress could authorize direct Government subsidies for manufacturers and providers of environmentally-sound products and services in order to make them competitive.

Third, Congress could establish a system whereby agencies are "reimbursed" for the additional monies expended to purchase environmentally-sound products and services thereby "greening" the Government without taking scarce funds away from more mission oriented requirements. This was done under the Noise Control Act³¹² and is being done under the Clean Air Act clean fuels vehicle program.³¹³

Congress appears to be leaning toward the first alternative, the least popular solution from the standpoint of Federal agencies. Whether this alternative is fully implemented depends upon the strength of the environmental and environmentally-sound business lobbies. The third option, while probably the most effective, will probably have little support if Congress decides to embrace fiscal responsibility

³¹²See note 13 *supra*.

³¹³See note 102 *supra* and accompanying text.

and deficit reduction. One thing is certain, inaction may kill the "green" procurement program as budgets decrease and agencies are faced with tough fiscal decisions involving their shrinking procurement budgets.

We've come a long way since RCRA started the Federal Government on the road toward more environmentally responsible procurement practices, but there's a ways to go and problems to be solved before the Government becomes a truly "green" consumer.