DEPARTMENT OF THE ARMY
U.S. Army Corps of Engineers
WASHINGTON, D.C. 20314-1000

REPLY TO
ATTENTION OF:

01 APR 1999

CEPR-P (715)

MEMORANDUM FOR COMMANDER/DIRECTORS, ALL USACE COMMANDS,
ATTN: DIRECTOR/CHIEF OF CONTRACTING

SUBJECT: PARC Instruction Letter 99-2, FAR Provision 52.223-4, Recovered Material Certification, and FAR Clause 52.223-9, Certification and Estimate of Percentage of Recovered Material Content for EPA Designated Items

1. References:

a. FAR 23.402 and 23.403.

b. FAR 23.404(b)(2) and (3).

c. DFARS 223.404(b)(3) and (4).

c. FAR 23.405(a) and (b).

2. The purpose of this PIL is to provide interim guidance on Environmental Protection Agency (EPA) designated items and recovered material.

3. FAR 23.402 defines an EPA designated item as an item that is or can be made with recovered materials and is listed by EPA in a procurement guideline.

4. FAR 23.403 states the Government's policy is to acquire, in a cost-effective manner, items composed of the highest percentage of recovered materials practicable consistent with maintaining a satisfactory level of competition without adversely affecting performance requirements of exposing suppliers' employees to undue hazards from the recovered materials.

5. FAR 23.404(b)(2) states that agencies shall establish an affirmative procurement program for EPA designated items and sets forth the minimum for such programs.

6. FAR 23.404(b)(3) states that acquisition of EPA designated items that do not meet the EPA minimum recovered material standards shall be approved by an official designated by the agency head based on a written determination that the items:

a. are not available within a reasonable period of time;

b. are available only at unreasonable prices;

c. are not available from a sufficient number of sources to maintain a satisfactory level of competition; or

d. based on technical verification, fail to meet performance standards in the specifications.

7. DFARS 223.404(b)(3) states that a contract for an EPA designated item that does not meet the EPA minimum recovered material standards shall not be awarded before approval of the written determination required by FAR 23.404(b)(3). The approving official shall be:

a. a general or flag officer, or a member of the Senior Executive Service, of the requiring activity; or

b. for requiring activities without a general or flag officer or member of the Senior Executive Service, the commander of the activity.

8. DFARS 223.404(b)(4) states that departments and agencies shall centrally collect information submitted in accordance with the clause at FAR 52.223-9 for reporting to the Office of the Secretary of Defense.

9. FAR 23.405(a) requires the contracting officer to insert the provision at 52.223-4, Recovered Material Certification, in solicitations that are for, or specify the use of, recovered materials. This provision states that the offeror certifies, by signing the offer, that the percentage of recovered materials to be used in the performance of the contract will be at least the amount required by the applicable contract specifications.

10. FAR 23.405(b) requires the contracting officer to insert the clause at 52.223-9, Certification and Estimate of Percentage of Recovered Material Content in EPA Designated Items, in contracts exceeding the simplified acquisition threshold that are for, or specify the use of, an EPA designated item. This clause requires contractors to certify the percentage of recovered material content for EPA Designated Items was at least the amount required by the contract. Additionally the contractor is required to estimate the percentage of recovered materials actually used in the performance of the contract.

11. This office has been notified that a draft Army Audit report on the implementation of the affirmative procurement program states that several Army contracting offices (including USACE) did not insert the subject provision in solicitations nor the subject clause in contracts

which required their use. Additionally, none of the contracting offices had obtained certifications from vendors nor had they obtained waivers to buy designated items that did not meet minimum levels for recovered material content.

12. The Army has not issued supplemental guidance to implement requirements for this program. However, it is expected that Army will issue guidance at a later date. For this reason, the PARC, in coordination and concurrence with Engineering and Construction Division (CEMP-E), is issuing the following interim guidance. Contracting officers shall:

a. ensure that designers using EPA designated items specify products that contain the required percentage of recovered materials. The following USACE Guide Specifications (CEGS) have been revised to include EPA designated items:

(1) carpet, CEGS- 09680*

(2) playground equipment, CEGS - 02882

(3) site furnishings, CEGS – 02870

(4) exterior planting, CEGS – 02930

(5) playground protective surfacing, CEGS – 02971

(6) concrete/fly ash, CEGS – 02753, 02754, 02755, 02770, 03300

b. ensure waivers are obtained from appropriate approving officials to purchase items that do not meet the EPA's standard for minimum recovered content material. If the designer does not specify a product that contains recovered materials, for those CEGS listed in 12a above, they are responsible for providing a justification and requesting a waiver,

c. insert the provision at 52.223-4, Recovered Material Certification, in solicitations that are for, or specify the use of, recovered materials and meets the other requirements of FAR 23.404(a),

d. insert the clause at 52.223-9, Certification and Estimate of Percentage of Recovered Material Content for EPA Designated Items, in contracts that exceed the simplified acquisition,

threshold that are for, or specify the use of, an EPA designated item and meets the other requirements of FAR 23.404(a),

e. obtain contractor's certifications after contracts are completed, take appropriate actions against contractors if certifications are not provided or properly completed with the required information, and

f. maintain files for the reported data on completed contracts. We suggest that a separate file be maintained for contracts completed in any specific calendar year. The reported information will eventually be collected and upward reported when instructions are received from the Army.

13. Our point of contact is Mr. Roger Adams, CEPR-P, 202-761-5221.

FOR THE COMMANDER:

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CF: Directors and Chiefs
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