

Affirmative Procurement Program

This summary explains RCRA Section 6002 requirements for the establishment of Affirmative Procurement Programs (APPs). Agencies should note that the FAR also addresses affirmative procurement programs. (See 62 FR 44809, August 22, 1997.)

Within 1 year after EPA designates an item, RCRA Section 6002(i) requires each procuring agency purchasing more than \$10,000 of that item, or functionally equivalent items in a fiscal year, to establish an APP for that item. Section 402 of Executive Order 12873 reinforces this requirement and further provides that Executive agencies "shall ensure that their APPs require that 100 percent of their purchases of products meet or exceed the EPA guideline standards," considering competition, price, availability, and performance.

An APP is an agency's strategy for maximizing its purchases of EPA-designated items. The APP should be developed in a manner that ensures that items composed of recovered materials are purchased to the maximum extent practicable consistent with Federal procurement law. RCRA Section 6002(i) requires that, at a minimum, an APP consist of four elements: (1) a preference program; (2) a promotion program; (3) procedures for obtaining estimates and certifications of recovered materials content and, where appropriate, reasonably verifying those estimates and certifications; and (4) procedures for monitoring and annually reviewing the effectiveness of the APP. In addition, Section 402 of the Executive Order directs an agency APP to encourage the electronic transfer of documents, the double-sided printing of government documents, and the inclusion of provisions in contracts, grants, and cooperative agreements that require documents to be printed two-sided on recycled paper.

EPA recommends that the Environmental Executive within each major procuring agency take the lead in developing the agency's APP and in implementing the requirements set forth in the CPG. This recommendation is consistent with the basic responsibilities of an Agency Environmental Executive as described in sections 302 and 402 of the Executive Order. Section 302 charges each Agency Environmental Executive with coordinating all environmental programs in the areas of acquisition, standard and specification revision, facilities management, waste prevention, recycling, and logistics. Section 402(c) of the Executive Order further directs each Agency Environmental Executive to track and report, to the FEE, agency purchases of EPA-designated items. In the absence of such an individual, EPA recommends that the head of the implementing agency appoint an individual who will be responsible for ensuring the agency's compliance with RCRA Section 6002 and the Executive Order.

RCRA requires and the Executive Order directs procuring agencies to establish APPs for each item EPA designates. In fulfilling this requirement, EPA recommends that each agency develop a comprehensive APP with a structure that provides for the integration of new items as they are designated. An agency's comprehensive APP does not need to be limited to EPA designated items. In fact, EPA encourages agencies to implement preference programs that expand beyond the EPA designated items in order to maximize purchases of recycled products and foster additional markets for recovered materials.

EPA believes that developing a single APP will substantially reduce procuring agencies' administrative burdens under RCRA that result from EPA item designations. EPA also recommends that if a procuring agency does not purchase a specific designated item, it should simply include a statement in its preference program to that effect. Similarly, if a procuring agency is unable to obtain a particular item for one or more of the reasons cited in RCRA Section 6002(c)(1), a similar statement should be included in the preference program along with the appropriate justification. According to RCRA Section 6002(i)(2)(D), it is the procuring agency's responsibility to monitor and regularly update its APP. Should an item that was previously unobtainable become available, then the procuring agency should modify its APP accordingly.

A. Specifications

RCRA Section 6002(d)(1) requires Federal agencies responsible for drafting and reviewing specifications for procurement items purchased by Federal agencies to review and revise their specifications and remove requirements specifying virgin materials only or excluding the use of recovered materials. This revision process should have been completed by May 8, 1986. For items designated by EPA, Section 6002(d)(2) directs Federal agencies to revise their specifications to require the use of recovered materials to the maximum extent possible without jeopardizing their intended end-use. Procuring agencies are required to complete their revisions within one year of an item's designation or publication of CPG revisions, as required by RCRA Section 6002(d)(2).

Sections 501, 504, 505, and 506 of Executive Order 12873 also address Federal specification requirements. Section 501 directs Executive agencies to review and revise their specifications, product descriptions, and standards to enhance Federal procurement of products containing recovered materials. When agencies convert to CIDs, they are required to ensure that the CIDs meet or exceed the recovered materials requirements in the specifications or product descriptions they replace.

B. Preference Program

A preference program is the system by which an agency implements its stated "preference" for purchasing products containing recovered materials. RCRA Section 6002(i)(3) requires procuring agencies to consider the following options when implementing their preference programs: minimum content standards, case-by-case policy development, or a substantially equivalent alternative.

To assist procuring agencies in establishing their preference programs, when EPA designates an item, it examines these statutory options and recommends the approach it believes to be the most effective for purchasing the designated item. Procuring agencies may elect either to adopt EPA's recommended approach or to develop their own approaches, provided that, in accordance with Section 402 of the Executive Order, the selected approach meets or exceeds EPA's recommendations as described in the RMAN(s).

1. Minimum Content Standards

One approach that RCRA Section 6002(i)(3) requires procuring agencies to consider is establishing minimum content standards. RCRA Section 6002(i)(3)(B) further requires the procuring agency to ensure that its standard requires the maximum amount of recovered materials content available for the item, without jeopardizing its intended use.

To assist procuring agencies with establishing their minimum content standards, EPA's RMANs recommend recovered materials content levels, where appropriate, for most of the items it designates. Under RCRA Section 6002(i), it is the procuring agency's responsibility to establish minimum content standards, while EPA provides recommendations regarding the levels of recovered materials in the designated items. To make it clear that EPA does not establish minimum content standards for other agencies, EPA refers to its recommendations as "recovered materials content levels," consistent with RCRA Section 6002(e) and the Executive Order.

Whenever possible, EPA's recommendations are expressed as recovered materials content ranges within which the items are available. EPA recommends that procuring agencies use these ranges, in conjunction with their own research into the recovered materials content of items available to them, to establish their minimum content standards. In some instances, EPA recommends a specific level (e.g., 100 percent recovered materials), rather than a range, because the item is universally available at the

recommended level.

2. *Case-by-Case Policy Development*

The second approach procuring agencies must consider is case-by-case policy development. RCRA Section 6002(i)(3)(A) describes case-by-case policy development as "a policy of awarding contracts to the vendor offering an item composed of the highest percentage of recovered materials practicable," subject to the limitations of RCRA Section 6002(c)(1)(A) through (C) (i.e., competition, price, availability, and performance). The case-by-case approach is appropriate where a procuring agency determines that the minimum content standard it has established for a particular designated item is not appropriate for a specific procurement action (i.e., the procuring agency is unable to acquire the item within the limitations described in RCRA Section 6002(c)(1)(A) through (C)). The case-by-case approach allows a procuring agency to specify different (usually lower) minimum content standards for specific procurement actions, while still ensuring that the agency fulfills its responsibility to procure the designated item containing the highest amount of recovered materials practicable.

This method does not obviate the need for agency minimum recovered materials content standards. It should be applied to singular procurement actions only when an agency's minimum content standard is unattainable. If a procuring agency determines that it is consistently unable to procure an EPA-designated item using the minimum content standard it establishes, the agency should evaluate its needs and adjust its content standard accordingly.

3. *Substantially Equivalent Alternative*

The third approach specified in RCRA Section 6002(i)(3) requires procuring agencies to consider a substantially equivalent alternative to minimum content standards and case-by-case policy development. For some items, the use of minimum content standards is inappropriate, because the product is remanufactured, reconditioned, or rebuilt (e.g., industrial drums).

4. *Requirements for Contractors*

Government contractors also are subject to the requirements of RCRA Section 6002. These requirements are applicable where the contractor uses appropriated Federal funds and purchases \$10,000 worth of a designated item or purchased \$10,000 or more of the item in the previous year.

5. *Exceptions*

A procuring agency may not always be able to purchase a designated item with recovered materials content. RCRA Section 6002(c)(1) allows a procuring agency the flexibility not to purchase an EPA-designated item with recovered materials content if any of the following conditions apply:

The agency is unable to secure a satisfactory level of competition.

The item is not reasonably available within a reasonable period of time.

The item fails to meet the performance standards set forth in the agency's specification.

The item is available only at an unreasonable price.

Section 402 of Executive Order 12873 further directs that, if a procuring agency waives its requirement to purchase an EPA-designated item with recovered materials content, it must provide a written justification specifying one or more of the exceptions listed above.

Competition

EPA recommends that determinations of "satisfactory" competition be made in accordance with the procuring agency's procurement requirements.

Availability and Performance

Information on the economic and technological feasibility of producing each designated item, including the availability and number of manufacturers that produce the item, the ability of the item to meet Federal or national specifications, the recovered materials content levels used by manufacturers to produce the item, and other information can be found in the CPG background documents.

Price

In previous guidelines, EPA defined an unreasonable price as a price that is greater than the price of a competing product made from virgin materials. EPA further interprets the reasonable price provision of RCRA Section 6002(c)(1)(C) to mean that there is no projected or observed long-term or average increases over the price of competing virgin items. This interpretation is supported in the preamble to OFPP Policy Letter 92-4 (57 FR 53364), which provides that there is no legal mandate to provide a price preference for products containing recovered materials over similar virgin products.

C. Promotion Program

RCRA Section 6002(i)(2)(B) requires each procuring agency to adopt a program to promote its preference to purchase EPA-designated items with recovered materials content. The promotion component of the APP educates staff and notifies an agency's current and potential vendors, suppliers, and contractors of the agency's intention to buy recycled products.

EPA believes that an agency's promotion program should consist of two components: an internal promotion program, targeted towards the agency's employees, and an external promotion program, targeted towards the agency's vendors and contractors.

1. Internal Promotion

Procuring agencies can use several methods to educate their employees about their APP. These methods include preparing and distributing agency affirmative procurement policies through in-house electronic mail and other media, publishing or posting articles in agency newsletters and on the Agency's World Wide Web home page, including affirmative procurement program requirements in agency staff

manuals, and conducting workshops and training sessions to educate employees about their responsibilities under agency affirmative procurement programs.

2. *External Promotion*

Methods for educating existing contractors and potential bidders of an agency's preference to purchase products containing recovered materials include publishing articles in appropriate trade publications, posting notices on the agency's World Wide Web homepage, participating in vendor shows and trade fairs, placing statements in solicitations, and discussing an agency's APP at bidders' conferences.

D. Estimation, Certification, and Verification

RCRA Section 6002(2) requires the APP to include procedures for estimating, certifying, and, where appropriate, reasonably verifying the amount of recovered content materials used during performance of a contract. RCRA Section 6002(c)(3) further provides "the contracting officer shall require that vendors (A) certify that the percentage of recovered materials to be used in the performance of the contract will be at least the amount required by applicable specifications or other contractual requirements and (B) estimate the percentage of the total material utilized for the performance of the contract, which is recovered materials." FASA (PL 103-355) amended this section of RCRA to require estimates only for contracts in amounts greater than \$100,000. The FAR, as amended on August 22, 1997 (62 FR 44809), addresses this change and provides clauses to be used for estimations and certifications.

E. Procedures to Monitor and Review the Procurement Program

Procuring agencies should monitor their APP to ensure that they are fulfilling their requirement to purchase items composed of recovered materials to the maximum extent practicable. RCRA Section 6002(i)(2)(D) requires the APP to include procedures for monitoring and annually reviewing the effectiveness of an agency's APP. RCRA Section 6002(g) requires OFPP to submit a report to Congress every 2 years on actions taken by Federal agencies to implement the affirmative procurement requirements of the statute. Section 402 of Executive Order 12873 directs each agency's Environmental Executive to track and report on agency purchases of EPA-designated items. Section 301 directs the FEE to submit a report annually, at the time of agency budget submission, to the OMB on Executive agency compliance with the Executive Order. In order to fulfill their responsibilities, the FEE and OFPP request information from appropriate agencies on

their affirmative procurement practices. It is important, therefore, for agencies to monitor their APP to ensure compliance with RCRA Section 6002 and Executive Order 12873.

In order to comply with the Executive Order, agencies will need to evaluate their purchases of products made with recovered materials content. This also will allow them to establish benchmarks from which progress can be assessed. To evaluate their procurements of products containing recovered materials, procuring agencies may choose to collect data on the following:

The percentages of recovered materials content in the items procured or offered

Comparative price information on competitive procurements.

The quantity of each item procured over a fiscal year.

The availability of each item with recovered materials content.

Performance information related to the recovered materials content of an item.

EPA recognizes that a procuring agency may be unable to obtain accurate data for all designated items but believes that estimates will be sufficient to determine the overall effectiveness of an agency's APP.