

October 2, 2023

TO:

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FROM: Steven M. Rothstein, Managing Director  
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**Re: Comment in FAR Case 2022-006 - Federal Sustainable Procurement Proposal**

[Ceres](#) appreciates this opportunity to provide comments on the proposed Federal Sustainable Procurement Rule (“Proposed Rule”) put forward by the Federal Acquisition Regulatory Council (FAR Council).<sup>1</sup> The Proposed Rule represents an important step forward in the government’s efforts to address the risks, and capture the opportunities, associated with climate change, nature loss, water constraints, and other environmental challenges. As the world’s largest purchaser of products and services, the government has an enormous opportunity and responsibility to use its purchasing dollars to power private sector innovation around sustainability. Ceres strongly supports the rule and offers below its rationale for this support and its recommendations for improvement.

Ceres is a nonprofit organization working with the most influential capital market leaders to solve the world’s greatest sustainability challenges. Our [Investor Network](#), composed of investors with a combined total of \$45 trillion in assets under management, focuses on ramping up sustainable investments in clean energy, clean technology innovation, and global food and water systems. Our [Company Network](#) drives business leaders to action to stabilize the climate, protect water and natural resources, and build a just and

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<sup>1</sup> “Federal Acquisition Regulation: Sustainable Procurement,” 88 Fed. Reg. 51672 (August 2, 2023).

inclusive economy. Our [Policy Network](#), with numerous corporate members, plays a critical role in passage of some of the most ambitious climate laws in the country.

The [Ceres Accelerator for Sustainable Capital Markets](#) is a center within Ceres that aims to transform the practices and policies that govern capital markets in order to reduce the worst financial impacts of the climate crisis. It spurs action on climate change as a systemic financial risk—driving the large-scale behavior and systems change needed to achieve a net zero emissions economy. Through [Ambition 2030](#) and other key programs, Ceres works to reduce emissions from six of the largest sectors in the economy – steel, utilities, oil and gas, transportation, banking, and food and agriculture.

### *Introduction*

The Proposed Rule is the second of three critically important rules that the Administration is promulgating to fulfill commitments regarding sustainable procurement that it made under recent [climate- and sustainability-oriented executive orders](#), December 2021 [Federal Sustainability Plan](#) and December 2021 [White House Memorandum M-22-06](#).

The first of these three rules was the [November 2022 FAR Council proposal](#), which would address climate-related risks and opportunities through company-level disclosures. The third, not yet proposed but discussed in an [October 2021 Advanced Notice of Proposed Rulemaking](#) (ANPR), would address these risks and opportunities through contracting (bid design, awards and post-award management).<sup>2</sup> The Proposed Rule focuses on an additional critical element of sustainable procurement: selection of individual products and services.

Together, these three rulemakings represent an opportunity to make historic progress in reducing financial and environmental risks in federal supply chains and in helping ensure the United States captures the enormous economic opportunities and savings to taxpayers associated with the transition to a more sustainable economy.

Although it has adopted sustainable procurement rules in an *ad hoc* manner in the past few decades, the federal government has never truly capitalized on the power of its \$630 billion annual procurement budget to drive the United States' transition to a sustainable, clean energy economy. Shifting to energy-efficient, water-saving, and other

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<sup>2</sup> Ceres filed supportive comments regarding the proposed contract-level ANPR in [January 2022](#) and supportive comments regarding the proposed company-level disclosure rule in [February](#) and [March](#) of this year.

sustainable products and services is a proven strategy for corporate and government purchasers to save money in addition to advancing economic development and climate and environmental stewardship objectives.<sup>3</sup> The FAR Council, by designing its rule to require procurement of sustainable products and services unless those products and services cannot achieve a reasonable performance schedule, performance requirements or price, ensures that procurements protect taxpayers and program delivery. The Proposed Rule will significantly benefit taxpayers and promote economical, efficient, and effective procurement, and it is well within the FAR Council's authority under the Procurement Act and other laws.

We encourage the Council to move quickly to finalize the Proposed Rule and related procurement rules and seize the enormous associated economic and environmental opportunities. As discussed below, this will send a clear signal to current and potential federal suppliers that sustainable purchasing reflects best business practice, strengthening the case for new investments in sustainability.

### *Overview of the Proposal and its Benefits*

The Proposed Rule has two primary components: it would promote federal procurement of products and services identified by federal agencies as environmentally preferable, and it would streamline and consolidate the Federal Acquisition Regulation's (FAR) environmental provisions. We strongly support the latter component - making the FAR's environmental provisions easier to navigate and enhancing consistency and clarity would inarguably strengthen implementation.<sup>4</sup> Our comments below focus on the first component, the proposed language to accelerate procurement of environmentally preferable products and services. We strongly support the proposed new requirements and offer a number of recommendations for strengthening the Proposed Rule.

Two categories of products and services would benefit from priority attention in the Proposed Rule:

(A) Those identified pursuant to explicit Congressional authorization:

- Products containing recovered material identified by EPA;

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<sup>3</sup> See, e.g., [International Energy Agency, Energy Efficiency Can Boost Economies Quickly with Long-lasting Benefits](#) (2020).

<sup>4</sup> The existing FAR has environmental provisions scattered throughout its many parts, and Part 23, while mostly focused on the environment, includes non-environmental provisions such as ones dealing with drug-free workplaces and texting while driving. By focusing Part 23 solely on environmental matters and moving non-Part 23 environmental provisions to Part 23 (and Part 52 regarding clauses to be included in solicitations and contracts), the Proposed Rule will go a long way to reducing confusion.

- Biobased products identified by USDA;
- Energy-efficient products certified by EPA's ENERGY STAR® program;
- Energy- and water-efficient products designated by DOE's Federal Energy Management Program (FEMP);
- Products containing alternatives to ozone-depleting substances listed by EPA's Significant New Alternatives Policy (SNAP) program; and

(B) Those recommended by the EPA:

- WaterSense® labeled (water efficient) products and services;
- Safer Choice-certified products (products that contain safer chemical ingredients); and
- Products and services that meet or exceed [EPA Recommendations of Specifications, Standards, and Ecolabels](#).

See proposed FAR section 2.101. As discussed below, the Proposed Rule would implement a clear national policy of prioritizing acquisition of these products and services and would include procedures that incentivize more sustainable products and services and significantly increase the likelihood they will be offered and selected for procurement by Federal agencies.<sup>5</sup>

*1. The Proposed Rule will Strengthen Federal Agencies' Accountability for Procuring Products Identified as Sustainable*

The policy set forth in proposed FAR section 23.103 - that agencies "shall procure sustainable products and services (as defined in 2.101) to the maximum extent practicable" - represents a significant improvement over existing procurement policy. The existing policy (at FAR section 23.103) calls for procurement of sustainable products and services using a fixed threshold of "95 percent of new contract actions" and thus implicitly assumes that this sustainable procurement rate is optimum. The proposed "maximum extent practicable" threshold embodies a presumption that sustainable procurement is always practicable, and can be deviated from only if certain exceptions are met.

The proposed new policy also represents an improvement because it is accompanied by two important accountability mechanisms that are absent from the existing FAR.<sup>6</sup>

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<sup>5</sup> We use the term "sustainable" interchangeably with "environmentally preferable" in this letter to describe federally-recommended products and services. We make no claim that the products and services have no adverse environmental impact.

<sup>6</sup> The existing FAR uses a "maximum extent practicable" or similar standard for sustainable procurement in just a few isolated cases. For example, the [40 CFR 82.84's](#) "maximum extent practicable" provision implements Clean Air Act requirements for federal agency procurement; [48 CFR 23.803\(b\)](#) calls for agencies to use acceptable alternatives to ozone-depleting substances to the maximum extent

First, section 23.104(a) of the Proposed Rule creates a new system in which procuring sustainable products and services is the default option for agencies specifying their procurement requirements (“requiring agencies”). If a requiring agency does not intend to call for acquisition of a sustainable product or service, the Proposed Rule calls for it to explain in writing why the acquisition (1) is impracticable because it cannot: (a) competitively acquire a product or service within a reasonable performance schedule; (b) acquire a product or service that meets reasonable performance requirements; or (c) acquire a product or service at a reasonable price, or (2) is subject to one or more exceptions or exemptions.<sup>7</sup>

In contrast, the sustainable procurement policy of the existing FAR lacks sufficient accountability mechanisms. Section 23.103 simply calls for agencies to ensure that 95 percent of new contract actions acquire sustainable products and services, leaving unanswered basic questions about the procedures that must be followed to achieve the standard or how barriers to uptake of sustainable products and services are identified.<sup>8</sup> The Proposed Rule, by calling for the requiring agency to justify decisions not to procure sustainable products or services in writing, would create a written record that facilitates evaluation of performance and corrective actions at the individual and program levels.

A second way the Proposed Rule would strengthen accountability is by requiring a new clause at proposed FAR 23.109(a), entitled Sustainable Products and Services, to be used in all solicitations and contracts. This clause would call for contracting officers to require contractors to, among other things, “deliver and furnish sustainable products and services for Government use,” “incorporate sustainable products and services into the construction of a public building or public works” and “furnish sustainable products and services for use in performing services under this contract, where the cost of the products is a direct cost to this contract.” Contracting officers also would be required to identify in solicitations and contracts any products or services not covered by these

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practicable; and [48 CFR 23.205](#) states that agencies should “make maximum use of the authority provided in the National Energy Conservation Policy Act ( ) to use an energy-savings performance contract (ESPC), when life-cycle cost-effective, to reduce energy use and cost in the agency’s facilities and operations.”[42 U.S.C. 8287](#)) to use an energy-savings performance contract (ESPC), when life-cycle cost-effective, to reduce energy use and cost in the agency’s facilities and operations.”

<sup>7</sup> The Proposed Rule reaffirms existing exceptions to the statutory mandates to purchase certain energy-efficient products, biobased products, and products containing recovered material, and offers exemptions if the procurement would conflict with statutes, Executive orders, or regulations that impose domestic manufacturing and content requirements.

<sup>8</sup> A [2014 report](#) by the Organization for Economic Cooperation and Development asserts that annual OMB sustainability scorecards serve as the mechanism for tracking implementation of the 95 percent standard. However, the most recent scorecards show only the number and value of “applicable” contracts with “sustainable clauses;” they do not offer any indication of performance against the 95 percent standard. See, e.g., the [Department of Defense’s FY 2021 OMB Scorecard for Federal Sustainability](#).

mandates due to exceptions or exemptions. Thus, the Proposed Rule has a “belt and suspenders” feature: contracting officers would be required to join with requiring officials in implementing the sustainable procurement policy.

## *2. Greater Clarity Regarding Which Products are Federally Recommended*

The Proposed Rule also would advance sustainable procurement by clarifying that the sustainable procurement mandate applies to a host of important agency-recommended products and services that are unmentioned or only implicitly addressed in the existing FAR. The definition of “sustainable products and services” at proposed FAR 2.101 would extend Federal procurement requirements to a clearly defined list of dozens of agency-recommended standards and ecolabels. Section 23.103, the core sustainable procurement policy in the existing FAR, only explicitly identifies products bearing the EPEAT® and ENERGY STAR® label. Although this provision also calls for procurement of products that are water-efficient and that avoid ozone depletion, it fails to mention the product standards and ecolabels that EPA has selected to achieve these environmental outcomes. Similarly, section 23.703 (b) calls for agencies to “Promote energy-efficiency and water conservation,” without indicating that DOE (through its FEMP program) and EPA (through WaterSense® and other standards and ecolabels) identify the products that promote these outcomes. By consolidating the full list of products and services identified by EPA, DOE, and DOA, the FAR Council would greatly increase the visibility and usage of a wide array of sustainable products and services and help agencies and contractors better understand and comply with existing sustainable procurement requirements.

Second, the Proposed Rule also would improve the sustainable procurement policy’s coverage by clarifying its applicability to certain contracts not specifically addressed in the existing FAR. Proposed section 23.703(c)(2) would clarify that the policy covers products provided by a contractor during performance at Government-owned contractor-operated facilities as well as certain products used by contractors while performing contracted-for services at a Federally-controlled facility. Proposed section 52.223 would clarify that sustainable procurement requirements apply to contracts using FAR part 12 procedures for the acquisition of commercial products, including commercially available off-the-shelf (COTS) items, and commercial services and acquisitions valued at or below the micro-purchase threshold.

## *3. The Proposed Rule will reward and incentivize voluntary investments in sustainability innovation*



Among the most important benefits of the Proposed Rule is the rewards and incentives it provides to businesses that voluntarily invest in sustainability innovation.

Agencies designate products and services as environmentally preferable only after companies make significant investments of time and money in product research and development as well as painstaking agency-led stakeholder processes, third-party certifications and agency reviews. This scrutiny of federal agencies, third-party certifiers and stakeholders is critical to establishing the credibility of agency designations and to ensuring that designated products and services deliver cost-effective climate and environmental solutions.

The Administration must move quickly and efficiently to shift federal supply chains (and the larger marketplace) to a more sustainable footing. Fortunately, this is now increasingly possible, thanks in significant part to private sector investments of time and money, because the products and services it is promoting have been thoroughly vetted.

The Proposed Rule makes these investments of time and money more likely by improving business certainty. With the clear signal that would be sent by the Proposed Rule, businesses considering making investments in sustainability innovation can raise capital with greater confidence that the marketplace will reward them for their investments. Flowing from these increased investments will be increased scale and associated learning and cost reductions. Thus, the Proposed Rule will serve as a “force multiplier,” helping to grow the economy with sustainable businesses and jobs well beyond federal supply chains. The Proposed Rule also will save money for taxpayers, as the growing number of businesses prioritizing sustainable products and services will increase competition in the bidding process.

A key feature of the Proposed Rule that further strengthens private sector innovation is proposed FAR 23.103(b), a provision encouraging agencies to prioritize purchases of “multi-attribute” products and services, i.e., those that meet *both* one of the explicit statutory mandates for sustainable purchasing and one of the EPA recommendations. Businesses developing products and services that achieve multiple positive environmental outcomes can move forward with the knowledge that this kind of innovation will likely be rewarded.

### *Recommended improvements*

We offer for consideration our suggestions on how the Proposed Rule could be improved.

First, as noted earlier, the Proposed Rule states that agencies shall procure sustainable products and services “to the maximum extent practicable” and then puts the burden on those officials crafting solicitations and contracts for products or services to explain in writing any decision not to acquire those identified as sustainable. Unfortunately, proposed section 23.104 uses a term to describe the requiring official - “requiring activities” - that may not achieve the intended degree of accountability.

We recommend that the FAR Council strengthen accountability by crafting a definition of “requiring activities” that is specific to Part 23. The new definition should make clear that requiring activities are those individuals who identify and define requirements for products and services and request initiation of, and provide funding for, an acquisition. Use of this definition in the Proposed Rule would help ensure that the appropriate agency official takes responsibility for any decision not to require a sustainable product or service in a solicitation or contract.

Second, the proposal would benefit from stronger transparency provisions. Implementation would be vastly improved if both the solicitations for sustainable products and services, and justifications for choosing not to undertake those solicitations, and other data regarding compliance with sustainable procurement requirements in solicitations and contracts, were compiled and required to be stored in an easily searchable website accessible to the public. Similarly, contracts that include acquisitions of sustainable products and services and/or justifications for choosing non-sustainable alternatives due to exceptions and exemptions, should be stored on such a website. In addition, in parallel with the rulemaking, the GSA should commit to preparing and publishing a biannual evaluation of these decision documents and related materials, with statistical analyses and recommended improvements to federal sustainable procurement policies and procedures.

Third, the GSA, DOD and NASA should identify ways to improve education and outreach around the FAR’s sustainable purchasing requirements, with the objectives of expanding markets and advancing fairness and equity. Expansion of markets for sustainable products and services would accelerate once it is widely understood among companies and investors that federal agencies will soon be implementing a significantly clarified, modernized sustainable procurement program with clear mandates.

Finally, we encourage the GSA, DOD, and NASA to ensure that the anticipated market expansion flowing from its Proposed Rule benefits all. Education and outreach should be heavily focused on assisting small and medium-sized businesses as well as low-income communities, communities of color, and other vulnerable communities. The Administration, through the Small Business Administration, [has stated](#) that expanding



access of small businesses (including small disadvantaged businesses) to federal contracting is a top priority. It also [has stated](#) that federal investments made in disadvantaged communities to advance its Justice40 environmental justice initiative should include procurement spending. The Proposed Rule represents an important opportunity to follow through on these encouraging statements. In tandem with the final rule, the Administration should announce an education and outreach plan with clear strategies, metrics, and timelines for helping disadvantaged businesses and communities fully participate in the transition to a more sustainable, clean energy economy that is underway. This plan should include actions to ensure meaningful participation from NGOs and other representatives from disadvantaged businesses and vulnerable communities.

The Proposed Rule represents a critical step in the Federal government's efforts to promote efficient and economical procurement and protect taxpayers while catalyzing technology innovation, helping American businesses compete in the global marketplace, and creating well-paying jobs. We strongly support its finalization.

Please reach out to Steven Rothstein ([srothstein@ceres.org](mailto:srothstein@ceres.org)) or John Kostyack ([john@kostyackstrategies.com](mailto:john@kostyackstrategies.com)) if you have any questions or would like to discuss our recommendations. Thank you for your consideration.