

October 20, 2020  
Mary B. Neumayr  
Chairman of CEQ

Ms Neumayr;

The Information Technology Industry Council (ITI) is requesting that the White House Council on Environmental Quality (CEQ) communicate to the General Services Administration (GSA) and Office of Information and Regulatory Affairs (OIRA) that Federal Acquisition Regulation (FAR) Case 2019-10; Efficient Federal Operations, implementing Executive Order (EO) 13834 is a priority for completion. As you are aware, ITI has been working with the CEQ since 2015 to address issues with previous EOs that specifically referenced and required the use of the Electronic Product Environmental Assessment Tool (EPEAT®), a third-party registered trademark owned by a 501(c)(4) tax exempt corporation, for government procurement of electronics. With the 2018 issuance of EO 13834, the reference to EPEAT® in the EO was removed, however, EPEAT® registration is still required in the FAR relating to procurement of electronics. Since 2018, ITI has been interfacing with the GSA and OIRA to help complete the last step of implementing EO 13834, changing the FAR to align with the EOs. Through recent discussions with federal government officials involved in the rulemaking process, we understand that Administration prioritization of FAR cases can greatly expedite movement of the text to the public comment phase. Accordingly, we request that CEQ, on behalf of the Administration, communicate its support for expediting resolution of FAR Case 2019-10—a necessary outcome to remedy the current untenable situation where a non-government entity (EPEAT®) defines policy for U.S. Government purchasing.

EO 13834, issued May 17, 2018 directs Federal agencies “to manage their buildings, vehicles, and overall operations to optimize energy and environmental performance, reduce waste, and cut costs.” This EO also revoked all previous EOs related to green procurement. Section 3(d) of the EO 13834 states:

*“Within 150 days of the date of this order, the Chairman of CEQ, in coordination with the Director of OMB, shall review and, where needed, revise existing CEQ guidance related to energy and environmental performance, and shall issue instructions for implementation of this order.” (emphasis added)*

While the CEQ issued [implementing guidance](#) in April 2019 that references the [EPA Sustainable Marketplace, Section 23.704](#) of the FAR still conflicts with EO 13834 in that it specifically requires that agencies purchase EPEAT®-registered products. FAR case 2019-10 was opened in 2018<sup>1</sup> to finalize the process of implementing EO 13834. However, this case is still pending – without even a proposed rule – more than two years after the President issued EO 13834.

In late 2018, ITI was asked by OIRA and CEQ to “hold off” on further engagement with these agencies during the internal review process. While we understand this position, it has been almost two years since this direction and the lack of movement in the FAR process persists. Meanwhile, ITI member

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<sup>1</sup> The nomenclature reflects 2019 because the 2018 case was combined with another case in 2019

companies continue to endure demonstrable harm because of this EPEAT® procurement monopoly in the FAR. For example:

- GEC has changed the requirements to be listed on the EPEAT® registry from being based on voluntary consensus standards, to “criteria” that are instead determined by GEC (per allowances afforded under their recent status as a Type-1 ecolabel<sup>2</sup>). This significantly changes the process by which requirements are determined, and to which only the manufacturers have obligations; and is counter to the voluntary consensus standards development requirements in OMB Circular A-119 and the National Technology Transfer and Advancement Act of 1995.
- There is a fee to be listed in the EPEAT® registry that manufacturers have no recourse but to pay if they wish to sell to the government; this fee has increased significantly over the past few years.
- GEC has changed its policies and procedures related to maintaining and achieving EPEAT® registration without notice several times in the past few years; and because GEC is a private third-party that is not subject to the notice and comment rulemaking requirements of the government, there has been no recourse for manufacturers to address issues.
- GEC has an outsized impact on the standards development processes to date:
  - o GEC has “venue shopped” to four different standards development organizations (SDOs) because they did not like the processes or outcome with the original SDOs.
  - o GEC caused the cancellation of a standard in development, despite that GEC was but a single stakeholder among many other stakeholders in the process. GEC has since announced that it will be using the un-balloted and incomplete criteria developed for this cancelled standard for its own purposes, as requirements for EPEAT® registration. (This right is granted by way of a contractual agreement between GEC and the SDO. Until the GEC announcement, stakeholders were unaware that this agreement meant that the content they were developing could be taken by GEC even before completion.)
  - o GEC has “veto power” over any standards used for the registry, for any reason.
  - o GEC is now contracting with SDOs, and co-branding standards developed as requirements for EPEAT® registration, and showing itself to be using its status (largely assigned by the FAR) to have undue influence over the management and administration of those standards.
- GEC also charges fees to the Conformity Assessment Bodies (CABs), to be trained to evaluate manufacturer conformity to the requirements associated with EPEAT® registration. It is not clear how GEC also operates its own competing CAB without holding a conflict of interest.
- GEC often adds and modifies the requirements and construct for how OEMs need to show conformity to the standards, which is normally solely the purview of the authoring SDO committees that develop the standards. Further, GEC provides interpretations of the criteria that are often inconstant and at odds with the intent of the SDO committee that authored.
- Other SDOs and conformity assessment bodies have looked to develop a registry similar to EPEAT registry to maintain a list of product that conform to the procurement standards, and other competing Type I Ecolabels exist such as TCO. However, due to the continued reference in the FAR, these companies are prevented from freely competing in the marketplace.

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<sup>2</sup> In March 2020, GEC achieved eligibility status by ANAB as an Eligible Scheme Owner of Type I Environmental Certification Labeling Scheme

Beyond conflicting with EO 13834, the requirement for agencies to purchase ICT products that are certified using EPEAT® (a non-governmental third party) is a federal procurement anomaly. In most cases, government contractors must meet certain legal or government-imposed standards as a condition of contract award, with severe legal and financial penalties for non-compliance. For example, companies providing web services to the government must meet the requirements of [Internet Protocol Version 6](#) (IPv6) and must demonstrate compliance via government-prescribed testing and certification protocols. There is no private third-party involved, let alone a requirement to be listed on a privately-owned registry as is the case with the Green Electronics Council's (GEC's) EPEAT.

It should be noted that we are not opposed to the idea of a registry, including EPEAT, but it must be an option, not a requirement. As we have noted in the past, ITI recommended that the CEQ and the GSA replace the current language in the FAR with language that would preserve EPEAT as an option for procurement of sustainable electronics while also allowing for other conformance options. In fact, for IPv6 many providers test their equipment at the University of New Hampshire Interoperability Labs (UNH-IOL). The UNH registry simply lists the tests passed, but does not add additional requirements, nor is the UNH registry use required as a condition for doing business with the federal government.

That EPEAT® registration has been required and the only option in the FAR was problematic enough when consensus-based ANSI-accredited standards processes were the basis for EPEAT®. But with the knowledge that GEC is no longer committed to this, we iterate that CEQ should consider this FAR case a priority — towards its obligation to "give preference to" consensus-based ANSI-accredited standards in accordance with OMB Circular A-119. With the FAR changed to reference standards, EPEAT® and/or alternative acceptable approaches such as other ecolabels (such as [TCO](#)) and third-party certification to the relevant product standards can show conformity to purchasing requirements.

Based on these concerns and the negative impact of EPEAT's monopoly for our member companies, ITI urges CEQ to communicate to the FAR Council and OIRA that FAR Case 2019-10 is a priority for completion. ITI stands ready to engage in the regulatory process; however, that process must progress to the public comment phase for us to do so. The CEQ is uniquely positioned to assist industry and the environment by finalizing the implementation of EO 13834 through prioritizing FAR Case 2019-10. Please do not hesitate to contact me at 202-626-5759 or at [ccleet@itic.org](mailto:ccleet@itic.org) if you have questions or would like to discuss further.

Regards,




Chris Cleet, QEP

Vice President of Policy, Sustainability & Regulatory  
Information Technology Industry Council (ITI)  
700 K Street, NW Suite 600  
Washington, DC 20001  
202.626.5759  
[www.itic.org](http://www.itic.org)

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