Overview of State and Local Government Procurement

The magnitude of state and local government procurement is staggering. We are light years beyond the time when procurement was considered a ministerial task performed by clerks to accomplish routine purchases. Today, state and local government procurement is complex, dynamic, and constantly the focus of efforts at reform and transformation. Amid a dynamic and changing landscape, the common mandate for government procurement is to timely meet user minimum needs with the delivery of best-value products or services, while ensuring the highest standards of integrity in order to maintain the public’s trust and fulfill state and local government public policy objectives. Thus, state and local government procurement professionals are faced with massive responsibilities to assist their executive agencies in accomplishing their missions while simultaneously guarding expenditures of taxpayer dollars. The increased responsibilities shouldered by procurement professionals are attributable to various developments that account for the rise in profile and significance of state and local government procurement. These developments include the following:

- The massive spending power controlled by state and local governments;
- The opening of U.S. state and local procurement markets to foreign competition pursuant to the World Trade Organization’s Government Procurement Agreement (WTO-GPA); and

The strategic uses of procurement to accomplish public policy goals and objectives. These developments present challenges to those who promote and support the implementation of sustainable procurement and associated best practices.

First, spending power at state and local government levels increases the profile of policymakers and procurement professionals who attempt to implement sustainable procurement as part of their public function. While too difficult to project accurately, it is conceivable that among the 50 states, six territories, and 87,525 local governments, state and local government procurement spending may be roughly valued at approximately $1.5 trillion annually for the purchase of goods, supplies, equipment, services, and construction. The dollar value of spending by state and local governments has risen significantly since 1979, when the estimate for spending was projected to be only $750 billion. The unprecedented growth of state and local procurement markets can be attributed largely to the federal government’s policies shifting program responsibilities more and more to the states. State and local governments have the capacity to impact and drive public policy because of spending directed at implementing collateral policies such as sustainable procurement.

With spending power comes obligation and responsibility. State and local governments must perform their procurement functions in an era of heightened oversight. For example, state and local governments receiving economic stimulus funds must comply with exacting reporting requirements to achieve high levels of accountability and transparency proscribed by federal and state stimulus funding legislation. This heightened level of oversight adds to the complexity of the state and local government procurement environment.

Second, state and local government procurement is more complex because of the pressures to accommodate foreign policy and international trade. The upward trend in procurement spending by state and local governments has major implications for international trade, especially in light of the federal government’s international obligations under the WTO-GPA and other bilateral free trade agreements (FTAs). In addition to considering how to respond to the internationalization of their historically insular procurement markets, state and local governments are being forced to increase transparency and oversight in procurement consistent with international obligations. This development adds to the complexity and transformation of the state and local government procurement environment.

Third, state and local government procurement is dynamic because of the use of the procurement function to accomplish public policy objectives. These public policy objectives are also referred to as collateral policies. Collateral policies advance important and unique social and economic goals. Generally, state and local governments realize their collateral policy goals and objectives by taking on the role of market actors in the procurement process. Collateral policies include, but are not limited to, the following:
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- Protection of domestic industry from foreign competition (Buy American Act legislation);
- Ensuring opportunities for small businesses;
- Ensuring that workers are paid according to prevailing wage rates and have adequate working conditions; and,
- Directly related to this chapter, promoting environmental and sustainable objectives.11

Various methods, including preferences, set-asides, and mandatory purchasing programs, facilitate the implementation of state and local government collateral policies. Whatever the policy objective, state and local governments increasingly rely upon their procurement functions to implement public policy.

Sustainable Procurement at the State and Local Government Level

Sustainable procurement is a means of adding environmental considerations to the price and performance criteria used by public- and private-sector procurement officers to make purchasing decisions.12 Most important, sustainable procurement attempts to identify and reduce the environmental impact of an organization’s activities while maximizing resource efficiency.13

Sustainable procurement considers both products and suppliers. For example, the federal government and state governments are required by executive order and federal and/or state laws and regulations to buy recycled paper.14 When so required, procurement personnel rely upon third-party determinations, such as those made by the Environmental Protection Agency or the Department of Agriculture, about what products are eligible, rather than rendering independent determinations.15 With respect to suppliers, solicitations can include evaluation criteria that favor suppliers who demonstrate experience with certified environmental standards.16

Sustainable procurement entails planning and deliberation at every stage of the procurement process in an effort to assess which method of procurement and which suppliers will best accomplish the minimum needs identified by the agency. Thus, to implement sustainable procurement, best practices dictate that state and local government agencies do the following:

- Consider and identify agency needs and demands during the acquisition planning stage of the procurement process;
- Consider the environmental impacts of goods and services over their life span;
- Consider suppliers’ social and environmental practices; and
- Consider value for money according to a life-cycle analysis as opposed to initial cost assumptions.
Implementing these best practices provides agencies the support needed to justify the collateral policy goal of advancing sustainable procurement.

While the four considerations stated above are vital to the implementation of sustainable procurement, the evaluation of life-cycle costs (the total costs of a product, technology, service, or infrastructure throughout its lifetime) instead of initial costs of goods and services has been the subject of debate. A common criticism of sustainable procurement is that initial costs for green products or services are more expensive than nongreen, conventional products. Green procurement proponents argue for an assessment of the cost that a product generates over its life span, noting that the purchase price for some products represents only a small quantity of all costs derived from the use, maintenance, and disposal of the product throughout its life cycle. Evaluating life-cycle costs instead of initial costs is a unique feature of sustainable procurement that will require procurement personnel to plan acquisitions with a focus on unveiling the hidden costs of conventional procurement. Integrating life-cycle cost determinations at the acquisition planning stage will encourage procurement professionals to weigh the benefits of sustainable procurement—cost savings, pollution prevention, and the unnecessary depletion of resources and energy—against the benefits of conventional procurement—speed and uniformity of procurement processes.

Although there are miles to go and milestones to reach, state and local governments have made significant strides in embracing sustainable procurement, ranging from establishing simple buy-recycled programs to instituting complex environmental and sustainable procurement strategies. The chapter appendix canvasses the type of environmentally sensitive programs implemented by state and territory. Wherever state and local governments may be on the spectrum, progress is evident. In 1986, only 13 states and a handful of local governments had significant buy-recycled laws. By 1998, legal requirements mandating the creation of buy-recycled programs were established in 47 states and more than 500 local governments. In 2010, nearly every state established a program to address environmentally preferable purchasing and/or sustainable procurement. Success with these programs depends on coherence. What this likely will require is an express articulation of the precise collateral policies that sustainable procurement should achieve throughout the various procurement systems currently in operation.

Sustainable Procurement and State and Local Government Collateral Policies

The effort to achieve sustainable procurement is largely a product of the environmental movement of the 1970s, government and industry reactions to the politics of oil production and consumption, and the need to develop innovative technologies that would improve energy efficiency and provide alternative energy sources. As major market participants, state and local governments are seen as important economic engines
capable of leading the push to respond to climate change, environmental degradation, and overall general energy inefficiency.

As public procurement generally moves toward a policy role, the procurement function has transformed from transactional to an instrument of strategic social reform. This means that politicians and policymakers are routinely called upon to work alongside strategic procurement personnel to achieve targeted reform. Such a relationship is vital to setting sustainable procurement agendas and meeting sustainable procurement targets.

While government green movements are still in their infancy, green agendas identify three priorities for green transformation—green buildings, green transportation, and green procurement. Green or sustainable procurement may be described as the process that agencies use to meet their needs by purchasing clean energy, alternative or renewable energy, and energy-efficient products, services, and construction in a way that achieves value for money on a whole life-cycle basis.

There are three distinct ways in which modern procurement can benefit the green government agenda. First, the procurement function can be used as a tool to promote green technology innovation. Second, procurement policy and regulations can be used to promote efficient use of public resources. And finally, the procurement function can be used to promote state and local government collateral policies.

Creating Markets for Green Technology, Products, and Services

As market actors with massive purchasing power, state and local governments have considerable potential to encourage and drive market innovation. The federal government offers examples for state and local governments in this regard. The federal government has historically embraced its role as a promoter of new environmental initiatives and has used its procurement system to this end. As program responsibilities shift from the federal government to state and local governments, the latter entities are expected to promote new initiatives and to keep pace with the rate of technology development in the commercial marketplace. Accordingly, state and local governments are obliged to innovate by encouraging the creation of markets for green technology, products, and services.

In order to fulfill this obligation, state and local governments are being asked to use their large procurement budgets to seek out new innovative solutions to existing and projected agency needs. In pursuing new solutions for existing and projected needs, state and local governments can spur demand for both new and prototype green technologies, products, and services. In this respect, state and local governments are serving as “launch customers” in three distinct scenarios:

- Driving research and development for currently unavailable technologies;
- Serving as beta purchasers of prototype technologies; and/or
- Becoming users of available technologies that have yet to achieve market penetration.
In each of these scenarios, state and local governments are trading the certainty of conventional purchasing for the risks associated with the adoption of new solutions.

Some critics of the government and its involvement in creating markets for green technology, products, and services rely upon hackneyed arguments to address the issue of whether government procurement should be used as a tool to create new markets. These arguments focus on whether such government conduct is truly an appropriate function, the degree to which the government incurs excessive costs associated with the implementation of collateral policies that often do not yield an adequate return on investment, or the potential for government efforts to fail to stimulate the creation of private markets or to spur demand for certain products. More relevant concerns, however, relate to the innovation-implementation chasm. The concern is that government in its sustainable procurement efforts may be looking for new, game-changing innovation rather than implementing green technologies, products, and services that are already available but that are kept from the market because of the price-gap between new solutions and conventional solutions, the latter being cheaper on a large scale.

Reframing the issue demonstrates the significant role that procurement plays in creating a market or demand for green technologies, products, and services.

Sustainable procurement, the implementation of strategies that expressly address and integrate environmental, social, and economic factors in policy and acquisition planning, is central to state and local government requirements to manage and distribute scarce resources and to spend taxpayer dollars in a fiscally responsible manner. In essence, using state and local government procurement to create markets and produce demand for green technologies, especially those that exist but have yet to reach acceptance in the market, promotes green procurement policy as well as demonstrates state and local government leadership in sustainability efforts. Thus, to drive market creation, state and local governments should be encouraged to do the following:

- Engage in market research to identify industry capability to supply green technologies, products, and services;
- Engage in acquisition planning to establish performance-based specifications that do not restrict innovation or disadvantage local suppliers of green solutions;
- Encourage the commercialization of green technologies, products, and services that have yet to penetrate the market;
- Support and maintain lines of communication with suppliers to stay abreast of innovations in green technologies, products, and services;
- Encourage a culture and philosophy of green markets; and
- Collaborate with industry to stimulate a market for green technologies, products, and services.

Exercising leadership in creating markets for green technologies, products, and services is consistent with the view that the state and local government procurement function is vital to promoting strategic social reform for the protection of the environment.
Promoting More Efficient Use of Public Resources

State and local governments recognize that economic considerations drive sustainable procurement policies and practices. Seventy percent of respondents to a survey conducted by IBM Corporation’s Institute for Electronic Government referred to economic factors as a primary reason driving their organizations’ green agendas. The report cites that “many executive orders were initially motivated by economics—cost savings associated with energy reduction.” In the prior section, a reference to the price-gap reflects just how important the economic piece of sustainability is to the transformation of organizational purchasing behavior. For example, clean technology proponents contend that energy technology exists today to respond to climate change and environmental degradation. These technologies include wind farms, concentrated solar power plants, and geothermal and tidal power. Despite the existence of these technologies, they have not hurdled the price-gap because they are considered too expensive when compared to fossil fuels, the latter currently dominating the market by virtue of its cheaper price.

Evening the playing field between clean technologies and fossil fuels requires clean technology markets that allow for economies of scale. As clean technology proponents point out, “[t]he fastest, simplest way to [switch to clean technology on a large scale] is to reorient government procurement away from fossil fuel energy toward clean energy and technology—to use the government’s vast spending power to create a market for green energy.” Sustainable initiatives have been shown to pay for themselves over their lifetimes, thereby creating net savings for the economy. Accordingly, state and local government sustainable procurement policies and practices are projected to promote more efficient use of public resources.

As mentioned previously, life-cycle costing offers a means of assessing the true cost of purchasing green technologies, products, and services as compared to conventional purchases. The push for life-cycle costing as a means to level the playing field between green purchases and conventional purchases is largely driven by two factors that arguably distort the true cost of a conventional purchase: the acquisition method selected to complete the procurement and, to a lesser degree, the level of decentralization of procurement functions. Focusing on these two factors is necessary to better discern when sustainable procurement will be considered a more efficient use of public resources.

The acquisition method selected to complete a purchase has a direct impact on the true cost of that purchase. When state and local governments purchase goods and services according to a sealed bid/low bid acquisition method, they base award solely on objectively determined price and other price-related factors. Routinely, bid prices evaluated under the sealed bid acquisition method consist of the initial purchase price of a product or service. More often than not, the initial purchase price does not take into account operational costs, maintenance costs, disposal costs, and salvage value recapture. The shortcoming with the sealed bid acquisition method is that it does not account for life-cycle costing. State and local governments' reliance on sealed bid
acquisition methods will generally yield an advantage for conventional products when the initial price of green products and services exceeds the price of conventional products. Accordingly, the choice of acquisition method has the potential to distort an assessment of the most efficient use of public resources.

In contrast, a negotiated acquisition method has the potential to account for life-cycle costing because this acquisition method emphasizes that it may be in the best interest of the government to consider award to other than the lowest-priced supplier or other than the highest technically rated supplier. Generally, the negotiated acquisition method looks at various factors, not just initial purchase price; as well, the negotiated acquisition method calls for a rational qualitative assessment that remains consistent with stated evaluation criteria. With respect to sustainable procurement, the negotiated acquisition method allows for express consideration of green product attributes and cost reductions or savings inherent in those attributes.

An indirect impact on assessing the true cost of purchasing products and services is the degree of decentralization inherent in many state and local government procurement functions. Another way of looking at this is to recognize that there is a lack of coordination and guidance among and between state and local government departments that execute the procurement function or that service those departments responsible for exercising procurement functions. While modern procurement reform has focused on the decentralization of procurement functions to deliver quality goods and services to users in a timely fashion at economical prices to ensure government performance, a decentralized system tends not to facilitate institutional adoption of innovative procurement initiatives, such as life-cycle costing. In the case of sustainable procurement policies and practices that promote consideration of life-cycle costing, a centralized system would promote a uniform approach to life-cycle costing for certain purchases and promote coordination among state and local government budgeting and accounting departments in support of their sister procurement organizations.

Policymakers and agency decision-makers are in the best position to drive a fiscal reformation agenda that embraces and mandates sustainability. As well, express treatment of the efficient use of public resources, especially fiscal resources, in appropriations legislation is essential to making a strong case for centralized integration of sustainability policies and practices throughout the procurement process.

**Implementation of Environmentally Preferable Purchasing Programs**

Many state and local governments have adopted environmentally preferable purchasing (EPP) programs in response to executive or legislative environmental and sustainability mandates. Mandates range from simple recommendations to expressly imposed obligations. Whether recommendations or requirements, EPP mandates are successful only inasmuch as they can be implemented. With some EPP mandates, implementation is meant to occur by identifying specific goals or strategies. In other cases, implemen-
tation occurs by setting specific purchasing targets or identifying preferable products with particular attributes. In still other cases, implementation is accomplished institutionally by centralizing acquisition planning and tasking teams of cross-functional acquisition planners to deploy EPP on system or organization-wide bases.

Implementing EPP by establishing goals and strategies offers procurement personnel significant flexibility to determine how to apply EPP and to what extent. For example, the State of Vermont issued executive order 06-94 directing state agencies to manage wastes by preferentially utilizing strategies that focus on pollution prevention, source reduction, and recycling. Vermont’s emphasis on establishing goals and strategies complements the state’s decentralized purchasing structure by setting goals and objectives for purchasing agents to address in managing the acquisition planning, contract formation, and contract administration processes.

Implementing EPP by setting specific purchasing targets or identifying preferable products with particular attributes represents a much more aggressive approach to achieving sustainable procurement. For example, the State of Oregon issued executive order 00-07 setting a goal for the state to become sustainable by 2025. To this end, the order directed the Department of Administrative Services to (1) aggressively pursue cooperative purchasing agreements; (2) appoint a Sustainable Supplier Council; (3) work with the Sustainable Supplier Council to develop sustainable purchasing policies, targets, and benchmarks for five product areas; and (4) coordinate efforts to better market Oregon’s sustainable products, industries, and services. Oregon’s approach is progressive in scope. Not only does Oregon single out specific product areas for environmentally preferable purchasing in executive order 00-07, the state, through the Department of Administrative Services, in its new Sustainability Plan has adopted an action item to block non-EPP products from state price agreements.

Changing organizational behavior and adopting a culture of sustainability among state procurement professionals is arguably the most challenging yet dynamic approach to implementing EPP. An example of a mandate to change state agency culture in connection with procurement is the State of Washington’s executive order 02-03, titled Sustainable Practices by State Agencies. The order provides in its preamble that “state government should model sustainable business practices that contribute to the long-term protection and enhancement of [the] environment, [the] economy and the health of current and future generations” and goes on to direct that “[e]ach state agency shall establish sustainability objectives and prepare a biennial Sustainability Plan to modify its practices regarding resource consumption; vehicle use; purchase of goods and services; and facility construction, operation and maintenance.” The order expressly regards institutional sustainability as a core agency value and requires agencies to make long-term commitments to, among other things, “shift to non-toxic, recycled and remanufactured materials in purchasing and construction” as well as facilitate the expansion of “markets for environmentally preferable products and services.” To monitor and enforce compliance with the core agency value, state agencies are required
to prepare biennial sustainability plans as well as to provide annual implementation progress reports. The State of Washington’s commitment to changing organizational behavior throughout its procurement system is indicative of the modern trend to treat the procurement function as an instrument of strategic social reform.

**Sustainability in the Procurement Process**

The most progressive approach to achieving sustainable procurement goes beyond the implementation of environmentally preferable purchasing programs and embarks on an institutional integration of environmental and sustainable strategies throughout the procurement process. Such complex and porous integration requires considering environmental, social, and economic interests throughout all phases of the procurement process, from acquisition planning and evaluation of bids or offers through contract award and contract administration. Accordingly, pervasive integration requires institutional changes of behavior in conducting all phases of the procurement process from cradle to grave.

State and local governments would be well served to examine the federal government’s efforts to integrate sustainable policies and practices in federal procurement. The Office of Federal Procurement Policy issued a proposed policy letter that enunciated the federal government’s commitment to integrating sustainable procurement throughout its processes, specifically to change the culture among procurement personnel in relation to the acquisition of green products and services. In addition to addressing the responsibilities of agencies to give preference to environmentally preferable products, agencies are also required to first consider mandatory and preferred sources to obtain green products and services that meet their performance needs and, when these sources are unable to meet their needs, to purchase green products and services from other sources.

The policy further sets out the requirement for agencies to include requirements and preferences for the use of green products in all new service contracts and other existing service contracts as they are recompeted and encourages incorporating these requirements and preferences into existing contracts as they are modified or extended through options. Strengthening this approach, President Obama issued an executive order that required the heads of each agency to advance sustainable acquisition to ensure that 95 percent of new contract actions, including task and delivery orders, for products and services include green products. In addition, the federal acquisition regulation council has promulgated Federal Acquisition Regulation (FAR) Part 23 to promote the government’s policies toward sustainable procurement. Specifically, FAR 23.403 states that the “[g]overnment policy on the use of recovered materials and biobased products considers cost, availability of competition, and performance.” The objective of the policy is to “acquire competitively, in a cost-effective manner, products...
that meet reasonable performance requirements and that are composed of the highest percentage of recovered materials and biobased materials practicable.\textsuperscript{58}

One aspect of the plan undertaken by the federal government is to pursue integration as early as possible by requiring agencies to form procurement teams, comprised of environmental and energy experts, managers, and technical personnel who will be a part of acquisition planning at the earliest stages of the procurement process.\textsuperscript{59} These team members are meant to consider sustainable design practices, life-cycle cost analysis, and salvage or take-back recycling,\textsuperscript{60} and maximization of energy and resource recovery in solid waste management.\textsuperscript{61} By integrating sustainable procurement practices during the early stages of the procurement process, the federal government expects to achieve an institutional behavioral shift in the prevailing culture of adherence to conventional procurement practices.

Another aspect of the plan is to extend the efforts at acquisition reform engaged over the past two decades to encompass sustainable and environmental practices in procurement. At the height of acquisition reform, the federal government sought to model its business after the way corporate America bought products and services.\textsuperscript{62} Applying this framework, the federal government points to hundreds of American companies that have committed to buying recycled content products and/or manufacturing their products from recycled content materials; as well, there are American companies that are focusing on energy efficiency, reducing reliance on toxic and hazardous chemicals, and considering product end-of-life issues.\textsuperscript{63} Accordingly, the federal government’s approach is to implement those functions used by corporate America to remain competitive by being stewards of sustainability.

Consistent with the federal government’s approach to sustainable procurement, several state and local governments have long recognized the benefits of integrating sustainability throughout the entire acquisition process. For example, Oregon and Massachusetts have been integrating sustainable and environmental practices throughout their entire procurement process since the 1990s. Oregon’s Sustainable Supplier Council is referred to as a cross-functional green team, comprised of purchasers, industry experts, vendors, and environmental and sustainability representatives.\textsuperscript{64} The council convened five work groups that then spent over six months examining specific markets, reviewing state purchasing practices, and developing recommendations for sustainable purchasing policies, targets, and benchmarks in five product areas.\textsuperscript{65} In Massachusetts, procurement management teams were formed to oversee the cooperative development of statewide contracts.\textsuperscript{66} These teams were granted additional authority to draft contract specifications that integrated environmental and human health considerations.\textsuperscript{67} State and local governments can use the experiences already amassed by the federal government and states such as Oregon and Massachusetts to assist them in integrating sustainable policies and practices throughout the various stages of the procurement process.
Considering Sustainability during Acquisition Planning

To achieve success in integrating sustainability into procurement, environmental and human health issues must be contemplated during the earliest phases of the acquisition planning process. Acquisition planning can be defined in many ways but generally is considered the "process by which the efforts of all personnel for an acquisition are coordinated and integrated through a comprehensive plan for fulfilling an agency need in a timely manner and at a reasonable cost. It includes developing the overall strategy for managing the acquisition."68

Successful acquisition planning for state and local purchasing of green products and services relies on the early exchange of information. With respect to government personnel, an acquisition plan provides sufficient information so that someone unfamiliar with the program will understand what is being proposed.69 In addition, all stakeholders must be involved in planning so as to generate commitment and support for the acquisition. A major aspect of promoting sustainable procurement is identifying and resolving concerns of stakeholders, including industry representatives, regarding the acquisition strategy. Government procurement personnel as well as vendors should be provided opportunities to comment on or receive early information about chosen acquisition methods; terms and conditions; the feasibility of the requirement, including performance requirements, statements of work, and data requirements; and the suitability of evaluation criteria.70 As sustainable procurement is relatively in its infancy, it is vital to measure the pulse of vendors during the acquisition planning process. To manage vendor resistance to changes in organizational culture surrounding integration of sustainability into procurement processes, state and local governments should look to include vendors and industry representatives in acquisition planning. State agencies can work with vendors to obtain information about sustainability and to make their products consistent with state agency sustainable purchasing goals.

During acquisition planning, contracting officers have various responsibilities they must meet, depending on the sustainable procurement policies and goals implemented within their jurisdictions. Generally, contracting officers must assess the need of the agency for the green product or service. Assessing the need requires a combination of market research and an understanding of user requirements. Contracting officers must address the following questions: (1) who will be the ultimate end-user of the product or service; (2) what use will be made of the product or service by the end-user; (3) when the product will be used; (4) where the product or service will be used; (5) why the end-user needs the product or service; and (6) how the end-user is going to use the product. Furthermore, planners must apply life-cycle cost concepts, where appropriate, in decision-making processes to determine the cost effectiveness of green alternatives. By performing a needs assessment and a cost analysis during acquisition planning, contracting officers are able to better determine the minimum requirements of an agency for a product or service. The needs assessment and cost analysis will assist
planners who must identify and document the availability of green products and services that satisfy the assessed needs.

Planners must then consult with environmental specialists when developing procurement plans and preparing statements of work or specifications to ensure incorporation of relevant sustainability requirements in procurement planning documents and purchase requests. In developing specifications integrating sustainability, planners must prioritize the requirements identified during the needs assessment and include a description of the physical and performance characteristics of the product as well as the environmental requirements of the product. When developing performance requirements, planners must identify what standards the product or service must meet. These requirements must be obtainable, measurable, and verifiable. In performing these tasks, planners must address the level of competition available to meet agency requirements. Establishing a set of performance requirements that unreasonably restricts competition among suppliers will violate competition laws and likely result in higher prices being paid by state and local governments. Maintaining an equitable number of suppliers while including environmental and sustainable performance requirements and specifications will result in competitive and fair outcomes.

During acquisition planning, contracting officers generally have the flexibility to determine how to integrate sustainability into an acquisition. For instance, they may decide to (1) specify environmental attributes as an objective requirement in a solicitation; (2) establish price preferences favoring green products and services or restrict competition to vendors supplying green products and services; and/or (3) incorporate green purchasing requirements into solicitations and contracts by drafting specifications that encourage vendors to offer green products and services. Whichever method or combination of methods is used, considering sustainability during acquisition planning encourages institutional acceptance of sustainable policies and practices throughout the entire procurement process.

Reinforcing Sustainability in the Evaluation of Bids or Offers

Another vital aspect of the procurement process is the publication of solicitations and their inclusive specifications. Agencies issue solicitations containing specifications that articulate their requirements. Solicitations serve many purposes, one of which is notice to prospective vendors regarding agency needs for products or services and the basis upon which vendors will compete to satisfy these needs. Specifications in a solicitation form the basis upon which agencies evaluate vendor bids or offers. With respect to sustainable procurement practices, specifications may tie agency requirements to environmental attributes that can be met by either the sealed bid acquisition method or the negotiated procurement acquisition method.

Under a sealed bid method, agencies in their discretion may determine that a specific green product or service satisfies the minimum need of the agency, thus requiring
vendors to conform strictly to agency specifications and statements of work in order to be deemed responsive and eligible for contract award. Under the negotiated procurement acquisition method, agencies can state evaluation factors or criteria based on environmental considerations, but these factors and significant sub-factors must represent the key areas of importance and emphasis to be considered in the source selection decision.\textsuperscript{72} They must also support meaningful comparison and discrimination between and among competing offers. After the requirement to state the factors and significant sub-factors, there is a requirement to state the relative importance or weight of the factors and sub-factors in relation to cost/price.\textsuperscript{73} Thus, the relative weight of the factors to one another should be provided as well as a decisional statement or rule regarding the weight of non–cost/price factors against the cost/price factor. Relative weighting of evaluation factors is a powerful tool because it sends a clear message to prospective vendors that an agency is serious about the green product or service requirements in the scope of work.\textsuperscript{74}

While agencies have the discretion to promote sustainable procurement through generally applicable procurement rules and regulations, acquisition personnel must comply with well-established laws and best practices meant to promote the fair and competitive principles that are a hallmark of the American public procurement system. In furtherance of these guiding principles, the comptroller general within the Government Accountability Office has decided a handful of bid protest cases addressing the issue of the proper evaluation of environmental criteria. These cases offer guidance to state and local government acquisition personnel responsible for integrating sustainability throughout the procurement process.

An agency has the discretion to establish solicitation requirements based upon environmental considerations so long as the factors relied upon are reasonably related to the agency’s need in choosing a contractor that will best serve the government’s interests. In \textit{King Construction Company, Incorporated},\textsuperscript{75} the protester challenged the solicitation’s requirements as unreasonably requiring LEED (Leadership in Energy and Environmental Design) experience by contractor personnel and, thus, unreasonably restricting competition, as few firms would have had experience with LEED projects.\textsuperscript{76} The General Services Administration responded that the solicitation for build-to-suit office space was not unduly restrictive of competition because the solicitation requirements did not establish LEED experience as a minimum experience standard; instead, the solicitation required that the building obtain LEED certification and, to this end, architectural and engineering firms with LEED experience would be evaluated more favorably.\textsuperscript{77}

The Comptroller General deemed the agency’s requirement reasonable because of the various executive orders, legislation, and regulations mandating sustainable design and development, energy efficiency, and verification of a building’s environmental performance.\textsuperscript{78} The Comptroller General concluded that “\textit{t}he agency has reasonably explained how the requirement that the building obtain LEED certification enables...
the agency to ensure that it meets certain mandated standards. While the requirement might place the protester at a competitive disadvantage, the fact that the requirement may be burdensome or even impossible for a particular firm to meet generally does not make it objectionable if the requirement properly reflects the agency’s needs. Accordingly, an agency may require vendors to describe their experience in the context of environmental considerations and treat vendors with such experience more favorably so long as the evaluation criteria is reasonable and stated in solicitations.

An agency may also cancel a solicitation if it determines that vendors’ proposals do not meet solicitation requirements after evaluation of stated technical evaluation factors. In *Sunshine Kids Service Supply Company*, the Comptroller General denied a protest that challenged the Department of Defense’s decision to cancel a solicitation for exterior custodial work where the protester failed to demonstrate the required performance experience with environmentally preferable products and failed to counter a determination that its management approach to environmental stewardship was inadequate. The Comptroller General upheld the agency’s discretion to establish reasonable requirements based upon environmental and sustainable considerations; as well, the agency’s evaluation of technical factors was upheld as reasonably related to and consistent with the solicitation’s requirements.

An agency may also exclude bidders or offerors who fail to demonstrate their capacity and willingness to meet evaluation factors based upon environmental and sustainable considerations. In *Future Solutions, Incorporated*, the Comptroller General had to decide a protest that presented a conflict between two competing government collateral policies. The protester, a small business, challenged an agency evaluation of its responses to a “sources sought” notice to small business as to determine their ability to provide a recycling program, green products, green delivery vehicles, green fleet maintenance programs, green training modules, and Environmental Management System plans. The Environmental Protection Agency excluded the protester from competition after evaluating the protester’s responses to the “sources sought” notice because of the agency’s determination that only large vendors could satisfy the requirements of the quotation. The Comptroller General held that the agency did not have to treat the protester in the same manner as it did the vendors that it had solicited for quotations because of the more limited purpose of the “sources sought” notice to ascertain whether any small business vendors could possibly satisfy the solicitation’s requirements.

An agency, however, may not issue a delivery order on the basis of a quotation that deviates from solicitation requirements unless all vendors are notified of the changed requirements and evaluation factors. In *Haworth Incorporated*, the Comptroller General sustained a protest challenging the agency’s evaluation of proposals and award of a contract to a vendor who offered non–Forest Stewardship Council (FSC)-certified wood conference tables in contravention of the solicitation requirements. The solicitation listed four technical evaluation factors, one of which was environmental factors. In awarding to a noncompliant vendor, the protester urged that the Environmental
Protection Agency erroneously discounted the environmental evaluation criteria and that this action was inconsistent with the solicitation’s sustainable requirement for FSC-certified wood products.\textsuperscript{88} The Comptroller General agreed with the protester that it was competitively prejudiced by the Environmental Protection Agency’s erroneous evaluation of various environmental criteria set forth in the solicitation.\textsuperscript{89} Thus, an agency is admonished to establish its minimum needs and to accurately identify the evaluation factors that are reasonably related to that need.

These cases demonstrate how environmental considerations can be integrated into the evaluation phase of procurement processes. The key consideration in accomplishing integration is relating the environmental considerations to the products, services, or construction required by the agency. When integrating environmental and sustainable considerations in the evaluation phase, it is vital to appreciate that several factors must be weighed before a decision to award can be made and justified.

**Achieving Sustainability at Contract Award and throughout Administration**

The final phases of the procurement process are integral to the promotion of sustainability. Procurement personnel can assess the past environmental performance of vendors before awarding a contract; as well, they can monitor vendors after contract award to assess whether vendors are remaining environmentally compliant during the administration phase of the contract. It is the well-established procurement concept of responsibility that provides procurement personnel with authority and discretion to implement environmental and sustainable policies and practices during the contract award and contract administration phases of the procurement process.

Prior to award, a contracting officer must make a determination that a vendor is qualified to perform a government contract. A qualified contractor is one who is deemed responsible by the contracting officer. Responsibility determinations vest significant business judgment in the contracting officer and they serve as a means of managing risk of nonperformance. A responsibility determination is based upon two factors: ability to perform (whether the contractor can perform the work); and tenacity, perseverance, and integrity (whether the contractor has the will to perform).\textsuperscript{90} The contracting officer uses two tools to avoid awarding contracts to unqualified vendors. The first tool is a nonresponsibility determination. This determination results in the disqualification of a contractor from a specific contract. The second tool, debarment and suspension,\textsuperscript{91} is made by an agency official or agency board and results in disqualification on an extended, more permanent basis. Thus, the contracting officer can employ both tools, when appropriate, to protect the integrity of the procurement process from nonresponsible vendors and to manage the risk that the required performance will not be completed.

There are several general standards that are used for measuring a contractor’s ability to perform. They include:
• the degree of financial resources;
• compliance with delivery schedules;
• access to facilities and equipment;
• management and technical capability; and
• the ability to obtain licenses and permits.

There are two general standards for measuring a contractor’s will to perform. The first is tenacity and perseverance. Under this general standard, the vendor must demonstrate that it has the will to complete the required work on time and satisfactorily. The government can look to past performance on private and public contracts to substantiate tenacity and perseverance. The second is integrity. Integrity says that contractors must be honest, upright, and free from criminal involvement or affiliations. Even if these two standards are met, vendors who appear otherwise responsible may be deemed nonresponsible for failure to meet collateral requirements of contracting with the government, one of these being environmental compliance.

Arguably, contract award is the “last chance” to proactively ensure that vendors are willing and able to render performance that is consistent with sustainable procurement policies and practices. As such, a responsibility determination represents a crucial mechanism to block unsustainable practices by vendors. At the intersection of responsibility and sustainability is the controversial issue of green washing. Green washing occurs when a company publicly misleads, exaggerates, or embellishes the environmental features of itself or its products, while involved in practices that are environmentally or socially irresponsible. Green washing is defined as “the unjustified appropriation of environmental virtue by a company, an industry, a government, a politician or even a non-governmental organization to create a pro-environmental image, sell a product or a policy, or to try and rehabilitate their standing with the public and decision makers after being embroiled in controversy.”

Procurement professionals can address green washing by treating it as a factor in the responsibility determination and vigorously investigating vendor environmental claims through inspection of vendor technical data, product specifications, marketing materials, and vendor-supplied Material Safety Data Sheets (MSDS) prior to contract award. Procurement professionals may also draft notices to bidders and offerors that inform them that environmental responsibility and compliance will be part of the standard measure for integrity in an assessment of a vendor’s will to perform. Where evidence of green washing appears, contracting officers have the discretion to render a nonresponsibility determination to protect the integrity of the procurement process.

Once a government contract is executed and performance of the contract begins, the parties to the contract have entered the contract administration phase of the procurement process. During this phase, contracting officers are required to monitor vendor performance as well as anticipate the need for making changes to the contract.
Generally, government contracts include various remedy-granting clauses that provide the contracting officer with great flexibility in administering contract performance to completion. The contracting officer can use these remedy-granting clauses to encourage and promote sustainability policies and practices. For example, most government contracts include a changes clause, which spells out when contract modifications, either bilateral or unilateral, are permitted and under what circumstances. A bilateral modification is a contract modification that is signed by both the contractor and the contracting officer. This type of modification is used to make negotiated equitable adjustments resulting from the issuance of a change order and to reflect any other agreement made between the parties, which memorializes the modification of the terms of the original contract. In contrast, unilateral modifications are contract modifications that are signed only by the contracting officer. Thus, the government can issue change orders to direct changes under specific circumstances during the course of performance. In exchange for giving the government the right to order unilateral changes, the contractor is promised an equitable adjustment if the change increases the cost or time of performance.

The changes clause has several purposes. First, it exists to provide operating flexibility by giving the government the unilateral right to order changes in the work to accommodate advances in technology. Second, it provides the contractor a means of proposing changes to the work, thereby facilitating more efficient performance and improving the quality of the contract. Third, it furnishes procurement authority to the contracting officer to order additional work within the "general scope" of the contract without using the procedures required for a new procurement. Finally, it offers both the contracting officer and contractors the opportunity to address technical variances or potential performance deficiencies that threaten to reduce or neutralize the government's ability to receive the product or service that was meant to achieve sustainability goals and objectives. Thus, the changes clause serves as a mechanism to alter performance before problems occur and thereby helps to guarantee that the government's ability to respond to new conditions or faulty assumptions will not ultimately frustrate the procurement of sustainable products or services.

A fundamental goal of the acquisition process is to obtain quality products and services. In furtherance of this goal, the government inspects products and services to guarantee conformance with contract requirements. Similar to the contract changes clause, the inspection clause is a significant remedy-granting clause that can also support sustainability efforts. The particular inspection clauses contained in a contract, if any, determine the scope and extent of the government’s right to inspect a contractor’s performance. If during inspection a contracting officer uncovers green washing or determines that a contractor’s performance does not conform to the contract’s sustainability requirements, the contracting officer may employ any number of remedies ranging from corrective action to cancellation of the contract. Pursuing inspection remedies demonstrates the contracting officer’s commitment to sustainability while
also reinforcing institutional commitments to integrating sustainability policies and practices during the administration phase of the procurement process.

Promoting Future Sustainable Procurement Policies and Practices through Leadership and Training

Full integration of environmental and sustainable policies and practices throughout the procurement process requires leadership and accountability. Furthermore, organizational and outreach efforts are imperative to institutionalizing sustainable procurement policies and practices. Institutional leadership and training go hand in hand so that the existence of both will promote standardization of green priorities and a universal commitment to transforming the institutional culture of procurement from conventional to sustainable. Instrumental to successful integration of sustainable procurement policy and practices is strategic support at the highest levels of government. To guide the transformation from conventional procurement to sustainable procurement, state and local governments must invest in a leader with a vision of green procurement from cradle to grave and the commitment to pursue green innovation initiatives to create markets for green technologies, products, and services.

A green leader will lobby for resources to hire competent green staff. A visionary green leader will recognize the need to create a steering committee to institutionalize sustainable procurement. The model in Oregon has been successful in large measure because of the formation of a council comprised of stakeholders from both the public and private sectors. Forming and convening a steering committee communicates broad-ranging support to legislators and taxpayers who are ultimately responsible for investment outlays for implementation of sustainable procurement measures. In addition, hiring competent technical staff will be vital to conducting market research into optimal sustainable procurement strategies; as well, hiring procurement professionals with acquisition planning experience will aid in successfully implementing chosen sustainable procurement strategies.

A green leader will also invest in green training, awareness, and outreach programs. Establishing foundations in green training will allow leaders and staff to assess where on the sustainability spectrum departments and agencies fall. Each department or agency may occupy a different point on the sustainability spectrum, so training, awareness, and outreach programs should be targeted to meet established benchmarks that ultimately achieve consistent and coherent approaches to sustainable procurement policies and practices. Training should be geared to building capacity, maintaining standards, and promoting progress as against an established baseline. The baseline for sustainable procurement should not be static but should be viewed as the subject of recurring discussions geared toward continuous innovation of the procurement process. With an investment in leadership and training, acquisition personnel and their end-users should be able to articulate the meaning of sustainable procurement at both
the policy level and the operational level of the organization, thereby developing a culture enmeshed in sustainability.

**Conclusion**

State and local governments are moving toward sustainable procurement; despite this movement there remains significant room for aggressive and ambitious transformation to an institutional culture based upon full sustainability. At no time has it been more important to comprehend all facets of the procurement process while at the same time appreciating the significance of the procurement function to the setting of environmental and sustainability policy. State and local government procurement officials are pivotal instruments in meeting the millennial need to respond to climate change, water and air pollution, toxic chemical exposure to people and the environment, and changing market conditions. Sustainable procurement has proved to reduce the negative effect that conventional procurement has had on human health and the environment. The task for state and local governments now is to institutionalize green initiatives and lead by example in the quest to achieve green government. Leading by example starts with the government taking a deliberate approach to implementing green government by insisting on transparency and using acquisition methods that transcend the parochial lowest bid method. Moreover, government leadership in advancing green procurement initiatives requires procurement professionals to exercise sound judgment in defining the optimal scope of sustainability and social responsibility while at the same time avoiding the pitfalls of green washing, fraud, and pandering with respect to funding green initiatives for the sake of playing environmental politics.
### Environmentally Sensitive Purchasing Programs by State and Territory

<table>
<thead>
<tr>
<th>State/Territory</th>
<th>Program Available?</th>
<th>Additional Information: Executive Orders and Sustainable/Environmental Statutes</th>
</tr>
</thead>
<tbody>
<tr>
<td>Alabama</td>
<td>No Statutorily Enacted Program</td>
<td>ALA. CODE 41-16-142. Energy cost-saving measures authorized</td>
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<tr>
<td>Alaska</td>
<td>No Statutorily Enacted Program</td>
<td>No statute; Tit. 36 (Procurement Code)</td>
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<tr>
<td>Colorado</td>
<td>No Statutorily Enacted Program</td>
<td>Recharge Colorado Program: <a href="http://rechargecolorado.com/index.php/programs_overview/procurement/">http://rechargecolorado.com/index.php/programs_overview/procurement/</a>; No statute, Tit. 24 (Procurement Code); But 24-1-3-207.5 does not require, but lists references to environmentally preferable products</td>
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<tr>
<td>State/Territory</td>
<td>Program Available?</td>
<td>Additional Information: Executive Orders and Sustainable/Environmental Statutes</td>
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<tr>
<td>Connecticut</td>
<td>No Statutorily Enacted</td>
<td>Nothing under Title 4e, State Contracting</td>
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<td>Program</td>
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<tr>
<td>Delaware</td>
<td>No Statutorily Enacted</td>
<td>6938: Purchase of Recycled, Reusable and Recyclable Products; 6939 Purchase of Energy Efficient Products; 6971-76: Energy Performance Contracting Act</td>
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<td>Program</td>
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<tr>
<td>District of</td>
<td>No Statutorily Enacted</td>
<td>No statute</td>
</tr>
<tr>
<td>Columbia</td>
<td>Program</td>
<td></td>
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<tr>
<td>Florida</td>
<td>No Statutorily Enacted</td>
<td>Fla. Admin. Code Ann. 283.32 Recycled Paper to be used by each agency, printing bids certifying use of recycled paper, percentage preference in awarding contracts; 286.29 Climate-friendly public business (FL Climate-Friendly Preferred Products List, etc.)</td>
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<td>Program</td>
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<tr>
<td>Georgia</td>
<td>No Statutorily Enacted</td>
<td>No statute, Title 13, Ch. 10 (K for Public Works) or Title 36, Ch. 91 (Public Works Bidding)</td>
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<tr>
<td>Hawaii</td>
<td>No Statutorily Enacted</td>
<td>HAW. REV. STAT. 103D-1303. Preferences for oil products with greater recycle content</td>
</tr>
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<td></td>
<td>Program</td>
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<tr>
<td>Idaho</td>
<td>No Statutorily Enacted</td>
<td>Executive Order: 2007-21 Establishing a Policy to Reduce Fossil Fuel Use and Greenhouse Gas Emissions from State Vehicles (<a href="http://gov.idaho.gov/mediacenter/execorders/eno/2007_21.html">http://gov.idaho.gov/mediacenter/execorders/eno/2007_21.html</a>); No statute, Tit. 54, Ch. 19 (Public Works Contractors) or Tit. 67, Ch. 28 (Purchasing by Political Subdivisions)</td>
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<td>Program</td>
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<tr>
<td>Illinois</td>
<td>No Statutorily Enacted</td>
<td>500/45-26 Environmentally preferable procurement; 500/45-15 Soybean oil-based ink; 500/45-20 Recycled Supplies; 500/45-25 Recyclable Supplies; 500/45-55 Corn-Based Plastics; 500/45-60 Vehicles Powered by Agricultural Commodity-Based Fuel; 500/45-75 Biobased products; Act 520 Soybean Ink Act</td>
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<td>Program</td>
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<tr>
<td>Indiana</td>
<td>No Statutorily Enacted</td>
<td>Greening the Government Program: <a href="http://www.in.gov/idoa/2343.htm">http://www.in.gov/idoa/2343.htm</a>; No Statute, Tit. 5, Art. 16 (Public Works) or Tit. 36, Ch. 12 (Public Works Projects)</td>
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<td>Program</td>
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### State/Territory | Program Available? | Additional Information: Executive Orders and Sustainable/Environmental Statutes
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Kansas | No; Green Team to encourage sustainable activity (http://www.kansasgreenteams.org/info) | No statute, Ch. 75, Art. 69 (Contracts for Public Improvement Projects)


Louisiana | No Statutorily Enacted Program | Executive Order BJ 2008-8 "Green Government": http://www.gov.state.la.us/assets/docs/OfficialDocuments/2008EOGreenGovernment.pdf; No statute, Tit. 38, Ch. 10 (Public Contracts)


Maryland | No Statutorily Enacted Program | 14-402 Recycled Paper, Paper Products; 14-405 Recycled Materials; 14-408 Biodiesel Fuel; 14-410 Maryland Green Purchasing Committee

Massachusetts | Yes | Executive Order No. 515 Establishing an Environmental Purchasing Policy (http://www.mass.gov/Agov3/docs/Executive%20Orders/executive_order_515.pdf)
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</thead>
<tbody>
<tr>
<td>Mississippi</td>
<td>No Statutorily Enacted Program</td>
<td>31-7-14 Energy Efficient Equipment Contracts; 31-7-14.1 Energy Efficient Projects, Energy Management Plans, Special Energy Funds</td>
</tr>
<tr>
<td>Missouri</td>
<td>No Statutorily Enacted Program</td>
<td>34.031 Recycled Products, Preference for Products made from solid waste-elimination of purchase of products made from polystyrene foam; 34.032 Recycled Paper to be used; 34.175 Soybean-based ink to be used for state printing</td>
</tr>
<tr>
<td>State/Territory</td>
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<tr>
<td>Nebraska</td>
<td>No procurement policy found. Nebraska does sell government surplus to recyclers.</td>
<td>Neb. Laws 81-1183-81-1189. Brenda Pape, Procurement Mgr. (402) 471-2401 Bill no. LR 335, introduced 2/25/10 sought to establish a Clean Energy Economic Committee that read like it would include procurement changes. Indefinitely postponed 4/1/2010</td>
</tr>
<tr>
<td>New Mexico</td>
<td>Yes</td>
<td>N.M. Admin. Code § 1.4.1.25 (recycled products preference); N.M. Stat. Ann. 13-1-135.1 (mandatory recycled products purchase when competitive); N.M. Stat. Ann 13-1B-3 (75% of vehicles purchased must be efficient or alternative energy)</td>
</tr>
<tr>
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<tr>
<td>North Dakota</td>
<td>Yes</td>
<td>N.D. CENT. CODE 54-44.4-07 (preference for soy-based ink, recycled content, bio-based products); N.D. CENT. CODE 54-44.4-07 (20% of paper purchased must be at least 25% recycled); also see “Guidelines to Environmentally Preferable and BioBased Procurement, <a href="http://www.nd.gov/spo/legal/docs/200908-EPB.pdf">http://www.nd.gov/spo/legal/docs/200908-EPB.pdf</a></td>
</tr>
<tr>
<td>Northern Marianas Islands</td>
<td>No information available</td>
<td></td>
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<tr>
<td>Ohio</td>
<td>No Statutorily Enacted Program</td>
<td>None found, although state law specifies local regulations can be stricter, OHIO REV. CODE §101:9-4-07 “Procurement Requirements”</td>
</tr>
<tr>
<td>Oklahoma</td>
<td>No Statutorily Enacted Program</td>
<td>No Statute</td>
</tr>
<tr>
<td>Oregon</td>
<td>Yes</td>
<td>Number of Executive Orders and Comprehensive Sustainable Procurement policy which includes encouragement to use life-cost method to calculate true product cost during procurement process. See OR. ADMIN. R. 125-247-0170</td>
</tr>
<tr>
<td>Pennsylvania</td>
<td>Yes</td>
<td>Act 101 (1988) established in-state recycling programs and procurement of goods with recycled content. 62 PA. CONS. STAT. § 3746 (recycled oil preference); 108 (recycled goods preference)</td>
</tr>
<tr>
<td>Puerto Rico</td>
<td>No information available</td>
<td></td>
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<tr>
<td>Rhode Island</td>
<td>Yes</td>
<td>R.I. GEN. LAWS § 37-2-75 (prohibiting use of lead-based paint); R.I. GEN. LAWS § 37-2-76 (50% recycled paper mandate and encouragement of other recycled goods; contract forfeiture if recycled content is misrepresented by vendors)</td>
</tr>
<tr>
<td>South Carolina</td>
<td>Yes</td>
<td>Comprehensive “Green Purchasing Initiative” binding on all state agencies and public universities encompassing source reduction, recycled content, water and energy reduction, pollution prevention, toxic content reduction, green landscaping, environmentally considerate travel for state employees, and life-cycle management</td>
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<tr>
<td>State/Territory</td>
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<td>Additional Information: Executive Orders and Sustainable/Environmental Statutes</td>
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<tr>
<td>South Dakota</td>
<td>Yes</td>
<td>Procurement site last updated 7 years ago. S.D. CODIFIED LAWS § 5-18A-30 (recycled products and biofuel preference); S.D. CODIFIED LAWS § 5-18A-38 (Environmentally preferable products to be selected)</td>
</tr>
<tr>
<td>Tennessee</td>
<td>Yes</td>
<td>Guidelines for purchasing environmentally preferable office supplies, equipment, appliances, and vehicles. TENN. CODE § 12-3-531 (recycled motor oil preference); TENN. CODE § 68-211-606 (40% recycled paper); TENN. CODE § 68-211-607 (Transportation Dept. to increase purchase of recycled materials)</td>
</tr>
<tr>
<td>Texas</td>
<td>Yes</td>
<td>TEX. ADMIN. CODE § 20.135 (requires all state agencies to file annual report of recycled products expenditures; designates “First-Choice” items including recycled oil, plastic office supplies, paper products, containers, and energy-efficient photocopiers)</td>
</tr>
<tr>
<td>Utah</td>
<td>Yes</td>
<td>UTAH CODE § 63G-6-403 (give bids with recycled goods priority during bidding); UTAH CODE § 63F-6-406 (recycled paper goods preference)</td>
</tr>
<tr>
<td>Vermont</td>
<td>Yes</td>
<td>Comprehensive Environmentally Preferable procurement program encompassing recycled products, products with low toxic compounds, alternative fuels, products from sustainable forests, energy efficient products, and life-cycle cost consideration.</td>
</tr>
<tr>
<td>Virginia</td>
<td>Yes</td>
<td>VA. CODE § 2.2-4313 (recycled goods); VA. CODE § 2.2-4314 (less toxic goods); VA. CODE § 2.2-4323 (programs &amp; agency responsibility re: recycled goods); VA. CODE § 2.2-4324 (preference for local recycled products); VA. CODE § 2.2-4326 (recycled paper preference); VA. CODE § 2.2-4328 (local products preference)</td>
</tr>
<tr>
<td>Virgin Islands</td>
<td>No Statutorily</td>
<td>No Statute</td>
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<td>Enacted Program</td>
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<tr>
<td>Washington</td>
<td>Yes</td>
<td>Comprehensive Recycled Product Procurement policy including paper, plastic, tires, motor oil, car batteries, latex paint; Washington Purchasing manual RCW 43.19A</td>
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</tbody>
</table>
State/Territory | Program Available? | Additional Information: Executive Orders and Sustainable/Environmental Statutes
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West Virginia | No Statutorily Enacted Program | No Statute

Wisconsin | Yes | Wisconsin boasted 98% recycled paper use rate in 1999, the best in nation at that time. Wisconsin no longer tracks recycled paper use though statutory requirement has not changed. Official "Buy Recycled Only" policy in place. Recycled policy extends to plastic, glass, motor oil, construction materials, office furnishings, and highway equipment.

Wyoming | No Statutorily Enacted Program | No Statute

Notes
2. *Id.*
5. See *Id.* (reporting that state and local governments are spending, conservatively, 25% to 40% of every tax dollar on purchased materials and supplies); see also Matthew Potoski, *State and Local Government Procurement and the Winter Commission*, PUB. ADMIN. REV. 558 (Dec. 2008).
8. See supra note 3 at 44–51.

12. Sustainable procurement is referred to by many names: responsible purchasing, eco-procurement, green procurement, green purchasing, and sustainable purchasing . . . to name just a few.


16. See King Construction Co., Inc., B-298276, 2006 CPD ¶ 110, 2006 WL 2000759 (Comp. Gen.).

17. See Aure Adell, Joseph Esquerrà, Helena Estevan, Simon Clement, Philipp Tepper, Hendrick Acker, & Dominik Seebach, Existing Approaches to Encourage Innovation Through Procurement, at 36, available at http://www.smart-spp.eu/?id=7323 (last visited Dec. 28, 2011) (Life-cycle costs can be defined as the total costs of a product, technology, service, or infrastructure throughout its lifetime. These include the costs of design, production, acquisition, operation, maintenance, and disposal unless the product still has a value after the life span of use by the owner, in which case the disposal costs can be replaced by sales income.). Life-cycle costing integrates into one number all of the costs that are produced during a certain period of time by a product. For purposes of sustainable procurement, life-cycle costs include initial expenses and future expenses associated with a product.

18. See supra note 14 at 25.

19. See supra note 14 at 5. At one end, state and local governments may be just starting by establishing buy-recycled programs. Others may be engaged in a more coordinated approach to buying that is facilitated by an environmentally preferable purchasing program. While at the other end, state and local governments may be considering the implementation of strategies that expressly address and integrate environmental, social, and economic factors in policy and acquisition planning.


22. Refer herein to this chapter’s appendix, Environmentally Sensitive Purchasing Programs by State or Territory.


24. See id. at 5.


27. See supra note 18 at 9; see also Jeffrey Harris, Matt Brown, John Deakin, Steve Jurovics, Afroz Khan, Ed Wisniewski, James Mapp, Barbara Smith, Melissa Podeszwa, & Alison Thomas,


30. A performance-based specification describes the function or performance to be achieved rather than specifying the exact product or service that will meet the government’s need. Performance-based specifications allow the market to suggest the best way in which an agency may meet its need, without being technically prescriptive. Performance-based specifications describe the required results and provide criteria for verifying whether or not these results have been met. Performance-based requirements do not state the methods for achieving the required results. See Ned H. Criscimagna, Performance Based Requirements, available at http://www.riac.org/DeskReference/viewDocument.php?id=207 (last visited Dec. 28, 2011).

31. See supra note 23.

32. Id.

33. See supra note 29.

34. Id.

35. Id.

36. Id.


38. See supra note 14 at 8.

39. Id.

40. Id.

41. Id. at 8–9.

42. Id. at 8.


47. Id.

48. Id.
49. Id.
50. Id.
51. Id.
52. See supra note 13.
53. Id.
54. Id.
59. See supra note 13.
60. See Alicia Culver, Buying Smart: Experiences of Municipal Green Purchasing Pioneers, available at http://www.calpsc.org/policies/green_purchasing.html (last visited Dec. 28, 2011) (Salvage or take-back contemplates the shifting of risk and responsibility to manufacturers and distributors to recycle products and to redesign their products to be more easily recyclable).
61. See supra note 13.
62. See supra note 63.
63. Id.
64. See supra note 14 at 9.
65. Id.
66. Id.
67. Id.
69. Id.
70. Id.
71. The Massachusetts Operational Services Division (OSD) has determined that specific commodities (such as paper products and office supplies; janitorial products; automotive products; flooring and facilities/recreational products; and office equipment) are available at a value and quality comparable to nonenvironmentally preferable counterparts. In an effort to assist departments, OSD has established statewide contracts for each of the commodities. Nonexecutive departments and other public entities are encouraged to use these statewide contracts whenever feasible. Executive departments are required to use these statewide contracts. If any unusual circumstances necessitate a separate procurement of these designated commodities, and OSD has approved the procurement, the request for responses include mandatory minimum specifications. Responses that do not meet the mandatory minimum specifications should be considered unresponsive and should be disqualified. See Operational Service Division, Environmentally Preferable Products Purchasing Program: General Information, Requirements and Guidance, available at www.mass.gov/Eoaf/docs/osd/pic/epp.doc (last visited Nov. 7, 2010).
72. See 48 C.F.R. § 15.304.
73. Id.
74. See supra note 63.
75. B-298276, 2006 CPD ¶ 110, 2006 WL 20000759 (Comp. Gen.).
76. Id. at "3.
While suspension and debarment is an appropriate monitoring and enforcement tool in relation to promoting sustainable procurement, a more detailed discussion is beyond the scope of this chapter.

Environmental endorsement claims likely come under regulation, scrutiny, and rules associated with state advertising laws, standards, and practices imposed by the various state and federal agencies, such as the Environmental Protection Agency or the Federal Trade Commission (FTC), and industry standards, such as Leadership in Energy and Environmental Design (LEED®) certification of the U.S. Green Building Council, American National Standards Institute, the International Organization for Standards (ISO), or Green Seal. See Public Relations Society of America, Code of Ethics, Professional Standards Advisory PS-12 (Oct. 2009), available at http://www.prsa.org/AboutPRSA/Ethics/ProfessionalStandardsAdvisories/ (last visited Dec. 28, 2011).


Procurement professionals can investigate environmental claims in the contract award and administration phases of the procurement process by researching complaints made by consumers and institutional purchasers to the Federal Trade Commission or reviewing studies of sustainable validation organizations, such as TerraChoice (http://sinsofgreenwashing.org/).

See 48 C.F.R. § 43.103(b).

Supra note 94.

See supra note 69 and accompanying text.