Biden Climate Push Expands With Contractor GHG Focus

By **William Kirkwood, Lawrence Block and Lawrence Sher** (November 8, 2023)

On Sept. 21, President Joe Biden directed federal agencies to consider contractors' greenhouse gas emissions when making procurement decisions.[1]

William Kirkwood

This announcement — along with Executive Order No. 14030, which directs the Federal Acquisition Regulatory Council, or FAR Council, to promulgate rules instructing agencies to consider the environmental impact of their contracts — demonstrates that the Biden administration has a continued interest in using government procurement as a vehicle for reducing GHG emissions.

Lawrence Block

The administration plans to incentivize government contractors to lower their environmental impact by requiring "significant" and "major" federal suppliers to publicly disclose their GHG emissions by (1) mandating that the largest contractors commit to meeting science-based emission reduction goals, and (2) creating rules requiring agencies to consider the environmental impact of contractors in the bid process.

Lawrence Sher

Companies doing business with the federal government should be closely monitoring the FAR Council for proposed rules relating to GHG emissions, as well as carefully reviewing solicitations for the inclusion of new climate change or GHG emission requirements.

Additionally, contractors should understand the key definitions contained in the new rules as they become available, and proactively assess their plans for reducing direct and indirect GHG emissions.

The Social Costs of Greenhouse Gases

On Jan. 20, 2021, Biden issued Executive Order No. 13990, on protecting public health and the environment and seeking science-based solutions to climate change. This order established the Interagency Working Group on the Social Cost of Greenhouse Gases.

According to the order, the social cost of greenhouse gases, or SC-GHG, consists of:

> estimates of the monetized damages associated with incremental increases in greenhouse gas emissions. They are intended to include changes in net agricultural productivity, human health, property damage from increased flood risk, and the value of ecosystem services.[2]

The Interagency Working Group released its initial report in February 2021, estimating the social cost of one metric ton of carbon dioxide in 2020 as being anywhere between $14 and $152, depending on the assumptions used by the IWG to represent the future environmental effect of carbon dioxide.[3]

Executive Order 14030 and the Federal Acquisition Regulation

On May 20, 2021, Biden issued Executive Order No. 14030, calling for a "comprehensive, [g]overnment-wide strategy" on climate-related financial risk.[4] Among other objectives, this order directed the FAR Council to consider amending the Federal Acquisition Regulation to:

- Require certain major federal contractors to publicly disclose their levels of GHG emissions, and to set science-based reduction targets; and

- Direct federal agencies to consider the social cost of GHGs when making procurement decisions, giving preference to contractors with lower SC-GHG scores where appropriate and feasible. The FAR Council addressed these points in two different proposed rulemakings.

Responding to the first direction under the executive order, the FAR Council published a proposed rule in November 2022 that would amend the Federal Acquisition Regulation to require certain contractors to publicly disclose their GHG emissions in order to qualify for federal contracts.[5]

The rule would apply to "significant" contractors, defined as those who received between $7.5 million and $50 million in federal contract obligations in the prior fiscal year, and "major" contractors, defined as those who received greater than $50 million.

Significant contractors would be required to annually disclose their Scope 1 and 2 emissions, which are GHG emissions from sources they own and control as well as emissions associated with electricity, heating and cooling, and steam that they use.[6]

In addition to those disclosures, major contractors also would have to disclose emissions that the organization indirectly affects. This may include employee travel, and even GHGs resulting from conferences that the contractor attends.

Further, under this rule, major contractors would be required to develop science-based targets aimed at reducing their companies' GHG production to meet the goals of the Paris Agreement — limiting global warming to below 2 degrees Celsius above preindustrial levels.[7]

Regarding the second direction in Executive Order No. 14030, the FAR Council issued an advance notice of proposed rulemaking seeking public comment on a proposed amendment to the Federal Acquisition Regulation that would direct agencies to consider SC-GHG in procurement award decisions, and a requirement that contractors with lower SC-GHG scores receive preference in award decisions.

There is no indication whether this new rule would apply only to significant and major contractors, or what level of preference in award decisions would be associated with a lower SC-GHG score.

Biden's September 2023 Announcement

Notwithstanding the ongoing rulemaking processes discussed above, Biden recently directed agencies to begin considering SC-GHG in federal procurement awards. Specifically, the Biden administration stated in September that agencies should focus on high-impact procurements, or procurements of "large, durable, energy-consuming products and systems that could serve as pilots for incorporating the SC-GHG."[8]

As an example, the administration points to the U.S. Postal Service — which has announced that it will invest $9.6 billion to acquire at least 66,000 electric vehicles to begin the replacement of old delivery vehicles — to show how some agencies are already considering the GHG impact of their procurement decisions, even though it is not yet a requirement.

This announcement, coupled with the previous executive orders, demonstrates the administration's commitment to reducing GHG emissions associated with the government's procurement activity by incentivizing contractors to pursue lower emissions.

Suggestions for Contractor Consideration

Contractors should monitor the activities of the FAR Council closely for the issuance of final rules and associated regulations relating to GHG emissions. Concurrently, they should monitor solicitations closely for the inclusion of new climate change or GHG emission requirements resulting from the recent actions announced by the Biden administration.

Contractors should become familiar with the definitions contained in the above-mentioned rules. For example, contractors should understand whether they will be considered a significant or major contractor, what scope of emissions contractors will be responsible for disclosing, and how contractors will collect the information that must be disclosed.

Contractors should also begin assessing plans and methods for reducing their direct and indirect GHG emissions, in anticipation of the pending rules being finalized.

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[1] https://www.whitehouse.gov/briefing-room/statements-releases/2023/09/21/fact-sheet-biden-harris-administration-announces-new-actions-to-reduce-greenhouse-gas-emissions-and-combat-the-climate-crisis/.

[2] E.O. No. 13990, 86 FR 7037.

[3] The Working Group's initial report: https://www.whitehouse.gov/wp-content/uploads/2021/02/TechnicalSupportDocument_SocialCostofCarbonMethaneNitrousOxide.pdf.

[4] Jonathan D. Brightbill and Suzanne Jaffe Bloom, Executive Order on Climate-Related Financial Risks — Compliance and Risk Considerations, Winston & Strawn LLP: Government Program Fraud, False Claims Act & Qui Tam Litigation Playbook (June 1,

2021), https://www.winston.com/en/blogs-and-podcasts/government-program-fraud-false-claims-act-and-qui-tam-litigation-playbook/executive-order-on-climate-related-financial-risks-compliance-and-risk-considerations.

[5] The proposed rule requires the contracting officer to "treat a significant or major contractor as nonresponsible unless it has (itself or through its immediate owner or highest-level owner) inventoried its annual GHG emissions, and the significant or major contractor has disclosed its total annual emissions in SAM [the U.S. System for Award Management]."

[6] The proposed rule defines three scopes of emissions: "Scope 1 emissions means direct greenhouse gas emissions from sources that are owned or controlled by the reporting entity. Scope 2 emissions means indirect greenhouse gas emissions associated with the generation of electricity, heating and cooling, or steam, when these are purchased or acquired for the reporting entity's own consumption but occur at sources owned or controlled by another entity. Scope 3 emissions means greenhouse gas emissions, other than those that are Scope 2 emissions, that are a consequence of the operations of the reporting entity but occur at sources other than those owned or controlled by the entity."

[7] A full list of the goals of the Paris Agreement is available at: https://unfccc.int/most-requested/key-aspects-of-the-paris-agreement#:~:text=The%20Paris%20Agreement's%20central%20aim,further%20to%201.5%20degrees%20Celsius.

[8] Fact Sheet: Biden-Harris Administration Announces New Actions to Reduce Greenhouse Gas Emissions and Combat the Climate Crisis, White House Briefing Room, Sept. 21, 2023, https://www.whitehouse.gov/briefing-room/statements-releases/2023/09/21/fact-sheet-biden-harris-administration-announces-new-actions-to-reduce-greenhouse-gas-emissions-and-combat-the-climate-crisis/.