

## New Actions to Reduce Greenhouse Gas Emissions May Cost Contractors

NOVEMBER 2, 2023

*This blog has been published in [Law360](#).*

On September 21, 2023, President Biden directed federal agencies to consider contractors' greenhouse gas emissions when making procurement decisions. This announcement, along with Executive Order 14030, which directs the Federal Acquisition Regulatory Council (FAR Council) to promulgate rules instructing agencies to consider the environmental impact of their contracts, demonstrates a continued interest by the Biden administration to use government procurement as a vehicle for reducing greenhouse emissions. The administration plans to incentivize government contractors to lower their environmental impact by requiring "significant" and "major" Federal suppliers to publicly disclose their greenhouse gas 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.

### THE SOCIAL COST OF GREENHOUSE GASES

On January 20, 2021, President Biden issued Executive Order 13990, "Protecting Public Health and the Environment and Restoring Science to Tackle the Climate Crisis." This Order established the Interagency Working Group on the Social Cost of Greenhouse Gases (Working Group). The Social Cost of Greenhouse Gases (SC-GHG) are "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."<sup>1</sup> The 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 Working Group to represent the future environmental effect of carbon dioxide.

### EXECUTIVE ORDER 14030 AND FAR RULES

On May 20, 2021, President Biden issued Executive Order 14030, calling for "a comprehensive, [g]overnment-wide strategy" on climate-related financial risk.<sup>2</sup> Among other objectives, this order directed the FAR Council to consider amending the Federal Acquisition Regulation (FAR) to: (1) require certain "major" federal contractors to publicly disclose their levels of greenhouse gas emissions, and to set "science-based reduction targets"; and (2) direct federal agencies to consider SC-GHG when making procurement decisions, giving preference to contractors with a

lower SC-GHG 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 FAR to require certain contractors to publicly disclose their greenhouse gas emissions in order to qualify for federal contracts.<sup>24</sup> The rule would apply to “significant” contractors (those who received between US\$7.5M and US\$50M in federal contract obligations in the prior fiscal year) and “major” contractors (those who received greater than US\$50M). “Significant” contractors would be required to annually disclose their Scope 1 and 2 emissions, which are greenhouse gas emissions from sources they own and control as well as emissions associated with electricity, including the heating and cooling, and steam, that they use.<sup>25</sup>

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 greenhouse gases 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’ greenhouse gas production to meet the goals of the Paris Agreement (limiting global warming to below 2°C above pre-industrial levels).<sup>26</sup>

Regarding the second direction in EO14030, the FAR Council issued an advance notice of proposed rulemaking seeking public comment on a proposed amendment to the FAR 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. See FAR Case 2021-016. There is no indication whether this new rule would apply to only “significant” and “major” contractors, or what level of preference in award decisions would be associated with a lower SC-GHG score.

## **PRESIDENT BIDEN’S SEPTEMBER 2023 ANNOUNCEMENT**

Notwithstanding the ongoing rulemaking processes discussed above, President Biden recently directed agencies to begin considering SC-GHG in federal procurement awards. Specifically, the Biden administration noted 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.”<sup>27</sup> As an example, the administration points to the United States Postal Service, which has announced that it will invest US\$9.6B 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 greenhouse gas 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 greenhouse gas emissions associated with the government’s procurement activity by incentivizing contractors to pursue lower emissions.

## **SUGGESTIONS FOR CONTRACTOR CONSIDERATION**

1. Contractors should monitor the activities of the FAR Council closely for the issuance of final rules and associated regulations relating to greenhouse gas emissions.
2. Concurrently, contractors should monitor solicitations closely for the inclusion of new climate-change or greenhouse-gas-emission requirements resulting from the recent actions announced by the Biden administration.
3. Contractors should be sure that they are 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.
4. Contractors should begin assessing plans and methods for reducing their direct and indirect greenhouse gas emissions in anticipation of the pending rules being finalized.

*Please contact the authors or your Winston & Strawn relationship attorney if you have any questions or need further information.*

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11 Exec. Order No. 13990, 86 FR 7037.

12 Jonathan D. Brightbill & 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>.

13 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 US System for Award Management].”

14 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.”

15 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>.

16 *Fact Sheet: Biden-Harris Administration Announces New Actions to Reduce Greenhouse Gas Emissions and Combat the Climate Crisis*, White House Briefing Room, Sep. 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/>.

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