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Proposed Amendment to Federal Acquisition Regulation Would Require Contractors to Disclose Greenhouse Gas Emissions, Emissions Reduction Targets, and Climate-Based Financial Risks

Client Alert | November 15, 2022

A proposed rule published in the Federal Register on November 14, 2022 would amend the Federal Acquisition Regulation (FAR) to require certain Federal contractors to provide data regarding their greenhouse gas (GHG) emissions and climate-based financial risks, and to establish "science-based targets" for reducing their GHG emissions.[1] The proposed rule implements President Biden's May 20, 2021 Executive Order (EO) 14030, Climate-Related Financial Risk, which directed the FAR Council to consider amending the FAR to "require major Federal suppliers to publicly disclose greenhouse gas emissions and climate-related financial risk and to set science-based reduction targets."[2] The comment period for the proposed rule is open until January 13, 2023.

The FAR Council's proposed rule would significantly expand the GHG reporting obligations for federal contractors, and reflects the Biden Administration's "whole of government" approach to addressing climate change. The preamble to the proposed rule notes, for example, similarities the proposal bears to the Securities and Exchange Commission's March 21, 2022 proposal to impose climate-related disclosure requirements on U.S. public companies and foreign private issuers.[3] Like the SEC's proposed rule, which has been controversial, the proposed amendment to the FAR aims to standardize the disclosure of climate-related financial risks and leverage existing standards, such as those of the Task Force on Climate-Related Financial Disclosures (TCFD).[4] Unlike the SEC's proposed rule, the proposed FAR amendment requires certain companies to establish emissions reduction targets, although the SEC did propose that registrants disclose such targets if they have them.[5]

The FAR Council's proposed GHG reporting rule would apply to "significant contractors," defined as contractors that receive at least $7.5 million, but less than $50 million, in Federal contract obligations during the prior fiscal year, and "major contractors," defined as contractors that received more than $50 million in Federal contract obligations during the prior fiscal year.[6] The proposed rule articulates baseline compliance requirements that would apply to both significant contractors and major contractors, as well as additional compliance requirements that would apply to major contractors only.[7] The baseline compliance requirements would begin one year after the publication of a final rule, while major contractors would have two years from the publication of a final rule to come into compliance with their additional reporting obligations.[8] Overall, the FAR Council's proposed rule would (1) create a new FAR subpart at 23.XX, "Public Disclosure of Climate Information," that would outline annual climate-related inventory and disclosure requirements for certain contractors, (2) amend existing annual climate-related representations in certain FAR solicitation clauses, and (3) amend the standard of

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responsibility for prospective significant and major contractors such that they are presumed to be nonresponsible if they have not complied with the new GHG disclosure requirements described in subpart 23.XX, unless "the noncompliance resulted from circumstances properly beyond the prospective contractor's control," they have "provided documentation sufficient for purposes of award that demonstrates substantial efforts taken to comply" with the requirements, they have "made a public commitment to comply as soon as possible (within [one] calendar year) on a publicly accessible website," or a valid exception, exemption, or waiver applies.[9]

The disclosure scheme outlined in the FAR Council's proposed rule represents a substantial expansion of the FAR's current GHG-related provisions. Promulgated in 2016, FAR 23.802(d) currently requires only that contractors that receive $7.5 million or more in Federal contract obligations in a fiscal year represent whether they publicly disclose their GHG emissions and quantitative GHG emissions reduction goals.[10] While the current GHG-related provisions were promulgated to "assist agencies in developing strategies to engage with offerors to reduce supply chain emissions,"[11] the FAR Council now appears prepared to make affirmative use of the information it collects from contractors regarding their GHG emissions, stating in the preamble to the proposed rule that its purpose is to "ensure major Federal suppliers make the required disclosures and set targets to reduce their GHG emissions."[12] As outlined in Section 23.XX03, the proposed rule would require a significant or major contractor, itself or through its immediate owner or highest-level owner, to complete an annual GHG inventory of its Scope 1 emissions, which are "emissions from sources that are owned or controlled" by the contractor, and its Scope 2 emissions, which "include GHG emissions associated with the generation of electricity, heating and cooling, or steam" purchased by the contractor but produced elsewhere.[13] The proposed rule also directs a significant contractor or major contractor to disclose its total Scope 1 and Scope 2 emissions in the Federal Government's System for Award Management (SAM) each year.[14]

In addition to the requirements that apply to both significant and major contractors, the FAR Council's proposed rule would require a major contractor to complete an "annual climate disclosure," which is "a set of disclosures by an entity that aligns with recommendations of the TCFD," and to publish the disclosure on a publicly accessible website.[15] The proposal states that the TCFD annual climate disclosure "includes a GHG inventory of not only Scope 1 and Scope 2 emissions, but also relevant Scope 3 emissions, which are emissions [(other than 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."[16] Additionally, the TCFD framework calls for the annual climate disclosure to "describe[] the entity's climate risk assessment process and any risks identified."[17]

The proposed rule would also require major contractors to develop "science-based targets" for GHG emission reductions.[18] A "science-based target" is an emissions reduction target that is consistent with the goals of the 2015 Paris Agreement, namely, "to limit global warming to well below 2^{o}C above pre-industrial levels and pursue efforts to limit warming to 1.5^{o}C."[19] Under the proposed rule, the science-based targets developed by major contractors must have been validated by the Science-Based Targets Initiative (SBTi) within the last five calendar years, and the major contractors must publish the targets on publicly accessible websites.[20]

The proposed rule indicates that the Government would enforce these new requirements by instructing contracting offerors "to treat a prospective contractor that is a significant or major contractor as nonresponsible under [FAR] 9.104-3(e)," unless the prospective contractor satisfies its GHG inventory and reporting obligations.[21] Only contractors deemed responsible are eligible to receive Federal Government contracts or subcontracts.[22] However, the proposed rule also provides for the issuance of exemptions from, and waivers to, the procedures for determining a contractor's responsibility, outlined at Section 23.XX05, and the corresponding new responsibility standards at FAR 9.104-3(e), under certain circumstances.[23]

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The FAR Council's proposed rule is representative of the Biden Administration's willingness to use the federal procurement process to address cross-cutting policy issues like climate change. For example, we have previously written about the Biden Administration's mandate that federal contractor employees be vaccinated against COVID-19,[24] an initiative that was first announced in EO 14042 of September 9, 2021 to "promote[] economy and efficiency in Federal procurement."[25] That mandate drew a number of legal challenges, including one that resulted in a decision by the U.S. Court of Appeals for the Eleventh Circuit that upheld a district court preliminary injunction blocking the implementation of the contractor vaccine mandate, but that narrowed the injunction's scope to limit it to contracts with the specific plaintiffs in that case (Georgia, Alabama, Idaho, Kansas, South Carolina, Utah, West Virginia, and a construction trade group).[26] It remains to be seen how the federal contractor community will respond to the FAR Council's GHG reporting rule in the notice and comment process, and whether the final rule will spark litigation.

As noted, the comment period for the FAR Council's proposed rule runs through January 13, 2023.

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[1] *See generally* Federal Acquisition Regulation: Disclosure of Greenhouse Gas Emissions and Climate-Related Financial Risk, 87 Fed. Reg. 68312 (Nov. 14, 2022) (to be codified at 48 C.F.R. pts. 1, 4, 9, 23, and 52).

[2] Executive Order 14030 of May 20, 2021: Climate-Related Financial Risk, 86 Fed. Reg. 27967 (May 25, 2021).

[3] Federal Acquisition Regulation: Disclosure of Greenhouse Gas Emissions and Climate-Related Financial Risk, 87 Fed. Reg. at 68312; *see also* The Enhancement and Standardization of Climate-Related Disclosures for Investors, 87 Fed. Reg. 21334 (Apr. 11, 2022) (to be codified at 17 C.F.R. pts. 210, 229, 232, 239, and 249).

[4] Federal Acquisition Regulation: Disclosure of Greenhouse Gas Emissions and Climate-Related Financial Risk, 87 Fed. Reg. at 68312.

[5] *Id.*

[6] *Id.* at 68313.

[7] *Id.* at 68329.

[8] *Id.* at 68316.

[9] *Id.* at 68327.

[10] 48 C.F.R. § 23.802(d).

[11] Federal Acquisition Regulation: Public Disclosure of Greenhouse Gas Emissions and Reduction Goals—Representation, 81 Fed. Reg. 83092 (Nov. 18, 2016) (to be codified at 48 C.F.R. pts. 1, 4, 23, and 52).

[12] Federal Acquisition Regulation: Disclosure of Greenhouse Gas Emissions and Climate-Related Financial Risk, 87 Fed. Reg. at 68312.

[13] *Id.* at 68313, 68329.

[14] *Id.* at 68329.

[15] *Id.* at 68313-14, 68329.

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[16] *Id.* at 68314.

[17] *Id.*

[18] *Id.*

[19] *Id.*

[20] *Id.* at 68329.

[21] *Id.*

[22] 48 C.F.R. § 9.103(a) ("Purchases shall be made from, and contracts shall be awarded to, responsible prospective contractors only.")

[23] Federal Acquisition Regulation: Disclosure of Greenhouse Gas Emissions and Climate-Related Financial Risk, 87 Fed. Reg. at 68316.

[24] Eugene Scalia et al., *President Biden Announces COVID-19 Vaccine Mandates, with Legal Challenges Likely to Follow*, Gibson Dunn (Sept. 10, 2021), https://www.gibsondunn.com/president-biden-announces-covid-19-vaccine-mandates-with-legal-challenges-likely-to-follow/.

[25] Executive Order 14042 of September 9, 2021: Ensuring Adequate Safety Protocols for Federal Contractors, 86 Fed. Reg. 50985 (Sept. 14, 2021).

[26] *Georgia v. Pres. of the U.S.*, 46 F.4th 1283 (11th Cir. 2022).

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