

Competition and Climate Change: How the FAR Proposed Rule on Contractor Greenhouse Gas Disclosures Seeks to Influence Both

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Government Contracts Issue Update

On May 25, 2016, the Federal Acquisition Regulatory Council (FAR Council) proposed an amendment to the Federal Acquisition Regulation (FAR) that would require certain federal contractors to make annual representations to the Government about whether and where they publicly disclose their greenhouse gas (GHG) emissions and reduction goals. Although the rule would not require federal contractors to directly disclose their emissions data to the Government, it would still require contractors to represent whether such data is publicly available, and if so, where. These provisions could influence not only the outcome of competitions for contract awards where agencies choose to factor these disclosures into their selection decisions, but they could also open the door for additional mandatory disclosures in furtherance of federal climate change policy. These potential impacts, as well as an overview of the rule, are discussed below.

The Rule Would Require Public Disclosures by Major Suppliers, Large, Small and Commercial

The proposed rule would apply to “major suppliers” who received \$7.5 million or more in federal contract awards during the preceding government fiscal year. These contractors would be required to indicate in the System for Award Management (SAM) whether they publicly disclose their GHG emissions and reduction goals. The publicly-disclosed data referred to in the rule would consist of a contractor’s responses to a greenhouse gas inventory performed in

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accordance with the Greenhouse Gas Protocol Corporate Standard or its equivalent.

If a contractor represents in SAM that its GHG emissions data is publicly available, the proposed rule would require the contractor to provide the web address to the “publicly accessible Web site” where the data may be found. Under the rule, a “publicly accessible Web site” includes either “the supplier’s own Web site” or the website of “a recognized, third-party greenhouse gas emissions reporting program.” Vendors could make this disclosure themselves, or through their parent companies.

For federal contractors with annual awards totaling less than \$7.5 million, GHG emissions disclosures would be optional, and these contractors could thus opt to disclose their data on a voluntary basis. Based on Fiscal Year 2015 data, the FAR Council expects this rule to impact approximately 5,500 unique business entities, including approximately 2,700 small businesses. According to the FAR Council, this constitutes 3.5% of all entities that did business with the Government in Fiscal Year 2015 and 2.6% of small businesses.

Moreover, the rule proposes making the GHG disclosure requirement applicable to “all solicitations, including solicitations for the acquisition of commercial items (including commercially available off-the-shelf [COTS] items) and items that do not exceed the simplified acquisition threshold.” The only exceptions would be solicitations for the contract types referenced in FAR 4.1102(a), which include classified procurements, micro-purchases, and contracts performed outside the United States. In explaining the application of the rule to commercial and COTS items, the FAR Council noted that reporting of GHG emissions is increasingly commonplace in the commercial market and, because the reporting is on an annual basis, not by acquisition, excluding such contractors would impair the efficacy of the rule’s goal of gathering information and insight on GHG emissions to enable agencies to manage such emissions.

The Rule Is Clearly Intended to Influence Competitions for Federal Procurements

The Government’s stated purpose for proposing this rule is to ensure federal procurements take contractor GHG emissions into consideration, as required by President Obama’s March 2015 Executive Order (E.O.) 13693, “Planning for Federal Sustainability in the Next Decade.” As discussed in the proposed rule, E.O. 13693 requires that the seven largest federal procuring agencies “implement procurements that take into consideration contractor GHG emissions.”

According to the FAR Council, there is a need for “greater insight into the scope of GHG management by companies seeking to do business with the Federal Government.” The Administration’s position on how this rule is intended to advance its climate change priorities is made clear through the statement posted to the White House website on May 25, titled “Making Federal Acquisitions Climate-Smart.” Authored by the United States Chief Acquisition Officer, together with senior officials at OMB and the Council on Environmental Quality, the post explains that the proposed rule “leverages the Federal Government’s purchasing power to push for this type of unprecedented disclosure.” The post also highlights a recent example where GSA “factored-in greenhouse gas intensity (paired with estimated damages from those emissions) to make multi-million dollar contract awards.” The post also states that knowing whether and where vendors disclose GHG emissions data will allow the Government to “address climate-risk in the Federal Government’s supply chain,

and engage with contractors to reduce supply chain emissions.” These statements leave little doubt that the Government intends to use disclosed GHG data to drive procurement decisions.

The Rule Seeks to Advance Administration Climate Change Priorities

While directly tied to E.O. 13693, which focuses on federal sustainability, the proposed rule also refers to E.O. 13653, “Preparing the United States for the Impacts of Climate Change,” issued in November 2013. The rule states that, “in furtherance” of the 2013 Climate Change E.O., the FAR Council agencies “are considering the development of means and methods to enable agencies to evaluate and reduce climate change related risks” as they relate to agency operations and missions. According to the proposed rule, these efforts are in response to the “growing Federal and public interest” in supplier operations and supply chain risks, including those related to climate change.

One such approach under consideration would require contractors to make additional representations about whether they analyze their business’s climate-related risks, and also whether they publicly disclose this information. The FAR Council further notes that publicly traded companies are already required to disclose to the Securities and Exchange Commission (SEC) material risks, which would include risks from climate change. The proposed rule contains an example of the type of representation offerors would be required to make in this regard. Under the example, offerors would have to indicate whether they assess the risks that various “effects of climate change,” such as “extreme weather” and other “physical impacts” have on their businesses. For contractors that are already required to file similar disclosures with the SEC, they would be required to represent whether their SEC filings discuss climate-related risks. Although this additional requirement is not part of the currently-proposed rule, the FAR Council is nonetheless seeking comment on it, suggesting that it may only be a matter of time before it is actually proposed.

This FAR proposed rule has the potential to affect thousands of large and small federal contractors by requiring them to represent to the Government whether they are publicly disclosing data related to their greenhouse gas emissions. The Administration clearly intends to use the rule as a mechanism to shape and influence federal procurements and advance climate change policy. As such, the disclosures that contractors would be required to make pursuant to the rule could impact future procurement outcomes where GHG emissions are factored into agency award decisions. The rule may also serve as a springboard for additional climate-related reporting requirements.

The FAR Council is accepting comments on the proposed rule through July 25, 2016.