

FAR Council Proposal Adds Teeth To Climate Disclosure Rules

By **Barron Avery, Sarah-Jane Lorenzo and Katelyn Hilferty**

(December 9, 2022, 4:12 PM EST)

Federal contractors' fitness for the job may soon be tied to more detailed disclosures of their greenhouse gas emissions and plans to reduce them.

The Biden administration's recently proposed amendment to the Federal Acquisition Regulation would create additional emissions disclosure requirements for all offerors that earned at least \$7.5 million in federal contract funds during the prior fiscal year.

The amendment would also require contracting officers to presume that prospective contractors are not responsible — and therefore ineligible for receipt of federal funds — unless they meet those disclosure requirements.

Key Changes to the FAR

The proposed amendment would amplify and add teeth to the FAR's current greenhouse gas emissions clause, FAR 52.223-22, on public disclosure of greenhouse gas emissions and reduction goals.

That clause requires all offerors that received at least \$7.5 million in federal contract funds during the prior fiscal year to represent whether they publicly disclose their greenhouse gas emissions, and whether they publicly disclose a quantitative greenhouse gas emissions reduction goal.

But this proposed rule would create more stringent requirements, especially for the highest-earning federal contractors.

The amendment proposes two tiers of obligations based on a newly proposed distinction that would label contractors as "significant" or "major" depending on how much federal funding they receive.

Significant Contractors

Offerors that received between \$7.5 million and \$50 million in federal funds the prior fiscal year would be considered significant contractors. Significant contractors



Barron Avery



Sarah-Jane
Lorenzo



Katelyn Hilferty

would need to assess two types of greenhouse gas emissions each year: Scope 1 and Scope 2 emissions.

Scope 1 emissions include direct greenhouse gas emissions from sources owned or controlled by the reporting entity. Scope 2 emissions include indirect greenhouse gas emissions associated with the generation of electricity, heating and cooling, or steam that is purchased or acquired for the reporting entity's consumption but occurs at sources owned or controlled by another entity.

Significant contractors would be required to report their total annual Scope 1 and 2 emissions in the System for Award Management.

Major Contractors

Offerors that received more than \$50 million in federal funds would be considered major contractors. Major contractors would be subject to the same Scope 1 and Scope 2 assessment and reporting requirements, and would also be required to complete an annual inventory of their Scope 3 greenhouse gas emissions.

Scope 3 emissions include greenhouse gas emissions other than Scope 2 emissions that are a consequence of the reporting entity's operations, but that occur at sources other than those owned or controlled by the reporting entity.

Major contractors would also be required to publish an annual climate disclosure, completed within their current or prior fiscal year, using the CDP climate change questionnaire, and develop a science-based target for greenhouse gas reduction validated by the Science Based Targets Initiative within the last five fiscal years.

Exemptions

Not all types of entities will be subject to these requirements.

The amendment proposes that higher education institutions, nonprofit research entities, state and local governments, and entities that derive at least 80% of their annual revenue from federal management and operating contracts will be exempt.

So will Alaska Native corporations, community development corporations, Indian tribes, Native Hawaiian organizations and tribally owned concerns.

Finally, while major contractors that are considered small businesses or nonprofits must still complete and report a greenhouse gas inventory for their Scope 1 and Scope 2 emissions, they will not be required to complete an annual climate disclosure or to set science-based targets.

The FAR amendments would also permit contracting officers to exercise some discretion. Contracting officers may still find that an offeror that could not certify compliance with the requirements is responsible if (1) that noncompliance resulted from circumstances properly beyond the offeror's control; (2) the offeror provided documentation that demonstrates substantial efforts to comply; or (3) the offeror made a public commitment to comply as soon as possible.

Implementation

If the proposed emissions disclosure amendments take effect, those offerors who are subject to the requirements will have time to prepare.

Scope 1 and Scope 2 emissions reporting requirements will not take effect until one year after publication of the final rule.

Scope 3 emissions reporting requirements, and requirements to submit an annual climate disclosure and develop a science-based target, will also have a delayed implementation, set to take effect two years after publication of the final rule.

Takeaways

Although the rule is not final, it represents part of a broader push by the Biden administration to intensify U.S. efforts to address climate change head-on. In May 2021, the administration issued Executive Order No. 14030 on climate-related financial risk, which directed various federal agencies to find ways of measuring and mitigating climate-related financial risks that could affect the U.S. economy.

This proposed rule directly responds to language in the executive order that asked the Federal Acquisition Regulatory Council to consider certain climate-related amendments to the FAR.

While the proposed rule only purports to implement some of those suggestions, the order also asked that the FAR Council consider amending the regulations to give preference to bids and proposals from suppliers with lower social-cost greenhouse gas emissions, perhaps in line with the Buy American and domestic preference requirements in the FAR.

It is unclear whether the FAR Council decided against making this change or whether it will be included in a future rulemaking.

We also note that the FAR Council is not the first to address federal climate goals by implementing stringent and tiered reporting requirements.

For example, this proposed rule advances similar goals to regulations proposed by the U.S. Securities and Exchange Commission in March. Those proposed rules would require investors to include certain climate-related disclosures in their registration statements and periodic reports.

The SEC's proposed rules were the subject of substantial comments and criticism. In the wake of that criticism, the SEC missed a self-imposed October deadline to publish final rules, and has not announced a new timeline for their completion. But the SEC's experience and delay did not dissuade the FAR Council from proposing a similar approach.

Within this broader context, we expect that the proposed rule and its reporting requirements will be pushed through in some form.

The FAR amendment was published in the Federal Register on Nov. 14, and interested parties have until Jan. 13, 2023, to submit written comments to the rule.^[1] We encourage federal contractors to review the rule in detail to assess how they may be affected by the reporting requirements and to submit comments to the rule before the deadline.

Barron Avery is a partner and head of the government contracts practice at Morgan Lewis & Bockius LLP.

Sarah-Jane Lorenzo and Katelyn M. Hilferty are associates at the firm.

The opinions expressed are those of the author(s) and do not necessarily reflect the views of their employer, its clients, or Portfolio Media Inc., or any of its or their respective affiliates. This article is for general information purposes and is not intended to be and should not be taken as legal advice.

[1] 87 Fed. Reg. 68,312.