

Biden E.O. Calls for Net Carbon Neutrality in Procurement by 2050; FAR Council Extends Green Procurement Comment Deadline

Litigation Alert

12.17.2021

There are two new updates related to the federal government's stated goals of reducing climate pollution and transitioning to a more sustainable economy:

- On December 8, 2021, President Biden signed the [Executive Order on Catalyzing Clean Energy Industries and Jobs Through Federal Sustainability](#) (the Order), directing the federal government to set itself on the path to net carbon neutrality by 2050, which, in conjunction with previous climate-centric executive orders, will result in new reporting obligations as well as new potential opportunities for contractors in this area.
- On December 7, 2021, the Federal Acquisition Regulation (FAR) Council [updated the due date](#) for public comment on a proposed FAR amendment aimed at minimizing the risk of climate change in federal procurement from December 14, 2021, to January 13, 2022.

Executive Order

Overview

The Order consists of a series of decarbonization deadlines that support the federal government's goals of achieving "a carbon pollution-free electricity sector by 2035 and net-zero emissions economy-wide by no later than 2050," as well as directives to agencies to align their practices with the Order's missions and the establishment of various leadership offices and working groups to help direct sustainable procurement. The sweeping efforts are the result of a "once-in-a-generation economic opportunity to create and sustain jobs, including well-paying union jobs; support a just transition to a more sustainable economy for American workers; strengthen America's communities; protect public health; and advance environmental justice." While the Order signals contracting opportunities for federal contractors already occupying the sustainability field, it may indicate needed changes in emissions tracking and reporting, as well as bidding strategies, for certain federal contractors.

The Order features both old and new leaders in the procurement community and relies on a substantial amount of inter-governmental collaboration to achieve its goals. Specifically, the Chair of the Council on Environmental Quality (CEQ) and Director of the Office of Management and Budget (OMB) play several key roles in the Order, including reviewing agency targets for meeting the decarbonization deadlines. The Order also reestablishes the Office of the Federal Chief Sustainability Officer within the CEQ, funded and supported by the Environmental Protection Agency (EPA).

It is important to note that the Order only applies to an agency's "activities, personnel, resources, and facilities located within the United States," unless the head of an agency determines that an application of the Order outside the United States "is in the interest of the United States." There also are exemptions for particularly sensitive subject matter areas involving national security or combat training.

We highlight two aspects of the Order: (1) the interim government-wide goals to achieve net-zero emissions by 2050, and (2) the policies specifically targeting the procurement community, including emissions reporting and Buy Clean initiatives.

Government-wide Goals

To achieve what it characterizes as "bold action" in the face of climate change, the Biden administration has rolled out a set of

interim government-wide goals to "transform Federal procurement and operations and secure a transition to clean, zero-emission technologies." The goals include:

- One hundred percent carbon pollution-free electricity on a net annual basis by 2030, including 50 percent 24/7 carbon pollution-free electricity
- One hundred percent zero-emission vehicle acquisitions by 2035, including 100 percent zero-emission light-duty vehicle acquisitions by 2027
- A net-zero emissions buildings portfolio by 2045, including a 50 percent emissions reduction by 2032
- Sixty-five percent reduction in scope 1 and 2 greenhouse gas emissions, as defined by the Federal Greenhouse Gas Accounting and Reporting Guidance, from federal operations by 2030 from 2008 levels
- Net-zero emissions from federal procurement, including the use of the Buy Clean policy to encourage the use of construction materials with lower embodied emissions
- Climate resilient infrastructure and operations
- Climate- and sustainability-focused federal workforce

Procurement-specific Objectives

The Order contains the following procurement-specific objectives which will have a direct impact on federal contractors:

- **Section 208. Sustainable Acquisition and Procurement:** The Order directs agencies:
 - To reduce emissions, promote environmental stewardship, support resilient supply chains, drive innovation, and incentivize markets for sustainable products and services by prioritizing products that can be reused, refurbished, or recycled
 - To maximize environmental benefits and cost savings through use of full lifecycle cost methodologies
 - To purchase products that contain recycled material, are biobased, or are energy and water efficient
 - To the maximum extent practicable, purchase sustainable products and services identified or recommended by the EPA
- **Section 302. Supplier Emissions Tracking:** The General Services Administration (GSA) Administrator is directed to "track disclosure of greenhouse gas emissions, emissions reduction targets, climate risk, and other sustainability-related actions by major Federal suppliers." This requirement builds on the May 20, 2021 [Executive Order 14030 on Climate-Related Financial Risk](#) (as reported in our previous [litigation alert](#)). That executive order directed the FAR Council to consider an amendment to require major federal suppliers to publicly disclose greenhouse gas emissions and climate-related financial risks and to set science-based reduction targets.
- **Section 303. Buy Clean:** The Order establishes a Buy Clean policy for federal procurements to promote the "purchase of construction materials with lower embodied emissions, taking into account the life-cycle emissions associated with the production of those materials." To enact this policy, the Order creates a Buy Clean Task Force which is directed to "provide recommendations to the Chair of CEQ and the Director of OMB, through the Administrator of the Office of Federal Procurement Policy, on policies and procedures to expand consideration of embodied emissions and pollutants of construction materials." The Task Force specifically is charged with:
 - Identifying materials and pollutants, including concrete and steel, that will fall under the umbrella of the Buy Clean policy

- Recommending measures to increase the transparency of embodied emissions, including supplier reporting and auditing
- Recommending pilot programs to incentivize procuring construction material with lower embodied emissions

Other sections of the Order, not specifically targeting the federal procurement process, will also impact federal contractors, particularly those in the construction industry, by creating opportunities for new construction and modernization projects to reduce greenhouse gas emissions across federal buildings and campuses and to increase energy and water efficiency in federal facilities.

Takeaways

The Order outlines an ambitious plan by the Biden administration to mobilize the whole of the federal government to combat climate change and could drastically impact the federal contracting landscape in numerous ways.

- First, the requirements for emissions reporting and tracking outlined in the Order and Order 14030 will impose new requirements on contractors and subcontractors to monitor and document their carbon output, and potentially begin altering practices to reduce that output. These new requirements mean new liabilities and potential new compliance costs for contractors unaccustomed to tracking emissions data or considering it in their solicitation responses.
- Second, the refocusing of procurement practices around sustainability creates new opportunities for contractors currently offering carbon neutral products or services and deploying clean and innovative technology and means that these companies are situated to bid more competitively than ever.
- Finally, certain industries, such as the construction industry, can expect to see the prioritization of materials that are subject to Buy Clean policies, potentially resulting in increased costs or supply demands.

In the coming months we will learn more about the how the agencies will implement the Order's policies and directives, and we will continue to monitor and report on any developments.

FAR Council's Advance Notice of Public Rulemaking

On December 7, 2021, the FAR Council [updated the due date](#) for public comment on a proposed FAR amendment aimed at minimizing the risk of climate change in federal procurement from December 14, 2021, to **January 13, 2022**.

As outlined in our [previous alert](#), on October 15, 2021, at the direction of the Biden administration's Order 14030, the FAR Council requested public comment on the inclusion of greenhouse emissions information in procurements and the use of the federal procurement process to minimize climate change risks through a series of targeted questions. The new deadline should further encourage federal contractors to respond to the FAR Council's questions and to consider the impact that potential green procurement initiatives and increased certification requirements may have on their businesses and their strategies for bidding on federal contracts. Comments can be [submitted here](#) by searching for "FAR Case 2021-016" and selecting "Comment Now."

Conclusion

If you have questions about the Order or its implications for your company or the FAR Council's Advanced Notice, please contact one of the Miller & Chevalier attorneys listed below:

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