

# PRATT'S GOVERNMENT CONTRACTING LAW REPORT

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# Forthcoming Federal Procurement Revisions Focus on Achieving Environmental Goals

*By Francis (Chip) Purcell, Jurgita Ashley, Heidi Friedman and  
Mona Adabi\**

*In this article, the authors explain that several executive orders reflect the government's increased focus on utilization of procurement policies to achieve environmental, social and governance goals—and that these executive orders likely will result in revisions to the Federal Acquisition Regulation that implement heightened environmental requirements.*

As companies increasingly consider the impact of environmental, social and governance (“ESG”) standards on their operations, recent federal government actions emphasize the need for federal contractors to focus on ESG considerations that may affect contract performance. The Biden administration has issued several executive orders addressing ESG issues relevant to federal procurement, and current administrative actions are under way to amend the Federal Acquisition Regulation (“FAR”) to implement key provisions of two of those executive orders.

Although regulations concerning ESG requirements have not yet been issued, contractors should be mindful of these forthcoming regulations and consider their potential effect on their operations.

## **EXECUTIVE ORDERS AFFECTING FEDERAL PROCUREMENT ESG STANDARDS**

From its inception, the Biden administration has elevated the importance of sustainable procurement and climate change to leverage the power of federal procurement to address climate change. Currently, FAR Subpart 23.8 provides some coverage of greenhouse gas emissions, but the FAR does not address other environmental considerations relevant to the current discussion of ESG standards. The Biden administration has issued several executive orders that utilize federal procurement as a tool to address climate change and environ-

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mental issues, beginning with Executive Order 14008, Tackling the Climate Crisis at Home and Abroad,<sup>1</sup> issued in January 2021. This executive order contains several sections that would address climate change through procurement, including Section 205, Federal Clean Electricity and Vehicle Procurement Strategy, which would use federal procurement to support a carbon pollution-free electricity sector by 2035 and to acquire zero-emission vehicles for federal government use, and Section 206, Procurement Standards, which would require federal agencies to follow Made in America laws as part of their decision-making regarding clean energy and energy efficient procurement and directs the chair of the Council on Environmental Quality (“CEQ”) to review potential actions to support the FAR Council in revising the FAR to require contractors to reduce carbon emissions and increase sustainability.

Two additional executive orders that also focus on federal procurement as a tool to address environmental issues, Executive Order 14030 and Executive Order 14057, provide the foundation for anticipated revisions to the FAR that would implement these policies.

#### **EXECUTIVE ORDER 14030, CLIMATE-RELATED FINANCIAL RISK**

Issued in May 2021, Executive Order 14030<sup>2</sup> cites the risks of climate change (including impacts on supply chains) and the need to identify and disclose climate-related financial risks. Two sections of the executive order direct the FAR Council (in consultation with the chair of the CEQ and the heads of other agencies) to consider amending the FAR to address such risks.

Section 5(b)(i) directs consideration of FAR amendments to “require major Federal suppliers to publicly disclose greenhouse gas emissions and climate-related financial risk and to set science-based reduction targets.”

Section 5(b)(ii) directs consideration of FAR amendments to “ensure that major Federal agency procurements minimize the risk of climate change, including requiring the social cost of greenhouse gas emissions to be considered in procurement decisions and, where appropriate and feasible, give preference to bids and proposals from suppliers with a lower social cost of greenhouse gas emissions.”

In response, the FAR Council has opened two cases that would amend the FAR consistent with these directions. FAR Case 2021-015, Disclosure of Greenhouse Gas Emissions and Climate-Related Financial Risk, implements

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<sup>1</sup> <https://www.whitehouse.gov/briefing-room/presidential-actions/2021/01/27/executive-order-on-tackling-the-climate-crisis-at-home-and-abroad/>.

<sup>2</sup> <https://www.whitehouse.gov/briefing-room/presidential-actions/2021/05/20/executive-order-on-climate-related-financial-risk/>.

Section 5(b)(i) of the executive order requiring public disclosures of greenhouse gas emissions and climate-related financial risks by major suppliers and the establishment of science-based reduction targets.

The case remains open, with staff members addressing proposed FAR language, and there is currently no date by which a proposed rule would be issued. FAR Case 2021-016, *Minimizing the Risk of Climate Change in Federal Acquisitions*, implements Section 5(b)(ii) of the executive order to ensure that major agency procurements minimize the risk of climate change.

### **EXECUTIVE ORDER 14057, CATALYZING CLEAN ENERGY INDUSTRIES AND JOBS THROUGH FEDERAL SUSTAINABILITY**

Executive Order 14057<sup>3</sup> emphasizes the government's role in achieving a carbon pollution-free electricity sector by 2035 and net-zero emissions economy-wide by 2050, in part through federal procurement. Section 102 of the order sets forth seven goals that would be achieved through the government's use of its procurement power:

- 100 percent carbon pollution-free electricity by 2030;
- 100 percent zero-emission vehicle acquisition by 2035, including 100 percent zero-emission light-duty vehicle acquisitions by 2027;
- A net-zero emissions building portfolio by 2045, including a 50 percent emissions reduction by 2032;
- A 65 percent reduction in scope 1 and 2 greenhouse gas emissions by 2030;
- Net-zero emissions from federal procurement, including a Buy Clean policy to promote use of construction materials with lower embodied emissions;
- Climate resilient infrastructure and operations; and
- A climate- and sustainability-focused federal workforce.

Several sections of the executive order harness federal procurement to support these goals.

#### **Section 208, Sustainable Acquisition and Procurement**

Section 208, *Sustainable Acquisition and Procurement*, directs agencies to reduce emissions and support resilient supply chains “by prioritizing products that can be reused, refurbished, or recycled; maximizing environmental benefits

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<sup>3</sup> <https://www.whitehouse.gov/briefing-room/presidential-actions/2021/12/08/executive-order-on-catalyzing-clean-energy-industries-and-jobs-through-federal-sustainability/>.

and cost savings through use of full lifecycle cost methodologies; purchasing products that contain recycled content, are biobased, or are energy and water efficient, in accordance with relevant statutory requirements; and, to the maximum extent practicable, purchasing sustainable products and services identified or recommended by the Environmental Protection Agency.” In addition, the section directs the chair of the CEQ to consider “establishing Federal food procurement policies to reduce associated greenhouse gas emissions and drive sustainability in the Federal food supply chain.”

### **Section 301, Federal Supply Chain Sustainability**

Section 301, Federal Supply Chain Sustainability, directs agencies to “pursue procurement strategies to reduce contractor emissions and embodied emissions in products acquired or used in Federal projects.”

### **Section 302, Supplier Emissions Tracking**

Section 302, Supplier Emissions Tracking, directs the General Services Administration (“GSA”) administrator to “track disclosure of greenhouse gas emissions, emissions reduction targets, climate risk, and other sustainability-related actions” by federal contractors pursuant to Section 5(b)(i) of Executive Order 14030.

### **Section 303, Buy Clean**

Section 303, Buy Clean, directs the Buy Clean Task Force established under the order to recommend policies and procedures to expand consideration of embodied emissions and pollutants of construction materials in federal procurement and federally funded projects. Section 509, Government-wide Support and Collaboration, directs the Secretaries of Defense and Energy and the GSA administrator to utilize federal electricity procurement “to aggregate and accelerate new carbon pollution-free electricity generation capacity to meet Federal energy needs.”

It further directs the Secretary of Transportation and GSA administrator to coordinate with states, tribes and local governments to facilitate wider adoption of zero-emission vehicles. Issued concurrently with Executive Order 14057, OMB Memo M-22-06, Catalyzing Clean Energy Industries and Jobs Through Federal Sustainability, directs federal agencies to undertake immediate action to comply with the order. In addition to providing guidance on establishing agency targets related to the order’s directives, the memo instructs the FAR Council to leverage existing third-party standards and systems in developing regulatory requirements. In response to the executive order and OMB memo, the FAR Council opened FAR Case 2022-006, Sustainable Procurement, to implement their requirements.

## CONTRACTOR CONSIDERATIONS

With the executive orders and forthcoming FAR requirements signaling a growing emphasis on the importance of ESG standards in federal procurement, federal contractors should consider several issues.

First, the open FAR cases likely will produce a proposed rule amending the FAR to add requirements reflected in the two executive orders. A comment period generally accompanies the issuance of a proposed rule, providing interested parties (here, federal contractors) an opportunity to review and respond to the proposed rule. The FAR Council often responds to comments by revising a proposed rule before its final issuance, which means that federal contractors likely will have the chance to provide specific feedback on elements of the proposed rule. It therefore is important for contractors to take advantage of any comment period to assess the proposed FAR provisions and how they will affect their operations and ability to perform contract requirements.

Second, during the period prior to issuance of any proposed rule, contractors should assess their current operations in light of the executive orders' procurement-related provisions. Although any proposed FAR rule will set forth detailed requirements governing a contractor's compliance obligations, the executive orders highlight specific procurement-related focus areas to support the orders' goals. For instance, Executive Order 14030 emphasizes the importance of tracking and reporting greenhouse gas emissions, so it is likely that any FAR rule will require contractors to record and disclose their emissions. While the FAR rule will identify which contractors will be subject to such a requirement, all contractors would benefit from starting an internal review of whether processes and procedures exist to support such an obligation.

Third, while the executive orders point to forthcoming performance obligations for existing contractors, both orders underscore the federal government's commitment to achieving environmental goals through its procurement power, thereby creating opportunities for a wide range of companies. The executive orders call for procurement of zero-emission vehicles, carbon pollution-free energy and products, and construction materials with lower embodied emissions. Companies that supply these products stand to benefit from increased federal procurement spending.

## TAKEAWAYS

- Several executive orders reflect the government's increased focus on utilization of procurement policies to achieve environmental, social and governance goals.
- These executive orders likely will result in revisions to the Federal Acquisition Regulation that implement heightened environmental

requirements.

- Contractors should review and understand the potential implications of the executive orders and revised procurement regulations on their operations.