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Changes Are Coming to the Biden Administration’s Federal Sustainability Plan

*By Taite R. McDonald, Kelsey M. Hayes and Hannah M. Coulter**

A potential amendment to the Federal Acquisition Regulation would require federal agencies to consider “the social cost of greenhouse gas emissions” in procurement decisions and to give preference to bids and proposals from suppliers with lower social costs of greenhouse gas emissions—similar to the Buy America domestic preference policy. The authors of this article discuss the potential changes for contractors.

President Joe Biden issued an Executive Order on Catalyzing Clean Energy Industries and Jobs through Federal Sustainability¹ on December 8, 2021, emphasizing the federal government’s role and initiative “[a]s the single largest land owner, energy consumer, and employer in the Nation,” to “build, buy, and manage electricity, vehicles, buildings, and other operations to be clean and sustainable.”

The Executive Order (“EO”) and its accompanying Federal Sustainability Plan² follow and build upon two earlier climate-related EOs, Executive Order on Tackling the Climate Crisis at Home and Abroad³ and Executive Order on Climate-Related Financial Risk,⁴ as well as an advance notice of proposed rulemaking⁵ issued by the Federal Acquisition Regulatory Council in October 2021,⁶ which seeks feedback on a potential amendment to the Federal

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¹ <https://www.whitehouse.gov/briefing-room/presidential-actions/2021/12/08/executive-order-on-catalyzing-clean-energy-industries-and-jobs-through-federal-sustainability/>.

² <https://www.sustainability.gov/federalsustainabilityplan/>.

³ E.O. 14008, Jan. 27, 2021, <https://www.whitehouse.gov/briefing-room/presidential-actions/2021/01/27/executive-order-on-tackling-the-climate-crisis-at-home-and-abroad/>.

⁴ E.O. 14030, May 20, 2021, <https://www.whitehouse.gov/briefing-room/presidential-actions/2021/05/20/executive-order-on-climate-related-financial-risk/>.

⁵ <https://www.federalregister.gov/documents/2021/10/15/2021-22266/federal-acquisition-regulation-minimizing-the-risk-of-climate-change-in-federal-acquisitions>.

⁶ Comment period extended to January 13, 2022, <https://www.federalregister.gov/documents/2021/12/07/2021-26243/federal-acquisition-regulation-minimizing-the-risk-of-climate-change->

Acquisition Regulation (“FAR”) to ensure that federal agency procurements minimize the risk of climate change.

This EO further invigorates the Biden administration’s efforts to position the United States as a leader on the low-carbon economic transition to bring net greenhouse gas emissions to zero, empowering nearly every federal agency with a role in reducing emissions. Further, the directive is the latest in a series of actions intended to reverse actions taken by the Trump administration’s broader deregulatory initiatives to “unravel the red tape.”

FEDERAL SUSTAINABILITY PLAN GOALS

The Biden administration’s sustainable procurement initiatives have the potential to impact a broad array of industries, contractors and lessors. At a high-level, the Federal Sustainability Plan seeks to achieve the following:

- *Net-zero emissions procurement:* Building on EO 14030, the Federal Sustainability Plan seeks to require public disclosure of greenhouse gas emissions by major federal contractors and accompanying reduction targets. Relatedly, the FAR Council has proposed an amendment to the FAR “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, *giving preference to bids and proposals from suppliers with a lower social cost of greenhouse gas emissions.*”
- *Net-zero federal buildings and leases:* In a Memorandum to Executive Agencies⁷ (issued as part of the Sustainability Plan), the General Services Administration (“GSA”) is directed to develop guidelines for “Federal green leases” within 180 days of the issuance of the EO to ensure that all new leases (including replacing, succeeding and superseding leases) entered into after September 30, 2023, “for at least 25,000 rentable square feet in a building where the Federal Government leases at least 75 percent of the total building square footage” are “green” leases. The memorandum provides that such “green leases” will require the lessors to report to the agency “annual data on facility greenhouse gas emissions, energy consumption, water consumption and waste generation.” New leases entered into after September 30, 2030, for greater than 25,000 rentable square feet must be in net-zero emissions buildings.

in-federal-acquisitions?utm_campaign=subscription+mailing+list&utm_source=federalregister.gov&utm_medium=email.

⁷ M-22-06, <https://www.whitehouse.gov/wp-content/uploads/2021/12/M-22-06.pdf>.

- *“Buy Clean” policy:* The EO establishes a “Buy Clean” policy, promoting the use of construction materials with lower embodied emissions and pollutants. A “Buy Clean Task Force” is set to provide recommendations on policies and procedures within 180 days. Their task includes identifying and prioritizing the pollutants and materials, “such as concrete and steel,” to be covered by the Buy Clean policy, “mechanisms for collecting environmental performance information for primary processing facilities of eligible materials, as well as recommendations for pilot programs to incentivize procurement of lower-embodied-emission materials.”
- *Carbon pollution-free electricity:* The EO directs the U.S. Secretary of Defense, the Secretary of Energy and the GSA Administrator to “use the scale of the Federal Government’s electricity use to aggregate and accelerate new carbon pollution-free electricity generation capacity to meet Federal energy needs.” Under the Sustainability Plan, the government will work with utility service providers to negotiate supply contracts that include carbon pollution-free electricity and energy storage. Agencies are also directed to explore options to increase energy and water efficiency, including the use of Utility Energy Service Contracts (“UESCs”) and Energy Savings Performance Contracts (“ESPCs”).
- *Net-zero emission vehicles:* The EO calls for 100 percent zero-emission vehicle acquisitions by 2035. Beginning June 30, 2022, and annually thereafter, agencies are required to submit a “strategic plan for transformation of its fleet to zero-emission vehicles,” which must include, among other things, “a plan for installation of necessary charging or refueling infrastructure; . . . and consideration of energy storage technologies and ancillary services to support vehicle-to-grid technology.”

CONCLUSIONS AND TAKEAWAYS

The latest EO and the Sustainability Plan establish concrete goals, policies and procedures to advance the Biden administration’s sustainable procurement goals. What makes this EO unique, as compared to previous Biden and Obama administration federal sustainability orders, is that it is much broader in its objectives and the parties of impact.

As such, it will be critical for companies to review and evaluate how the EO relates to their current and future federal business and objectives, as well as prepare for the opportunities it will create. Federal contractors and lessors can (and should) expect to see these policy principles embodied in coming

procurement actions—and perhaps start taking steps towards understanding their current greenhouse gas emissions, as well as ways to reduce remissions.

While climate change remains a polarizing issue, and while we are still grappling with executive overreach in federal procurement (e.g., the federal contractor vaccine mandate), these initiatives will likely be met with less resistance and implemented in a meaningful way, creating immediate and lasting impacts to the federal procurement landscape.