

# PRATT'S GOVERNMENT CONTRACTING LAW REPORT

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# Proposed Greenhouse Gas Rule Previews New Compliance Frontier for Government Contractors

*By Michael J. Slattery and Justin A. Chiarodo\**

*In this article, the authors summarize a rule proposed by the Biden Administration incorporating certain climate-change measures into the federal procurement system.*

For over 18 months, the Biden Administration has discussed incorporating certain climate-change measures into the federal procurement system. A recent proposed rule<sup>1</sup> forecasts where the Biden Administration may be headed. In a nutshell, the proposed rule would require contractors receiving over \$7.5 million in annual contract obligations to disclose greenhouse gas emissions. And it would require those receiving over \$50 million in annual contract obligations to also set greenhouse gas reduction targets. The FAR Council has tentatively tied compliance with the rule to responsibility determinations – making this a key new compliance frontier for many government contractors. This article summarizes the proposed rule, including implementation and enforcement mechanisms.

## BACKGROUND

Climate change has been a procurement priority since early in the Biden Administration. In May 2020, the President issued Executive Order (E.O.) 14030, which directed the FAR Council to consider amending the FAR to require contractors to publicly disclose greenhouse gas (GHG) emissions and climate-related financial risk, have these entities set science-based GHG-reduction targets, and ensure that federal procurements minimize climate change risk.

Six months later, the Office of Management and Budget issued memorandum M-22-06 and suggested that the FAR Council should leverage existing third-party, international standards, such as the Task Force on Climate-related Financial Disclosure (TCFD) Recommendations, the CDP (formerly Carbon Disclosure Project) reporting system, and Science Based Targets Initiative (SBTi) criteria, to amend current regulations to “promote contractor attention to” reducing carbon emissions.

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<sup>1</sup> <https://www.federalregister.gov/documents/2022/11/14/2022-24569/federal-acquisition-regulation-disclosure-of-greenhouse-gas-emissions-and-climate-related-financial>.

The Biden Administration recently took a big step toward implementing its climate policy into the federal procurement system by issuing a proposed rule that would require many federal contractors to annually audit and disclose their greenhouse gas emissions and to require larger contractors to set emission reduction targets.

## PROPOSED RULE SUMMARY

The proposed rule imposes two sets of requirements: (1) auditing and disclosure duties, and (2) target-setting duties.

“Significant” contractors – those that received between \$7.5 million and \$50 million in total federal contract obligations in the prior federal fiscal year – are subject to auditing and disclosure duties. Significant contractors will be deemed non-responsible unless they, or their immediate owner: (1) complete an inventory of annual Scope 1 and Scope 2 GHG emissions, and (2) report these emissions in SAM.gov. A GHG “inventory” means a quantified list of an entity’s annual GHG emissions during a continuous period of 12 months, which is computed in accordance with the Greenhouse Gas Protocol Corporate Accounting and Reporting Standard.<sup>2</sup>

“Scope 1” means direct GHG emissions from sources that are owned or controlled by the reporting entity. “Scope 2” means indirect GHG emissions associated with the generation of electricity, heating/cooling, or steam, when these are purchased or acquired for the reporting entity’s own consumption (but occur at sources owned or controlled by another entity).

“Major” contractors – those who have received more than \$50 million in total federal contract obligations in the prior federal fiscal year – are likewise subject to audit and disclosure requirements, but must also set targets for GHG reductions. Under the proposed rule, Contracting Officers must treat major contractors as non-responsible unless they, or their owners:

- Submit an annual climate disclosure by completing applicable portions of the CDP Climate Change Questionnaire;
- Develop a science-based emissions reduction target that has been validated by the SBTi within the previous five calendar years; and
- Publish the annual climate disclosure and the validated science-based target on a publicly accessible website.

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<sup>2</sup> <https://ghgprotocol.org/sites/default/files/standards/ghg-protocol-revised.pdf>.

## IMPLEMENTATION AND ENFORCEMENT

Where applicable, the proposed rule requires contractors to certify their compliance with the new requirements via FAR clause.<sup>3</sup> Companies may calculate emissions using the calculation tool of their choice, as long as it is in alignment with the GHG Protocol Corporate Accounting and Reporting Standard. The proposed rule provides a link to one such tool offered by the Environmental Protection Agency (EPA): [epa.gov/climateleadership/simplified-ghg-emissions-calculator](https://epa.gov/climateleadership/simplified-ghg-emissions-calculator). This provision will appear in all solicitations that include FAR 52.204-7, System for Award Management. In short, this means that compliance will be required in all but a handful of small or specialized procurements.

One aspect of the proposed rule that has garnered surprisingly little attention is the fact that it requires contractors to disclose information to, and obtain validation of emission reduction targets from, international organizations such as the CPD and SBTi. By requiring contractors to “obtain SBTi validation of a science-based target,” the rule could, at least in theory, place in the hands of an international organization the determination of whether or not an otherwise qualified U.S. taxpayer in good standing can do business with its own government.

In a sign of the high stakes attached to the proposed rule, Contracting Officers must presume that non-complying suppliers are non-responsible under FAR Part 9 unless the Contracting Officer determines that the prospective contractor: is non-compliant due to circumstances beyond its control; has provided sufficient documentation that demonstrates substantial efforts to comply; and has made a public commitment to comply as soon as possible.

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<sup>3</sup> FAR 52.223-22, Public Disclosure of Greenhouse Gas Emissions and Reduction Goals – Representation.