

Proposed Rule Requires Contractors to Disclose Greenhouse Gas Emissions and Climate-Related Financial Risk

Article By:

Townsend L. Bourne

Shaunna E. Bailey

On November 14, 2022, the Department of Defense (DoD), General Services Administration (GSA), and National Aeronautics and Space Administration (NASA) published a [proposed rule](#) that would amend the Federal Acquisition Regulation (FAR) to require Federal contractors that receive annual Federal contract obligations over a specified amount to disclose their greenhouse gas (GHG) emissions^[1] and climate-related financial risk, and set science-based targets to reduce GHG emissions.^[2] This proposed rule implements section 5(b) of Executive Order 14030, Climate-Related Financial Risk, which we previously wrote about [here](#). The Government will consider comments from interested parties that are submitted by **January 13, 2023**, after which a final rule will be formulated.

Key Elements of the Proposed Rule

- **The proposed climate-related disclosure requirements apply to “significant” and “major” contractors.** A “significant” contractor is an offeror that has received between \$7.5 million and \$50 million in “Federal contract obligations” in the prior Federal fiscal year, whereas a “major” contractor is an offeror that has received over \$50 million in “Federal contract obligations” in the prior Federal fiscal year. The proposed rule revises the FAR to require offerors, when registering or updating their registrations in the System for Award Management (SAM), to report whether they are a significant or major contractor.
- **Both *significant contractors* and *major contractors* are required to inventory their annual Scope 1 and Scope 2 GHG emissions and report them in SAM annually.** Scope 1 emissions include GHG emissions from sources owned and controlled by the reporting company. Scope 2 emissions include indirect GHG emissions associated with generating energy (*i.e.*, electricity, steam, or heating or cooling) that are purchased or acquired to be consumed by the reporting company, but physically occur at a separate facility.
- **In addition to the Scope 1 and Scope 2 disclosures, *major contractors* also will be required to disclose Scope 3 GHG emissions annually and develop science-based reduction targets to be validated by the Science Based Targets initiative (SBTi).** Scope 3 emissions include indirect GHG emissions that are a consequence of the entity’s

operations but occur at other sources (e.g., purchased goods and services, leased assets, transportation and distribution, employee commuting, use of sold products, end-of-life treatment of sold products, etc.). Scope 3 emissions are also called “value chain emissions” and often make up the majority of an organization’s total GHG emissions. Science-based targets are targets for the reduction of GHG emissions that are in conformance with the Paris Agreement goals on limiting global warming.

- **The proposed rule requires contractors to use four standards when inventorying and publicly disclosing annual climate data.** The standards are the GHG Protocol Corporate Accounting and Reporting Standards and Guidance, the 2017 Recommendations of the Task Force on Climate-Related Financial Disclosures (TCFD), the CDP Climate Change Questionnaire, and the SBTi criteria.
- **Contractors will have one year to comply with requirements for Scope 1 and 2 emissions reporting, and two years to comply with Scope 3 emissions reporting and the requirements for annual climate disclosures and setting science-based targets.** For significant and major contractors disclosing Scope 1 and Scope 2 emissions, compliance with the new requirements will be required one year after publication of the final rule. Major contractors must comply with the requirements regarding disclosing Scope 3 emissions in their annual climate disclosures and setting science-based targets two years after publication of the final rule.
- **Contractors that do not make the required annual disclosures may be deemed nonresponsible, and thus ineligible for awards from the Federal Government.** In accordance with new procedures set forth at FAR 9.104-3(e), significant and major contractors will be subject to a nonresponsibility determination unless they have inventoried and disclosed their total annual GHG emissions in SAM. Additionally, major contractors will be deemed nonresponsible unless they also have made available on a publicly accessible website an “annual climate disclosure” using the CDP Climate Change Questionnaire and set science-based reduction targets validated by SBTi.
- **A significant or major contractor that is not in compliance with the disclosure requirements may avoid a finding of nonresponsibility under certain circumstances.** This requires a determination by the contracting officer that (1) noncompliance resulted from circumstances beyond the offeror’s control; (2) the offeror demonstrates substantial efforts taken to comply; or (3) the offeror makes a public commitment to comply within one calendar year.
- **The proposed rule establishes exceptions for certain categories of contractors that must represent they are either a significant or major contractor.** The following types of contractors would not be required to inventory Scope 1, 2, or 3 emissions or submit annual climate disclosures or develop science-based targets: Alaska Native Corporations, Community Development Corporations, Indian tribes, Native Hawaiian Organizations, Tribally owned concerns, higher education institutions, nonprofit research entities, state or local governments, and entities that derive 80 percent or more of their annual revenue from Federal management and operating (M&O) contracts that are subject to annual sustainability reporting requirements. Additionally, major contractors that are also small businesses would not be required to report Scope 3 emissions or set science-based reduction targets, but would still be required to report Scope 1 and Scope 2 emissions.

-
- **The proposed rule establishes additional exemptions and waivers.** The requirements of the proposed rule do not apply to acquisitions where the offeror is exempt from the requirement to be registered in SAM at the time the offer is submitted (per FAR 4.1102(a)). Senior procurement officials also may waive the requirements for purposes of national security, emergencies, or other mission essential purposes. Additionally, senior procurement executives may provide an entity-level waiver for up to one year to allow an entity to come into compliance with the rule.
 - **The proposed rule applies to offerors with contracts for commercial products (including contracts for Commercially Available Off-the-Shelf (COTS) items), commercial services, noncommercial products and services, and contracts below the simplified acquisition threshold.** The proposed rule will amend the FAR to include applicable representations in FAR 52.212-3, Offeror Representations and Certifications—Commercial Products and Commercial Services, and amend the annual representation found in the solicitation provision at FAR 52.223-22, Public Disclosure of Climate Information—Representation.
 - **The proposed rule adds a new FAR subpart at 23.XX regarding the expanded climate-related disclosure requirements and establishes the new responsibility standard for certain contractors under FAR subpart 9.1.**

The Federal Register Notice permits interested parties to provide comments on the proposed rule by January 13, 2023. Comments addressing the following are specifically invited:

- The appropriateness of the exceptions for certain categories of contractors, including potential alternatives to be considered in the drafting of the final rule;
- The use of standards identified in the proposed rule, including potential alternatives to be considered in the drafting of the final rule;
- Whether any additional specificity regarding language about the applicability of the CDP Climate Change Questionnaire is needed in the final rule; and
- The impact on small entities.

Although the final rule likely will not be identical to the proposed rule, Federal contractors should be aware of these forthcoming requirements and – if they haven’t done so already – begin establishing systems to track and disclose their GHG emissions in order to minimize risk.

FOOTNOTES

^[1] The proposed rule defines greenhouse gas as “carbon dioxide, methane, nitrous oxide, hydrofluorocarbons, perfluorocarbons, nitrogen trifluoride, or sulfur hexafluoride.” See *also* FAR 23.001.

^[2] This proposed rule is similar – although not identical – to the Securities and Exchange Commission’s (SEC) April 11, 2022 [proposed rule](#) that would require disclosures on climate-related financial risk and GHG emissions from SEC-registered companies, including publicly listed/traded

companies. Notably, unlike this proposed FAR rule, the proposed SEC rule does not require disclosure using a standardized system nor does it require companies to set science-based reduction targets to reduce their GHG emissions.

Copyright © 2024, Sheppard Mullin Richter & Hampton LLP.

National Law Review, Volumess XII, Number 334

Source URL: <https://natlawreview.com/article/proposed-rule-requires-contractors-to-disclose-greenhouse-gas-emissions-and-climate>