



February 13, 2023

Jennifer Hawes  
General Services Administration  
Regulatory Secretariat Division  
1800 F Street, NW  
Washington, DC 20405  
Via: <https://www.regulations.gov>

**Re: FAR Case 2021-015 Federal Acquisition Regulation: Disclosure of Greenhouse Gas Emissions and Climate-Related Financial Risk**

Dear Ms. Hawes:

The Center for American Progress is pleased to submit these comments on the proposal advanced by the Department of Defense, General Services Administration, and National Aeronautics and Space Administration entitled “Federal Acquisition Regulation: Disclosure of Greenhouse Gas Emissions and Climate-Related Financial Risk” (FAR Case 2021-015) and originally published in the Federal Register on November 14, 2022 (“proposed rule” or “proposal”).<sup>1</sup>

The Center for American Progress (CAP) is an independent, nonpartisan policy institute that is dedicated to improving the lives of all Americans through bold, progressive ideas, as well as strong leadership and concerted action.

**Introduction**

We applaud the FAR Council on moving forward to provide further guidance to offerors in connection with the exceedingly important task of ensuring that the federal procurement system appropriately integrates climate considerations, which are sure to impact the ability of the federal government and its federal acquisition partners to deliver value for money in the near and longer term.

***Climate risk and emissions disclosures will “support the attainment of public policy goals adopted by Congress and the President.”***<sup>2</sup> Under President Joe Biden, the federal government has committed to reducing its own climate emissions to net zero by 2050 and by at least 50 percent below 2005 levels by 2030.<sup>3</sup> This means not only the emissions

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<sup>1</sup> Federal Acquisition Regulation: Disclosure of Greenhouse Gas Emissions and Climate-Related Financial Risk (FAR Case 2021-015), Fed. Reg. 87:218, at 68312, November 14, 2022. Extension of deadline for comments to February 13, 2023, at Fed. Reg. 27884.

<sup>2</sup> See, FAR Part 1.102-2(d).

<sup>3</sup> “The United States of America, Nationally Determined Contribution,” available at <https://unfccc.int/sites/default/files/NDC/2022-06/United%20States%20NDC%20April%2021%202021%20Final.pdf> (“...the United States government

directly caused by federal government buildings and operations—known as Scope 1 emissions—or from energy purchased and used directly in federal facilities—known as Scope 2 emissions—but also emissions up and down the federal supply chain, or Scope 3 emissions. The climate emissions associated with federal contractors constitute Scope 3 emissions for the federal government.

The proposed rule takes a critical step forward in providing more detailed guidance for how those seeking federal procurement contracts should assess and publicly disclose climate risk and emissions information. In accordance with existing FAR requirements, it would do the following: It would help the federal government manage the physical and transition risks that climate change poses to efficient, high-quality goods and services purchased by taxpayers.<sup>4</sup> It would help the federal government manage its supply chain risks and ensure uninterrupted government products and services.<sup>5</sup> And it would help the federal government identify areas for increased efficiency<sup>6</sup> and reduced risks<sup>7</sup> and emissions. The proposal provides ample support for these points.

Additional measures could help ensure that the information received under the proposal is integrated effectively into the federal government’s plan to reduce its climate emissions. Suggestions for doing so are discussed below beginning on page 4.

***Climate impacts are an important and relevant concern for federal procurement.*** We wish to emphasize what is embedded throughout the FAR: That the federal government does not operate in a vacuum when it is seeking to acquire goods or services. The federal government both impacts and is impacted by broader considerations than price on a specific project or even than economic factors like inflation.

Because of the federal government’s role in carrying out the full range of policies advanced by congress through legislation, a variety of other considerations external to the economic transaction in the federal contract in question can be important for the federal government to assess, even though private contracting parties might be free to ignore such costs in day-to-day transactions with each other. Examples of such externalities that the federal government might have a duty to consider might include disproportionate impacts on certain communities, infant mortality, threats to human health, or reduced life expectancy. For example, it might cost less money to purchase lead pipes for construction of systems to transport drinking water but doing so can have disastrous impacts on the health and life expectancy of people who drink water from those pipes—harms from which governments are expected to protect their citizens. These factors may not affect the parties to the contract, but they are economic externalities that the federal government cannot ignore.

It is well established, for example, that climate change and the related pollution from fossil fuel production and use and other sources of emissions have a disproportionate impact on

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will use its procurement power to support early markets for these very low-and zero-carbon industrial goods.”); and United Nations Climate Change Nationally Determined Contributions Registry, available at <https://unfccc.int/NDCREG>.

<sup>4</sup> See, 48 CFR Section 1.102-2(c)(2).

<sup>5</sup> See, e.g., 48 CFR Section 252.239-7018.

<sup>6</sup> See, e.g., 48 CFR Section 1.102-2(b)(1).

<sup>7</sup> See, e.g., 48 CFR Section 1.102(c)(2).

low and moderate-income communities and communities of color.<sup>8</sup> A major responsibility of the federal government is to use tax revenues appropriately for the benefit of all citizens and in a fair and effective manner. Failure to gather and incorporate climate risk and emissions information and considerations in the federal procurement process would tend to perpetuate the status quo in which certain individuals and businesses benefit from economic activity at the expense of others who are more vulnerable.

***Uniform rules around climate risk are cost efficient for government, offerors, and taxpayers.*** Acting now is critical, since climate change is already impacting the U.S. economy. As climate disasters increase in number and severity, delay in integrating climate-related financial risk and emissions reduction into the federal procurement process will only become more costly. The number of climate-related disasters costing one billion dollars or more is accelerating.<sup>9</sup> This will invariably result in increased federal spending on national flood insurance, disaster relief, and much more. In both the short and longer term, reducing climate risks reduces costs to taxpayers. These are direct savings. In addition, as climate disclosures become more routine, there will be more information of a higher quality, and companies will adjust and improve if they want to continue their partnership with the federal government on defense-related and other government contract projects. Leveraging federal purchasing in this way will lead to even greater savings. It makes good economic sense to use federal government purchasing power to reduce the government's own costs.

The overwhelming majority of companies understand that the physical and transition risks climate change poses to their business is a concern they must assess and manage. In a recent Deloitte survey, 97 percent of top executives stated that climate change will affect their company strategies and operations.<sup>10</sup> Business leaders also know that climate risk management may contribute to the resiliency of their company, provide a competitive advantage, enhance the firm's reputation, spur an innovation mindset, increase employee morale, and improve recruiting and retention of qualified employees. Large companies that operate internationally are particularly aware of this. They see that many of the U.S.'s trading partners are rapidly moving to adopt reporting and other measures to reduce climate risk and emissions and that the U.S. and its companies will need to do so, as well, to remain competitive.

For all of these reasons, an increasing number of companies are making climate-related disclosures and commitments to reach net zero. While this process will take time and it is not always easy at this point to distinguish between accurate disclosures and greenwashing, only by beginning the process of transparency around climate risk can governments, companies, and experts develop improved and standardized means of

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<sup>8</sup> Cathleen Kelly and Mikyla Reta, "Building Equitable, Healthy, and Climate Change-Ready Communities in the Wake of COVID-19," Center for American Progress, October 8, 2020, available at <https://www.americanprogress.org/article/building-equitable-healthy-climate-change-ready-communities-wake-covid-19/>.

<sup>9</sup> Adam B. Smith, "2022 U.S. billion-dollar weather and climate disasters in historical context," Climate.gov, January 10, 2023, available at <https://www.climate.gov/news-features/blogs/2022-us-billion-dollar-weather-and-climate-disasters-historical-context>.

<sup>10</sup> Mark Segal, "97% of Top Execs Expect Climate Change to Impact Company Strategy & Operations: Deloitte Survey," ESGToday, January 16, 2023, available at <https://www.esgtoday.com/97-of-top-execsexpect-climate-change-to-impact-company-strategy-operations-deloitte-survey/>

measuring and reporting climate risk and emissions and, even more important, design appropriate measures to reduce emissions, adapt, and combat global climate change. The FAR proposed rule is a critical incentive that the federal government has at its disposal.

At the same time, uniformity on how climate information is reported and used in the procurement process is more efficient for offerors who need only learn one set of rules in order to do business with different agencies and departments.<sup>11</sup>

Uniformity is also more cost efficient because it promotes a procurement process that runs more smoothly. When contracting parties think ahead about potential risks that may arise in the course of carrying out their respective duties under the contract and make a plan for how to handle those risks should they arise, the burden of those risks is much less likely to fall unexpectedly on one party or another and less time is wasted deciding after the fact what should be done. Even if one party understands beforehand that they will bear a certain risk, they can seek insurance, for example, to avoid catastrophic costs or line up secondary options for accomplishing their commitments under the contract. Thus, transparency about climate risks ensures a balancing of the burden of those risks between the federal government and federal contractors, so that costs are managed and backup plans are ready should the physical or transition risks of climate change affect the expected outcome of the project and so that parties can prepare before the fact for how risks will be handled should they materialize. Many aspects of the FAR allow the government to modulate risk.<sup>12</sup>

Finally, we note that the FAR already requires significant consideration of climate risk in its existing provisions. For example, FAR 52.223-22 (“Public Disclosure of Climate Information”) requires offerors receiving \$7.5 million or more in federal procurement in the preceding fiscal year to disclose whether they publicly disclose their greenhouse gas emissions and a greenhouse gas emission reduction goal, and, if so, to provide the publicly accessible website(s) where the emissions and reduction goals may be found. FAR 52.212-3 contains similar provisions for Offeror Representations and Certifications-Commercial Products and Commercial Services. These provisions have been part of the FAR for over six years, thus many offerors may already be collecting this information or preparing to do so.

The following comments relate to specific sections of the proposal and make recommendations for improving it where appropriate.

## **Definitions Should Be Included in Part 2**

The proposal adds definitions of climate-related matters to its newly proposed FAR Part 23.<sup>13</sup> The FAR Council should consider adding those definitions to the general list of

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<sup>11</sup> See, Steven L. Schooner, “Desiderata: Objectives for a System of Government Contract Law,” George Washington University School of Law, 2011, at p.14, available at [https://scholarship.law.gwu.edu/cgi/viewcontent.cgi?article=1101&context=faculty\\_publications](https://scholarship.law.gwu.edu/cgi/viewcontent.cgi?article=1101&context=faculty_publications).

<sup>12</sup> See, Steven L. Schooner, at pp.13-14 (For example, by using different types of contracts to protect against cost overruns or by a termination for convenience clause “where its need for the contracted items has evaporated or been overtaken by events”).

<sup>13</sup> Proposal at Fed. Reg. 68317.

definitions in FAR Part 2, especially if it adopts recommendations below to augment the federal procurement principles in FAR Part 1.

### **Guardrails Are Needed on Waivers**

The proposal would allow contracting officers to waive the proposal's new requirements for certain reasons.<sup>14</sup> We strongly recommend narrowing the circumstances under which waivers are permitted. In particular, the proposed "mission-essential" waiver<sup>15</sup> should be eliminated, as it is inadequately explained, invites an inappropriate amount of discretion, and could result in unfair application of the new procedures. In short, it would give free reign to federal agencies to ignore the proposal's requirements and potentially make climate reporting by federal contractors meaningless. Moreover, with respect to the other waivers, the FAR Council should consider requiring agencies to justify the use of a waiver and establishing procedures for review and approval of each waiver.

### **Outsourcing of Reporting and Certifications**

The FAR Council has proposed to rely on third-party standards and methodologies that are already being used by a wide range of companies to assess climate risk and measure emissions—the Task Force on Climate-Related Financial Disclosures (TCFD), the CDP Climate Change Questionnaire, the Greenhouse Gas Protocol (GHG Protocol), and the Science-Based Targets Initiative (SBTi). Reliance on these frameworks simplifies compliance with the rule by contractors and reduces their costs of complying to the extent that contractors will not waste resources selecting from the wide range of frameworks available for assessing climate risk and emissions. As the proposal points out, a large number of companies that serve the federal government are already familiar with these frameworks.<sup>16</sup>

Ideally, however, the federal government should exercise some control over the use of the outside frameworks to ensure that they are consistent with its goals and practices. We believe it is appropriate to view the current proposal as another step in the process of perfecting consideration of climate-related financial risks and greenhouse gas emissions in the federal procurement process to protect supply chains, improve efficiency, and obtain the most value for money from taxpayers' investment. While use of the selected frameworks will offer a transparent baseline to begin the process of integrating consideration of climate risk in federal procurement, we recommend that the FAR Council consider the following steps.

First, it should provide training for contracting officers on climate considerations and evaluation of disclosures. Without this training, we believe that climate reporting may be without consequences and that the valuable efficiencies such reporting offers may not be realized. The public expects contracting officers to use information it receives in solicitations to obtain better value for money and to determine when a price premium is warranted. Without training, contracting officers may not be able to properly assess the information and make those determinations.

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<sup>14</sup> Proposal at Fed. Reg. 68316.

<sup>15</sup> *Ibid.*

<sup>16</sup> Proposal at Fed. Reg. 68320.

Second, the FAR Council should consider whether certain aspects of the frameworks should be directly incorporated into the FAR, such as the GHG Protocol's categories of Scope 3 emissions. As the FAR Council consults with the Environmental Protection Agency, the Securities and Exchange Commission (SEC), and other agencies, it may be able to determine which aspects of the frameworks are the most useful and result in the most reliable information, warranting their direct inclusion in the FAR. Moreover, as the FAR Council incorporates provisions into the FAR, it can do so in harmony with the requirements of those other agencies, further improving the efficiency of climate change disclosures for federal contracting companies.

In the longer term, we are very concerned about the potential for increased corporate capture of these non-governmental frameworks. While at this point in the process, it is more efficient for businesses to have consistent systems for measuring and reporting progress on climate-related financial risk and emissions reduction, over time the methods will evolve, and metrics will improve. Other agencies, including the SEC, will also gain knowledge and expertise relating to the assessment of climate risk and measurement of emissions. The FAR Council should plan a full review of the disclosures called for in the proposal after a specified period of time to ensure that they are keeping pace with increased risks and federal government policies.

But, in order to ensure that the process of learning and improving takes place, we emphasize again how important it is for the federal government to act expediently to develop training for contracting officers, so they can begin developing deeper skills at assessing climate risk and emissions and also build toward a future when the climate risk assessment is more internalized within federal government agencies.

### **Principles and Procedures Should Reflect Explicit and Concrete Expectations for Government Contracting**

Climate considerations will overshadow all commerce indeed life itself in the decades ahead. The federal government cannot afford to be slow in recognizing this. The principles expressed in FAR Part 1 should reflect this priority, and the new climate-related information should be actively analyzed and considered in acquisition decisions.

FAR Part 1 principles should recognize the potential for harmful externalities resulting from federal contracting. Part 1.102-2(d) should explicitly state that the term "public resources" is "defined broadly to include non-pecuniary resources, such as clean air and water." And Part 1.102(b)(4) should state that the Federal Acquisition System will "Fulfill public policy objectives, including those identified in Part 23." Similarly, Part 1.102-2(a)(3) should state that "When selecting contractors to provide products or perform services, the Government will use contractors who have a track record of successful past performance, who demonstrate a current superior ability to perform, *and who demonstrate a commitment to the goals and procedures described in Part 23.*" When combined with the FAR climate disclosures as proposed, these would provide more assurance to the American public that the federal government can be trusted to live up to its public policy commitments.

Without these changes, the importance of climate risk will be minimized and relegated solely to Part 23 where its importance is disconnected from the primary substance of the FAR. The FAR Council should further consider how climate-related disclosures of federal

contractors should inform federal acquisition decisions, including on grants, loans, and other non-procurement spending. In addition to the changes to the principles section of the FAR, the FAR Council could set emission reduction goals for contracting officers and require officers to file annual reports. And, again, contracting officers should receive training on how to identify and weigh information about climate risk and emissions. These steps are important to ensure that taxpayers receive value for money.

### **Disclosure Related to Historically Disadvantaged and Vulnerable Communities**

In the U.S., low-income communities and communities of color have been disproportionately affected by toxic waste and pollution associated with power plants, oil refineries, chemical plants, and other industrial facilities, which are concentrated in these communities' neighborhoods.<sup>17</sup> The Biden Administration is committed to addressing environmental injustice and has taken steps to address it, such as its Justice40 Initiative aiming to direct at least 40 percent of the administration's climate and clean energy investment benefits to disadvantaged communities.<sup>18</sup> The proposal already refers to this concern and to the President's Executive Order on Tackling the Climate Crisis at Home and Abroad where this and many other climate-related commitments were made.<sup>19</sup>

To help the administration carry out this commitment to the public, we strongly encourage the FAR Council to require Tier 3 federal contractors to make the following representation on the SAM website: whether they have any facilities in or within 10 miles of a disadvantaged community (as determined using the Climate and Economic Justice Screening Tool),<sup>20</sup> and, if so, any current or planned actions the contractor is taking to address challenges faced by each such community.

### **Conclusion**

The federal government is at a critical point. The physical and transition impacts of climate change are already affecting federal supply chains, as well as our economy and daily life in communities across the U.S. and around the globe. The federal government is one of the largest purchasers of goods and services in the world, and it must act quickly to align its procurement process, including the thousands of businesses that benefit from federal contracting, with the rapidly advancing global effort to reduce greenhouse gas emissions. The cost efficiencies for the federal government of doing so are obvious and the larger economic and social benefits will ensure that taxpayers receive value for money.

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<sup>17</sup> See, e.g., Cathleen Kelly and Mikyla Reta, "Implementing Biden's Justice40 Commitment To Combat Environmental Racism," Center for American Progress, June 2021, available at <https://www.americanprogress.org/article/implementing-bidens-justice40-commitment-combat-environmental-racism/>.

<sup>18</sup> "Executive Order on Tackling the Climate Crisis at Home and Abroad," The White House, January 27, 2021, available at <https://www.whitehouse.gov/briefing-room/presidential-actions/2021/01/27/executive-order-on-tackling-the-climate-crisis-at-home-and-abroad/>; and "Justice40: A Whole-of-Government Initiative," The White House, available at <https://www.whitehouse.gov/environmentaljustice/justice40/>.

<sup>19</sup> Proposal at Fed. Reg. 68312 and 68328.

<sup>20</sup> Climate and Economic Justice Screening Tool, "About," available at <https://screeningtool.geoplatform.gov/en/about>.

To align federal government contracts with this economic, environmental and social juggernaut, the federal government must build climate risk management and emissions reduction mechanisms into the federal procurement process as soon as possible. There is no time to waste. Failure to do so will contractually lock in poor risk management and poor emissions reduction performance in this enormous sector of the economy—a result that would have negative consequences for U.S. trade, competition, and economic efficiency, as well as for communities and our way of life.

Thank you for your consideration of these comments.

Respectfully submitted,

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