



VIA ELECTRONIC SUBMISSION

February 13, 2023

Lesley A. Field
Acting Administrator
Office of Federal Procurement Policy
Office of Management and Budget
Washington, DC 20503

RE: Docket No. FAR-2021-0015, Notice of Proposed Rulemaking on Federal Acquisition Regulation: Disclosure of Greenhouse Gas Emissions and Climate-Related Financial Risk (FAR Case 2021-015) [RIN: 9000-AO32]

Dear Ms. Field:

Associated Builders and Contractors hereby submits the following comments in response to the above-referenced proposed rule published in the Federal Register on Nov. 14, 2022, at 87 Federal Register 68312.

About Associated Builders and Contractors

ABC is a national construction industry trade association representing more than 22,000 member companies. ABC and its 68 chapters help members develop people, win work and deliver that work safely, ethically and profitably for the betterment of the communities in which ABC and its members work.

ABC's membership represents all specialties within the U.S. construction industry and is comprised primarily of general contractors and subcontractors that perform work in the industrial and commercial sectors for government and private sector customers.¹

The vast majority of ABC's contractor members are small businesses. This is consistent with the U.S. Census Bureau and U.S. Small Business Administration Office of Advocacy's findings that the construction industry has one of the highest concentrations of small businesses (82% of all construction firms have fewer than 10 employees)² and industry workforce employment (more than 82% of the construction industry is employed by small businesses).³ In fact, construction companies that employ fewer than 100 construction professionals comprise 99%

¹ For example, see ABC's 32nd Excellence in Construction Awards program from 2022:

<https://www.abc.org/Portals/1/2022%20Files/32ND%20EIC%20program--Final.pdf?ver=2022-03-25-115404-167>.

² U.S. Census Bureau 2019 County Business Patterns:

<https://data.census.gov/cedsci/table?q=CBP2019.CB1900CBP&n=23&tid=CBP2019.CB1900CBP&hidePreview=true> and <https://www.census.gov/programs-surveys/cbp/data/tables.2019.html>.

³ 2020 Small Business Profile, U.S. Small Business Administration Office of Advocacy (2020), at Page 3,

<https://cdn.advocacy.sba.gov/wp-content/uploads/2020/06/04144224/2020-Small-Business-Economic-Profile-US.pdf>.

of construction firms in the United States; they build 63% of U.S. construction, by value, and account for 68% of all construction industry employment.⁴

In addition to small business member contractors that build private and public works projects, ABC also has large member general contractors and subcontractors that perform construction services for private sector customers and federal, state and local governments procuring construction contracts subject to respective government acquisition policies and regulations.

Specific to this rulemaking, ABC members won 57% of the \$128.73 billion in direct prime construction contracts exceeding \$25 million awarded by federal agencies during fiscal years 2009-2021. ABC member federal contractors that won contracts provided subcontracting opportunities to large and small contractors in the specialty trades and delivered taxpayer-funded construction projects safely, on time and on budget for their federal government customers.

ABC's diverse membership is bound by a shared commitment to the merit shop philosophy in the construction industry. The philosophy is based on the principles of nondiscrimination due to labor affiliation and the awarding of construction contracts through open, competitive bidding based on safety, quality and value.

For these reasons, ABC's members are heavily impacted by the FAR Council's proposed rule affecting federal contracting opportunities for taxpayer-funded construction contracts and deeply concerned about the potential effects of the greenhouse gas emissions disclosure and reduction requirements outlined in the proposed rule.

Background

On Nov. 14, 2022, the FAR Council issued a [proposed rule](#) to amend the Federal Acquisition Regulation to require certain federal contractors to disclose their GHG emissions and set GHG emissions reduction targets.

Under the proposed rule, federal contractors who qualify as significant contractors (those receiving between \$7.5 million and \$50 million in federal contracting obligations in the prior fiscal year), would be required to inventory their annual GHG emissions and disclose this information. This inventory would capture Scope 1 and Scope 2 emissions. Scope 1 emissions are defined as direct GHG emissions from the contractor's activities.⁵ Scope 2 emissions are defined as indirect GHG emissions resulting from the generation of electricity or other energy for use by the contractor.⁶

⁴ U.S. Census County Business Patterns by Legal Form of Organization and Employment Size Class for the U.S., States, and Selected Geographies: 2019, available at <https://thetruthaboutplas.com/wp-content/uploads/2021/07/Construction-firm-size-by-employment-2019-County-Business-Patterns-Updated-071321.xlsx>.

⁵ See rule: <https://www.federalregister.gov/d/2022-24569/p-240>.

⁶ See rule: <https://www.federalregister.gov/d/2022-24569/p-241>.

Based on an analysis of federal contracting data, ABC estimates that, in FY 2021, over \$4.5 billion in federal construction contracts valued at between \$7.5 million and \$50 million were awarded to at least 90 contractors that would be deemed significant under the proposed rule.⁷ This estimate does not capture additional contractors that may be deemed significant if they received multiple contracts with a total value over \$7.5 million.

Major contractors (those receiving over \$50 million in contracting obligations) would also be required to make publicly available CDP climate disclosures and set targets for reducing GHG emissions. This disclosure would also include Scope 3 emissions, defined as GHG emissions that result from a contractor's activity but occur from sources that are not owned or controlled by the contractor.⁸

ABC estimates that, in FY 2021, more than \$12.1 billion in federal construction contracts over \$50 million were awarded to at least 60 contractors that would be deemed major under the proposed rule.⁹ Again, a significant number of federal contractors may be deemed major due to receiving multiple contracts totaling over \$50 million.

Contractors that fail to comply with these requirements would be deemed nonresponsible and ineligible to be awarded federal contracts.

ABC's Response to the Proposed Rule

ABC understands the need for sensible environmental policies that balance the protection of the environment with the costs that compliance with these regulations requires, including assessment of GHG emissions by federal contractors. Many of ABC's contractor members are involved in the construction and installation of the infrastructure necessary for America's transition to clean energy.

Unfortunately, the proposed rule fails to strike this balance and comes at a time when federal contractors are already facing severe economic headwinds. High materials costs¹⁰ and a skilled labor shortage of over half a million workers¹¹ are substantial obstacles to the continued growth of the construction industry and its ability to provide taxpayers with the best possible product at the best possible price on federal projects.

As demonstrated in our comments below, the proposed rule will only exacerbate these issues with its overly burdensome, costly and punitive approach to regulating GHG emissions of federal contractors. Moreover, our comments outline a number of concerns related to the Competition in Contracting Act, Federal Property and Administrative Services Act, Small Business Act and Administrative Procedure Act, which cast serious doubt on the legality of the proposed rule.

⁷ Federal contract award data downloaded from [usaspending.gov](https://www.usaspending.gov), November 2022.

⁸ See rule: <https://www.federalregister.gov/d/2022-24569/p-242>.

⁹ Federal contract award data downloaded from [usaspending.gov](https://www.usaspending.gov), November 2022.

¹⁰ "Inflation Easing: Monthly Construction Input Prices Drop 2.7% in December, Says ABC," ABC, January 2023.

¹¹ "Construction Workforce Shortage Tops Half a Million in 2023, Says ABC," ABC, February 2023.

1. The Proposed Rule Harms Competition, Economy and Efficiency in Federal Procurement, Violating Federal Procurement Statutes.

The foundation for the federal government's procurement requirements is the Competition in Contracting Act of 1984.¹² CICA was enacted to ensure that all interested and responsible parties have an equal opportunity to compete for and win federal government contracts. Full and open competition means that all responsible sources are permitted to submit competitive proposals on a procurement action, without favoritism or discrimination in the procurement process. CICA requires, with certain limited exceptions, that the federal government promote full and open competition in awarding contracts.¹³

Of particular significance to the proposed rule, CICA expressly bars federal agencies from using restrictive bid specifications to effectively discourage or exclude contractors from the pool of potential bidders or offerors. As the act states, agencies must solicit bids and offers "in a manner designed to achieve full and open competition" and "develop specifications in such a manner as is necessary to obtain full and open competition."¹⁴

The proposed rule conflicts directly with CICA by requiring federal agencies to discriminate against contractors that are unwilling or unable to disclose and/or reduce GHG emissions. By demonstrating a preference toward a narrow class of contractors, this proposal clearly does not "obtain full and open competition" and is therefore unlawful under CICA.

Further, the FAR Council claims statutory authority to promulgate the proposed rule under the Federal Property and Administrative Services Act of 1949,¹⁵ which is intended to "provide the Federal Government with an economical and efficient system" of government procurement. FPASA gives the president the authority to "prescribe policies and directives that [the President] considers necessary to carry out" the act, but only provided that such policies are "consistent with" the act and with other laws, such as CICA. Unless the proposed rule aligns with this statutory authority, it is invalid.¹⁶

The proposed rule directly contradicts FPASA's goal of providing for economy and efficiency in federal procurement. The proposed rule's own estimate states that the requirements will impose over \$3 billion in added costs over the next 10 years.¹⁷ This may be an underestimation of the extensive costs the regulation will impose on contractors and ultimately taxpayers.

Few construction contractors, even among larger companies but especially for small businesses, currently inventory their Scope 1 or 2 GHG emissions. This lack of familiarity

¹² 40 U.S.C. §101 *et seq.* and 41 U.S.C. §3701 *et seq.*

¹³ For a full and recent discussion of CICA's requirements, see Manuel, *Competition in Federal Contracting: An Overview of the Legal Requirements* (Congressional Research Service April 2009).

¹⁴ *Id.* at 18, citing 10 U.S.C. § 2305(a)(1)(A) and 41 U.S.C. § 253a(a)(1)(A-C); see also Cohen, *The Competition in Contracting Act*, 14 Pub. Con. L. J. 19 (1983/1984).

¹⁵ 40 U.S.C. § 101, *et seq.*

¹⁶ See *Liberty Mut. Ins. Co. v. Friedman*, 639 F. 2d 164, 169-171 (4th Cir. 1981) ("[A] court must reasonably be able to conclude that the grant of [legislative] authority contemplates the regulations issued.").

¹⁷ See rule: <https://www.federalregister.gov/d/2022-24569/p-95>.

means that contractors deemed significant or major will be forced to hire substantial numbers of new employees and outside consultants to effectively understand and implement the proposed rule's provisions or be barred from federal contracting opportunities.

Firms designated as major contractors under the proposed rule would face additional, more onerous compliance costs. These contractors are required to submit the CDP's climate change questionnaire and pay the organization's fees,¹⁸ develop science-based reduction targets and disclose Scope 3 emissions in addition to Scope 1 and 2.¹⁹

While all of these provisions will require burdensome and costly new activities by contractors to ensure compliance, the Scope 3 disclosure requirement will place unprecedented new burdens on contractors. The proposed rule states that contractors should follow the GHG Protocol Corporate Accounting and Reporting Standard for completing inventories of Scope 1, 2 and 3 emissions.²⁰

According to an analysis of this protocol by the European Network of Construction Companies for Research and Development, Scope 3 emission sources by construction companies include employee commutes via private vehicle or public transit, transportation and disposal of waste from construction activities, embodied GHG emissions in the production of construction materials, and subsequent emissions from the usage of buildings, roads and other infrastructure deemed to be the "product" of the contractor.²¹ Attempting to document the total emissions from this vast suite of activities would likely cost millions of dollars annually for contractors, and may not even be feasible in some cases due to a lack of data.

Another factor that will make this rule especially costly and burdensome for construction contractors is the high level of subcontracting within the construction industry. Prime contractors utilize numerous specialty contractors on most significant projects. For example, 93% of respondents to an ABC survey conducted in September 2022 indicated that more than two subcontractors would be required for contracts over \$35 million in value, with respondents most frequently indicating such projects require 10 to 15 subcontractors.²²

The proposed rule fails to provide clarity on third-party compliance, meaning the burden for disclosure of subcontractor emissions appears to fall entirely on prime contractors. It will be extraordinarily difficult for prime contractors to obtain this data from subcontractors who do not have the knowledge or resources to effectively provide it.

Therefore, the proposed rule represents a massive increase in contractor costs that will subsequently be passed onto the federal government and taxpayers, harming the economy

¹⁸ See rule: <https://www.federalregister.gov/d/2022-24569/p-20>; CDP, Admin Fee FAQ, <https://www.cdp.net/en/info/admin-fee-faq>.

¹⁹ See rule: <https://www.federalregister.gov/d/2022-24569/p-284>.

²⁰ See rule: <https://www.federalregister.gov/d/2022-24569/p-78>.

²¹ "Construction CO₂e Measurement Protocol," ENCORD, May 2012.

²² [Survey: 97% of ABC Contractors Say Biden's Government-Mandated Project Labor Agreement Policies Would Make Federal Construction More Expensive](#), ABC Newswire, Sept. 28, 2022.

and efficiency of federal procurement. As a result, the proposed rule cannot be found to be authorized by the FPASA.²³

2. The Proposed Rule Will Have a Disparate Impact on Small Business Contractors, Violating the Small Business Act.

The adverse economic impact this proposed rule will have on small businesses in the construction industry directly contravenes Congress's repeatedly expressed intent to promote and encourage federal procurement to small businesses.²⁴ In 1978, Congress amended the SBA to require all federal agencies to set percentage goals for the awarding of procurement contracts to small businesses.²⁵

As previously stated, the majority of ABC's contractor members are classified as small businesses, which represent the backbone of the construction industry. Unfortunately, the proposed rule would continue a trend of regulatory policies that have reduced construction industry small business participation in federal contracting. Construction industry small businesses suffered a 60% decline in the number of firms awarded federal contracts from 2010-2020, according to SBA data.²⁶

²³ Because of the president's failure to justify his executive order with facts demonstrating a close nexus between government-mandated PLAs and increase economy and efficiency of federal procurement, such cases as *AFL-CIO v. Kahn*, 618 F. 2d 784 (D.C. Cir. 1979) are distinguishable.

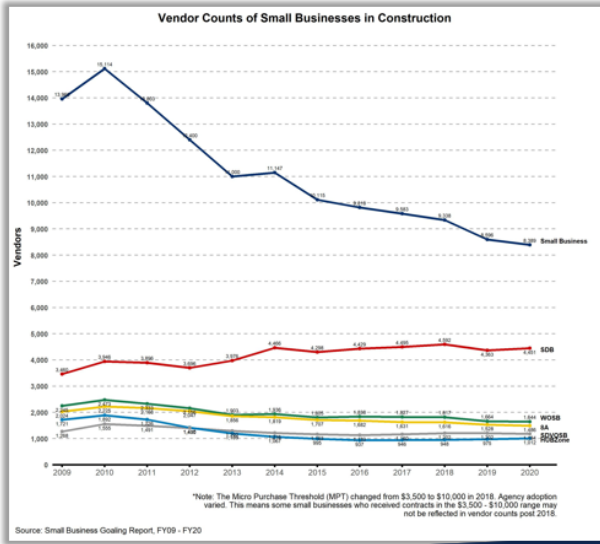
²⁴ See discussion in [An Overview of Small Business Contracting](#), Congressional Research Service, updated July 29, 2022.

²⁵ P.L. 95-507 (1978), 15 U.S.C. 644 (g).

²⁶ Chart available at: <https://thetruthaboutplas.com/wp-content/uploads/2022/09/60-percent-decline-of-small-businesses-awarded-federal-construction-contracts-2010-to-2020.png>. The data was prepared by an SBA economist who said, "The charts represent data on vendors who have received obligations. The definition of 'small' comes from the contracting officer's determination when the contract was awarded. The COs follow the NAICS size standards." Data is from FPDS that can be publicly accessed through SAM.gov: <https://sam.gov/reports/awards/standard>.



Number of Construction Industry Small Businesses Awarded Federal Contracts Declined 60% From 2010-2020



Vendor Counts of Small Businesses in Construction

FY	Small Business	SDB	SDVOSB	HUBZone	WOSB	8A	SBGR
2009	13960	3460	1268	1721	2245	2024	16186
2010	15114	3946	1555	1892	2473	2225	17644
2011	13803	3896	1491	1726	2333	2168	16335
2012	12400	3696	1400	1416	2156	2047	14510
2013	11000	3976	1292	1199	1903	1856	12690
2014	11147	4466	1216	1067	1936	1819	12706
2015	10115	4298	1163	995	1805	1707	11724
2016	9818	4429	1133	937	1838	1682	12465
2017	9583	4495	1160	946	1827	1631	12146
2018	9338	4592	1202	948	1817	1616	11424
2019	8596	4363	1202	975	1664	1528	10504
2020	8389	4451	1184	1012	1644	1486	10191

The decline in small business participation in federal contracts directly correlates with increasing federal regulatory burdens. Small business contractors may choose to bid on private sector and state/local government contracts, where increased regulatory clarity and lower regulatory burdens reduce costs related to the need for expertise from attorneys and compliance professionals, instead of federal contracts.

The increased costs and compliance requirements outlined above represent yet another burden for these small businesses. The proposed rule will have a disparate impact on federal small business general contractors and subcontractors, many of whom are minority-, women-owned and disadvantaged businesses and employ a diverse workforce. The majority of these firms do not have the resources to comply with the proposed rule's requirements, which larger construction firms are more capable of absorbing.

3. The Proposed Rule Violates the Arbitrary and Capricious Standard of the APA.

The U.S. Supreme Court has repeatedly held that agencies act arbitrarily when they change course without dealing with the important aspects of the problem addressed by the rule they purport to reconsider.²⁷ Here, the proposed FAR Council rule fails to address the injuries to competition and increased costs to contractors caused by the proposed rule's GHG emissions disclosure and reduction requirements, as demonstrated throughout ABC's comments in this document.

Agency reversals of policy have also been vacated when they rely on factors that they should not have considered, and when they offer explanations for new rules that run counter to the

²⁷ See, e.g., *DHS v. Regents of the Univ. of Cal.*, 140 S. Ct. 1891, 1910 (2020); *State Farm*, 463 U.S. at 43 (1983) ("An agency's action is arbitrary and capricious, ... where it fails to consider important aspects of the problem.").

evidence.²⁸ The proposed FAR Council rule offers explanations for its GHG emissions disclosure and reduction requirements that run counter to the evidence. The use of internally contradictory reasoning also indicates arbitrary action.²⁹ The proposed rule claims that its new requirements may promote greater efficiency or reduced costs for contractors.³⁰ As demonstrated in our comments, this is clearly contradicted by the increased costs and reduced competition that will result from this proposal.

As the Supreme Court has also held, an agency that purports to be changing longstanding policies, as is certainly occurring here, must also consider costs to regulated parties, as well as the reliance interests of the regulated parties.³¹ Government contractors in the construction industry have long relied on the principle of government neutrality in procurement to provide competitive, responsive and responsible bids. By favoring companies that are willing and capable of making GHG disclosures and setting reduction targets, the proposed rule upends these longstanding principles without any consideration of the reliance interests of the regulated parties.³²

In sum, the FAR Council's proposed rule is arbitrary and capricious because the agency has entirely failed to consider important aspects of the problem, offers explanations for its decision that run counter to the evidence before the agency and/or fails to address the costs and reliance interests of the regulated parties. For all of these reasons, the proposed rule violates the APA, as a federal court is likely to find, and should be immediately withdrawn.

4. The Proposed Rule Unlawfully Delegates Agency Authority to Private Entities.

ABC is seriously concerned with the proposed rule's delegation of agency rulemaking authority to private entities. Key elements of the GHG emissions disclosure and reduction regime that federal contractors would be required to follow have been outsourced to groups that will therefore have unlawful authority over the activities of these contractors. Longstanding legal precedent clearly indicates that this manner of delegation is impermissible.³³ In addition to legal concerns, this raises the possibility that these entities may fail to effectively communicate their changing standards and processes, substantially amplifying the regulatory burden on contractors.

Contractors designated as significant or major under the proposed rule are required to conduct inventories of GHG emissions that align with the GHG Protocol Corporate Accounting and

²⁸ *Id.*; see also *FCC v. Fox TV Stations, Inc.*, 556 U.S. 502, 515 (2009).

²⁹ See *Southwestern Elec. Power Co. v. EPA*, 920 F.3d 999, 1030 (5th Cir. 2019) (“[T]he agency’s rationales contradict themselves ... and therefore cannot stand.”).

³⁰ <https://www.federalregister.gov/d/2022-24569/p-84>.

³¹ *Encino Motorcars v. Navarro*, 136 S. Ct. 2117, 2125-26 (2016); *Brackeen v. Haaland*, 994 F.3d 249 (5th Cir. 2021) (*en banc*).

³² See also *Tex. Ass’n of Mfrs. v. U.S. Consumer Prod. Safety Comm’n*, 989 F.3d 368, 387 (5th Cir. 2021).

³³ *Carter v. Carter Coal Co.*, 298 U.S. 238, 311 (1936), *Ass’n of Am. R.Rs. v. U.S. Dep’t of Transp.*, 721 F.3d 666, 670 (D.C. Cir. 2013), *vacated on other grounds*, 575 U.S. 43 (2015); *Ass’n of Am. R.Rs.*, 575 U.S. at 62 (Alito, J., concurring) (“There is not even a fig leaf of constitutional justification” for delegations of regulatory authority to “private entities.”).

Reporting Standard.³⁴ These standards were developed by the World Resources Institute and the World Business Council for Sustainable Development, both private nonprofit organizations without any accountability to the contractors and taxpayers that these regulations will ultimately impact.

Requirements imposed on major contractors raise additional issues regarding delegation of agency authority. Major contractors are required to complete their annual emissions disclosures by completing portions of CDP's climate change questionnaire.³⁵ CDP, another private nonprofit organization, makes frequent changes to its climate change questionnaire, meaning CDP will have ongoing authority to alter which disclosures major contractors are required to make.³⁶

Perhaps most concerning of all is the FAR Council's delegation in regard to science-based emission reduction targets. The agencies state that major contractors must have these targets validated by the Science Based Targets initiative.³⁷ The SBTi is an initiative of the WRI, CDP, World Wildlife Foundation and the United Nations Global Compact.³⁸ Troublingly, this provision of the proposed rule ventures beyond allowing nonprofits to set standards, granting private groups and foreign governments direct decision-making authority over federal procurement.

Conclusion

For all of the reasons discussed in this comment letter, ABC strongly urges the FAR Council to withdraw the proposed rule and reconsider its approach to reducing GHG emissions by federal contractors. ABC stands ready to partner with the federal government to establish more feasible and less punitive methods of addressing this important issue.

Thank you for the opportunity to submit comments on this matter.

Respectfully submitted,



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³⁴ See rule: <https://www.federalregister.gov/d/2022-24569/p-18>.

³⁵ See rule: <https://www.federalregister.gov/d/2022-24569/p-20>.

³⁶ <https://www.cdp.net/en/guidance/guidance-for-companies>: See "CDP questionnaire changes 2022-2023."

³⁷ See rule: <https://www.federalregister.gov/d/2022-24569/p-21>.

³⁸ <https://www.wri.org/initiatives/science-based-targets>.