U.S. Chamber of Commerce

1615 H Street, NW
Washington, DC 20062-2000
uschamber.com

January 13, 2022

Submitted via Regulations.gov

Department of Defense
1400 Defense Pentagon
Washington, DC 20301-1400

General Services Administration
1800 F Street, NW
Washington, DC 20405

National Aeronautics and Space Administration
300 E Street SW
Washington DC 20024-3210

Re: Notice of Availability and Request for Comment on the "Federal Acquisition Regulation (FAR) – Minimizing the Risk of Climate Change in Federal Acquisitions;" 86 FR 57404 (October 15, 2021) and 86 FR 69218 (December 7, 2021)

Dear Jennifer Hawes:

The U.S. Chamber of Commerce submits the following comments in response to the October 15, 2021, Notice of Availability and Request for Comment on the "Federal Acquisition Regulation – Minimizing the Risk of Climate Change in Federal Acquisitions" ("Notice") published by the Department of Defense, General Services Administration, and the National Aeronautics and Space Administration ("FAR Council" or "Agencies").[1]

Combating climate change requires citizens, governments, and businesses to work together. The Chamber continues to leverage the innovation and the strength of American business to find durable solutions that improve our environment, grow our economy, and leave the world better for generations to come.

American companies and investors are already playing a crucial role in spurring the continued evolution of climate disclosures and advancing sustainability. Companies are increasingly reporting more information to the public and investors about their efforts

[1] 86 Fed. Reg. 57,404/3.

to reduce their greenhouse gas emissions. Many have also made forward looking statements and commitments to reduce their emissions over time at the pace of innovation. These commitments, supported by technological innovations, have helped drive progress that the United States has made to address climate change over the last decade and will help make further progress to address the climate challenge.

Businesses are updating their management practices, systems, and processes to help drive more sustainable solutions. They are focusing resources on delivering more financial value and reducing their climate impacts. As they make these changes, it is important that the FAR Council evaluate the many important legal and policy issues associated with the consideration of GHG emissions related to potential government contractors. The U.S. Chamber respectfully requests that the FAR Council ensure that before advancing a proposal, it considers a number of key matters.

- To the extent that climate metrics may be considered in federal procurement, such consideration must be firmly rooted in the statutory authority of federal agencies and used in a manner consistent with the limits that Congress has placed on agencies' authority to make such decisions. To implement a procurement-related program that appropriately balances climate considerations against other procurement and policy needs, modifications to statutory authority may be necessary.

- Any consideration of climate metrics should make use of existing, market-driven disclosures based on practices, requirements, and/or reporting regimes that businesses are already familiar with and using. Among other things, this would ease implementation. In addition, flexibility must be a priority. Companies overwhelmingly agree that any climate change disclosure should reflect differences between various industries and be tailored appropriately.

- If developed properly, the Social Cost of GHG (SC-GHG) estimates may be appropriate for use in benefit-cost analyses for certain regulatory actions under E.O. 12866. However, in light of existing limits on agencies' procurement authority and other considerations, SC-GHG estimates should not be used or considered in federal procurement.[2]

- Amending the FAR to establish a new threshold determination of "**Major Federal Procurements**" would be challenging and would need to be carefully defined, only

[2] The Chamber's comments herein include various additional, constructive suggestions for consideration in the event that the Agencies proceed to develop a notice of proposed rulemaking concerning a proposed procurement rule that would include the use of such estimates. Such suggestions are not intended to imply that the Chamber is of the view that the use of such estimates would be appropriate, workable, or legally defensible absent the enactment by Congress of new law.

after extensive consultation with regulated industries before proposal of any FAR amendments.

- The FAR Council must ensure that consideration of climate metrics does not result in **expanded litigation**, such as litigation related to increased bid protests or litigation under the False Claims Act. Such litigation may slow innovation needed to meet the climate challenge.

- The FAR Council must not lose sight of the importance of competition, which could be reduced by overly burdensome reporting requirements. To this end, it is critical to consider whether and how GHG considerations might appropriately weigh into government **Best Value Assessments** and **Lowest Price Technically Acceptable** determinations.

- The incorporation of GHG considerations into the FAR must be cost-effective. The FAR Council should use **Other Transaction Authority** to improve cost-effective and quality government procurement, and weigh how such metrics would impact **Emergency** procurement.

- In light of the litigation concerns noted above, any changes to the FAR in this area must include appropriate safe harbors and exemptions to protect against counterproductive litigation and transaction costs—costs that would ultimately be borne by the government and taxpayers in the form of higher costs or less competition.

Before proceeding with any proposal, the FAR Council should carefully consider implementation challenges.

GENERAL COMMENTS

The Notice premises the proposal on "leveraging [the federal government] scale as the Nation's largest spender to speed the adoption of key assessment, disclosure, and mitigation measures across the private sector." As the FAR Council is aware, participants in U.S. and global markets are already providing significant and a growing amount of climate-related financial and other information, both voluntarily and pursuant to various requirements. Numerous financial and environmental regulators have also announced plans and proposals to mandate such disclosures, both in the United States and abroad.

Before embarking on a challenging initiative to incorporate GHG metrics into federal procurement, the FAR Council should carefully consider whether new rules in this specific area would improve government and public procurement decisions, and the United States' ability to address climate challenges, or would undercut and stymie market-based initiatives that are already under way in the private sector, including actions driven by U.S. government contractors. To this end, the Chamber offers the following general comments on the proposal before addressing the FAR Council's specific questions.

A. Legal Authority

Some of the necessary threshold questions for the Agencies to consider implicate the statutory authority to consider GHGs and SC-GHG estimates in procurement and potential conflicts that could arise between agency missions. The Agencies would need to consider how to appropriately prioritize the consideration of climate metrics without violating longstanding federal procurement policies and legal requirements.

One longstanding procurement authority to consider is the Competition in Contracting Act (CICA), which generally requires competition. Imposing overly burdensome requirements on companies relating to GHG and SC-GHG estimates may have the effect of limiting the number of companies that may be able to participate in such competition.[3] Under current law, it appears that it would be difficult, if not impossible, to reconcile such requirements with procuring on "normal commercial terms." For example, it appears that inclusion of GHG factors in procurement decision-making would exceed minimum needs.

To implement a program that appropriately balances climate considerations against other procurement and policy needs, modifications to statutory authority may be necessary. Notably, certain contracting requirements already established will need to be examined. Examples include exemptions for small or HUBZONE, service-disabled veteran-owned small businesses, and woman-owned small businesses. These statutory exemptions to CICA in the Small Business Act, Buy American Act, and similar statutes suggest that further Congressional authority is also required for FAR's proposed actions to incorporate climate policy considerations.

In light of these legal considerations, FAR Council must give careful consideration to whether any changes would achieve tangible climate benefits given the costs, complexity, and potential impacts on federal procurement needs, and the exemptions to implementation that would be required.

B. New Threshold Determination

The Notice suggests adoption of a new threshold determination using the following terms: "major Federal agency procurements" and "major Federal suppliers." This appears to propose a new distinction between major federal agency procurements

[3] 41 USCA § 3301.

versus major federal suppliers for the FAR.[4] The definitions of these terms, and therefore the scope and impact of the proposed amendments, will be central to the cost and potential policy benefits. Prior to the Council's proposing a distinction between "major federal agency procurements" and "major Federal suppliers," the Chamber recommends that this distinction be thoroughly discussed with the regulated community, government contractors, and other stakeholders who may be impacted by it. The Chamber stands ready to collaborate with the FAR Council on such an effort if the Council elects to develop a proposal that would use this concept.

C. Commercial Items and Appropriate Exemptions

Before determining that the costs of new regulations impacting federal procurement are worth the benefit to federal government management and operations, the climate, and the environment more broadly, the FAR Council must determine the breadth of entities and activities that would be impacted by the standards, and consider the scope of needed exemptions. For example, "commercial items" are exempt from the requirement for certified cost or pricing data.[5] Commercial item procurement, while subject to the FAR, is meant to be expeditious and comport with how industry does business.

The FAR Council would therefore presumably exempt sellers of these and other off-the-shelf items from climate metrics, as well.[6] The Chamber also recommends exemptions for medical and certain food products. Product packaging such as virgin plastic is often used to protect public health, or the health of the user. Those sanitary functions should continue to be prioritized. Accordingly, exemptions should be provided for drugs, vaccines, biologics, medical devices, diagnostic tests, and any other therapeutic or diagnostic product regulated by the U.S. Food and Drug Administration or the Centers for Medicare and Medicaid Services under the Federal Food, Drug, and Cosmetic Act or the Public Health Service Act.

These and other appropriate exemptions would exclude large silos of procurements, potentially limiting the projected climate benefits of any new rules and the justification for so imposing them. Moreover, many commercial products have voluntarily certified their products and services to be carbon free or carbon neutral by various third-party organizations. Adding additional requirements for considering GHG and SC-GHG estimates would turn commercial item procurement into something similar to Best Value, likely increasing transaction costs.

D. "Best Value" Assessment and Lowest Price Technically Acceptable

---

[4] *Compare* FAR Regulations Part 13 and 41 USCA § 3305.

[5] FAR 15.403-1

[6] 41 USCA § 103.

The FAR generally gives latitude to contracting officers to craft "best value" evaluation factors and then weigh those to meet particular agency requirements. Any proposed rule should provide detailed information on where and how proposed revisions would mandate consideration of GHG metrics in these processes.

For example, would the regulations mandate GHG emissions as a "best value" evaluation factor which would drive the award decision one way or another in competitive procurements?[7] Would the regulations instead make certain metrics a threshold part of inclusion in the System for Award Management? Or both? The determination of where and how federal procurement might incorporate climate-related information is a critical consideration. Would proposed regulations attempt to target Tier One suppliers only, or a set of sub-suppliers?

If GHG emissions are a factor in "best value" determinations, that would logically dilute the weight the federal government is giving to other evaluation factors, such as technical capability or past performance. Moreover, if GHG considerations were given only a small percentage advantage in procurement decisions, the marginal public benefit of implementing these complex and likely costly changes would likewise be small. On the flip side, giving GHGs a significant percentage weight in the process would mean that other cost, technical, and performance factors would, by definition, be deprioritized. The FAR Council should carefully consider these tradeoffs, including the impacts on consideration of significant factors of historical relevance in "best value" contract awards.

For Lowest Price Technically Acceptable procurements, imposed GHG accounting requirements would likely result in impacts such as compliance costs, risks of delivery and supply chain availability, and a limitation in possible technical solutions. The probable result would be higher costs of procurement or reduced performance relative to business as usual. Tradeoffs relating to such procurements should also be carefully considered.

E. "Other Transaction Authority"

In recent years, the Department of Defense (DOD) has substantially expanded its use of "Other Transaction Authority" (OTA).[8] This approach allows DOD to transact with innovative industry partners who might ordinarily decline to participate in the slow and sometimes cumbersome federal procurement processes. OTA recognizes that U.S. procurement needs to become faster and nimbler to reduce transaction costs. Adding a major GHG component to the procurement evaluation process trends the other way.

---

[7] 48 CFR § 1352.215-74 ("Best value creation criteria").
[8] 15 USCA. § 4653; 10 USCA § 2371.

The recent pandemic and medical emergency situations, and recent supply chain bottlenecks, present other sets of issues for consideration. Any proposal to incorporate climate metrics would also warrant exemptions and legal protections for companies called on in emergency situations, or when the government must engage in procurement on an expedited basis.

Added procedures and personnel required for incorporating climate metrics may reduce readiness and innovation, and run contrary to efforts to simplify the supply chain and enhance flexibility.[9] To the extent vendors would be legitimately excluded from requirements, burdens (including potentially increased burdens) would thereby be imposed and focused on a smaller class of putative government contractors. Put otherwise, the need for exemptions is real and great, but that very need would unavoidably undermine the overall impact and value of imposing requirements on non-exempt entities. Due attention should be given to such possibilities and their implications for effective policy in light of the practical reality of ensuring an efficient government procurement system.

COMMENTS REGARDING DISPUTES AND GOVERNMENT ENFORCEMENT

The FAR Council must also carefully consider what would be required to ensure and police compliance with these new regulations. For example, government enforcement would be required regardless of whether considerations are imposed as a procurement commitment (in the case of an evaluation factor) or as a standard or set of standards (in the case of generally imposed requirements under the solicitation). Who would review compliance, and how would that be done with an adequate degree of effectiveness, transparency, and reliability?

Beyond the complexities and uncertainties inherent to estimating GHG emissions within supply chains, with those difficulties multiplied with SC-GHG estimates, the Chamber is concerned about the role that the False Claims Act ("FCA") may play. The FCA is one of the government's most powerful tools for uncovering and punishing fraud against the government. At the same time, the statute can be abused by plaintiffs who bring meritless claims.

Identity of the specific representations that the FAR may require contractors to make in conjunction with bids is critical to understanding whether spurious and counterproductive litigation might be an unintended consequence of these changes. Would GHG emissions and SC-GHG estimates be required or requested in the form of statements concerning objective scientific facts (for which FCA liability can attach) or

[9] https://www.csis.org/analysis/department-defense-other-transaction-authority-trends-new-rd-funding-paradigm; https://aida.mitre.org/ota/

mere statements of opinion (for which FCA liability ordinarily cannot attach)? Different representations, by different companies, in different contexts, about emissions goals and the prospect of reducing emissions could arguably land in many different places on the spectrum between objective facts and opinions. For example:

- Would proposals require a certification of compliance with the new regulation, which could be characterized as an independent ground of liability?
- Would there be any ongoing certification requirements, including in conjunction with payment requests? Such requirements could be characterized as independent grounds of liability.
- Would the regulations indicate whether compliance with the requirements is material to receiving payment?

Given the variability in climate modeling, the climate projections produced, and evolving climate policy, if GHG considerations are incorporated into the FAR, the regulation must include many safe harbors to protect against counterproductive FCA litigation and other ill-fitted enforcement activity or disputes. FCA liability should not attach where a company makes good faith statements, representations, or certifications regarding steps to be taken to achieve stated objectives. There are many reasons, having nothing to do with fraud, why particular companies may fall short of achieving such objectives; the concern here is that such rationales often could not be disposed of by a motion to dismiss a spurious lawsuit.

In particular, failures for projections and goals to materialize cannot be permitted to produce costly litigation requiring "battles of the experts." FCA plaintiffs frequently second-guess whether it was reasonable for a defendant company to believe, at the time of a representation, in the accuracy of that representation. With rapidly changing technology and scientific developments and research in the area of GHG and SC-GHG estimates, one could easily imagine situations in which circumstances change from the time of initial representations, to the time of certifications submitted in connection with contract procurement, and then to the time of actual implementation. Such changes may impact disputes over whether statements and certifications were "false" under the FCA in litigation.

Confirming this concern, it is now routine for groups opposing projects requiring federal permits or authorizations to demand that federal agencies use SC-GHG estimates for National Environmental Policy Act ("NEPA") environmental analyses. Federal agencies have explained why using SC-GHG estimates for such analyses is inappropriate and unhelpful for NEPA analysis purposes. For example, "the protocol is too uncertain and indeterminate to be useful to the [NEPA] analysis."[10] Other concerns include the lack of consensus regarding the appropriate discount rates used in the SC-GHG. Agencies also have no way of understanding whether a wide range of putative or potential monetary damages are "significant" for NEPA purposes or not.[11] Disputes like these should not expand to envelop federal contractors under the FCA. This would impose additional transaction costs on federal contractors and, by extension, the government itself and taxpayers.

COMMENTS ON SELECT NOTICE QUESTIONS

a. *How can greenhouse gas emissions, including the social cost of greenhouse gases, best be qualitatively and quantitatively considered in Federal procurement decisions, both domestic and overseas? How might this vary across different sectors?*

Developing estimates of the potential future socio-economic costs of GHG emissions is a demanding task. We commend the Agencies for considering the potential barriers to taking on such a project. In previously filed comments, the Chamber and other associations have noted significant concerns with their application of the SC-GHG estimates beyond regulatory benefit-cost analyses, such as in the procurement process.[12] For convenience, the Chamber here incorporates these comments by reference.

The Chamber advises that the FAR Council acknowledge the proper scope of, and limited role for, SC-GHG estimates, and not use them in procurement absent appropriate changes to current law. SC-GHG estimates are monetized estimates of the projected cost of GHG emissions developed for use in benefit-cost analyses for regulatory actions under E.O. 12866, where permissible under an agency's statutory authority. The estimates are imprecise, uncertain, and not designed for other applications, including federal procurement decisions.

Relatedly, it should be noted that attempts to use SC-GHG estimates in applications outside the context of E.O. 12866 benefit-cost analyses could run into practical problems when applied to proposals being evaluated at different geographic levels and scales. For example, agency personnel who evaluate contracts at the local level have far less resources to dedicate to such evaluations than do some of their counterparts;

[10] *350 Montana v. Bernhardt*, 443 F. Supp. 3d 1185, 1196 (D. Mont. 2020).
[11] *EarthReports v. FERC*, 828 F.3d 949 (D.C. Cir. 2016).
[12] *See* June 21, 2021 Response to the OMB May 7, 2021 Notice of Availability and Request for Comment on the "Technical Support Document: Social Cost of Carbon, Methane, and Nitrous Oxide Interim Estimates Under Executive Order 13990", *available at* https://www.globalenergyinstitute.org/sites/default/files/2021-06/Association%20Comments%20on%20OMB%20SC-GHG%20Notice%20-%206_21_2021.pdf

for this and other reasons, the potential for expansive variability in interpretation and application of requirements is a serious one. If procedures are not made expressly clear in relevant statutory and regulatory provisions, then interpretation and application of the requirements will depend in large measure on agency resource constraints, creating a potential for significant backlogs in procurements.

Moreover, the Interagency Working Group ("IWG") on the Social Cost of Greenhouse Gases is expected to announce an update to the SC-GHG estimates in January 2022. The IWG was ordered to make recommendations to President Biden on areas of decision-making, budgeting, and procurement, which has not yet occurred to the Chamber's knowledge. The FAR Council should wait for the IWG to issue its update and should then engage in further, extensive consultation with regulated entities and existing government contractors. The FAR Council should not get ahead of the IWG by proposing use of the SC-GHG estimates in procurement until careful consideration of that update and until after such further consultation has occurred. Many are concerned that the process that the IWG has used in the past and appears to be using now to update the SC-GHG estimates may be flawed, and much may depend on the full particulars of the procedures that the IWG uses before completing and releasing any new updates.

In particular, the new IWG process offers an opportunity to address fully the recommendations outlined by the National Academy of Sciences ("NAS") during its reviews. In 2015, the IWG contracted with the NAS for two reviews of its estimates and methodology for the Social Cost of Carbon (SCC). In Phase I, the IWG asked the NAS whether it should pursue short term updates to parts of the underlying models. The IWG also sought recommendations on its characterization of uncertainty with the SCC estimates. In Phase II, the IWG asked the NAS for recommendations for a more comprehensive update to reflect the best available science. The IWG asked for recommendations on the choice of models, discount rates, socio-economic scenarios, and presentation of uncertainty. The NAS panel held several public meetings during both its Phase I and Phase II reviews and produced two reports. The NAS peer reviewed each report and published the Phase I report in January 2016 and the Phase II report in January 2017. The NAS also held a public symposium on both reports in June 2017.

The NAS reports made recommendations that the Chamber has urged the IWG—and now urges the FAR Council—to consider if it moves forward with considering development of a proposed rule. Specifically, in the Phase I report, the NAS considered the role of the specific parameters that the IWG was considering for an update. The NAS panel examined the role of these parameters in the modeling and the sensitivity of the final estimates to these parameters. It also evaluated whether the models were more sensitive to other assumptions, data, and methodologies. In the end, all estimates should undergo proper peer review. Peer review is critical to securing public trust in scientific information, analysis, and its real-world application.

In addition, SC-GHG estimates should not be portrayed as mathematically precise calculations of an acquisition's potential social cost, especially when they are compared against more concrete, immediate, non-speculative, and better understood project benefits, such as capital expenditures, jobs created, local tax revenues generated, or government royalty rates. Moreover, the majority of the impacts calculated by the SC-GHG estimates go to global effects, not just those in the U.S. or the local area related to the procurement under consideration.

Without receding from our understanding that SC-GHG estimates are not appropriate for use in procurement decisions under current law, the Chamber respectfully submits the following practical comments for consideration in the event that the Agencies proceed to develop a proposed procurement rule that would require the use of such estimates. First, in developing any proposed rule, the Agencies should carefully consider the costs and risks of any potential option to require contractors to disclose the GHG "social cost" estimates of their entire business operations, as opposed to disclosure of the estimated range of "costs" associated with the particular projects for which they are contracting with the government. Pursuing the former, broader approach would risk creating an unwarranted and disproportionate imposition on companies that may bid on discrete government projects, but do most of their business in the private sector. Pursuing such an approach not only would risk deterring bids, but would also highlight questions concerning whether such requirements are authorized by statute.

Language in the Notice suggests that the broader approach may be under consideration: "One critical lever is ensuring that the Federal Government manages climate-related financial risk within its own procurement activity, while also leveraging its scale as the Nation's largest spender to speed the adoption of key assessment, disclosure, and mitigation measures across the private sector." In addition to the concerns noted above, we also note the concern here that using the broader approach would vastly expand the potential for FCA litigation by encouraging relators to challenge the accuracy or adequacy of a company's GHG calculations with regard to areas of business that are wholly unrelated to its government contracts.

Second, any proposed rule should include provisions to ensure that the Government is prepared to make SC-GHG estimate training available for all internal contracting teams. This should be accessible by all entities who wish to do business with the government. Without broad use and availability of the same tools, competition would likely be diluted, and opportunities for protests and litigation would likely increase.

Third, for overseas procurements, status of forces agreements (SOFA) must be considered, as they will be different in each country. Overseas procurement generally is not subject to the FAR, but may incorporate FAR clauses. Consultation and coordination with the ministries of energy in each country should inform how any GHG considerations are applied overseas. On balance, the obvious complexities of implementing such a regime indicate that robust and clear exemptions for these activities may be necessary.

Fourth, in section 5(b)(ii)(C) of EO 13990, it states that the IWG shall "provide recommendations to the President, by no later than September 1, 2021, regarding areas of decision-making, budgeting, and procurement by the Federal Government where the SCC, SCN, and SCM should be applied." Further, this Notice states that "[r]recommendations from the Interagency Working Group on the Social Cost of Greenhouse Gases established under E.O. 13990 on considering the social cost of carbon, methane, and nitrous oxide in procurement will also be considered in development of a proposed rule under this FAR case." It is unclear whether these recommendations have been developed or submitted to the President as directed in the executive order.

Given the significant implications of the IWG's forthcoming recommendations under E.O. 13990, we further suggest that the Agencies solicit public input on draft recommendations to the President. In addition, the Agencies should make their final recommendations fully available to the public before embarking on the drafting of any proposed rules.

b. *What are usable and respected methodologies for measuring the greenhouse gas emissions over the lifecycle of the products procured or leased, or of the services performed?*

The Chamber does not, at this time, endorse any particular methodology. However, at present, there are a number of methodologies and protocols used by the private markets to measure and report GHG emissions over the lifecycle of a product. One example includes the Greenhouse Gas Protocol Product Life Cycle Accounting and Reporting Standard, developed by the World Resources Institute in consultation with a steering committee of representatives from across private industry. The business community is voluntarily considering and employing many metrics, appropriate to their particular businesses, industries, and competitive situations.

If the FAR Council proceeds with a proposal, it should use existing commercially adopted standards for measuring emissions. This would ease implementation and reduce costs. To the extent the FAR Council considers proposing an alternative methodology, the Chamber recommends that the FAR Council pursue a robust consultation process. It must ensure any procedures adopted are appropriate, and must advance and be consistent with the longstanding policy goals of the FAR and associated legal requirements. Specifically, the process should:

1. Be transparent and include full engagement and participation by the public.
2. Undergo proper peer review of all methodologies for generating estimates.
3. Explicitly limit the use of GHG metrics to circumstances in which the measurable benefits to emissions and the climate outweigh the costs.
4. Harmonize its work and clarify its role with related Administration initiatives.
5. Present its major modeling assumptions/inputs and presentation of the estimates.
6. Thoroughly explain its approach to addressing uncertainty.
7. Continue to evaluate acceptable alternatives in the procurement process that include other measures of potential environmental performance in addition to GHG emissions, and not give undue weight to GHG emissions

c. How can procurement and program officials of major Federal agency procurements better incorporate and mitigate climate-related financial risk? How else might the Federal Government consider and minimize climate-related financial risks through procurement decisions, both domestic and overseas?

American companies and investors are already playing a crucial role in spurring the continued evolution of climate disclosures. This has helped to provide the public and investors with information that they may find useful. To accommodate the varying needs and relevance of different industries, and to meet our shared climate priorities, any FAR Council consideration of climate metrics should allow for flexibility and options. Climate metrics are an evolving measurement tool. These metrics can be subjective depending on the emphasis placed on particular assumptions or preferences. Any approach needs to account for the differences in the diverse suppliers to the federal government. To the extent that climate-related financial risks might impact the value of a particular contract, the FAR Council should make use of existing market metrics.

d. How might the Federal Government best standardize greenhouse gas emission reporting methods? How might the Government verify greenhouse gas emissions reporting?

The Environmental Protection Agency (EPA) has already developed a standardized method for regulated entities to report GHG emissions, including the emissions from the production and use of fuels. For example, refinery owners or operators and importers and exporters of petroleum products are required to collect data on their products; calculate the GHG emissions associated with these products; and follow the specified procedures for ensuring data quality, amending missing data, and meeting recordkeeping and reporting requirements. The refinery reporting requirements are but one example of existing regulatory and voluntary programs that already collect GHG emissions information. Duplicative reporting requirements for contractors should, of course, be avoided.

Regarding the issue of verification, there are many issues and challenges that further underscore the inappropriateness of trying to adopt such metrics into the FAR. One example is whether and how to incorporate third-party verification to keep costs low. There is also the question of assurance level: *i.e.*, the characterization of the finding by the entity that is engaged for third-party verification. Companies should indicate either a "Reasonable" or "Limited" assurance level, including the scope of work for the verifier and any differentiation in the level of assurance for the indicators reported. Some companies, for example, use third parties such as the International Standard on Assurance Engagements to provide assurances.[13] Verification and assurance of reported GHG and SC-GHG estimates will be important principles to map out.

e. How might the Federal Government give preference to bids and proposals from suppliers, both domestic and overseas, to achieve reductions in greenhouse gas emissions or reduce the social cost of greenhouse gas emissions most effectively?

Based on the information provided by the Notice about the likely contours of the FAR Council's potential proposal, initial consideration of any new potential requirements related to climate metrics and greenhouse gas emissions should be limited to those specific contracts for which a primary award criterion is direct reduction in the government's own greenhouse gas emissions. For example, if the government is procuring solar panels for powering of federal buildings, it would seem relevant to consider the expected reduction in greenhouse gas emissions that a particular proposal may achieve. Beyond this discrete class of situations, the complexity and cost of implementing a system such as that described in the Notice may be prohibitive – particularly if the SC-GHG estimates are used.

In considering the cost of implementing these changes, the Council should further consider the transaction costs created by litigation and by decisions motivated by assessments and perceptions of litigation risk. Bid protests and related litigation would result. FCA relators would have incentive to second-guess valuations and decisions, arguing that a company violated the FCA. The more complicated the standard, the more difficult it would be to determine whether any particular alleged

---

[13] 2013, *ISAE 3000 (revised 2015), Assurance Engagements Other than Audits or Reviews of Historical Financial Information*.

violation is sufficiently material to be actionable under the FCA. This, too, would increase litigation costs for parties and also for the government, and would also affect decisions that are shaped by perceptions of litigation risk.

f. *How might the Government consider commitments by suppliers to reduce or mitigate greenhouse gas emissions?*

As previously stated, any consideration of new potential requirements related to greenhouse gas emissions should be limited to what can be achieved through specific contracts for which a primary award criterion is direct reduction in the government's own greenhouse gas emissions. Beyond this discrete class of situations, the complexity and cost of implementing a system such as that described in the Notice may be prohibitive.

For example, if contracts are put in place for several years at a time, consideration of supplier commitments to reduce or mitigate greenhouse gas emissions would raise difficult baseline questions for comparison. Would any commitments to reduce GHG emissions beyond the particular project at issue be based on past emissions, current emissions, or documented plans for emissions reductions? To ensure the fairness of the federal procurement process—while continuing to advance the primary, longstanding policy goals of the FAR and conforming with relevant legal requirements—the government's consideration of any such broader commitments would need to be transparent, uniform, reasonable, science-based, and predictable.

g. *What impact would consideration of the social cost of greenhouse gases in procurement decisions have on small businesses, including small disadvantaged businesses, women-owned small businesses, service-disabled veteran-owned small businesses, and Historically Underutilized Business Zone (HUBZone) small businesses? How should the FAR Council best align this objective with efforts to ensure opportunity for small businesses?*

The Chamber believes that requiring small businesses to account for and report GHG emissions and SC-GHG estimates to participate in government procurement would be extraordinarily burdensome and disproportionate. For this reason, many small businesses are not covered by EPA GHG rules, as they do not meet the applicable emissions threshold. Accordingly, an exemption from requirements for such businesses under the FAR would seem to be not only appropriate, but highly desirable.

As noted above, careful consideration should be given to the Notice's suggested concept of a new threshold determination that might be developed for implementing the proposal, using the terms "major Federal agency procurements" and "major Federal suppliers." As previously stated, this concept warrants thorough discussion and deliberation prior to the issuance of any specific proposal. In addition, the FAR Council should work in consultation with the Small Business Administration (SBA) Office of Advocacy. Although a Small Business Regulatory Enforcement Fairness Act panel would not seem to be required under the Regulatory Flexibility Act, the FAR Council could benefit significantly by working with the SBA Office of Advocacy and obtaining its expertise on these topics. The Chamber similarly stands ready to participate in any such discussion.

CONCLUSION

Thank you for the opportunity to comment on the Notice and to provide recommendations for the Agencies to consider as they move forward. The Chamber would welcome the opportunity to meet with you to discuss these comments and related issues.

Sincerely,

Chad Whiteman

Chad Whiteman
Vice President, Environment and Regulatory Affairs
Global Energy Institute
U.S. Chamber of Commerce