

Gov't Contractor Takeaways From Biden's Clean Energy Order

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On Dec. 8, 2021, President Joe Biden signed Executive Order No. 14057 on "Catalyzing Clean Energy Industries and Jobs Through Federal Sustainability," the administration's latest — and most significant — effort to promote cleaner and more sustainable federal procurement.[1]

At the heart of the new order is the administration's goal to meet a net-zero emissions target across the federal government by 2050. To do so, the administration promises to transform federal procurement and operations, and calls for the government to leverage its portfolio of "300,000 buildings, fleet of 600,000 cars and trucks, and annual purchasing power of \$650 billion [in] goods and services" to facilitate increased adoption of green technology.

Overview of the Executive Order

In order to achieve net-zero emissions by 2050, the executive order and an accompanying federal sustainability plan set four primary goals.[2]

1. Power: 100% carbon pollution-free electricity for federal government operations on a net annual basis by 2030, with half of that energy supplied hourly on a 24/7 basis by the same regional grid where the energy is consumed;
2. Vehicles: 100% zero-emission vehicle acquisitions by 2035, including 100% zero-emission light-duty vehicle acquisitions by 2027;
3. Buildings: A net-zero emissions building portfolio by 2045, including a 50% emissions reduction by 2032; and
4. Materials: Net-zero emissions from federal procurement no later than 2050.

Achieving the last of these four goals will necessarily turn both on the government's progress toward the first three goals — i.e., procuring cleaner electricity, vehicles and buildings — and on certain other reforms.

These include a buy-clean policy for construction materials, new emissions-disclosure requirements for



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major federal suppliers — as previously announced in the May 2021 Executive Order No. 14030 on climate-related financial risk — [3] and an expectation that agencies will "incentivize markets for sustainable products and services by prioritizing products that can be reused, refurbished, or recycled."

All of these changes necessitate substantial new rulemaking and guidance, to be conducted through multiple administrative channels. Among other things, the order:

- Reestablishes the office of the federal chief sustainability officer within the Council on Environmental Quality, or CEQ, and requires agency-level chief sustainability officers to be maintained with new responsibilities under the order;
- Directs the U.S. Office of Management and Budget and the chair of the CEQ to issue implementing guidance for the agencies by April;
- Directs the U.S. Office of Personnel Management and the chair of the CEQ to solicit input from nongovernment stakeholders — including "public, private, and non-profit sectors and labor unions and worker organizations" — through the establishment of a presidential sustainability executives program;
- Directs the heads of 22 so-called principal agencies to develop and implement annual sustainability plans; and
- Directs the creation of various agency working groups to further implement the order's objectives.

Three Key Takeaways

The order clearly has potential to alter the landscape of the government's procurement system — if it is fully implemented. Its status as an executive order, however, means that it does not have same durability as legislation enacted by the Congress. Indeed, the goals discussed above could be subject to change by future administrations — especially because all four goals are scheduled to be met after the conclusion of Biden's current term.

On the other side of the coin, congressional inaction may mean that Biden — and future administrations — will have to lean more heavily on executive policy to achieve their climate and environmental goals. To take one particularly relevant example, the version of the Build Back Better Act passed by the U.S. House of Representatives late last year includes a number of significant climate-related measures but does not have the necessary support to pass the Senate in its current form.[4]

There remains a strong chance that a skinnier version of the bill will garner sufficient support in the coming months, but otherwise executive action may be the primary mode for climate policy going forward.

In any event, there are at least three major takeaways from the executive order.

First, the order is the latest — but certainly not the first — sign that clean energy and sustainability considerations have arrived and are here to stay in the world of federal procurement. This is the second executive order in a six-month period, along with the order on climate-related financial risk, that includes provisions specifically focusing on greening federal procurement. But even before this latest

order, the government already was trumpeting its desire to prioritize the procurement of greener products and services.[5]

To that end, there have been requests for public comment related to potential changes to the Federal Acquisition Regulation and federal procurement practices in order to support a more sustainable procurement process. And the National Defense Authorization Act for fiscal year 2022, passed at the end of last year, includes a number of provisions aimed at accelerating the shift toward more sustainable federal operations, including a requirement that 10% of major military installations achieve energy net-zero by 2035.

Second, the order presents both challenges and significant opportunities for industry. For traditional contractors, changing procurement rules and procedures often present a short-term challenge, but those who are quickest to adapt to the federal government's new emphasis on sustainability can seize a distinct competitive advantage going forward.

For example, the order and its accompanying sustainability plan specifically direct federal agencies to "incentivize markets for sustainable products and services ... [and] use purchasing preferences to drive investment in low-carbon and zero-carbon products and services." The administration has already sought comment on options for potential preferences under Executive Order No. 14030.

Contractors at the leading edge of the sustainability push will be in position to benefit from these preferences and incentives — as well as to help shape their terms through active engagement with rulemaking processes.

And for nontraditional government contractors, including renewable energy, technology and other players in the rapidly growing green economy, the order presents a unique opportunity to gain access to federal marketplace that exceeds \$650 billion annually — especially as the government emphasizes the importance of addressing "historic barriers for entry into the sustainable supply-chain sector."

Of course, doing business with the government poses its own regulatory challenges, but companies that navigate these requirements may find that the reward is well worth the effort.

Third, implementation of this order already is underway. Although the order contemplates that its primary goals would be achieved over a longer time horizon, it directs federal agencies to start planning their new rulemaking and guidance processes now.

These initial steps will set the parameters for the eventual changes to procurement rules and requirements envisioned by the order, and contractors would be wise to closely monitor this implementation process and seek out opportunities to shape aspects of emerging new requirements in real time.

To take one example, the government has already actively solicited input from federal contractors on greenhouse gas reporting criteria in advance of a formal rulemaking. Many contractors took the opportunity to provide input regarding various aspects of the anticipated requirements, including their preferred method of tracking and reporting emission data and the thorny question of how to evaluate the so-called social cost of such greenhouse gases, which is the subject of pending litigation filed by a coalition of states against the administration.

Meanwhile, other commenters have focused on the possibility that companies doing business with the

government could be subject to parallel — and potentially inconsistent — greenhouse gas reporting requirements imposed under new U.S. Securities and Exchange Commission rules emerging at the same time.

Publicly traded contractors, in particular, would be well-advised to closely track the evolving reporting requirements on both fronts and seek engagement opportunities to minimize the risk of conflicting or inconsistent standards and requirements.

Needless to say, there is much more to come in this space. For although implementation of the executive order is just beginning, the push for sustainability in federal procurement is not going away anytime soon.

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[1] <https://www.govinfo.gov/content/pkg/FR-2021-12-13/pdf/2021-27114.pdf>.

[2] Federal Sustainability Plan Catalyzing America's Clean Energy Industries and Jobs; <https://www.sustainability.gov/pdfs/federal-sustainability-plan.pdf>.

[3] <https://www.govinfo.gov/content/pkg/FR-2021-05-25/pdf/2021-11168.pdf>.

[4] <https://www.congress.gov/bill/117th-congress/house-bill/5376>.

[5] <https://www.epa.gov/sustainable-marketplace-greener-products-and-services/selling-greener-products-and-services-federal>.