January 13, 2021

Comments on Proposed Rule: Federal Acquisition Regulation: Minimizing the Risk of Climate Change in Federal Acquisitions

FAR Case 2021-016, Docket ID: FAR-2021-0016, Sequence No. 1

On behalf of the BlueGreen Alliance, a coalition of the nation's largest labor unions and environmental organizations collectively representing millions of members and supporters, we thank the president for recognizing the opportunity the Federal Government has to lead by example on climate-related issues and for seeking public input on a potential Federal Acquisition Regulation (FAR) amendment. We particularly thank the president for outlining the pathways for the Federal Government to use its scale and procurement power to help achieve net-zero emissions economy-wide by no later than 2050 and launching the first-ever national Buy Clean initiative with the release of E.O. 14057, "Catalyzing Clean Energy Industries and Jobs Through Federal Sustainability," referred to in this document as "the E.O." We also appreciate the president's approach to federal procurement as both a means to help minimize the risk of climate change as demonstrated in E.O. 14030, "Climate Related Financial Risks" and to address climate change directly as demonstrated in E.O. 14008, "Tackling the Climate Crisis at Home and Abroad". We are committed to helping support the president and his Administration in achieving our shared goal of ensuring that federal procurements—like all federal activities—are undertaken in a way that reduces greenhouse gas emissions, improves health and environmental outcomes in communities harmed by environmental injustice, and creates good, family-supporting jobs across the United States.

Materials produced in energy-intensive sectors, such as steel, cement, and concrete, produce a significant amount of industrial-sector greenhouse gas (GHG) and toxic emissions during the manufacturing process. The global iron and steel industry alone accounts for around 21 percent of global industrial energy use and 24 percent of industrial CO2 emissions.[i] These emissions are exacerbated when the U.S. imports products and materials produced overseas that are manufactured in ways that would not meet U.S. federal or state environmental and emissions standards. Many of these imported products and materials could be made here in the U.S. by American workers instead of in countries with lower environmental and health standards and higher-emitting facilities. The higher emissions from the production of those materials pass through what is referred to as the "carbon loophole," when imported.[ii]

Tackling industrial sector emissions, which are concentrated in a select number of energy intensive manufacturing subsectors, including steel, cement, and others, must be central to our climate strategy moving forward. In the United States, the Environmental Protection Agency (EPA) found in 2019 that industry was responsible for 30 percent of US GHG emissions once accounting for the end use of electricity, more than transportation and agriculture and just behind residential and commercial buildings.[iii] Within the industrial sector, as defined by the EPA, cement and iron and steel production account for nearly half of the sector's CO2 emissions.

It is nevertheless the case that the global economy requires continued production of energy-intensive products and materials. Ensuring that production of these materials results in the fewest GHG emissions possible requires eliminating the carbon loophole and—instead—driving production in those countries and firms where production is the cleanest and most energy efficient. For example, the U.S. steel sector is already among the cleanest in the world,[iv] which means that domestic content requirements, such as Buy America(n), have added climate benefits associated with steel procurement, but the sector can and must become even cleaner. The technology and processes to further reduce emissions exists, but for industry to make the necessary investments it must be assured of the development of a large, stable market for cleaner goods. Once that demand is established, increased investments will follow, further driving emissions reduction improvements.

As a top purchaser of concrete, cement, steel, and other construction materials widely used in public infrastructure projects, the Federal Government has the power to be a major market mover to the benefit of our climate, environment, and our domestic manufacturing sectors. The framework for Buy Clean laid out in the E.O. begins to develop the foundation necessary to realize those benefits.

In order to achieve many of the stated objectives put forward in this request for public comment, we advise that the Federal Government ensure the new federal Buy Clean initiative strategically transitions from the status quo to a system that advances our climate and environmental goals, bolsters domestic manufacturing, and improves the lives of workers and community members in industrial communities.

As the E.O. suggests, such an initiative must be built upon a foundation of data transparency and disclosure of the embodied GHG emissions and other pollutants in the major materials and products purchased by the Federal Government. This must

also be accompanied by federally supported research and development, and direct investment for improvements in technology, efficiency, and process changes. Some of these investments could be supported by provisions included in the House-passed Build Back Better Act. With this foundation in place, steps toward procurement standards for environmental performance should be taken in order to cut out the worst actors in the global industry and strengthen domestic industry.

Transparency and Disclosure

If the FAR is to be amended to ensure that major Federal agency procurements minimize the risk of climate change, then the United States must take additional action to expand and implement an integrated Buy Clean initiative for (a) promoting transparency regarding the quantity of embodied emissions of covered pollutants in construction materials in projects supported by Federal funds, (b) reducing those emissions, and (c) ensuring that doing so increases the strength and competitiveness of our manufacturers. Such an initiative would reduce domestic and global climate pollution, improve sustainable resource-use, reduce the health impacts of industrial pollution, particularly in marginalized communities, and support good jobs. Critically, it must not impede, but rather complement Buy America and Buy American policies in supporting domestic manufacturers and retaining and creating family-sustaining jobs for workers in the United States.

As established in the E.O., the Buy Clean Task Force should be comprised of representatives from, but not limited to:

- the Office of Management and Budget (e.g., the Office of Federal Procurement Policy and the Made in America Office),
- the Council on Environmental Quality,
- the National Economic Council,
- the Office of Domestic Climate Policy,
- the Department of Energy (e.g., the Advanced Manufacturing Office),
- the Environmental Protection Agency (e.g., the Center for Environmental Measurement and Modeling, and the Environmentally Preferable Purchasing Program),

- the Department of Commerce (e.g., the National Institute of Standards and Technology),
- the Department of Transportation,
- the General Services Administration,
- the Department of Defense, and
- the National Aeronautics and Space Administration.

Among other duties, the Task Force should be responsible for issuing guidance and analysis regarding the calculation and disclosure of embodied emissions of GHGs and other air, water, and land pollutants from construction materials purchased by the Federal Government or used in federally funded projects.

The success of Buy Clean is dependent on the increased transparency and disclosure of such pollutants. A foundation of reliable processes is necessary for both (1) generating accurate, verifiable, and comparable data concerning the embodied emissions of construction materials, and (2) ensuring the transparency of that data with regard to materials purchased with federal funds, either through direct procurement or through federal support.

An agreed-upon methodology for measuring and calculating the embodied carbon of such materials and products is an Environmental Product Declaration (EPD), as cited in the E.O. as a means for reporting emissions data. EPDs are a commonly used reporting mechanism here in the United States as well as in Europe. For the purposes of launching a successful federal Buy Clean initiative, Type III EPDs must be utilized.

A Type III EPD[v] is a document that has been independently verified to be in accordance with the International Organization for Standardization standard 14025, is valid for no more than five years, includes a calculation of embodied GHGs of a given material, and communicates transparent and comparable information about the environmental impact and life-cycle assessment of a product.

In its work to develop a list of construction materials and pollutants to be covered under a Buy Clean initiative as well as provide additional recommendations, the Task Force must establish a mechanism to solicit input from, and engage cooperatively with, relevant stakeholders and organizations, including representatives of manufacturers of relevant construction materials, labor organizations, fenceline

communities, and environmental organizations; and issue guidance for bidders for eligible project contracts to report the embodied emissions of the covered pollutants for eligible materials to be used in such projects.

As EPDs begin to be submitted by bidders for eligible projects, they should be collected and housed in a publicly accessible database not only to ensure full government transparency, but also so that they may be used by the general public and private entities to inform their own procurement decisions.

There are costs associated with obtaining an EPD, however, and companies, particularly small and mid-sized manufacturers, will need technical assistance and funding to help them obtain EPDs. The costs of EPDs can vary greatly—between $5,000 to $50,000 according to a study in Washington,[vi] and an international study found the cost to be around $18,700.[vii] Not only that, but these are not one-time costs. EPDs must be updated every 3-5 years to remain relevant. In addition to these costs, the number of EPDs a company will need can vary greatly by industry. A steel producer might only need one EPD for the rebar it produces, but a concrete manufacturer might have dozens of different product specifications. While none of this presents a significant barrier for large multinational industrial firms, it could be a barrier to small and mid-sized companies. As a result, a Buy Clean initiative must include grants and technical assistance to companies to support them in obtaining or developing their own EPDs.

In addition to their regular auditing, as cited in the E.O., EPDs will need to be reevaluated by the Task Force and stakeholders to ensure they are capturing all aspects of the relevant data necessary to set eventual procurement standards.

Funding included in the House-passed Build Back Better Act can help launch a federal Buy Clean initiative that leads with transparency and disclosure.

For example, the following provisions provide funding that could be used for this purpose:

- $0.25 billion for EPA Environmental Product Declaration Assistance Program (Section 30113)

- $0.1 billion for EPA Low-Embodied Carbon Labeling for Construction Materials for Transportation Projects (Section 30118)
- $3.25 billion for GSA Procurement and Technology to support efficiency and lower-carbon materials (Section 80008)
- $0.9 billion for Low-Carbon Transportation Materials Grants (Section 110019)
- FEMA Disaster Relief that supports lower-carbon materials (Section 110017)
- $1.77 billion to HUD for projects that implement low-emission technologies, materials, or processes (Section 40006)[viii]

Federal Funding Accountability and Transparency Act

More data is also needed to determine what exactly is being purchased with federal funds, either through direct procurement or federal assistance. The Federal Funding Accountability and Transparency Act of 2006 (FFATA)[ix] requires the Office of Management and Budget (OMB) to create a searchable website that includes information about entities receiving federal funding—including contracts, subcontracts, grants, awards, and other financial assistance.[x] The required information includes the name and location of the company receiving the award; the size, purpose, and place of performance of the award; and information on the parent company of the recipient, if applicable.[xi] FFATA could provide a powerful tool for providing transparency regarding both federal supply chains and federally funded projects to help ensure that products purchased with federal funds are produced in a manner that is consistent with appropriate environmental and labor standards.

OMB, however, has limited the effectiveness of FFATA by restricting its application to primary contractors and certain first-tier subcontractors. In a memorandum dated April 6, 2010, OMB indicated that implementation of the Act would not extend below the first tier.[xii] Relying on this guidance, in 2012 the agencies responsible for issuing the FAR stated that "although the Transparency Act reporting requirements flow down to all subcontracts, regardless of tier, OMB…directed that the FAR be amended to limit the reporting of subcontract awards to the contractor's first-tier subcontractors."[xiii]

This narrow application of FFATA is inconsistent with both the text and the legislative history of the statute. FFATA does not contain any language limiting its disclosure

requirements to a particular tier of recipients of federal funds. Instead, transactions valued below $25,000 are excluded from federal award reporting, as are entities whose gross income in the previous tax year did not exceed $300,000.[xiv]

The architects of the Act also made it clear that they expected it to have a broad reach. Senators McCain and Obama, original cosponsors of the Act in the Senate, both explicitly rejected the argument that it was inappropriate for the Federal Government to track its funding down to the level of subawards and subcontracts. Senator McCain stated[xv] that "it is the taxpayers' money. I think we should track the taxpayers' dollar to its ultimate end." Senator Obama agreed. Other supporters of the bill similarly indicated that the disclosure requirement should apply to all tiers. Accordingly, directing the OMB to provide for full implementation of FFATA at levels of covered subawards would be well within the President's authority and would more accurately reflect Congress's intent, and would be crucial to effective implementation of a federal Buy Clean initiative.

Additional Reports

The data gathered from EPDs and the full implementation of FFATA will be crucial to building the necessary foundation for the rest of a Buy Clean initiative, but additional publicly available reports will be necessary. The Task Force should regularly submit to Congress and make publicly available reports with information that include:

- Total number and value of contracts awarded by agency and by material/product
- Total number and value of contracts & subcontracts awarded to foreign entities
- U.S. competitive advantage in core environmental metrics for industrial production (i.e., average country levels of embedded emissions of GHGs; embedded levels of air, water, and land pollution – this report should be produced at predictable intervals (e.g., every couple years)
- Total environmental product cost of contracts awarded by agency, including climate, air, water, and land pollution
- Comparisons of environmental product cost of contracts awarded & not awarded; including climate pollution; air, water, and land pollution

- A national map of communities most impacted by industrial sources of air, water, and land pollution
- Recommendations for more disclosures from contractors to improve assessment of awarding contracts
- Total procurement value of funds expended on materials manufactured outside the USA

Much of this information will need to be gathered from the awarding authorities themselves, and so the Task Force should provide guidance for awarding authorities on how to submit applicable information to the Task Force, which it may then compile and share with Congress.

RD&D and Direct Investment

In addition to supporting the utilization and reporting of emissions through EPDs such that an amended FAR may minimize the risk of climate change, the federal government must also prioritize investments in research, development, and deployment of industrial efficiency and emissions-reducing technologies and practices in manufacturing facilities. The E.O. rightly calls on the Task Force to provide recommendations for "grants, loans, technical assistance, or alternative mechanisms" to support domestic manufacturers to report and reduce embodied emissions in priority materials they produce. R&D and direct investments are necessary components of a successful Buy Clean initiative and critical to reducing industrial emissions.

Despite the urgency of the climate crisis and the need to invest in industrial competitiveness, total federal support for research and development has been declining for decades[xvi] from over two percent of GDP in the early 1960s to about a half percent in 2019. Restoring R&D spending to the 2 percent peak in 1964 would increase public funding for innovation by over $300 billion. Spending on energy-related R&D[xvii] has declined even further from 3.6 percent of total R&D spending in 1964 to 2.8 percent of spending in 2019. Pulling back on our investments in innovation makes it harder to solve the climate crisis and risks leaving American companies and workers at a disadvantage in a globally competitive economy. There is no reason the U.S. cannot be home to the cutting-edge industrial operations of the future, but we must make the necessary investments now.

Significant funding is included in the House-passed Build Back Better Act for industrial investment and financial assistance to begin the process of reducing emissions and strengthening our domestic manufacturing. Specifically, funding is allocated for the Department of Energy's (DOE) Advanced Industrial Facility Deployment Program (Section 30471). However, more funding will be needed to ensure not only the initiative's success, but also the country's continued leadership in global manufacturing.

Towards Buy Clean Standards

Buy Clean standards are meant to serve as a vehicle for strengthening and reducing emissions in U.S. industry. The process for setting such standards must begin with the necessary data from the firms seeking to compete for public funding. Once the foundation of embodied emissions data is developed and robust enough, and RD&D programs and funding are in place, the Federal Government should set an initial baseline environmental performance standard for all direct federal procurement of materials and procurement of materials using federal assistance above a *de minimis* threshold.

The standard should be set based on the data collected in EPDs; a stakeholder input process, which should include representatives from included industries, representatives of associated workforce including organized labor, representatives from fenceline communities, and environmental organizations; and the associated analysis by the Task Force with the guidance that they should not impede domestic industry but rather cut out the worst actors in the global industry. Standards should strengthen over time and should be directly correlated with subsidies and other forms of direct financial support (as described above) to allow domestic industry to innovate, improve efficiency, and improve sustainability.

The Task Force should also establish a robust process for determining product category eligibility, which must include significant stakeholder input and consider separate standards for differing technologies that create significant competitive and economic disadvantage for domestic facilities. The clearest example of this is structural steel, where steel from Electric Arc Furnace facilities and integrated steelmaking facilities must be treated separately. The same may also be said for certain domestic cement and concrete technologies.

High-Achievers Market

Establishing standards for construction materials should be considered a floor for the more transformational changes that a Buy Clean initiative can incentivize. The Task Force should also establish a high-achievers' market, through which the government would procure a certain percentage from high-performing bidders.

This high-achievers market would reward firms that:

- Meet high-road labor standards;
- Meet an exceptional absolute level of both GHG emissions and air, water, and land pollution reduction, aiming for zero, net-zero, or net-negative emissions; and
- Create accessible jobs in marginalized communities, using equitable hiring practices that support communities of color, low-income communities, and deindustrialized communities.

While standards, coupled with investment, would help raise the floor of domestic performers, a high achievers' market would help raise the ceiling on performance, further pushing for innovation and improved technologies and processes.

Market Transformation

The U.S. faces a series of misaligned incentives as it tries to confront industrial emissions, a core piece of our climate crisis. No domestic market exists yet to reward companies that are making investments to reduce their emissions. An improved federal procurement system could hold the key to creating a market for firms that innovate and create good jobs.

A federal Buy Clean initiative that prioritizes transparency, invests in innovation, and ties public dollars to low-carbon materials holds the promise of transforming some of the most carbon-intensive sectors in our economy, allowing us to confront climate change while reinvesting in and rebuilding the middle class. By establishing the framework for such an initiative, the Administration is taking steps to ensure the U.S. federal government leads by example on climate action, environmental justice, the creation of good jobs, and strengthening our domestic manufacturing.

End Notes

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[xvii] *Ibid.*