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The federal government's use of procurement
to further ESG sustainability initiatives

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Through Aerospace & Defense Insights, we share with you the top legal and political issues affecting the aerospace and defense (A&D) industry. Our A&D industry team monitors the latest developments to help our clients stay in front of issues before they become problems, and seize opportunities in a timely manner.

In recent years, environmental, social, and governance (ESG) initiatives have come to the forefront of corporate considerations. The Federal government itself has begun to focus more on ESG policy, especially with respect to environmental sustainability, as reflected in the Biden Administration's recent Executive Orders (EOs), open Federal Acquisition Regulation (FAR) cases, and several recent agency requests for information. The government is focused on driving sustainability through the power of procurement. As such, government contractors, including the A&D industry, need to track relevant Federal government ESG initiatives.

Background on ESG

Companies are increasingly focused on considerations related to ESG policies and practices. These considerations may center on sustainability, diversity and inclusion, and compliance with ethical business practices such as the following:

- **Environmental:** Considerations include areas such as energy use, waste, pollution, carbon footprint, and sustainability practices.
- **Social:** Considerations include area such as commitment to diversity and inclusion, charitable or pro bono work, employee benefits, and engagement with the local community.
- **Governance:** Considerations include areas such as how an organization operates, its mission statement, and internal and external transparency about practices.

Although these are not new considerations in an organization's operation, such practices are gaining a spotlight in response to consumer demand, shareholder activism, and government policies. As attention on ESG continues to grow, it is increasingly important for businesses to focus on ESG practices to remain in compliance with Federal requirements and to remain competitive in both the commercial and Federal marketplace.



Recent ESG Developments Affecting Government Contractors

Under the Biden Administration, the Executive Branch has enhanced its focus on ESG, including in relation to government contracts and environmental considerations. Recent developments include the issuance of several EOs, Office on Management and Budget (OMB) guidance, multiple FAR amendments, and agency requests for information. These developments are layered on top of an already formidable foundation of ESG requirements applicable to government contractors.¹ Most of the recent developments aim to use the Federal procurement system to change behavior that impacts the environment.

Executive Orders

The Administration has issued several EOs as a key legal mechanism to drive environmental change through Federal procurement. Key provisions of the most relevant EOs are summarized below.

- **Executive Order on Tackling the Climate Crisis at Home and Abroad (EO 14008):**

On January 27, 2021, President Biden issued [EO 14008](#), which included multiple provisions aimed at using government contracting to combat climate change and promote sustainability:

- Section 204 emphasizes the Administration's interest in "lead[ing] the Nation's effort to combat the climate crisis by example – specifically, by aligning the management of Federal procurement. . . to support robust climate action." This EO directs the Chair of the Council on Environmental Quality (CEQ) to "consider additional administrative steps and guidance to assist the Federal Acquisition Regulatory Council in developing regulatory amendments to promote increased contractor attention on reduced carbon emission and Federal sustainability."
- Section 205 sets out a plan to "create good jobs and stimulate clean energy industries" through Federal procurement strategy, which is meant

to achieve a carbon pollution-free electricity sector no later than 2035. The strategy will also achieve clean and zero-emission vehicles for Federal, State, local, and Tribal government fleets, including the Postal Service.

- Section 206 directs each Federal agency to develop a plan that "describe[s] the agency's plan to use the power of procurement to increase the energy and water efficiency." Moreover, the section notes that agencies must adhere to "the requirements of the Made in America Laws in making clean energy, energy efficiency, and clean energy procurement decisions." The section also directs the Chair of the CEQ to consider additional administrative steps and guidance to assist the FAR Council in developing regulatory amendments to promote increased contractor attention on reduced carbon emission and Federal sustainability.
- Section 210 directs the heads of agencies to identify opportunities for Federal funding to spur innovation, commercialization, and deployment of clean energy technologies and infrastructure, then take steps to ensure that, to the extent consistent with applicable law, Federal funding is used to spur innovation, commercialization, and deployment of clean energy technologies and infrastructure.
- Section 211 instructs each Federal agency to submit a draft action plan, and subsequent progress plans, that describe the agency's climate vulnerabilities and its plan to use the power of procurement to increase the energy and water efficiency of United States Government installations.
- Section 213 requires the Chair of the CEQ and the Director of OMB to take steps to ensure that Federal infrastructure investment reduces climate pollution, and to require that Federal permitting decisions consider the effects of greenhouse gas emissions and climate change.
- **Executive Order on Climate-Related Financial Risk (EO 14030):** On May 20, 2021, President Biden issued [EO 14030](#), which included several provisions directly related to government

1. E.g., requirements to promote small and diverse businesses (FAR 52.219-9), combat human trafficking (FAR 52.222-50), set minimum wages for contractor workers (52.222-55), and utilize energy efficient products (FAR 52.223-15).



contracts. Among other provisions, this EO directed the FAR Council to “consider amending the FAR to:

- (i) require major Federal suppliers to publicly disclose greenhouse gas emissions and climate-related financial risk and to set science-based reduction targets; and
 - (ii) ensure that major Federal agency procurements minimize the risk of climate change, including requiring the social cost of greenhouse gas emissions to be considered in procurement decisions and, where appropriate and feasible, give preference to bids and proposals from suppliers with a lower social cost of greenhouse gas emissions.” See EO 14030 § 5(b).
- **Executive Order on Catalyzing Clean Energy Industries and Jobs Through Federal Sustainability (EO 14057):** On December 8, 2021, President Biden issued [EO 14057](#), which focuses on the need to “[i]mprove the Nation’s preparedness and resilience to the effects of a changing climate, including advancing the Federal Government’s . . . procurement to ensure climate resilient operations.” In seeking to “transform Federal procurement and operations,” the EO set forth key goal metrics associated with decreasing emissions. See EO 14057 § 102. To support achieving these goals, the EO also included several sections that implicate government contracts:
 - Section 203 directs each agency to increase its percentage use of carbon pollution-free electricity and to facilitate new carbon pollution-free electricity generation and energy storage capacity.
 - Section 204 requires each agency’s light-duty vehicle acquisitions to be zero-emission vehicles by the end of fiscal year 2027.
 - Section 205 addresses achieving net-zero emissions buildings, campuses, and installations by 2045 and reducing greenhouse gas emissions by 50 percent from buildings, campuses, and installations by 2032. To reduce greenhouse gas emissions, Section 205 encourages agencies to use performance contracting to improve efficiency and resilience of Federal facilities, deploy clean and innovative

technologies, and reduce greenhouse gas emissions from building operations.

- Section 207 directs each agency to minimize waste by supporting markets for recycled products and promoting a transition to a circular economy.
- Section 208 focuses specifically on Sustainable Acquisition and Procurement and directs agencies to “reduce emissions, promote environmental stewardship, support resilient supply chains, drive innovation, and incentivize markets for sustainable products and services by prioritizing products that can be reused, refurbished, or recycled; maximizing environmental benefits and cost savings through use of full lifecycle cost methodologies; purchasing products that contain recycled content, are biobased, or are energy and water efficient, in accordance with relevant statutory requirements; and, to the maximum extent practicable, purchasing sustainable products and services identified or recommended by the Environmental Protection Agency (EPA).”
- Section 301 focuses on Federal Supply Chain Sustainability and directs agencies to “pursue procurement strategies to reduce contractor emissions and embodied emissions in products acquired or used in Federal projects.”
- Section 302 will require General Services Administration to track disclosure of “greenhouse gas emissions, emissions reduction targets, climate risk, and other sustainability-related actions by major Federal suppliers,” based on the information collected through the supplier disclosures under EO 14030 section 5(b)(i).
- Section 303 focuses on buying clean and directs the Buy Clean Task Force to provide recommendations to the Chair of the CEQ and Director of OMB “on policies and procedures to expand consideration of embodied emissions and pollutants of construction materials in Federal procurement and federally funded projects.”

Although the implementation of the EOs may not be as advanced as initially desired by the Administration, significant progress has been made through the issuance of the plans, guidance, and proposed FAR rules addressed below.

Federal Sustainability Plan

The Office of Federal Chief Sustainability Officer—part of the White House CEQ—issued the [Federal Sustainability Plan](#) to accompany EO 14057. The plan sets forth goals to reduce and reach net zero emissions and procurements by 2050 through the following types of activities:

- Require major Federal suppliers to publicly disclose greenhouse gas emissions and climate risks, and set science-based targets to reduce emissions
- Launch a Buy Clean initiative for low-carbon materials
- Change Federal procurement rules to minimize the risk of climate change, including factoring in the social cost of greenhouse gas in procurement decisions
- Maximize the procurement of sustainable products and services
- Establish the Net-Zero Emissions Procurement Federal Leaders Working Group, including a Buy Clean Task Force

OMB Guidance Memo M0-22-06

Another aspect of the Administration’s implementation of EO 14057 is OMB publication of [Guidance Memo M0-22-06](#), Catalyzing Clean Energy Industries and Jobs Through Federal Sustainability. The memo directs agencies to immediately begin taking steps to comply with EO 14057, “provid[ing] direction to agencies on establishing agency targets to meet EO goals and sets forth associated planning and reporting requirements.” The memo also “outlines governance, oversight, and management functions for EO implementation, including duties of heads of agencies, appointment of an Agency Chief Sustainability Officer, and direction to specific agencies to provide coordination and support for government-wide implementation efforts.” Finally, it forecasts that the CEQ will issue “Implementing Instructions” as required by the EO.

Climate Adaptation Plans

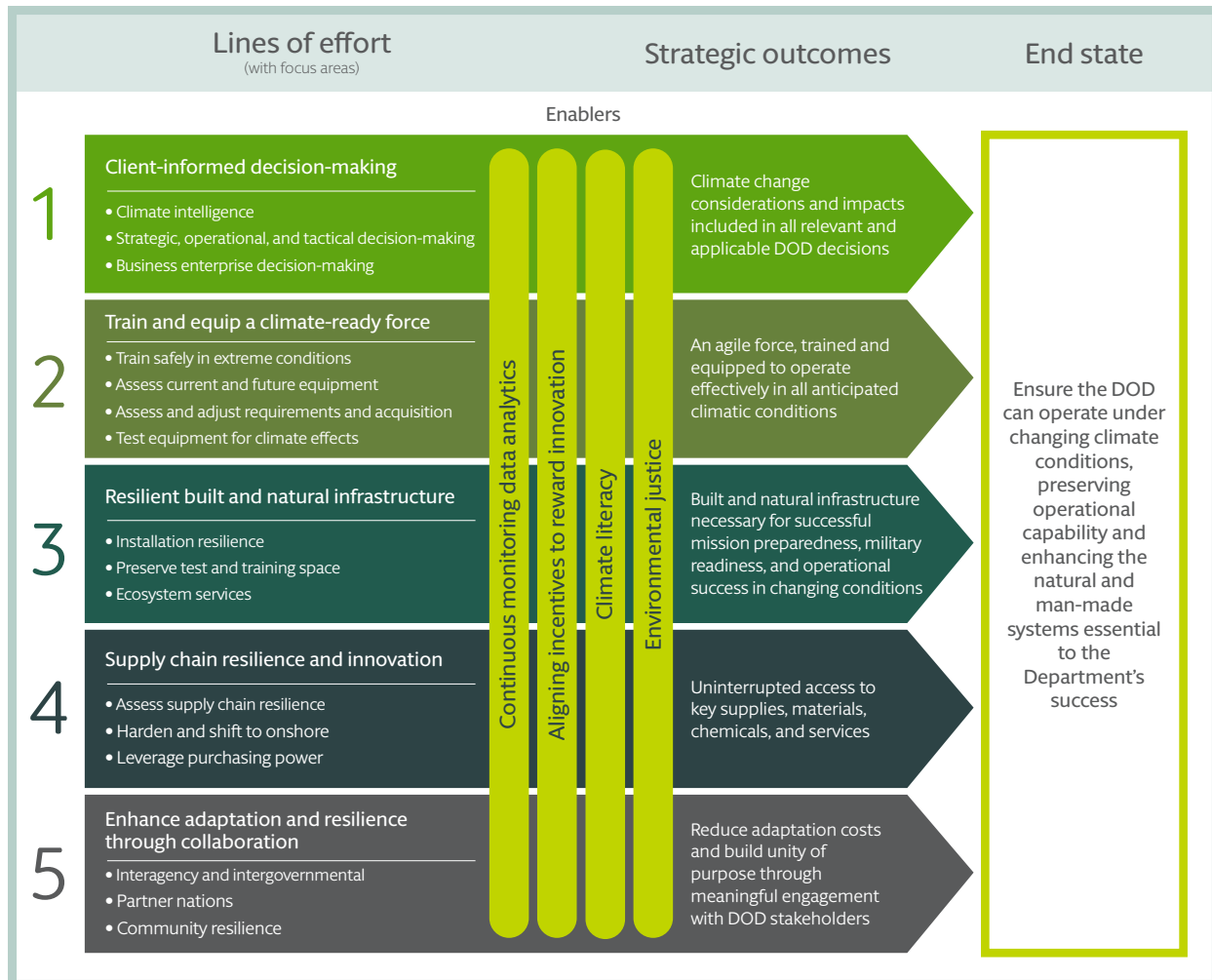
Several agencies, in response to EO 14008, have released climate adaptation and resilience plans to address their most significant climate risks and vulnerabilities. DoD, for instance, issued “[The Department of Defense Climate Adaptation Plan](#)” on October 7, 2021, which articulates DoD’s vision for climate adaptation and aligns adaptation and resilience efforts with the DoD’s warfighting mission. DoD’s plan lays out how operations, planning activities, business processes, and resource allocation decisions will include climate change considerations.

For instance, as part of its Supply Chain Resilience and Innovation effort, DoD notes that sustainable procurement enhances and sustains mission readiness through cost-effective acquisition that achieves compliance; prevents pollution; ensures product availability; and minimizes environmental, safety, and occupational health impacts to the warfighter. *See also* [DoD Instruction 4105.72](#) (Procurement of Sustainable Goods and Services, DOD 2018b).

FAR Updates

In relation to the EOs noted above, several FAR cases have emerged that provide additional insight on how the Federal government’s ESG initiatives will impact government contractors. Two cases relate to implementation of EO 14030 (Case Numbers 2021-015 & 2021-016) while a third relates to implementation of EO 14057 (Case Number 2022-006). All three cases are at the draft Proposed Rule stage.

- **Case Number 2021-015 Disclosure of Greenhouse Gas Emissions and Climate-Related Financial Risk:** This FAR case implements EO 14030 § 5(b)(i), “which directs the FAR Council to consider amending the FAR to require major Federal suppliers to publicly disclose greenhouse gas emissions and climate-related financial risk and to set science-based reduction targets.” This case remains open, while the Defense Acquisition Regulation (DAR) and FAR Council resolve “open issues” with the draft proposed FAR. *See* [Open FAR Cases as of 7/29/2022](#).



- **Case Number 2021-016 Minimizing the Risk of Climate Change in Federal Acquisitions:** This case implements EO 14030 § 5(b)(ii), “which directs the FAR Council to consider amending the FAR to ensure that major agency procurements minimize the risk of climate change.” This case is open with a report due on August 10, 2022. [See Open FAR Cases as of 7/29/2022.](#)
- **Case Number 2022-006 Sustainable Procurement:** This case implements E.O 14057 and OMB Memo Mo-22-06 as it relates to “the procurement of sustainable products and services.” More specifically, it “[u]pdates the definition of “biobased product” (7 U.S.C 8101 and 8102) for the purposes of agency affirmative procurement programs and reorganizes FAR Part 23 for consistency and clarity.” This case is open; the Acquisition Environmental and Contract Management Team is drafting the proposed FAR rule, with a report due August 10, 2022. [See Open FAR Cases as of 7/29/2022.](#)

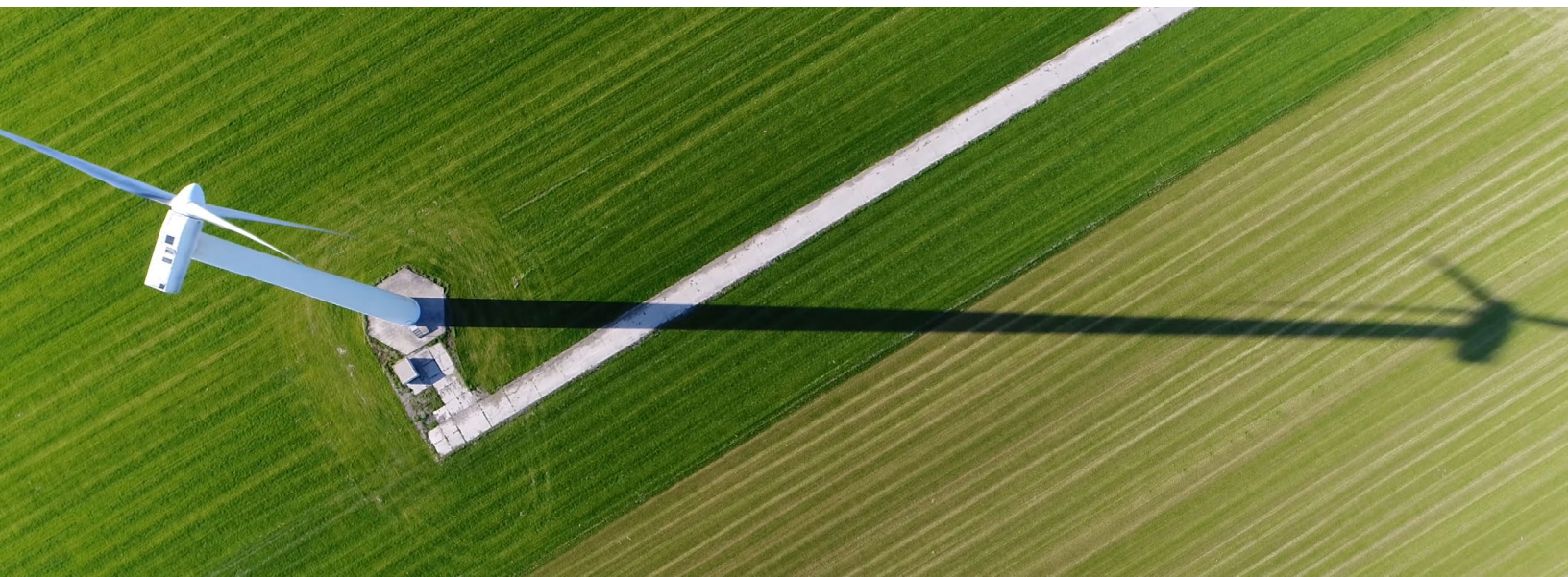
Other Executive Branch Actions related to ESG and Government Contracts

In addition to the actions noted above, other Federal agencies have taken actions that may influence government contractor ESG considerations.

- **General Services Administration (GSA) Acquisition Manual (GSAM) Amendments for Sustainable Acquisition:** In October 2021, GSA amended the GSAM through [Change 138](#) to provide guidance on sustainable acquisition,

specifically during the acquisition planning phase, as well as contract administration that promotes environmentally sustainable solutions. Through these amendments, GSA hopes to support successful government initiatives such as use of ecolabels and greenhouse gas emissions reduction.

- **GSA National Carbon Standards:** On March 30, 2022, GSA published new standards for concrete and asphalt used in GSA “construction, modernization, and paving projects,” that include carbon emission standards. Under these standards, GSA concrete and asphalt contractors are required “to provide environmental product declarations,” where feasible. For asphalt-related contracts, contractors must also provide “at least two environmentally preferable techniques or practices to be used during the material’s manufacture and installation.” [See GSA Press Release and Standards.](#)
- **GSA Polaris Governmentwide Acquisition Contract Small Business Pool Request for Proposal (RFP):** On March 25, 2022, GSA issued an RFP for IT Services. Among other criteria, the RFP required candidates to “provide products that comply with the Federal sustainable acquisition policy” and “ensur[e] that products” are EPEAT Bronze Level or higher, energy-efficient, “non-ozone depleting, made with recovered materials ancillary products, and to the maximum extent practicable, sustainable products and services identified or recommended by the Environmental Protection Agency.” Further, “[c]ontractors are strongly encouraged to post their Sustainable Practices and Impact Statement on



its website,” including “a Greenhouse Gas (GHG) inventory for the enterprise or GHG emissions resulting from the contract.” See [Criteria H.7, GSA RFP No. 4 7QTCB22R0001](#) at 36-37.

- **GSA Single-Use Plastic Advanced Notice of Proposed Rulemaking:** On July 7, 2022, GSA issued an [Advance Notice of Proposed Rulemaking](#), which seeks comments—due September 6, 2022—pertaining to the use of plastic consumed in both packaging and shipping, as well as other single-use plastics for which GSA contracts. The comments will be used to inform future rulemaking to establish requirements and reporting mechanisms for reducing unnecessary single-use plastic, to include plastic packaging and shipping materials.
- **DoD Request for Information (RFI) on Sustainability Initiatives and Climate-Related Disclosures:** On July 8, 2021, DoD published an [RFI](#) soliciting input on sustainability initiatives and climate-related disclosures. DoD’s request asked for comments on company efforts in measuring and disclosing Greenhouse Gas Emissions, ESG reporting, and Supply Chain Greenhouse Gas and Risk Management, which could inform future DoD rulemaking.
- **DoD Climate Adaptation Plan:** On September 1, 2021, DoD issued its own [Climate Adaptation Plan](#), which provides a roadmap to ensure DoD maintains the ability to operate under changing climate conditions while preserving operational capability and protecting essential systems. Through the plan, DoD will incorporate climate risk into planning, modeling, simulation, wargaming, and key agency documents.
- **Defense Innovation Unit’s (DIU) Solicitations:** Over the last several months, DIU has issued various [solicitations](#) linked to sustainability efforts and considerations, including for microgrid generators, battery storage, and carbon neutral synthetic fuels. We expect DoD’s DIU to continue to issue such solicitations geared towards climate considerations.
- **DoD RFI on Carbon Pollution-Free Electricity:** On February 3, 2022, DoD issued a [RFI](#) seeking information on costs and technologies for supporting DoD’s shift to purchasing 100% carbon pollution-free electricity. DoD recognizes that it is one of the largest electricity users in the

United States, and thus could lead the way in transitioning to carbon pollution-free electricity. The RFI sends signal to the market that DoD is underway in its efforts to support President Biden’s EO 14057 to achieve a carbon pollution-free electricity sector by 2035. See [DoD Press Release](#).

Conclusion

Since taking office, the Biden Administration has advanced many actions focused on ESG—especially actions aimed at addressing climate change and sustainability—in government contracting. In light of this emphasis on ESG, companies seeking to obtain government contracts should actively take steps to ensure they are able to provide the necessary information to compete for contracts and sell products and services in line with government-specific ESG requirements. Such steps may include:

- Evaluating current ESG-related practices, including the extent to which such practices are tracked and measured. Companies may wish to concentrate attention on areas named in the Executive Branch actions noted above.
- Considering ways to begin transitioning to, or enhancing, current sustainability practices to better align with new ESG requirements.
- Reviewing Hogan Lovells ESG resources, such as:
 - The [ESG Academy](#) training series to navigate the ever-changing world of ESG issues.
 - Hogan Lovells’ [Guide to ESG Trends for 2022](#).
 - The [EGS Perspectives](#) 360° view of issues and opportunities.

The Hogan Lovells Government Contracts team is deeply familiar with ESG initiatives and we welcome discussion about compliance strategies.



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