

Who Will Reap From FLEEEP? Gaining New Federal Contracting Business Under Obama's Executive Order on Federal Agency Sustainability

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On October 5, 2009, President Obama issued Executive Order No. 13,514 ("EO 13,514" or "Order") on "Federal Leadership in Environmental, Energy, and Economic Performance" ("FLEEEP"),¹ which created a bold policy on sustainability for federal agencies. If fully implemented, it will not only "green" the federal supply chain, but will also shake up the federal agencies' \$500 billion market for goods and services.² How can businesses gain an early advantage under FLEEEP to win business away from incumbent contractors?

A crucial aspect of FLEEEP is that federal agencies must inventory, report, and reduce not only their own greenhouse gas emissions, but also those of their federal contractors. In green parlance, the emissions of a firm (the federal agency itself in this case) are "scope 1 emissions"; the emissions of the electric generating utility, or utilities that supply electric power to a firm (federal agency) are the firm's "scope 2 emissions."³ "Scope 3 emissions" include those of the contractors who supply products and services to the firm.⁴ The public policy rationale is that the firm, the buyer of products and services, is in a sense responsible for the scope 2 and scope 3 emissions even though it did not emit them. The Order explicitly requires federal agencies to inventory, report, and reduce all three categories of emissions—although the scope 3 emissions are subject to a different percentage reduction target than scope 1 and 2 emissions.

The unprecedented inclusion of scope 3 emissions in agency reporting requirements is a major driver in this Executive Order. Federal procurement policy's new focus on carbon emissions from would-be federal contractors will encourage competing firms to adopt sustainable practices. Prospective bidders who are immediately ready to help the agency meet the Order's requirements on scope 3 emissions will have an early advantage.

FLEEEP is not the first occasion in which a major procurer of products and services decided to examine its scope 3 emissions. Wal-Mart Stores, Inc. ("Walmart") has already taken this step and claims it will create a sustainability index from supplier emissions data, presumably to consider when selecting future suppliers.⁵ FLEEEP, if fully implemented, adds the nation's largest public supply chain to the largest private supply chain—Walmart—in leveraging sustainability. Other corporations with large supply chains are following suit. What firm that hopes to sell products and services to such supply chains can afford to ignore the attraction of these potential markets?

Savvy corporate procurement officers at "green" firms will say that FLEEEP will not substantially alter procurement procedures unless federal agencies change the criteria by which they evaluate bid proposals, so as to give weight to "greenness." Contracts for *goods* do incorporate some "green" criteria, largely because of statutory requirements for the federal purchase of Energy Star appliances and the recycled content of paper and other materials. Remarkably however, until very recently, federal contracts for *services* incorporated little recognition of, or preference for, "green" contractors, even in EPA contracts.

Does FLEEEP change the agencies' procurement selection criteria to give weight to greenness? At first blush, FLEEEP only requires recommendations for such changes, which

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1. Exec. Order No. 13,514, 74 Fed. Reg. 52,117 (Oct. 8, 2009).
2. *President Obama signs an Executive Order Focused on Federal Leadership in Environmental, Energy, and Economic Performance*, THE WHITE HOUSE (Oct. 5, 2009), http://www.whitehouse.gov/the_press_office/President-Obama-signs-an-Executive-Order-Focused-on-Federal-Leadership-in-Environmental-Energy-and-Economic-Performance.
3. See WORLD RES. INST., THE GREENHOUSE GAS PROTOCOL: A CORPORATE ACCOUNTING AND REPORTING STANDARD 25 (2004) available at http://pdf.wri.org/ghg_protocol_2004.pdf.
4. *Id.*

5. See *Sustainability Index*, WALMART, <http://walmartstores.com/Sustainability/9292.aspx> (last visited Oct. 7, 2010).

may never be adopted. For example, the section on “Vendor and Contractor Emissions” (section 13) merely requires the General Services Administration (“GSA”) to make “recommendations” about “working with the Federal vendor and contractor community to provide information that will assist Federal agencies in tracking and reducing scope 3 greenhouse gas emissions related to the supply of products and services to the Government.”⁶ Likewise, GSA must only make “recommendations” about adding purchasing preferences to federal contracts. What if these recommendations are never adopted? Further, the last measure in the Order suggests that the Order itself is not a basis for challenging any agency procurement decision, including the failure to give proper weight to greenness.⁷ Consequently, many companies may take a wait-and-see approach to FLEEEP.

However, these companies may be left behind. Broader examination of the Order reveals that federal agencies will have little choice but to act quickly, and so far, progress is remarkably good. First, agency compliance with the Order is not optional.⁸ The Order charges the Office of Management and Budget (“OMB”) Director and the Chair of the Council on Environmental Quality (“CEQ”) to ensure that federal agencies are held accountable for conformance.⁹ OMB, of course, has considerable leverage, as it oversees each agency’s budget.¹⁰

Second, agencies must act quickly as the Order’s schedule puts each agency in a time bind. So far, agencies are largely on track to meet the Order’s deadlines. Within thirty days of the Order’s issuance, November 4, 2009, each agency head must have appointed a “Senior Sustainability Manager” from “among the agency’s senior management officials.”¹¹ Currently, over fifty federal agencies have appointed one. By January 4, 2010, agencies must have set their targets for reducing their scope 1 and 2 emissions. Thirty-five agencies have set their individual targets so far, and President Obama announced an overall goal of reducing the federal government’s greenhouse gas emissions by an audacious twenty-eight percent by 2020.

As for the more difficult problem of scope 3 emissions, the Order requires that by June 2, 2010, each agency head set an agency-wide percentage reduction target for those emissions by 2020, from a 2008 baseline. In addition, the agency head must submit a Strategic Sustainability Performance Plan by

that date. Obviously, an agency cannot select a percentage reduction target or formulate a performance plan unless it knows what the contractors’ baseline emissions were in 2008. To obtain that data, the agency needs to quickly choose and adopt a carbon reporting protocol for its contractors because, by January 5, 2011, each agency must report its scope 1, 2, and 3 greenhouse gas emissions.¹²

While the Order does not specify what an acceptable reporting format is, it invites “using accepted greenhouse gas accounting and reporting principles.”¹³ These would likely include the Greenhouse Gas Protocol,¹⁴ the protocols under EPA’s Climate Leaders program,¹⁵ and The Climate Registry.¹⁶ As for a private supply chain, Walmart asks its vendors to report their greenhouse gas emissions to the Carbon Disclosure Project, which has the largest corporate database of greenhouse gas emissions and which accepts the Greenhouse Gas Protocol. The key attribute for a contractor is to have both the data and the flexible software necessary to report the emissions produced under the federal contract, including emissions from subcontractors. Significantly, those emissions associated with a specific federal contract are distinct from the contractor’s total emissions for all their business activities, which is why flexible carbon reporting software is invaluable.

Third, the agency must act quickly because FLEEEP applies to ninety-five percent of new contract actions, including task and delivery orders. These actions must meet the Order’s sustainability requirements for products and services (with the exception of weapons systems acquisitions), specified in Section 2(h). This means that the agency has to include the Order’s specific sustainability requirements in nearly all new contracts in order to achieve the ninety-five percent goal.

In short, a federal agency must quickly begin including clauses in its contracts that require contractors to report their carbon emissions under specified protocols. Otherwise, the agency will not be able to establish a baseline, develop a Strategic Sustainability Performance Plan, set a reduction target for scope 3 emissions, lay the groundwork for future compliance, or meet their reporting deadline. This is the first key test of the Administration’s commitment to driving the private sector toward greater sustainability through green federal procurement.

Recently, CEQ tentatively charted a course for EO 13,514’s treatment of vendor supply chains that temporarily delays requiring their inclusion in scope 3 reporting for all federal agencies. On July 2, 2010, the CEQ issued draft guidance on the government-wide requirements for calculating and reporting greenhouse gas emissions associated with

6. Exec. Order No. 13,514, 74 Fed. Reg. at 52,124.

7. “This order is intended only to improve the internal management of the Federal Government and is not intended to, and does not, create any right or benefit, substantive or procedural, enforceable at law or in equity by any party against the United States, its departments, agencies, or entities, its officers, employees, or agents, or any other person.” Exec. Order No. 13,514, 74 Fed. Reg. at 52,127.

8. Exec. Order No. 13,514, 74 Fed. Reg. at 52,117.

9. Exec. Order No. 13,514, 74 Fed. Reg. at 52,120.

10. *The Mission and Structure of the Office of Management and Budget*, OFFICE OF MGMT. AND BUDGET, http://www.whitehouse.gov/omb/organization_mission/ (last visited Oct. 7, 2010).

11. Exec. Order No. 13,514, 74 Fed. Reg. at 52,121–22.

12. See Exec. Order No. 13,514, 74 Fed. Reg. at 52,118.

13. Exec. Order No. 13,514, 74 Fed. Reg. at 52,123.

14. WORLD RES. INST., *THE GREENHOUSE GAS PROTOCOL: A CORPORATE ACCOUNTING AND REPORTING STANDARD* (2001).

15. *Climate Leaders: Reporting*, U.S. ENVTL. PROT. AGENCY, <http://www.epa.gov/climateleaders/reporting/index.html> (last visited Oct. 7, 2010).

16. THE CLIMATE REGISTRY, *GENERAL REPORTING PROTOCOL VERSION 1.1* (2008).

federal agency operations.¹⁷ CEQ put agencies and federal contractors on notice that the requirement of scope 3 emissions data will be phased in, and ultimately required “to the fullest extent feasible”:

Vendor and contractor emissions are those associated with the services, materials, and products that an agency purchases, and are a category of scope 3 emissions. Agencies are not required to report emissions related to their vendors and contractors at this time, but future inventories will include vendor and contractor emissions to the greatest extent feasible.¹⁸

CEQ explained that the collection of scope 3 emissions, including from vendor supply chains, would be phased in over time because the accounting and calculation methodologies are still evolving:

Because efforts to account for scope 3 emissions are recent and accepted methods for calculating emissions are evolving, this Guidance utilizes a phased approach to inclusion of scope 3 emissions in agency inventories. Initial efforts focus on accounting for scope 3 emission categories for which reliable and accessible data are available for estimating emissions, and for which more detailed calculation methodologies have been established. As a result, substantial fractions of the scope 3 emissions of many agencies will not initially be captured. The goal of this approach is to continually improve scope 3 data quality. Over time, new methodologies and procedures will be included in revisions to this document and the [Technical Support Document (“TSD”)] to improve the Federal Government’s ability to account for and report GHG emissions through the inventory process. Examples of areas to be added over time include emissions from the following: (1) operations associated with leased space; (2) vendors, contractors and supply chain; and (3) production of fuels (biofuels, gasoline, hydrogen, etc.) used to operate internal combustion vehicles¹⁹

Yet, left open is the possibility that individual agencies could in their discretion require scope 3 reporting by vendor supply chains for selected activities, prior to CEQ requiring all agencies to do so:

Agencies may voluntarily report additional scope 3 emissions resulting from unique activities that do not currently have a methodology in the TSD. Voluntary reporting refers to the reporting of emissions that do not currently have a specified calculation methodology in the TSD. Agencies may report emissions for these voluntary items, but must clearly identify them and provide documentation for calculation methods used in the submission of the agency’s inventory.²⁰

Therefore, under the draft guidance an agency can voluntarily report its scope 3 emissions, but from where would they obtain this information other than a government contractor?

This raises the question whether an individual agency may prompt its vendors to disclose this information by including a green incentive in a procurement solicitation, even though agencies are not yet compelled by CEQ to report this information. Several comments on the draft guidance urged CEQ to clarify that individual agencies do have this latitude.²¹

On October 6, 2010, CEQ issued its final Federal Greenhouse Gas Accounting and Reporting Guidance.²² It includes virtually the same text quoted above from the draft guidance, which means that CEQ is deferring to the future a general requirement that agencies report their scope 3 emissions.²³ As such, using the full federal procurement process to leverage the private sector to measure and report their carbon emissions will have to wait.

Why did CEQ (and GSA) delay greenhouse gas reporting requirements in federal solicitations? Perhaps the answer is revealed in the CEQ/GSA Summit on Greening the Federal Supply Chain, held in Chicago on November 16, 2010. GSA Administrator Martha Johnson spoke of the need to nurture small businesses to pursue green strategies and GSA has just created a small business pilot project that already includes 60 companies. It appears that CEQ and GSA worry that while some small businesses are at the cutting edge of green practices, including greenhouse gas reporting, others are low on the learning curve and might suffer a competitive disadvantage if carbon-reporting mandates/incentives are included now in federal solicitations.

Nevertheless, the final guidance does permit agencies to voluntarily report their scope 3 carbon emissions “resulting from unique activities that do not currently have a methodology in the TSD.”²⁴ The agency must “clearly identify them and provide documentation for calculation methods used in the submission of the agency’s inventory.”²⁵ Leaving aside the meaning of “unique activities” which the guidance does not define, some carbon emissions would presumably qualify for such early reporting by an agency. For example, while the TSD has a methodology for measuring the carbon emissions of federally owned vehicles, the TSD, by its terms, does not have a methodology for measuring carbon emissions from vendors’ vehicles.²⁶ However, the methodology for computing carbon emissions from federally owned and contractor owned vehicles would be essentially the same method of calculations and would provide ready documentation. The CEQ guidance defines the minimum performance expected by federal agencies in carrying out the Order.²⁷ The guidance

17. COUNCIL ON ENVTL. QUALITY, DRAFT FEDERAL GREENHOUSE GAS ACCOUNTING AND REPORTING GUIDANCE (2010).

18. *Id.* at 13.

19. *Id.* at 11–12.

20. *Id.* at 12.

21. See comments of United Parcel Service, the BlueGreen Alliance, and the Natural Resources Defense Council/Sierra Club/National Wildlife Federation at *GHC Accounting Comments*, COUNCIL FOR ENVTL. QUALITY, <http://www.whitehouse.gov/administration/eop/ceq/sustainability/fed-ghg/view-comments> (last visited Oct. 7, 2010).

22. COUNCIL ON ENVTL. QUALITY, FEDERAL GREENHOUSE GAS ACCOUNTING AND REPORTING GUIDANCE (2010).

23. *Id.* at 14. A few specific federal scope 3 reporting requirements were included in the final guidance, such as federal employee air travel, business ground travel and commuting, and contracted solid waste disposal and waste water treatment. *Id.* at 13–14.

24. *Id.* at 14.

25. *Id.*

26. *Id.* at 14–16.

27. *Id.* at 1.

should not prevent agencies from exceeding the minimum expected of them.

Astute green firms seeking more federal business will anticipate these requirements on contractors. They will have the software on hand that uses widely accepted carbon reporting protocols to determine their scope 3 emissions, including those produced by subcontractors. Further, the Order invites the agency in its Strategic Sustainability Performance Plan to “take into consideration environmental measures as well as economic and social benefits and costs in evaluating projects and activities based on lifecycle return on investment.”²⁸ Enterprising would-be contractors will stand ready to advise the agency on creative, innovative concepts that are the most cost effective ways to reduce scope 3 emissions. These firms will also want to show the agency the carbon footprint reductions that they are ready to offer, compared to those of incumbent contractors. They can also suggest supply logistics and other strategies for the agency to reduce its scope 1 and 2 emissions.

Green contractors seeking more federal business will look beyond the Order’s absolute prohibition on using the Order as a basis for any legal action such as a bid protest. Once an agency does create green contract requirements, preferences, or other green criteria in the contract solicitation, then the agency must abide by those provisions in its selection of the winning bidder. Those requirements, not what is in the Executive Order, would be the basis for challenging whether the agency followed its own rules in awarding the contract.

FLEEEP, if conscientiously implemented, has the potential to “green” the federal supply chain and to set an example for other governmental entities at the state and municipal level. Even NGOs, especially environmental groups, can and should apply the same principles to their own procurements. An enormous business opportunity awaits any firm that has expended the considerable time and financial resources necessary to achieve world-class energy efficiency, to understand fully its own carbon footprint, and to possess the flexible software for measuring their carbon emissions on a contract-by-contract basis.

28. Exec. Order No. 13,514, 74 Fed. Reg. 52,117, 52,122 (Oct. 8, 2009).