Dan K. Fordice, III, President
Lester C. Snyder, III, Senior Vice President
Thomas Brown, Vice President
Henry J. Massman, IV, Treasurer
Stephen E. Sandherr, Chief Executive Officer
Jeffrey D. Shoaf, Chief Operating Officer

February 13, 2023

Jennifer Hawes
Procurement Analyst
General Services Administration
1800 F St. NW
Washington, DC 20405
Sent *via electronic* mail to *Regulation.gov*

RE: AGC of America Comments on FAR Case 2021-015 – Federal Acquisition Regulation: Disclosure of Greenhouse Gas Emissions and Climate-Related Financial Risk

Dear Ms. Hawes,

Thank you for the opportunity to comment on FAR Case 2021-015 – *Federal Acquisition Regulation: Disclosure of Greenhouse Gas Emissions and Climate-Related Financial Risk* ("Proposed GHG Rule").[1] For years, the Associated General Contractors of America ("AGC") has worked with the Federal Acquisition Regulatory Council ("FAR Council") and other federal entities to ensure that our nation has the high-quality infrastructure it needs now and in the future. Federal investment in infrastructure plays an essential role in building our economy and creating well-paying jobs for the American people.

AGC is the leading association in the construction industry representing more than 27,000 firms, including union and open-shop general contractors and specialty-contracting firms. Many of the nation's service providers and suppliers are associated with AGC through a nationwide network of 89 chapters in every state, the District of Columbia and Puerto Rico. AGC contractors are engaged in the construction of the nation's defense facilities, federal facilities, commercial buildings, factories, warehouses, highways, bridges, tunnels, airports, water infrastructure facilities, locks, dams, multi-family housing projects, and more.

The construction industry is the project delivery system for building a safer, healthier, and environmentally sustainable future. Our nation cannot simply wish for a greener future; it must build it. Likewise, the construction industry must be an integral part of the policymaking processes to help ensure that construction firms and the construction workforce can continue to grow and prosper.

AGC is concerned about the establishment of technically unfeasible measures to address climate change that construction firms of all sizes, especially small businesses, cannot meet. Such measures threaten construction firms' ability to compete in the federal construction marketplace and build the infrastructure that the Administration desires to realize its goals.

For the reasons set forth below, the FAR Council should rescind the Proposed GHG Rule, conduct further outreach and research on the consequences and feasibility of implementing such a proposal upon industry and refrain from mandating a rigid approach to reporting on greenhouse gas emissions.

[1] 87 FR 68312 (Nov. 14, 2022) online at https://www.federalregister.gov/documents/2022/11/14/2022-24569/federal-acquisition-regulation-disclosure-of-greenhouse-gas-emissions-and-climate-related-financial.

An outline of AGC's comments on the Proposed GHG Rule are as follows:

I. Background on the Construction Industry and Environmental Stewardship

II. AGC's General Business Concerns with the Proposed GHG Rule

III. Proposal Increases False Claims Act Risks Assumed by Federal Contractors

IV. AGC's Construction-Specific Concerns with GHG Emissions Reporting Generally

V. AGC's Concerns with the Proposed Scope 3 Emissions Reporting Requirement
- **A.** The Construction Industry Faces Unique Challenges in Collecting GHG Emissions Data

VI. Proposal Exceeds Statutory Limits

VII. Additional Concerns
- **A.** The Paperwork Reporting Burden Is Understated
- **B.** More Research is Needed on the Analysis of the Public Burden
- **C.** More Research is Needed to Understand the Potential Impact on Business Participation, Including Small Businesses and Small Disadvantaged Businesses
- **D.** Flawed Compliance Cost Analysis Ignores the Strain this Unfunded Mandate will have on Public and Private Resources

VIII. If the FAR Council Rejects AGC's Recommendation to Rescind the Proposed GHG Rule, it Should Implement Steps to Minimize the Disruption to the Procurement of Federal Construction

IX. Conclusion

AGC provides the following comments to ensure that the Proposed GHG Rule does not upend the expeditious and efficient distribution of taxpayer dollars, while ensuring the efforts to reduce greenhouse gas emissions do not jeopardize U.S. economic competitiveness, supply chain readiness, and energy security.

I. Background on the Construction Industry and Environmental Stewardship

In recent years, AGC has undertaken significant steps to better understand, and educate our members about, the challenges and opportunities the construction industry faces related to climate change. Over the decades of effort on sustainability in general, contractors have improved their operational efficiency and environmental performance on projects through advancements in equipment, fuel, technology, and practices such as recycling and lean construction that reduce waste.

According to a recent survey AGC conducted on sustainability practices, almost 80 percent of respondents have policies in place to encourage recycling.[2] More recently, environmental, social and governance (ESG) considerations are being looked at by construction industry stakeholders — lenders/investors, insurers, public- and private-sector developers of real-estate/infrastructure/industrial projects as well as their

[2] AGC conducted the survey during May 2022. At the time of this writing, it is currently unpublished. AGC will make available a summary of the findings upon request.

customers and clients. AGC expects the demand for, and company disclosure of, information about climate change risks, impacts, and opportunities to continue to grow—even without the Proposed GHG Rule.[3]

In the first half of 2021, AGC convened a Climate Change Task Force to further review these issues. In July 2021, the Task Force issued its final report and recommendations on ways to position construction firms, and the entire construction industry to respond to changing climate.[4] The report also discusses the top impacts associated with climate change for construction markets and construction firms, as well as provides details on opportunities and challenges specific to many of the projects that AGC members build, spanning all major construction markets.

In light of these and other efforts by the construction industry and industry stakeholders to address climate change, AGC is disappointed by the Proposed GHG Rule's framework for climate-related disclosures. The proposed regulations would have an ongoing deleterious effect on the industry by, amongst other things:

- Creating new risks for potential liability for federal contractors and federal construction firms;
- Diverting capital, time, and other resources away from infrastructure investment and into compliance;
- Creating new incentives to scale back greenhouse gas reduction goals; and
- Creating significant new inequities and competitive advantages within the industry, depending on how a construction firm contracts and is organized.

For these reasons and those listed below, AGC has significant reservations about the Proposed GHG Rule and its impact on federal construction contractors.

II. AGC's General Business Concerns with the Proposed GHG Rule

The Proposed GHG Rule establishes novel requirements for most federal contractors in general—federal construction contractors in specific—to begin continuously reporting on greenhouse gas (GHG) emissions and climate-related financial risk. Broadly summarized, the Proposed GHG Rule introduces two new categories for federal contractors, "significant contractors" and "major contractors."[5] Significant contractors, $7.5 to $50 million in federal contract obligations—not revenue—in the prior fiscal year to inventory greenhouse gases will be required to report Scope 1 and 2 emissions[6] and complete an annual GHG emissions inventory on www.SAM.gov. Major contractors, with more than $50 million in federal contract obligations—not revenue—will have the same reporting requirements as significant contractors but will also have to report on scope 3 emissions and develop climate-based targets for reducing emissions, among other requirements. Starting one year after the publication of a final rule, a significant or major must

[3] AGC construction firms are being asked how they are preparing for the impact of climate change on their business (including the impact of extreme weather changes, markets, access to human and material resources, and possible government regulations); the level of greenhouse gas emissions related to their direct, indirect, and third-party supply-chain operations; and the associated costs of climate change initiatives. Developing methods to estimate the impact of climate change on construction businesses is significantly challenging, particularly with a highly complex, fragmented, and project-based construction process. Some companies are reporting data on their public filings and annual reports, others are voluntarily publishing sustainability reports accessible to their clients and the public and/or voluntarily complying with third-party standards.

[4] AGC of America Climate Change Task Force Final Report & Recommendations July 7, 2021, available at: https://www.agc.org/sites/default/files/Files/Communications/AGC_Climate_Change_Task_Force_Final_Report.pdf

[5] 87 FR 68313

[6] Per OMB Memo M-22-06 and as currently defined at FAR 23.001.

have completed a GHG inventory and must have disclosed the total annual Scope 1 and Scope 2 emissions in www.SAM.gov. The additional compliance requirements for major contractors will start two years after publication of a final rule. Once the requirements are in effect, contracting officers shall presume prepositive contractors are "non-responsible" unless an exception applies. Construction companies fail to respond as required and are determined "non-responsible" under FAR 9.104-1 would negate their ability to be awarded a new contract award. *See also* Section III below -Increased False Claims Act Risks Assumed by Federal Contractors.

It is important to that the Proposed GHG Rule's does not create novel categories of contractors. The U.S. Small Business Administration (SBA) delineates small business size standards on an industry-by-industry basis. Small business size standards and corresponding North American Industry Classification System (NAICS).[7] Based on a firm's NAICS code the SBA will determine if a company is a small business based on *revenue* — not *federal contract obligations* — averaged over a period of five years.[8] An illustrative example being if an SBA-designated small business had a federal contract valued at $51 million and made zero profit — or even lost money as is a real possibility in the federal market — the Proposed GHG Rule would treat that small business as "major" contractor requiring the corresponding Scope 1, Scope 2, Scope 3, and other requirements. Further, the disconnect is even more apparent given that a mere three days after the publication of the Proposed GHG Rule the SBA increased the small business size standards.[9] If the goal of the Administration is to grow small businesses — especially small disadvantaged small businesses — the Proposed GHG Rule will not help and will likely have a deleterious effect.

Disappointingly, the Proposed GHG Rule makes no effort in differentiating federal contractors by industry, instead lumping practically every category of federal contractor into a one-size-fits-all bucket. The proposed regulations would instead create a blizzard of new paperwork requirements and the disclosure of far too much immaterial information, assuming the information to comply is even available. The Proposed GHG Rule establishes an aggressive timeframe[10] for federal contractors to understand, begin compliance with a rigid reporting regime, and implement fully these new requirements. According to the Biden administration, the Proposed GHG Rule will require federal contractors to meet standards not required by other contractors in the rest of the world.

Through this action, the United States would become the first national government to strengthen its supply chain by requiring major suppliers to set Paris Agreement-aligned emissions reduction goals.[11]

The Proposed GHG Rule does provides exemptions for a few categories of entities with federal contract obligations.[12] These include:

- An Alaska Native Corporation, a Community Development Corporation, an Indian tribe, a Native Hawaiian Organization, or a Tribally owned concern, as those terms are defined at 13 CFR 124.3;

- A higher education institution (defined as institutions of higher education in the OMB Uniform Guidance at 2 CFR part 200, subpart A, and 20 U.S.C. 1001);

---

7 FAR 19.102
8 13 CFR § 121.201
9 SBA-2022-0015
10 87 FR 68316
11 The White House. Fact Sheet: Biden-Harris Administration Proposes Plan to Protect Federal Supply Chain from Climate-Related Risks. November 10, 2022. Available at: https://www.whitehouse.gov/briefing-room/statements-releases/2022/11/10/fact-sheet-biden-harris-administration-proposes-plan-to-protect-federal-supply-chain-from-climate-related-risks/.
12 87 FR 68313

- A nonprofit research entity;
- A state or local government; or
- An entity deriving 80 percent or more of its annual revenue from Federal management and operating (M&O) contracts that are subject to agency annual site sustainability reporting requirements.

Confusingly, the Biden Administration and the Proposed GHG Rule seemingly expound contradictory justifications for the Proposed GHG Rule when one compares the White House Press Release and the exemption for higher education institutions. The Biden Administration asserted that most federal contractors are already reporting, suggesting that compliance with many of the provisions of the Proposed GHG Rule is already being done.

Today, more than half of major Federal contractors are already disclosing climate-related information. These Federal contractors are among the 18,700 companies globally—worth more than half of global market capitalization—that voluntarily disclose emissions and climate risk through CDP (formerly Carbon Disclosure Project) reporting system, including 1,800 small and medium-sized enterprises.[13]

The Proposed GHG Rule provides the justification for exempting higher education institutions read as follows:

> The exception for institutions of higher education or nonprofit research entities is provided because a large majority of such institutions that are significant or major contractors either already set GHG reduction targets and make sustainability disclosures but are likely doing so (in accordance with current commercial norms for sustainability reporting) with standards and systems other than those specified in this rule, or are pass-through entities with minimal Scope 1 and 2 emissions and little capacity to manage Scope 3 emissions and climate risks.

Therefore, if an exemption is provided for one category (higher education institutions) of federal contractors because most in that category are setting GHG reduction targets and are making disclosures, and according to the Biden administration most federal contractors are also doing the same, why would this exemption not apply to all federal contractors? If this exception is not applied to all federal contractors, what other categories of entities with federal contract obligations would also qualify? Are higher education institutions the most proactive regarding disclosures and reporting to justify an exemption, or are there other categories that are more active and should also be exempt?

A similar argument must be made regarding small business federal contractors. The Proposed GHG Rule exempts Alaskan Native Corporations, Native Hawaiian Organizations and some other small businesses from these new requirements. But the proposal does not exempt *all* small businesses from these requirements. It is patently unfair, arbitrary and capricious, and potentially unconstitutional under the Fifth Amendment, that small businesses—or even *all* disadvantaged small businesses—are not treated equally under the Proposed GHG Rule.

---

[13] [13] The White House. Fact Sheet: Biden-Harris Administration Proposes Plan to Protect Federal Supply Chain from Climate-Related Risks. November 10, 2022. Available at: https://www.whitehouse.gov/briefing-room/statements-releases/2022/11/10/fact-sheet-biden-harris-administration-proposes-plan-to-protect-federal-supply-chain-from-climate-related-risks/.

The facts above alone should be enough to justify a rescission of the Proposed GHG Rule. AGC strongly urges the FAR Council not to institute a top-down, rigid mandate that would require companies to calculate and report both direct and indirect emissions, for which the ability to accurately calculate is not currently feasible. Counting supply chain as well as other types of indirect greenhouse gas emissions (associated with sources that the entity does not directly control) in a mandatory reporting scheme would significantly increase costs to federal construction contractors and potential legal liability—such as under the False Claims Act—by requiring them to track down information that may be difficult—or impossible—to access or verify and reduce the reliability of the disclosures. The FAR Council should establish boundaries on the scope of reporting for entities with complex carbon footprints and include limits on both legal liability and draconian responsibility determinations based on unverifiable, unachievable, and untested emissions requirements.

III. Proposal Increases False Claims Act Risks Assumed by Federal Contractors

As proposed, the rule contemplates several new definitions and several new reporting requirements around GHG.[14] The completeness and accuracy of those disclosures will create challenges and potential risks for the disclosing contractor – including potential greenwashing[15] and violations of the False Claims Act and False Statements Act risks. For example, the False Claims Act has recently been used to pursue federal contractors that do not adhere to cybersecurity reporting standards.[16]

When a construction project will be paid for by the Federal Government, any payment application or invoice made to the government is subject to the False Claims Act. The Act encourages individuals to file claims on behalf of the government; whistleblowers get paid a percentage of recovery and they are protected from backlash. FCA violations result in treble damages (i.e., triple the total actual damages to the government). Each request for payment is treated as a separate violation. Most violations under the FCA also give rise to potential criminal liability as well.

Contractors that are publicly traded could face competing (or even conflicting) reporting standards under the Securities and Exchange Commission's (SEC) proposed greenhouse gas reporting rule (490-page proposal expected to go final spring 2023) that would require them to make environmental, social, and governance disclosures at various times and in different ways. What is more, the U.S. Environmental Protection Agency (EPA) already requires big greenhouse gas emitters and fossil fuel suppliers to report their emissions. Major Defense Department and NASA contractors disclose the EPA data, according to agency records.[17] The proliferation of multiple GHG reporting standards will increase legal risks for contractors, for example, if the disclosures a company makes to compete for a government contract exceed or are inconsistent with what they report in SEC or EPA filings.[18]

---

[14] Once finalized, the FAR Council will revise the Federal Acquisition Regulation (FAR) Part 9 (Contractor Responsibility), Part 12 (Commercial Products and Commercial Services), Part 23 (Environment, Energy, and Water Efficiency), and Part 52 (Provisions and Clauses).

[15] *See* "EarthNGO Mighty Earth filed an SEC whistleblower complaint against global meat processing company." MightyEarth (Jan. 18, 2023), https://www.mightyearth.org/whistleblower-complaint-to-the-securities-and-exchange-commission-against-jbs.

[16] *See* "Justice Department to Fine Contractors for Not Reporting Cyber Incidents." *Wall Street Journal* (Oct. 7, 2021), https://www.wsj.com/articles/justice-department-to-fine-contractors-for-not-reporting-cyber-incidents-11633599001.

[17] https://www.epa.gov/ghgreporting/data-sets

[18] "The nature of the information that would be reported under SEC's proposed climate risk disclosure rule versus EPA's [Greenhouse Gas Reporting Program (GHGRP)] is notably different," states an EPA comment letter submitted on the SEC's proposed rulemaking. "The EPA GHGRP requires certain facilities to report their emissions of GHGs while the Proposed SEC Rule requires registrants to disclose information about climate-related risks, which includes information on GHG emissions." https://www.sec.gov/comments/s7-10-22/s71022-20132508-302990.pdf

IV. AGC's Construction-Specific Concerns with GHG Emissions Reporting Generally

The U.S. Environmental Protection Agency (EPA) estimates that the construction industry emits around 1-2 percent of the total U.S. manmade GHG emissions.[19] These emissions come from equipment use and energy consumption on jobsites. In discussions with AGC, contractors have provided multiple examples of strategies to reduce emissions through choices about equipment and vehicles, efficient lighting and jobsite facilities (e.g., trailers), and even the power tools used on projects. For example, routine equipment maintenance and voluntary "no idling" policies could lead to reduced fuel consumption and related emissions.

AGC members have varied sources of emissions and likewise varied and limited options that are feasible for them to reduce emissions. On top of the unique attributes for each individual construction project (scope, purpose, materials used), each construction firm itself will have unique equipment and energy needs, so much so that meaningful comparisons in carbon performance will be impossible—regardless of the amount of data collected. Furthermore, as discussed below, many of these variables are outside the scope of a contractor's control.

AGC recently conducted a sustainability reporting and practices survey[20] and the results are illustrative about the challenges the construction industry would face if Scope 3 reporting requirements are implemented. Of the respondents to the survey:

- Only 14 percent currently report GHG emissions on *any* project (emphasis added). Six percent report their GHG emissions voluntarily, and eight percent are required to do so.

- Only 11 percent calculate embodied carbon of materials used on a project.

- 61 percent have *zero* full-time, in-house employees dedicated to sustainability (e.g., greenhouse gas reporting, ESG, green building, sustainable purchasing, etc.). An additional 15 percent have an employee with part-time responsibilities only.

As the survey shows, most construction firms do not currently have systems in place to collect and meaningfully report GHG emissions data to registrant companies in order to comply with the proposed Scope 3 emissions reporting requirements. For commercial construction companies, climate data is not easily aggregated or consistently measured throughout the business's footprint. Many construction firms manage a highly fragmented multi-employer workforce that uses downstream vendors and materials suppliers across multiple jobsites. Some of those businesses may already report GHG estimates. For others, their data collection and analysis processes may be nonexistent or evolving. Data collection and analysis

[19] There is not a definitive percentage of GHG emissions for the construction industry. AGC uses the estimate of 1-2% of U.S. total emissions based on two resources. The U.S. EPA inventory of GHG emissions and sinks indicates that the equipment from construction and mining combined emitted 1.1 percent of total U.S. manmade GHG emissions in 2019. This does not reflect electricity use onsite. *See* https://www.epa.gov/sites/production/files/2021-04/documents/us- ghg-inventory-2021-main-text.pdf. Another report from the U.S. EPA focuses solely on construction and estimates that construction industry accounts for 1.7 percent of total U.S. GHG emissions. *See* U.S. Environmental Protection Agency, Potential for Reducing Greenhouse Gas Emissions in the Construction Sector, February 2009, archived copy available online at https://archive.epa.gov/sectors/web/pdf/construction-sector-report.pdf. This report is dated; however, it is the only comprehensive look at the construction industry's emissions as well as the intensity of those emissions. The construction industry's carbon intensity is low, meaning a small amount of emissions come from many discrete sources (i.e., equipment, project sites).
[20] AGC conducted the survey during May 2022. At the time of this writing, it is currently unpublished. AGC will make available a summary of the findings upon request.

processes continue to evolve, as do the standards for auditing and assurance of climate and ESG information. A requirement to collect information from suppliers, subsidiaries, purchasers, or consumers would impact the reliability of the relevant data. There could also be significant roadblocks related to data accessibility, sharing, or privacy —creating problems for both reporting and assurance.

Specifically in the case of commercial construction, it is difficult to quantify direct mobile source emissions from equipment on the jobsite that the contractor owns or directly controls, as testing methods and calculations are subjective and inaccurate at best. Moreover, it becomes nearly impossible for a contractor to independently collect and verify emissions data associated with material inputs or the outputs of a completed project.

V. AGC's Concerns with the Proposed Scope 3 Emissions Reporting Requirement

AGC's primary concern with the proposed regulations is the inclusion of a new Scope 3 reporting regime for Major contractors, which would have the effect of mandating emissions tracking and disclosure for many, if not most, commercial construction firms. The Scope 3 emissions standard developed by GHG Protocol is still relatively new and there remains significant uncertainty about the data and methodologies necessary to achieve a robust Scope 3 reporting system.

It is important to note that Scope 3 emissions are also "overlapping" emissions with Scope 1 and Scope 2 emissions. In other words, one company's Scope 1 emissions are another company's Scope 3 emissions, and vice versa. In the proposed regulations, registrants who determine that their Scope 3 emissions are material, or those who have set emissions reduction targets would thus require construction firms to track and report their Scope 1 and 2 emissions, as well as data, such as embedded carbon in building materials, that may or may not be available. The disclosures will be an exercise in data gathering rather than having a meaningful impact on emissions reduction, where corporate resources would be more usefully deployed.

Additionally, AGC has concerns that the effect of mandating Scope 3 emissions disclosure would actually create a perverse incentive for federal contractors to curtail, or eliminate entirely, GHG reduction goals that include Scope 3 emissions. The net effect would be to set less ambitious goals for GHG reductions or setting no goals at all.

As outlined elsewhere, collecting emissions data from subcontractors, especially in construction, can be particularly challenging. Requiring such disclosures of subcontractors could put into conflict other ESG priorities, such as meeting contractual obligations, or internal goals, for contracting or subcontracting to disadvantaged and minority businesses under the federal Small Business Act program.

A. <u>The Construction Industry Faces Unique Challenges in Collecting GHG Emissions Data</u>

While AGC has taken proactive steps to better understand the industry's impact on climate change, we have also emphasized some of the limitations that the construction industry faces in assessing and reducing its environmental impact. Importantly, contractors have direct control over *only* the means and methods of the construction process. With rare exception, AGC members do not decide what to build or where to build or determine how structures will appear or how they will perform. Additionally, while the industry has taken strides to develop tools to track, for example, embodied carbon in building materials and/or on-site carbon emissions, these tools are still in their infancy and will need time to develop.

The construction industry faces many unique challenges in both tracking and reporting GHG emissions data, which would add to the difficulty of registrants disclosing their Scope 3 emissions. Some of these unique challenges include:

- Construction firms conduct most of their work on project-specific job sites, most of which are not owned/operated by the firm. Each project and job site are unique, including, for example the equipment, subcontractors, and materials used for the project. Whereas there could be fewer variables when tracking GHG emissions at fixed facilities, collecting that data on construction job sites has proven to be challenging.

- Included in the challenges of collecting GHG emissions data from job sites are the job and contract specific use of, for example, on-site energy usage. If a contract specifies that the project owner pays for electricity usage on project, a contractor would have to rely on the owner to willingly provide them with information about the electricity usage on the site. Some contractors have relayed to AGC that this information can be difficult to obtain.

- Additionally, on any given project there could be hundreds, if not thousands, of pieces of equipment and tools used that are not easily tracked—or where the technology to track use or resultant emissions is not widespread or does not yet exist.

- AGC members familiar with tracking have shared with AGC their challenges with Scope 1 and 2 emissions: including availability of data, staff to track down and manually process/enter data, expense and availability of qualified consultants, and the time it took to initiate this type of analysis. Several of these firms are large, multi-billion-dollar businesses, and, even so, they do not have the resources and in-house expertise to effectively track and report the vast scope of Scope 3 emissions.

- General contractors vary in their use of subcontractors compared to work that is self-performed. For contractors that perform as a construction management firm, very little work is self-performed. Collecting GHG emissions data from subcontractors can be very challenging.

- Environmental product declarations (EPDs) for materials used in construction projects are increasing in use and availability. They are not, however, currently available for every product. Even if EPDs were universal, capturing and extrapolating that data across an entire portfolio of projects would be a herculean task—and one that could have to be repeated anew each year with varying results depending on the projects themselves for that reporting period.

- Furthermore, EPDs or sourcing of materials thought of as "green" may not tell the whole story. For example, materials may have supply chain and availability concerns resulting in longer shipping distances (and associated emissions). Other materials may have better environmental performance under a life cycle assessment approach than EPDs.

- Climate policies, such as the Proposed GHG Rule, that would encourage wide-spread reporting of non-material (and even speculative, especially when conducting medium- or long-term analysis) climate risks, can impact material selection and supply chains leading to shortages of common materials or creating demand for products that are not widely available. This may increase costs for capital expenditures.

- Across industries, the cost for compliance will likely be passed on to consumers. In the construction of infrastructure, that can mean passing along the cost to public owners—which is a detrimental unintended consequence of the rule on the public.

For the above reasons, AGC recommends the FAR Council rescind the Proposed GHG Rule, conduct further outreach and research on the consequences to and feasibility of implementing such a proposal upon industry, and refrain from mandating a rigid approach to reporting on greenhouse gas emissions.

VI. Proposal Exceeds Statutory Limits

Aside from the magnitude and complexity of determining emissions and the increased costs to contractors, the rule may exceed the statutory limits of the agencies promulgating the rule. While the Department of Defense, the National Aeronautics and Space Administration and the General Services Administration are granted rulemaking power, AGC maintains that Congress did not authorize these agencies, each tasked with providing for our military, exploring space, and supporting Government operations, respectively, to engage in substantive environmentally-based climate rulemaking.

The U.S. Supreme Court's recent decision in *West Virginia v. EPA*[21] limits even the U.S. Environmental Protection Agency's options for regulating greenhouse gas emissions. The Court relied on the "major questions" doctrine that holds that in "extraordinary cases" of "political and economic significance," where an agency makes "unheralded" use of its authority, the agency must be able to point to a "clear statement" from Congress authorizing its action.

In addition, the Proposed GHG Rule exceeds the Department of Defense, the National Aeronautics and Space Administration and the General Services Administration's authority under the Federal Property and Administrative Services Act (the "Procurement Act").[22] Any action taken under a claim of Procurement Act authority must have a close nexus to, and advance, the purposes embodied in the Procurement Act in order for that action to be lawful under that act – namely, economy and efficiency in procurement. As discussed above, the Proposed GFG Rule do not advance economy and efficiency in procurement. Because the government has failed to demonstrate the requisite nexus, the Proposed GHG Rule exceeds the related authorities of the FAR Council, and its implementation via the Proposed GHG Rule is subject to challenge as *ultra vires* action under the major questions and nondelegation doctrines.

VII. Additional Concerns

AGC is concerned that the Proposed GHG Rule grossly miscalculates the impact to federal contractors in general, and federal small contractors in specific

A. The Paperwork Reporting Burden Is Understated

AGC is concerned that new reporting requirements related to greenhouse gas emissions would shift resources away from the construction industry's primary job of building our quality of life. The estimates of compliance costs and public reporting burden hours included in the FAR Council's *Federal Register* notice (including the time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information) do not accurately account for how labor-intensive these new reporting requirements would be; notably, the proposal estimates compliance with *only* the Scope 1 and Scope 2 greenhouse gas emissions reporting requirements in the first year will require several employees plus consultants to work dozens of hours, at a significant cost. **The paperwork requirements under the proposal would be challenging and resource intensive and the reporting burden is understated.**

---

[21] https://www.supremecourt.gov/opinions/21pdf/20-1530_n758.pdf
[22] 40 U.S.C. § 101 et seq. The president asserts that E.O. 14063 is authorized by the Constitution and the Federal Property and Administrative Services Act (the "Procurement Act").

B. More Research is Needed on the Analysis of the Public Burden

The Proposed GHG Rule dramatically expands the time and capital expenses associated with compliance without reasonably weighing those costs against the risks it purports to guard against. AGC anticipates a significant diversion of corporate leadership's attention and company resources away from developing new products, managing supply chains, reducing costs, and improving customer service in order to comply with these initiatives. These disruptions are not adequately accounted for in the proposed regulations. As such, they will be an undue burden on all companies directly or indirectly subject to the Proposed GHG Rule.

The Proposed GHG Rule's assertion that it "may" have a significant economic impact on a substantial number of small entities within the meaning of the Regulatory Flexibility Act[23] is perplexing given, as explained above, the designations of "significant" and "major" contractors are based on *contract obligations* and not *revenue* as the SBA categorizes small entities. Despite this critical fact, the Proposed GHG Rule does not base its calculations on the contract obligations per entity. Instead, the calculations for impacted small entities are based on number of small entities registered as small for their primary NAICS code in www.SAM.gov, which is approximately 364,290 or 74 percent of all registered entities.[24] AGC asserts that the public burden is significantly more than is concluded in the initial regulatory flexibility analysis. **The above analysis of the number of estimated small businesses alone is so fundamentally inaccurate that it should be enough for the FAR Council to rescind the Proposed GHG Rule and do more research.**

In addition, the costs associated with compliance and the time required for the review of Proposed GHG Rule are significantly higher. Curiously, the Proposed GHG Rule is able to calculate the time and cost for all federal small contractors but is unable to provide such analysis for the government contracting officers that will be tasked with enforcement. Logically knowing the time and cost for a government official to comply with a government rule should be easier than calculating the impact on the private sector. Even using the Proposed GHG Rule's calculated costs, the Proposed GHG Rule will present a significant cost to small businesses in perpetuity. The analysis states:

> Costs for small businesses expected to be impacted by this rule include the cost of regulatory familiarization, completing the annual SAM representations, and conducting the Scope 1 and 2 GHG inventory each year. The total estimated cost to small businesses is \$103,054,261 (17 percent of the total estimated public costs) in the initial year of implementation and \$62,514,193 (14 percent of the total estimated public cost) in subsequent years.[25]

For federal contractors with no experience operating the Proposed GHG Rule reporting regime—a significant share of market—it will take significant expense and workhours to read, understand, and implement the terms and conditions. The more risks that contractors bare, the higher bids will be submitted during a time when federal agencies are increasingly receiving bids that exceed the government estimates for the project, resulting in bid busts. The FAR Council is well aware of the significant time and cost to federal agencies to request additional funding from Congress; a process that can take years and cost the agency millions of dollars in manhours. These are just a few of the many errors in the analysis section. **The government analysis fails to perform the required analysis, and the figures used are so grossly inaccurate that the FAR Counsel should rescind the Proposed GHG Rule.**

---

[23] 87 FR 68324
[24] *Id.*
[25] *Id.*

C. More Research is Needed to Understand the Potential Impact on Business Participation, Including Small Businesses and Small Disadvantaged Businesses

Transparency and clear requirements are important for providing free and open competition to our nation's businesses and accountability to the American people. However, the Proposed GHG Rule mandates and the predictably burdensome reporting requirements will undermine the significant infrastructure investments recently enacted into law. It will preclude many businesses from participating in the federal market, lowering competition in the federal market. It is important to note that the federal construction industry has long been a well-regulated industry, ensuring that workers are safe, taxpayer dollars are properly spent, and the environment is protected. Businesses of all types—especially small businesses—are confronted with an unparalleled crisis that threatens them both financially as well as the health, safety, and welfare of themselves and their employees. These businesses should not be burdened or distracted with vague regulations and reporting requirements, especially during the crisis brought about by the COVID-19 pandemic and accompanying supply chain disruptions that continue to contribute to higher construction material costs and longer lead times for their delivery, if they are even available.[26]

Federal construction contracting, in general, is a challenging market to participate. Businesses in the federal area must comply with numerous regulations, reporting requirements, security clearances, small business participation plans, cybersecurity requirements, and so on. It is important to ensure that federal regulations do not create unnecessary barriers for businesses, especially for small businesses with limited resources. As such, it is disconcerting that the Proposed GHG Rule fails to provide adequate analysis on the impact to small prime contractors and small subcontractors.

Federal agencies have small business participation goals which generally require a certain percentage of the total value of all small-business eligible prime contracts be awarded to small businesses. According to a recent report by the Congressional Research Service, federal agencies and prime contractors consistently have difficulty meeting the goals of 5% to Women-Owned Small Business (WOSBs) and 3% to Historically Under-utilized Business Zones Small Business (HUBZone).[27] As explained above, the Biden Administration has ordered dramatic increases to these goals of at least 12% of all federal contract spending to SDBs in fiscal year 2023. Therefore, it is important that any new regulations and reporting requirements do not discourage participation by small businesses, especially participation by WOSBs and HUBZones—which are not exempt from the proposal. However, there is little to no accurate analysis of the impact on small business contractors at all tiers—including any potential decline in participation—due to the cost and time of complying with the Proposed GHG Rule.

As stated above, there is no indication that the U.S. Small Business Administration was consulted in the drafting of the Proposed GHG Rule, despite the substantial number of small businesses that will be impacted. AGC encourages the FAR Council to collaborate with the U.S. Small Business Administration to better analyze any potential impact to our nation's small businesses. **Therefore, the Proposed GHG Rule should be rescinded until more research and analysis are preformed to understand its impact on businesses—especially Small Businesses and SDBs—participation.**

D. Flawed Compliance Cost Analysis Ignores the Strain this Unfunded Mandate Will Have on Public and Private Resources

---

[26] Associated General Contractors (July 2022). *AGC Construction Inflation Alert.* Retrieved from: www.agc.org/sites/default/files/users/user21902/Construction%20Inflation%20Alert%20Cover_Jul2022_V4.pdf

[27] For additional information, see CRS Report R45576, *An Overview of Small Business Contracting*, by Robert Jay Dilger.

AGC is concerned that the Proposed GHG Rule represents an unfunded mandate that will diminish the economy and efficiency of many federal construction projects and needlessly require federal employees to spend significant time to comply with the Proposed GHG Rule. As explained above, the Proposed Rule will significantly increase the number of written communications between interested parties—taking significant time to review—with little tangible benefit for the federal agency procuring construction services. There will be a significant increase in public comments that will require an increase in time to review whether one of the exceptions the Proposed GHG Rule applies in determining whether or not a federal contractor is developing science-based targets for reducing GHG emissions. AGC members currently experience difficulty with federal agencies awarding contracts and issuing *Notice To Proceed* orders in a timely and reasonable manner. Unless the relevant federal agencies substantially increase the number of personnel, the Proposed GHG Rule will further strain the federal workforce and contribute to further delays in federal construction.

An axiom of contracting holds that the more risk is shifted to a contractor the higher their bid. The Proposed GHG Rule will cause a significant increase in the costs of bids for federal solicitations. This will inevitably cause an increase in bid busts on federal solicitations. The FAR Council is well aware of the costs associated with bid busts. The Proposed GHG Rule will lead to project award delays and significant costs to individual agencies as it goes back to request more appropriations from Congress. **AGC is concerned that the Proposed GHG Rule represents an unfunded federal mandate that will further strain federal resources and, in turn, increase delays in awarding contracts, construction starts, and undertaking other requirements necessary to deliver infrastructure projects.**

VIII. If the FAR Council Rejects AGC's Recommendation to Rescind the Proposed GHG Rule, it Should Implement Steps to Minimize the Disruption to Procurement of Federal Construction

As stated above, AGC strongly recommends that the FAR Council rescind and to do more research on the impact of the Proposed GHG Rule will have on industry, and in particular small businesses. If, however, the FAR Council chooses to reject our primary recommendation, then AGC urges the FAR Council:

- To evaluate the need for a GHG emissions disclosure based on NAICS codes;
- Clearly align "Significant" contractor with the SBA size standard;
- Make these requirements voluntary; and
- Provide waiver authority by federal staff at the field level for the construction industry.

IX. Conclusion

The construction industry must be an integral part of the policymaking processes to help ensure that construction firms and the construction workforce can continue to grow and prosper. It is important to reiterate that over the decades, contractors have improved their operational efficiency and environmental performance on projects through advancements in equipment, fuel, technology, and practices such as recycling and lean construction that reduce waste AGC is concerned about onerous requirements that add regulatory and other roadblocks to improving the efficiency of our infrastructure.

For these reasons henceforth, AGC respectfully requests the FAR Council rescind the Proposed GHG Rule, conduct further outreach and research on the consequences to and feasibility of implementing such a proposal upon industry and refrain from mandating a rigid approach to reporting on greenhouse gas emissions.

If you would like to discuss this matter with us further, please do not hesitate to contact AGC.

Sincerely,

Jordan Howard

Jordan F. Howard
Counsel
Federal Construction & Regulatory Affairs
Associated General Contractors of America