

Who Will Reap From FLEEEP?

Gaining New Federal Contracting Business Under Obama's Executive Order on Federal Agency Sustainability

On Oct. 5, 2009, President Obama issued an Executive Order (No. 13514) on "Federal Leadership in Environmental, Energy, and Economic Performance" ("FLEEEP") that creates 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. How can businesses gain an early advantage under FLEEEP to win business away from incumbent contractors?

A crucial aspect in 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 the green parlance, the emissions of a firm (the Federal agency itself in this case) are "scope 1 emissions;" and the emissions of the electric generating utility that supplies electric power to a firm (federal agency) are the firm's "scope 2" emissions. "Scope 3 emissions" are those of the contractors who supply products and services to the firm, in this case, to the Federal agency. The public policy rationale here is that while the firm, the buyer of products and services, did not emit those scope 2 and 3 emissions, the firm in a sense responsible for them. The Order explicitly requires federal agencies to inventory, report and reduce all three -- scope 1, 2, and 3 emissions, although the scope 3 emissions are subject to a different percentage reduction target than the target for scope 1 and 2 emissions.

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

FLEEEP is not the first occasion that a major procurer of products and services decided to examine its scope 3 emissions from its supply chain. Wal-Mart has already taken this step and claims it will create a sustainability index for suppliers, presumably to use to select future suppliers. FLEEEP, if fully implemented, adds the nation's largest public supply chain to the largest private supply chain (Wal-Mart) in leveraging sustainability. Other corporations with large supply chains are following suit. What firms who hope 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 won't really change procurements unless the agencies change the criteria by which they evaluate bid proposals, so as to give weight to "greenness." Remarkably, recent federal contracts for services incorporate little recognition of, or preference for,

“green” contractors, even in EPA contracts. Contracts for goods do incorporate some “green” criteria, largely because of statutory requirements for federal purchase of Energy Star appliances, and the recycled content of paper and other materials.

Does FLEEEP change the agencies’ procurement selection criteria to give weight to greenness? At first blush, FLEEEP only requires recommendations for such changes, which may never be adopted. For example, the section on “Vendor and Contractors emissions” (sec. 13) requires General Services Administration (GSA) merely 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.” 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.¹ Consequently, many companies may take a wait-and-see approach to FLEEEP.

However, such companies may be left behind. Broader examination of the Order reveals that federal agencies will have little choice but to act quickly.

First, agency compliance with the Order is not optional. The Order charges the Office of Management and Budget (OMB) Director and the Chair of the Council of Environmental Quality (CEQ) in the White House to ensure that federal agencies are held accountable for conformance (see sec. 3(e)). The OMB, of course, has considerable leverage, as OMB oversees each agency’s budget.

Second, agencies must act quickly as the Order’s schedule puts each agency in a time bind. Within 30 days of the Order’s issuance, November 4, 2009, by my count, each agency head must have appointed a “Senior Sustainability Manager” from “among the agency’s senior management officials.” By July 31, 2010, the Order requires the agency head to set an agency-wide percentage reduction target for the agency’s scope 3 emissions by 2020, off a 2008 baseline.² (Establishing a 2008 emissions baseline could be problematic and will require careful scrutiny of the

¹ “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.” (Sec. 20(e) FLEEEP)

² The timing is even tighter for setting the agency’s target for scope 1 and 2 emissions, January 3, 2010.

contractors' reporting methodologies.) In addition, the agency head must by that date submit a Strategic Sustainability Performance Plan. Obviously, the agency cannot select a percentage reduction target or formulate a performance plan unless they know what the contractors' baseline emissions were in 2008. To obtain that, the agency needs to quickly choose and adopt a carbon reporting protocol for its contractors.

While the Order does not specify what is an acceptable reporting format, it invites "using accepted greenhouse gas accounting and reporting principles." These would likely include the Greenhouse Gas Protocol (World Resources Institute), and the protocols under EPA's Climate Leaders program, and the Climate Registry. As for a private supply chain, Wal-Mart asks its vendors to report their greenhouse gas emissions to the Carbon Disclosure Project (CDP), 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 the data and the flexible software to report the contractor's emissions under the federal contract, including emissions from subcontractors as well. Significantly, these emissions associated with a specific federal contractor 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 puts requirements on 95% of new contract actions, including task and delivery orders. These actions, for products and services (with the exception of weapons systems acquisitions) must meet the Order's specified sustainability requirements (see 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 95% goal.

In short, a Federal agency must quickly include in their future contracts some requirement on contractors to report their carbon emissions under specified protocols. Otherwise, the agency cannot establish a baseline, develop a Strategic Sustainability Performance Plan, set a reduction target for scope 3 emissions, or lay the groundwork for future compliance.

Astute green firms seeking more federal business will anticipate these requirements on contractors. They will have the software in hand, using widely accepted carbon reporting protocols, to provide what the agency needs to determine their scope 3 emissions, including for subcontractors. Further, these 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. (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.") These firms will also want to show the agency the carbon footprint reductions that they are ready to offer, compared to what characterizes the incumbent. 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 in their selection of the winning bidder. Those requirements, not what is in the Executive Order, would be the basis for challenging whether the agency followed their own rules in awarding the contract.

FLEEEP, if conscientiously implemented, has the potential to "green" the federal supply chain and set an example for other governmental entities at the state and municipal level. Even NGO's, 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.

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