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PRESIDENT OBAMA'S OCTOBER 5 EXECUTIVE ORDER ON ENVIRONMENTAL AND ENERGY PERFORMANCE CHANGES GOVERNMENT ACQUISITION OF BUILDINGS AND SERVICES

GOVERNMENT CONTRACTS ALERT

President Obama's October 5 Executive Order titled "Federal Leadership in Environmental, Energy, and Economic Performance" signals substantial changes in how the federal government purchases construction services, buildings and just about everything else. The Order establishes an integrated strategy for sustainability in federal government activities and identifies as a priority for federal agencies a reduction in greenhouse gas emissions. The Order targets federal procurement, stating that the policy of the U.S. government in this area shall be to "leverage agency acquisitions to foster markets for sustainable technologies and environmentally preferable materials, products and services" and "design, construct, maintain and operate high performance sustainable buildings in sustainable locations."

To these ends, the Order defines standards for the location, construction and operation of federal buildings, as well as emissions reductions from government contractors and vendors. Without doubt, and very quickly, the Order's mandates will significantly affect how the government buys from the private sector.

Framework of the Executive Order

The Executive Order can be broken down into four mandates: (i) establishment of greenhouse gas percentage emissions goals; (ii) articulation of specific action goals; (iii) designation of responsibility within the government for implementing the Order's requirements; and (iv) recommendations for siting and operation of government buildings.

Greenhouse Gas Percentage Emissions Goals

The October 5 Order contains overarching requirements for federal agencies to establish targets for the reduction of greenhouse gases. Specifically:

- Within 90 days of the Order, each agency must establish a percentage target for agency-wide reductions of scope 1 (direct emissions from sources owned or controlled by the government) and scope 2 (direct emissions from generation of electricity, heat or steam purchased by an agency) greenhouse gas emissions in absolute terms by 2020.¹
- Within 240 days of the Order, each agency must establish a percentage target for agency-wide reductions of scope 3 (emissions from sources not owned or controlled by the government but related to agency activities such as vendor supply chains and delivery services) greenhouse gas emissions in absolute terms by 2020.
- Within 15 months of the Order, and annually thereafter, each agency must establish and report a comprehensive inventory of absolute greenhouse gas emissions.

Action Goals

Next, the Order lists action goals for each government agency, including the improvement of water efficiency and management, pollution prevention and waste elimination and advancement of local and regional integrated planning. Specific measurement standards and practices accompany each action goal. Two of the goals directly impact federal procurement, as each agency must:

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- Implement “high performance sustainable federal building design, construction, operation and management, maintenance and deconstruction”; and
- Advance sustainable acquisition to ensure that 95 percent of new contract actions including task orders are energy-efficient, water-efficient, bio-based, environmentally preferable, non-ozone depleting and contain recycled content, non-toxic or less-toxic alternatives.²
- The measurement standards and practices relevant to the procurement goals are explained further in the section ‘Provisions Affecting Federal Contractors.’ They will quickly result in the insertion of new clauses in federal government contracts.

Implementation Responsibility

The Executive Order also establishes responsibility within the government for implementation of the Order’s mandates by, among other actions, creating a steering committee on federal sustainability, granting new duties to the Office of Management and Budget (OMB) and the Council on Environmental Quality (CEQ) chair and tasking the Department of Energy (DOE) with development of greenhouse gas reporting and accounting procedures.

Siting and Operation of Government Buildings

Finally, the Executive Order affects the manner by which sites are selected for federal buildings and by which they are operated. The Department of Transportation (DOT) is tasked with coordinating with other agencies to provide recommendations within 180 days to the CEQ regarding sustainable location strategies for site selection of federal facilities. Similarly, the General Services Administration (GSA) is to coordinate an effort to provide the CEQ with recommendations to achieve increased usage of public transportation by federal employees. The Environmental Protection Agency (EPA) is required to provide recommendations within 60 days of the Order regarding guidance for stormwater discharges at federal facilities.

These recommendations will result in significant changes in how the government develops, constructs and operates new buildings.

Provisions Affecting Federal Contractors

As set forth above, the Order’s action goals will quickly affect government contractors, particularly landlords, developers and construction companies. Specifically, in describing implementation of the action goals, the Order imposes the following requirements for federal buildings:

- By 2020, all new planned federal buildings must be designed to achieve zero-net-energy by 2030;
- All new construction, major renovation or repair and alteration must comply with the Guiding Principles for Federal Leadership in High Performance and Sustainable Buildings (the Guiding Principles);
- By 2015, at least 15 percent of the federal buildings over 5,000 gross square feet and building leases over 5,000 gross square feet must meet the Guiding Principles and each agency must make progress on an annual basis towards achievement of 100 percent conformance;
- Federal agencies must pursue cost-effective innovative strategies, such as vegetated roofs, to minimize consumption of water, energy and materials;
- Agencies are to manage existing building systems to reduce energy, water and material consumption and must identify alternatives to renovation that reduce existing buildings’ deferred maintenance costs;
- Agencies must identify opportunities to consolidate and dispose of assets, optimize performance of existing assets and reduce associated environmental impacts, when adding assets to their real estate portfolio; and
- Agencies must also ensure that rehabilitation of historic buildings use best practices to promote long-term viability.

The building requirements are accompanied by new, more broadly-applicable procurement rules. Agencies are to ensure that 95 percent of their new procurement actions are energy and water efficient, biobased and environmentally preferable, non-ozone depleting and contain non-toxic and less toxic materials. The Order names the following illustrative standards for compliance:

- Energy Star or Federal Energy Management Program designation; and
- Electronic Product Environmental Assessment Tool certified.

Finally, the Order establishes a review and recommendation process of potentially huge significance to all government contractors and vendors. Within 180 days, GSA is to lead an effort to provide recommendations to the CEQ and OMB regarding the feasibility of tracking and reducing greenhouse gas emissions from the supply chain to the federal government. The recommendations are to explore the following:

- A requirement for vendors and contractors to register with an organization for reporting greenhouse gas emissions;
- Mandating that contractors develop and report a greenhouse gas inventory and their efforts to mitigation emissions; and
- The use of federal government purchasing preferences or other incentives for products manufactured using processes that minimize greenhouse gas emissions.

In conclusion, federal procurements may soon change as a result of this Order. Within the next fiscal year, many contractors may see new procurement preferences, or new emissions reporting requirements. Developers and construction companies will need to focus on the sustainability of potential sites, as well as building efficiency targets and reporting. All contractors will become accustomed to procurement provisions governing the content and performance of their products.

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¹ Where appropriate, agencies may exclude direct emissions from vehicles, aircraft and vessels owned and operated by the agency and used in combat operations, law enforcement, emergency response, or spaceflight, and equipment and from electric power produced and sold commercially to other parties in the course of regular business.

² Weapon system acquisitions are exempt from this requirement.