of construction firms in the United States; they build 63% of U.S. construction, by value, and account for 68% of all construction industry employment.

Based on an analysis of federal contracting data, ABC estimates that, in FY 2021, over $4.5 billion in federal construction contracts valued at between $7.5 million and $50 million were awarded to at least 90 contractors that would be deemed significant under the proposed rule.[7] This estimate does not capture additional contractors that may be deemed significant if they

1. **The Proposed Rule Harms Competition, Economy and Efficiency in Federal Procurement, Violating Federal Procurement Statutes.**

The foundation for the federal government's procurement requirements is the Competition in Contracting Act of 1984.[12] CICA was enacted to ensure that all interested and responsible parties have an equal opportunity to compete for and win federal government contracts. Full and open competition means that all responsible sources are permitted to submit competitive proposals on a procurement action, without favoritism or discrimination in the procurement process. CICA requires, with certain limited exceptions, that the federal government promote full and open competition in awarding contracts.[13]

Of particular significance to the proposed rule, CICA expressly bars federal agencies from using restrictive bid specifications to effectively discourage or exclude contractors from the pool of potential bidders or offerors. As the act states, agencies must solicit bids and offers "in a manner designed to achieve full and open competition" and "develop specifications in such a manner as is necessary to obtain full and open competition."[14]

The proposed rule conflicts directly with CICA by requiring federal agencies to discriminate against contractors that are unwilling or unable to disclose and/or reduce GHG emissions. By demonstrating a preference toward a narrow class of contractors, this proposal clearly does not "obtain full and open competition" and is therefore unlawful under CICA.

Further, the FAR Council claims statutory authority to promulgate the proposed rule under the Federal Property and Administrative Services Act of 1949,[15]

means that contractors deemed significant or major will be forced to hire substantial numbers of new employees and outside consultants to effectively understand and implement the proposed rule's provisions or be barred from federal contracting opportunities.

Firms designated as major contractors under the proposed rule would face additional, more onerous compliance costs. These contractors are required to submit the CDP's climate change questionnaire and pay the organization's fees,[18] develop science-based reduction targets and disclose Scope 3 emissions in addition to Scope 1 and 2.[19]

While all of these provisions will require burdensome and costly new activities by contractors to ensure compliance, the Scope 3 disclosure requirement will place unprecedented new burdens on contractors. The proposed rule states that contractors should follow the GHG Protocol Corporate Accounting and Reporting Standard for completing inventories of Scope 1, 2 and 3 emissions.[20]

According to an analysis of this protocol by the European Network of Construction Companies for Research and Development, Scope 3 emission sources by construction companies include employee commutes via private vehicle or public transit, transportation and disposal of waste from construction activities, embodied GHG emissions in the production of construction materials, and subsequent emissions from the usage of buildings, roads and other infrastructure deemed to be the "product" of the contractor.[21] Attempting to document the total emissions from this vast suite of activities would likely cost millions of dollars annually for contractors, and may not even be feasible in some cases due to a lack of data.

Another factor that will make this rule especially costly and burdensome for construction contractors is the high level of subcontracting within the construction industry. Prime contractors utilize numerous specialty contractors on most significant projects. For example, 93% of respondents to an ABC survey conducted in September 2022 indicated that more than two subcontractors would be required for contracts over $35 million in value, with respondents most frequently indicating such projects require 10 to 15 subcontractors.[22]

The proposed rule fails to provide clarity on third-party compliance, meaning the burden for disclosure of subcontractor emissions appears to fall entirely on prime contractors. It will be extraordinarily difficult for prime contractors to obtain this data from subcontractors who do not have the knowledge or resources to effectively provide it.

Therefore, the proposed rule represents a massive increase in contractor costs thataaoTQq0.00000912 0

evidence.[28] The proposed FAR Council rule offers explanations for its GHG emissions disclosure and reduction requirements that run counter to the evidence. The use of internally contradictory reasoning also indicates arbitrary action.[29] The proposed rule claims that its new requirements may promote greater efficiency or reduced costs for contractors.[30] As demonstrated in our comments, this is clearly contradicted by the increased costs and reduced competition that will result from this proposal.

As the Supreme Court has also held, an agency that purports to be changing longstanding policies, as is certainly occurring here, must also consider costs to regulated parties, as well as the reliance interests of the regulated parties.[31] Government contractors in the construction industry have long relied on the principle of government neutrality in procurement to provide competitive, responsive a31

Reporting Standard.[34] These standards were developed by the World Resources Institute and the World Business Council for Sustainable Development, both private nonprofit organizations without any accountability to the contractors and taxpayers that these regulations will ultimately impact.

Requirements imposed on major contractors raise additional issues regarding delegation of agency authority. Major contractors are required to complete their annual emissions disclosures by completing portions of CDP's climate change questionnaire.[35] CDP, another private nonprofit organization, makes frequent changes to its climate change questionnaire, meaning CDP will have ongoing authority to alter which disclosures major contractors are required to make.[36]

Perhaps most concerning of all is the FAR Council's delegation in regard to science-based emission reduction targets. The agencies state that major contractors must have these targets validated by the Science Based Targets initiative.[37] The SBTi is an initiative of the WRI, CDP, World Wildlife Foundation and the United Nations Global Compact.[38] Troublingly, this provision of the proposed rule ventures beyond allowing nonprofits to set standards, granting private groups and foreign governments direct decision-making authority over federal procurement.

Conclusion

For all of the reasons discussed in this comment letter, ABC strongly urges the FAR Council to withdraw the proposed rule and reconsider its approach to reducing GHG emissions by federal contractors. ABC stands ready to partner with the federal government to establish more feasible and less punitive methods of addressing this important issue.

Thank you for the opportunity to submit comments on this matter.

Respectfully submitted,

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[34] See rule: https://www.federalregister.gov/d/2022-24569/p-18.
[35] See rule: https://www.federalregister.gov/d/2022-24569/p-20.
[36] https://www.cdp.net/en/guidance/guidance-for-companies: See "CDP questionnaire changes 2022-2023."
[37] See rule: https://www.federalregister.gov/d/2022-24569/p-21.
[38] https://www.wri.org/initiatives/science-based-targets.