BY IRVIN GRAY, JD, MBA, CPCM, CFCM, CCCM and MARC J. SOSS, JD, LL.M

This month's column has two differences.

First, we have a guest co-author: Marc J. Soss, Esquire, who is an attorney and retired Supply Corps officer. Marc and I served together as U.S. Navy officers in Afghanistan in 2006-2007.

Second, this article does not have a particular clause to analyze. The clause at issue is a future *FAR* clause that hasn't been drafted yet, since it is still in the brainstorming phase. In keeping with this month's issue theme, "Compliant Contracting," we're focused on how the regulatory landscape of contracting is always changing.

This article examines the process of an emerging *FAR* clause on greenhouse gas emissions and the origins of the clause in statutes, executive orders, *FAR* cases, and case law. Reviewing a clause during the government's brainstorming phase provides lessons learned for contractors and agencies who implement those clauses in federal contracts.

Legislate, Rulemake, Litigate

The typical flow of a procurement reform such as a new clause begins with a problem. For example, an agency may notice that they have construction disputes concerning differing site conditions. Or a contractor may notice that it is investing too much bid and proposal costs in solicitations. In another scenario, Congress or the U.S. President will determine that a problem exists.

Based on that problem, Congress will change or add a provision to federal law on procurements to deal with the problem, usually in the National Defense Authorization Act issued annually. Or the President will issue an executive order to the FAR Council to address the problem. Based on the statute or executive order, the FAR Council will issue a rulemaking in the Federal Register seeking comments from contractors, academia, and trade associations. After the *FAR* clause is added or changed, interested parties to a contract can sue to challenge the new *FAR* clause.

Future *FAR* Clause to Reduce Emissions

The *FAR* clause probably will emerge from questions such as, "How might the federal government give preference to bids and proposals from suppliers, both domestic and overseas, to achieve reductions in greenhouse gas emissions or reduce the social cost of greenhouse gas emissions most effectively?"

The FAR Council could use a price preference to give an advantage to a product that produces less greenhouse gas emissions. How much of a price preference would be appropriate? How would it depend on the amount of the emissions? Or the FAR Council could prohibit the purchase of supplies that produce certain levels of emissions. Or it could prohibit agencies from hiring service contractors who use equipment that produces emissions. How would that preference or prohibition relate to mission accomplishment? Should the FAR Council include an override approval where a senior contracting official can select the product with above-standard emissions?

By tracing the development of a clause in its initial stages, we can get a better sense of how *FAR* provisions and clauses are drafted.

New Federal Law on Greenhouse Gas Emissions

On November 15, 2021, the federal Infrastructure Investment and Jobs Act was signed into law. The law includes more than $62 billion to deliver a more equitable clean energy future by investing in American manufacturing and workers; expanding access to energy efficiency and clean energy for families, communities and businesses; delivering reliable, clean and affordable power to more Americans; and building the technologies of tomorrow through clean energy demonstrations. It also specifically includes historic investments in carbon management, both to mitigate and remove carbon dioxide (CO_2) emissions.

Executive Order 14057 and Climate Change

On December 8, 2021, President Biden issued Executive Order 14057, Catalyz-

ing Clean Energy Industries and Jobs Through Federal Sustainability (EO 14057). In response to the risks and costs posed by the world's changing climate, EO 14057 was designed to create a cleaner, more sustainable method and ensure climate resilient operations to build, buy, and manage electricity, vehicles, buildings, and other operations in the United States.

The goal of EO 14057 was to achieve a carbon pollution-free electricity sector by 2035 and net-zero emissions economy-wide on or before 2050. The chair of the Council on Environmental Quality (CEQ) and the director of the Office of Management and Budget (OMB) were tasked with reviewing agency targets and incorporating the performance management systems (carbon pollution-free energy use, deep-energy retrofits, whole-building commissioning, energy and water conservation measures, and space reduction and consolidation).

To achieve its objectives, EO 14057 establishes seven sustainability goals:

1. 100% carbon pollution-free electricity by 2030
2. 100% zero-emission vehicle acquisitions by 2035
3. A net-zero emissions building portfolio by 2045
4. A 65% reduction in scope 1 and 2 greenhouse gas emissions
5. Net-zero emissions from federal procurement
6. Climate-resilient infrastructure and operations
7. A climate and sustainability-focused federal workforce

To accomplish these goals, EO 14057 directs the prioritization of reused, refurbished, or recycled products; full lifecycle cost methodologies to maximize cost-savings through purchase products that contain recycled content, are biobased, or are energy- and water-efficient; and the purchase of sustainable products and services specified by the U.S. Environmental Protection Agency (EPA).

Prior Executive Orders on Climate Control

EO 14057 follows Executive Order 14030, Climate – Related Financial Risk (EO 14030), Executive Order 14008, Tackling the Climate Crisis at Home and Abroad (EO 14008), and Executive Order 13990, Climate Crisis; Efforts to Protect Public Health and Environment and Restore Science (EO 13990).

EO 14030, Climate – Related Financial Risk, signed by the president on May 20, 2021, to develop a government-wide strategy regarding: "(a) the measurement, assessment, mitigation, and disclosure of climate-related financial risk to Federal Government programs, assets, and liabilities in order to increase the long-term stability of Federal operations; (b) financing needs associated with achieving net-zero greenhouse gas emissions for the U.S. economy by no later than 2050, limiting global average temperature rise to 1.5 degrees Celsius, and adapting to the acute and chronic impacts of climate change; and (c) areas in which private and public investments can play complementary roles in meeting these financing needs – while advancing economic opportunity, worker empowerment, and environmental mitigation, especially in disadvantaged communities and communities of color."

EO 14008, Tackling the Climate Crisis at Home and Abroad, signed by the president on January 27, 2021, promotes safe global temperature, increases climate resilience, and supports a pathway toward lower greenhouse gas emissions and climate-resilient development. It further requires the integration of "climate-related financial risk" into the agency procurement process.

EO 13990, Protecting Public Health and the Environment and Restoring Science To Tackle the Climate Crisis, signed by the President on January 20, 2021, directs all executive departments and agencies to review and take action, as applicable, to address federal regulations between 2017 – 2021, and other actions to confront the climate crisis.

FAR Cases

Three recent *FAR* cases take a major step towards implementing the administration's vision of leveraging federal procurement to confront the climate crisis.

FAR Case 2022-006: This case implements portions of EO 14057, Catalyzing Clean Energy Industries and Jobs Through Federal Sustainability, and OMB Memorandum ("OMB Memo") M-22-06 on procuring of sustainable products and services.

FAR Case 2021-015: This case implements an amendment to the *FAR* to require major federal suppliers to publicly disclose greenhouse gas emissions and climate-related financial risk while setting

science-based reduction targets.

FAR Case 2021-016: This case implements an amendment to the *FAR* to ensure that major agency procurements minimize the risk of climate change.

As of this writing, the case of West Virginia v. Environmental Protection Agency, Docket No. 20-1530, was pending before the United States Supreme Court. The case involves a challenge by several states and coal industry interests to the methods the EPA utilizes to regulate carbon emissions from power plants under the Clean Air Act. Pundits who support current and expanded protections are concerned that a ruling against the EPA could result in (1) a narrow future interpretation and implementation of existing environmental protection laws; (2) limitations on how polluters are regulated in the future; and (3) a decreased ability to strengthen future standards as climate change becomes more deadly and costly (heat waves, wildfires, flooding, extreme rainfall, drought, ocean acidification, sea level rise, etc...).

In similar cases, plaintiffs have won injunctions to prevent the federal government from implementing *FAR* clauses after the FAR Council completed notice and comment. In 2016, a federal court in Texas enjoined the federal government from using a *FAR* clause based on Executive Order 13673, Fair Pay and Safe Workplaces. In numerous cases in 2021, courts issued injunctions against the federal government's COVID-19 vaccination clauses based on an executive order.

Depending on the outcome of this and other cases, interested parties could challenge the final version of a *FAR* clause that the FAR Council issues to reduce greenhouse gas emissions.

Lessons from the Case Study

We can draw the following lessons from this case study:

- A *FAR* clause begins with a problem to be solved through a change, add, or deletion from the *FAR*.
- Congress and the U.S. president address the problem through statutes (normally the National Defense Authorization Act) or executive orders.
- The FAR Council uses "notice and comment" rulemaking published on the Federal Register to implement statutes and executive orders.
- By submitting comments to the rulemaking, contractors and interested parties can influence the development of a *FAR* clause.
- After a *FAR* clause is implemented, interested parties can litigate to stop the federal government from using the clause generally, or to remove the clause from a particular solicitation.

Summary

When reviewing a *FAR* clause, it helps to review the background of *FAR* clauses generally and the background of that particular clause. Each *FAR* clause starts with a problem. The Congress or president attempts to address the problem through a statute or executive order. The FAR Council issues a rulemaking that receives numerous comments from industry and academia. Lastly, interested parties decide whether to litigate over the final *FAR* clause. By understanding the process, and participating at the appropriate times, contractors can influence the development of future *FAR* clauses. CM

Irvin Gray, JD, MBA, CPCM, CFCM, CCCM is the assistant general counsel for contracts at Honeywell Federal Manufacturing & Technologies, LLC in Kansas City, Missouri. He provides legal advice to executives, buyers, and contract managers with an emphasis on federal government contracts and commercial subcontracts. He is an LL.M candidate in Government Procurement at The George Washington Law School with an anticipated graduation date of August 2022. He is president of the NCMA Kansas City Chapter.

Marc J. Soss, Esquire is an attorney and a retired Supply Corps officer.

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