

CONTRACT MANAGEMENT

www.ncmahq.org

Equipping the Acquisition Workforce for an Uncertain Tomorrow

Tim Applegate, CPCM, NCMA Board Chair PY26 shares his strategic vision for building bridges across acquisition functions.

See page 62.



NCMA
NATIONAL CONTRACT MANAGEMENT ASSOCIATION®

CONNECTING TO
CREATE WHAT'S NEXT

COUNSEL COMMENTARY



Managing Risk Under the New *FAR* Sunset Provision

The overhauled *FAR* will make non-statutory regulations expire automatically after four years unless they are renewed.

BY STEPHEN L. BACON

Earlier this year, the Trump administration launched a sweeping initiative to revamp the *Federal Acquisition Regulation* (*FAR*) with the issuance of Executive Order 14275, “Restoring Common Sense to Federal Procurement” (E.O. 14275).¹

This effort, referred to as the “revolutionary *FAR* overhaul” by the Office of Management and Budget (OMB), seeks to drastically reduce the number of acquisition regulations.²

The Office of Federal Procurement Policy (OFPP) is leading the overhaul in coordination with the *FAR* Council. A key objective of the overhaul is to refocus the *FAR* on its “statutory roots” by removing many of the “non-statutory” regulations that have accumulated during the four decades since the *FAR* became effective.³

Pursuant to E.O. 14275, regulations that are not required by statute should only remain if they are “essential to

sound procurement” because they are “necessary to support simplicity and usability, strengthen the efficacy of the procurement system, or protect economic or national security interests.”⁴

As of the writing of this article, the *FAR* overhaul process is ongoing and it remains to be seen which “non-statutory” regulations will be included in the final amended *FAR*.

But any such non-statutory regulations included will automatically expire

COUNSEL COMMENTARY CONT'D

after four years under the overhauled *FAR*'s new "regulatory sunset" provision. The goal of this provision is to establish a relatively short, built-in lifespan for any regulations that are not grounded in a statutory requirement.

The sunset provision introduces several thorny issues that contractors and procuring agencies are likely to encounter during the next several years. By proactively identifying potential problem areas, they will be better equipped to spot these issues, mitigate risks, and avoid disputes.

The Sunset Provision's Foundation

E.O. 14275 states that "the *FAR* has swelled to more than 2,000 pages of regulations, evolving into an excessive and overcomplicated regulatory framework" that has become "a barrier to, rather than a prudent vehicle for, doing business with the federal government."⁵

To curb the growth of regulations going forward, Section 6 of E.O. 14275 directs the OFPP Administrator to establish the regulatory sunset provision in coordination with the *FAR* Council.

Specifically, Section 6 requires the amended *FAR* to:

1. Identify all *FAR* provisions not required by statute that will remain in the *FAR*;
2. Consider amending the *FAR* such that these non-statutory provisions expire after 4 years unless renewed; and
3. Consider whether new non-statutory *FAR* provisions should include similar expiration language.

On May 2, 2025, OMB issued Memorandum M-25-25, which outlines

a two-phase approach for implementing E.O. 14275. In Phase I, the *FAR* Council will issue model deviation text by *FAR* part on a rolling basis and agencies should generally adopt it through individual or class deviations within 30 days of release. After the *FAR* Council has posted model deviation guidance for all *FAR* parts, Phase II will include a formal rulemaking to codify the new *FAR* through a notice and comment process.

On the same day that OMB issued M-25-25, the *FAR* Council released the model deviation text for *FAR* Part 1, which includes the regulatory sunset provision at *FAR* 1.109.⁶ It states: "All *FAR* sections that are not required by statute must expire

four years after the effective date of the sections, unless renewed by the Federal Acquisition Regulatory Council."⁷

E.O. 14275 directs the *FAR* to be amended within 180 days, or by October 12, 2025, but it will likely take more time to complete the rulemaking process. Assuming the new *FAR* becomes effective in late 2025 or early 2026, any non-statutory regulations would begin to expire in late 2029 or early 2030.

The sunset provision creates several potential areas of uncertainty or dispute regarding the application of clauses. It is essential for contractors and agencies to anticipate how these issues might arise and how to navigate them when they do.

The sunset provision creates several potential areas of uncertainty or dispute regarding the application of clauses. It is essential for contractors and agencies to anticipate how these issues might arise and how to navigate them when they do.

The Expired Clause Problem

Once the sunset provision takes effect, there will likely be situations where a non-statutory provision expires between the time of the issuance of a solicitation and the award. This creates potential ambiguity regarding whether the “expired” provision must be applied to the agency’s evaluation of proposals.

Generally, a provision in effect when an agency issues a solicitation will remain applicable even if the underlying regulation is subsequently amended.⁸ This rule reflects the legitimate concern that a solicitation’s ground rules should not be altered amid a procurement absent an amendment to the solicitation that gives offerors a fair opportunity to adjust their proposals.

But this rule has not been applied with uniform consistency. For example, the protest of *ASRC Federal Systems Solutions, LLC* involved a challenge to the award of a competitive 8(a) set-aside contract to a joint venture that had not been approved by the Small Business Administration (SBA).⁹

When the solicitation was issued in February 2020, the governing regulations required SBA approval of joint venture agreements before the award of an 8(a) contract. The solicitation expressly incorporated that regulation, but the SBA approval requirement was subsequently eliminated in November 2020 prior to the award. GAO denied the protest because it concluded that “[r]equiring such an approval, at a time when the SBA no longer issues them, would lead to an absurd result.”¹⁰

To avoid or at least limit potential disputes, the FAR Council should clearly address the application of expired regulations in its forthcoming rulemaking to

codify the new overhauled FAR. The existing model deviation text for the overhauled FAR retains the general rule that “FAR changes apply to solicitations issued on or after the effective date of the change.”¹¹ However, there is no clear statement that clauses that expire *after* a solicitation is issued will continue to apply to that solicitation unless the contracting officer issues an amendment to remove the clause.

If the FAR Council’s intent regarding the application of expired clauses is unclear, agencies may be subject to protest for failing to amend a solicitation to reflect the change. Indeed, under the current FAR, “where an agency’s requirements materially change after a solicitation has

been issued, it must issue an amendment to notify offerors of the changed requirements and afford them an opportunity to respond.”¹²

If the expiration of a regulation may result in a material change to the government’s requirements, an offeror could challenge the agency’s failure to amend the solicitation in a bid protest to reflect those changes. This type of challenge to the terms of the solicitation must be timely filed prior to the deadline for receipt of proposals.¹³

The Revived Clause Problem

Although some clauses may expire and never be revived, other clauses could be reinstated at some point after their expiration date. This may occur, for



Secure

Networks

safeguard acquisitions - on-site or in the cloud

- Classified / unclassified source selection
- Custom built networks
- Information systems security
- Web-based applications
- Cloud migration
- Helpdesk support

BVTI
Best Value Technology Inc

Cleared IT and contracting professionals
send your resume to recruiting@bvti.com

703.229.4200
bd@bvti.com
www.bvti.com



COUNSEL COMMENTARY CONT'D

example, if a new administration decides to reinstitute certain regulations that expired during a previous administration.

In this situation, questions may arise about the applicability of the revived clause to a solicitation that was issued during a period when the clause was not effective. Generally, “[t]here is no requirement that mandatory provisions must be incorporated into solicitations by operation of law when they have been omitted.”¹⁴

Thus, if a solicitation omits a provision that is subsequently “revived” and made effective mid-procurement, it is unlikely that the provision will be “read in” to the solicitation in a post-award bid protest absent an amendment that expressly

incorporates the clause. If an offeror believes a revived mandatory regulation was incorrectly omitted from a solicitation, it has an obligation to raise that issue in a timely pre-award protest.¹⁵

The Extinct Contract Clause Problem

In addition to bid protests, expired clauses are likely to generate disputes and contract administration issues in the post-award context. Suppose a clause is effective at the time of the solicitation and contract award, but it subsequently expires in the middle of the performance period. Does the “extinct” clause still apply to the contract?

Generally, the answer to that question

will be, “Yes,” because contracts are governed by the clauses and provisions in effect at the time of solicitation.¹⁶ This aligns with the “normal rule” that regulations should “be applied prospectively to events and agreements which occur later” but not retroactively.¹⁷

Contractors should therefore assume that they will continue to be bound by contract clauses even if they become “extinct” amid performance. A failure to comply with a contract clause, even an “extinct” one, could potentially serve as grounds for a default termination or other legal consequences, including liability under the False Claims Act.

Contractors may believe that an administration’s decision to let a clause expire signals a general reluctance to enforce its terms. But even if that may be true, contractors should not overlook the very real possibility that a change in administration could be accompanied by significant changes in priorities that may include enforcement of expired clauses that the new administration favors.

Conversely, a new administration could also direct agencies to remove clauses from existing contracts that it no longer wants to enforce. This would need to be accomplished through a bilateral modification, including potentially a price reduction to the extent that the removal of a requirement lowers the cost of performance.

Conclusion

The *FAR* sunset provision creates a new dynamic for government contractors that demands increased vigilance and adaptability. As the new *FAR* is implemented, it will be important to stay informed about which non-statutory provisions



LAW
GOVERNMENT
PROCUREMENT

MASTER OF STUDIES IN LAW
GOVERNMENT PROCUREMENT
& CYBERSECURITY LAW

THE GOLD STANDARD IN GOVERNMENT CONTRACTS EDUCATION

Learn from the field’s foremost experts.
Study on your schedule.
Build ties with leaders in government & industry.

ONLINE | FLEXIBLE | IN-DEMAND



are approaching sunset dates and understand the potential legal implications for open solicitations and contracts.

Contractors should proactively identify non-statutory clauses to anticipate which provisions might expire amid a solicitation or contract performance. Agencies will also need to develop clear processes for managing solicitations and contracts that span regulatory transition periods. By staying informed of upcoming sunset dates, contractors and agencies will be better prepared to mitigate risks and potential challenges that may arise due to non-statutory regulations expiring under the new sunset provision. **CM**

Stephen L. Bacon is a shareholder in the Washington, D.C. office of the law firm Rogers

Joseph O'Donnell, where he represents government contractors in bid protests, claims, terminations, investigations, and suspension and debarment proceedings. He frequently litigates cases at the Court of Federal Claims, the Government Accountability Office, the Boards of Contract Appeals, and the Small Business Administration's Office of Hearings and Appeals. He also provides advice and counsel to clients on a broad range of contractual and regulatory compliance issues that confront government contractors.

The views expressed in this article are those of the author and do not necessarily reflect the views of Rogers Joseph O'Donnell or its clients. This article is for general information purposes and is not intended to be and should not be construed as legal advice.

ENDNOTES

- 1 90 Fed. Reg. 16447 (Apr. 18, 2025).
- 2 OMB Memorandum M-25-25, Overhauling the Federal Acquisition Regulation (May 2, 2025).
- 3 Id. at 1.

- 4 90 Fed. Reg. at 16447–48.
- 5 Id. at 16447.
- 6 The FAR model deviation text is available at <https://www.acquisition.gov/far-overhaul>.
- 7 See https://www.acquisition.gov/far-overhaul/far-part-deviation-guide/far-overhaul-part-1#FAR_1_109.
- 8 See, e.g., Yang Enterprises, Inc., B–418922.4, B–418922.6, May 20, 2021, 2021 CPD ¶ 209; Washington Bus. Dynamics, LLC, B–421953, Dec. 18, 2023, 2023 CPD ¶ 286.
- 9 ASRC Fed. Sys. Sols., LLC, B–420443, B–420443.2, Apr. 12, 2022, 2022 CPD ¶ 96.
- 10 Id. at 10.
- 11 FAR 1.107(d)(1) (Model Deviation Text).
- 12 Chronos Sols., LLC, et al., B–417870.2, et al., Oct. 1, 2020, 2020 CPD ¶ 395.
- 13 Second Street Holdings, LLC et al., B–417006.4 et al., Jan. 13, 2022, 2022 CPD ¶ 33.
- 14 Maxim Healthcare Staffing Services Inc., B–422389.2, Aug. 21, 2024, 2024 CPD ¶ 201.
- 15 McGean-Rohco, Inc., B–218616, Aug. 7, 1985, 85–2 CPD ¶ 140.
- 16 See, e.g., Call Henry, Inc. v. United States, 855 F.3d 1348, 1352 n.1 (Fed. Cir. 2017).
- 17 BearingPoint, Inc. v. United States, 77 Fed. Cl. 189, 195 (2007) (citing Lockheed Aircraft Corp. v. United States, 192 Ct. Cl. 36, 46 (1970)).

COBBLESTONE
software

7
Easy Steps
to Streamlined
Contract Management!

Get Free Guide.

Visit CobbleStoneSoftware.com or Call (866) 330-0056.