

**UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION**

STATE OF FLORIDA,

Plaintiff,

v.

No. 8:21-cv-2524-SDM-TGW

BILL NELSON, et al.,

Defendants.

_____ /

FLORIDA’S SUPPLEMENTAL BRIEF

This Court asked the parties to file supplemental briefs addressing four questions related to the deviation clauses that implement the challenged executive order and the requirements of 41 U.S.C. § 1707. *See* Doc. 31. Florida addresses each question below.

Before doing so, however, Florida wishes to highlight an issue that may inform the Court’s consideration of these questions. Each of the deviation clauses uses the contract clause drafted by the FAR Council. *See* FAR Council guidance at 4–5; Ex. 1. That clause requires contractors to comply with guidance “published by the Safer Federal Workforce Task Force.” FAR Council guidance at 5. Under the executive order, the Task Force may only publish such guidance when the OMB Director “approves” the guidance and makes an economy and efficiency finding. Exec. Order No. 14042, Ensuring Adequate COVID Safety Protocols for Federal Contractors, 86 Fed. Reg. 50,985, 50,985 (Sept. 9, 2021).

As a result of this framework, the deviation clauses impose no obligations on federal contractors *unless and until* the OMB Director approves the Task Force guidance. OMB attempted to do so via the new OMB rule, which Florida challenges on multiple grounds. If this Court preliminarily enjoins enforcement or implementation of the new OMB rule, that will have the effect of nullifying the deviation clauses because there will be no Task Force guidance with which contractors must comply. In other words, even if this Court agrees with the government’s contention that each agency is implementing its deviation clause pursuant to its own authority (and that authority alone), those clauses have no effect absent OMB approval of the Task Force guidance. For this reason, Florida respectfully submits that the Court should at a minimum preliminarily enjoin enforcement or implementation of the new OMB rule, which would render the deviation clauses a nullity.

I. SECTION 1707 APPLIES TO THE CLASS DEVIATIONS.¹

Pursuant to the executive order, the government is using identical contract clauses across its agencies, as reflected in each agency’s class deviation. *See* Ex. 1. Section 1707 applies to each such deviation.

Section 1707 applies to “a procurement policy, regulation, procedure, or form (including an amendment or modification thereto)” so long as two conditions are met.

¹ The government argues that Florida waived any arguments related to the class deviations by raising them for the first time in its reply. *See* Doc. 26 at 8. But Florida’s reply was also an amended motion in response to the government taking new action, and the parties’ joint submission to this Court did not limit the arguments Florida could raise. *See* Doc. 19. In any event, Florida’s argument that the class deviations violate § 1707 is made in response to that new action—specifically the § 1707(d) finding in the new OMB rule.

41 U.S.C. § 1707(a)(1). Those conditions are (A) that it “relates to the expenditure of appropriated funds,” and (B) that it either (i) “has a significant effect beyond the internal operating procedures of the [issuing] agency,” or (ii) “has a significant cost or administrative impact on contractors or offerors.” *Id.* The deviation clauses satisfy (A) because they relate to government contracts and they satisfy (B) because they require government contractors to mandate vaccination for millions of American workers. The deviation clauses also relate to procurement, so the only question is whether the deviation clauses are “polic[ies], regulation[s], procedure[s], or form[s].”

The deviation clauses are both procurement regulations and procurement policies. They are procurement regulations because they impose burdensome and unprecedented requirements on contractors. In other words, the deviation clauses “create[] new law, rights, or duties.” *Warshauer v. Solis*, 577 F.3d 1330, 1337 (11th Cir. 2009). The government recognizes as much, which is why it is seeking to amend the Federal Acquisition Regulation. But in the meantime, imposing these requirements via class deviation does not exempt them from § 1707. *See Navajo Refining Co. v. United States*, 58 Fed. Cl. 200, 209 (2003) (noting that “a class deviation may fall within any of the various categories of procurement changes identified” in § 1707); *see also* FAR § 1.404 (“When an agency knows that it will require a class deviation on a permanent basis, it should propose a FAR revision.”).

The government has already admitted that the class deviations are regulations. In its surreply and at the hearing, the government asserted that it is implementing the deviation clauses pursuant to 41 U.S.C. § 1303(a)(2)(A). *See* Doc. 26 at 3. That

provision exempts from § 1303(a)(2)'s exclusivity rule certain “*regulations* relating to procurement issued by an executive agency.” 41 U.S.C. § 1303(a)(2) (emphasis added).² But if they are “regulations” then they are subject to § 1707.

The deviation clauses are also procurement policies because they are “[a] standard course of action that has been officially established by an organization, business, political party, etc.” *Policy*, Black’s Law Dictionary (11th. ed. 2019). The government suggests that the deviation clauses are not procurement policies but merely actions implementing the procurement policy set by the executive order and the OMB rules. *See* Doc. 26 at 8. But that argument is inconsistent with the government’s position that each agency is issuing “agency-specific class deviations.” *Id.* at 3. The government cannot have it both ways. Florida’s position is that the new OMB rule creates government-wide requirements. But if the government is arguing otherwise, it cannot simultaneously argue that each class deviation is not a separate procurement policy.

For these reasons, the deviation clauses are subject to § 1707.

² At the hearing, the government argued that § 1303(a)(2) is an affirmative grant of authority. But that provision merely explains that “regulations relating to procurement issued by an executive agency [other than the FAR Council] shall be limited to” certain things. 41 U.S.C. § 1303(a)(2). Put differently, it creates an exception to the FAR Council’s exclusivity, but it does not affirmatively authorize any specific procurement regulation. Rather, an agency must identify statutory authority to impose the requirements in any regulation it issues. The government has utterly failed to do so in each of its class deviations.

II. THIS COURT HAS JURISDICTION TO CONSIDER A CHALLENGE TO THE DEVIATION CLAUSES.

Section 1491(b)(1) confers exclusive jurisdiction on the Court of Federal Claims “to render judgment on an action by an interested party objecting to a solicitation by a Federal agency for bids or proposals for a proposed contract or to a proposed award or the award of a contract or any alleged violation of statute or regulation in connection with a procurement or a proposed procurement.” 28 U.S.C. § 1491(b)(1).³

The Federal Circuit has interpreted § 1491(b)(1) to include disputes related to “the application of” regulations to specific solicitations and contracts. *See Land Shark Shredding, LLC v. United States*, 842 F. App’x 589, 593 (Fed. Cir. 2021). But challenges to “the validity of a regulation governing a procurement must be brought in federal district court under the Administrative Procedure Act.” *Id.* (citing *Southfork Sys., Inc. v. United States*, 141 F.3d 1124, 1135 (Fed. Cir. 1998)). For the reasons explained above, the class deviations are procurement regulations, and this court has jurisdiction. At least two courts, relying on these same cases, have agreed that district courts have jurisdiction to hear APA challenges to class deviations. *See Bayaud Enters. v. U.S. Dep’t of Veteran’s Affairs*, 440 F. Supp. 3d 1230, 1237 (D. Colo. 2020); *Alphapointe v. Dep’t of Veteran’s Affairs*, 416 F. Supp. 3d 1, 7 (D.D.C. 2019).

To be sure, the court in *Navajo Refining*, in adjudicating a damages claim with respect to specific contracts, considered the validity of several “individual deviations”

³ While the statute mentions concurrent jurisdiction in the district courts, Congress terminated that jurisdiction in 2001 via a “sunset provision.” *See Bayaud Enters. v. U.S. Dep’t of Veteran’s Affairs*, 440 F. Supp. 3d 1230, 1237 n.2 (D. Colo. 2020).

and one “class deviation.” 58 Fed. Cl. at 203, 209. But Florida does not seek damages with respect to specific contracts, it seeks wholesale invalidation of several agency-wide class deviations.⁴

Moreover, with respect to contracts Florida is not a party to—but which the government asserts preempt Florida law—§ 1491(b)(1) is inapplicable for the additional reason that Florida is not an “interested party” able to bring an action under that statute. *See AFL-CIO v. United States*, 258 F.3d 1294, 1302 (Fed. Cir. 2001) (interpreting “interested party” to include only “actual or prospective bidders or offerors”). Florida’s exclusive remedy for its sovereign injury, therefore, is to file an APA challenge in district court.

For these reasons, § 1491(b)(1) does not apply to Florida’s challenge to the class deviations and this Court has jurisdiction.

III. THE DEVIATION CLAUSES VIOLATE § 1707.

If this Court finds that § 1707 applies to the deviation clauses, the government lacks even a plausible defense that it complied with that provision. The government has not conducted notice and comment, and it cannot invoke the exception in § 1707(d) without publishing a notice in the Federal Register that each class deviation is “temporary” and providing “for a public comment period of 30 days beginning on the date on which the notice is published.” *See* 41 U.S.C. § 1707(e)(1). The government

⁴ Florida also notes that the court in *Najavo Refining* never discussed whether it had jurisdiction to consider the validity of a class deviation, presumably because the government raised no such defense. *See Jacobson v. Fla. Sec’y of State*, 974 F.3d 1236, 1268 (11th Cir. 2020) (“When a jurisdictional issue is neither challenged nor discussed, [a court’s] exercise of jurisdiction carries no precedential weight.”).

has not done so. And even if it does so now, it cannot satisfy the “urgent and compelling circumstances” exception for the reasons Florida has already explained. Doc. 24 at 15–16.

The government argues, however, that the new OMB rule’s invocation of § 1707(d) is sufficient for each class deviation to comply with § 1707. *See* Doc. 26 at 8. The government is wrong for several reasons.

First, if a deviation clause is a “procurement policy, regulation, procedure, or form” under § 1707, then it “may not take effect until 60 days after *it* is published for public comment.” 41 U.S.C. § 1707(a)(1) (emphasis added); *accord id.* § 1707(e)(1)(A) (requiring “a notice of *the* policy, regulation, procedure, or form” (emphasis added)). Put differently, the deviation clause must itself be published for comment, not some other document purportedly describing the policy or regulation, such as the new OMB rule.

Second, the government’s argument is a poor fit for the facts of this case. The class deviations were issued *before* the new OMB rule, which was not issued until November 16. *See* Ex 1. It is thus implausible for the government to argue that the new OMB rule’s § 1707(d) finding obviated the need for the earlier issued class deviations to comply with § 1707.

Third, as Florida has explained, the § 1707(d) finding in the new OMB rule is legally insufficient. Doc. 24 at 15–16. As such, even if that finding applied to the deviation clauses, they would still be unlawful.

IV. THE REMEDY IF THE DEVIATION CLAUSES VIOLATE § 1707.

Challenges to “the validity of a regulation governing a procurement must be brought in federal district court under the Administrative Procedure Act.” *Land Shark Shredding*, 842 F. App’x at 593 (citing *Southfork Sys.*, 141 F.3d at 1135). Florida brings such a challenge here.

Under the APA, “the reviewing court shall . . . hold unlawful and set aside agency action” that is “not in accordance with law,” “in excess of statutory jurisdiction, authority, or limitations,” or “without observance of procedure required by law.” 5 U.S.C. § 706(2)(A), (C)–(D). A violation of § 1707 falls within each of these categories. The ultimate remedy, therefore, is for the Court to hold unlawful and set aside the deviation clauses. The remedy at this stage is preliminarily enjoining the agencies from enforcing or implementing those clauses.

The Court has also asked what relief is available “against the named defendants.” Doc. 31 at 2. Because Florida names the United States as a Defendant, this Court may “enter[] . . . a judgment or decree . . . against the United States” itself. 5 U.S.C. § 702. All § 702 requires is that the Court “specify the Federal officer or officers (by name or by title), and their successors in office, personally responsible for compliance.” *Id.* Florida’s position is that the Court should preliminarily enjoin enforcement or implementation of the new OMB rule. But if the Court reaches the validity of the deviation clauses, § 702 authorizes an injunction against the head of each agency that issued such a clause. *See* Ex. 1. In other words, because Florida has

sued the United States, the Court need not limit relief to the named agencies and officials.⁵

Respectfully submitted,

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John Guard (FBN 374600)
CHIEF DEPUTY ATTORNEY GENERAL

/s/ James H. Percival
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⁵ At a minimum, because Florida sued officials from NASA, GSA, and DOD, those officials should be enjoined from enforcing or implementing their agencies' deviation clauses.

CERTIFICATE OF SERVICE

I hereby certify that on December 15, 2021, a true and correct copy of the foregoing was filed with the Court's CM/ECF system, which will provide service to all parties.

/s/ James H. Percival
James H. Percival

EXHIBIT 1

**UNITED STATES DEPARTMENT OF AGRICULTURE
OFFICE OF CONTRACTING AND PROCUREMENT**

October 08, 2021

**FAR Class Deviation Regarding Implementation of Executive Order 14042, Ensuring
Adequate COVID Safety Protocols for Federal Contractors**

Purpose: This memorandum approves a class deviation from the Federal Acquisition Regulation (FAR) to implement Executive Order 14042, [Ensuring Adequate COVID Safety Protocols for Federal Contractors](#).

Authority: This class deviation is issued under the authority of FAR 1.404 and through consultation with the Chair of the Civilian Agency Acquisition Council (CAAC) via the [CAAC Letter 2021-03](#).

Background: Executive Order (E.O.) 14042 was signed by the President on September 9, 2021 and published in the Federal Register at 86 FR 50985 on September 14, 2021. The E.O. directs agencies to include a clause in certain contracts (which includes contract-like instruments) to ensure that contractors and subcontractors at any tier comply with all guidance for contractor or subcontractor workplace locations as published by the Safer Federal Workplace Task Force ([Task Force Guidance](#)) at <https://www.saferfederalworkforce.gov/contractors/>. This class deviation sets forth USDA's implementation of the E.O. and CAAC Letter.

Required Action: Effective immediately, contracting officers **shall** insert the deviation FAR clause 52.223-99, Ensuring Adequate COVID-19 Safety Protocols for Federal Contractors, in the following solicitations, contracts, task orders, delivery orders, and modifications thereof that are for services (including construction). Bilateral modification shall be used to incorporate the deviation clause.

- New solicitations issued on or after **October 15, 2021**, and contracts, task orders, and delivery orders awarded pursuant to those solicitations, that are expected to exceed the simplified acquisition threshold (SAT).
- New contracts, task orders, and delivery orders, awarded on or after **November 14, 2021**, from solicitations issued before **October 15, 2021**, that exceed the SAT.
- All extensions or renewals of existing contracts, task orders, and delivery orders awarded on or after **October 15, 2021** that exceed the SAT.
- All options exercised, on or after **October 15, 2021**, on contracts, task orders, and delivery orders that exceed the SAT.
- Existing IDIQ contracts that are anticipated to have orders that exceed the SAT and that have an ordering period that extends beyond **October 15, 2021**.

Optional Action: In accordance with the Safer Federal Workforce Task Force Guidance and FAR 1.108(d)(2) and (3), contracting officers **may**, at their discretion, insert the deviation clause in the following:

- All solicitations issued prior to October 15, 2021;
- Contracts, task orders, or delivery orders awarded before November 14, 2021, from solicitations issued before October 15, 2021;
- All solicitations, contracts, task orders, and delivery orders valued at or below the SAT and are for services (including construction); or
- All solicitations, contracts, task orders, and delivery orders for the manufacturing of products.

Exclusions: The clause is **not required** in:

- Contracts and subcontracts with Indian Tribes under the Indian Self-Determination and Education Assistance Act (Public Law 93-638) (the exclusion would not apply to a procurement contract or subcontract under the FAR to an Indian-owned or tribally-owned business entity); or
- Solicitations and contracts if performance is outside the United States or its outlying areas (the exclusion is limited to employees who are performing work only outside the U.S. or its outlying areas).

Effective Date: This class deviation is effective immediately and remains in effect until incorporated into the FAR or until otherwise rescinded.

Resources: The USDA Procurement Policy [website](#) will be updated with USDA FAQs and other additional resources as they become available. Questions regarding this deviation may be directed to Procurement.Policy@usda.gov.

Attachments

- Attachment A – FAR Deviation Clause
- Attachment B – Sample Contractor Notification Letter
- Attachment C – Considerations for Negotiating Equitable Adjustments
- Attachment D – Implementation Criteria

Attachment A - FAR Deviation Clause

Executive Order 14042, Ensuring Adequate COVID Safety Protocols for Federal Contractors

September 30, 2021

PART 52—SOLICITATION PROVISIONS AND CONTRACT CLAUSES

Subpart 52.2—Text of Provisions and Clauses

[52.223-99 Ensuring Adequate COVID-19 Safety Protocols for Federal Contractors.

ENSURING ADEQUATE COVID-19 SAFETY PROTOCOLS FOR FEDERAL CONTRACTORS (OCT 2021) (DEVIATION)

(a) *Definition.* As used in this clause -

United States or its outlying areas means—

- (1) The fifty States;**
- (2) The District of Columbia;**
- (3) The commonwealths of Puerto Rico and the Northern Mariana Islands;**
- (4) The territories of American Samoa, Guam, and the United States Virgin Islands; and**
- (5) The minor outlying islands of Baker Island, Howland Island, Jarvis Island, Johnston Atoll, Kingman Reef, Midway Islands, Navassa Island, Palmyra Atoll, and Wake Atoll.**

(b) *Authority.* This clause implements Executive Order 14042, Ensuring Adequate COVID Safety Protocols for Federal Contractors, dated September 9, 2021 (published in the Federal Register on September 14, 2021, 86 FR 50985).

(c) *Compliance.* The Contractor shall comply with all guidance, including guidance conveyed through Frequently Asked Questions, as amended during the performance of this contract, for contractor or subcontractor workplace locations published by the Safer Federal Workforce Task Force (Task Force Guidance) at <https://www.saferfederalworkforce.gov/contractors/>.

(d) *Subcontracts.* The Contractor shall include the substance of this clause, including this paragraph (d), in subcontracts at any tier that exceed the simplified acquisition threshold, as defined in Federal Acquisition Regulation 2.101 on the date of subcontract award, and are for services, including construction, performed in whole or in part within the United States or its outlying areas.

(End of clause)

Attachment B – Sample Contractor Notification Letter

As required by Executive Order 14042, Ensuring Adequate COVID Safety Protocols for Federal Contractors, USDA is working to proactively “promote economy and efficiency in procurement by contracting with sources that provide adequate COVID-19 safeguards for their workforce.” In order to implement this Executive Order, USDA has published a FAR deviation that includes a clause for incorporation in applicable contracts and contract-like instruments via a bilateral modification. For additional details regarding this federal-wide effort please review details published by the Safer Federal Workplace Task Force ([Task Force Guidance](#)) at <https://www.saferfederalworkforce.gov/contractors/>.

New solicitations and contracts must incorporate, and meet the requirements of, FAR Deviation Clause 52.223-99 Ensuring Adequate COVID-19 Safety Protocols for Federal Contractors. Incorporation of this clause is mandatory before USDA will proceed with new contracts.

Existing contracts with USDA must be bilaterally modified to incorporate, and meet the requirements of, FAR Deviation Clause 52.223-99 Ensuring Adequate COVID-19 Safety Protocols for Federal Contractors. This modification is mandatory before USDA will renew, extend the period of performance, or exercise an option period on a USDA contract.

NOTE- Contractor notification or clause inclusion is not required for USDA contracts using GSA sponsored contract vehicles including: Government-wide Acquisition Contracts (GWAC), Multi Agency Contracts (MAC), Federal Supply Schedule (FSS) contracts, and Blanket Purchase Agreements (BPA). For additional information please review [GSA's COVID website](#).

Attachment C – Considerations for Negotiating Equitable Adjustments

There may be contractors who, after receiving a bilateral modification, submit a request to the contracting officer for an equitable adjustment. Although each contract, and circumstances of the contract, may vary, there are several general topics that should be considered when negotiating equitable adjustments:

1. Contracting officers should remember that vaccinations to the public are free.
2. Contractor points of contacts who manage their vaccination programs are intended to be more of a part-time function and not intended to be overly burdensome.
3. Vaccination programs are considered to be far less expensive than testing programs which require more frequency and logistical challenges.
4. Facility protocols are more stringent to promote physical distancing when vaccinations are not prevalent. Increased vaccinations reduce costs for facility enhancements.
5. Is the contractor already implementing vaccination requirements from other contracts or other mandates? If so, consider what, if any, additional contractor costs are directly and reasonably linked to the USDA contract being modified.
6. Do you feel like you are coming to an impasse? Consult with your leadership. After that, consult with general counsel if necessary.

Additional Resources

1. FAR 8.405-4
2. FAR 15.405
3. FAR 15.406
4. "Practical Negotiation Skills" (VAO Webinar)
5. "Competency Builder – Negotiating Under FAR Part 15 Acquisitions" (VAO Advisory)
6. "Planning Contract Negotiations" (VAO E-Modules)
7. "Overview of Contract Negotiations" (VAO E-Modules)
8. "Conducting Contract Negotiations" (VAO E-Modules)

Attachment D – Implementation Criteria

Required Action Type	Date	Dollar Value	Insert Clause 52.223-99?
1) New solicitations	Issued <u>on or after Oct 15, 2021</u>	Above SAT (\$250,000)	YES
2) All Contracts, task orders (TOs) and delivery orders (DOs)	Awarded from solicitations issued <u>on or after Oct 15, 2021</u>	Above SAT (\$250,000)	YES
3) New contracts, TOs and DOs	Awarded <u>on or after Nov 14, 2021</u> (from solicitations issued <u>before Oct 15, 2021</u>)	Above SAT (\$250,000)	YES
4) All extensions or renewals of existing contracts, TOs and DOs	Awarded <u>on or after Oct 15, 2021</u>	Above SAT (\$250,000)	YES
5) All options exercised on contracts, TOs and DOs	<u>On or after Oct 15, 2021</u>	Above SAT (\$250,000)	YES
6) Existing IDIQ contracts with orders	With ordering period <u>beyond Oct 15, 2021</u>	Above SAT (\$250,000)	YES

Optional Action Type	Date	Dollar Value	Insert Clause 52.223-99?
1) All solicitations	<u>Before Oct 15, 2021</u>	Below SAT (\$250,000)	As determined by CO
2) All contracts, TOs or DOs	Awarded <u>before Nov 14, 2021</u> (from solicitations issued <u>before Oct 15, 2021</u>)	Below SAT (\$250,000)	As determined by CO
3) All solicitations, contracts, TOs, DOs and services including construction	<u>Before and after Oct 15, 2021</u>	At or below SAT (\$250,000)	As determined by CO
4) All solicitations, contracts, TOs and DOs for the manufacturing of products	<u>Before and after Oct 15, 2021</u>	At or below SAT (\$250,000)	As determined by CO

Excluded Action Type	Date	Dollar Value	Insert Clause 52.223-99?
1) Contracts and subcontracts with Indian Tribe under the Indian Self-Determination and Education Assistance Act (P.L. 93-638)	No specific date	None	NO
2) Solicitations and contracts if performance is outside of the United States or its outlying areas	No specific date	None	NO



UNITED STATES DEPARTMENT OF COMMERCE
 Chief Financial Officer and
 Assistant Secretary for Administration
 Washington, D.C. 20230

PROCUREMENT MEMORANDUM 2022-01

ACTION

MEMORANDUM FOR: Senior Bureau Procurement Officials

FROM: Barry E. Berkowitz **BARRY BERKOWITZ**
 Senior Procurement Executive and
 Director for Acquisition Management

Digitally signed by BARRY
 BERKOWITZ
 Date: 2021.10.05 07:07:35 -04'00'

SUBJECT: Federal Acquisition Regulation Class Deviation: Ensuring
 Adequate COVID-19 Safety Protocols for Federal Contractors

Background

Executive Order 14042, *Ensuring Adequate COVID Safety Protocols for Federal Contractors*, (“the order”) directs executive departments and agencies to ensure that covered contracts¹ include a clause that the contractor and any subcontractors (at any tier) shall incorporate into lower-tier subcontracts. This clause shall specify that the contractor or subcontractor shall, for the duration of the contract, comply with all guidance for contractor or subcontractor workplace locations published by the Safer Federal Workforce Task Force (“Task Force”), provided that the Director of the Office of Management and Budget (“OMB”) approves the Task Force Guidance (the or this “Guidance”) and determines that the Guidance, if adhered to by covered contractors, will promote economy and efficiency in Federal contracting.

On September 30, 2021, the Civilian Agency Acquisition Council (CAAC) issued CAAC Letter 2021-03, *Class Deviation From the Federal Acquisition Regulation Regarding Implementation of Executive Order 14042, Ensuring Adequate COVID Safety Protocols for Federal Contractors*, authorizing agencies to issue a class deviation from the Federal Acquisition Regulation (FAR).

Purpose

This class deviation is issued in accordance with FAR 1.404 and partially pursuant to CAAC Letter 2021-03 to include a clause that implements Executive Order 14042 and directs the contractor to comply with all guidance published by the Safer Federal Workforce Task Force, including guidance conveyed through Frequently Asked Questions. This deviation revises the clause provided by the CAAC letter to replace “simplified acquisition threshold” with “micro purchase threshold” in 52.223-99(d).

Required Actions

- A. Contracting officers shall insert the clause 1352.223-99 provided in Attachment A in any new contract; new or existing solicitation for a contract; or an existing contract except for the following:

¹ For purposes of this Procurement Memorandum the term “contract” has the meaning as defined in section 2.101 of the FAR and includes orders under indefinite delivery, indefinite quantity contracts and blanket purchase agreements as well as contracts issued under an other transaction authority.

- (i) contracts or subcontracts whose value is equal to or less than the micro-purchase threshold, as that term is defined in section 2.101 of the FAR;
- (ii) contracts awarded prior to October 15, 2021, with an ultimate end date prior to October 15, 2022, where work is NOT performed on site at a Government facility, that do not contain option periods within this timeframe, and are not otherwise extended;
- (iii) solicitations and contracts if performance is outside the United States or its outlying areas (the exclusion is limited to employees who are performing work outside the U.S. or its outlying areas).

Effective Date

This deviation is effective immediately for the following:

- (i) new contracts;
- (ii) solicitations for a contract;
- (iii) extensions or renewals of existing contracts awarded on or after October 15, 2021; and
- (iv) options on existing contracts exercised on or after October 15, 2021.

This deviation is effective January 1, 2022, for existing contracts.

The deviation remains in effect until rescinded or fully incorporated into the FAR.

Exceptions

Exceptions to the requirements of this procurement memorandum may be provided in the below instances and shall be approved by the Senior Bureau Procurement Official, without further delegation, with a copy to oam_mailbox@doc.gov:

- (i) solicitations or contracts whose value is equal to or less than the Simplified Acquisition Threshold, as that term is defined in section 2.101 of the FAR;
- (ii) existing contracts when the modification to add the clause is not in conjunction with:
 - a. extensions or renewals of existing contracts and orders awarded on or after October 15, 2021; or
 - b. options on existing contracts and orders exercised on or after October 15, 2021; or
- (iii) solicitations or contracts solely for the provision of products

Questions

Please direct any questions regarding this Procurement Memorandum to OAM_Mailbox@doc.gov.

Attachment A – Clause 1352.223-99



ACQUISITION
AND SUSTAINMENT

OFFICE OF THE UNDER SECRETARY OF DEFENSE

3000 DEFENSE PENTAGON
WASHINGTON, DC 20301-3000

In reply refer to
DARS Tracking Number: 2021-O0009

MEMORANDUM FOR COMMANDER, UNITED STATES CYBER
COMMAND (ATTN: ACQUISITION EXECUTIVE)
COMMANDER, UNITED STATES SPECIAL OPERATIONS
COMMAND (ATTN: ACQUISITION EXECUTIVE)
COMMANDER, UNITED STATES TRANSPORTATION
COMMAND (ATTN: ACQUISITION EXECUTIVE)
DEPUTY ASSISTANT SECRETARY OF THE ARMY
(PROCUREMENT)
DEPUTY ASSISTANT SECRETARY OF THE NAVY
(PROCUREMENT)
DEPUTY ASSISTANT SECRETARY OF THE AIR FORCE
(CONTRACTING)
DIRECTORS, DEFENSE AGENCIES
DIRECTORS, DEFENSE FIELD ACTIVITIES

SUBJECT: Class Deviation—Ensuring Adequate COVID-19 Safety Protocols for Federal
Contractors

Effective immediately, contracting officers shall insert the clause 252.223-7999, Ensuring Adequate COVID-19 Safety Protocols for Federal Contractors (Deviation 2021-O0009), in the following solicitations, contracts, task orders, delivery orders, and modifications thereof that are for services (including construction) performed in whole or in part within the United States or its outlying areas:

- Solicitations issued on or after October 15, 2021, and contracts, task orders, and delivery orders awarded pursuant to those solicitations, that are expected to exceed the simplified acquisition threshold (SAT).
- Contracts, task orders, and delivery orders, awarded on or after November 14, 2021, from solicitations issued before October 15, 2021, that exceed the SAT.
- All extensions or renewals, issued on or after October 15, 2021, of contracts, task orders, and delivery orders that exceed the SAT.
- All options exercised, on or after October 15, 2021, on contracts, task orders, and delivery orders that exceed the SAT.
- Existing indefinite-delivery, indefinite-quantity contracts that are anticipated to have orders that exceed the SAT and that have an ordering period that extends beyond October 15, 2021.

Exhibit 1 - 0012

Ensuring Adequate COVID-19 Safety Protocols for Federal Contractors

The deviation clause is not required in contracts or subcontracts with Indian Tribes under the Indian Self-Determination and Education Assistance Act (the exclusion would not apply to a procurement contract or subcontract under the Federal Acquisition Regulation (FAR) to an Indian-owned or tribally-owned business entity).

In accordance with the Safer Federal Workforce Task Force Guidance and FAR 1.108(d)(2) and (3), contracting officers may insert the deviation clause in—

- Solicitations issued prior to October 15, 2021;
- Contracts, task orders, or delivery orders awarded before November 14, 2021, resulting from solicitations issued before October 15, 2021;
- Solicitations, contracts, task orders, and delivery orders that are valued at or below the SAT and are for services (including construction) performed in whole or in part within the United States and its outlying areas; or
- Solicitations, contracts, task orders, and delivery orders for the manufacturing of products.

When modifying existing contracts, task orders, or delivery orders in accordance with this deviation, contracting officers shall use a bilateral modification to incorporate the deviation clause.

This class deviation implements the requirements of Executive Order 14042, Ensuring Adequate COVID Safety Protocols for Federal Contractors, dated September 9, 2021, which directs agencies to include a clause in certain contracts to ensure that contractors comply with all guidance for contractor and subcontractor workplace locations published by the Safer Federal Workforce Task Force at: <https://www.saferfederalworkforce.gov/contractors/>.

This class deviation remains in effect until incorporated into the FAR or until otherwise rescinded. Please direct any comments or questions to Defense Pricing and Contracting, Contract Policy, at osd.pentagon.ousd-a-s.mbx.asda-dp-c-contractpolicy@mail.mil.

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N.M.1154945926

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Date: 2021.10.01 11:02:24 -04'00'

John M. Tenaglia
Principal Director,
Defense Pricing and Contracting

Attachment
As stated

Attachment 1
Class Deviation 2021-O0009

Ensuring Adequate COVID-19 Safety Protocols for Federal Contractors

252.223-7999 Ensuring Adequate COVID-19 Safety Protocols for Federal Contractors (Deviation 2021-O0009)

As prescribed in Class Deviation 2021-O0009, Ensuring Adequate COVID-19 Safety Protocols for Federal Contractors, use the following clause:

ENSURING ADEQUATE COVID-19 SAFETY PROTOCOLS FOR FEDERAL
CONTRACTORS (DEVIATION 2021-O0009) (OCT 2021)

(a) *Definition.* As used in this clause –

United States or its outlying areas means—

- (1) The fifty States;
- (2) The District of Columbia;
- (3) The commonwealths of Puerto Rico and the Northern Mariana Islands;
- (4) The territories of American Samoa, Guam, and the United States Virgin Islands; and
- (5) The minor outlying islands of Baker Island, Howland Island, Jarvis Island, Johnston Atoll, Kingman Reef, Midway Islands, Navassa Island, Palmyra Atoll, and Wake Atoll.

(b) *Authority.* This clause implements Executive Order 14042, Ensuring Adequate COVID Safety Protocols for Federal Contractors, dated September 9, 2021 (published in the *Federal Register* on September 14, 2021, 86 FR 50985).

(c) *Compliance.* The Contractor shall comply with all guidance, including guidance conveyed through Frequently Asked Questions, as amended during the performance of this contract, for contractor or subcontractor workplace locations published by the Safer Federal Workforce Task Force (Task Force Guidance) at <https://www.saferfederalworkforce.gov/contractors/>.

(d) *Subcontracts.* The Contractor shall include the substance of this clause, including this paragraph (d), in subcontracts at any tier that exceed the simplified acquisition threshold, as defined in Federal Acquisition Regulation 2.101 on the date of subcontract award, and are for services, including construction, performed in whole or in part within the United States or its outlying areas.

(End of clause)



OFFICE OF THE UNDER SECRETARY OF DEFENSE

3000 DEFENSE PENTAGON
WASHINGTON, DC 20301-3000

ACQUISITION
AND SUSTAINMENT

MEMORANDUM FOR COMMANDER, UNITED STATES CYBER
COMMAND (ATTN: ACQUISITION EXECUTIVE)
COMMANDER, UNITED STATES SPECIAL OPERATIONS
COMMAND (ATTN: ACQUISITION EXECUTIVE)
COMMANDER, UNITED STATES TRANSPORTATION
COMMAND (ATTN: ACQUISITION EXECUTIVE)
DEPUTY ASSISTANT SECRETARY OF THE ARMY
(PROCUREMENT)
DEPUTY ASSISTANT SECRETARY OF THE NAVY
(PROCUREMENT)
DEPUTY ASSISTANT SECRETARY OF THE AIR FORCE
(CONTRACTING)
DEFENSE AGENCY AND DOD FIELD ACTIVITY DIRECTORS

SUBJECT: Implementation of Executive Order 14042, Ensuring Adequate COVID-19 Safety
Protocols for Federal Contractors, in Other Transaction Agreements

This memorandum implements the requirements of Executive Order 14042, Ensuring Adequate COVID Safety Protocols for Federal Contractors, dated September 9, 2021, which directs agencies to include a clause in certain contracts and contract-like instruments to ensure contractors comply with all guidance for contractor and subcontractor workplace locations. This guidance was published by the Safer Federal Workforce Task Force, and is available at: <https://www.saferfederalworkforce.gov/contractors/>. Class Deviation 2021-O0009 promulgated clause 252.223-7999, Ensuring Adequate COVID-19 Safety Protocols for Federal Contractors, for use in Federal Acquisition Regulations-based contracts.

Effective immediately, agreements officers shall insert the attached clause, Ensuring Adequate COVID-19 Safety Protocols for Federal Contractors, in the following Other Transaction Agreements and modifications thereof that are for services (including research, development, and/or prototyping) performed in whole or in part within the United States or its outlying areas:

- Solicitations issued on or after October 15, 2021, and agreements awarded pursuant to those solicitations, that are expected to exceed \$250,000.
- Agreements awarded on or after November 14, 2021, from solicitations issued before October 15, 2021, that exceed \$250,000.
- All extensions or renewals exceeding \$250,000 issued on or after October 15, 2021.
- Award of new work executed on after November 14, 2021, exceeding \$250,000, and within the existing ceiling and period of performance of an agreement irrespective of when the agreement was awarded.
- All options exercised, on or after October 15, 2021, on agreements that exceed \$250,000.

Exhibit 1 - 0015

Agreements officers may make modifications to the clause to reflect the characterization of the parties to the agreement if terms other than “contractor” and “subcontractor” are used.

In accordance with the Safer Federal Workforce Task Force Guidance, agreements officers may insert the clause in—

- Solicitations issued prior to October 15, 2021;
- Agreements awarded before November 14, 2021, resulting from solicitations issued before October 15, 2021;
- Extensions or renewals, or award of new work within the existing ceiling and period of performance of the agreement, that are valued at or below \$250,000; and
- Agreements for the manufacturing of products.

When modifying existing agreements, agreements officers shall use a bilateral modification to incorporate the attached clause.

This guidance remains in effect until rescinded. Direct any comments or questions to the Office of the Under Secretary of Defense for Acquisition and Sustainment, Defense Pricing and Contracting, Contract Policy, at osd.pentagon.ousd-a-s.mbx.asda-dp-c-contractpolicy@mail.mil.

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TENAGLIA.JOHN.
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Date: 2021.10.08
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John M. Tenaglia
Principal Director,
Defense Pricing and Contracting

Attachment:
As stated

Ensuring Adequate COVID-19 Safety Protocols for Federal Contractors

Ensuring Adequate COVID-19 Safety Protocols for Federal Contractors

As prescribed in Principal Director, DPC memorandum of October 8, 2021, Implementation of Executive Order 14042, Ensuring Adequate COVID-19 Safety Protocols for Federal Contractors, in Other Transaction Agreements, use the following clause:

ENSURING ADEQUATE COVID-19 SAFETY PROTOCOLS FOR FEDERAL CONTRACTORS (OCT 2021)

(a) *Definition.* As used in this clause –

United States or its outlying areas means—

- (1) The fifty States;
 - (2) The District of Columbia;
 - (3) The commonwealths of Puerto Rico and the Northern Mariana Islands;
 - (4) The territories of American Samoa, Guam, and the United States Virgin Islands; and
 - (5) The minor outlying islands of Baker Island, Howland Island, Jarvis Island, Johnston Atoll, Kingman Reef, Midway Islands, Navassa Island, Palmyra Atoll, and Wake Atoll.
- (b) *Authority.* This clause implements Executive Order 14042, Ensuring Adequate COVID Safety Protocols for Federal Contractors, dated September 9, 2021 (published in the *Federal Register* on September 14, 2021, 86 FR 50985).
- (c) *Compliance.* The Contractor shall comply with all guidance, including guidance conveyed through Frequently Asked Questions, as amended during the performance of this agreement, for contractor or subcontractor workplace locations published by the Safer Federal Workforce Task Force (Task Force Guidance) at <https://www.saferfederalworkforce.gov/contractors/>.
- (d) *Subcontracts.* The Contractor shall include the substance of this clause, including this paragraph (d), in subcontracts at any tier that exceed \$250,000 and are for services, including construction, performed in whole or in part within the United States or its outlying areas.

(End of clause)

Page 1 of 1




UNITED STATES DEPARTMENT OF EDUCATION

OFFICE OF FINANCE AND OPERATIONS

October 12, 2021

ACQUISITION ALERT 2022-02

TO: Heads of Contracting Activities
Office of Finance and Operations/Contracts and Acquisitions Management
Federal Student Aid/Federal Student Aid Acquisitions
Executive Officers

FROM: Phillip R. Juengst 
Deputy Assistant Secretary for Acquisition and Grants Administration
Senior Procurement Executive

SUBJECT: Class Deviation from the Federal Acquisition Regulation (FAR) Regarding Implementation of Executive Order (EO) 14042, Ensuring Adequate COVID Safety Protocols for Federal Contractors

1. **Purpose:** The purpose of this alert is to issue a class deviation from the FAR as authorized by the Civilian Agency Acquisition Council (CAAC) Chair in CAAC Letter 2021-03 (Attachment A). The class deviation implements EO 14042. This alert also provides guidance to the Acquisition Workforce on when to include a new clause (Attachment B) in ED solicitations and contracts.
2. **Applicability:** This class deviation applies to all solicitations and contracts for services, including construction contracts, regardless of dollar value.
3. **Background:** On September 9, 2021, President Joseph R. Biden signed EO 14042 to ensure the health and safety of the federal workforce and the contractor community. The EO requires agencies include a clause requiring contractors and subcontractors (at any tier) to comply with all guidance for contractor workplace locations as published by the Safer Federal Workforce Task Force. On September 24, 2021, the Safer Federal Workforce Task Force issued workplace safety protocols which require specific actions supporting the goal of getting more people vaccinated and to decrease the spread of COVID-19.
4. **Effective Date:** This deviation is effective immediately.
5. **Expiration Date:** This deviation remains in effect until it is incorporated into the FAR or until otherwise rescinded.

6. **Required Actions:** Contracting officers shall insert the clause (52.223-99) in the following solicitations, contracts, task orders, delivery orders, and modifications:
- a. New contracts awarded on or after November 14, 2021, from solicitations issued before October 15, 2021 (this includes new orders awarded on or after November 14, 2021, from solicitations issued before October 15, 2021, under existing indefinite-delivery contracts);
 - b. New solicitations issued on or after October 15, 2021, and contracts awarded pursuant to those solicitations (this includes new solicitations issued on or after October 15, 2021, and orders awarded pursuant to those solicitations under existing indefinite-delivery contracts);
 - c. Extensions or renewals of existing contracts and orders awarded on or after October 15, 2021;
 - d. Options on existing contracts and orders exercised on or after October 15, 2021 if the option will be exercised no later than December 8, 2021; and
 - e. All active contracts not already covered by categories a-d above, subject to the following exceptions noted below.

The clause shall **not** be applied to:

- Contracts and subcontracts with Indian Tribes under the Indian Self-Determination and Education Assistance Act (Public Law 93-638) (the exclusion would not apply to a procurement contract or subcontract under the FAR to an Indian-owned or tribally-owned business entity); or
- Solicitations and contracts if performance is outside the United States or its outlying areas (the exclusion is limited to employees who are performing work only outside the U.S. or its outlying areas).

In respect to active contracts not covered by a-d above, and where an option would not be exercised until after December 8, 2021, contracting officers shall execute modifications to include clause (52.223-99) no later than December 8, 2021.

7. **Other:** An MS WORD copy of clause (52.223-99) is provided for your use while the clause is being added to CPSS.
8. **Additional Information:** Strategic Acquisition Management Initiatives Division, SAMI_Policy@ed.gov.

9. **Attachments:**

- A. CAAC Letter 2021-03
- B. FAR DEVIATION CLAUSE 52.223-99
- C. MS WORD copy of FAR CLAUSE 52.223-99

**CLASS DEVIATION
FINDINGS AND DETERMINATION
IMPLEMENTATION OF EXECUTIVE ORDER 14042, ENSURING ADEQUATE
COVID SAFETY PROTOCOLS FOR FEDERAL CONTRACTORS**

Findings

1. Executive Order (E.O.) 14042 was signed by the President on September 9, 2021 and published in the Federal Register at 86 FR 50985 on September 14, 2021. The E.O. requires agencies to include a clause requiring contractors and subcontractors at any tier to comply with all guidance for contractor workplace locations as published by the Safer Federal Workforce Task Force (Task Force Guidance) at https://www.saferfederalworkforce.gov/downloads/Draft%20contractor%20guidance%20doc_20210922.pdf.
2. The Civilian Agency Acquisition Council (CAAC) issued CAAC Letter 2021-03 on September 30, 2021, authorizing agencies to issue class deviations to implement the requirements of E.O. 14042 pending publication of the formal amendment to the Federal Acquisition Regulation (FAR) via FAR case 2021-021.
3. CAAC letter 2021-03 constitutes consultation in accordance with FAR 1.404 with the Chair of the CAAC allowing agencies to authorize a class deviation to implement the changes.


Determination

It is hereby determined that a class deviation (using the FAR Deviation text included in CAAC Letter 2021-03) is appropriate to implement Executive Order 14042. This class deviation is effective upon the date of signature and will remain in effect until cancelled or until the FAR is amended.

**John R.
Bashista**

John R. Bashista
Director
Office of Acquisition Management,
Department of Energy

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R. Bashista
Date: 2021.10.01
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**S. Keith
Hamilton**

S. Keith Hamilton
Deputy Associate Administrator
Acquisition and Project Management
and Senior Procurement Executive
National Nuclear Security Administration

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Keith Hamilton
Date: 2021.10.01
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Attachment: CAAC Letter 2021-03 with FAR Deviation text



DEPARTMENT OF HEALTH & HUMAN SERVICES

Office of the Secretary
Washington, D.C. 20201

October 7, 2021

MEMORANDUM FOR: Heads of Contracting Activity

FROM: H. Katrina Brisbon **H Katrina Brisbon** Digitally signed by H Katrina Brisbon
Date: 2021.10.07 16:29:47 -04'00'
Acting, Deputy Assistant Secretary for Acquisitions and Senior Procurement Executive

SUBJECT: Class Deviation (2021-03) from the Federal Acquisition Regulation (FAR)
Regarding Implementation of Executive Order 14042, Ensuring Adequate COVID Safety
Protocols for Federal Contractors

EFFECTIVE DATE: Immediately

EXPIRATION DATE: This class deviation is effective upon signature and remains in effect until it is incorporated in the FAR or this deviation is rescinded.

BACKGROUND: The Civilian Agency Acquisition Council (CAAC) has issued CAAC Letter 2021-03, Class Deviation From the Federal Acquisition Regulation Regarding Implementation of Executive Order 14042, Ensuring Adequate COVID Safety Protocols for Federal Contractors, issued September 30, 2021, authorizing agencies to issue a class deviation to implement Executive Order (E.O.) 14042.

E.O. 14042 was signed by the President on September 9, 2021 and published in the Federal Register at 86 FR 50985 on September 14, 2021. The E.O. requires agencies to include a clause requiring contractors and subcontractors at any tier to comply with all guidance for contractor or subcontractor workplace locations as published by the Safer Federal Workforce Task Force (Task Force Guidance) at <https://www.saferfederalworkforce.gov/contractors/>.

AUTHORITY: This class deviation is issued under the authority of FAR 1.404 and HHS Acquisition Regulation (HHSAR) 301.401. This class deviation is issued following consultation with the Chair of the Civilian Agency Acquisition Council (CAAC) in accordance with FAR 1.404(a) and the HHS Senior Procurement Executive in accordance with HHSAR 301.401.

DEVIATION: Effective immediately, and no later than October 15, 2021, HHS contracting officers shall insert the clause 52.223-99 Ensuring Adequate COVID-19 Safety Protocols for Federal Contractors, in all contracts or contract-like instruments, for commercial and non-commercial requirements for services, research and development, and construction services. For the purposes of this guidance, contract or contract-like instrument has the meaning set forth in the Department of Labor's proposed rule, "Increasing the Minimum Wage for Federal Contractors," 86 Fed. Reg. 38,816, 38,887 (July 22, 2021)

<https://www.federalregister.gov/documents/2021/07/22/2021-15348/increasing-the-minimum-wage-for-federal-contractors>], and includes but is not limited to, solicitations, contracts, task orders, delivery orders, modifications, Blanket Purchase Agreements (BPAs), Broad Agency Announcements (BAA), and Other Transaction Authority (OTA).

HHS Contracting Officers shall include the clause in the following:

- new contracts and contract-like instruments¹ above the micro-purchase threshold awarded on or after November 14, 2021, from solicitations issued before October 15, 2021 (this includes new orders awarded on or after November 14, 2021, from solicitations issued before October 15, 2021, under existing indefinite-delivery contracts);
- new solicitations issued on or after October 15, 2021, and contracts and contract-like instruments above the micro-purchase threshold awarded pursuant to those solicitations (this includes new solicitations issued on or after October 15, 2021, for orders awarded pursuant to those solicitations under existing indefinite-delivery contracts);
- extensions or renewals of existing contracts, contract-like instruments and orders above the micro-purchase threshold awarded on or after October 15, 2021;
- options on existing contracts and contract-like instruments above the micro-purchase threshold and orders exercised on or after October 15, 2021; and
- existing solicitations, contracts and contract-like instruments above the micro-purchase threshold and at or below the simplified acquisition threshold.

Contracting officers are highly encouraged to include the clause in:

- contracts and contract-like instruments above the simplified acquisition threshold that have been or will be awarded prior to November 14, 2021, on solicitations issued before October 15, 2021.

Contracting officers are encouraged, but are not required, to include the clause in:

- contracts and contract-like instruments that are not covered or directly addressed by the E.O. because the contract or subcontract is for the manufacturing of products.

The clause shall not be applied to:

- contracts, subcontracts, and contract-like instruments with Indian Tribes under the Indian Self-Determination and Education Assistance Act (Public Law 93-638) (the exclusion would not apply to a procurement contract or subcontract under the FAR to an Indian-owned or tribally owned business entity); or
- solicitations, contracts, and contract-like instruments if performance is outside the United States or its outlying areas (the exclusion is limited to employees who are performing work only outside the U.S. or its outlying areas).

¹ For purposes of this memorandum, the term “contract-like instruments” shall include only those instruments within the responsibility of contracting officers as that term is defined by the EO.

When issuing extensions, renewals, exercising options, and modifying existing contracts and contract-like instruments, in accordance with this deviation, contracting officers shall use a bilateral modification to incorporate the deviation clause.

ATTACHMENTS:

Attachment 1: FAR Deviation Clause 52.223-99 Ensuring Adequate COVID-19 Safety Protocols for Federal Contractors.

Attachment 2: Civilian Agency Acquisition Council (CAAC) Letter 2021-03, Class Deviation from the Federal Acquisition Regulation Regarding Implementation of Executive Order 14042, Ensuring Adequate COVID Safety Protocols for Federal Contractors, issued September 30, 2021.

(Class Deviation 2021-03)

Attachment 1

**FAR Deviation Clause
Executive Order 14042, Ensuring Adequate COVID Safety Protocols for Federal
Contractors**

September 30, 2021

PART 52—SOLICITATION PROVISIONS AND CONTRACT CLAUSES

Subpart 52.2—Text of Provisions and Clauses

[52.223-99 Ensuring Adequate COVID-19 Safety Protocols for Federal Contractors.

**ENSURING ADEQUATE COVID-19 SAFETY PROTOCOLS FOR FEDERAL
CONTRACTORS (OCT 2021) (DEVIATION)**

(a) *Definition.* As used in this clause -
United States or its outlying areas means—

- (1) The fifty States;**
- (2) The District of Columbia;**
- (3) The commonwealths of Puerto Rico and the Northern Mariana Islands;**
- (4) The territories of American Samoa, Guam, and the United States Virgin Islands; and**
- (5) The minor outlying islands of Baker Island, Howland Island, Jarvis Island, Johnston Atoll, Kingman Reef, Midway Islands, Navassa Island, Palmyra Atoll, and Wake Atoll.**

(b) *Authority.* This clause implements Executive Order 14042, Ensuring Adequate COVID Safety Protocols for Federal Contractors, dated September 9, 2021 (published in the Federal Register on September 14, 2021, 86 FR 50985).

(c) *Compliance.* The Contractor shall comply with all guidance, including guidance conveyed through Frequently Asked Questions, as amended during the performance

of this contract, for contractor or subcontractor workplace locations published by the Safer Federal Workforce Task Force (Task Force Guidance) at <https://www.saferfederalworkforce.gov/contractors/>.

(d) *Subcontracts*. The Contractor shall include the substance of this clause, including this paragraph (d), in subcontracts at any tier that exceed the simplified acquisition threshold, as defined in Federal Acquisition Regulation 2.101 on the date of subcontract award, and are for services, including construction, performed in whole or in part within the United States or its outlying areas.

(End of clause)]

U.S. Department of Homeland Security
Washington, DC 20528Homeland
Security

MEMORANDUM FOR: Heads of the Contracting Activities

PAUL R

FROM:

Paul R. Courtney COURTNEY
Chief Procurement OfficerDigitally signed by PAUL
R COURTNEY
Date: 2021.10.01
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SUBJECT:

**Federal Acquisition Regulation Class Deviation (Number
22-01) – Executive Order 14042 Ensuring Adequate COVID
Safety Protocols for Federal Contractors**

Purpose: This class deviation is issued in accordance with Federal Acquisition Regulation (FAR) 1.404. The purpose of this deviation is to implement Executive Order 14042 Ensuring Adequate COVID Safety Protocols for Federal Contractors.

Effective Date: Immediately.

Background: On September 30, 2021, Civilian Agency Acquisition Council (CAAC) Letter 2021-03 Class Deviation From the Federal Acquisition Regulation Regarding Implementation of Executive Order 14042, Ensuring Adequate COVID Safety Protocols for Federal Contractors was issued. CAAC Letter 2021-03 serves as consultation in accordance with FAR 1.404, authorizing agencies to issue a class deviation to implement Executive Order 14042 Ensuring Adequate COVID Safety Protocols for Federal Contractors.

Executive Order (E.O.) 14042 was signed by the President on September 9, 2021, and published in the Federal Register at [86 FR 50985](#) on September 14, 2021. The E.O. requires agencies to include a clause requiring contractors and subcontractors at any tier to comply with all guidance for contractor workplace locations as published by the [Safer Federal Workforce Task Force \(Task Force Guidance\)](#). This clause applies to solicitations and contracts for services, including construction.

Requirement: Contracting Officers shall include the clause into the following:

- new contracts awarded on or after November 14 from solicitations issued before October 15 (this includes new orders awarded on or after November 14 from solicitations issued before October 15 under existing indefinite-delivery contracts);
- new solicitations issued on or after October 15 and contracts awarded pursuant to those solicitations (this includes new solicitations issued on or after October 15 for orders awarded pursuant to those solicitations under existing indefinite-delivery contracts);
- extensions or renewals of existing contracts and orders awarded on or after October 15, 2021; and
- options on existing contracts and orders exercised on or after October 15, 2021.

Exhibit 1 - 0027

SUBJECT: Federal Acquisition Regulation Class Deviation (Number 22-0X) – Executive Order 14042
Ensuring Adequate COVID Safety Protocols for Federal Contractors

Page 2

Contracting officers are encouraged, but are not required, to include the clause into the following:

- contracts that will be awarded prior to November 14 on solicitations issued before October 15; and
- contracts that are not covered or directly addressed by the E.O. because the contract or subcontract is under the simplified acquisition threshold or is a contract or subcontract for the manufacturing of products.

The clause shall not be applied to:

- contracts and subcontracts with Indian Tribes under the Indian Self-Determination and Education Assistance Act (Public Law 93-638) (the exclusion would not apply to a procurement contract or subcontract under the FAR to an Indian-owned or tribally-owned business entity); or
- solicitations and contracts if performance is outside the United States or its outlying areas (the exclusion is limited to employees who are performing work outside the U.S. or its outlying areas).

When modifying existing contracts, task orders, or delivery orders in accordance with this deviation, contracting officers shall use a bilateral modification to incorporate the deviation clause.

Expiration: This class deviation will remain in effect until it is incorporated into the FAR or is rescinded.

Attachments:

Attachment 1: 52.223-99 Ensuring Adequate COVID-19 Safety Protocols for Federal Contractors. (OCT 2021) (DEVIATION)

Attachment 2: CAAC Letter 2021-03, Class Deviation From the Federal Acquisition Regulation Regarding Implementation of Executive Order 14042, Ensuring Adequate COVID Safety Protocols for Federal Contractors

Additional Information: DHS Component contracting activities should update their contract writing systems (CWS) to include the solicitation language found at sections A(1) and B(1) of this deviation. In order to provide access to the solicitation language in Component CWS, Component Acquisition Policy Chiefs should coordinate with the appropriate Component CWS personnel to determine if the addition of the solicitation language to their CWS is possible.

Questions or comments about this class deviation may be directed to Catherine Benavides at Catherine.Benavides@hq.dhs.gov or Ben Shih at Ben.Shih@hq.dhs.gov.

Attachment 1 - **52.223-99 Ensuring Adequate COVID-19 Safety Protocols for Federal Contractors. (OCT 2021) (DEVIATION)**

Executive Order 14042, Ensuring Adequate COVID Safety Protocols for Federal Contractors

As prescribed in FAR Class Deviation 22-0X Executive Order 14042 Ensuring Adequate COVID Safety Protocols for Federal Contractors, use the following clause:

52.223-99 Ensuring Adequate COVID-19 Safety Protocols for Federal Contractors. (OCT 2021) (DEVIATION)

(a) *Definition.* As used in this clause -

United States or its outlying areas means—

- (1) The fifty States;
- (2) The District of Columbia;
- (3) The commonwealths of Puerto Rico and the Northern Mariana Islands;
- (4) The territories of American Samoa, Guam, and the United States Virgin Islands; and
- (5) The minor outlying islands of Baker Island, Howland Island, Jarvis Island, Johnston Atoll, Kingman Reef, Midway Islands, Navassa Island, Palmyra Atoll, and Wake Atoll.

(b) *Authority.* This clause implements Executive Order 14042, Ensuring Adequate COVID Safety Protocols for Federal Contractors, dated September 9, 2021 (published in the Federal Register on September 14, 2021, 86 FR 50985).

(c) *Compliance.* The Contractor shall comply with all guidance, including guidance conveyed through Frequently Asked Questions, as amended during the performance of this contract, for contractor workplace locations published by the Safer Federal Workforce Task Force (Task Force Guidance) at <https://www.saferfederalworkforce.gov/contractors/>.

(d) *Subcontracts.* The Contractor shall include the substance of this clause, including this paragraph (d), in subcontracts at any tier that exceed the simplified acquisition threshold, as defined in Federal Acquisition Regulation 2.101 on the date of subcontract award, and are for services, including construction, performed in whole or in part within the United States or its outlying areas.

(End of clause)



U.S. Department of Housing and Urban Development
Washington, D.C. 20410

CHIEF PROCUREMENT OFFICER

**Class Deviation From the Federal Acquisition Regulation (FAR) Regarding
Implementation of Executive Order 14042, Ensuring Adequate COVID Safety Protocols
for Federal Contractors**

On September 30, 2021, the Civilian Agency Acquisition Council (CAAC) issued CAAC Letter 2021-03. This letter implements Executive Order 14042 (E.O.), [*Ensuring Adequate COVID Safety Protocols for Federal Contractors*](#), signed by the President on September 9, 2021, (and published in the Federal Register on September 14, 2021 at 86 FR 50985). The CAAC letter indicated that its issuance constitutes consultation with the Chair of the CAAC pursuant to FAR Section 1.404(a)(1), allowing agencies to authorize a class deviation. Pursuant to the foregoing, the Department of Housing and Urban Development (HUD) is hereby issuing this deviation to add FAR Clause 52.223-99 and the prescription for use in all existing and new HUD solicitations and contracts over the micro purchase threshold. This prescription and clause implement the requirements of E.O. 14042.

E.O. 14042 directs executive departments and agencies, including independent establishments subject to the Federal Property and Administrative Services Act, 40 U.S.C. § 102(4)(A), to ensure that covered contracts and contract-like instruments include a clause requiring contractors and any subcontractors (at any tier) to comply with all guidance for covered contractor or subcontractor workplace locations as published by the Safer Federal Workforce Task Force at: <https://www.saferfederalworkforce.gov/contractors/>.

Contracting Officers shall apply the FAR Clause 52.223-99 according to the prescription below on or around October 15, 2021, effective immediately upon full execution.

PRESCRIPTION: The clause applies to all solicitations and existing and new contracts above the micro purchase threshold except as indicated below.

The clause shall not be applied to:

- contracts and subcontracts with Indian Tribes under the Indian Self-Determination and Education Assistance Act (Public Law 93-638) (the exclusion would not apply to a procurement contract or subcontract under the FAR to an Indian-owned or tribally-owned business entity); or
- solicitations and contracts if performance is outside the United States or its outlying areas (the exclusion is limited to employees who are performing work only outside the U.S. or its outlying areas).

HUD will share the deviation widely among the workforces to ensure full awareness of and compliance with E.O. 14042. The FAR Council has opened a case (FAR Case 2021-021, Ensuring Adequate COVID-19 Safety Protocols for Federal Contractors) to make appropriate amendments in the FAR to reflect the requirements of E.O. 14042. This deviation will be effective until the FAR is amended, or the deviation is otherwise rescinded.

A copy of this deviation (including direction to the workforce, prescription for use of clause, and clause text) will be provided to the FAR Secretariat, General Services Administration, by emailing the deviation to GSARegSec@gsa.gov. Please contact Patricia Broome if you have any questions or concerns at patricia.a.broome@hud.gov or (202) 402-5290.



Ronald C. Flom
Chief Procurement Officer

October 7, 2021

Date

Attachment

FAR Deviation Clause
Executive Order 14042, Ensuring Adequate COVID Safety Protocols for Federal Contractors

September 30, 2021

PART 52—SOLICITATION PROVISIONS AND CONTRACT CLAUSES

Subpart 52.2—Text of Provisions and Clauses

52.223-99 Ensuring Adequate COVID-19 Safety Protocols for Federal Contractors.
ENSURING ADEQUATE COVID-19 SAFETY PROTOCOLS FOR FEDERAL CONTRACTORS (OCT 2021) (DEVIATION)

(a) Definition. As used in this clause -
United States or its outlying areas means—

- (1) The fifty States;
- (2) The District of Columbia;
- (3) The commonwealths of Puerto Rico and the Northern Mariana Islands;
- (4) The territories of American Samoa, Guam, and the United States Virgin Islands; and
- (5) The minor outlying islands of Baker Island, Howland Island, Jarvis Island, Johnston Atoll, Kingman Reef, Midway Islands, Navassa Island, Palmyra Atoll, and Wake Atoll.

(b) Authority. This clause implements Executive Order 14042, Ensuring Adequate COVID Safety Protocols for Federal Contractors, dated September 9, 2021 (published in the Federal Register on September 14, 2021, 86 FR 50985).

(c) Compliance. The Contractor shall comply with all guidance, including guidance conveyed through Frequently Asked Questions, as amended during the performance of this contract, for contractor or subcontractor workplace locations published by the Safer Federal Workforce Task Force (Task Force Guidance) at <https://www.saferfederalworkforce.gov/contractors/>.

(d) Subcontracts. The Contractor shall include the substance of this clause, including this paragraph (d), in subcontracts at any tier that exceed the simplified acquisition threshold, as defined in Federal Acquisition Regulation 2.101 on the date of subcontract award, and are for services, including construction, performed in whole or in part within the United States or its outlying areas.

(End of clause)



United States Department of the Interior

OFFICE OF THE SECRETARY

Washington, DC 20240

October 15, 2021

Memorandum

To: All Bureaus and Offices that Award Contracts or Contract-Like Instruments

From: Megan Olsen
Director, Office of Acquisition and Property Management
Senior Procurement Executive

MEGAN OLSEN

Digitally signed by MEGAN OLSEN
Date: 2021.10.15 13:12:10 -04'00'

Cara Whitehead
Director, Office of Grants Management

CARA WHITEHEAD

Digitally signed by CARA WHITEHEAD
Date: 2021.10.15 14:56:58 -04'00'

Re: FAR Deviation – Implementation of Executive Order 14042, Ensuring Adequate COVID Safety Protocols for Federal Contractors

A. Purpose

This memorandum approves a class deviation from the Federal Acquisition Regulation (FAR) to implement [Executive Order 14042, Ensuring Adequate COVID Safety Protocols for Federal Contractors](#) (“the order”), signed September 9, 2021.

This memorandum also provides instructions for the Department of the Interior (DOI) workforce regarding when to include a new clause (“the clause”) in solicitations, contracts, and “contract-like instruments.” The clause specifies that the contractor or subcontractor shall, for the duration of the contract, comply with all guidance for contractor or subcontractor workplace locations published by the Safer Federal Workforce Task Force (“Task Force”). As directed by the order, on September 24, 2021, the Task Force issued [COVID-19 Workplace Safety: Guidance for Federal Contractors and Subcontractors](#) to provide the initial guidance.

On September 30, 2021, the Civilian Agency Acquisition Council (CAAC) issued [CAAC Letter 2021-03](#) regarding implementation of the order, which serves as consultation with the CAAC Chair to authorize agencies to issue their own class deviations. This class deviation sets forth DOI’s implementation of the order and the CAAC Letter.

B. Applicability

1. Subject to sections B and C of this deviation, the clause is required in the following:
 - Contracts or contract-like instruments for services, construction, or a leasehold interest in real property exceeding the simplified acquisition threshold (SAT) or simplified lease acquisition threshold (SLAT);

- Contracts or contract-like instruments for services covered by the Service Contract Act, 41 U.S.C. § 6701, et seq.; exceeding the SAT/SLAT
 - Contracts or contract-like instruments for concessions, including any concessions contract excluded by Department of Labor regulations at 29 CFR § 4.133(b) exceeding the SAT/SLAT; and,
 - Contracts or contract-like instruments entered into with the Federal Government in connection with Federal property or lands and related to offering services for Federal employees, their dependents, or the general public, exceeding the SAT/SLAT.
2. DOI is strongly encouraging the clause be included in the following:
- Contracts, subcontracts, or contract-like instruments whose value is equal to or less than the SAT/SLAT; and,
 - Contracts or subcontracts solely for the manufacturing of products.
3. The clause is not applicable to:
- Micro-Purchases;
 - Grants;
 - Solicitations, contracts, and contract-like instruments if performance is outside the United States or its outlying areas (the exclusion is limited to employees who are performing work only outside the U.S. or its outlying areas); or
 - Contracts, subcontracts, and contract-like instruments with Indian Tribes under the Indian Self Determination and Education Assistance Act (Public Law 93-638) (the exclusion would not apply to a procurement contract or subcontract under the FAR to an Indian-owned or tribally-owned business entity).

C. Implementation for Procurement Contracts

1. Solicitations
- a. *New Solicitations.* Contracting officers shall include clause 52.223-99 in solicitations for applicable contracts (in accordance with Section B) issued on or after **October 15, 2021**.
 - b. *Existing Solicitations.* Contracting officers shall either amend the solicitation to include the clause at FAR 52.223-99 or incorporate it into the award of the apparent successful offeror for applicable solicitations (in accordance with Section B) that were issued prior to October 15, 2021, and that have not closed, or awards that have not been made by October 15, 2021.

2. Contracts

- a. *New Contracts*. Contracting officers shall include the clause at FAR 52.223-99 in new applicable contracts (in accordance with Section B) awarded on or after **October 15, 2021**.
- b. *Existing Contracts*. Contracting officers shall modify applicable existing contracts (in accordance with Section B) to add the clause at FAR 52.223-99.
 - The modification must be bilateral, even if an option is also being exercised simultaneously. Prior to agreeing to any contract price increase resulting from incorporating this clause into an existing contract, Contracting Officers must submit the proposed contract modification to the Office of the Solicitor for review, even if the modification would not otherwise be subject to legal review under DOI-AAAP-075, *Legal Review of Acquisition Actions*.
 - Contracting officers shall complete as many modifications of existing contracts as possible before **November 14, 2021** rather than waiting to add the clause with the next option or extension for the contract.

3. Indefinite Delivery Vehicles

- a. Agencies that manage Government-wide indefinite-delivery vehicles (IDVs), such as the Federal Supply Schedules and other Government-Wide Acquisition Contracts (GWAC), will be modifying those vehicles to add the clause.
- b. DOI Contracting officers who manage IDVs that were awarded by DOI shall review each IDV and modify those that fall under the scope of the order to add clause 52.223-99 in accordance with this guidance.
- c. When awarding an order under any such IDV, where the order would otherwise be subject to this policy, the Contracting officer must check to see whether the clause has been incorporated into the IDV. If the clause has been incorporated, then the order does not need to include the clause. If the clause has not been incorporated into the IDV, then the clause must be incorporated in individual orders that fall within the scope of Section B.

D. Implementation for Contract-Like Instruments. This section provides supplemental implementation instructions for certain types of DOI contract-like instruments. The list should not be considered a comprehensive list of covered contract-like instruments for DOI.

1. Review of Contract-Like Instruments

- a. Any DOI official who is responsible for any type of contract-like instrument must review the order, the Task Force's guidance, and this document, and determine

whether the clause must be included in the instrument. The order should be interpreted broadly, within the parameters of law.

- b. If a bureau or office is uncertain whether the clause must be included in a specific instrument of a type that is not addressed directly in this guidance, the bureau or office must elevate the question to the Director of the Office of Acquisition and Property Management for a final determination.
 - c. DOI officials shall use the same clause for covered contract-like instruments that has been adopted for procurement contracts.
 - d. The clause shall be used in exact text. If substantive edits are needed to tailor the language to a specific agreement or type of agreement, those edits must be approved by the Solicitor's Office and the Senior Procurement Executive prior to being included in any contract-like agreement.
2. **Concessions Contracts**
- a. *New Contracts.* The clause must be inserted in all applicable (in accordance with Section B) new DOI concessions contracts awarded after **October 15, 2021**.
 - b. *Existing Contracts.* Bureaus and offices shall modify existing applicable (in accordance with Section B) concessions contracts to incorporate the clause, consistent with normal procedures for modifying the terms and conditions of concession contracts or the law applicable to concession contracts, as soon as practicable following the date of this policy. Bureau and offices shall complete as many modifications as possible by **November 15, 2021**.
 - c. *Similar Instruments.* The guidance above also applies to any other type of contract-like instrument (such as a Memorandum of Understanding, Memorandum of Agreement, Commercial Use Authorization, permit, lease of DOI building, etc.) that meets the definition: "contracts in connection with Federal property or land and related to offering services for Federal employees, their dependents, or the general public."
3. **Cooperative Agreements**
- a. *Covered Cooperative Agreements.* Bureaus and offices must include the clause in cooperative agreements in accordance with the thresholds in Section B if:
 - It is a cooperative agreement entered into with the Federal Government "in connection with Federal property or lands and related to offering services for Federal employees, their dependents, or the general public" or
 - It is a cooperative agreement under which the recipient's staff and/or one or more subrecipients, including subcontractors, are performing work subject to the Service Contract Act, 41 U.S.C. 6701 et seq.
 - b. *New Cooperative Agreements.* Bureaus and offices shall include the clause in any new covered agreement awarded after **October 15, 2021**.

- c. *Existing Cooperative Agreements.* Bureaus and offices shall amend existing covered agreements to incorporate the clause as soon as practicable. Bureau and offices shall complete as many amendments as possible by **November 15, 2021**.
 - d. *Legal Review.* Prior to including the clause in any cooperative agreement, bureaus and offices shall obtain legal review of the notice or amendment.
- 4. **Real Property Leases**
 - a. *GSA Leases.* The General Services Administration (GSA) will be modifying their covered real property leases to incorporate the clause. Therefore, DOI employees do not need to take any action with regard to Occupancy Agreements with GSA, as the clause will be incorporated into the leases by the awarding agency.
 - b. *New Direct Leases.* For DOI's direct leases (under GSA delegated or statutory authority) for real property, where DOI has a contract directly with the landlord, DOI Leasing Contracting Officers (LCO) must incorporate the clause into all new applicable leases (in accordance with Section B) issued after **October 15, 2021**. In accordance with Section B, LCOs are strongly encouraged to include the clause in solicitations for new leases below the SLAT if there is a significant benefit to adding the clause in accordance with the goals outlined in the order. Further guidance is provided in GSA Leasing Alert 21-15 – Implementation of Executive Order 14042, Ensuring Adequate COVID Safety Protocols for Federal Contractors.
 - c. *Existing Direct Leases.* DOI LCOs shall modify existing applicable leases (in accordance with Section B) to incorporate the clause as soon as practicable. LCOs shall complete as many amendments as possible by **November 15, 2021**.
- 5. **Water-related contracts under Federal reclamation law**
 - a. *Covered Contracts.* Bureaus and offices shall include the clause in water-related contracts entered into under Federal reclamation law in accordance with the applicability requirements and thresholds in Section B.
 - 1. *New Contracts.* If a contract is covered under Section B, bureaus and offices shall include the clause in any new covered contract awarded after **October 15, 2021**.
 - 2. *Existing Contracts.* If a bureau or office amends an existing contract covered under Section B, bureaus and offices shall incorporate the clause.
 - b. *Legal Review.* Prior to including the clause in any water-related contracts entered into under Federal reclamation law, bureaus and offices shall obtain legal review of the contract or amendment.

E. Effect of this Deviation on Prior DOI Guidance

- DOI previously issued [COVID Policy Bulletin 2021-02: Visitors and Contractors](#) and the Senior Procurement Executive's August 23, 2021 memo on [Implementation of certification of vaccination for contractor employees working in any Federal building](#)

or Federally controlled indoor worksite. Those previous documents remain in effect and are not in rescinded by this guidance.

- As DOI implements the order and adds the clause to certain contracts and contract-like instruments, contractors who are operating under this clause will no longer have to comply with the certification of vaccination for contractor employees working in Federal buildings or Federally controlled indoor worksites. The contractors operating under a contract or contract-like agreement that contains the clause will abide by the terms and conditions in their contract regarding COVID health and safety, including while working in Federal buildings or Federally controlled indoor worksites.
- Any contractor employee working under a contract or other instrument that does not contain the clause must continue to comply with the requirements in [COVID Policy Bulletin 2021-02: Visitors and Contractors](#), and Contracting Officers and other similar officials within DOI must continue to notify contractors of these requirements in accordance with existing guidance if they are not subject to the clause.
- Recipients of federal financial assistance awards must follow the procedures for visitors when entering DOI facilities.

Attachments:

- [Executive Order 14042, Ensuring Adequate COVID Safety Protocols for Federal Contractors](#)
- [Safer Federal Workforce Task Force COVID-19 Workplace Safety: Guidance for Federal Contractors and Subcontractors](#)
- [Civilian Agency Acquisition Council Letter 2021-03](#)
- [COVID Policy Bulletin 2021-02: Visitors and Contractors](#)
- [DOI Senior Procurement Executive's August 23, 2021 memo on Implementation of certification of vaccination for contractor employees working in any Federal building or Federally controlled indoor worksite](#)



U.S. Department of Justice
Justice Management Division
Senior Procurement Executive

Washington, D.C. 20530

MEMORANDUM FOR BUREAU PROCUREMENT CHIEFS

FROM: Arthur E. Gary
Senior Procurement Executive

**ARTHUR
GARY**

Digitally signed by
ARTHUR GARY
Date: 2021.10.04
11:50:58 -04'00'

SUBJECT: Federal Acquisition Regulation Class Deviation Regarding Implementation of Executive Order 14042, Ensuring Adequate COVID Safety Protocols for Federal Contractors

1. PURPOSE

This class deviation is issued under the authority of Federal Acquisition Regulation (FAR) 1.404 authorizing agencies to issue a class deviation to implement Executive Order 14042 (“the order”), [Ensuring Adequate COVID Safety Protocols for Federal Contractors](#). In addition to guidance, this memorandum prescribes a contract clause, which implements the order.

2. BACKGROUND

Executive Order 14042 was signed by the President on September 9, 2021, and published in the Federal Register at 86 FR 50985 on September 14, 2021. The order requires agencies to include a clause requiring contractors and subcontractors at any tier to comply with all guidance for contractor workplace locations as published by the Safer Federal Workforce Task Force (“Task Force”) at <https://www.saferfederalworkforce.gov/contractors/> (“Task Force Guidance”). The clause applies to solicitations and contracts for services, including construction.

Section 3(a) of the order requires the Federal Acquisition Regulatory Council to develop a contract clause and provide initial policy direction to acquisition office for use of the clause by recommending that agencies exercise their authority under FAR subpart 1.4.

3. AUTHORITY

This class deviation is issued under the authority of FAR 1.404.

4. DEVIATION

See Attachment 1 for the new FAR clause created by this deviation.

5. EFFECTIVE DATE AND EXPIRATION

This deviation is effective immediately and remains in effect until the FAR is amended or the deviation is otherwise rescinded.

6. SCOPE AND APPLICABILITY

The attached FAR deviation clause is provided consistent with the order and the Task Force Guidance. Agencies are **required** to include the clause in –

- new contracts awarded on or after November 14 from solicitations issued before October 15 (this includes new orders awarded on or after November 14 from solicitations issued before October 15 under existing indefinite-delivery contracts).
- new solicitations issued on or after October 15 and contracts awarded pursuant to those solicitations (this includes new solicitations issued on or after October 15 for orders awarded pursuant to those solicitations under existing indefinite-delivery contracts).
- extensions or renewals of existing contracts and orders awarded on or after October 15, 2021; and
- options on existing contracts and orders exercised on or after October 15, 2021.

The clause applies to solicitations and contracts for services, including construction.

To maximize the goal of getting more people vaccinated and decreasing the spread of COVID-19, the Task Force strongly encourages agencies to apply the requirements of the Task Force Guidance broadly, consistent with applicable law. Accordingly, agencies are **encouraged, but are not required** to include the clause in –

- contracts that will be awarded prior to November 14 on solicitations issued before October 15; and
- contracts that are not covered or directly addressed by the order because the contract or subcontract is under the simplified acquisition threshold or is a contract or subcontract for the manufacturing of products.

The clause shall not be applied to:

- contracts and subcontracts with Indian Tribes under the Indian Self-Determination and Education Assistance (Public Law 93-638); or
- solicitations and contracts if performance is outside the United States or its outlying areas (the exclusion is limited to employees who are performing work outside the U.S. or its outlying areas).

7. ADDITIONAL INFORMATION

If you have questions, please contact DOJAcquisitionPolicy@usdoj.gov.

8. ATTACHMENTS

Attachment 1 – FAR Deviation Clause, *Executive Order 14042, Ensuring Adequate COVID Safety Protocols for Federal Contractors*

**CLASS DEVIATION
FINDINGS AND DETERMINATION
EXECUTIVE ORDER 14042, ENSURING ADEQUATE COVID SAFETY PROTOCOLS
FOR FEDERAL CONTRACTORS**

Findings

1. Executive Order 14042 (“the order”) was signed by the President on September 9, 2021 and published in the Federal Register at 86 FR 50985 on September 14, 2021. The order requires agencies to include a clause requiring contractors and subcontractors at any tier to comply with all guidance for contractor workplace locations as published by the Safer Federal Workforce Task Force.
2. The Civilian Agency Acquisition Council (CAAC) issued CAAC Letter 2021-03 on September 30, 2021, authorizing agencies to issue class deviations implementing these provisions pending formal amendment to the Federal Acquisition Regulation (FAR) via FAR case 2021-21, Ensuring Adequate COVID-19 Safety Protocols for Federal Contractors.
3. CAAC letter 2021-03 constitutes consultation in accordance with FAR 1.404 with the Chair of the CAAC allowing agencies to authorize a class deviation to implement the changes.

Determination

It is hereby determined that a class deviation is appropriate to implement Executive Order 14042. This class deviation will be effective as stated and will remain in effect until cancelled or the authority expires.

Lee Lofthus Date: 2021.10.04
12:29:57 -04'00'

Lee J. Lofthus
Assistant Attorney General
for Administration

Date

ATTACHMENT 1

FAR Deviation Clause

Executive Order 14042, Ensuring Adequate COVID Safety Protocols for Federal Contractors

September 30, 2021

PART 52—SOLICITATION PROVISIONS AND CONTRACT CLAUSES

Subpart 52.2—Text of Provisions and Clauses

[52.223-99 Ensuring Adequate COVID-19 Safety Protocols for Federal Contractors.

ENSURING ADEQUATE COVID-19 SAFETY PROTOCOLS FOR FEDERAL CONTRACTORS (OCT 2021) (DEVIATION)

(a) *Definition.* As used in this clause -

United States or its outlying areas means—

- (1) The fifty States;
- (2) The District of Columbia;
- (3) The commonwealths of Puerto Rico and the Northern Mariana Islands;
- (4) The territories of American Samoa, Guam, and the United States Virgin Islands;and
- (5) The minor outlying islands of Baker Island, Howland Island, Jarvis Island, Johnston Atoll, Kingman Reef, Midway Islands, Navassa Island, Palmyra Atoll, and Wake Atoll.

(b) *Authority.* This clause implements Executive Order 14042, Ensuring Adequate COVID Safety Protocols for Federal Contractors, dated September 9, 2021 (published in the Federal Register on September 14, 2021, 86 FR 50985).

(c) *Compliance*. The Contractor shall comply with all guidance, including guidance conveyed through Frequently Asked Questions, as amended during the performance of this contract, for contractor or subcontractor workplace locations published by the Safer Federal Workforce Task Force (Task Force Guidance) at <https://www.saferfederalworkforce.gov/contractors/>.

(d) *Subcontracts*. The Contractor shall include the substance of this clause, including this paragraph (d), in subcontracts at any tier that exceed the simplified acquisition threshold, as defined in Federal Acquisition Regulation 2.101 on the date of subcontract award, and are for services, including construction, performed in whole or in part within the United States or its outlying areas.

(End of clause)]

U.S. Department of Labor

Office of the Assistant Secretary
for Administration and Management
Washington, D.C. 20210



October 13, 2021

MEMORANDUM FOR DOL CONTRACTING AND GRANT OFFICERS

FROM: RACHANA DESAI MARTIN
Assistant Secretary for
Administration and Management

SUBJECT: Class Deviation from the Federal Acquisition Regulation Regarding
Implementation of Executive Order 14042, Ensuring Adequate COVID
Safety Protocols for Federal Contractors

EXECUTIVE SUMMARY

This memorandum approves a class deviation from the Federal Acquisition Regulation (FAR) to implement Executive Order (E.O.) 14042, Ensuring Adequate COVID Safety Protocols for Federal Contractors, dated September 9, 2021.

This memorandum also provides instructions for the Department of Labor (DOL) acquisition workforce on when to include a new clause in DOL solicitations, contracts, and applicable contract-like instruments (including but not limited to contract-like cooperative agreements). For the purpose of this guidance, contract-like cooperative agreements and other contract-like instruments are considered contracts¹. The instructions include specific implementation timelines for solicitations, new contracts, existing contracts, and applicable contract-like instruments.

BACKGROUND/DISCUSSION

In order to ensure the health and safety of the federal workforce and contractor community, the President signed E.O. 14042. The E.O. promotes economy and efficiency in Federal procurement by ensuring that contractors and subcontractors that contract with the Federal Government provide COVID-19 safeguards. The E.O. directs executive departments, to the extent permitted by law, to ensure that contracts and contract-like instruments include a clause that the contractor and any subcontractors (at any tier) shall incorporate into lower-tier subcontracts. This clause shall specify that the contractor or subcontractor shall, for the duration of the contract, comply with all guidance for contractor or subcontractor workplace locations published by the Safer Federal Workforce Task Force. The E.O. also directs the Safer Federal Workforce Taskforce to

¹ For the purpose of this guidance and as referenced in E.O. 14042, contract and contract-like instruments (e.g., cooperative agreements) shall have the meaning set forth in the Department of Labor's proposed rule, "Increasing the Minimum Wage for Federal Contractors," 86 FR 38816, 38887 (July 22, 2021). Note that grants and grant-like cooperative agreements are not 'contract-like instruments' and are therefore not covered by this FAR Deviation.

issue guidance to provide implementation details and the Federal Acquisition Regulatory Council to establish a new clause to be included in solicitations and contracts and contract-like instruments.

The Safer Federal Workforce Task Force issued guidance on September 24, 2021, found at saferfederalworkforce.gov, which was later approved by the Director of the Office of Management and Budget (OMB). That guidance requires:

- Vaccination of covered contractor employees, except in limited circumstances where an employee is legally entitled to an accommodation;
- Requirements related to masking and physical distancing while in covered contractor workplaces; and
- Designation by covered contractors of a person or persons to coordinate COVID-19 workplace safety efforts at covered contractor workplaces.

On September 30, 2021, the Civilian Agency Acquisition Council (CAAC) issued CAAC Letter 2021-03 regarding implementation of E.O. 14042, which serves as consultation with the CAAC Chair to authorize agencies to issue their own class deviations, in compliance with FAR 1.404(a)(1).

APPLICABILITY

Contracts

Effective immediately, all DOL contracting officers shall include the clause provided in Attachment A, in all solicitations and awards above the micro-purchase threshold (exceeding \$10,000), as follows:

- a) **New solicitations.** Contracting officers shall include the clause at FAR 52.223-99, Ensuring Adequate COVID-19 Safety Protocols for Federal Contractors, in all new applicable solicitations.
- b) **Existing Solicitations.** Contracting officers shall either amend the solicitation to include the clause at FAR 52.223-99 or incorporate it into the award of the apparent successful offer or for applicable solicitations that were issued.
- c) **New Contracts.** Contracting officers shall include the clause at FAR 52.223-99 in new applicable contracts.
- d) **Existing Contracts.** Contracting officers shall modify all applicable existing contracts to add the clause at FAR 52.223-99. A copy of the cover letter (Attachment C) and modification shall be sent to the contractor. The modification must be executed bilaterally.
- e) **Exercise of Options and Contract Extensions.** Contracting officers shall not exercise an option period or extend the period of performance for applicable existing contracts

unless the contract has been modified to include the new clause for the option or extended period of performance.

Contract-like Cooperative Agreements

Effective immediately, all DOL grant officers responsible for the award and administration of contract-like cooperative agreements or other contract-like instruments shall include the clause provided in Attachment B in all applicable contract-like instruments for services with a value above \$10,000, as follows:

- a) **New Notice of Funding Opportunity.** Grant officers shall include the clause, Ensuring Adequate COVID-19 Safety Protocols for Federal Contractors, in all notices of funding opportunities for contract-like cooperative agreements or other applicable contract-like instruments².
- b) **Existing Notice of Funding Opportunity.** Grant officers shall either amend the notice of funding opportunity to include the clause, Ensuring Adequate COVID-19 Safety Protocols for Federal Contractors, or incorporate it into the award of contract-like cooperative agreements or applicable contract-like instruments for which the notice of funding opportunities³ was issued.
- c) **New Cooperative Agreements.** Grant officers shall include the clause, Ensuring Adequate COVID-19 Safety Protocols for Federal Contractors, in all contract-like cooperative agreements or applicable contract-like instruments⁴ issued.
- d) **Existing Cooperative Agreements.** Grant officers shall modify all applicable contract-like cooperative agreements or applicable contract-like instruments⁵ to add the clause, Ensuring Adequate COVID-19 Safety Protocols for Federal Contractors. A copy of the sample cover letter (Attachment D) and modification shall be sent to the contractor. The modification must be executed bilaterally.
- e) **Period of Performance Extensions.** Grant officers shall not extend the period of performance for applicable existing awards unless the award has been modified to include the new clause for the optional or extended period of performance.

EXEMPTIONS

The clause in Attachment A shall not be applied to:

- (a) Micro-purchases;

² For Notice of Funding Opportunity, the FAR citation number shall not be included.

³ For Notice of Funding Opportunity, the FAR citation number shall not be included.

⁴ For Cooperative Agreements, the FAR citation number shall not be included.

⁵ For Cooperative Agreements, the FAR citation number shall not be included.

- (b) Contracts and subcontracts with Indian Tribes under the Indian Self-Determination and Education Assistance Act (Public Law 93-638) (the exclusion would not apply to a procurement contract or subcontract under the FAR to an Indian-owned or tribally-owned business entity); or
- (c) Solicitations and contracts if performance is outside the United States or its outlying areas (the exclusion is limited to employees who are performing work outside the U.S. or its outlying areas).

EFFECTIVE DATE

This deviation is effective immediately and shall remain in effect until the FAR is amended or the deviation is rescinded.

All questions related to this memorandum should be sent to Ryan Chandler at Chandler.Ryan.P@dol.gov.

ATTACHMENTS

- Attachment A – FAR Deviation Clause 52.223-99, Ensuring Adequate COVID-19 Safety Protocols for Federal Contractors
- Attachment B – Deviation Clause, Ensuring Adequate COVID-19 Safety Protocols for Federal Contractors, for Contract-like Cooperative Agreements
- Attachment C – Contractor Cover Letter Template for Existing Contracts
- Attachment D – Contractor Cover Letter Template for Existing Contract-like Cooperative Agreements

cc: Agency Heads
Administrative Officers
Carl V. Campbell, Senior Procurement Executive

ATTACHMENT A

FAR Deviation Clause

Executive Order 14042, Ensuring Adequate COVID Safety Protocols for Federal Contractors

September 30, 2021

PART 52—SOLICITATION PROVISIONS AND CONTRACT CLAUSES

Subpart 52.2—Text of Provisions and Clauses

[52.223-99 Ensuring Adequate COVID-19 Safety Protocols for Federal Contractors.

ENSURING ADEQUATE COVID-19 SAFETY PROTOCOLS FOR FEDERAL CONTRACTORS (OCT 2021) (DEVIATION)

(a) *Definition.* As used in this clause -

United States or its outlying areas means—

- (1) The fifty States;
- (2) The District of Columbia;
- (3) The commonwealths of Puerto Rico and the Northern Mariana Islands;
- (4) The territories of American Samoa, Guam, and the United States Virgin Islands; and
- (5) The minor outlying islands of Baker Island, Howland Island, Jarvis Island, Johnston Atoll, Kingman Reef, Midway Islands, Navassa Island, Palmyra Atoll, and Wake Atoll.

(b) *Authority.* This clause implements Executive Order 14042, Ensuring Adequate COVID Safety Protocols for Federal Contractors, dated September 9, 2021 (published in the Federal Register on September 14, 2021, 86 FR 50985).

(c) *Compliance.* The Contractor shall comply with all guidance, including guidance conveyed through Frequently Asked Questions, as amended during the performance of this contract, for contractor or subcontractor workplace locations published by the Safer Federal Workforce Task Force (Task Force Guidance) at <https://www.saferfederalworkforce.gov/contractors>.

(d) *Subcontracts*. The Contractor shall include the substance of this clause, including this paragraph (d), in subcontracts at any tier that exceed the simplified acquisition threshold, as defined in Federal Acquisition Regulation 2.101 on the date of subcontract award, and are for services, including construction, performed in whole or in part within the United States or its outlying areas.

(End of clause)]

ATTACHMENT B

FAR Deviation Clause

Executive Order 14042, Ensuring Adequate COVID Safety Protocols for Federal Contractors

Agreement Number: [INSERT Number]

This clause is applicable to the aforementioned Cooperative Agreement,¹ as prescribed in the DOL FAR Deviation Memorandum dated [xxx]. The term ‘Contractor’ as used in this clause refers to party entering into this Cooperative Agreement.

ENSURING ADEQUATE COVID-19 SAFETY PROTOCOLS FOR FEDERAL CONTRACTORS (OCT 2021) (DEVIATION)

(a) *Definition.* As used in this clause -

United States or its outlying areas means—

- (1) The fifty States;
- (2) The District of Columbia;
- (3) The commonwealths of Puerto Rico and the Northern Mariana Islands;
- (4) The territories of American Samoa, Guam, and the United States Virgin Islands; and
- (5) The minor outlying islands of Baker Island, Howland Island, Jarvis Island, Johnston Atoll, Kingman Reef, Midway Islands, Navassa Island, Palmyra Atoll, and Wake Atoll.

(b) *Authority.* This clause implements Executive Order 14042, Ensuring Adequate COVID Safety Protocols for Federal Contractors, dated September 9, 2021 (published in the Federal Register on September 14, 2021, 86 FR 50985).

(c) *Compliance.* The Contractor shall comply with all guidance, including guidance conveyed through Frequently Asked Questions, as amended during the performance of this contract, for contractor or subcontractor workplace locations published by the Safer Federal Workforce Task Force (Task Force Guidance) at <https://www.saferfederalworkforce.gov/contractors>.

(d) *Subcontracts.* The Contractor shall include the substance of this clause, including this paragraph (d), in subcontracts at any tier that exceed the simplified acquisition threshold, as defined in Federal Acquisition Regulation 2.101 on the date of subcontract award, and are for

¹ For purposes of this guidance and as referenced in E.O. 14042, contracts and contract-like instruments shall have the meaning set forth in the Department of Labor’s proposed rule, “Increasing the Minimum Wage for Federal Contractors,” 86 FR 38816, 38887 (July 22, 2021).

services, including construction, performed in whole or in part within the United States or its outlying areas.

(End of clause)

Except as provided herein, all terms and conditions of the award referenced above, remains unchanged and in full force and effect.

ACCEPTED THIS DATE FOR THE AWARDEE	U.S. DEPARTMENT OF LABOR
<div data-bbox="248 640 755 682"> <div></div> <div>DATE OF ACCEPTANCE</div> </div>	<div data-bbox="868 640 1412 682"> <div></div> <div>EXECUTION DATE</div> </div>
<div data-bbox="224 798 779 829"> <div></div> <div>AUTHORIZED SIGNATURE FOR AWARDEE</div> </div> <div data-bbox="248 934 755 976"> <div></div> <div>(TYPED NAME AND TITLE)</div> </div>	<div data-bbox="868 798 1412 829"> <div></div> <div>SIGNATURE OF GRANT OFFICER</div> </div> <div data-bbox="868 934 1412 976"> <div></div> <div>(TYPED NAME)</div> </div>

U.S. Department of Labor

Office of the Senior Procurement Executive
Office of the Assistant Secretary for Administration and Management
Washington, D.C. 20210



[Date]

[Contractor's Name] [Contractor's Street
Address] [Contractor's City, State and Zip
Code]

Subject: Contract Modification - New Clause for Ensuring Adequate COVID-19 Safety
Protocols for Federal Contractors – [Contract Number & Title]

Dear [Contractor's POC name],

The Department of Labor (DOL) appreciates the hard work and dedication of our contractors. The health and safety of DOL employees, contractors, and their families is our top priority. In order to ensure the health and safety of the Federal workforce and contractor community, the President signed [*Executive Order 14042 - Ensuring Adequate COVID Safety Protocols for Federal Contractors*](#). The requirements in the Executive Order are being implemented via a FAR deviation. The clause in the FAR deviation will be incorporated into DOL contracts via a **bilateral** modification.

If you hold a DOL contract, to include Blanket Purchase Agreements (BPAs) and Basic Ordering Agreements (BOAs), that exceeds the micro-purchase threshold (MPT), DOL strongly encourages you to accept this contract modification at this time. The modification is **mandatory** before DOL will renew, extend the period of performance of your contract, or exercise an option.

If you have additional questions or concerns, please contact your Contracting Officer.

[OGM to insert letterhead]

[Date]

[Contractor's Name] [Contractor's Street
Address] [Contractor's City, State and Zip
Code]

Subject: Contract-like Cooperative Agreement or Contract-like Instruments Modification -
New Clause for Ensuring Adequate COVID-19 Safety Protocols for Federal Contractors –
[Agreement Number & Title]

Dear [Contractor's POC name],

The Department of Labor (DOL) appreciates the hard work and dedication of our contractors. The health and safety of DOL employees, contractors and their families is our top priority. In order to ensure the health and safety of the Federal workforce and contractor community, the President signed [Executive Order 14042 - Ensuring Adequate COVID Safety Protocols for Federal Contractors](#). The requirements in the Executive Order are being implemented via a deviation. The deviation clause will be incorporated into DOL contract-like cooperative agreements or applicable contract-like instruments via a **bilateral** modification.

If you hold a DOL contract-like cooperative agreement or contract-like instrument that exceeds \$10,000, DOL strongly encourages you to accept this modification at this time. The modification is **mandatory** before DOL will renew or extend the period of performance of your contract-like cooperative agreement or contract-like instrument.

If you have additional questions or concerns please contact your Grant Officer.



Office of the Procurement Executive

SENIOR PROCUREMENT EXECUTIVE MEMORANDUM 22- 01

DATE: October 7, 2021

TO: All Domestic Contracting Officers Only

FROM: Michael W. Derrios - Senior Procurement Executive

MICHAEL W
DERRIOS

Digitally signed by MICHAEL
W DERRIOS
Date: 2021.10.06 17:35:44
-04'00'

SUBJECT: Federal Acquisition Regulation (FAR) Class Deviation -- Implementing Executive Order 14042, Ensuring Adequate COVID Safety Protocols for Federal Contractors

1. **Purpose:** This class deviation is issued in accordance with Federal Acquisition Regulation (FAR) 1.404. The purpose of this deviation is to implement [Executive Order 14042, Ensuring Adequate COVID Safety Protocols for Federal Contractors](#).

This SPE Memorandum also provides instructions for the Department of State (DOS) acquisition workforce on when to include a new clause in DOS *domestic* solicitations, contracts, and “contract-like instruments” (e.g., licenses, leasehold agreements for real property, personal services contracts, tenders for freight household goods, and Interagency Agreements).

2. **Background:** On September 9, 2021, [Executive Order \(EO\) 14042 Ensuring Adequate COVID Safety Protocols for Federal Contracts](#) was signed by the President and published in the Federal Register at [86 FR 50985](#) on September 14, 2021. The E.O. directs the Safer Federal Workforce Taskforce to issue guidance to provide implementation details and the Federal Acquisition Regulatory (FAR) Council to establish a new clause to be included in solicitations and contracts and contract-like instruments.

The Safer Federal Workforce Task Force issued guidance on September 24, 2021, at saferfederalworkforce.gov which requires:

- Vaccination of covered contractor employees, except in limited circumstances where an employee is legally entitled to an accommodation;
- Requirements related to masking and physical distancing while in covered contractor workplaces; and
- Designation by covered contractors of a person or persons to coordinate COVID-19 workplace safety efforts at covered contractor workplaces.

On September 30, 2021, the Civilian Agency Acquisition Council (CAAC) issued [CAAC Letter 2021-03](#) regarding implementation of E.O. 14042, which serves as consultation with the CAAC Chair to authorize agencies to issue their own class deviations. This class deviation sets forth the Department's implementation of the E.O. and CAAC Letter.

The FAR Council has undertaken rulemaking to formally incorporate the requirements of EO 14042 under FAR Case 2021-021, Ensuring Adequate COVID-19 Safety Protocols for Federal Contractors. Thus, pending publication of the amendment to the FAR via FAR Case 2021-021, DOS is issuing a class deviation to comply with EO 14042. The deviation will remain effective until the FAR is amended or the deviation is otherwise rescinded by the agency.

3. Applicability:

- a. Subject to Section 4 of this deviation, the clause at FAR 52.223-99 (Attachment 1) is required in the following:
 - Contracts or contract-like instruments for services, construction, or a leasehold interest in real property exceeding the simplified acquisition threshold (SAT);
 - Contracts or contract-like instruments covered by the Service Contract Act, 41 U.S.C. § 6701, *et seq.*;
 - Contracts or contract-like instruments for concessions, including any concessions contract excluded by Department of Labor regulations at 29 CFR § 4.133(b) exceeding the SAT; or
 - Contracts or contract-like instruments entered into with the Federal Government in connection with Federal property or lands and related to offering services for Federal employees, their dependents, or the general public, exceeding the SAT.
- b. DOS encourages, but does not require, the clause be included in the following:
 - Contracts or subcontracts whose value is less than or equal to the SAT;
 - Contracts or subcontracts solely for the manufacturing of products; or
 - Contracts awarded prior to November 14, 2021, on solicitations issued before October 15, 2021.
- c. The new clause ***is not*** applicable to:
 1. Actions at or below the micro-purchase threshold;
 2. Solicitations and contracts if performance is outside the United States or its outlying areas (the exclusion is limited to employees who are performing work only outside the U.S. or its outlying areas);
 3. Sales of surplus real and personal property; or
 4. Contracts and subcontracts with Indian Tribes under the Indian Self Determination and Education Assistance Act (Public Law 93-638) (the exclusion would not apply to a procurement contract or subcontract under the FAR to an Indian-owned or tribally owned business entity).

4. Requirements:

Contracting Officers must include the clause into the following:

- New contracts awarded on or after November 14, 2021, from solicitations issued before October 15, 2021, (this includes new orders awarded on or after November 14, 2021, from solicitations issued before October 15, 2021, under existing indefinite-delivery contracts);
- New solicitations issued on or after October 15, 2021, and contracts awarded pursuant to those solicitations (this includes new solicitations issued on or after October 15, 2021, for orders awarded pursuant to those solicitations under existing indefinite-delivery contracts);
- Extensions or renewals of existing contracts and orders awarded on or after October 15, 2021;
- Options on existing contracts and orders exercised on or after October 15, 2021; and
- Existing DOS single and multiple award indefinite delivery/indefinite quantity contracts, requirements contracts, and blanket purchase agreements (BPA).

Contracting Officers should issue bilateral modifications to existing contracts, task orders, or BPA calls, in accordance with this deviation, to incorporate the clause.

5. Applicability:

This class deviation is issued under the authority of FAR 1.404 and Department of State Acquisition Regulation (DOSAR) 601.404.

This deviation is issued following consultation with the Chair of the Civilian Agency Acquisition Council (CAAC) in accordance with FAR 1.404(a).

6. Effective Date:

This deviation is effective immediately and remains in effect until it is incorporated into the FAR or is rescinded.

7. Attachment:

52.223-99 Ensuring Adequate COVID-19 Safety Protocols for Federal Contractors (OCT 2021) (DEVIATION)

8. Point of Contact:

Any questions or concerns regarding this Class Deviation should be directed to the Acquisition Policy mailbox at AcquisitionPolicy@state.gov.

Attachment 1

52.223-99 Ensuring Adequate COVID-19 Safety Protocols for Federal Contractors (OCT 2021) (DEVIATION)

Executive Order 14042, Ensuring Adequate COVID-19 Safety Protocols for Federal Contractors

As prescribed in FAR Class Deviation 22-0X Executive Order 14042 Ensuring Adequate COVID-19 Safety Protocols for Federal Contractors, use the following clause:

52.223-99 ENSURING ADEQUATE COVID-19 SAFETY PROTOCOLS FOR FEDERAL CONTRACTORS (OCT 2021) (DEVIATION)

- (a) *Definition.* As used in this clause – *United States or its outlying areas* means—
- (1) The fifty States;
 - (2) The District of Columbia;
 - (3) The commonwealths of Puerto Rico and the Northern Mariana Islands;
 - (4) The territories of American Samoa, Guam, and the United States Virgin Islands; and
 - (5) The minor outlying islands of Baker Island, Howland Island, Jarvis Island, Johnston Atoll, Kingman Reef, Midway Islands, Navassa Island, Palmyra Atoll, and Wake Atoll.
- (b) *Authority.* This clause implements Executive Order 14042, Ensuring Adequate COVID Safety Protocols for Federal Contractors, dated September 9, 2021 (published in the Federal Register on September 14, 2021, 86 FR 50985).
- (c) *Compliance.* The Contractor shall comply with all guidance, including guidance conveyed through Frequently Asked Questions, as amended during the performance of this contract, for contractor workplace locations published by the Safer Federal Workforce Task Force (Task Force Guidance) at <https://www.saferfederalworkforce.gov/contractors/>.
- (d) *Subcontracts.* The Contractor shall include the substance of this clause, including this paragraph (d), in subcontracts at any tier that exceed the simplified acquisition threshold, as defined in Federal Acquisition Regulation 2.101 on the date of subcontract award, and are for services, including construction, performed in whole or in part within the United States or its outlying areas.
- (End of clause)



**U.S. Department
of Transportation**

1200 New Jersey Ave., S.E.
Washington, DC 20590

Office of the Secretary
of Transportation

October 12, 2021

SUBJECT: Class Deviation No. 2022-01 from the Federal Acquisition Regulation regarding implementation of Executive Order No. 14042, *Ensuring Adequate COVID Safety Protocols for Federal Contractors*.

FROM: Dr. Willie H. Smith WILLIE
Senior Procurement Executive HERBERT SMITH

Digitally signed by WILLIE
HERBERT SMITH
Date: 2021.10.12 14:00:22
-04'00'

TO: Department of Transportation Chiefs of the Contracting Offices

- I. Purpose:** This class deviation (CD) is issued in accordance with Federal Acquisition Regulation (FAR) 1.404 to implement [Executive Order \(EO\) No. 14042](#), *Ensuring Adequate COVID Safety Protocols for Federal Contractors* (86 FR 50985). It authorizes a deviation from the FAR and establishes FAR Clause 52.223-99, Ensuring Adequate COVID-19 Safety Protocols for Federal Contractors as outlined herein.

This CD also provides guidance to DOT contracting officers on when to include the new clause in DOT solicitations, contracts, orders and “contract-like instruments”¹ (e.g. certain Other Transaction Authority awards).

This CD is being issued to implement regulatory changes associated with the EO No. 14042 while the FAR is updated via the rulemaking process.

II. Effective Date: Immediately

- III. Background:** To maximize the goal of getting more people vaccinated and decrease the spread of COVID-19, President Biden signed EO No. 14042. The EO promotes economy and efficiency in Federal procurement by ensuring that contractors and subcontractors that contract with the Federal Government provide COVID-19 safeguards. The EO directs the [Safer Federal Workforce Taskforce](#) (“Task Force”) to issue guidance to provide implementation details and the FAR Council to establish a new clause to be included in solicitations, contracts and contract-like instruments.

¹ As defined by the September 24, 2021 Task Force guidance, available [here](#).

The Task Force issued guidance on September 24, 2021 at saferfederalworkforce.gov, which requires:

- Vaccination of covered contractor employees², except in limited circumstances where an individual is legally entitled to an accommodation;
- Requirements related to masking and physical distancing while in covered contractor workplaces; and
- Designation by covered contractors of a person or persons to coordinate COVID-19 workplace safety efforts at covered contractor workplaces.

On September 30, 2021, the FAR Council issued a [memorandum](#) to Senior Procurement Executives and Chief Acquisition Officers regarding implementation of EO 14042. Subsequently, the Chair of the Civilian Agency Acquisition Council (CAAC) issued CAAC Letter No. [2021-03](#), which serves as consultation with the CAAC Chair in accordance with FAR 1.404(a)(1) to authorize agencies to issue their own class deviations. This class deviation sets forth DOT's implementation of the EO, CAAC Letter and FAR Council memorandum.

DOT Acquisition Directive (DAD) No. [2021-02](#) – *COVID-19 Entry Procedures for On-Site Contractors Reporting to DOT Facilities* will continue to apply to all contracts and orders for on-site contractor support where the FAR clause has not yet been incorporated into the contract/order. DOT's acquisition workforce and contractors should also review the [Frequently Asked Questions](#) (FAQ) developed to answer common questions regarding the DAD.

IV. Applicability: This CD applies to and shall be inserted in DOT solicitations, contracts and orders as outlined below.

In accordance with EO 14042 and subsequent guidance from the FAR Council, contracting officers **are required** to include the clause found in Attachment A of this CD in the following solicitations and awards **for services and construction**:

- New contracts or contract-like instruments and orders³ awarded on or after November 14, 2021 that exceed the simplified acquisition threshold⁴ (SAT);
- New solicitations issued on or after October 15, 2021, and contracts or contract-like instruments or orders awarded pursuant to those solicitations that exceed the SAT;
- Extensions or renewals of existing contracts contract-like instruments or orders that exceed the SAT awarded on or after October 15, 2021; and

² Covered contractor employee means any full-time or part-time employee of a covered contractor working on or in connection with a covered contract or working at a covered contractor workplace. This includes employees of covered contractors who are not themselves working on or in connection with a covered contract.

³ As used in this CD, "order" means blanket purchase agreement (BPA) calls, task and delivery orders. If an order was issued under an existing Government-wide contract or Federal Supply Schedule, contracting officers should review the base contract award vehicle to determine if the clause has been incorporated prior to incorporating at the order-level.

⁴ As defined at FAR 2.101.

- Options on existing contracts or contract-like instruments and orders that exceed the SAT exercised on or after October 15, 2021.

In addition to requirements outlined in the EO (and associated subsequent guidance), DOT contracting officers **are also required** to include the clause found in Attachment A of this CD in the following solicitations and awards **for services and construction**:

- New contracts (e.g., purchase orders) and orders awarded on or after November 14, 2021 that exceed the micro-purchase threshold⁵ (MPT);
- New solicitations issued on or after October 15, 2021, and contracts or orders awarded pursuant to those solicitations that exceed the MPT;
- Extensions or renewals of existing contracts or orders that exceed the MPT awarded on or after October 15, 2021;
- Options on existing contracts and orders that exceed the MPT exercised on or after October 15, 2021; and
- Existing indefinite-delivery, indefinite-quantity (IDIQ) contracts that are anticipated to have orders that exceed the MPT and that have an ordering period that extends beyond October 15, 2021.

In addition, DOT Contracting officers **are strongly encouraged** to include the clause in:

- New contracts and orders awarded prior to November 14, 2021;
- Contracts, orders or subcontracts solely for the manufacturing of products above the MPT; and
- Existing contracts and orders otherwise having a bilateral modification not tied to an extension, renewal, or option exercise (e.g. change in Statement of Work, change in delivery schedule), on or after October 15, 2021.

Prime contractors are required to flow down the text of the FAR clause in subcontracts at any tier that exceed the SAT.

See Attachment A – *Line-In/Line-Out: FAR Text* for the changes in the FAR text as revised by this CD.

This CD does not apply to:

- Purchases at or below the micro-purchase threshold⁶ (MPT);
- Solicitations and contracts if performance is outside the United States or its outlying areas (the exclusion is limited to employees who are performing work only outside the U.S. or its outlying areas); and
- Contracts and subcontracts with Indian Tribes under the Indian Self Determination and Education Assistance Act (Public Law 93-638) (the exclusion would not apply to a

⁵ As defined at FAR 2.101.

⁶ As defined at FAR 2.101.

procurement contract or subcontract under the FAR to an Indian-owned or tribally-owned business entity).

V. Expiration Date: This CD will remain in effect until it is incorporated into the FAR or is otherwise rescinded.

VI. Point of Contact.

Questions or comments regarding this class deviation may be directed to DOTAcquisitionPolicy@dot.gov.

Attachments:

Attachment A – Line-In/Line-Out: FAR Text

ATTACHMENT A

FAR DEVIATION TEXT

Additions are **[bolded and bracketed]**, deletions are indicated by ~~strikethroughs~~.

**Executive Order 14042
Ensuring Adequate COVID Safety Protocols for Federal Contractors**

PART 52—SOLICITATION PROVISIONS AND CONTRACT CLAUSES

Subpart 52.2—Text of Provisions and Clauses

[52.223-99 Ensuring Adequate COVID-19 Safety Protocols for Federal Contractors.

**ENSURING ADEQUATE COVID-19 SAFETY PROTOCOLS FOR FEDERAL
CONTRACTORS (OCT 2021) (DEVIATION 2022-01)**

(a) *Definition.* As used in this clause -

***United States or its outlying areas* means—**

- (1) The fifty States;**
- (2) The District of Columbia;**
- (3) The commonwealths of Puerto Rico and the Northern Mariana Islands;**
- (4) The territories of American Samoa, Guam, and the United States Virgin Islands;
and**
- (5) The minor outlying islands of Baker Island, Howland Island, Jarvis Island,
Johnston Atoll, Kingman Reef, Midway Islands, Navassa Island, Palmyra Atoll, and
Wake Atoll.**

(b) *Authority.* This clause implements Executive Order 14042, Ensuring Adequate COVID Safety Protocols for Federal Contractors, dated September 9, 2021 (published in the Federal Register on September 14, 2021, 86 FR 50985).

(c) *Compliance.* The Contractor shall comply with all guidance, including guidance conveyed through Frequently Asked Questions, as amended during the performance of

this contract, for contractor or subcontractor workplace locations published by the Safer Federal Workforce Task Force (Task Force Guidance) at <https://www.saferfederalworkforce.gov/contractors/>.

(d) *Subcontracts*. The Contractor shall include the substance of this clause, including this paragraph (d), in subcontracts at any tier that exceed the simplified acquisition threshold, as defined in Federal Acquisition Regulation 2.101 on the date of subcontract award, and are for services, including construction, performed in whole or in part within the United States or its outlying areas.

(End of clause)]



DEPARTMENT OF THE TREASURY
WASHINGTON, D.C. 20220

Acquisition Bulletin No: 22-01
Deviation No. 2022-00001

Date: October 7, 2021

MEMORANDUM FOR TREASURY ACQUISITION PERSONNEL

FROM: NICOLE EVANS *Nicole Evans*
SENIOR PROCUREMENT EXECUTIVE

SUBJECT: Class Deviation from the Federal Acquisition Regulation (FAR) Regarding Executive Order (E.O.) 14042, Ensuring Adequate COVID Safety Protocols for Federal Contractors

- PURPOSE:** To issue a class deviation from the FAR to implement E.O. 14042, Ensuring Adequate COVID Safety Protocols for Federal Contractors. This memorandum also provides instructions to the Treasury acquisition workforce on applicability and timeline for implementation of the deviation clause.
- EFFECTIVE DATE:** Immediately upon issuance.
- BACKGROUND:** On September 30, 2021, the Civilian Agency Acquisition Council (CAAC) issued CAAC Letter 2021-03 authorizing agencies to issue a class deviation in accordance with FAR 1.404 to implement E.O. 14042, Ensuring Adequate COVID Safety Protocols for Federal Contractors.

E.O. 14042 was signed by the President on September 9, 2021, and published in the Federal Register at [86 FR 50985](#) on September 14, 2021. The E.O. requires agencies to include a clause requiring contractors and subcontractors at any tier to comply with all guidance for contractor workplace locations as published by the [Safer Federal Workforce Task Force \(Task Force Guidance\)](#). This clause applies to solicitations and contracts for services, including construction.

On September 24, 2021, the Safer Federal Workplace Task Force (Task Force) released [guidance on COVID-19 workplace safety protocols for Federal contractors and subcontractors](#), which requires federal contractors and subcontractors with a covered contract to conform to the following workplace safety protocols:

- (1) Covered contractor employees are required to receive the COVID-19 vaccination, except in limited circumstances where an employee is legally entitled to an accommodation;
 - *Covered contract* – means any contractor or contract-like instrument that includes the FAR clause described in Section 2 (a) of Executive Order 14042.
 - *Covered contractor* – means a prime contractor or subcontractor at any tier who is a party to a covered contract.

Exhibit 1 - 0065

Acquisition Bulletin No: 22-01
Deviation No. 2022-00001

- *Covered contractor employee* – means any full-time or part-time employee of a covered contractor working on or in connection with a covered contract or working at a covered contractor workplace. This includes employees of covered contractors who are not themselves working on or in connection with a covered contract.
- *Federal workplace* – means any place, site, installation, building, room, or facility in which any Federal executive department or agency conducts official business, or is within an executive department or agency’s jurisdiction, custody, or control.

(2) Masking and physical distancing is required while in covered contractor workplaces; and

- Covered contractor must ensure that all individuals, including covered contractor employees and visitors, comply with published CDC guidance for masking and physical distancing at a covered contractor workplace.
- *Contractor or subcontractor workplace location* - means a location where covered contract employees work, including a covered contractor workplace or Federal Workplace.

(3) Covered contractors must designate a person or persons to coordinate implementation of and compliance with these workplace safety protocols at covered contractor workplaces.

4. **AUTHORITY:** In accordance with FAR 1.404, DTAR 1001.404, and as authorized by CAAC [Letter 2021-03](#), Treasury bureaus are required to use the attached deviation version of FAR 52.223-99 – Ensuring Adequate COVID-19 Safety Protocols for Federal Contractors

5. **REQUIREMENTS:**

Effective immediately, Contracting Officers **shall** include the clause into the following solicitations and contracts for services, including construction:

- All new contracts awarded **on or after** November 14, 2021 from solicitations issued before October 15, 2021 (this includes new orders awarded on or after November 14, 2021 from solicitations issued before October 15, 2021 under existing indefinite-delivery contracts, or blanket-purchase agreements);
- All new solicitations issued **on or after** October 15, 2021 and contracts awarded pursuant to those solicitations (this includes new solicitations issued on or after October 15 and orders awarded pursuant to those solicitations under existing indefinite-delivery contracts, or blanket purchase agreements);
- Extensions or renewals of existing contracts and orders awarded **on or after** October 15, 2021; and
- Options on existing contracts and orders exercised **on or after** October 15, 2021.

Acquisition Bulletin No: 22-01 Deviation No. 2022-00001
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- For contracts and orders awarded **prior to** October 15, 2021, where performance is ongoing the deviation clause must be incorporated at the time an option is exercised or an extension to the period of performance is required.

Contracting officers **are strongly encouraged, but are not required**, to include the clause into the following:¹

- Contracts that have been or will be awarded prior to November 14, 2021 on solicitations issued before October 15, 2021;
- Contracts that are not covered or directly addressed by E.O. 14042 because the contract or subcontract is equal to or less than the simplified acquisition threshold, as defined in FAR 2.101; and
- Contracts or subcontracts solely for the manufacturing of products.

The clause **shall not** be applied to:

- Grants;
- Contracts, contract-like instruments, or agreements with Indian Tribes under the Indian Self-Determination and Education Assistance Act (Public Law 93-638), as amended, (the exclusion would not apply to a procurement contract or subcontract under the FAR to an Indian-owned or tribally owned business entity); or
- Solicitations and contracts if performance is outside the United States or its outlying areas (the exclusion is limited to contractor employees who are performing work outside the U.S. or its outlying areas).

When modifying existing contracts, task orders, delivery orders, or call orders in accordance with this deviation, contracting officers shall use a bilateral modification to incorporate the FAR deviation clause.

¹ Although E.O. 14042 does not require inclusion of the clause in these circumstances, guidance issued by the Safer Federal Workforce Task Force strongly encourages agencies to incorporate the clause into contracts that are not covered or directly addressed by the order.

Acquisition Bulletin No: 22-01
Deviation No. 2022-00001

6. **EXPIRATION DATE:** Until superseded, incorporated into the FAR, or otherwise rescinded.
7. **ADDITIONAL INFORMATION:** The point of contact for this Acquisition Bulletin is Ms. Joy Garnett who can be reached at Joy.Garnett@treasury.gov.

Attachment:

Attachment 1 – 52.223-99 Ensuing Adequate COVID-19 Safety Protocols for Federal Contractors.
(OCT 2021) (DEVIATION)

Acquisition Bulletin No: 22-01
Deviation No. 2022-00001

ATTACHMENT 1

FAR Deviation Text shown as [bolded, bracketed additions]; Deletions shown as ~~strike throughs~~; and FAR text unchanged shown as asterisks * * * or * * * * *.

* * * * *

PART 52—SOLICITATION PROVISIONS AND CONTRACT CLAUSES

* * * * *

Subpart 52.2—Text of Provisions and Clauses

* * * * *

[52.223-99 Ensuring Adequate COVID-19 Safety Protocols for Federal Contractors.

ENSURING ADEQUATE COVID-19 SAFETY PROTOCOLS FOR FEDERAL CONTRACTORS (OCT 2021) (DEVIATION)

(a) *Definition.* As used in this clause -

***United States or its outlying areas* means—**

- (1) The fifty States;**
- (2) The District of Columbia;**
- (3) The commonwealths of Puerto Rico and the Northern Mariana Islands;**
- (4) The territories of American Samoa, Guam, and the United States Virgin Islands;**
and
- (5) The minor outlying islands of Baker Island, Howland Island, Jarvis Island, Johnston Atoll, Kingman Reef, Midway Islands, Navassa Island, Palmyra Atoll, and Wake Atoll.**

(b) *Authority.* This clause implements Executive Order 14042, Ensuring Adequate COVID Safety Protocols for Federal Contractors, dated September 9, 2021 (published in the Federal

**Acquisition Bulletin No: 22-01
Deviation No. 2022-00001**

Register on September 14, 2021, 86 FR 50985).

(c) *Compliance.* The Contractor shall comply with all guidance, including guidance conveyed through Frequently Asked Questions, as amended during the performance of this contract, for contractor or subcontractor workplace locations published by the Safer Federal Workforce Task Force (Task Force Guidance) at <https://www.saferfederalworkforce.gov/contractors/>.

(d) *Subcontracts.* The Contractor shall include the substance of this clause, including this paragraph (d), in subcontracts at any tier that exceed the simplified acquisition threshold, as defined in Federal Acquisition Regulation 2.101 on the date of subcontract award, and are for services, including construction, performed in whole or in part within the United States or its outlying areas.

(End of clause)]

* * * * *

**Department of
Veterans Affairs**

Memorandum

Date: October 1, 2021

From: Executive Director, Office of Acquisition and Logistics (003A), and Senior
Procurement Executive

Subj: Class Deviation from the Federal Acquisition Regulation Regarding Implementation
of Executive Order 14042, Ensuring Adequate COVID Safety Protocols for Federal
Contractors (VIEWS 06042621)

To: Heads of the Contracting Activities

1. Purpose. To issue a class deviation in accordance with Federal Acquisition Regulation (FAR) 1.404, to implement Executive Order (E.O.) 14042, [Ensuring Adequate COVID Safety Protocols for Federal Contractors](#). Federal agencies are authorized by the Civilian Agency Acquisition Council letter [2021-03](#), dated September 30, 2021 to issue a class deviation.

2. Effective Date. Immediately.

3. Expiration Date. This deviation expires when incorporated into the FAR or is otherwise rescinded.

4. Applicability. This class deviation applies to solicitation and contracts for services, including construction.

5. Current FAR Policy. There is no current FAR policy.

6. Need for Deviation. E.O. 14042 was signed by the President on September 9, 2021 and published in the Federal Register at [86 FR 50985](#) on September 14, 2021. The E.O. requires agencies to include a clause in applicable contracts requiring contractors and subcontractors at any tier to comply with all guidance for contractor workplace locations as published by the [Safer Federal Workforce Task Force \(Task Force Guidance\)](#). The clause applies to solicitations and contracts for services, including construction.

7. Required Action. Contracting officers are **required** to include the clause in—

- New contracts awarded on or after November 14, 2021 from solicitations issued before October 15, 2021 (this includes new orders awarded on or after November 14, 2021 from solicitations issued before October 15, 2021 under existing indefinite-delivery contracts):
- New solicitations issued on or after October 15, 2021 and contracts awarded pursuant to those solicitations (this includes new solicitations issued on or

Class Deviation from the Federal Acquisition Regulation Regarding Implementation of Executive Order 14042, Ensuring Adequate COVID Safety Protocols for Federal Contractors (VIEWS 06042621)

after October 15, 2021 for orders awarded pursuant to those solicitations under existing indefinite-delivery contracts);

- Extensions or renewals of existing contracts and orders awarded on or after October 15, 2021; and
- Options on existing contracts and orders exercised on or after October 15, 2021.

To maximize the goal of getting more people vaccinated and decrease the spread of COVID-19, the Task Force strongly encourages agencies to apply the requirements of the Task Force Guidance broadly, consistent with applicable law. Accordingly, in VA contracting officers are **encouraged, but are not required** to include the clause in-

- Contracts that will be awarded prior to November 14, 2021 on solicitations issued before October 15, 2021; and
- Contracts that are not covered or directly addressed by the E.O. because the contract or subcontract is under the simplified acquisition threshold.

The clause shall not be applied to:

- Contracts and subcontracts with Indian Tribes under the Indian Self-Determination and Education Assistance (P.L. 93-638); or
- Solicitations and contracts if performance is outside the United States or its outlying areas (the exclusion is limited to employees who are performing work outside the U.S. or its outlying areas).

The attached FAR deviation clause is provided consistent with the E.O. and the Task Force Guidance. (See attachment).

8. Additional information. Send questions to va.procurement.policy@va.gov.

Angela Billups
1724054



Digitally signed by Angela Billups 1724054
Date: 2021.10.01 14:45:15 -04'00'

Angela Billups, Ph.D.

Attachment

Attachment

FAR Deviation Clause

**Executive Order 14042, Ensuring Adequate COVID Safety Protocols
for Federal Contractors**

September 30, 2021

PART 52—SOLICITATION PROVISIONS AND CONTRACT CLAUSES

Subpart 52.2—Text of Provisions and Clauses

[52.223-99 Ensuring Adequate COVID-19 Safety Protocols for Federal Contractors.

**ENSURING ADEQUATE COVID-19 SAFETY PROTOCOLS FOR FEDERAL
CONTRACTORS (OCT 2021) (DEVIATION)**

(a) *Definition.* As used in this clause -

***United States or its outlying areas* means—**

- (1) The fifty States;**
- (2) The District of Columbia;**
- (3) The commonwealths of Puerto Rico and the Northern Mariana Islands;**
- (4) The territories of American Samoa, Guam, and the United States Virgin Islands; and**
- (5) The minor outlying islands of Baker Island, Howland Island, Jarvis Island, Johnston Atoll, Kingman Reef, Midway Islands, Navassa Island, Palmyra Atoll, and Wake Atoll.**

(b) *Authority.* This clause implements Executive Order 14042, Ensuring Adequate COVID Safety Protocols for Federal Contractors, dated September 9, 2021 (published in the Federal Register on September 14, 2021, 86 FR 50985).

(c) *Compliance.* The Contractor shall comply with all guidance, including guidance conveyed through Frequently Asked Questions, as amended during the performance of this contract, for contractor workplace locations published by the Safer Federal Workforce Task Force (Task Force Guidance) at <https://www.saferfederalworkforce.gov/contractors/>.

(d) *Subcontracts.* The Contractor shall include the substance of this clause,

including this paragraph (d), in subcontracts at any tier that exceed the simplified acquisition threshold, as defined in Federal Acquisition Regulation 2.101 on the date of subcontract award, and are for services, including construction, performed in whole or in part within the United States or its outlying areas.

(End of clause)]

U.S. Environmental Protection Agency

Class Deviation to FAR Part 52.2 Ensuring Adequate COVID-19 Safety Protocols for Federal Contracts

FINDINGS

1. To maximize the goal of getting more people vaccinated and decrease the spread of COVID-19, [Executive Order 14042](#), *Ensuring Adequate COVID-19 Safety Protocols for Federal Contracts*, requires agencies to include a clause requiring contractors and subcontractors at any tier to comply with all guidance for contractor workplace locations as published by the [Safer Federal Workforce Task Force](#) (Task Force Guidance).
2. Consequently, the Federal Acquisition Regulation (FAR) Council has issued Civilian Agency Acquisition Council (CAAC) Letter 2021-03 authorizing agencies to deviate from the FAR by using new FAR clause 52.223-99, *Ensuring Adequate COVID-19 Safety Protocols for Federal Contracts*, until the FAR has officially been amended through FAR Case 2021-021, *Ensuring Adequate COVID-19 Safety Protocols for Federal Contractors*.
3. Executive agencies are given the authorization to issue a class deviation, in accordance with FAR 1.404, under Civilian Agency Acquisition Council (CAAC) Letter 2021-03. The CAAC Letter also constitutes consultation with the Chair of the CAAC as required by FAR 1.404(a)(1).

DETERMINATION

1. Under the authority of FAR 1.404 and based upon the above findings, I grant a class deviation to FAR Part 52.2 as detailed in the attached FAR deviation text. The FAR text deviation is taken directly from CAAC Letter 2021-03.
2. This deviation is effective at the date of signature below and shall remain in effect until incorporated into the FAR, superseded, or is otherwise rescinded.

Patrick, Kimberly

Digitally signed by Patrick,
Kimberly
Date: 2021.10.06 19:35:36 -04'00'

Kimberly Y. Patrick, Director
Office of Acquisition Solutions

Date

Attachments:

FAR 52.223-99 Prescription and Deviation Clause Text
CAAC Letter 2021-03



GSA Office of Governmentwide Policy

Class Deviation CD-2021-13
September 30, 2021

MEMORANDUM FOR ALL GSA CONTRACTING ACTIVITIES

FROM: JEFFREY A. KOSES DocuSigned by:
Jeffrey A. Koses
27BC80BBE6AC4A0...
SENIOR PROCUREMENT EXECUTIVE
OFFICE OF ACQUISITION POLICY (MV)

SUBJECT: FAR Class Deviation - Implementation of Executive Order 14042,
Ensuring Adequate COVID Safety Protocols for Federal Contractors

A. Purpose.

This memorandum approves a class deviation from the Federal Acquisition Regulation (FAR) to implement Executive Order (E.O.) 14042, Ensuring Adequate COVID Safety Protocols for Federal Contractors, signed September 9, 2021.

This memorandum also provides instructions for the GSA acquisition workforce on when to include a new clause in GSA solicitations and contracts and “contract-like instruments” (e.g., licenses, outleases, and tenders).

The instructions include GSA-specific implementation timelines for solicitations, new contracts, and existing contracts.

B. Background.

In order to ensure the health and safety of the federal workforce and contractor community, the President signed [E.O. 14042](#). The E.O. promotes economy and efficiency in Federal procurement by ensuring that contractors and subcontractors that contract with the Federal Government provide COVID-19 safeguards. The E.O. directs the Safer Federal Workforce Taskforce to issue guidance to provide implementation details and the Federal Acquisition Regulatory (FAR) Council to establish a new clause to be included in solicitations and contracts and contract-like instruments.

The Safer Federal Workforce Task Force issued guidance on September 24, 2021 at [saferfederalworkforce.gov](https://www.saferfederalworkforce.gov) which requires:

U.S. General Services Administration
1800 F Street, NW
Washington, DC 20405
www.gsa.gov

Exhibit 1 - 0076

- Vaccination of covered contractor employees,¹ except in limited circumstances where an employee is legally entitled to an accommodation;²
- Requirements related to masking and physical distancing while in covered contractor³ workplaces; and
- Designation by covered contractors of a person or persons to coordinate COVID-19 workplace safety efforts at covered contractor workplaces.

On September 30, 2021, the Civilian Agency Acquisition Council (CAAC) issued CAAC Letter 2021-03 regarding implementation of E.O. 14042, which serves as consultation with the CAAC Chair to authorize agencies to issue their own class deviations (see Attachment A). This class deviation sets forth GSA's implementation of the E.O. and CAAC Letter.

C. Applicability.

1. Subject to section D of this deviation, the clause is required in the following:
 - Contracts or contract-like instruments for services, construction, or a leasehold interest in real property exceeding the simplified acquisition threshold (SAT) or simplified lease acquisition threshold (SLAT);
 - Contracts or contract-like instruments for services covered by the Service Contract Act, 41 U.S.C. § 6701, *et seq.*; exceeding the SAT/SLAT
 - Contracts or contract-like instruments for concessions, including any concessions contract excluded by Department of Labor regulations at 29 CFR § 4.133(b) exceeding the SAT/SLAT; or,
 - Contracts or contract-like instruments entered into with the Federal Government in connection with Federal property or lands and related to offering services for Federal employees, their dependents, or the general public, exceeding the SAT/SLAT.
2. GSA is strongly encouraging the clause in the following:⁴
 - Contracts or subcontracts whose value is equal to or less than the SAT/SLAT; or,
 - Contracts or subcontracts solely for the manufacturing of products, unless exempted by FAS or PBS specific guidance. See Attachments C and D.
3. The new clause is not applicable to:
 - Micro-Purchases;
 - Site Acquisition;

¹ Covered contractor employee means any full-time or part-time employee of a covered contractor working on or in connection with a covered contract or working at a covered contractor workplace. This includes employees of covered contractors who are not themselves working on or in connection with a covered contract.

² Note that contractor employees working from home must be vaccinated but do not have to follow the CDC masking and social distancing protocols, because an employee's personal residence is not a covered contractor workplace. See Safer Federal Workforce Task Force FAQs for Federal Contractors.

³ Covered contractor means a prime contractor or subcontractor at any tier who is party to a covered contract.

⁴ While the E.O. does not require the clause in these circumstances, the Safer Federal Workforce Task Force guidance strongly encourages agencies to include it.

- Sales of surplus real and personal property;
- Solicitations and contracts if performance is outside the United States or its outlying areas (the exclusion is limited to employees who are performing work only outside the U.S. or its outlying areas); or
- Contracts and subcontracts with Indian Tribes under the Indian Self Determination and Education Assistance Act (Public Law 93-638) (the exclusion would not apply to a procurement contract or subcontract under the FAR to an Indian-owned or tribally-owned business entity).

D. Requirements.

1. Solicitations.

a. **New Solicitations.** Contracting officers shall include the clause at FAR **52.223-99**, Ensuring Adequate COVID Safety Protocols for Federal Contractors in new applicable solicitations issued on or after **October 15, 2021**.

b. **Existing Solicitations.** Contracting officers shall either amend the solicitation to include the clause at FAR 52.223-99 or incorporate it into the award of the apparent successful offeror for applicable solicitations that were issued prior to **October 15, 2021**, that have not closed, or awards that have not been made by **October 15, 2021**.

c. New and existing solicitations for items described in section C.1. and C.2. of this deviation shall include the clause. Solicitations for items described in section C.3. of this deviation shall not include the clause.

2. Contracts.

a. **New Contracts.** Contracting officers shall include the clause at FAR **52.223-99** in new applicable contracts, lease acquisitions, and “contract-like instruments” awarded on or after **October 15, 2021**.

New contracts for items described in section C.1. and C.2. of this deviation shall include the clause. New contracts for items described in section C.3. of this deviation shall not include the clause.

b. **Existing Contracts.** Contracting officers shall send a cover letter⁵ and modification request to add the clause at **FAR 52.223-99** for existing contracts

⁵ The cover letter, among other things, informs the contractor that the modification is strongly encouraged for contracts described in section C.1. and C.2 of this deviation. Also, it informs the contractor that the modification is mandatory before GSA will renew, extend the period of performance, or exercise an option for contracts described in section C.1. of this deviation.

including indefinite delivery, indefinite quantity (IDIQ) contracts,⁶ and contract-like instruments, described in section C.1. and C.2. of this deviation.

- The modification must be bilateral.
- The language in Attachment B shall be used in the cover letter.
- Contracting officers are ultimately responsible for sending the cover letter and modification request to contractors; however, GSA will use a technology solution to automatically send the cover letter and modification request to the contractor for most GSA contracts. The FAS and PBS specific guidance in Attachments C and D identifies each GSA contracting program that will send the modification using a central mass modification process.⁷

Existing contracts for items described in section C.3. of this deviation shall not include the clause or cover letter.

Contracting officers shall complete as many modifications as possible before **November 14, 2021**. For IDIQs, contracting activities may take interim actions if a signed modification is not returned to GSA by **November 14, 2021**, such as:

- Temporarily hiding contractor information on GSA websites and/or e-tools
- Flagging contractors that have not accepted the modification

Contracting officers shall not exercise an option period or extend the period of performance for existing contracts for items described in section C.1. of this deviation unless the contract has been modified to include the new clause.

E. Authority.

This class deviation is issued under the authority of FAR 1.404 and General Services Administration Acquisition Manual (GSAM) 501.404.

This deviation is issued following consultation with the Chair of the Civilian Agency Acquisition Council (CAAC) in accordance with FAR 1.404(a) and GSAM 501.404(a).

F. Effective Date.

This deviation is effective immediately and remains in effect until the FAR and GSAR are amended or until cancelled.

G. Cancellation.

SPE Memo SPE-2021-16 *Return to Facilities Contractor Guidance* is cancelled in its entirety by this class deviation.

⁶ For IDIQs, once the modification is accepted, it applies to all existing and future orders. Orders placed prior to an IDIQ contract modification can include the clause at the order level, if desired.

⁷ The Office of Administrative Services shall refer to PBS guidance for the automated modifications sent using EASI.

H. Resources.

The Acquisition Portal's [Public Health Emergencies topic page](#) will be updated with additional resources, including GSA FAQs, talking points, and links to all related policies. Questions can be directed to the points of contact listed on the [Acquisition Portal](#).

Attachments

- Attachment A - [CAAC Letter 2021-03](#)
- Attachment B - [Sample Cover Letter](#)
- Attachment C - [FAS Specific Guidance](#)
- Attachment D - [PBS Specific Guidance](#)



Color coding of this template is as follows:

BLACK - standard text

BLUE - text that must be filled in by acquisition team

[Date]

[Contractor's Name]

[Contractor's Street Address]

[Contractor's City, State and Zip Code]

Subject: Contract Modification - New Clause for Ensuring Adequate COVID-19 Safety Protocols for Federal Contractors - [Procurement Instrument Identifier/Lease Contract Number]

Dear [Contractor's POC name],

GSA appreciates the hard work and dedication of our contractors. The health and safety of GSA employees, contractors and their families is our top priority. In order to ensure the health and safety of the Federal workforce and contractor community, the President signed [Executive Order 14042, Ensuring Adequate COVID Safety Protocols for Federal Contractors](#). The requirements in the Executive Order are being implemented via a FAR deviation. The clause in the FAR deviation will be incorporated into GSA contracts via a bilateral modification.

If you hold a GSA contract for services, construction, or a leasehold interest in property that exceeds the simplified acquisition threshold (SAT) or the simplified lease acquisition threshold (SLAT), GSA strongly encourages you to accept this contract modification at this time. The modification is **mandatory** before GSA will renew, extend the period of performance of your contract, or exercise an option.

Acceptance of the contract modification is also **mandatory** for all Federal Supply Schedule contractors.

If you hold a contract at or below the SAT/SLAT or a contract only for products, GSA strongly encourages you to accept the modification.

For IDIQ contracts, including all Federal Supply Schedule contracts, you must sign the modification by **November 14, 2021** to be eligible for new orders. GSA may take

interim actions if a signed modification is not returned to GSA by **November 14, 2021**, such as:

- Temporarily hiding contractor information on GSA websites and/or e-tools
- Flagging contractors that have not accepted the modification

Once an IDIQ contract is modified, the clause applies to the exercise of options on all existing orders and to all future orders.

Based on the urgency of this issue, please return your signed contract modification as soon as possible and no later than **November 14, 2021**.

For more information, please visit <https://gsa.gov/covid19>.

CD-2021-13 EO 14042 COVID Safety Protocols for Federal Contractors:
Attachment C - Guidance Specific to the Federal Acquisition Service

The following provides FAS-specific guidance for implementing GSA Class Deviation 2021-13:

Applicability

FAS will include the clause at **FAR 52.223-99** in all new applicable contracts and “contract-like instruments” awarded on or after October 15, 2021.

FAS will bilaterally modify all existing contracts and “contract-like instruments” awarded before October 15, 2021, to include the clause at FAR 52.223-99, as applicable. Additional clarifications and exceptions regarding applicability of FAS contract vehicles are provided below.

1. **Federal Supply Schedule (FSS):** FAS COs shall incorporate the clause at FAR 52.223-99, in all new and existing FSS contracts above the micro-purchase threshold, including contracts that are solely for products. The Safer Federal Workforce Task Force guidance strongly encourages agencies to incorporate the clause into contracts that are solely for products. It is not administratively feasible to distinguish FSS contracts that are solely for products from FSS contracts that are primarily for products but also include ancillary-type services (e.g., installation, maintenance, training, ancillary services acquired via the Order-Level Materials SIN, etc.). Requiring the clause in all FSS contracts will simplify compliance tracking, vendor communication, and customer messaging efforts.
2. **Blanket Purchase Agreements (BPAs):** For BPAs established under FAR Part 13 procedures, applicable orders and calls must include the clause at FAR 52.223-99 for all new and existing orders and calls unless the clause is already incorporated into the BPA. For applicable BPAs established under FAR Part 8 procedures, the objective is to get the clause into the Schedule contract as soon as possible. If necessary, FAS COs shall incorporate FAR 52.223-99 for all new and existing orders and calls awarded unless the clause is already part of the contract under which the BPA was established or incorporated into the BPA. FAS COs may, at their discretion, modify (by bilateral modification) existing BPAs to incorporate the clause at FAR 52.223-99.
3. **Government-wide Acquisition Contracts (GWACs), Multi Agency Contracts (MACs), and Agency-specific IDV/IDIQs:** FAS COs shall incorporate FAR 52.223-99, in all new and existing GWACs, MACs, and IDV/IDIQ contracts, including contracts that are solely for products, except as provided below. The

Safer Federal Workforce Task Force guidance strongly encourages agencies to incorporate the clause into contracts that are solely for products. Requiring the clause in all GWAC and MAC contracts will simplify compliance tracking, vendor communication, and customer messaging efforts.

- a. **GSA SmartPay® Program:** FAS COs shall incorporate FAR Clause 52.223-99 in the GSA SmartPay master contracts prior to exercise of option or extension. Agencies shall not issue new task orders until the master contract has been modified, unless FAR Clause 52.223-99 is incorporated at the order level. All charge card transactions under the program may continue unabated prior to modification of the master contracts.
 - b. **GSA City Pair Program:** FAS COs shall incorporate FAR Clause 52.223-99 for all GSA City Pair Program new contract awards or prior to extending existing GSA City Pair contracts. Transactions under the GSA City Pair Program (i.e., booking flights) may continue without modifying existing GSA City Pair contracts.
 - c. **Automotive IDV/IDIQs:** The FAS COs should strongly encourage Automotive contractors to accept bilateral modifications to incorporate FAR Clause 52.223-99. FAR Clause 52.223-99 is not required in Automotive contracts because they are contracts solely for products.
4. **Orders:** On or after November 14, 2021, prior to placing orders, COs shall review the contract to ensure that the clause at FAR 52.223-99 has been incorporated in the underlying contract. If the clause has not been incorporated in the contract, COs shall include the clause in the solicitation and resultant order, as applicable.

For existing orders against IDV/IDIQ contracts (e.g., FSS, GWACs, and MACs), COs shall review the contract's terms and conditions to determine whether the clause at FAR Clause 52.223-99 has been incorporated. If the underlying contract has not been modified to include the clause, or the underlying contract has expired, the order-level CO shall modify the order (by bilateral modification) to include FAR Clause 52.223-99 prior to exercise of the option period or extension.

5. **Assisted Acquisitions:**

- a. For acquisitions where GSA is not the funding agency, COs shall follow policies of the funding agency.

- b. For applicable open market contracts, FAS COs should include FAR Clause 52.223-99 in solicitations and new awards.
 - c. For orders against IDV/IDIQs, FAS CO shall follow the guidance in paragraph 4.
- 6. **Commercial Solutions Opening (CSO):** GSA's pilot program is not governed by the FAR and uses CSO procedures to competitively award innovative commercial items for products, technology and services. Nevertheless, CSOs are considered "contract-like instruments" and are subject to the requirements of the E.O. and GSA Class Deviation. FAS COs shall incorporate FAR Clause 52.223-99 in CSO contracts. See GSAM 571 for additional guidance about CSOs.
- 7. **Commercial Platforms:** The FAS CO should strongly encourage Commercial Platform contractors to accept bilateral modifications to incorporate FAR Clause 52.223-99. FAR Clause 52.223-99 is not required in the Commercial Platform contracts because they are no-cost service contracts whose value is less than the simplified acquisition threshold. Orders placed under Commercial Platform contracts are equal to or less than the micro-purchase threshold and are not required to incorporate FAR Clause 52.223-99.
- 8. **Tenders of Service:** FAS uses a tender procurement method for freight and household goods transportation and other services. FAS considers tenders of service a "contract-like instrument" under the E.O. FAS will therefore modify applicable terms and conditions documents (e.g., a GSA Standard Tender of Service) to include language equivalent to FAR 52.223-99. FAS will communicate to agencies that any bills of lading which exceed the simplified acquisition threshold should include language equivalent to FAR 52.223-99. Consistent with the Safer Federal Workforce Task Force, FAS will strongly encourage any bills of lading at or below the simplified acquisition threshold to include language equivalent to FAR 52.223-99, but it is not required

Implementation

- 1. **Modifications:**
 - a. Modification Begin Date: FAS will begin to bilaterally modify all existing contracts and "contract-like instruments" awarded before October 15, 2021 to include the clause at FAR 52.223-99, as applicable.
 - b. Automated Modifications: FAS will use an automated mass modification process for applicable contracts in FSS-19.

- c. Non-automated Modifications: FAS COs are responsible for modifying all applicable contracts that are not in FSS-19.

2. Internal Compliance Tracking Dashboard:

- a. FAS Office of Policy and Compliance (OPC) will develop an internal dashboard showing the compliance of FAS contracts modified to include FAR 52.223-99.
- b. FAS OPC will regularly notify FAS Heads of Contract Activity (HCAs) with modification status on FAS contracts.
- c. For non-automated modifications, FAS HCAs will provide regular status updates to FAS OPC.

3. Customer Support:

- a. FAS OPC will develop an external dashboard showing the compliance status of MAS/GWAC/MAC contracts to aid our customer agencies in identifying which contracts have been modified to include FAR 52.223-99. A link to this dashboard will be provided on customer facing tools such as GSAAAdvantage and eBay.
- b. For FSS contracts, COs can also review the current terms and conditions in [Contracts Online](#) to determine if the contractor is in compliance. For contracts that are manually modified (i.e., not a mass modification), the FAS CO shall provide modification status updates using a spreadsheet link to be provided by OPC.

4. Acquisition Workforce Training: Training will be provided to the FAS acquisition workforce by the FAS OPC and OGP's Office of Acquisition Policy.

5. Contractor Communications:

- a. All contractor communications will be posted at [GSA's COVID website](#).
- b. An advance Interact Notice will be posted to inform FAS contract vehicle holders on solicitation updates and modification requirements.

CD-2021-13 EO 14042 COVID Safety Protocols for Federal Contractors:
Attachment D - Guidance Specific to the Public Buildings Service

The following provides PBS-specific guidance for implementing GSA Class Deviation 2021-13:

1. Acquisitions.

A. Mass Modification Process

a. Mass Modification (i.e. “The Bot”) Points of Contact (POCs)

- Each Region must identify a POC and alternate on the Mass Modification POC List to work with OAM no later than October 5, 2021.
- The Mass Modification POCs are responsible for reviewing the PBS E.O. 14042 Dashboard and tracking regional progress.

b. Modifications to Existing Contracts and Contract-Like Instruments in EASi

- The following contract actions will be modified through the Bot process:
 - Stand-Alone Contracts
 - Blanket Purchase Agreements (BPAs)
 - BPA Calls
 - Indefinite-Delivery Indefinite-Quantity (IDIQ) Contracts
 - Task Orders and Delivery Orders
 - Purchase Orders

c. The Bot Process

- Bilateral modifications will be partially automated using a bot.
- The mass modifications for existing contracts and contract-like instruments will incorporate the clause at FAR 52.223-99.
- The Bot will create the cover letters and modifications to existing contracts and contract-like instruments in EASi and email them to the contractors. The CO for each contract will be copied on each email.
- Each contractor must sign the modification and return it to the CO. After the contractor returns the signed modification, the CO must sign and finalize the modification in EASi (including preparing an FPDS report) and return a copy of the signed modification to the contractor.
- It is anticipated that the Bot process will commence on or about October 8, 2021 and will be completed by October 15, 2021.

B. Contracts and Contract-Like Instruments outside of EASi

The Bot process will only work for contracts and contract-like instruments that are in EASi. For those actions that are outside of the EASi system, the CO must follow normal procedures for bilaterally modifying the action to include the clause at FAR 52.223-99. The CO shall send the cover letter provided in Attachment B of the class deviation along with the modification request.

C. Existing Solicitations

- Existing solicitations must be amended to include the clause at FAR 52.223-99.

- Existing solicitations include solicitations for stand-alone contracts, BPAs, BPA calls, IDIQ contracts, Delivery Orders, Task Orders, and Purchase Orders.
- ***NOTE:*** For orders and GSA Schedule BPAs, if it becomes known by the Contracting Officer that the base IDIQ has already been modified to include the clause at FAR 52.223-99, then the solicitation does not need to be modified. To see if the base IDIQ has been modified:
 - For FSS contracts, review the contract's current terms and conditions in [Contracts Online](#)
 - For PBS IDIQs, review the PBS E.O. 14042 Dashboard or contact the IDV CO
 - For all other IDIQs, contact the IDIQ CO or review the program website, if available.
- If offers have already been received by the Government, in lieu of amending the solicitation, the CO may incorporate the clause at FAR 52.223-99 into the contract/order of the apparent successful offeror, which must be signed bilaterally.

D. New Solicitations (as of October 15, 2021).

- The CO must include the clause at FAR 52.223-99 in the solicitation and resultant award.
- Updated PBS Construction Contract Templates are available in EASi and on [InSite](#).

E. Solicitations for orders under IDIQs.

- *Until the base IDIQ has been modified* to include the clause at FAR 52.223-99 the CO must also include this clause in the solicitation and resultant orders.
- To see if the base IDIQ has been modified:
 - For FSS contracts, review the contract's current terms and conditions in [Contracts Online](#).
 - For PBS IDIQs, review the PBS E.O. 14042 Dashboard or contact the IDV CO.
 - For all other IDIQs, contact the IDIQ CO or review the program website, if available.

2. Leases.

A. Mass Modification Process - Bilateral Lease Amendments to Existing PBS Leases (Issuance of Lease Amendments to Lessors for signature)

- PBS Office of Leasing will issue bilateral lease amendments to Lessors for signature.
- All existing leases, regardless of dollar value, will be modified through this process.
- Bilateral amendments will be generated and sent using automation (e.g., DocuSign, Google script, Macro, etc).
- The mass modifications for existing leases will incorporate the clause at FAR 52.223-99.

- Each Lessor signs the modification and returns it to the Administrative Lease Contracting Officer (ALCO). After the Lessor returns the signed modification, the ALCO will countersign and return the fully signed modification to the Lessor.
- ALCOs will be responsible for executing the bilateral lease amendments and tracking progress/status.
- The PBS Office of Leasing will issue lease amendments to lessors for signature no later than October 15, 2021.

B. Existing Request for Lease Proposals (RLPs)

- For leases awarded on or after October 15, 2021:
 - Existing solicitations must be amended to include the clause at FAR 52.223-99, if Final Proposals Revisions (FPR) have not been received prior to October 15, 2021.
- If FPR has been received, in lieu of reopening discussions, the LCO may incorporate the clause at FAR 52.223-99 into the contract of the apparent successful offeror, which must be signed bilaterally.

C. New RLPs (issued on or after October 15, 2021)

- The LCO must include the clause at FAR 52.223-99 in the RLP and resultant lease contract by using updated General Clauses (GSA Forms 3517A or 3517B).
- Prior to October 15, 2021, Office of Leasing will update the General Clauses (GSA Forms 3517A and 3517B) to incorporate the clause at FAR 52.223-99. LCOs must use the updated General Clauses in new RLP packages. Updated GSA Forms 3517A and 3517B will be available on the Office of Leasing Google site and in the G-REX Templates Management Library.

3. PBS Training.

A. Implementation of E.O. 14042 and Class Deviation 2021-01 Training

Training will be provided to the PBS acquisition workforce regarding PBS-specific implementation and guidance regarding PBS acquisition programs.

B. Mass Modification Informational Sessions

The Office of Acquisition Management and the Office of Leasing will host mass modification information sessions for COs, ALCOs, and Mass Modification POCs on a regular basis regarding the mass modification process, the PBS E.O. 14042 Dashboard and tracking regional progress.



National Aeronautics and
Space Administration
Washington, DC 20546

Procurement Class Deviation

PCD 21-03B

October 1, 2021

November 8, 2021

Updated: December 9, 2021

CLASS DEVIATION FROM THE FEDERAL ACQUISITION REGULATION (FAR) FOR EXECUTIVE ORDER 14042, ENSURING ADEQUATE COVID SAFETY PROTOCOLS FOR FEDERAL CONTRACTORS

PURPOSE: To provide a procurement class deviation (PCD) from the FAR to implement the requirements of Executive Order (E.O.) 14042, Ensuring Adequate COVID Safety Protocols for Federal Contractors, signed by the President on September 9, 2021 (and published in the Federal Register on September 14, 2021 at 86 FR 50985).

GUIDANCE: E.O. 14042 directs executive departments and agencies, including independent establishments subject to the Federal Property and Administrative Services Act, 40 U.S.C. § 102(4)(A), to ensure that covered contracts and contract-like instruments include a clause requiring contractor and any subcontractors (at any tier) to comply with all guidance for covered contractor or subcontractor workplace locations as published by the Safer Federal Workforce Task Force at: <https://www.saferfederalworkforce.gov/contractors/>.

The actions directed by this E.O. will ensure that contractors and any subcontractors (at any tier) contracting with the Federal Government will provide COVID-19 safeguards in workplaces with employees working on or in connection with a Federal Government contract or contract-like instrument. These workplace safety protocols will apply to all contractors and any subcontractors (at any tier) in covered contractor workplaces who are not working on a Federal Government contract or contract-like instrument. These safeguards will decrease the spread of COVID-19, which will, in turn, decrease worker absences, reduce labor costs, and improve the efficiency of contractors and subcontractors performing work for the Federal Government.

The Department of Defense (DoD), General Services Administration (GSA), and NASA have started the formal rulemaking process to incorporate this change into the FAR. These rulemaking changes will be published in the Federal Register via FAR Case 2021-021, Ensuring Adequate COVID-19 Safety Protocols for Federal Contractors, to make appropriate amendments in the FAR to include the requirements of this E.O..

Exhibit 1 - 0090

The FAR Council and OFPP provided direction to agencies for the incorporation of a clause in solicitations and contracts in the memorandum titled “Issuance of Agency Deviations to Implement Executive Order 14042”, dated September 30, 2021, found here: <https://www.whitehouse.gov/wp-content/uploads/2021/09/FAR-Council-Guidance-on-Agency-Issuance-of-Deviations-to-Implement-EO-14042.pdf>. NASA implementation is set forth in the deviation clause enclosed in this PCD. Subsequent guidance has been received from the Office of Management and Budget regarding cooperative agreements. The Office of the Chief Financial Officer Grants Policy & Compliance Branch will be issuing separate guidance specific to cooperative agreements.

In accordance with the Safer Federal Workforce Task Force Guidance (Task Force Guidance), which states in part “...agencies are strongly encouraged to incorporate a clause requiring compliance with this Guidance into contracts that are not covered or directly addressed by the order...,” NASA has decided to incorporate the clause requiring compliance with this Task Force Guidance into acquisitions that are not covered or directly addressed by this E.O. in order to maximize the goal of getting more people vaccinated and decrease the spread of COVID-19.

To support transparency in connection with the implementation of the E.O., and the Task Force Guidance, a central collection of data is being implemented via contract action reports (CARs) submitted to the Federal Procurement Data System (FPDS). This is necessary to support federal-wide analysis of implementation progress and visibility into the steps taken to safeguard workers in accordance with Office of Management and Budget Email to the Chief Acquisition Officers Council “Tracking Implementation of Executive Order 14042,” dated October 19, 2021.

On December 7, 2021, the United States District Court for the Southern District of Georgia Augusta Division (hereinafter “the Court”) ordered a [nationwide injunction](#) enjoining the Government from implementing Executive Order 14042 in all covered contracts. As a result, NASA will take no action to enforce the clause implementing requirements of Executive Order 14042, absent further written notice from the agency, where the place of performance identified in the contract is in a U.S. state or outlying area subject to a court order prohibiting the application of requirements pursuant to the Executive Order (hereinafter, “Excluded State or Outlying Area”). A current list of such Excluded States and Outlying Areas is maintained at <https://www.saferfederalworkforce.gov/contractors/>.

ACTION REQUIRED BY CONTRACTING OFFICERS: Effective immediately ~~and no later than October 15, 2021~~, for commercial and non-commercial acquisitions that include requirements for services, supplies, research and development, construction, and end-items, insert the attached clause **including the preamble pertaining to enforcement** in the following:

- All new solicitations and resulting contracts, orders, and blanket purchase agreements (BPAs) above the micro-purchase threshold (MPT) issued on or after the effective date of this PCD.
- ~~All existing contracts, orders, and BPAs above the simplified acquisition threshold (SAT) via a bilateral modification, and~~

- ~~All solicitations above the MPT issued prior to the effective date of the PCD.~~

For existing solicitation and contracts for commercial and non-commercial acquisitions that include requirements for services, supplies, research and development, construction, and end-items, take the following actions:

- For existing solicitations above the MPT that already include the clause, amend the solicitation to include the preamble language regarding enforcement prior to the clause;
- For existing contracts, including subcontracts, that do not include the clause and have performance entirely in an Excluded State or Outlying Area, or in a covered contractor workplace located in an Excluded State or Outlying Area, cease all efforts to pursue including the clause via modification; and
- Existing contracts that have been previously modified to incorporate the clause are not required to be modified again to incorporate this latest clause revision with the preamble.

The use of this clause shall be excluded from the following:

- Solicitations and contracts with Indian Tribes under the Indian Self-Determination and Education Assistance Act (Public Law 93-638) (does not apply to a procurement contract or subcontract under the FAR to an Indian-owned or tribally-owned business entity); and
- Solicitations and contracts if performance is outside the United States or its outlying areas (limited to employees who are performing work only outside the U.S. or its outlying areas).

FPDS Reporting:

- At the beginning of the "Description of Requirement" data field on the contract action report (CAR) enter **EO14042** (with no spaces or punctuation breaking up the EO identifier; the second character of the entered text is an "O" (as in Oscar) and the fifth character is a zero (0)).
- Additional information shall be entered into the "Description of Requirement" data field after the EO14042 identifier, with no further restrictions on spaces or punctuation, to provide the actual description of the requirement for the contract.
- Modifications or awards issued prior to the issuance of this instruction and on or after September 30, 2021 shall update their records in FPDS by December 1, 2021.
- Do not include the "National Interest Action" (NIA) data field on the CAR for COVID-19 (code P20C) solely to implement the attached clause. The NIA code should only be used when the action meets the requirements identified in PIC 20-01.

EFFECTIVE DATE: This PCD is effective as dated and shall remain in effect until it is incorporated into the FAR, or until this class deviation is otherwise rescinded or revised.

CLAUSE CHANGES: FAR clause 52.223-99 (Deviation 21-03).

HEADQUARTERS CONTACT: Geoffrey Sage, NASA FAR Supplement (NFS) Manager, 202-358-2420, email: geoffrey.s.sage@nasa.gov.

Karla Jackson

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Jackson
Date: 2021.12.09 17:22:32
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Karla Smith Jackson

Assistant Administrator for Procurement

Enclosure

FAR Deviation Text Additions shown in [bold brackets]; Deletions shown as ~~strike throughs~~; and FAR text unchanged shown as asterisks * * * or * * * * *.

* * * * *

PART 52—SOLICITATION PROVISIONS AND CONTRACT CLAUSES

* * * * *

Subpart 52.2—Text of Provisions and Clauses

* * * * *

[NASA will take no action to enforce the clause implementing requirements of Executive Order 14042, absent further written notice from the agency, where the place of performance identified in the contract is in a U.S. state or outlying area subject to a court order prohibiting the application of requirements pursuant to the Executive Order (hereinafter, “Excluded State or Outlying Area”). In all other circumstances, NASA will enforce the clause, except for contractor employees who perform substantial work on or in connection with a covered contract in an Excluded State or Outlying Area, or in a covered contractor workplace located in an Excluded State or Outlying Area. A current list of such Excluded States and Outlying Areas is maintained at <https://www.saferfederalworkforce.gov/contractors/>.

52.223-99 Ensuring Adequate COVID-19 Safety Protocols for Federal Contractors.

ENSURING ADEQUATE COVID-19 SAFETY PROTOCOLS FOR FEDERAL CONTRACTORS (DEVIATION 21-03)

(a) *Definition.* As used in this clause -

United States or its outlying areas means—

- (1) The fifty States;
- (2) The District of Columbia;
- (3) The commonwealths of Puerto Rico and the Northern Mariana Islands;
- (4) The territories of American Samoa, Guam, and the United States Virgin Islands; and
- (5) The minor outlying islands of Baker Island, Howland Island, Jarvis Island, Johnston Atoll, Kingman Reef, Midway Islands, Navassa Island, Palmyra Atoll, and Wake Atoll.

(b) *Authority.* This clause implements Executive Order 14042, Ensuring Adequate COVID Safety Protocols for Federal Contractors, dated September 9, 2021 (published in the Federal Register on September 14, 2021, 86 FR 50985).

(c) ***Compliance.*** The Contractor shall comply with all guidance, including guidance conveyed through Frequently Asked Questions, as amended during the performance of this contract, for contractor or subcontractor workplace locations published by the Safer Federal Workforce Task Force (Task Force Guidance) at <https://www.saferfederalworkforce.gov/contractors/>.

(d) ***Subcontracts.*** The Contractor shall include the substance of this clause, including this paragraph (d), in subcontracts at any tier that exceed the micro-purchase threshold, as defined in Federal Acquisition Regulation 2.101, performed in whole or in part within the United States or its outlying areas.

(End of clause)]



Office of
Procurement
Operations

UNITED STATES OFFICE OF PERSONNEL MANAGEMENT
Washington, DC 20415

MEMORANDUM

DATE: October 15, 2021

TO: Office of Personnel Management (OPM) Acquisition Workforce

FROM: Todd Anthony
OPM Senior Procurement Executive
Director, Office of Procurement Operations (OPO)

SUBJECT: Office of Personnel Management Federal Acquisition Regulation
Class Deviation No. 22-01, Implementing Executive Order 14042,
Ensuring Adequate COVID Safety Protocols for Federal
Contractors

Digitally signed by
Todd A. Anthony
Date: 2021.10.15
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Purpose. This class deviation is issued in accordance with Federal Acquisition Regulation (FAR) 1.404 to implement Executive Order (E.O.) 14042, Ensuring Adequate COVID Safety Protocols for Federal Contractors.

Effective Date. Upon Issuance.

Background. E.O. 14042 was signed by the President on September 9, 2021, and published in the Federal Register at 86 Fed. Reg. 50985 on September 14, 2021. The order requires agencies to include a clause requiring contractors and subcontractors at any tier to comply with all guidance for contractor workplace locations as published by the Safer Federal Workforce Task Force at <https://www.saferfederalworkforce.gov/contractors>. The clause applies to solicitations and contracts for services, including construction.

On September 30, 2021, the Civilian Agency Acquisition Council (CAAC) issued a memorandum to serve as consultation in accordance with FAR 1.404, allowing agencies to authorize a class deviation to implement E.O. 14042.

Deviation. This OPM FAR class deviation implements E.O. 14042 by prescribing contract clause at FAR 52.223-99 Ensuring Adequate Safety Protocols for Federal Contractor (OCT 2021) (DEVIATION).

Applicability. Contracting Officers shall insert the clause at FAR 52.223-99 in the following solicitations, contracts, task orders, delivery orders, and modifications thereof that are for services (including construction) exceeding the Simplified Acquisition Threshold (SAT) performed in whole or in part within the United States or its outlying areas:

- New contracts awarded on or after November 14, 2021, from solicitations issued before October 15, 2021 (this includes new orders awarded on or after November 14, 2021, from solicitations issued before October 15, 2021, under existing indefinite-delivery contracts);
- New solicitations issued on or after October 15, 2021, and contracts awarded pursuant to those solicitations (this includes new solicitations issued on or after October 15, 2021, for orders awarded pursuant to those solicitations under existing indefinite-delivery contracts);
- Extensions or renewals of existing contracts and orders awarded on or after October 15, 2021;
- Options on existing contracts and orders exercised on or after October 15, 2021; and
- By November 14, 2021, existing indefinite-delivery, indefinite-quantity contracts issued by OPM that are anticipated to have orders that exceed the SAT and that have an ordering period that extends beyond October 15, 2021.
- When awarding an order under Government-wide indefinite-delivery vehicles (IDVs), such as the Federal Supply Schedules and other Government-Wide Acquisition Contracts (GWAC), where the order would otherwise be subject to this policy, the Contracting officer must verify whether the clause has been incorporated into the IDV. If the clause has been incorporated, then the order does not need to include the clause. If the clause has not been incorporated into the IDV, then the clause must be incorporated in individual orders that fall within the scope of this deviation.

The clause shall not be applied to:

- Contracts and subcontracts with Indian Tribes under the Indian Self-Determination and Education Assistance Act (Public Law 93-638) (the exclusion would not apply to a procurement contract or subcontract under the FAR to an Indian-owned or tribally-owned business entity); or
- Solicitations and contracts if performance is outside the United States or its outlying areas (the exclusion is limited to employees who are performing work only outside the U.S. or its outlying areas).

When modifying existing contracts, task orders, or delivery orders in accordance with this deviation, Contracting Officers shall use a bilateral modification to incorporate the deviation clause.

Expiration Date. This class deviation will remain in effect until the clause at FAR 52.223-99 is either incorporated into the FAR or is otherwise rescinded.

Attachment. FAR 52.223-99 Ensuring Adequate COVID-19 Safety Protocols for Federal Contractor (OCT 2021) (DEVIATION)

Additional Information. Please direct any questions on this class deviation to Heather Hirshman, Director, Acquisition Policy and Innovation at (202) 709-0608 or Heather.Hirshman@opm.gov.

Attachment - FAR 52.223-99 Ensuring Adequate COVID-19 Safety Protocols for Federal Contractors (OCT 2021) (DEVIATION)

FAR Deviation Clause

Executive Order 14042, Ensuring Adequate COVID Safety Protocols for Federal Contractors

September 30, 2021

PART 52—SOLICITATION PROVISIONS AND CONTRACT CLAUSES

Subpart 52.2—Text of Provisions and Clauses

[52.223-99 Ensuring Adequate COVID-19 Safety Protocols for Federal Contractors.

ENSURING ADEQUATE COVID-19 SAFETY PROTOCOLS FOR FEDERAL CONTRACTORS (OCT 2021) (DEVIATION)

(a) Definition. As used in this clause –

United States or its outlying areas means—

- (1) The fifty States;
- (2) The District of Columbia;
- (3) The commonwealths of Puerto Rico and the Northern Mariana Islands;
- (4) The territories of American Samoa, Guam, and the United States Virgin Islands; and
- (5) The minor outlying islands of Baker Island, Howland Island, Jarvis Island, Johnston Atoll, Kingman Reef, Midway Islands, Navassa Island, Palmyra Atoll, and Wake Atoll.

(b) Authority. This clause implements Executive Order 14042, Ensuring Adequate COVID Safety Protocols for Federal Contractors, dated September 9, 2021 (published in the Federal Register on September 14, 2021, 86 FR 50985).

(c) Compliance. The Contractor shall comply with all guidance, including guidance conveyed through Frequently Asked Questions, as amended during the performance of this contract, for contractor or subcontractor workplace locations published by the Safer Federal Workforce Task Force (Task Force Guidance) at <https://www.saferfederalworkforce.gov/contractors/>.

Attachment - FAR 52.223-99 Ensuring Adequate COVID-19 Safety Protocols for Federal Contractors (OCT 2021) (DEVIATION)

(d) Subcontracts. The Contractor shall include the substance of this clause, including this paragraph (d), in subcontracts at any tier that exceed the simplified acquisition threshold, as defined in Federal Acquisition Regulation 2.101 on the date of subcontract award, and are for services, including construction, performed in whole or in part within the United States or its outlying areas.

(End of clause)]



UNITED STATES
SECURITIES AND EXCHANGE COMMISSION
STATION PLACE
100 F STREET NE
WASHINGTON, DC 20549-2000

OFFICE OF
ACQUISITIONS

October 6, 2021

**Class Deviation from Federal Acquisition Regulation
Implementation of Executive Order 14042,
Ensuring Adequate COVID Safety Protocols for Federal Contractors
(2022-001)**

1. **Purpose:** To issue a class deviation in accordance with CAAC Letter 2021-03 and Federal Acquisition Regulation (FAR) subpart 1.404 to implement Executive Order (E.O.) 14042, Ensuring Adequate COVID Safety Protocols for Federal Contractors, signed September 9, 2021. This memorandum also provides instructions for the SEC acquisition workforce on when to include a new clause in SEC solicitations and contracts.

The instructions include GSA-specific implementation timelines for solicitations, new contracts, and existing contracts.

2. **Effective Date:** Immediately
3. **Expiration Date:** Expires when incorporated into the FAR or is otherwise rescinded.
4. **Background:** In order to ensure the health and safety of the federal workforce and contractor community, the President signed [E.O. 14042](#). The E.O. promotes economy and efficiency in Federal procurement by ensuring that contractors and subcontractors that contract with the Federal Government provide COVID-19 safeguards. The E.O. directs the Safer Federal Workforce Taskforce to issue guidance to provide implementation details and the Federal Acquisition Regulatory (FAR) Council to establish a new clause to be included in solicitations and contracts and contract-like instruments.

The Safer Federal Workforce Task Force issued guidance on September 24, 2021 at [saferfederalworkforce.gov](https://www.saferfederalworkforce.gov) which requires:

- Vaccination of covered contractor employees,¹ except in limited circumstances where an employee is legally entitled to an accommodation;²

¹ Covered contractor employee means any full-time or part-time employee of a covered contractor working on or in connection with a covered contract or working at a covered contractor workplace. This

- Requirements related to masking and physical distancing while in covered contractor³ workplaces; and
- Designation by covered contractors of a person or persons to coordinate COVID-19 workplace safety efforts at covered contractor workplaces.

FAR Case 2021-021 has been opened to implement the appropriate amendments in the FAR to reflect the requirements of E.O. 14042.

5. **Authority:** This deviation is issued under the authority of FAR 1.404. The required consultation with the Chair of the Civilian Agency Acquisition Council (CAAC) is satisfied by the CAAC Letter 2021-03 issued on September 30, 2021.
6. **Applicability:** The clause is required in all solicitations, contracts, orders, and agreements for supplies and services, except as indicated below.

The new clause is not applicable to:

- Micro-Purchases
 - Solicitations and contracts if performance is outside the United States or its outlying areas (the exclusion is limited to employees who are performing work only outside the U.S. or its outlying areas); or
 - Contracts and subcontracts with Indian Tribes under the Indian Self Determination and Education Assistance Act (Public Law 93-638) (the exclusion would not apply to a procurement contract or subcontract under the FAR to an Indian-owned or tribally-owned business entity).
7. **Exceptions:** Contracting Officers should e-mail the HCA with any Contractor requests for exceptions.

The HCA may approve exceptions, via e-mail, for contracts less than the SAT or solely for the manufacturing of products.

The Chief Operating Officer may approve urgent, mission-critical needs for a covered contractor to have covered contractor employees begin work on a covered contract or at a covered workplace before becoming fully vaccinated. In the case of such limited exceptions, the covered contractor must ensure these covered contractor employees are fully vaccinated within 60 days of beginning work on a covered contract or at a covered workplace. The covered contractor must further ensure that such employees comply with masking and physical distancing requirements for not fully vaccinated individuals in covered workplaces prior to being fully vaccinated.

Includes employees of covered contractors who are not themselves working on or in connection with a covered contract.

² Note that contractor employees working from home on covered contracts must be vaccinated but do not have to follow the CDC masking and social distancing protocols, because an employee's personal residence is not a covered contractor workplace. See Safer Federal Workforce Task Force FAQs for Federal Contractors.

³ Covered contractor means a prime or subcontractor at any tier who is party to a covered contract.

8. Requirements:

- **New Solicitations.** Contracting officers shall include the clause at FAR 52.223-99, Ensuring Adequate COVID Safety Protocols for Federal Contractors in new applicable solicitations issued on or after **October 15, 2021**.
- **Existing Solicitations.** Contracting officers shall either amend the solicitation to include the clause at FAR 52.223-99 or incorporate it into the award of the apparent successful offeror for applicable solicitations that were issued prior to **October 15, 2021**, that have not closed, or awards that have not been made by **October 15, 2021**.
- **New Contracts.** Contracting officers shall include the clause at FAR 52.223-99 in new applicable contracts, orders, and agreements awarded on or after **October 15, 2021**.
- **Existing Contracts.**
 - By October 11, 2021, OA will notify all contractor POC of the SEC's intent to add the clause at FAR 52.223-99 to its existing contracts, purchase orders, and agreements described in section 6 of this deviation by, using the contractor point of contact information in eFile.
 - Contracting Officers shall send a bilateral modification request to add the clause at FAR 52.223-99 for all existing contracts, orders, and agreements **no later than December 8, 2021**.
 - Contracting Officers **shall not renew, extend the period of performance, or exercise an option on any existing contract, order, or agreement** before it has been bilaterally modified to include the clause at FAR 52.223-99.
 - GSA master contracts are expected to be modified before November 14, 2021. Orders and BPAs against GSA-issued agreements are not required to be modified by the SEC if GSA has modified the base agreement. A dashboard will be provided to check the status of modifications to GSA contracts.
 - COs must contact IAA COs to verify applicable contracts have been modified by the host agency no later than December 8, 2021.

9. Deviation: See Attachment A for the changes in the FAR text as revised by this deviation.

10. Additional Guidance: In addition to this deviation, all entrants into SEC spaces, including contractor personnel working on-site at SEC facilities, are required to follow the SEC's COVID-19 Workplace Safety Plan available on the SEC's intranet or upon request from the CO.

11. Point of Contact: If you have any questions please contact Steven Fennel, Supervisory Procurement Analyst at (202)551-8635 or fennells@sec.gov.

Attachment A – Deviation Text

Cathell, Vance

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Vance
Date: 2021.10.06 11:11:18
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VANCE J. CATHELL
Director (Senior Procurement Executive)
Office of Acquisitions

Small Business Administration Acquisition Alert (SBA-AA)

Title	Class Deviation from Federal Acquisition Regulation (FAR) for Executive Order (EO) 14042 – Ensuring Adequate COVID Safety Protocols for Federal Contractors
Reference Number	2022-01
Version Number	
Point of Contact	Nauman A. Ansari
Source of this Requirement	EO 14042
Regulatory Reference	FAR 1.404

Purpose

The purpose of this SBA Acquisition Alert (AA) is to issue a deviation from the FAR to implement EO 14042, Ensuring Adequate COVID Safety Protocols for Federal Contractors.

This SBA AA prescribes a contract clause, 52.223-99 Ensuring Adequate COVID-19 Safety Protocols for Federal Contractors (OCT 2021)(DEVIATION), which implements the order.

Effective Date

This AA will be effective upon issuance and will remain in effect until clause 52.223-99 is incorporated into the FAR or this deviation is otherwise rescinded.

Background

EO 14042 was signed by the President on September 9, 2021, and published in the Federal Register at 86 Fed. Reg. 50985 on September 14, 2021. The order requires agencies to include a clause requiring contractors and subcontractors at any tier to comply with all guidance for contractor workplace locations as published by the Safer Federal Workforce Task Force at <https://www.saferfederalworkforce.gov/contractors>. The clause applies to solicitations and contracts for services, including construction.

Section 3(a) of the order requires the Federal Acquisition Regulatory Council to develop a contract clause and provide initial policy direction to acquisition office for use of the clause by recommending that agencies exercise their authority under FAR subpart 1.4.

Action

Effective immediately, contracting officers shall insert the clause 52.223-99 in the following solicitations, contracts, task orders, delivery orders, and modifications thereof that are for services (including construction) performed in whole or in part within the United States or its outlying areas.

The clause **shall** apply to:

- New contracts awarded on or after November 14, 2021, from solicitations issued before October 15, 2021 (this includes new orders awarded on or after November 14, 2021, from solicitations issued before October 15, 2021, under existing indefinite-delivery contracts);
- New solicitations issued on or after October 15, 2021, and contracts awarded pursuant to those solicitations (this includes new solicitations issued on or after October 15, 2021, for orders awarded pursuant to those solicitations under existing indefinite-delivery contracts);
- Extensions or renewals of existing contracts and orders awarded on or after October 15, 2021; and
- options on existing contracts and orders exercised on or after October 15, 2021.
- Existing indefinite-delivery, indefinite-quantity contracts that are anticipated to have orders that exceed the SAT and that have an ordering period that extends beyond October 15, 2021.

To maximize the goal of getting more people vaccinated and decreasing the spread of COVID-19, the Task Force strongly encourages agencies to apply the requirements of the Task Force Guidance broadly, consistent with applicable law. Accordingly, CO's may apply the clause to:

- Contracts that will be awarded prior to November 14 on solicitations issued before October 15; and
- Contracts that are not covered or directly addressed by the E.O. because the contract or subcontract is under the simplified acquisition threshold or is a contract or subcontract for the manufacturing of products.

The clause **shall not** be applied to:

- Contracts and subcontracts with Indian Tribes under the Indian Self-Determination and Education Assistance Act (Public Law 93-638) (the exclusion would not apply to a procurement contract or subcontract under the FAR to an Indian-owned or tribally-owned business entity); or
- Solicitations and contracts if performance is outside the United States or its outlying areas (the exclusion is limited to employees who are performing work only outside the U.S. or its outlying areas).

When modifying existing contracts, task orders, or delivery orders in accordance with this deviation, contracting officers shall use a bilateral modification to incorporate the deviation clause.

Point of Contact

Questions regarding this AA should be directed to Nauman Ansari at nauman.ansari@sba.gov

Attachments

- Clause 52.223-99 Ensuring Adequate COVID-19 Protocols for Federal Contractors (OCT 2021) (DEVIATION)

Approval Signature

NAUMAN
ANSARI

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Date: 2021.10.07
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Nauman A. Ansari
Senior Procurement Executive

FAR Deviation Clause

Executive Order 14042, Ensuring Adequate COVID Safety Protocols for Federal Contractors

September 30, 2021

PART 52—SOLICITATION PROVISIONS AND CONTRACT CLAUSES

Subpart 52.2—Text of Provisions and Clauses

[52.223-99 Ensuring Adequate COVID-19 Safety Protocols for Federal Contractors.

ENSURING ADEQUATE COVID-19 SAFETY PROTOCOLS FOR FEDERAL CONTRACTORS (OCT 2021) (DEVIATION)

(a) *Definition.* As used in this clause -

***United States or its outlying areas* means—**

- (1) The fifty States;**
- (2) The District of Columbia;**
- (3) The commonwealths of Puerto Rico and the Northern Mariana Islands;**
- (4) The territories of American Samoa, Guam, and the United States Virgin Islands; and**
- (5) The minor outlying islands of Baker Island, Howland Island, Jarvis Island, Johnston Atoll, Kingman Reef, Midway Islands, Navassa Island, Palmyra Atoll, and Wake Atoll.**

(b) *Authority.* This clause implements Executive Order 14042, Ensuring Adequate COVID Safety Protocols for Federal Contractors, dated September 9, 2021 (published in the Federal Register on September 14, 2021, 86 FR 50985).

(c) *Compliance.* The Contractor shall comply with all guidance, including guidance conveyed through Frequently Asked Questions, as amended during the

performance of this contract, for contractor or subcontractor workplace locations published by the Safer Federal Workforce Task Force (Task Force Guidance) at <https://www.saferfederalworkforce.gov/contractors/>.

(d) *Subcontracts*. The Contractor shall include the substance of this clause, including this paragraph (d), in subcontracts at any tier that exceed the simplified acquisition threshold, as defined in Federal Acquisition Regulation 2.101 on the date of subcontract award, and are for services, including construction, performed in whole or in part within the United States or its outlying areas.

(End of clause)]



SOCIAL SECURITY

MEMORANDUM

Date: October 14, 2021

Refer To: S1QC

To: Office of Acquisition and Grants Staff

From: Kevin P. Muñiz **Kevin MUNIZ** Digitally signed by Kevin MUNIZ
Date: 2021.10.14 10:53:09 -04'00'
Technical Advisor, Office of Acquisition Support

Subject: Flash Notice (FN) 23_22-01, Class Deviation from the Federal Acquisition Regulation (FAR) to Implement Executive Order 14042, Ensuring Adequate COVID Safety Protocols for Federal Contractors—ACTION

Purpose

This FN implements the agency's approval (see attached) of a FAR class deviation pursuant to a recently issued Civilian Agency Acquisition Council (CAAC) Letter regarding [Executive Order \(E.O.\) 14042, Ensuring Adequate COVID Safety Protocols for Federal Contractors](#), and as amended by the agency's consultation with the CAAC dated October 5, 2021. The CAAC letter (see attached) authorized a class deviation to implement the E.O., requiring agencies to include a new clause, or deviation thereto, of 52.223-99, Ensuring Adequate COVID-19 Safety Protocols for Federal Contractors, in certain solicitations and contracts.

Policy and Procedure

(a) Effectively immediately, include the deviation clause 2352.223-99¹ (see the attachment to the FN) in all solicitations and contracts (to include contract-like instruments as described in Section 5 of the E.O.) for services, including construction, and ancillary services (e.g., maintenance, installation, repair, and alteration services) in connection with supplies acquisitions, above the Simplified Acquisition Threshold (SAT) (and to the maximum extent practicable in solicitations and contracts that exceed the micro-purchase threshold but are equal to or less than the SAT), for commercial and non-commercial actions as follows:

- **New Contracts (and contract-like instruments)** awarded on or after November 14, 2021 from solicitations issued before October 15, 2021 (this includes new orders awarded on or after November 14, 2021 from solicitations issued before October 15, 2021 under existing indefinite-delivery contracts);

¹ See Attachment 3 for specific instructions related to inclusion of clause 2352.223-99.

- **New Solicitations** issued on or after October 15, 2021 and contracts awarded pursuant to those solicitations (this includes new solicitations issued on or after October 15, 2021 for orders awarded pursuant to those solicitations under existing indefinite-delivery contracts);
- extensions or renewals of existing contracts and orders awarded on or after October 15, 2021;
- options on existing contracts and orders exercised on or after October 15, 2021;
- existing contracts and orders otherwise having a bilateral modification not tied to an extension, renewal, or option exercise (e.g. change in Statement of Work, change in delivery schedule), on or after October 15, 2021; and
- contracts that will be awarded prior to November 14, 2021 on solicitations issued before October 15, 2021.

Contract-like instruments is inclusive of both GSA (see **Special Note** below) and open market blanket purchase agreements (BPAs). A BPA shall be treated as exceeding the SAT if it is anticipated that the total value of calls issued across the life of the BPA will exceed that amount.

Note: Contracting staff are *strongly encouraged* to issue a bilateral modification to include the deviation clause *before* extending, renewing, or otherwise exercising an option on existing contracts (and contract-like instruments) or orders.

(b) *Exceptions.* The clause shall not apply to:

- contracts and subcontracts with Indian Tribes under the Indian Self-Determination and Education Assistance (Public Law 93-638);
- solicitations and contracts if performance is outside the United States or its outlying areas (the exclusion is limited to employees who are performing work outside the U.S. or its outlying areas); or
- Micro-Purchases as defined by agency policy.

Special Note for GSA Orders and Schedule BPAs: The new deviation clause will be added to the SSA Streamlined Acquisition System (SSASy) agency-specific clause database and to all clause templates. Note: Clause template 3 is for orders against the GSA's Federal Supply Schedule (FSS). Normally, the GSA Schedule contract contracting officer amends the contract to add new FAR clauses, including any FAR deviation clauses, which would then apply to resultant orders. If the FSS contract is not updated with its own deviation clause in time for a contracting staff member to meet the dates indicated above under paragraph (a), contracting staff can begin including the clause 2352.223-99, as applicable, in the solicitation or award for FSS orders. GSA will develop an external dashboard showing the compliance status of their contracts (e.g. FSS) to aid customer agencies in identifying which contracts have been modified. A link to this dashboard will be provided on customer facing tools such as GSA Advantage, eBUY, and [Contracts Online Home \(gsa.gov\)](https://www.gsa.gov).

Background

On September 9, 2021, the President signed E.O. 14042. Its purpose was to “promote economy and efficiency in procurement by contracting with sources that provide adequate COVID-19 safeguards for their workforce.” Specifically, it aims to maximize vaccination among the general populace and thereby decrease the spread of COVID-19. Therefore, the E.O. requires agencies to include a clause requiring contractors and subcontractors at any tier to comply with all Task Force Guidance², as amended, for contractor workplace locations. (In other words, the clause flows down to subcontractors.) Agencies have been directed to apply the clause as broadly as possible.

Further Information

Please direct *general* questions regarding this FN to Kevin P. Muñoz via email at Kevin.Muniz@ssa.gov, or phone (410) 966-3297.

Please direct specific questions (e.g. questions regarding applying the clause to actions exceeding the micro-purchase threshold but are equal to or less than the SAT) to your assigned OAG Office Director (or Division Director) in your respective area.

Attachments

Attachment 1 - CAAC Letter Authorizing Deviation



CAAC Letter 2021-03
Ensuring Adequate CC

Attachment 2 – Agency Deviation Approval Memorandum

[RESERVED]

Attachment 3 – SSASy Clause Instructions for FN 23 22-01

[RESERVED]

Attachment 4 – Agency Deviation Clause 2352.223-99

[SEE BELOW]

² The [Task Force Guidance](#) includes Frequently Asked Questions regarding the application and operation of the clause to contracts and subcontracts.

Attachment 4

FAR Deviation Clause

**Executive Order 14042, Ensuring Adequate COVID Safety Protocols for Federal
Contractors**

PART 52—SOLICITATION PROVISIONS AND CONTRACT CLAUSES

Subpart 52.2—Text of Provisions and Clauses

2352.223-99 Ensuring Adequate COVID-19 Safety Protocols for Federal Contractors.

**ENSURING ADEQUATE COVID-19 SAFETY PROTOCOLS FOR FEDERAL
CONTRACTORS (OCT 2021) (DEVIATION)**

(a) *Definition.* As used in this clause -
United States or its outlying areas means—

- (1) The fifty States;
- (2) The District of Columbia;
- (3) The commonwealths of Puerto Rico and the Northern Mariana Islands;
- (4) The territories of American Samoa, Guam, and the United States Virgin Islands; and
- (5) The minor outlying islands of Baker Island, Howland Island, Jarvis Island, Johnston Atoll, Kingman Reef, Midway Islands, Navassa Island, Palmyra Atoll, and Wake Atoll.

(b) *Authority.* This clause implements Executive Order 14042, Ensuring Adequate COVID Safety Protocols for Federal Contractors, dated September 9, 2021 (published in the Federal Register on September 14, 2021, 86 FR 50985).

(c) *Compliance.* The Contractor shall comply with all guidance, including guidance conveyed through Frequently Asked Questions, as amended during the performance of this contract, for contractor or subcontractor workplace locations published by the Safer Federal Workforce Task Force (Task Force Guidance) at
<https://www.saferfederalworkforce.gov/contractors>

(d) *Subcontracts.* The Contractor shall include the substance of this clause, including this paragraph (d), in subcontracts at any tier that exceed the simplified acquisition threshold (and to the maximum extent practicable in subcontracts that exceed the micro-purchase threshold but are equal to or less than the simplified acquisition threshold), as defined in Federal Acquisition

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Attachment 4

Regulation 2.101 on the date of subcontract award, and are for services, including construction, and ancillary services (e.g., maintenance, installation, repair, and alteration services) in connection with supplies acquisitions, performed in whole or in part within the United States or its outlying areas.

(End of clause)