UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
GALVESTON DIVISION

THE STATE OF TEXAS, Plaintiff, v. JOSEPH R. BIDEN, *et al.*, Defendants.	No. 3:21-cv-309

DEFENDANTS' RESPONSE TO PLAINTIFF'S
SUPPLEMENTAL BRIEF TO MOTION FOR PRELIMINARY INJUNCTION

At the December 3, 2021, hearing on the State of Texas's motion for preliminary injunction ("Motion"), ECF No. 6, the Court noted its "concern that there is not a lot of evidence out there that there is going to be – that there are contracts that are in imminent danger of being altered here." Tr. Hrg. Dec. 3, 2021, at 53, lns. 11–17, ECF No. 41 [hereinafter "Tr."]. Given this dearth of evidence, the Court permitted Texas until December 6 "to submit a letter brief . . . or another declaration that points [the Court] to contracts that it fears are going to be directly affected very soon," *id.* lns. 18–22, and gave Defendants the opportunity to file a response, *id.* at 58, lns. 3–6. Texas submitted its Supplemental Brief ("Supplement"

or "Supp.") and five attached exhibits on December 6, *see* Supp. Br., ECF No. 43, and Defendants hereby respond.[1]

Texas's second attempt to demonstrate standing and irreparable harm fares no better than its first. Texas formerly alleged that it stood to lose dozens or hundreds of current and future contracts worth $14.6 billion dollars in total. *See* Compl. at 21, ¶ 64 (internet-generated list of federal contracts). *Cf.* Mot. at 7 n.32 (same). Pressed by the Court to point to specific evidence that supports the "extraordinary and drastic" relief that it seeks, *Mazurek v. Armstrong*, 520 U.S. 960, 972 (1997), Texas now attempts to remedy the evidentiary deficiency identified by the Court through declarations addressing current or potential future contracts.

Texas's last-minute attempt to demonstrate standing and irreparable harm fails. It offers no evidence of any current contract to which it is a party where Defendants have compelled the inclusion of a COVID-19 safety clause, nor has Texas identified any contracting opportunity in the near future in which the inclusion of a COVID-19 safety clause is a prerequisite for award/renewal. As explained in greater detail below, because Texas's efforts to demonstrate standing and irreparable harm do not transcend speculation, its request for a

---

[1] On December 7, 2021, the United States District Court for the Southern District of Georgia issued a nationwide preliminary injunction enjoining the federal government from enforcing the vaccine mandate for federal contractors and subcontractors. *See* Order, *State of Georgia v. Biden*, No. 1:21-cv-163 (S.D. Ga.), ECF No. 94. Defendants are taking immediate steps to comply with that preliminary injunction. The information provided in this supplemental brief and declarations attached hereto describes the state of affairs before the nationwide preliminary injunction was issued by that court.

preliminary injunction must be denied. *See Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008); *Holland Am. Ins. Co. v. Succession of Roy*, 777 F.2d 992, 997 (5th Cir. 1985).

Sandia National Lab. Texas has not put forth any additional evidence that shows Sandia has a contract with a COVID-19 safety clause that is "fairly traceable" to Executive Order ("EO") 14042. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992) (citation omitted); *see also* Ensuring Adequate COVID Safety Protocols for Federal Contractors, Exec. Order No. 14042, 86 Fed. Reg. 50,985 (Sept. 14, 2021). All additional contracts that Texas identifies between Sandia and Texas Tech University ("TTU") cannot support standing for the same reasons as Texas's first attempt: All of the contracts between TTU and Sandia are subcontracts to a contract that was not required to be modified by the EO. None of these contracts change the fact that TTU remains a subcontractor with National Technology and Engineering Solutions of Sandia, LLC ("NTESS"),[2] a private corporation, and not the federal government. The overarching contract between NNSA and NTESS is an ongoing contract that NNSA modified to include a COVID-19 safety clause based on its existing authority under the terms of that contract. *See* ECF No. 34-4, Westlake Decl. ¶ 12. And, as previously argued, the modification of existing contracts is not required by the EO, and so any injuries stemming from those modifications is not "fairly traceable" to EO 14042. *See Allen v. Wright*, 468 U.S. 737, 757 (1984); Defendants' Opposition to Texas's Motion for a Preliminary Injunction

[2] As previously noted, the National Nuclear Security Administration ("NNSA") contracts with NTESS, and NTESS in turn subcontracts with TTU. *See* Westlake Decl. ¶¶ 4, 31.

("Opposition") at 39–40, ECF No. 34. For this reason, it is of no matter that the contract between NNSA and NTESS includes a "flow down" requirement with NTESS and its subcontractors that applies to many different clauses, including the COVID-19 safety clause. *Id.* ¶ 40.

Lawrence Livermore National Laboratory. The Lawrence Livermore National Lab ("Livermore") contracts relied upon by Texas fare no better. As with Sandia, NNSA contracts with a private entity, Lawrence Livermore National Security, LLC ("LLNS"), to manage and operate Livermore. Ex 2, Duff Decl. ¶ 4. Subject to a bilateral modification, the private entity running the Lab—Lawrence Livermore National Security, LLC ("LLNS")—voluntarily agreed to include the COVID-19 safety clause into its existing contract with NNSA. *Id.* ¶ 11. Similar to its contract with NTESS, NNSA's contract with LLNS also includes a flow-down requirement for its subcontractors. *Id.* ¶ 17. Accordingly, LLNS sent a proposed subcontract to TTU that included the COVID-19 safety clause. *Id.* ¶ 18. Again, the bilateral modification between NNSA and LLNS was not required by the EO, so any COVID-19 safety clause that flows down to TTU's subcontract is not caused by the EO.

U.S. Department of Defense. Texas also points to two separate contracts involving the U.S. Army ("Army"). The first involves a Research Project Award from Medical Technology Enterprise Consortium ("MTEC"), a 501(c)(3), biomedical technology consortium. Supp. Ex. C, ¶ 5. The U.S. Army Medical Research Acquisition Activity ("USAMRAA") has an agreement with MTEC under which USAMRAA issues task orders to MTEC based on proposals that one of its consortium members has submitted. Ex. 3, Best Decl. ¶ 7. A

COVID-19 safety clause was added to the agreement between USAMRAA and MTEC as a result of a bilateral modification (again, not mandated by EO 14042). *Id.* ¶ 9. That agreement also contains a flow-down requirement specifying that MTEC insert a COVID-19 safety clause in its agreements with members of the consortium. *Id.* USAMRAA has awarded MTEC a task order based on a proposal from TTU, and accordingly, the resulting Research Project Award includes a COVID-19 safety clause. *Id.* But again—just like the proposed Livermore contract—TTU is not in any contractual privity with the federal government. The inclusion of a COVID-19 safety clause in a proposed TTU contract results from the intervening relationship between TTU and its contracting party, which here is MTEC. Any alleged injury relating to this subcontract, then, is also not fairly traceable to the limited requirements of the EO.

The second contract with the Army involves the Business Enterprises of Texas ("BET"), a program with the Vocational Rehabilitation Division ("VR") of the Texas Workforce Commission ("TWC"). Supp. at 4 & its Ex. E, Fuller Decl., ECF No. 43-5. Under that contract, the Army issues various task orders with separate periods of performance and funding. Ex. 4, Brown Decl. ¶¶ 3, 5. The contract, which was awarded on July 30, 2020, did not contain a COVID-19 safety clause, *id.* ¶ 6, and the Army "cannot unilaterally enforce the Contractor to accept modifications to the contract," *id.* ¶ 5. On November 26, 2021, the Army issued a (now completed) task order for the period of November 28 through December 3, 2021, that did incorporate a COVID-19 safety clause, but because the contractor did not agree to that clause, its performance under the contract was not subject to a COVID-19 safety

clause. *Id.* ¶ 6. The Army has issued a new task order to extend the period of performance and provide funding from December 4 to 18, 2021; the task order does not incorporate a COVID-19 safety clause. *Id.* ¶ 7. There is no current intention to include a COVID-19 safety clause in future task orders under this contract, nor is there any intent to cancel this contract due to a refusal to accept a COVID-19 safety clause. *Id.* ¶ 8.

Texas further relies upon a contract between BET and the U.S. Department of the Air Force. Supp. at 3–4 (citing Mot. Ex. J); Ex. 5, Novatnak Decl. ¶ 3. The option to extend the contract was exercised on September 29, 2021, and runs through September 30, 2022. *Id.* ¶ 3.b. The option on the contract therefore falls outside the express requirements of EO 14042. *See* EO 14042 § 5(a); *see also* Novatnak Decl. ¶ 3.c. The option on the contract currently does not include the COVID-19 safety clause and the Air Force will not require the TWC to agree to the inclusion of that clause in the existing option on the contract, which expires on September 30, 2022. Novatnak Decl. ¶¶ 3.b., d.-e.

Department of Health and Human Services ("HHS"). Last, Texas points to a contract involving the Texas Department of State Health Services ("DSHS") and HHS's Health Resources and Services Administration ("HRSA"). Supp. at 3 & its Ex. D, ECF No. 43-4. The contract at issue has a "base" performance period of up to one year, followed by up to four one-year option periods. Ex. 6, Garcia Decl. ¶ 7. The contract period of performance started on April 1, 2018, and will run through March 31, 2023, if all option periods are exercised. *Id.* The contract is currently in Option Period 3 with an effective date and period of performance from April 1, 2021, through March 31, 2022. *Id.* ¶ 9. The Option Period 3

Modification, which predates the issuance of EO 14042, was executed bilaterally (including by DSHS) on March 17, 2021. *Id.* That option therefore falls outside the express requirements of the EO. *See* EO 14042 § 5(a). On November 17, 2021, HRSA notified DSHS that it intends to exercise the option for Option Period 4. Garcia Decl. ¶ 10. Option Period 4 would begin on March 31, 2022 and run through March 31, 2023. *Id.* HRSA informed DSHS of its intention to pursue a bilateral modification of the contract for Option Period 4 to include the COVID-19 safety clause, but to date DSHS has not agreed to that modification. *Id.* ¶ 11. This contract also does not currently include a COVID-19 safety clause, and it remains speculative how the parties' ongoing contractual discussions may resolve several months from now. *See id.* at ¶ 12. *Cf. Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 402 (2013) (injury must be "certainly impending").

The other proof offered by Texas through its Supplement consists of an order from the Department of Energy ("DOE") regarding COVID-19 safety protocols and what appears to be internal e-mail correspondence between TTU personnel discussing the Sandia contracts. Supp. Exs. A & B, ECF Nos. 43-1 & 43-2. Defendants already addressed the applicability of the DOE order during the December 6, 2021, hearing, and note—as discussed with the Court that day and as outlined herein—that there is no contractual privity between TTU and DOE entities. *See Hollis v. Biden*, No. 1:21-CV-163-GHD-RP, 2021 WL 5500500, at *4 (N.D. Miss. Nov. 23, 2021) (finding, in a suit challenging EO 14042, that university-employee plaintiffs had no standing to sue the Federal Government as they had "failed to identify a single contract that potentially connects them to the federal contractor vaccine requirement" and the state

system's decision to require all university employees to vaccinate for COVID-19 did not provide standing). The e-mail correspondence only serves as evidence of TTU's view of the situation; it does not and cannot provide evidence of what DOE or any Defendant has done or intends to do on account of EO 14042. Last, Texas points to "at least 474 contracts with the State of Texas and its agencies and universities [with] a total potential value of $250,000 or more" that "will be subject to the Contractor Mandate when extended or renewed," Supp. at 4 (citation omitted); this is the same sort of conclusory, self-serving assertion about which this Court has rightly expressed skepticism. As already noted, Texas—despite ample opportunity—has not offered any proof of one contract that falls into such a category, let alone shown that the extraordinary relief that it seeks here is necessary to prevent the imminent inclusion of a COVID-19 safety clause in any extension/renewal. All of Texas's supplemental allegations are therefore, at most, "conjectural" and "hypothetical," not "actual," "imminent," or "concrete." *Lujan*, 504 U.S. at 560; *cf. Winter*, 555 U.S. at 20.

In the end, and despite having been given repeated opportunities, Texas has failed to show that that it has been or will imminently be harmed by EO 14042. To the contrary, the record is replete with examples of unimpeded, currently ongoing contractual performance, and the few future contracting opportunities on which Texas relies are not ones that will be "directly affected very soon," even assuming they are ever affected at all. Tr. at 53, lns. 11–17. Texas also assured this Court that absent an injunction, Defendants would summarily nullify their contracts with Texas and preclude Texas from further federal contracting opportunities if Texas dared oppose EO 14042. The evidence before the Court shows exactly

the opposite: Texas has repeatedly declined various requests to insert COVID-19 safety clauses into current contracts and, because those were merely *requests*, contractual performance has continued, unchanged. *See*, *e.g.*, Brown Decl. ¶¶ 6–8; Opp'n Ex. B, Liu Decl. ¶ ¶ 13, 17. Texas's failure of proof not only belies its assertion of imminent harm, but brings into stark relief the balance of the equities here: Texas seeks emergency relief to prevent Defendants from taking a measure to promote workplace safety in the midst of a global pandemic. In light of Texas's evidentiary showing, granting such relief would be manifestly inappropriate. The evidence that Texas has provided shows that Defendants have not unilaterally compelled contractual modifications or otherwise caused Texas's foreboding predictions of contractual upheaval to come to pass.

For the foregoing reasons, and for the reasons stated in Defendants' Opposition and at the December 6 hearing, the Court should deny the requested relief.

DATED: December 8, 2021

Respectfully submitted,

BRIAN M. BOYNTON
Acting Assistant Attorney General

BRAD P. ROSENBERG
Assistant Branch Director

/s/ Kristin A. Taylor
KRISTIN A. TAYLOR (TX Bar. 24046952)
C. Lee Reeves III
Madeline M. McMahon
Trial Attorneys
U.S. Department of Justice
Civil Division, Federal Programs Branch
1100 L St. NW

Washington, DC 20005
(202) 353-0533 (direct)
(202) 616-8470
kristin.a.taylor@usdoj.gov

JENNIFER B. LOWERY
Acting United States Attorney

Daniel David Hu
Chief, Civil Division
Assistant U.S. Attorney
S.D. Id. 7959
Texas Bar Number 10131415
1000 Louisiana, Suite 2300
Houston, TX 77002
713 567 9518
Daniel.hu@usdoj.gov

Counsel for Defendants

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on December 8, 2021, I electronically filed the foregoing with the Clerk of Court using the CM/ECF system, which will send a notification to counsel of record.

/s/ Kristin A. Taylor

Kristin A. Taylor
Trial Attorney
U.S. Department of Justice
Civil Division, Federal Programs Branch
1100 L St. NW
Washington, DC 20005
(202) 353-0533 (direct)
(202) 616-8470
kristin.a.taylor@usdoj.gov

EXHIBIT 1

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
GALVESTON DIVISION

STATE OF TEXAS, et al. Plaintiffs, v. JOSEPH R. BIDEN in his official capacity as President of the United States, et al. Defendants.	Case No. _____

DECLARATION OF PATRICIA D. GUTIERREZ

I, Patricia D. Gutierrez, hereby make this declaration under penalty of perjury pursuant to 28 U.S.C. § 1746:

1. I am over the age of 18 years and am otherwise competent to make this declaration.

2. I make this declaration on the basis of personal knowledge.

3. I have been employed by National Technology and Engineering Solutions of Sandia, LLC (NTESS) since 2017. I presently serve as a Subcontract Manager in the Science & Technology/University Procurement Department within Sandia National Laboratories' Integrated Supply Chain Management Center.

4. NTESS, a wholly owned subsidiary of Honeywell International, Inc., manages and operates Sandia National Laboratories (SNL) on behalf of the U.S. Department of Energy (DOE) National Nuclear Security Administration (NNSA), under Contract No. DE-NA0003525

(hereinafter "the M&O Contract"). I have worked at SNL since July 2011. I have worked in procurement at SNL for nine years.

5. As a Subcontract Manager, I am responsible for the negotiation, award, and administration of SNL subcontracts issued to Universities, including several purchase orders (POs) previously awarded or currently pending award to Texas Tech University.

6. NTESS has a Contract Purchase Agreement ("CPA") with TTU. As explained in Declaration of Kelly Westlake ("Westlake Decl."), the CPA governs the terms and conditions that apply to various task orders and POs between SNL and TTU. Westlake Decl. ¶ 32. NTESS has an active Purchase Order under the CPA that involves TTU's management and operation of the Scaled Wind Farm Technology (SWiFT) facility. The SWiFT facility is located at TTU's National Wind Institute Research Center in Lubbock, Texas. The SWiFT facility provides an experimental site with research-scale turbines for studying wind turbine wakes and turbine-turbine interactions on a realistic scale. Research performed at SWiFT seeks to reduce turbine-to-turbine interaction and wind plant underperformance, develop advanced wind turbine rotors, and improve the validity of advanced simulation models. (For more information about SWiFT see: https://energy.sandia.gov/programs/renewable-energy/wind-power/wind_plant_opt/.)

7. The first PO from SNL to TTU related to SWiFT is dated November 29, 2011 with a period of performance beginning on December 1, 2011. In the past, SNL has issued approximately 12 POs to TTU related to the SWiFT facility. Those POs have a total cumulative value of just over $3 million. Tasks funded under these POs have primarily included the maintenance and operations of the SWiFT facility by TTU staff and technicians; as well as some research performed at the facility.

8. SNL currently has only one active PO with TTU funding the SWiFT facility. This PO, #2032028, is issued under the general CPA with TTU, which expires on September 30, 2023. PO #2032028 has a period of performance from July 19, 2019 through September 30, 2022. PO #2032028 funds TTU's maintenance and operations of the SWiFT facility. The total amount awarded under PO #2032028 is $468,776. As of today, TTU has invoiced $446,954 under PO #2032028.

9. A proposed revision to PO #2032028 would increase the funding ceiling from $468,776 to $711,824. However, as of today's date, TTU has advised that it will not agree to modify the contractual provisions of the CPA, and has not agreed to continue to negotiate such terms. As such, the proposed revision has not been forwarded to TTU.

10. I have reviewed the December 6, 2021, declaration of Eric Bentley, including its paragraph 3, which states "TTU has indicated that SNL provided TTU with $515,000 for an environmental research impact study specific to wind turbines as well as $25,000 for a student intern program specific to wind engineering." I reviewed all purchase orders previously issued to TTU, but given the limited information provided, I was not able to clearly identify any previous purchase order in which SNL provided funding in these amounts or for these purposes.

11. I have also reviewed Texas's Exhibit B. TTU Principal Investigator Dr. Jacob Stephens submitted a proposal to SNL on September 20, 2021 to fund research that supports efforts to identify alternatives to Sulfur Hexafluoride (SF6) for use in spark gap switches that have reduced global warming potential, in the amount of $250,000. This would be a Task Order under the CPA should SNL and TTU agree to contractual terms to implement the proposal.

12. The existence of the CPA provides no guarantee or agreement that either task orders or purchase orders will be issued and funded under it. In the Section I Clauses of the

CPA with TTU, Clause 1, ORDERING AGREEMENT - 806OAC (05-17), it expressly states, provides "[n]o guarantee is made or implied that any orders will be issued. All orders must be in writing and must be issued by a Subcontracting Professional. Expiration of the term shall not affect any outstanding orders."

I declare under penalty of perjury that the foregoing is true and correct.

Executed on: December 7, 2021:

Patricia D. Gutierrez Digitally signed by Patricia D. Gutierrez Date: 2021.12.07 17:49:47 -07'00'

PATRICIA D. GUTIERREZ
SUBCONTRACT MANAGER
SCIENCE & TECHNOLOGY/UNIVERSITY PROCUREMENT

EXHIBIT 2

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
GALVESTON DIVISION

STATE OF TEXAS, et al. Plaintiffs, v. JOSEPH R. BIDEN in his official capacity as President of the United States, et al. Defendants.	)	Case No. _____

DECLARATION OF CHARLES W. DUFF II

I, Charles W. Duff II, hereby make this declaration under penalty of perjury pursuant to 28 U.S.C. § 1746:

1. I am over the age of 18 years and am otherwise competent to make this declaration.

2. I make this declaration on the basis of personal knowledge.

3. I have been employed by Lawrence Livermore National Security, LLC (LLNS) since 2018. I presently serve as the Manager, Supply Chain Management.

4. LLNS manages and operates Lawrence Livermore National Laboratory (LLNL) on behalf of the U.S. Department of Energy (DOE) National Nuclear Security Administration (NNSA), under Contract No.: DE-AC52-07NA27344 (hereinafter "the M&O Contract"). I have been in my current role for approximately 3 ½ years.

5. On September 9, 2021, the President issued an Executive Order that requires federal agencies to ensure that certain contractors have a clause incorporated into their contract that requires compliance with all guidance published by the Safer Federal Worker Task Force

(Task Force), which includes a COVID-19 vaccination requirement for contractor, subcontractor, and lower-tier subcontractor employees in covered subcontracts. Executive Order 14042, Ensuring Adequate COVID Safety Protocols for Federal Contractors (EO 14042).

6. EO 14042 also provides that for all existing contracts, agencies are strongly encouraged, to the extent permitted by law, to ensure that required safety protocols are consistent with the requirements in the EO.

7. The Task Force issued its guidance pursuant to EO 14042 on September 24, 2021. On September 30, 2021, the Federal Acquisition Council (FAR Council) issued a memorandum providing federal agencies with initial direction for the incorporation of a clause into their solicitations and contracts to implement the Task Force's guidance. Civilian Agency Acquisition Council Letter 2021-03 Ensuring Adequate COVID Safety Protocols for Federal Contractors (EO 14042) (09/30/2021). The FAR Council memorandum included a clause to support agencies in meeting the requirements of EO 14042, FAR class deviation 52.223-99, "Ensuring Adequate COVID-19 Safety Protocols for Federal Contractors".

8. On October 12, 2021, the DOE issued DOE Order 350.5, COVID Safety Protocols for Federal Contractors.

9. The purpose of DOE Order 350.5 is "[t]o ensure the continued operation of DOE sites and facilities under health and safety emergencies as designated by the President and implement Executive Order 14042, *Ensuring Adequate COVID Safety Protocols for Federal Contractors*."

10. DOE Order 350.5 provides that its Contractor Requirements Document (CRD) or the FAR class deviation 52.223-99, "Ensuring Adequate COVID-19 Safety Protocols for Federal Contractors" must be included in M&O contracts bilaterally or unilaterally.

11. On October 14, 2021, through a bilateral modification (Contract Modification No.

0788), the Government added I-154 FAR 52.223-99 *Ensuring Adequate COVID-19 Safety Protocols for FederalContractors* (OCT 2021) (DEVIATION) and DOE Order 350.5, *COVID Safety Protocols for Federal Contractors* to LLNS's M&O Contract.

12. Attachment 1 to DOE Order 350.5 provides "[t]he contractor is responsible for flowing down the requirements of this CRD to subcontractors at any tier to the extent necessary to ensure the contractor's compliance with the requirements."

13. Both Contract clause I-154 and DOE Order 350.5 require LLNS to include the substance of the clause and CRD in subcontracts at any tier that exceed the simplified acquisition threshold and are for services, including construction, performed in whole or in part within the United States or its outlying areas. LLNS's requirement to incorporate FAR 52.223-99 into new subcontracts for service became effective on October 14, 2021, the date FAR 52.223-99 was incorporated into the M&O Contract.

LLNS SUBCONTRACT WITH TEXAS TECH UNIVERSITY

14. As described above, on October 14, 2021, DOE NNSA amended the M&O contract, adding FAR 52.223-99 *Ensuring Adequate COVID-19 Safety Protocols for Federal Contractors (OCT 2021) (DEVIATION)* and DOE Order 350.5 *COVID Safety Protocols for Federal Contractors* to implement the requirements of EO 14042.

15. FAR 52.223-99 and DOE Order 350.5 established a requirement that LLNS include the substance of the clause referenced above, in subcontracts at any tier that exceed the simplified acquisition threshold (SAT) (as defined in Federal Acquisition Regulation 2.101) on the date of subcontract award, and that are for services, including construction, performed in whole or in part within the United States or its outlying areas.

16. The SAT is subject to periodic adjustment for inflation. Currently, the SAT is $250,000.

17. The requirement to "flow down" FAR 52.223-99 and DOE Order 350.5 in LLNS's subcontracts was added to the M&O contract on October 14, 2021.

18. On or about November 22, 2021, LLNS sent Texas Tech University (TTU) a proposed subcontract (#B649261) to perform certain research and development activities associated with investigating alternatives to sulfur hexafluoride dielectric gas. The proposed subcontract would be effective upon signature of both parties and contemplates a three-year term running through November 30, 2024. The proposed subcontract has a total estimated cost of $907,780 with a planned initial incremental amount of $298,533. The proposed subcontract incorporates FAR 52.223-99, as required by paragraph (d) of the FAR clause. To date, TTU has not signed the subcontract and has not informed LLNS of any concerns or objections to the Subcontract terms, including, without limitation inclusion of FAR 52.223-99.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on December 7, 2021

Charles Walter Duff II

Digitally signed by Charles Walter Duff II
Date: 2021.12.07 16:33:53 -08'00'

CHARLES W. DUFF II, MANAGER, SUPPLY CHAIN MANAGEMENT

LAWRENCE LIVERMORE NATIONAL SECURITY, LLC

EXHIBIT 3

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
GALVESTON DIVISION

STATE OF TEXAS, *et al.*, Plaintiffs, v. JOSEPH R. BIDEN, *et al.*, Defendants.	Case No. 3:21-CV-309

DECLARATION OF AMANDA L. BEST

I, *Amanda L. Best*, hereby make this declaration under the penalty of perjury under 28 U.S.C. § 1746:

1. I am over the age of 18 years and am otherwise competent to make this declaration.

2. I make this declaration on the basis of personal knowledge.

3. I have been employed with the U.S. Army Medical Research Acquisition Activity (USAMRAA), which is part of the U.S. Army Medical Research and Development Command (USAMRDC), since 2008. I am currently the Branch Chief, Contract Branch 4 and supervisor of Terrie L. Bloom, an Agreements Officer (AO) at USAMRAA, and have served in this role since 2020. My responsibilities include, but are not limited to, overseeing the base Medical Technology Enterprise Consortium (MTEC)

prototype Other Transaction Agreement (p-OTA), W81XWH-15-9-0001, (10 USC § 2371b) and awarding new prototype projects under the p-OTA with the MTEC.

4. I understand that President Biden issued Executive Order Number 14042, Ensuring Adequate COVID Safety Protocols for Federal Contractors on September 9, 2021, 86 Fed. Reg. 50985 (Sept. 9, 2021) (hereafter, "the Executive Order"), and that the Safer Federal Workforce Task Force (the "SFWTF") issued guidance on September 24, 2021, *COVID-19 Workplace Safety: Guidance for Federal Contractors and Subcontractors*, SFWTF (Sept. 24, 2021) (hereafter "the SFWTF Guidance"). The Executive Order is applicable to procurement contracts and contract-like agreements with the Federal government.

5. As the Branch Chief, I am familiar with the operation of the MTEC p-OTA. MTEC, a 501(c)(3) non-profit corporation, is an enterprise partnership involving individuals from both industry and academia who facilitate medical research and development important to the Department of Defense.

6. An "Other Transaction" agreement (OT) is an agreement that is not a procurement contract, cooperative agreement, or grant. See, e.g., 10 U.S.C. § 2371(a) (authorizing "transactions (other than contracts, cooperative agreements, and grants)." 10 U.S.C. § 2371(a) is a companion statute to 10 U.S.C. § 2371b, which establishes authority for the p-OTA. A p-OTA is a type of OT.

7. MTEC is a consortium-model p-OTA awarded and administered by USAMRAA. Under this agreement, USAMRAA issues task orders to MTEC based on a proposal that one of its consortium members has submitted. A company called Advanced

Technology International (ATI) manages the MTEC p-OTA. Once USAMRAA issues a task order, ATI in turn executes a Research Project Award to the MTEC member.

8. On December 2, 2021, USAMRAA awarded MTEC a task order that resulted from a proposal submitted by Texas Tech University related to a Research Project Award entitled, "Modeling of Biomechanics of Parachute Opening Shock" proposal number MTEC-21-06-MPAI-043. Privity of contract exists between MTEC and Texas Tech University but not between the USAMRAA and Texas Tech University. The period of performance is December, 7, 2021 to December 26, 2024.

9. A COVID-19 safety clause was added as a result of a bilateral modification to the MTEC p-OTA on December 1, 2021. The p-OTA between MTEC and USAMRAA has a flow down requirement that requires MTEC to flow down various clauses to the members of the consortium. Accordingly, the Research Project Award with Texas Tech likely includes a COVID-19 safety clause. USAMRAA has not seen an executed Research Project Award between ATI and Texas Tech.

10. I declare under penalty of perjury that the foregoing is true and correct.

Executed on December 07, 2021.

BEST.AMANDA.LEE.1369630896

Digitally signed by BEST.AMANDA.LEE.1369630896
Date: 2021.12.07 22:00:27 -05'00'

Amanda L. Best
Branch Chief, Contract Branch 4
U.S. Army Medical Research Acquisition Activity (USAMRAA)

EXHIBIT 4

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
GALVESTON DIVISION

STATE OF TEXAS, *et al.*,	)	
Plaintiffs,	)	
v.	)	Case No. 3:21-cv-309
JOSEPH R. BIDEN, *et al.*,	)	
Defendants.	)	

Sworn Affidavit of Contracting Officer Ricky Brown

1. I, Ricky Brown, Contracting Officer, Mission and Installation Contracting Command (MICC) Department of Army, state as follows pursuant to 28 U.S.C. §1746:
2. I am over twenty-one years of age, of sound mind and competent to testify and have never been convicted of a felony. The statements herein are true and correct and based upon my personal knowledge.
3. I am a Contracting Officer on W9124J-20-D-0012, a contract for providing of all labor, personnel, supplies, materials, supervision, and any other items necessary to provide for Full Food Service Functions at various Dining Facilities, Fort Bliss, Texas. Consistent with the terms of this Indefinite Quantity Indefinite Delivery contract, Task Orders are issued to provide periods of performance and funding.
4. I understand that President Biden issued Executive Order (EO) Number 14042, Ensuring Adequate COVID Safety Protocols for Federal Contractors on September 9, 2021, 86

Fed. Reg. 50985 (Sept. 9, 2021) (hereafter, "the Executive Order"), and that the Safer Federal Workforce Task Force (the "SFWTF") issued guidance on September 24, 2021, *COVID-19 Workplace Safety: Guidance for Federal Contractors and Subcontractors*, SFWTF (Sept. 24, 2021) (hereafter "the SFWTF Guidance"). The Executive Order is applicable to procurement contracts and contract-like agreements with the Federal government.

5. Contract W9124J-20-D-0012 was awarded on 30 July 2020 and subsequent Task Orders (TOs) are services contract covered by EO 14042. This is a Commercial Contract under FAR Part 12. The Government cannot unilaterally enforce the Contractor to accept modifications to the contract. Per FAR 52.212-4(c), changes to a contract using FAR part 12 require written agreement of the parties.
6. Contract W9124J-20-D-0012 did not contain DFARS clause 252.223-7999 (DEV), the DFARS clause implementing EO 14042. Task Order (TO), W911SG-22-F-0031 issued on 26 Nov 2021 to provide performance/funding for the period 28 Nov - 03 Dec 2021, did incorporate DFARS clause 252.223-7999 (DEV) by reference. This TO expired on 03 Dec. 2021. The Contractor performed the services under TO-0031, but did not sign the TO agreeing to the DFARS clause, which they were not required to sign to continue the provision of services under that contract. Performance on the TO was sufficient to indicate acceptance to continue providing services on the base contract. For this reason, the services provided under TO-0031 were not subject to DFARS clause 252.223-7999 (DEV).
7. TO W911SG-22-F-0035 was issued to extend the period of performance and provide funding from 04 -18 Dec 2021. TO-0035 does not incorporate the clause. The

Contractor is performing the services as they were not required to sign and return TO-0035.

8. There is no current intention to include DFARS clause 252.223-7999 (DEV) in future TOs under this contract. Additionally, there is no intent to cancel this contract due to the contractor's refusal to accept DFARS clause 252.223-7999 (DEV).

I declare under penalty of perjury under the laws of the United States of America that it is true and correct to the best of my knowledge and belief.

Further affiant sayeth not."

Dated: December 7, 2021.

BROWN.RICKY.ANTHONY.1285332466 Digitally signed by BROWN.RICKY.ANTHONY.1285332466 Date: 2021.12.07 18:04:39 -07'00'

Ricky A. Brown

EXHIBIT 5

IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
GALVESTON DIVISION

STATE OF TEXAS, *et al*.,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	Case No: 3:21-cv-309
	)	
JOSEPH R. BIDEN, JR., in his official capacity as President of the United States, *et al.*,	)	
	)	
	)	
Defendants.	)	
	)	

DECLARATION OF AUDRA L. NOVATNAK

I, Ms. Audra L. Novatnak, hereby state and declare as follows:

1. I am a GS-14 in the United States Air Force currently assigned as the Supervisory Contract Specialist at Joint Base San Antonio Randolph, TX. I have been in this position since 26 August 2012. As a part of my duties, I am responsible for supervising a team of 19 contract specialists and contracting officers, workload management, and I am a contracting officer with an unlimited warrant.

2. I make this declaration in my official capacity as the contracting officer for FA301618D0009 and based upon my personal knowledge and upon information that has been provided to me in the course of my official duties.

3. The Air Force believes the food services contract between the Texas Workforce Commission and the Department of the Air Force (DAF) is a contract or contract-like instrument subject to the requirements of Executive Order (EO) 14042 and the Safer Federal Workforce

Task Force guidance; however the current option period is not subject to the requirements of EO 14042 and the Safer Federal Workforce Task Force guidance for the following reasons:

a. It is a food service contract covered under the Randolph Sheppard Act which gives state licensing agency priority over other offerors;

b. The current option was exercised on 29 September 2021 and expires on 30 September 2022;

c. Any options exercised prior to 15 October 2021 are not required to incorporate DFARS Class Deviation 252.223-7999, Ensuring Adequate COVID-19 Safety Protocols for Federal Contractors (Deviation 2021-O0009);

d. This option period does not include this clause; and

e. The Air Force will not require the Texas Workforce Commission to agree to new terms (DFARS 252.223-7999, Ensuring Adequate COVID-19 Safety Protocols for Federal Contractors (Deviation 2021-O0009)) for this option period.

Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury that the foregoing is true and correct. Executed this 7th day of December 2021.

Audra L. Novatnak

AUDRA L. NOVATNAK
Contracting Officer

EXHIBIT 6

UNITED STATES DISTRICT COURTSOUTHERN DISTRICT OF TEXAS GALVESTON DIVISION

STATE OF TEXAS, *et al.*, Plaintiffs, v. JOSEPH R. BIDEN, *et al.*, Defendants.	Case No. 3:21-CV-309

DECLARATION OF ALEXANDRA B. GARCIA

I, Alexandra B. Garcia, Head of Contracting Activity ("HCA") in the Health Resources & Services Administration ("HRSA"), Department of Health and Human Services ("HHS"), hereby make this declaration under the penalty of perjury under 28 U.S.C. § 1746:

1. I am over the age of 18 years and am otherwise competent to make this declaration.

2. I make this declaration on the basis of personal knowledge and on information provided to me in the scope of my employment.

3. I have been employed with the HRSA since 1990. I am currently the Head of Contracting Activity ("HCA"), and have served in this role since 2011. My responsibilities include, but are not limited to, advising on procurement actions, procurement policy, and defense of bid protest and contract claims.

4. I understand that President Biden issued Executive Order Number 14042, Ensuring Adequate COVID Safety Protocols for Federal Contractors on September 9, 2021, 86 Fed. Reg. 50985 (Sept. 9, 2021) (hereafter, "the Executive Order"), and that the Safer Federal Workforce Task Force (the "SFWTF") issued guidance on September 24, 2021, *COVID-19 Workplace Safety: Guidance for Federal Contractors and Subcontractors*, SFWTF (Sept. 24, 2021) (hereafter "the SFWTF Guidance"). The Executive Order is applicable, with certain exceptions, to procurement services contracts and contract-like agreements with the Federal government.

5. The Executive Order provides that: "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."

6. As HCA, I am familiar with HRSA's communications with the Texas Department of State Health Services ("DSHS') about implementing the SFWTF Guidance.

7. As HCA of HRSA, I am familiar with the contract between HRSA and the Texas Department of State Health Services (DSHS) as part of the National Hansen's Disease Program.

8. After reviewing the declaration made by Ms. Maria Imelda Garcia, MPH, Associate Commissioner of Laboratory and Infectious Diseases Services for the Department of State Health Services ("DSHS"), I have reviewed the contract that Ms. Garcia references between HRSA and DSHS. The contract has a "base" performance

period of up to one year, followed by up to four one-year option periods. The contract period of performance started on April 1, 2018 and will run through March 31, 2023, if all option periods are exercised.

9. This contract is currently in Option Period 3 with an effective date and period of performance from April 1, 2021, through March 31, 2022. The Option Period 3 Modification, which predates EO 14042, was executed bilaterally by both the Government and the Contractor on March 17, 2021.

10. On November 17, 2021, HRSA notified DSHS that it intends to exercise the option for Option Period 4, which would extend the contract period to March 31, 2023.

11. With respect to the option period noted above, and in accordance with the Executive Order, HRSA has informed DSHS of its intention to include the COVID-19 safety clause provision as part of the exercise of Option 4. To date, DSHS has not agreed to that modification.

12. HRSA is committed to continuing to work with DSHS to try to reach a mutually acceptable resolution that would allow the parties to continue their ongoing contractual relationship.

13. I declare under penalty of perjury that the foregoing is true and correct.

Executed on December 8, 2021.

Alexandra B. Garcia -S

Digitally signed by Alexandra B. Garcia -S
Date: 2021.12.08 16:08:44 -05'00'

Alexandra B. Garcia
Head of Contracting Activity
Health Resources and Services Administration