



October 7, 2021

MEMORANDUM FOR: Heads of Contracting Activity

FROM: H. Katrina Brisbon

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deviation is effective upon signature and remains in effect until it is incorporated in the FAR or this deviation is rescinded.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)]