

UPDATE CONCERNING THE APPLICABILITY OF FAR DEVIATION CLAUSE
52.223-99 (September 30, 2021) Executive Order 14042, Ensuring
Adequate COVID Safety Protocols for Federal Contractors

Effective December 9, 2021

A court has issued a nationwide injunction—an order that bars enforcement of EO 14042 **in any state (including DC)** or outlying area of the United States. This court order and the one mentioned on the following page are both preliminary and may be supplemented, modified, or vacated, depending on the course of ongoing litigation. Given the uncertainty surrounding the court orders, OMB has formulated the following updated guidance to be applicable even if the existing court orders change or new orders are issued.

When taking any action, USDA contracting officers should follow the instructions provided in the most up to date version of USDA FAQ's available at <https://www.usda.gov/coronavirus> to ensure compliance with currently applicable court orders.

At this time, do not attempt to add the clause to an existing solicitation, new solicitation, or new order or modification of an existing contract. USDA will post a special notice on SAM.gov notifying contractors who have the clause in their current contract that we will not enforce at this time. GSA will be providing a similar notice to schedule-holders which will apply to any orders you have issued.

In short, USDA will take no action to enforce the clause implementing the requirements of Executive Order 14042, absent further written notice, 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 vaccine mandate requirements pursuant to the Executive Order (hereinafter, "Excluded State or Outlying Area").

UPDATE CONCERNING THE APPLICABILITY OF FAR DEVIATION CLAUSE

52.223-99 (September 30, 2021) Executive Order 14042, Ensuring Adequate COVID Safety Protocols for Federal Contractors

Effective December 1, 2021

For a contract, task order, or delivery order awarded or option renewed prior to October 15, 2021 that has been bilaterally amended to include Clause 52.223-99, that clause shall not apply to a contractor or subcontractor employee engaged in the performance of any work under such contract, task order, or delivery order in the States of Kentucky, Tennessee, and Ohio and the contract must be unilaterally modified or contractor informed to append this update to Clause 52.223-99 in such contract, task order, or delivery order.

For a contract, task order, or delivery order awarded or option renewed subsequent to October 15, 2021 that includes Clause 52.223-99, that clause shall not apply to a contractor or subcontractor employee engaged in the performance of any work under such contract, task order, or delivery order in the States of Kentucky, Tennessee, and Ohio and the contract should be unilaterally modified or contractor informed to append this update to Clause 52.223-99 in such contract, task order, or delivery order.

For a solicitation for a contract, task order, or delivery order issued after October 15, 2021 that includes Clause 52.223-99, that clause shall not apply to a contractor or subcontractor employee engaged in the performance of any work under such contract, task order, or delivery order in the States of Kentucky, Tennessee, and Ohio and the solicitation should be amended to append this update to Clause 52.223-99 in such contract, task order, or delivery order.

For a contract, task order, or delivery order awarded, option renewed, or bilateral modification to a contract made that includes Clause 52.223-99, that clause shall not apply to a contractor or subcontractor employee engaged in the performance of any work under such contract, task order, or delivery order, option, or bilateral modification in the States of Kentucky, Tennessee, and Ohio and the contract should be unilaterally modified or contractor informed to append this update to Clause 52.223-99 in such contract, task order, or delivery order.

Section (e) of the clause (in Attachment A) enforces these updates.

-END-

COURTS ORDER:

The Government is **ENJOINED** from enforcing the vaccine mandate for federal contractors and subcontractors in all covered contracts in Kentucky, Ohio, and Tennessee.

**UNITED STATES 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.

(e) OMB guidance. (Effective Dec. 1, 2021)

For existing contracts and contract-like instruments (hereinafter “contracts”), including extensions and renewals, that are performed at least in part in Kentucky, Ohio, and/or Tennessee:

If the contract includes a clause requiring compliance with guidance issued by the Safer Federal Workforce Task Force (“Task Force guidance”), the administering agency must take no action to enforce that clause and should inform the contractor that the clause will not be enforced absent further notice from the agency.

If the contract or order does not include a clause requiring compliance with Task Force guidance, the administering agency must refrain from attempting to insert such a

clause into the document. The agency should not ask that the contractor voluntarily agree to the insertion of such a clause.

For existing solicitations for services that may be performed at least in part in Kentucky, Ohio, and/or Tennessee:

If the solicitation includes a provision that would require compliance with Task Force guidance, the issuing agency shall issue a solicitation amendment either removing that provision or providing that the provision would not be enforced in contracts subject to the court order. The agency should comply with all applicable legal requirements for full and open competition.

If the solicitation contains no clause requiring compliance with Task Force guidance, the agency shall not seek to add one, unless it provides that the provision would not be enforced in contracts subject to the court order.

For future solicitations, contracts, and orders that may be performed at least in part in Kentucky, Ohio, and/or Tennessee:

Absent further direction from OMB, agencies shall not include a clause requiring compliance with Task Force guidance in new solicitations, contracts, or orders, including extensions or renewals, that may be performed at least in part in Kentucky, Ohio, and/or Tennessee, unless the clause provides that it would not be enforced in contracts or orders subject to the court order. In some cases, agencies may be unable to determine in advance whether work under a given solicitation will be performed in any of those states. In those cases, the solicitation must not include a clause requiring compliance with Task Force guidance, unless the clause provides that it would not be enforced in contracts or orders subject to the court order.

For existing and future contracts and orders, including extensions and renewals, that are known to be performed entirely outside of Kentucky, Ohio, and/or Tennessee:

No change in approach is required. The court order applies only to contracts that are performed at least in part in Kentucky, Ohio, or Tennessee. If contracting officers or other cognizant agency personnel are unsure whether performance on a given contract takes place at least in part in one of those three states, they should immediately request that information from the contractor. If still in doubt, they should treat the contract as if it is being performed at least in part in Kentucky, Ohio, and/or Tennessee, and follow the guidance above.

(End of clause)

Attachment B – Sample Contractor Notification Text

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 reduces 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 the 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 the SAT	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