



## GOVERNMENT CONTRACTS | US Issues Federal Agency COVID Contract Clause and Policy Direction Along with Immediate DoD and GSA Implementation

The Federal Acquisition Regulatory Council (“FAR Council”) has issued a new FAR clause and published guidance for its implementation along with specific agency deviations to immediately implement COVID-19 safety protocols that were published in the Safer Federal Workforce Task Force’s (“Task Force”) Guidance (“the Task Force Guidance”).<sup>1</sup> Following suit, the Department of Defense (“DoD”) and the General Services Administration (“GSA”) promptly published class deviations.

### **FAR Council Guidance and FAR Clause**

On September 30, the FAR Council issued the contract clause, FAR 52.223-99, *Ensuring Adequate COVID-19 Safety Protocols for Federal Contractors* (“the clause”), and published guidance to agencies providing for immediate exercise of their FAR deviation authority. These actions reflect the FAR Council’s initial steps to expeditiously comply with the Biden administration’s COVID-19 Order (“the Order”).

### *Applicability and Effective Dates*

Consistent with both the Order and the Task Force Guidance, federal agencies must include the FAR clause in solicitations and contracts for (i) procurement contracts for services, construction or a leasehold in interest in real property; (ii) contracts covered by the Service Contract Act; (iii) contracts for concessions; and (iv) contracts in connection with federal property or lands and related to offering services to federal employees, their dependents or the general public. Agencies must incorporate the

clause “in accordance with the following dates . . . :

- [N]ew contracts awarded on or after November 14 from solicitations issued before October 15 (this includes new [task or delivery] orders awarded on or after November 14 from solicitations issued before October 15 under existing indefinite-delivery contracts);
- [N]ew 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 [task or delivery] orders awarded pursuant to those solicitations under existing indefinite-delivery contracts);
- [E]xtensions or renewals of existing contracts and orders awarded on or after October 15, 2021; and
- [O]ptions on existing contracts and orders exercised on or after October 15, 2021.”<sup>2</sup>

The FAR Council emphasizes to agencies that the Task Force “strongly encourages” agencies to incorporate the clause in “contracts that have been or will be awarded prior to November 14 on solicitations issued before October 15; as well as 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.”<sup>3</sup> In other words, the FAR Council is pressing for use of the clause for contracts and subcontracts not directly covered by the Order.

#### *Exclusions*

The FAR Council’s guidance confirms that the Order does not apply to “contracts and 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 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).”<sup>4</sup>

#### *FAR 52.223-99 – Compliance*

The clause is straightforward and states that “[t]he 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 . . .” (emphasis added). Notably, contractors (and subcontractors, as contractors must flow down this clause to subcontractors) must be aware of their obligation to monitor and implement new or amended Task Force Guidance during contract performance.

#### *Deviation Timing*

The FAR Council advises agencies to “act expeditiously to issue their deviations so that their contracting officers may begin to apply the clause **on or before** October 15”<sup>5</sup> (emphasis added).

#### **Department of Defense Class Deviation**

On October 1, the DoD exercised its deviation authority and published a class deviation that directed contracting officers within the DoD to “insert the clause 252.223-7999, Ensuring Adequate COVID-19 Safety Protocols for Federal Contractors (Deviation 2021-O0009)” for solicitations and contracts

according to the same timeline described above by the FAR Council.<sup>6</sup> The DFARS clause is substantially the same as FAR 52.223-99.

In addition, the DoD deviation authorizes contracting officers to implement the clause in solicitations and contracts in existence *prior to* the aforementioned timeline. However, “[w]hen 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.”<sup>7</sup> (emphasis added). The deviation’s bilateral modification language is clear that contractors must agree to the contract change to comply with the safety protocols for existing contracts, task orders or delivery orders. The contractor may attempt to negotiate for inclusion of any increased costs it can establish from implementing the safety protocols. However, contractors may find that DoD buyers attempt to exercise leverage with respect to obtaining agreement with the clause.

The deviation also encourages contracting officers to include the clause in agreements not otherwise expressly covered by the Order—in “[s]olicitations, contracts, task orders, and delivery orders that are valued at or below the SAT [simplified acquisition threshold] and are for services (including construction) performed in whole or in part within the United States and its outlying areas” and in “[s]olicitations, contracts, task orders, and delivery orders for the manufacturing of products.”<sup>8</sup>

### **GSA Class Deviation**

On September 30, GSA published Class Deviation CD-2021-13, which “provides instructions for the GSA acquisition workforce regarding when to include a new clause [FAR 52.223-99] in GSA solicitations and contracts and contract-like instruments” (e.g., licenses, outleases, and tenders).<sup>9</sup> The deviation complies with the Order’s and the Task Force Guidance’s applicability but expressly “include[s] GSA-specific implementation timelines for solicitations, new contracts, and existing contracts.”<sup>10</sup>

GSA, similar to the FAR Council in its guidance, strongly encourages contracting officers to incorporate the clause in agreements not expressly covered by the Order, such as “[c]ontracts or subcontracts whose value is equal to or less than the SAT/SLAT [simplified lease acquisition threshold]” and “contracts or subcontracts solely for the manufacturing of products, unless exempted by FAS [Federal Acquisition Service] or PBS [Public Building Service] specific guidance.”<sup>11</sup>

### *Exclusions*

The deviation specifically states, “The new clause is not applicable to:

- Micro-Purchases;
- Site Acquisition;
- 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).”

## GSA-Specific Implementation Timelines

- **New Solicitations and New Contracts.** The deviation directs contracting officers to include the clause in new solicitations and “new applicable contracts, lease acquisitions, and ‘contract-like instruments’ awarded on or after October 15, 2021.”<sup>12</sup>
- **Existing Solicitations.** In an effort to address the Order’s intent for agencies to quickly implement contractor compliance with the safety protocols prior to the specified timelines, the deviation directs contracting officers to “either amend the solicitation to include the clause . . . 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.”<sup>13</sup>
- **Existing Contracts.** The GSA deviation directs contracting officers to execute a bilateral modification “for existing contracts including indefinite delivery, indefinite quantity (IDIQ) contracts, and contract-like instruments.”<sup>14</sup> The specific identification of applicability to IDIQ contracts and orders is an important clarification to ensure that the requirements apply to the broad range of IDIQ-type ordering vehicles used by agencies. To initiate the bilateral modification, “contracting officers shall send a cover letter and modification request to add the clause at FAR 52.223-99” and are required to use the language provided in the deviation’s sample cover letter.<sup>15</sup> Moreover, the deviation directs the following to GSA contracting officers:
  - “Contracting officers shall complete as many modifications as possible before November 14, 2021.”<sup>16</sup>
  - For IDIQs, the deviation directs that “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*** [and] ***Flagging contractors that have not accepted the modification***”<sup>17</sup> (emphasis added). These types of actions highlight GSA’s power to leverage contractors’ compliance.

## What Contractors Need to Know

It is evident from the Order, the Task Force Guidance and now the FAR Council’s guidance to agencies to use their FAR deviation authority, along with the DoD’s and GSA’s published deviations, that agencies will make strong efforts to implement the Task Force Guidance prior to the Order’s implementing deadlines and to encompass agreements not expressly addressed in the Order. However, it remains unclear how the government will enforce a contractor’s compliance (e.g., using a separate certification of compliance). As mentioned in our previous Legal Updates, the consequences for noncompliance may include government actions to limit work awarded, the government terminating a contract for default, and/or debarment.<sup>18</sup> In addition, given the breadth of the Order and the clause’s requirement for contractors to comply with amended Task Force Guidance occurring after contract performance has begun, contractors must be vigilant in their compliance and be concerned with compliance scrutiny, as well as potential false certifications of compliance and exposure to False Claims Act liability.

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<sup>1</sup> Memorandum from the Federal Acquisition Regulatory Council, Issuance of Agency Deviations to Implement Executive Order 14042 (Sept. 30, 2021), *available* at <https://www.whitehouse.gov/wp-content/uploads/2021/09/FAR-Council-Guidance-on-Agency-Issuance-of-Deviations-to-Implement-EO-14042.pdf>.

<sup>2</sup> *Id.* at 2.

<sup>3</sup> *Id.* at 3.

<sup>4</sup> *Id.*

<sup>5</sup> *Id.*

<sup>6</sup> Department of Defense Class Deviation—Ensuring Adequate COVID-19 Safety Protocols for Federal Contractors (Oct. 1, 2021), *available* at <https://www.acq.osd.mil/dpap/policy/policyvault/USA001998-21-DPC.pdf>.

<sup>7</sup> *Id.* at 2.

<sup>8</sup> *Id.* at 2.

<sup>9</sup> GSA Class Deviation CD-2021-13 (Sept. 30, 2021), *available* at [https://www.gsa.gov/cdnstatic/Class Deviation CD-2021-13\\_0.pdf](https://www.gsa.gov/cdnstatic/Class%20Deviation%20CD-2021-13_0.pdf).

<sup>10</sup> *Id.* at 1.

<sup>11</sup> *Id.* at 2.

<sup>12</sup> *Id.* at 2.

<sup>13</sup> *Id.*

<sup>14</sup> *Id.* at 4.

<sup>15</sup> *Id.*

<sup>16</sup> *Id.*

<sup>17</sup> *Id.*

<sup>18</sup> *See* previous Legal Updates, Executive Orders Place US Federal Contractors and Employers at Forefront of New COVID Mandates (Sep. 17, 2021), *available* at <https://www.mayerbrown.com/en/perspectives-events/publications/2021/09/executive-orders-place-us-federal-contractors-and-employers-at-forefront-of-new-covid-mandates>; Task Force

Issues Expansive Guidance for US Federal Contractors on COVID-19 Safety Protocols – Vaccines Mandated (Sep. 27, 2021), *available* at <https://www.mayerbrown.com/en/perspectives-events/publications/2021/09/task-force-issues-expansive-guidance-for-us-federal-contractors-on-covid19-safety-protocols-vaccines-mandated>.