



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, Revision 1

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

Effective immediately, this class deviation revises and supersedes Class Deviation 2021-O0009 issued on October 1, 2021. The purpose of this revision to the class deviation is to implement—

- The requirements of a preliminary injunction issued by the United States District Court for the Eastern District of Kentucky on November 30, 2021, enjoining implementation of the provisions of Executive Order (E.O.) 14042, Ensuring Adequate COVID Safety Protocols for Federal Contractors, in the States of Kentucky, Ohio, and Tennessee; and
- The attached preliminary guidance provided by the Office of Management and Budget (OMB) Office of Federal Procurement Policy (OFPP) related to this preliminary injunction.

Contracting officers shall insert the clause 252.223-7999, Ensuring Adequate COVID-19 Safety Protocols for Federal Contractors (Deviation 2021-O0009, Revision 1) (Attachment 1), 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.

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).

Effective immediately, to ensure compliance with the preliminary injunction, contracting officers shall follow the OMB Preliminary Guidance at Attachment 2. Contracting officers shall exempt new and existing solicitations and contracts, task orders, and delivery orders that will be performed, in whole or in part, in the States of Kentucky, Ohio, and/or Tennessee from the requirements of this class deviation. In addition, contracting officers shall not enforce the deviation clause that is in a contract, task order, or delivery order that will be performed, in whole or in part, in the States of Kentucky, Ohio, and/or Tennessee.

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 to incorporate the deviation clause, contracting officers shall use a bilateral modification.

This class deviation implements the requirements of E.O. 14042, 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/>.

Class Deviation 2021-O0009, Revision 1
Ensuring Adequate COVID-19 Safety Protocols for Federal 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.

John M. Tenaglia
Principal Director,
Defense Pricing and Contracting

Attachments:
As stated

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, Revision 1) (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)

Update on Implementation of E.O. 14042 Office of Management and Budget (OMB) and Office of Federal Procurement Policy (OFPP), December 1, 2021

On November 30, 2021, a Federal district court temporarily enjoined implementation of provisions of Executive Order 14042 in three states. The court order covers the States of Kentucky, Ohio, and Tennessee. This memorandum informs agencies of the actions that must be taken to ensure compliance with that court order.

The Department of Justice is currently reviewing the court order to determine its scope and to decide on next steps in the ongoing litigation. In time, as the litigation continues and agencies implement the court order, additional or amended guidance may be issued to address new legal developments, resolve logistical difficulties, or mitigate disruption to the procurement process. In the meantime, pending further direction, agencies must follow this preliminary guidance to ensure compliance with the court order.

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

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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.

Agencies must adhere to this guidance to ensure that the Government meets its legal obligations. If agency Chief Acquisition Officers or senior procurement executives have questions or need further information about this guidance, they should contact Barbara Thomas in the OMB Office of General Counsel at barbara.e.thomas@omb.eop.gov.