

## CLIENT ALERT

### FAR Council Publishes Memo with FAR Clause; DoD and GSA Publish Class Deviations for Implementing Executive Order 14042

October 1, 2021

The FAR Council, the Department of Defense (“DoD”), and the General Services Administration (“GSA”) took steps to implement the new COVID-safety requirements mandated by Executive Order 14042 (“EO”) and the Safer Federal Workforce Task Force’s (“Task Force”) Guidance. Key takeaways from each publication are addressed below.

#### FAR Council

The FAR Council released the clause at FAR 52.223-99, *Ensuring Adequate COVID-19 Safety Protocols for Federal Contractors* and published the memorandum, *Issuance of Agency Deviations to Implement Executive Order 14042*. In summary, both the clause and memorandum provide direction for agencies to implement the new FAR clause as required by the EO and the Task Force Guidance. The memorandum and the clause address, in part, the following points:

- **Incorporation into Non-Covered Contracts.** There is strong encouragement for the incorporation of the clause into contracts that are not subject to the EO’s mandatory incorporation. Specifically, the FAR Council recommends the clause’s incorporation in contracts and subcontracts for the manufacturing of products or contracts with a value below the simplified acquisition threshold.
- **Contractor Compliance.** The FAR clause provides that a covered 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). Accordingly, contractors are expected to comply with any subsequent Task Force Guidance that is published after award or contract extension, so long as performance is ongoing.
- **Agency Class Deviations.** The FAR Council is encouraging agencies to expeditiously publish their own class deviations to provide guidance to contracting officers on how to incorporate the clause on or before the effective date of October 15, 2021.

#### Department of Defense

DoD published [Class Deviation 2021-00009](#) to provide direction to DoD contracting officers on how to incorporate the new DFARS clause at 252.223-7999, *Ensuring Adequate COVID-19 Safety Protocols for Federal Contractors (Deviation 2021-00009)*. The DFARS clause is materially the same as the clause at FAR 52.223-99. The class deviation tracks the provisions of the EO and the Task Force Guidance provided thus far. The class deviation also notes:

- **Manufactured Products.** Contracting officers “may insert the deviation clause” into “[s]olicitations, contracts, task orders, and delivery orders for the manufacturing of products.”

- **Bilateral Modifications for Existing Contracts.** Contracting officers are required to use a bilateral modification to incorporate the DFARS clause into existing contracts, task orders, or delivery orders.

### General Services Administration

GSA published [Class Deviation CD-2021-13](#) to provide direction to GSA contracting officers on how to incorporate the new FAR clause at FAR 52.223-99, *Ensuring Adequate COVID-19 Safety Protocols for Federal Contractors*. The class deviation tracks the provisions of the executive order and the Task Force Guidance provided thus far, along with additional GSA-specific instructions. The class deviation addresses, in part, the following points:

- **Existing Solicitations and Contract Awards.** For open solicitations issued prior to October 15, 2021 (*i.e.*, have not been closed yet), as well as contract awards that have not been finalized by October 15, 2021, GSA’s class deviation requires contracting officers to either amend open solicitations to incorporate the clause or incorporate the clause into the contract award of the apparent successful offeror. This approach appears to follow the EO’s encouragement to incorporate the clause into contracts and contract-like instruments before the effective date whenever possible.
- **Existing Contracts.** Contracting officers are required to send a cover letter and modification request to contractors in order to add the clause to existing contracts in accordance with the following.
  - Contract modifications to incorporate the clause must be bilateral.
  - Contracting officers are required to use the template cover letter that is provided in the class deviations at Attachment B, *Sample Cover Letter*.
  - November 14, 2021 is the deadline by when contracting officers “shall complete as many modifications as possible.”
  - For Indefinite Delivery, Indefinite Quantity (“IDIQ”) contracts, contracting officers may take interim actions if a signed modification is not received by November 14, 2021, including “temporarily hiding contractor information on GSA websites and/or e-tools,” and “flagging contractors as not having accepted the modification.”
  - Of particular note, the template cover letter states for existing contracts that “GSA strongly encourages you to accept this contract modification at this time.” This statement is in contrast to other parts of the letter which indicate that the modification is mandatory, such as for renewals, extensions, or option exercises.

This reflects our initial analysis. We will continue to monitor developments and report on updates.

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