



**ACTION MEMO FOR THE DIRECTOR OF ACQUISITION AND ASSISTANCE**

**FROM:** M/OAA/P, Marcelle J. Wijesinghe, Division Chief

**SUBJECT:** Federal Acquisition Regulation (FAR) Class Deviation M/OAA-DEV-FAR-22-01c, Ensuring Adequate COVID-19 Safety Protocols for Federal Awards

**RECOMMENDATION:**

- (1) That you approve a Class Deviation from the FAR to direct contracting officers to include the clause in Attachment 1 as instructed below. The deviation will be effective on your signature and will remain in effect unless rescinded or when the clause is incorporated into the FAR through the rulemaking process.

MARK ANTHONY WALTHER (affiliate) Digitally signed by MARK ANTHONY WALTHER (affiliate) Date: 2021.10.12 18:34:14 -04'00' Approve \_\_\_\_\_ Disapprove \_\_\_\_\_

- (2) That you sign the Acquisition and Assistance Policy Directive (AAPD) 21-04, “Executive Order 14042 on Ensuring Adequate COVID-19 Safety Protocols for Federal Awards” in Attachment 2.

**AUTHORITY:**

Class Deviation from the FAR:

In accordance with FAR 1.404(a), the agency head or their designees may authorize FAR class deviations. Per USAID’s ADS 103.3.9.5.a, the M/OAA/Director has been delegated the authority to act as USAID’s head of the agency in accordance with the FAR, with certain limitations. AIDAR 701.601(a)(2)(ii) authorizes the M/OAA Director to approve the FAR Class Deviation as specified above.

FAR 1.404(a) requires officials authorized to approve FAR class deviations to first consult with the Chair of the Civilian Agency Acquisition Council (CAAC). Per the requirements in FAR 1.4, consultation with the Chair of the CAAC has been obtained on (September 30, 2021 and *October 8, 2021*) (Attachments 3 and 4, as discussed below).

**BACKGROUND/DISCUSSION:**

Attachment 1 contains the FAR text authorized by this deviation. On September 27, 2021, the CAAC provided a draft CAAC letter containing a new clause for use USG-

wide to implement the Executive Order on Ensuring Adequate COVID-19 Safety Protocols for Federal Contractors (EO 14042, dated September 09, 2021). On September 28, 2021, OAA/P, after consulting with GC/A&A, provided comments and questions pertaining to USAID's concerns with implementation of the letter. The final CAAC letter 2021-03, issued on September 30, 2021 (Attachment 3), served the purpose of providing consultation with the Chair of the CAAC required by FAR 1.404(a)(1) if an agency adopts the draft FAR clause language without change in the agency's deviation.

M/OAA/P, in consultations with GC/A&A, has determined that USAID requires revisions to the clause as presented in the CAAC letter. The first revision to paragraph (c) *Compliance* is necessary to provide additional guidance for contracts requiring employees to have routine physical access to USAID domestic facilities. Because these contractor employees are performing in the same workplace as federal employees, it is important to protect federal employees by requiring contractor employees to be vaccinated or have an accommodation on the same basis as federal employees. In addition, and for the same reason, we are authorizing COs to include the clause in contracts performed overseas in which contractor employees must perform in the same workplace as federal employees, depending on local conditions, even though the EO and CAAC Memorandum exclude applying the clause to contracts performed outside the United States.

We are also including in the deviation a replacement to paragraph (c) *Compliance* to address the Agency's requirements applicable to U.S. personal services contracts with individuals (USPSCs). The terms of USAID's PSCs establish an employer-employee relationship (FAR 37.104 and AIDAR Appendix D), although the relationship remains contractual. Because the wording of paragraph (c) of the FAR clause prepared by the Safer Federal Workforce Task Force assumes the contractor is an organization with employees and holds the organization responsible for complying with the clause and related guidance, it is not appropriate to apply the clause as written in USAID PSCs. Therefore, as a matter of Agency policy, we are including a replacement paragraph (c) to apply the Agency's COVID-19 requirements for its direct-hire employees to USPSCs. COs may incorporate this requirement into new solicitations and resulting contracts and may modify existing CCN and TCN contracts, depending on local conditions.

Implementation guidance to USAID contracting officers will be issued in AAPD 21-04 (See Attachment 2). The deviation clause in Attachment 1 contains an alternate paragraph (c) *Compliance* for USPSCs, but the AAPD issues separate clauses, one for non-PSCs (AAPD Attachment 1) and a separate one for PSCs (AAPD Attachment 2). We are issuing implementation guidance this way to simplify implementation for COs, since the different clauses will be loaded into the Agency's contract writing system (Global Acquisition and Assistance System, or GLAAS).

The required consultation with the CAAC Chair for this FAR class deviation was obtained on October 8, 2021.(Attachment 4).

Once USAID receives confirmation from the Task Force and OFPP, M/OAA/P will revise the attached AAPD to include instructions for Agreement Officers (AOs) to incorporate a provision in Cooperative Agreements (CAs) . This action will support the Task Force's recommendation to achieve the goal of getting more people vaccinated and decrease the spread of COVID-19.

Rulemaking Update: DOD, GSA, and NASA have opened FAR Case 2021-021, "Ensuring Adequate COVID-19 Safety Protocols for Federal Contractors" to make appropriate amendments in the FAR to reflect the requirements of E.O. 14042. Consequently, USAID has no plans to revise the AIDAR until such time as the FAR has been amended.

**ATTACHMENTS:**

Attachment 1 – Class Deviations language from the FAR (M/OAA-DEV-FAR-22-01c)

Attachment 2 – AAPD 21-04 "Executive Order 14042 on Ensuring Adequate COVID-19 Safety Protocols for Federal Awards (OCT 2021) (Deviation)"

Attachment 3 – CAAC Memorandum "Issuance of Agency Deviations to Implement Executive Order 14042" dated September 30, 2021

Attachment 4 – CAAC chair consultations per FAR 1.404(a)

**ATTACHMENT 1 – Class Deviation language from the FAR (M/OAA-DEV-FAR-22-01c)**

**FAR Deviation Clause**

**Executive Order 14042, Ensuring Adequate COVID Safety Protocols for Federal Contractors**

Changes to the language authorized by the CAAC letter 2021-03 are shown as **[bolded, bracketed additions]**.

Part 52—SOLICITATION PROVISIONS AND CONTRACT CLAUSES

Subpart 52.2—Text of Provisions and Clauses

**[Prescription: Insert the following clause in all solicitations and contracts:**

- 1) Over the simplified acquisition threshold for services, including construction,**  
or
- 2) That provide contractor personnel with routine physical access to domestic USAID workplaces, regardless of contract value.**

**COs may modify existing contracts that provide employees routine physical access to overseas USAID workplaces, depending on local conditions.]**

52.223-99 Ensuring Adequate COVID-19 Safety Protocols for Federal Contractors.

**ENSURING ADEQUATE COVID-19 SAFETY PROTOCOLS FOR FEDERAL CONTRACTORS (OCT 2021) [(DEVIATION M/OAA-DEV-FAR-22-01c)]**

(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/>. **[While at a USAID workplace, covered contractor employees must also comply with any additional agency workplace safety requirements for that workplace that are applicable to federal employees, as amended [USAID's COVID-19 Safety Plan and Workplace Guidelines \(Safety Plan\)](#).]**

(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 in the United States or its outlying areas.

(End of clause)

***[Alternate 70 for use in all solicitations and contracts for personal services with individuals performing in the United States or its outlying areas. COs may incorporate this requirement into new solicitations and resulting contracts for personal services with individuals performing outside of the United States or outlying areas (United States National (US), Cooperating Country National (CCN), and Third Country National (TCN)), depending on local conditions.]***

**Substitute the following paragraph in place of paragraph (c) of the basic clause and delete paragraph (d):**

***(c) Personal Services Contracts with individuals. As a matter of policy, the contractor must comply with the USAID's guidance applicable to direct-hire federal employees.]***