Federal Contractor Mandates

Operating with Vaccine Requirements

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AGENDA

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VACCINE MANDATE BACKGROUND

- **Executive Order 14042** dated September 9, 2021.
- The EO directs the Federal Acquisition Regulation (“FAR”) Council to **amend the FAR to include a vaccine mandate** clause and to direct agencies to use the clause.
- New **FAR 52.223-99** issued September 30, 2021
- References **Safer Federal Workforce Task Force Guidance** issued September 24, 2021
- Applies to both prime contracts and subcontracts (but not supply only)
1. **Mandates COVID-19 vaccine for covered contractor employees**, except in limited circumstances where an employee is legally entitled to an accommodation;

2. **Requires masking and physical distancing** while in covered contractor workplaces; and

3. **Requires designated coordinator for COVID-19 workplace safety** efforts at covered contractor workplaces.
Vaccine Mandate – Key Dates

- **Mandate Applies to**
  - New solicitations issued on or after **October 15**.
  - Extensions or renewals of existing contracts and orders awarded on or after **October 15**.
  - New contracts awarded on or after **November 14**.
  - In addition, **Agencies are “strongly encouraged” to include FAR 52.223-99 in solicitations issued before October 15.**
- **By January 18 all covered contractor employees must be fully vaccinated for COVID-19** (previously December 8)
Do the Mandates apply to my contract?

- It depends whether it is a new contract or an existing contract.

- **For new contracts** FAR 52.223-99 will be in the base contract from day 1.

- **For existing contracts**, the agencies are not required to incorporate the new FAR clause but are encouraged to do so.

**NOTE:** Most agencies are incorporating the vaccine mandate FAR clause into existing contracts.
Contract Rights and Remedies
What to do for new contracts?

• FAR 52.223-99 will be incorporated into the base contract.

• This clause will need to be similarly incorporated into all subcontracts.

• Any price and time impacts of this clause should be incorporated into base cost and time proposal/bid.

• Any concerns regarding the ability to comply must be resolved pre-bid.

• Submitting a proposal/bid signifies compliance is possible.
What to do for existing contracts?

- Step 1: Determine whether the government has issued a modification/change order
- Step 2: Submit an REA
- Step 3: Negotiate REA
- Step 4: Submit Claim (if REA is rejected or ignored)
Step 1: Determine whether the Government has issued a Modification/Change Order

• The first question is whether the government has issued you a change order/modification or has simply provided a written order or direction.

• Contracting officers may or may not have issued a modification/change order incorporating FAR clause 52.223-99.

• We are seeing both from agencies.
Written Order w/o Modification

• This situation falls under FAR 52.243-4(b) and (d)

• Contractor must give notice of change within 20 days

• “Pursuant to the terms of our Contract......and FAR 52.243-4(b), please consider this correspondence to be our notice of change”

• “Pursuant to FAR 52.243-4(d), this change will cause an increase to the cost and time for performance of the work of this contract.”
Change Order/Modification issued by Gov’t

- If the government has issued a modification/change order, referencing FAR 52.243-4 (Changes), then this situation falls under FAR 52.243-4(a) and (d).

- No Notice of Change is required under FAR 52.243-4(b).

- However, when in doubt, provide notice of change under FAR 52.243-4(b).

- Do not execute a proposed modification from the government until you are in agreement with the cost and time adjustment or unless there is an express reservation of contractor’s rights to submit an REA at a later date.
Step 2: Submit REA

- Under FAR 52.243-4(e), contractor is required to submit a request for equitable adjustment (REA).

- REA required within 30 days after (1) receipt of change order from gov’t or (2) contractor’s notice of change.

- NOTE: Under FAR 52.243-4(e), the gov’t can extend the time for submission of the REA.
  - If the cost and time impacts of the vaccine mandate are not yet known, consider contacting the contracting officer and requesting an extension of time to submit the REA.
Contents of REA

• Under FAR 52.243-4(e), the REA should be submitted to the contracting officer and contain the following information:
  
  • (1) A statement that the contractor has a right to an adjustment under FAR 52.243-4(d); and

  • (2) A written statement describing the general nature and amount of the proposal (for adjustment of cost and time).

• Note: The proposal may be an estimate and is not required to be certified.
Quantifying Cost and Schedule Impacts

- Quantifying the cost impacts of the change may be more challenging than proving entitlement.
  - Simply submitting a total cost claim comparing current costs to original bid costs is likely insufficient.
  - Must demonstrate how increased costs were caused by the vaccine mandates.
  - Document information received from subcontractors regarding impacts.
- Consider a contemporaneous TIA to demonstrate time impacts.
Step 3: Negotiate REA

• After the REA is submitted, it is common for the contractor and government to negotiate the REA.

• If the information in the REA changes or if the contractor has additional information relevant to the REA, then the contractor should submit supplements to the REA.

• Per FAR 52.243-4(f), any updates or supplements to the REA must be submitted prior to final payment.

• When REA is agreed, then government should issue modification incorporating the change in cost and time.
Step 4: Submit Claim (if REA is rejected or ignored)

• If the contractor and the government reach an impasse in negotiations or the government rejects the REA, then contractor must submit a Claim.

• FAR 52.233-1 (Disputes) provides the process for submitting a Claim to the government.

• Claims and disputes with the government are governed by the Contract Disputes Act (41 U.S.C. § 7101 et seq.)
NOTICE: When in doubt, give notice to government. There is no such thing as too much notice.

ESTIMATES ARE OK: Estimates of cost and time impacts are OK, but don’t represent something as an actual cost if it is only an estimate.

TRANSPARENCY: We always recommend transparency with the government, especially when the impacts of the mandates are still unknown.

REA PROCESS IS BEST FOR RESOLUTION: Don’t jump to a Claim immediately.
Frequently Asked Questions
Example: Pella is supplying the windows (but not installing). Does Pella need to comply?

The Order specifically excludes “subcontracts solely for the provision of products” so the short answer is “No”.

Note: The Order is being interpreted broadly for anyone having any contact with a covered contractor workplace or federal workplace, therefore, the Order does apply to mixed services/products contracts and subcontracts. Other exclusions are services subcontracts not subject to the Services Contract Act, or equal to or below the FAR simplified acquisition threshold.
Do offsite employees need to comply?

Yes, an employee working on a covered contract from their residence is a covered contractor employee and must comply with the vaccination requirement for covered contractor employees, even if the employee never works at either a covered contractor workplace or Federal workplace during the performance of the contract.

- The employee’s residence is not a covered contractor workplace, so while in the residence the individual need not comply with masking and distancing requirements.
What are the penalties for non-compliance?

• The contract would govern for any non-compliance, however, the workforce guidance instructs that the contracting officer should work with the contractor to address any challenges.

• If the contractor is not taking steps to comply, then default actions can occur including termination.
On November 30 a federal court enjoined the vaccine mandate in KY, OH, and TN (three states that filed the court action).

All other states must comply with vaccine mandate thus a patchwork of compliance until a case reaches the U.S. Supreme Court.
Resources

- The SAFER Guidance including any questions and answers related to the Guidance can be found online at https://www.saferfederalworkforce.gov

- For details on compliance with the various vaccine mandates at the local, state and federal level, see the site developed by Fisher & Phillips at https://www.fisherphillips.com/services/emerging-issues/vaccine-resource-center/index.html?tab=overview

- AGC Memo. https://www.agc.org/sites/default/files/reports/Vaccine%20Requirements%20for%20Federal%20Contractors%20202
What are your questions?
Thank you!