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Acquisition & Assistance Policy Directive (AAPD)

From the Director, Office of Acquisition & Assistance Issued: **December 14, 2021**

AAPD No. 21-04 (Revision 3)

EXECUTIVE ORDER 14042 ON ENSURING ADEQUATE COVID-19 SAFETY PROTOCOLS FOR FEDERAL AWARDS (FAR Deviation No. M-OAA-DEV-FAR-22-01c)

Subject Category: Acquisition Management, PSCs

Type: POLICY

AAPDs provide information of significance to all agency personnel and partners involved in the Acquisition and Assistance process. Information includes (but is not limited to): advance notification of changes in acquisition or assistance regulations; reminders; procedures; and general information. Also, AAPDs may be used to implement new requirements on short notice, pending formal amendment of acquisition or assistance regulations.

AAPDs are EFFECTIVE AS OF THE ISSUED DATE unless otherwise noted in the guidance below; the directives remain in effect until this office issues a notice of cancellation.

This AAPD: Is New Replaces/ Amends AAPD 21-04 **Revision 2**

Applicable to:

Existing awards; Modification required

No later than

As noted in guidance below

RFPs/RFAs issued on or after the effective date of this AAPD; all other Pending Awards, i.e., 8(a), sole source, IQC

Other

Precedes change to:

FAR Part(s) Deviation effective until rescinded

AIDAR Part(s)

USAID Automated Directives System (ADS) Chapter

Other Code of Federal Regulations

Other

No change to regulations

New Provision/Clause Provided Herein: Available in GLAAS

MARK ANTHONY WALTHER (affiliate)
Digitally signed by MARK ANTHONY WALTHER (affiliate)
Date: 2021.12.14 15:40:20 -05'00'

Mark A. Walther,
Acting Director, M/OAA

IMPORTANT NOTE: On December 7, 2021, a district court judge in the Southern District of Georgia issued a [preliminary injunction](#) to halt the U.S. Government's enforcement of the Executive Order 14042 federal contractor vaccine mandate throughout the nation. Please refer to the notification related to this injunction in Attachment 3 of this AAPD, as well as the new guidance in yellow highlighting in this AAPD. Until further notice, COs must NOT enforce compliance with FAR 52.223-99 when the place of performance is in an "Excluded State or Outlying Area" (as described in Attachment 3).

I. PURPOSE:

The purpose of this AAPD is to inform Acquisition and Assistance professionals of new award requirements to implement Executive Order (E.O.) 14042 on [Ensuring Adequate COVID Safety Protocols for Federal Contractors](#), issued on September 9, 2021. The requirements in this E.O. are applicable to contracts (including personal services contracts) and contract-like awards, with the goals of maximizing the number of individuals vaccinated and decreasing the spread of COVID-19. Revision #1 to this AAPD incorporated an additional mandatory reporting requirement in Federal Procurement Data System-Next Generation (FPDS-NG). Revision #2 clarified certain aspects of this AAPD – including equitable adjustments and PSC exceptions to the vaccination requirement – and revised the date by which affected individuals must be vaccinated, based on a recent update to the E.O. **Revision #3 incorporates guidance related to any court order affecting implementation of the E.O.**

Important note: The applicability of the requirements in AAPD 21-04 to cooperative agreements is still under discussion. Guidance regarding applicability of these requirements to cooperative agreements will be issued as a revision to this AAPD at a later time. These requirements do not apply to grants, including fixed amount awards that are grants, or grants under contracts (GUCs).

Contracting Officers (COs) are required to amend solicitations and modify existing awards in accordance with the required action in Section II below.

Effective Date: This AAPD is effective on October 12, 2021 and continues in effect unless rescinded or the FAR is formally revised through rulemaking, whichever occurs first.

II. REQUIRED ACTION:

1. FOR USAID DIRECT CONTRACTS:

Use of the contract clause is authorized through the approval of FAR class deviation #M/OAA-DEV-FAR-22-01c. The clause applies to all solicitations and contracts (including task orders and delivery orders) as specified in the prescription of the clause at **Attachment 1**.

COs must include clause 52.223-99 ENSURING ADEQUATE COVID-19 SAFETY PROTOCOLS FOR FEDERAL CONTRACTORS (OCT 2021) [DEVIATION #M/OAA-DEV-FAR-22-01c] provided in **Attachment 1** in the following:

(a) Solicitations:

- All new solicitations above the Simplified Acquisition Threshold (SAT) issued on or after October 15, 2021, and contracts awarded pursuant to those solicitations. This includes new solicitations issued on or after October 15 for orders awarded pursuant to those solicitations under existing indefinite-delivery contracts. **The CO must include the notification found in Attachment 3 in the solicitation with the FAR 52.223-99 clause.**
- All existing solicitations above the SAT: COs must also amend solicitations to include the deviation clause in solicitations issued before October 15, 2021 where the award has not yet been made. For amendments to solicitations issued after the period for receipt of proposals has closed, COs must provide the amendment to all offerors that have not been eliminated from the competition (see FAR 15.206). **The CO must include the notification found in Attachment 3 in the amendment with the FAR 52.223-99 clause.**

(b) All new contracts above the SAT awarded on or after November 14, 2021, from solicitations issued before October 15, 2021, where the solicitation did not include the clause. This includes new orders awarded on or after November 14 from solicitations issued before October 15 under existing indefinite-delivery contracts. **When issuing new contracts and orders, COs must include the FAR 52.223-99 clause and also provide the notification contained in Attachment 3 in writing (by letter or e-mail) to the contractor.**

(c) Existing contracts and orders above the SAT:

- Modifications awarded on or after October 15, 2021 to extend or renew the award.
- Options exercised on or after October 15, 2021.

When modifying existing contracts and orders, COs must use a bilateral modification to incorporate the FAR 52.223-99 clause; COs must also provide the notification contained in Attachment 3 in writing (by letter or e-mail) to the contractor.

(d) Existing contracts (including purchase orders or other types of awards) that provide personnel with routine physical access to domestic USAID workplaces (e.g., institutional support contracts (ISCs)), regardless of contract value. COs must issue the letter signed by the Senior Procurement Executive (SPE) (**Attachment 4**), Mark Walther, to all existing ISCs and follow-up with a bilateral modification that must be executed no later than November 14, 2021. COs may modify existing contracts that provide employees access to overseas USAID workplaces, depending on local conditions. **When modifying existing contracts and orders, COs must use a bilateral modification to incorporate the FAR 52.223-99 clause; COs must also provide the notification contained in Attachment 3 in writing (by letter or e-mail) to the contractor.**

2. FOR PERSONAL SERVICES CONTRACTS WITH INDIVIDUALS (PSCs):

- (a) COs must immediately include clause 52.223-99 ENSURING ADEQUATE COVID-19 SAFETY PROTOCOLS FOR FEDERAL CONTRACTORS (OCT 2021), Alternate 70

(OCT 2021) (DEVIATION #M/OAA-DEV-FAR-22-01c), provided in **Attachment 2**, in all new USPSCs solicitations and contracts for personal services with individuals under AIDAR Appendix D performing in the United States or its outlying areas. When modifying existing PSC contracts, COs must use a bilateral modification to incorporate the FAR 52.223-99 clause; COs must also provide the notification contained in **Attachment 3** in writing (by letter or e-mail) to the PSC.

- (b) COs must issue the letter signed by the Senior Procurement Executive (SPE) (**Attachment 5**), Mark Walther, to all existing USPSCs performing in the United States or its outlying areas and follow up with a bilateral modification to include the clause no later than November 14, 2021. When modifying the award to incorporate the clause, the CO must specify that the contractor must be fully vaccinated by January 18, 2022 in the cover page of the modification.
- (c) COs may incorporate this requirement into new solicitations and resulting contracts and may modify existing overseas US, CCN and TCN personal services contracts, depending on local conditions. COs may issue a similar letter as in **Attachment 5** to existing US, CCN or TCN PSCs performing overseas, depending on the local conditions, until the bilateral modification is executed, if the Mission decides to implement this requirement for such PSCs immediately.
- (d) For new solicitations and awards, the CO must include the following language in the solicitation and the conditional selection letter regarding the vaccination requirement:

“The contractor will be required to show proof that the contractor is fully vaccinated against COVID-19 on or before the first date of onboarding, or submit an approved reasonable accommodation to the CO. If the contractor does not meet this requirement the contract may be terminated.”

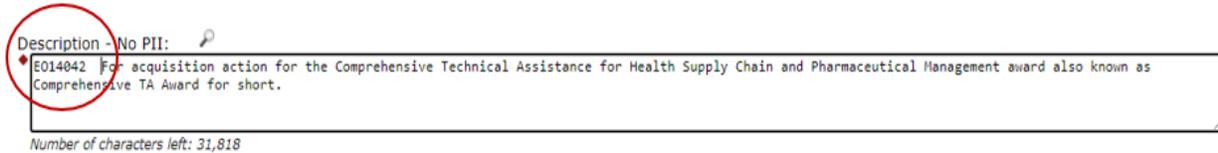
- (e) For new solicitations that include the FAR 52.223-99 clause, the CO must include the notification found in **Attachment 3** in the solicitation with the clause.

The PSC solicitation templates have been updated to include the applicable language. COs are reminded to use the GLAAS templates for both solicitations and awards to PSCs.

3. GLAAS/FPDS-NG MANDATORY REPORTING:

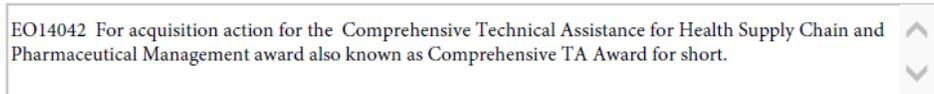
COs must report affected contracts and modifications in FPDS-NG. COs must enter **EO14042** (with no spaces or punctuation breaking up the seven-digit E.O. identifier) at the beginning of the applicable “Description of Requirement” data field on the contract action report (CAR) in FPDS-NG if the action being reported is (1) a new award (contract or order) that includes the required new clause; or (2) a modification to an existing award (contract or order) that incorporates the new clause. Additional information may be entered into the “Description of Requirement” field after the E.O. identifier with no further restrictions on spaces or punctuation to provide the actual description of the requirement for either the contract or the specific modification depending on the purpose of the modification.

In GLAAS, enter this E.O. identifier in the field titled “Description - No PII” (see sample screenshot below):



In FPDS-NG, it will appear in the “Description of Requirement” field as shown below:

Description Of Requirement:
(Limit 250 characters)
Current: 248



Note: This new E.O. identifier coding requirement does not trigger the need to use the National Interest Action (NIA) code for COVID (code P20C), which applies only when the award itself was issued in response to the pandemic.

III. BACKGROUND:

On September 9, 2021, President Biden announced his Path Out of the Pandemic: COVID-19 Action Plan. As part of that plan, the President signed [E.O. 14042](#) on Ensuring Adequate COVID Safety Protocols for Federal Contractors that directs Executive departments and agencies, including independent establishments subject to the Federal Property and Administrative Services Act, 40 U.S.C. 102(4)(A), to ensure that contracts and contract-like instruments include a clause that the contractor and any subcontractors (at any tier) shall incorporate into lower-tier subcontracts. This was done to promote economy and efficiency in federal procurement by ensuring that parties that contract with the federal government provide adequate COVID-19 safeguards to their workers performing on or in connection with a federal government contract or contract-like instruments. The E.O. also expanded the application of new requirements for federal contractors beyond those individuals performing on-site under contracts in federal facilities. On September 29, 2021, the Director of OAA issued the Letter to Partners - Vaccination Requirement - E.O. 14042 which provided preliminary guidance.

Class deviation (#M/OAA-DEV-FAR-22-01c) was approved on October 8, 2021 to implement the requirements of E.O. 14042, Ensuring Adequate COVID Safety Protocols for Federal Contractors, dated September 9, 2021, which directs agencies to include a clause in certain contracts to ensure that contractors comply with all guidance published by the Safer Federal Workforce Task Force at: <https://www.saferfederalworkforce.gov/contractors/>. In accordance with the award requirements provided in this AAPD, “covered contractors” must adhere to the requirements in this guidance.

As there is on-going litigation related to E.O. 14042 – including a [preliminary injunction](#) affecting Kentucky, Ohio, and Tennessee as well as a [nationwide preliminary injunction](#) – the notice found in **Attachment 3** was developed in coordination with the Office of Management and Budget (OMB) to address any court orders that may affect implementation of the E.O.

IV. GUIDANCE:

On October 12, 2021, the Director of M/OAA signed a letter to inform existing partners (ISCs with employees who have access to domestic USAID workplaces) and USPSCs of the applicability of the deviation clause to their awards effective October 15, 2021 (see **Attachments 4 and 5**). CO must send the appropriate letter immediately to existing relevant partners and PSCs and follow up with a bilateral modification to incorporate the deviation clause into the award. **Attachment 6 provides an overview of the required actions.**

Contractors are not required to provide attestations, reports, or information regarding vaccination status of employees from the contractor. However, if a CO has identified that a contractor has not been fully compliant with the requirements in the Safer Federal Workforce Task Force (Task Force Guidance) at <https://www.saferfederalworkforce.gov/contractors/> (e.g., not all employees have met the vaccination deadlines), the CO should use standard remedies available under the award for failing to meet award requirements.

Equitable adjustments: There may be contractors who, in negotiating the bilateral modification to incorporate FAR 52.223-99, contemplate requesting an equitable adjustment. Contractors and COs are reminded of the following factors: (1) COVID vaccinations are available for free to the public; (2) Vaccination programs are considered to be far less expensive than testing programs, which entail more logistical challenges; and (3) The safety protocols of FAR 52.223-99 will reduce the spread of COVID and thereby decrease worker absence, reduce labor costs, and improve the efficiency of contractors performing work for the Federal Government. If the contractor elects to request an equitable adjustment, the contractor must provide a detailed justification supporting the request. This justification must include identification of the specific additional costs that are directly and reasonably linked to the contract being modified. In addition, the contractor must address whether it is already implementing vaccination requirements from other contracts or other mandates. As the circumstances of each contract may vary, COs have the discretion to determine – on a case-by-case basis – if an equitable adjustment is appropriate, fair, and reasonable.

***Federal agency workplace safety protocols:* Separate from the requirements of E.O. 14042, Federal agencies maintain additional workplace safety requirements. If any court order is issued related to E.O. 14042, that order only applies to the application of requirements of E.O. 14042. There is no change to the Safer Federal Workforce Task Force's guidance for COVID-19 workplace safety protocols for Federal agencies. Federal agency workplace safety protocols for Federal buildings and Federally-controlled facilities still apply in all locations. Contractor employees working onsite in those facilities must still follow those Federal agency workplace safety protocols.**

1. FOR USAID DIRECT CONTRACTS:

- (a) COs are strongly encouraged to familiarize themselves with the E.O., including guidance conveyed through Frequently Asked Questions, as amended, for contractor or subcontractor workplaces published by the Safer Federal Workforce Task Force (Task Force Guidance) at <https://www.saferfederalworkforce.gov/contractors/>.

(b) Orders under GSA contracts:

GSA is planning to include the new FAR clause in all FSS, GWACS, and MACs and it will apply to existing and future orders. The contract modification is mandatory for contracts for services, construction, or a leasehold interest in property that exceeds the simplified acquisition threshold (SAT) or the simplified lease acquisition threshold (SLAT), and for all Federal Supply Schedule contractors.

GSA has established a dashboard to indicate whether the particular contract has been modified. The dashboard is available on GSA's website here: <https://gsa.gov/covid19>. Orders can be modified if the contract has not been modified yet. See the GSA Class Deviation: [GSA Class Deviation From the Federal Acquisition Regulation \(FAR\) Regarding Implementation of E.O. 14042, Ensuring Adequate COVID Safety Protocols for Federal Contractors](#). FAS-specific guidance for implementing GSA Class Deviation 2021-13 is at Attachment C of the GSA deviation.

2. FOR PERSONAL SERVICES CONTRACTS WITH INDIVIDUALS (PSCs)

USAID has created text specifically applicable to its PSCs, under AIDAR Appendices D and J, by approving deviation clause 52.223-99, Alternate 70, to be applied as specified in the prescription. As a matter of Agency policy, this alternate clause makes PSCs subject to the requirements for direct-hire federal employees pursuant to [E.O. 14043](#), including the Agency's [COVID-19 Safety Plan & Workplace Guidelines](#) and other Agency or Mission requirements. The CO must use the updated PSC solicitation and award templates, available on the templates website as well as in GLAAS, to ensure that all new solicitations and awards contain the alternate deviation clause, as appropriate.

Where the place of performance identified in the contract is not an "Excluded State or Outlying Area" (see **Attachment 3**): While direct-hires are required to be fully vaccinated by November 22, 2021, PSCs subject to the clause must be fully vaccinated by January 18, 2022, which is the date set for all contractors. When incorporating the clause into existing awards, the CO must state on the modification cover page that the contractor must be fully vaccinated by January 18, 2022.

PSC exceptions to vaccination requirement: In certain circumstances, a PSC may seek a legal exception to the vaccination requirement based on a medical condition or sincerely held religious belief. A PSC who receives an exception from the vaccination requirement would instead comply with alternative health and safety protocols, as applicable to USAID direct-hire federal employees. The procedures for obtaining legal exceptions that apply to USAID direct-hire federal employees also apply to PSCs. PSCs seeking an exception to the vaccination requirement must follow the procedures outlined in USAID's [COVID-19 Safety Plan & Workplace Guidelines](#). To initiate a request for an exception, a PSC must contact ReasonableAccommodations@usaid.gov (for a medical exception) or OCD-Diversity-Inclusion@usaid.gov (for a religious exception) for additional instructions. If a PSC decides to request an exception, the PSC must still sign the modification to incorporate FAR 52.223-99 into their contract while the exception request is being processed. A PSC's signature on the modification will not preclude them from submitting a request for a medical or religious exception. If a PSC is seeking an exception, they do not need to be vaccinated while the request for an exception is being processed.

V. POINT OF CONTACT:

M/OAA will continue to update its website [COVID-19 Guidance for Implementing Partners](#). Additionally, OFPP has shared a blog "[Ensuring Adequate COVID Safety Protocols for Federal Contractors](#)" discussing the evolving role of federal contractors in fighting this pandemic.

Contracting officers may direct their questions about this AAPD to [Ask M/OAA Policy](#). Questions related to PSCs should be directed to the [PSC Policy Mailbox](#).

ATTACHMENTS:

- 1- Direct Contracts - FAR Deviation Text
- 2- Personal Services Contracts with Individuals - FAR Deviation Alternate Text
- 3- [Notice Regarding Any Court Order Affecting the Implementation of E.O. 14042](#)
- 4- Letter to ISCs
- 5- Letter to PSCs
- 6- [Overview of Applicability of FAR 52.223-99](#)

ATTACHMENT 1 – CONTRACTS

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 (M/OAA-DEV-FAR-22-01c)

PART 52—SOLICITATION PROVISIONS AND CONTRACT CLAUSES

Subpart 52.2—Text of Provisions and Clauses

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

Prescription: Insert the following clause in all solicitations and contracts

- 1) Over the simplified acquisition threshold for services, including construction;
- 2) For goods with a service component that must be performed at a domestic USAID workplace;
- or
- 3) 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 (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 workplaces 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 (see [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)

ATTACHMENT 2 - PERSONAL SERVICES CONTRACTS WITH INDIVIDUALS

PART 52—SOLICITATION PROVISIONS AND CONTRACT CLAUSES

Subpart 52.2—Text of Provisions and Clauses

52.223-99 Ensuring Adequate COVID-19 Safety Protocols for Federal Contractors, Alternate 70.

Insert the following clause 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.

52.223-99 ENSURING ADEQUATE COVID-19 SAFETY PROTOCOLS FOR FEDERAL CONTRACTORS (OCT 2021)-Alternate 70 (OCT 2021) (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) *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.

(End of clause)

ATTACHMENT 3 - Notice Regarding Any Court Order Affecting the Implementation of E.O. 14042

USAID will take no action to enforce the clause (FAR 52.223-99) implementing the requirements of Executive Order 14042, absent further written notice from USAID, where the place of performance identified in the contract is in a U.S. state or outlying area subject to a court order prohibiting the application of requirements pursuant to the Executive Order (hereinafter, "Excluded State or Outlying Area"). In all other circumstances, USAID will enforce the clause, except for contractor employees who perform substantial work on or in connection with a covered contract in an Excluded State or Outlying Area, or in a covered contractor workplace located in an Excluded State or Outlying Area. A current list of such Excluded States and Outlying Areas is maintained at <https://www.saferfederalworkforce.gov/contractors/>.

AAPD 21-04

This chart provides an overview of applicability of FAR 52.223-99. Only those scenarios identified below require action. Please see [AAPD 21-04](#) for full details and instructions.

Applicable Scenarios

Instructions

Solicitations above the SAT for services, regardless of place of performance

New solicitations

Insert FAR 52.223-99 in new solicitations

Existing solicitations

Amend solicitations to add in FAR 52.223-99

Contracts above the SAT for services, regardless of place of performance

New contracts

Insert FAR 52.223-99 in new contracts

Existing contracts

Insert FAR 52.223-99 **only when modifying to extend or renew the contract or when exercising an option**

Contracts with physical access (e.g., ISCs), regardless of contract value

Contracts that provide personnel with routine physical access to *domestic* USAID workplaces

Include FAR 52.223-99 in new solicitations and contracts; Modify existing contracts to include FAR 52.223-99

Contracts that provide personnel with routine physical access to *overseas* USAID workplaces

Optional: COs may include FAR 52.223-99 or modify it into solicitations and contracts, depending on local conditions

PSCs, regardless of contract value

USPSCs performing in the U.S. or its outlying areas

Include FAR 52.223-99 in new solicitations and contracts; Modify existing contracts to include FAR 52.223-99

Overseas US, CCN, & TCN PSCs

Optional: COs may include FAR 52.223-99 or modify it into solicitations and contracts, depending on local conditions