

THE EXECUTIVE ORDER IMPACT ON COVID SAFETY PROTOCOLS FOR FEDERAL CONTRACTORS

Executive Summary

On September 9, 2021, President Biden issued an Executive Order on ensuring adequate COVID safety protocols for federal contractors. In short, the order is extensive and requires all contractors working on federally funded projects over \$250,000 to comply with all guidelines provided by the Safer Federal Workforce Task Force (SFWTF). The order has far-reaching implications for both new and existing federally funded projects. The order is being interpreted to extend to the national electrical grid, steam lines supplying heating to buildings, and offsite mechanical equipment, not contractors simply physically on site. To date, there are over 50 federal agencies offering guidance and interpretations of the order. This advisory article intends to summarize the potential cost implications to comply with the executive order. Despite widespread legal challenges, the Biden Administration is urging businesses to align their business operations with the mandate. It is unlikely the legal challenges will eliminate all of the executive order requirements. Additionally, it most certainly will take months to settle the legal challenges and arrive at a decisive conclusion.

It is essential to understand that the Executive Order applies to businesses of all sizes servicing federal contracts (or contract-like instruments) over the \$250,000. The requirement to comply is based on the flow-down provisions of a company's contracts. The executive order likely applies if you are a prime contractor or a subcontractor working for a prime contractor on any federally funded project over the SAT (Simplified Acquisition Threshold). The list of potential additional costs to comply with the Executive Order is not necessarily exhaustive. Still, it is intended to provide the basis for equitable adjustments which are allowable under Federal Acquisition Regulations (FAR) as a bi-lateral change order. A sample of typical contract change order language is included in Appendix A.

Potential Cost Implications

What follows is a list of potential cost implications and a brief description of the impact. It is impossible to author all possible scenarios, so each project impacted by the Executive Order should be evaluated independently. It is important to note that many of the change orders require contractors to comply with changes to the interpretation of the executive order under the frequently asked questions (FAQ) section of the Safer Federal Workforce Task Force website (<https://www.saferfederalworkforce.gov>). Here are the potential impacts:

- **Reduced Workforce** – It is anticipated that the task force guidance will be for all employees to be fully vaccinated. It is unlikely employers will reach 100% employee vaccination, and thus projects will have to be completed with fewer tradespeople.

- **Overtime** – Substantial overtime will likely be offered and required to complete projects with a reduced workforce. Overtime also fails to yield additional productivity after seven weeks, and therefore the cost of both the overtime and the loss in productivity must be captured.¹
- **Recruiting New Employees** – Contractors may be forced to increase their recruiting efforts if employees decide to leave the company or the construction industry entirely over the mandate requirements.
- **Isolation of the Workforce** – Contractors will be required to isolate their workforce if they perform federal and private work, resulting in significant idle time, additional rent and utilities, and other costs to keep crews and office staff separated. Under the order, employees would not be allowed to go to a job site requiring vaccination or testing. The current interpretation of this rule extends to anyone working physically on the project but not necessarily support staff who do not come in contact with people working on the job site.
- **Fines for Non-Compliance** – Non-compliance with the guidance will likely carry escalating penalties similar to an OSHA fine for a safety violation. See the enforcement section below.
- **Incentives to Get Vaccinated** – Employers are increasingly offering incentives for employees to get vaccinated to maintain staffing levels. If the mandate requires vaccination, the contractor will bear the costs of the incentives.
- **Compliance Tracking** – The cost of administering all the paperwork to track vaccinations, reporting of vaccination status, and software and hardware costs will fall to the contractor. There are already software programs coming to market to manage this process and the associated requirements. The SFWTF currently has two forms employers are required to file. One form is regarding employee vaccination status, and the other is related to exemptions. At the time of the writing of this article, the requirements to be in compliance with the mandate starts on January 18, 2022.
- **Out of Sequence Work** – Whether it is your workforce that has been reduced or other trades due to the requirements, the likelihood of substantial out of sequence work increases dramatically. It will be imperative to track the impacts associated with out of sequence work.
- **Schedule Delays** – Delays resulting from workforce shortages will result in extended home office overhead and general conditions. The delays could also result in liquidated damages for failure to achieve contract milestones.
- **State by State Requirements** – States are instituting additional requirements to comply with the order. For example, the state of New York requires pay for 4 hours for vaccination, paid time for adverse reactions to the vaccine and must pay employees for time off for COVID up to three times while they recover. The costs of these requirements should be quantified and included in any bi-lateral change request.

Contractors are also encouraged to revisit the MCAA/SMACNA/NECA paper on Project Specific Loss, which can be found here: [Project-Specific Loss of Productivity Analysis Methodologies - MCAA](#).²

Recommended Actions

To best position your company to manage through the executive order, contractors can take some practical steps. These include:

- Immediately reserve your rights to seek an equitable adjustment to the contract. It can be stated that the cost and schedule implications cannot be fully quantified at this time. Still, the executive order has been issued, and contractors must immediately reserve their rights. The requirement to comply with the FAQ interpretations of the mandate makes it imperative that contractors reserve their rights for changing requirements to comply until the conditions and cost impacts become evident and quantifiable.
- Understand your contract and your ability to walk off the project (work stoppage).
- Discuss with your insurance carrier if this can be considered a claim under business interruption.
- Be proactive on future jobs you are bidding on and avoid securing backlog you cannot profitably execute.
- Review your contracts and the associated flow-down provisions (supplier and vendor agreements, subcontracts, etc.) and update contracts as necessary.
- Identify employees who work in connection with your Federal contracts since they will be required to comply with all new guidelines.
- Review the current guidelines issued by the Safer Federal Workforce Task Force at <https://www.saferfederalworkforce.gov>

Enforcement

It is unclear how enforcement of the order will occur. The discussions regarding enforcement are wide-ranging, from the use of an honor system with no expectations of an audit to OSHA fines of \$70-700K, or \$14K per employee. It is advisable to keep timely, accurate, and complete records of your workforce compliance to avoid potential fines. The consequences of a hefty fine could result in bankruptcy for many contractors.

Conclusion

The Executive Order is broad and will have many unforeseen impacts. Contractors are advised to stay up-to-date on these issues and the latest developments. The implications will be significant and likely long-lasting. Some employees leave the industry. Some companies will shut down. While the OSHA Emergency Temporary Standard is under a “Stay” order under the U.S. District Court 5, the Biden Administration is likely to take the issue to the U.S. Supreme Court if the stay is upheld by District 6. It is unclear the degree of urgency the U.S. Supreme Court will place on the case regarding timing and adjusting priorities. ELECTRI International, New Horizons Foundation, and the Mechanical Contractors Association of America understand the importance of this issue and are

committed to continuous updates to keep our members and the contracting community at large up-to-date on forthcoming critical developments.

About The Author: Michael McLin, Managing Director at Maxim Consulting Group, works with all sizes of construction-related firms to evaluate their business practices and assist with management challenges. His areas of specialization include business strategy, operational execution, financial controls, productivity improvement, prefabrication, peer groups, and training programs. McLin has consulted with hundreds of contractors and his industry experience includes an array of the most complex construction projects undertaken across the country. He is adept at utilizing available tools and analysis to identify opportunities and challenges within an organization. In addition to his expertise in many facets of the construction world, McLin is a nationally recognized public speaker and published author.

APPENDIX A: SAMPLE CONTRACT CHANGE ORDER LANGUAGE

November 12, 2021

To whom it may concern,

Subcontractor and all of its subcontractors at any tier are required to comply with the following:

FAR Deviation Clause - Executive Order 14042, Ensuring Adequate COVID Safety Protocols for Federal Contractors, to the full extent it is incorporated into the Owner Contract: FAR Deviation Clause Executive Order 14042, Ensuring Adequate COVID Safety Protocols for Federal Contractors September 30, 2021

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.

ENSURING ADEQUATE COVID-19 SAFETY PROTOCOLS FOR FEDERAL CONTRACTORS (OCT 2021) (DEVIATION)

- (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

YOUR SUBCONTRACT IS HEREBY AMENDED TO INCLUDE THE PROVISIONS OF THE EXTRA WORK ORDERS LISTED BELOW.

This Supplement constitutes full and final settlement of all claims, demands, disputes, or requests for additional time, delay, impact, acceleration and/or any form of compensation whatsoever, whether asserted or unasserted or known or unknown by you arising out of or relating in any way to the work or services described herein. Subcontractor acknowledges and agrees that any such claims not previously asserted in writing prior to the date of execution of this Subcontract Supplement shall be deemed, and are hereby, expressly waived and released by the Subcontractor.

<u>PCI</u>	<u>Description</u>	<u>Amount</u>
INT000006	Contractual Language Modification for Executive Order 14042 for Subcontract 23A.	\$0.00
TOTAL ADD THIS SUPPLEMENT Zero Dollars 00/100		Dollars: \$0.00

Original Subcontract Amount	Previous Supplements	Amount of This Supplement	Revised Subcontract Amount*
\$3,025,000.00	\$0.00	\$0.00	\$3,025,000.00

Trade Partner Certification

Pursuant to Executive Order 14042 and FAR 52.223-99

Pursuant to Executive Order 14042 and FAR 52.223-99 ("Federal Contractor COVID-19 Requirements"), it is the undersigned Trade Partner's (Subcontractor's, Supplier's, Vendor's, Visitor's) obligation to make certain that all of its employees follow all Applicable COVID-19 Legal Requirements on all XYZ Contractor Federal projects which are subject to the Federal Contractor COVID-19 Requirements ("the Projects") and, accordingly, the Trade Partner hereby certifies, warrants, and represents as follows:

1. All of the Trade Partner's employees on the Projects shall comply with and follow all obligations and requirements of the Federal Contractor COVID-19 Requirements.
2. To the full extent required by the Federal Contractor COVID-19 Requirements, all of the Trade Partner's employees on the Projects shall be fully vaccinated and follow all applicable mask mandates and other requirements of the Federal Contractor COVID-19 Requirements.
3. Trade Partner shall flow down these Federal Contractor COVID-19 Requirements to all of its subcontractors, suppliers, and delivery personnel on the Project and ensure that the Federal Contractor COVID-19 Requirements are included in all subcontracts and agreements with lower tier subcontracts, suppliers, and delivery personnel, with applicable flow down.

¹ Hanna, A. (2001). Quantifying the Cumulative Impact of Change Orders for Electrical Contractors. ELECTRI INTERNATIONAL Research Report, 31 pages. <https://electri.org/product/quantifying-the-cumulative-impact-of-change-orders-for-electrical-contractors/>

² Mechanical Contractors Association of America's (MCAA). (2020). Change Orders, Productivity, Overtime—A Primer for the Construction Industry. Research Report. <https://www.mcaa.org/resource/change-orders-productivity-overtime-a-primer-for-the-construction-industry-2-2/>