



**Office of Government-wide Policy
U.S. General Services Administration**

October 10, 2023

CAAC Letter 2024-01

MEMORANDUM FOR CIVILIAN AGENCIES

**FROM: WILLIAM CLARK
DIRECTOR**

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Date: 2023.10.10 16:49:07 -04'00'

OFFICE OF GOVERNMENT-WIDE ACQUISITION POLICY

SUBJECT: CAAC Consultation to Issue a Class Deviation From the Federal Acquisition Regulation (FAR) Regarding Legal Challenges to Executive Order 14026, Increasing the Minimum Wage for Federal Contractors.

This CAAC Letter is being issued to serve as consultation in accordance with FAR 1.404, authorizing agencies to issue a class deviation regarding a September 26, 2023 court order in litigation challenging Executive Order (E.O.) 14026, Increasing the Minimum Wage for Federal Contractors.

Background

On April 27, 2021, President Biden signed E.O. 14026, Increasing the Minimum Wage for Federal Contractors. See 86 FR 22835 (Apr. 30, 2021). This E.O. directed federal agencies to enter into or renew covered contracts only with entities paying their employees at or above a specified minimum wage. On January 1, 2023, that wage was increased from \$15 to \$16.20 through an inflation adjustment. See 87 FR 59464 (Sept. 30, 2022).

On November 24, 2021, the Department of Labor (DOL) Wage and Hour Division published a final rule implementing E.O. 14026, which added a new 29 CFR part 23. See 86 FR 67126 (Nov. 24, 2021).

On January 26, 2022, DoD, GSA, and NASA published an interim rule amending the Federal Acquisition Regulation (FAR) to implement E.O. 14026 and the DOL implementing regulations through FAR clause 52.222-55, Minimum Wages for Contractor Workers Under Executive Order 14026. See 87 FR 4117 (Jan. 26, 2022).

On September 26, 2023, the U.S. District Court for the Southern District of Texas enjoined President Biden and the DOL from enforcing E.O. 14026 or the DOL Final Rule against the States of Texas, Louisiana, and Mississippi and their agencies. The injunction does not apply geographically to all contractors or contracts within those three states; rather, it applies only to these three states and their agencies as parties to federal contracts, regardless of the place of performance. The injunction became effective on October 4, 2023.

Policy

Based on the order issued by the U.S. District Court for the Southern District of Texas on September 26, 2023, agencies until further notice must ensure their workforce does not enforce the requirements of E.O. 14026 or the DOL Final Rule as implemented in FAR clause 52.222-55 (Jan 2022) for federal contracts or subcontracts to which the States of Texas, Louisiana, or Mississippi, including their agencies, are a party.

Additionally, agencies should issue an agency deviation (see Use of the Deviated Clause) when the minimum wage 52.222-55 clause is applicable, and where the agency:

- has contracts with the States of Texas, Louisiana, or Mississippi, including their agencies;
- has contracts where the prime contractor subcontracts with one of the applicable States or their agencies; or
- anticipates entering into such contracts or subcontracts.

Agencies that do not have or anticipate entering into such contracts do not need to take further action.

Agencies should consult with their legal counsel when developing their agency deviation and any associated acquisition workforce guidance.

Use of the Deviated Clause

Agencies should only use the deviated clause while the injunction is in effect.

For new contracts:

- For solicitations not yet issued, while the injunction is in effect, insert the deviated clause 52.222-55 (Oct 2023) in solicitations and contracts that include the clause at 52.222-6, Construction Wage Rate Requirements, or 52.222-41, Service Contract Labor Standards, where work is to be performed, in whole or in part, in the United States.
- For solicitations that have been issued but where an award has not been made,

while the injunction is in effect, the solicitation must be amended to replace FAR clause 52.222-55 (Jan 2022) with the deviated FAR clause 52.222-55 (Oct 2023).

For existing contracts:

- When extending, renewing, or exercising an option while the injunction is in effect, replace FAR clause 52.222-55 (Jan 2022) with the deviated clause FAR 52.222-55 (Oct 2023) through bilateral modifications. In such a circumstance, if the contracting officer is unable to incorporate the deviated clause in an existing contract through bilateral modification, then the contracting officer shall not enforce the requirements of FAR clause 52.222-55 (Jan 2022) for federal contracts or subcontracts to which the States of Texas, Louisiana, or Mississippi, including their agencies, are a party.
- For all other existing contracts, the contracting officer shall not enforce the requirements of FAR clause 52.222-55 (Jan 2022) while the injunction is in effect for federal contracts or subcontracts to which the States of Texas, Louisiana, or Mississippi, including their agencies, are a party.

Additional Guidance

When the E.O. 14026 minimum wage does not apply to contracts, the requirements of FAR 52.222-6, Construction Wage Rate Requirements, and FAR 52.222-41, Service Contract Labor Standards, must be adhered to, as applicable.

The Attachment provides the deviated language for FAR clause 52.222-55, Minimum Wages for Contractor Workers Under Executive Order 14026 (Oct 2023), which includes an exemption for "contracts or subcontracts to which the States of Texas, Louisiana, and Mississippi, including their agencies, are a party."

The deviated clause will automatically address subcontracts through the flowdown of paragraph (c)(2) in accordance with requirement in paragraph (k). Paragraph (k) states: "Subcontracts. The Contractor shall include the substance of this clause, including this paragraph (k) in all subcontracts, regardless of dollar value, that are subject to the Service Contract Labor Standards statute or the Wage Rate Requirements (Construction) statute, and are to be performed in whole or in part in the United States."

This CAAC letter constitutes consultation with the Chair of the CAAC required by FAR 1.404(a)(1). Agencies are reminded that FAR 1.404 requires agencies to furnish a copy of each approved class deviation to the FAR Secretariat, General Services Administration, by emailing the deviation to GSARegSec@gsa.gov. Please include whether or not the document can be posted on acquisition.gov.

If you have any questions or require additional information about this Letter, please contact Malissa Jones at (571) 882-4687 or at malissa.jones@gsa.gov

ATTACHMENT

ATTACHMENT - Deviation to FAR Text

Baseline is accurate through FAC 2023-06, published October 5, 2023.
Changes to baseline shown as **[bolded, bracketed additions]** and ~~struckthrough~~
~~deletions~~. FAR text unchanged shown as asterisks.

Part 52 - Solicitation Provisions and Contract Clauses

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52.222-55 Minimum Wages for Contractor Workers Under Executive Order 14026. **[DEVIATION (OCT 2023)]**

As prescribed in 22.1906, insert the following clause:

Minimum Wages for Contractor Workers Under Executive Order 14026
[DEVIATION (OCT 2023)] ~~(JAN 2022)~~

(a) * * *

(b) * * *

(c) (1) * * *

(2) This clause does not apply to—

[(i) Contracts or subcontracts to which the States of Texas, Louisiana, or Mississippi, including their agencies, are a party;

(ii)] Fair Labor Standards Act (FLSA)-covered individuals performing in connection with contracts covered by the E.O., *i.e.* those individuals who perform duties necessary to the performance of the contract, but who are not directly engaged in performing the specific work called for by the contract, and who spend less than 20 percent of their hours worked in a particular workweek performing in connection with such contracts;

[(iii)]~~(ii)~~ Individuals exempted from the minimum wage requirements of the FLSA under 29 U.S.C. 213(a) and 214(a) and

(b), unless otherwise covered by the Service Contract Labor Standards statute, or the Wage Rate Requirements (Construction) statute. These individuals include but are not limited to-

(A) Learners, apprentices, or messengers whose wages are calculated pursuant to special certificates issued under 29 U.S.C. 214(a);

(B) Students whose wages are calculated pursuant to special certificates issued under 29 U.S.C. 214(b); and

(C) Those employed in a bona fide executive, administrative, or professional capacity (29 U.S.C. 213(a)(1) and 29 CFR part 541).

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(End of clause)