



COVID-19 Requirements for Contractors Member Questions

Scope/Applicability

Covered Contracts

1. Could the Government provide more clarity and examples of what contracts would not be covered and what employees would not be covered?
2. Does the Executive Order and Guidance apply to SCA contracts exclusively or all contracts for services?
3. Very broadly, what is the definition of a procurement contract for services? Does it track the definition of a service contract in FAR 37.101?
4. Section 5(b)(v) of the Executive Order states that the order shall not apply to subcontracts solely for the provision of products. Does it apply to prime contracts solely for the provision of products?
5. Can contractors rely on the definition of “products” in FAR 2.101 which refers one to the definition of “supplies” to determine whether their contract is solely for products? This definition includes “alteration or installation” of products as products.
6. Does the exclusion of “manufacturing of products” from the EO’s scope also include “the supply, provision and” manufacturing of products, “including commercial off-the-shelf [COTS] products”?
7. Does the EO exempt all prime contracts and subcontracts solely for products? There is some confusion in the language of the Guidance: “contractor or subcontract for the manufacturing of products” in the second paragraph on page 5, and flowdown not required for “subcontracts solely for the provision of products” in Q13 on page 12.
8. Under what parameters will federal agencies mandate compliance with the Guidance, when not required to do so, such as with contracts and subcontracts for products?
9. Will this apply to future unilateral modifications or only those in which the price and/or scope is still to be negotiated?
10. Are license or royalty agreements that require the company to pay the government a license or royalty fee covered contracts for purposes of the EO?
11. When a RFP is posted / solicited via GSA e Buy or Open Market (sam.gov), Contracting Officers (COs) will include the applicable governing FAR clauses which a responding supplier agrees to – once RFP is awarded, the award serves as the binding contract and supplier must comply with contract for its duration.
12. Will awards without stipulated termination dates cover the time the equipment remains onsite? For example, leases, BPAs and IDIQs have termination dates.

Covered Employees

13. How broadly does “in connection with” apply? Does an employee have to have a specific link to a contract (attorney who reviews, AR clerk who invoices, etc) or can it be broader and include,

for example, the C Suite who are necessary to the operation of the company? Does it include sales if they have no role in contract performance after contract award?

14. Regarding employees in the indirect labor pool, such as legal and HR that were mentioned in the guidance from the task force. Are all contractor general administrative personnel covered employees? If not, what is the test a contractor should apply to determine which are or are not?
15. Are indirect general and administrative personnel who are working remotely but not directly on a covered contract a covered contract employee? The workforce guidance only mentions direct charge employees.
16. Is the “necessary to performance” standard the same as that found in *OFCCP v. Monongahela Railroad Co.*, 85-0FC-2 CALJ Apr. 2, 1986), *aff’d* March 11, 1987 for OFCCP jurisdiction?

Exemptions and Accommodations

17. A government employee may claim certain medical and religious exemptions without being deemed insubordinate and possibly terminated. The same is true of a contractor employee. Will the proposed contract language take into account legitimate instances where the covered employee is in the process or has been determined to be exempt?
18. Would the Government provide guidance and/or examples of when a religious or medical exemption should apply?
19. Please provide guidance about how contractors handle employees who DO raise a medical/religious exemption. In the case we determine it is bona fide, are they then able to work on contracts? Do they need to get tested?
(Just a plain reading seems to say that if they are exempt for health/religious reasons they are perfectly free to operate on federal contracts without testing.)
20. Based on the ADA, contractors will have the sole responsibility to determine whether their employee’s medical or religious exemption requests are valid. If that is true, how will that contractor’s compliance be determined at the GWAC or Agency contract-level? For example, a contractor has 50 employees, of which 47 have their vaccination documentation and 3 employees are deemed to have valid exemptions. How will that contractor convey the fact that it is “in compliance with valid exemptions”?
21. When an employee who works remotely is subject to the EO’s vaccination requirement but legitimately requests a reasonable accommodation based on disability or sincerely-held religious belief, is continuing remote work a reasonable accommodation without regular COVID testing?
22. What would the Government agree is a reasonable accommodation for those covered employees with a medical condition/disability or a sincerely held religious belief, practice or observation that would prohibit them from receiving a Covid-19 vaccination? If a contractor determines that an employee is legally entitled to an accommodation would the Government allow:
 - a. An employee to perform on site with a negative Covid test (every 72 hours) and a mask?
 - b. An employee to perform in support of a covered contract at a contractor facility with a negative Covid test (every 72 hours and a mask)?
 - c. An employee to perform in support of a covered contract at home with or without a testing requirement?

Compliance

23. Will the contractor be required to certify compliance?
24. If an employee is in the middle of evaluating accommodation requests in good faith and cannot meet the December 8 deadline for full vaccination of those employees in the accommodation process, can they get a waiver or would they be considered out of compliance. (Some employers are anticipating literally thousands of accommodation requests.)
25. Is there a requirement for the contractor to maintain copies of proof of vaccination or is it sufficient that they view the record and acknowledge vaccination in an employee's file?
26. Failing to fully implement this requirement could be a competitive advantage. What will be the manner in which the GSA will determine compliance, if other than a representation or certification?
27. This will have an immediate impact on skilled labor. What is the proposed mechanism for potential breach/remedy of the provision by the contractor? Will it account for reasonable delays due to implementation?
28. Clarity on the following topics would be greatly appreciated:
 - a. The federal government's handling of disciplinary issues (beginning to address this via last week's Fed guidance but still developing)
 - b. Audit processes and procedures
 - c. Costs issues – particularly around testing
 - d. Handling of contract implications resulting from loss of key personnel/subcontractors/vendors/etc.

Miscellaneous

29. Individual agencies have already started providing different guidance in terms of vaccination deadlines. Which guidance should govern if there are different deadlines?