

Date: October 16, 2023

From: Executive Director, Office of Acquisition and Logistics (003A), and Senior Procurement Executive

Subj: Class Deviation from the Federal Acquisition Regulation (FAR) Regarding Legal Challenges to Executive Order 14026, Increasing the Minimum Wage for Federal Contractors

To: Heads of the Contracting Activities

1. Purpose. To issue a class deviation, in accordance with FAR 1.404 and as authorized by the Civilian Agency Acquisition Council (CAAC) letter 2024-01, October 10, 2023, regarding a September 26, 2023 court order in litigation challenging Executive Order (E.O.) 14026, Increasing the Minimum Wage for Federal Contractors. The deviation is issued in advance of a FAR final rule as authorized by CAAC letter 2024-01 and establishes deviations from FAR 52.222-55.

2. 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). This deviation, as noted above, establishes deviations from FAR 52.222-55.

3. Current FAR Policy. FAR clause [52.222-55, Minimum Wages for Contractor Workers Under Executive Order 14026](#) (see [87 FR 4117](#), Jan. 26, 2022) requires the contractor to pay to workers, while performing in the United States, and performing on, or in connection with, the contract, or working on a contract, a minimum hourly wage rate of \$16.20 per hour. This includes any subcontractors where work is to be performed, in whole or in part, in the United States.

4. Need for Deviation. On September 26, 2023, the U.S. District Court for the Southern District of Texas issued an injunction to President Biden and the DOL from enforcing [E.O. 14026](#) or the DOL Final Rule against the States of Texas, Louisiana, and Mississippi and

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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.

5. Effective Date. Immediately.

6. Expiration Date. This deviation expires when incorporated into the FAR or is otherwise rescinded.

7. Applicability. This deviation applies to all contracts where VA—

- 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.

Contracting officers shall—

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

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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.

8. Additional information. Send questions to va.procurement.policy@va.gov.

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Attachment

Deviation to FAR Text at FAR 52.222-55, Minimum Wages for Contractor Workers Under Executive Order 14026 (Deviation OCT 2023)

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)] ~~(i)~~ 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)