



United States Department of the Interior

NATIONAL PARK SERVICE
1849 C Street, NW
Washington, DC 20240

Memorandum

To: Regional Directors
Associate and Assistant Directors
Superintendents
Commercial Services Program Managers
Park Partner Program Managers

From: Deputy Director, Operations
Exercising the Delegated Authority of the Director

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BENGE

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Subject: Implementation of Executive Order No. 14042, Ensuring Adequate COVID Safety Protocols for Federal Contractors – (Contract Like Instruments)

I. Introduction

This memorandum provides direction to National Park Service (NPS) superintendents, commercial services program managers, and other park partner program managers to implement the requirements of [Executive Order No. 14042, Ensuring Adequate COVID Safety Protocols for Federal Contractors](#) (Sept. 9, 2021) (EO) for concession contracts, commercial use authorizations, covered commercial leases, and cooperating association agreements. The EO applies to various Federal contracts and contract-like instruments, including those for concessions and those “entered into with the Federal Government in connection with Federal property or lands and related to offering services for Federal employees, their dependents, or the general public.” Based on the EO and subsequent guidance issued by the Safer Federal Workforce Task Force (Task Force) and the Department of the Interior (DOI), the NPS has determined that it will apply the requirements of the EO and the Task Force guidance to all NPS concession contracts, commercial use authorizations, covered commercial leases, and cooperating association agreements.¹ As discussed further in this memorandum, the NPS will

¹ By their very nature, all NPS concession contracts, commercial use authorizations, and cooperating association agreements are contracts or contract-like instruments “entered into with the Federal Government in connection with Federal property or land and related to offering services for Federal employees, their dependents, or the general public,” i.e., they were entered into in connection with federal property or land and relate to offering services for members of the public who visit units of the National Park System. On the other hand, not all NPS commercial leases are “related to offering services for Federal employees, their dependents, or the general public.” In this memorandum, the term “covered commercial leases” refers to those NPS commercial leases that are subject to the EO under § 5(a) of the EO, as discussed further below. If a region or park has a question as to whether a specific commercial lease is covered by the EO and thus must comply with this guidance, they should consult with the Washington Support Office (WASO) Commercial Services Program. This memorandum does not address procurement contracts governed by the Federal Acquisition Regulation, or financial assistance agreements,

apply the new requirements to both new and existing NPS contracts and contract-like instruments, to the extent permitted by law.²

II. Background

On September 9, 2021, President Biden issued the EO, which directs Federal Agencies, to the extent permitted by law, to

ensure that contracts and contract-like instruments (as described in section 5(a) of this order) include a clause that the contractor and any subcontractors (at any tier) shall incorporate into lower-tier sub-contracts. This clause shall specify that the contractor or subcontractor shall, for the duration of the contract, comply with all guidance for contractor or subcontractor workplace locations published by the Safer Federal Workforce Task Force This clause shall apply to any workplace locations (as specified in the Task Force Guidance), in which an individual is working on or in connection with a Federal Government contract or contract-like instrument (as described in section 5(a) of this order).

EO at § 2(a). Section 2(e) of the EO states, “For purposes of this order, the term ‘contract or contract-like instrument’ shall have the meaning set forth in the Department of Labor’s proposed rule, ‘Increasing the Minimum Wage for Federal Contractors,’ 86 FR 38816, 38887 (July 22, 2021).” The Department of Labor’s proposed rule defines “contract or contract-like instrument” to mean “an agreement between two or more parties creating obligations that are enforceable or otherwise recognizable at law,” including procurement contracts, concessions contracts, and “contracts in connection with Federal property or land and related to offering services for Federal employees, their dependents, or the general public.” Following the definition in this proposed rule, § 5(a) of the EO provides that the EO applies to various contracts and contract-like instruments, including those for concessions and those “entered into with the Federal Government in connection with Federal property or lands and related to offering services for Federal employees, their dependents, or the general public.”³ With respect to existing contracts and contract-like instruments, § 6(c) of the EO encourages federal agencies, “to the extent permitted by law, to ensure that the safety protocols required under those contracts and contract-like instruments are consistent with the requirements specified in section 2 of this order.”

As directed by the EO, on September 24, 2021, the Task Force issued its “COVID-19 Workplace Safety: Guidance for Federal Contractors and Subcontractors” (Task Force Guidance).⁴ The Task

including notices of funding opportunity and cooperative agreements, all of which are addressed in a guidance document issued by the U.S. Department of the Interior on October 8, 2021, and reissued on October 15, 2021, and titled “FAR Deviation – Implementation of Executive Order 14042, Ensuring Adequate COVID Safety Protocols for Federal Contractors,” discussed further below, and separate NPS written guidance for those instruments. This memorandum also does not address NPS volunteer agreements, which will be addressed in future written guidance.

² For purposes of this memorandum, “new contracts and contract-like instruments” include renewed, reissued, extended, continued, modified, and amended contracts and contract-like instruments.

³ Section 5(b) of the EO exempts certain categories of instruments from the application of the EO, including “subcontracts solely for the provision of products.” Subcontractors who provide only products or supplies to concessioners are therefore exempt from the EO and this memorandum.

⁴ The Task Force Guidance and related guidance for federal contractors is available on the Task Force’s website at <https://www.saferfederalworkforce.gov/contractors/>.

Force Guidance broadly defines various terms⁵ and requires Federal contractors and subcontractors to conform to the following workplace safety protocols:

1. COVID-19 vaccination of covered contractor employees, except in limited circumstances where an employee is legally entitled to an accommodation;
2. Compliance by individuals, including covered contractor employees and visitors, with the Guidance related to masking and physical distancing while in covered contractor workplaces; and
3. Designation by covered contractors of a person or persons to coordinate COVID-19 workplace safety efforts at covered contractor workplaces.

The Task Force Guidance further states:

Consistent with applicable law, agencies are strongly encouraged to incorporate a clause requiring compliance with this Guidance into contracts that are not covered or directly addressed by the order because the contract is under the Simplified Acquisition Threshold as defined in section 2.101 of the FAR or is a contract or subcontract for the manufacturing of products. Agencies are also strongly encouraged to incorporate a clause requiring compliance with this Guidance into existing contracts and contract-like instruments prior to the date upon which the order requires inclusion of the clause.

As of the date of this memorandum, all covered contractor employees must be fully vaccinated by January 4, 2022.

On October 8, 2021, DOI issued a guidance document titled “FAR Deviation – Implementation of Executive Order 14042, Ensuring Adequate COVID Safety Protocols for Federal Contractors” (DOI Guidance), which was reissued with minor amendments on October 15, 2021. Although the DOI Guidance focuses on procurement contracts, it also directs bureaus and offices to include the “same clause [developed by the FAR Council]⁶ . . . that has been adopted for procurement contracts” in new concession contracts and similar contract-like instruments awarded after October 15, 2021, and to amend or modify existing concession contracts and similar contract-like instruments to incorporate the clause, “consistent with normal procedures for modifying the terms and conditions of concession contracts [or similar contract-like instruments] or the law applicable to concession contracts [or similar contract-like instruments], as soon as practicable

⁵ In addition to reiterating the definition of “contract or contract-like instrument” in the EO and the Department of Labor’s proposed rule, the Task Force Guidance defines “covered contractor employee” to mean “any full-time or part-time employee of a covered contractor working on or in connection with a covered contract or working at a covered contractor workplace. This includes employees of covered contractors who are not themselves working on or in connection with a covered contract, as it includes employees of covered contractors also who are simply working at a “covered contractor workplace.” It defines “covered contractor workplace” to mean “a location controlled by a covered contractor at which any employee of a covered contractor working on or in connection with a covered contract is likely to be present during the period of performance for a covered contract. A covered contractor workplace does not include a covered contractor employee’s residence.” However, if a contractor employee is working at their residence “on or in connection with a covered contract,” then that employee is also covered by the Task Force Guidance. The Task Force Guidance further defines “Federal workplace” to mean “any place, site, installation, building, room, or facility in which any Federal executive department or agency conducts official business, or is within an executive department or agency’s jurisdiction, custody, or control.”

⁶ This clause is included in a FAR Council memorandum dated September 30, 2021, available on the Task Force’s website.

following the date of this policy.” The DOI Guidance directs bureaus and offices to complete as many amendments or modifications as possible by November 15, 2021.

III. Implementation of EO, Task Force Guidance, and DOI Guidance

A. New and existing concession contracts awarded under the National Park Service Concessions Management Improvement Act of 1998

The NPS issues prospectuses and awards concession contracts under the National Park Service Concessions Management Improvement Act of 1998 (1998 Act).⁷ Standard language for 1998 Act contracts includes numerous provisions intended to protect public health and safety and a provision that expressly requires concessioners to provide the visitor services required or authorized by their contracts in a manner satisfactory to the NPS Director. The contracts also include detailed operating plans (usually attached to the contracts as Exhibit B) that include specific concessioner operating requirements. During the term of the contract the NPS may revise those operating plans at any time, after consultation with the concessioner, as long as the revisions “are in furtherance of the purposes of this Contract and are not inconsistent with the terms and conditions of the main body of this Contract.” The NPS therefore may revise those operating plans, after consultation with the concessioner, to include reasonable provisions to protect public health and safety.

Effective immediately, NPS commercial services program managers must include in all new prospectuses issued under the 1998 Act and in operating plans for all new concession contracts awarded under the 1998 Act the clause set out in Attachment 1a to this memorandum. NPS commercial services program managers also must include the clause in all extended or amended 1998 Act concession contracts. As soon as possible, but no later than November 15, 2021, NPS commercial service program managers also must consult with all concessioners operating in their park units under existing 1998 Act contracts about revising the operating plans for those contracts to incorporate the clause set forth in Attachment 1a to this memorandum. The goal of consultation is to communicate and educate concessioners about why the NPS is amending their contract operating plans to incorporate the clause. A template correspondence that can be used to consult with the concessioner is provided as Attachment 1b. Unless a concessioner articulates a purported reason (based on law or on scientifically based public-health concerns) why it should not be required to comply with the Task Force Guidance,⁸ the NPS commercial services program manager must revise the operating plan to incorporate the clause set out in Attachment 1a to this memorandum by November 15, 2021.

Through this new operating plan provision, the requirements contained in the Task Force Guidance will apply to all “covered contractor employees,” including those who work in “covered contractor workplaces” as well as those who work in “Federal workplaces,” as those terms are defined in the Task Force Guidance.

⁷ Tit. IV of the National Parks Omnibus Management Act of 1998, Pub. L. No. 105-391, 112 Stat. 3497, 3503, codified as amended at 54 U.S.C. §§ 101911-101926. The NPS still administers a small number of contracts awarded under what was commonly known as the National Park Service Concession Policies Act of 1965 (1965 Act), Pub. L. No. 89-249, 79 Stat. 96, which the 1998 Act repealed. Contracts awarded under the 1965 Act are addressed in section III.B. of this memorandum.

⁸ If a concessioner articulates such a reason, then the commercial services manager should immediately consult with the superintendent, who, in turn, should consult with the WASO Commercial Services Program and Office of the Solicitor.

B. Existing concession contracts awarded under the 1965 Act

The terms of concession contracts awarded under the 1965 Act do not allow the NPS to revise the operating plans for those contracts without executing a bilateral amendment to the contract. NPS superintendents and commercial services program managers should consult with the concessioners operating under 1965 Act contracts in their park units and ask whether the concessioners would agree to amend their contracts to incorporate the clause set out in Attachment 2a to this memorandum. If so, then the NPS and the concessioner should promptly execute the amendment. If not, then the NPS must seek to include the clause in the contract as a condition of extending or continuing the contract. A template correspondence that can be used to consult with the concessioner is provided as Attachment 2b.

C. New commercial use authorizations, covered commercial leases, and cooperating association agreements

Effective immediately, NPS commercial services program managers and park partner program managers must include in all new commercial use authorizations, covered commercial leases, and cooperating association agreements the clause set out in Attachments 3a through 6a to this memorandum. The NPS commercial services program managers and park partner program managers also must include the clause in all such renewed, reissued, extended, continued, modified, or amended agreements or instruments. For ease of implementation, the Washington Support Office (WASO) Commercial Services Program and Cooperating Associations and Partnerships Program are already integrating the clause into the standard CUA forms and cooperating association agreement respectively, so no further action will be necessary to independently incorporate all the clause once these standard documents are updated and used.

D. Existing commercial use authorizations, covered commercial leases, and cooperating association agreements

Because of the large number of commercial use authorizations, covered commercial leases, and cooperating association agreements currently in place nationwide,⁹ NPS commercial services program managers and park partner program managers are not required to attempt to bilaterally amend or modify those existing agreements or instruments solely for the purpose of including the clause. But superintendents or program managers should consult with the holders of those contract-like instruments and encourage them to comply with the Task Force Guidance. Some holders may want to modify or amend their existing instruments to include the clause; in those cases, the holder and the NPS should promptly execute an amendment to the existing instrument to incorporate the clause set out in Attachments 3a through 6a to this memorandum. Other instrument holders may not be amendable to modifying or amending their existing instruments but may nonetheless voluntarily comply with the requirements in the clause; in those cases, the NPS must include the clause in the instrument when the NPS renews or reissues the instrument. Template correspondence that can be used to consult with the existing instrument holders is provided as Attachments 3b through 6b. Finally, in any rare cases where an existing instrument holder indicates that it will not comply with the guidance and the superintendent determines that the holder's non-compliance poses an immediate threat to public health or safety, the

⁹ The Commercial Services Program estimates, for example, that approximately seven thousand commercial use authorizations are currently in place. By statute, the duration of those authorizations is limited to two years, and they are renewed or reissued on a rolling basis.

superintendent should immediately consult with the NPS regional director. With the regional director's concurrence, the superintendent may then suspend or terminate the contract-like instrument in accordance with the instrument's terms and conditions.

IV. Compliance

All individuals, organizations, and entities with the EO-required clause in their contracts or contract-like instruments must comply with the new requirements, and the NPS expects them to do so in a reasonable and timely manner. If the NPS becomes aware of a possible violation of the requirements, then the appropriate NPS program manager should contact the individual, organization, or entity and attempt to obtain voluntary compliance through consultation and communication. If compliance is not forthcoming, then the program manager should create a detailed record of the noncompliance and consult with the superintendent and the NPS's regional program point of contact on the appropriate response to the noncompliance.

V. For Additional Information

If you have any questions about this memorandum, please contact your regional program coordinator. If these coordinators cannot answer the question or if coordinators themselves have questions, please contact Kurt Rausch, Chief of Commercial Services, for questions on commercial services instruments at kurt_rausch@nps.gov or (202) 513-7202 and Monique Vanlandingham for questions on cooperating association agreements at monique_vanlandingham@nps.gov or (202) 513-7143.

Attachments