



September 21, 2021

TO: Region and Program Construction Engineers

FROM: Jon Deffenbacher, PE

SUBJECT: Vaccine Implementation

The following interim policy and guidance addresses how WSDOT will implement the requirements of Governor Inslee's Proclamation 21.14.1 (Proclamation) on WSDOT construction contracts. This document is applicable to all projects that have unfinished Work under the contract, regardless of completion status. Any reference to "Region" in the document should be interpreted to include regions, programs, or divisional offices with responsibility to supervise construction in accordance with the Construction Manual M41-01.

The effects of COVID-19 on our projects have shifted dramatically since early 2020. Knowing that the situation will continue to evolve, updates to this guidance will be necessary. Regions should communicate with their assigned ASCE about any questions, or topics that we may have overlooked in the development of this document. This document does not supersede any prior policy or guidance regarding job-site health and safety.

Contractor Notification

September 1, 2021 – The first Vaccine Mandate letter was sent to each contractor through the Project Engineers. It established that the Proclamation applies to WSDOT projects and contractors and assigned to contractor employers' the responsibility to verify vaccination, exemption, and/or accommodation.

September 1, 2021 – HQ Construction sent preliminary policy points to Regions and Project Engineers

September 3, 2021 – HQ Construction sent a second letter to all prequalified contractors providing a link to vaccine implementation information and resources. This letter did not modify or amend the previous direction letter. Several contractors responded to these initial letters by providing notice letters to WSDOT asserting one or more claims under the contract; objection to the mandate and its legality, asserting that WSDOT is changing or has changed the contract, reserving rights to time and or money due to the Proclamation.

September 15, 2021 - HQ provided template language to Project Engineers to establish WSDOT's contract interpretation related to implementing the vaccine mandate. This template letter may be used either as a response to a contractor notice letter, or to inform the contractor of WSDOT's position. The template should be modified to address project needs and/or prior notice provided by the contractor.

Transmit Declaration Form – Project Engineers need to send the Declaration form to their contractors and inform them that WSDOT will require one form that covers the contractor workers on the project (standard letter text will be provided by HQ Construction).

Contract Interpretation

WSDOT's contractual position was briefly stated in the September 1st letter, but is more fully presented in the September 15th letter, relying on Section 1-07.1 Laws to be Observed. This section assigns to the contractor the responsibility to follow all legal requirements. Prior legal challenges in Washington have confirmed that proclamations issued by the Governor have the force of law, and therefore should be applied in the same manner as any other state law. Section 1-07.1 also addresses the question of compensation in the event that a legal requirement changes.

“The Contracting Agency will not adjust payment to compensate the Contractor for changes in legal requirements unless those changes are specifically within the scope of RCW 39.04.120. For changes under RCW 39.04.120, the Contracting Agency will compensate the Contractor by negotiated change order as provided in Section 1-04.4.”

Proclamation 21.14.1 (Proclamation) falls outside the scope of RCW 39.04.120, and therefore is not eligible for an adjustment of payment. That means WSDOT is not obligated to provide any additional monetary compensation related to following the requirements that are established by the Proclamation. This also includes any discussion of extended overhead associated with a delay arising from the implementation of this Proclamation.

WSDOT staff should avoid offering unnecessary interpretations of the Proclamation or instructions to Contractor. The Project Engineer's interpretations and instructions could inadvertently add requirements, representing a change in the Work under Section 1-04.4. This creates potential entitlement to a cost adjustment.

It is possible that a project's critical path could be delayed as a result of implementing the Proclamation. Potential causes of delay could include labor shortages, complications associated with getting workers vaccinated, or lack of subcontractors able to comply with the Proclamation. Section 1-04.1(1) obligates the contractor to provide the labor, equipment, and materials required to complete the Work. While WSDOT bears no responsibility to ensure adequate labor, the contractor could be eligible for an extension of time under Section 1-08.8. If WSDOT is notified of a potential or ongoing project delay related to the Proclamation, PE's should direct them to follow the requirements of Section 1-08.8.

Vaccination Verification and Declaration

As provided in the Proclamation, WSDOT elected to require employers of contractors to assume responsibility for vaccination verification and accommodation. The Prime Contractor is employing subcontractors to provide public works services pursuant to its contract with WSDOT. The Prime Contractor must ensure that subcontractors comply fully with the plans and specifications, and therefore, the Contractor is expected to ensure that their subcontractors are complying with the Proclamation by submitting signed declarations. **WSDOT will only require**

the Prime Contractor to declare on behalf of all workers performing Work under the contract. Submission of subcontractor declarations is not required and should not be requested by the Project Engineer.

WSDOT will provide Contractors with a WSDOT specific Declaration form that meets the requirement of the Proclamation, and therefore required. Whether the declaration form is handled digitally, electronically, or otherwise is up to the Project Engineer's discretion.

Contractors will determine how to verify that subcontractor employees are compliant with the Proclamation, but the WSDOT furnished Declaration form would be suitable for this purpose.

Deadlines:

For contracts that started Work prior to October 19th, the deadline for submitting their signed declaration is **5:00 pm, October 18th**. The Project Engineer may elect to modify that deadline, provided that Work does not proceed on or after October 19th without the signed declaration.

For contracts that will start Work after October 19th, the signed declaration must be submitted **before starting Work on the site**.

Compliance and Enforcement

The Project Engineer shall verify that the person signing the declaration is an authorized representative, such as the person that has been delegated authority to sign change orders or other transactional documents. Once the Contractor has submitted the signed declaration, the Project Engineer may rely upon the truthfulness and accuracy of that document. The contractor is not required to submit additional declarations unless circumstances on the project change significantly. The Project Engineer shall consult with the Region Construction Engineer and HQ Construction prior to requesting additional declarations.

The signed declaration requires the Contractor to have a process that addresses workers who are on site for a short period of time, and any moments of close physical proximity to others on site are fleeting. This exception was intended for workers like material delivery drivers. The Project Engineer should not endeavor to define or interpret the terms of the Proclamation or the Contractor's signed declaration.

The Proclamation reserves the rights of Agencies to investigate and review documents to ensure compliance. WSDOT staff shall not exercise that right without the approval of HQ Construction. If the Project Engineer becomes aware of a potential non-compliance issue, they shall consult with the Region Construction Engineer to determine the need for further investigation. If further investigation is warranted, the Project Engineer will direct the Contractor to investigate and verify that all Workers are covered under the signed declaration. The Contractor shall provide a written summary to the Project Engineer within 3 business days. In all cases, the Contractor is responsible for the initial investigation, explanation, and action in response to the issue raised.

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The Region shall report all Contractor investigations and findings to their ASCE. If the Region Construction Engineer or the ASCE find the Contractor's investigation, explanation, and/or actions to be insufficient, the matter shall be referred to the Lead Construction Engineer.

Administration Scenarios

WSDOT anticipates that contractors intend to comply with the Proclamation, but many have expressed considerable labor uncertainty as the deadline approaches. Regions should expect that some portions of the Work will not proceed as planned after October 18th. Project Engineers should continue to administer contract time in accordance with their contract, regardless of notices from the Contractors. Not charging time or suspending time is not an appropriate response to issues that arise out of the Proclamation.

There are two scenarios that Regions are likely to encounter. The required response procedures follow.

1. The Contractor submits a signed declaration, but is unable to perform due to inadequate resources
 - a. The Project Engineer shall advise the Contractor to request an extension of contract time in accordance with Section 1-08.8. The delay may be continuing, but this is the only method for a Contractor to seek time relief in this circumstance.
 - b. The Region shall consult with the ASCE regarding the Contractor's request for time extension. The effects of the Proclamation may prove to create a circumstance that is beyond the control of the Contractor, entitling them to an extension of contract time. **Only HQ Construction can approve a time extension related to the Proclamation.**
 - c. If the Contractor is unable to commence with the Work within a reasonable period of time, HQ Construction *may* direct the Region to issue a notice of breach to the Contractor and Surety with 15 days to remedy in accordance with Section 1-08.10(1).

2. Contractor fails or refuses to provide a signed declaration by 5pm October 18th
 - a. If the Contractor attempts to perform Work without a signed declaration, the Region shall immediately suspend all Work under Section 1-08.6 for failure to comply with the contract. If the Contractor does not indicate the intent or ability to submit a signed declaration, HQ Construction, will direct the Region to issue a notice of breach to the Contractor and Surety with 15 days to remedy in accordance with Section 1-08.10(1).
 - b. If the Contractor was not scheduled to perform Work on October 19th, then the Project Engineer should request a written explanation of how the Contractor will perform the Work while complying with the Proclamation. If the Contractor fails to commence with Work in accordance with the contract requirements, HQ Construction will direct the Region to issue a notice of breach to the Contractor and Surety with 15 days to remedy in accordance with Section 1-08.10(1).

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The only reason for issuing a change order that is associated with the Proclamation would be to extend the contract time. Regions must receive Deputy State Construction Engineer concurrence prior to issuing a change order to address any Proclamation related issues other than adjusting contract time.

JDD:rlp

Contract #: _____

Vaccine Declaration

Contractor Name: _____

In accordance with Proclamation 21-14, as amended, I _____ [name of declarant] declare the following:

- I am the _____ [job title] of the above-named Contractor and am duly authorized to make this declaration on behalf of the Contractor;
- [name of contractor] currently is, and shall remain for the duration of the Contract, in full compliance with Proclamation 21-14, as amended (hereafter, the "Proclamation");
- A process is in place to verify proof of full vaccination against COVID-19 for all current Contractor employees, and current subcontractors and other employees currently working on-site, in accordance with the Proclamation;
- A process is in place to verify and ensure any future Contractor employees, including subcontractors and other employees, have provided proof of full vaccination against COVID-19, through the duration of the Contract, or a disability or religious exemption and corresponding accommodation has been granted in accordance with the Proclamation, prior to performing Work on-site.
- A process is in place to grant and document disability and/or religious exemptions, and corresponding accommodations, if any, to current and future employees, subcontractors and other employees in accordance with the Proclamation;
- A process is in place to ensure that all current and future work activities that occur on-site are performed by Contractor employees, including subcontractors and other employees, who are fully vaccinated against COVID-19 or properly exempted, in accordance with the Proclamation, unless they are only on site for a short period of time and any moments of close physical proximity to others on site are fleeting, as described in Section 6.f. of the Proclamation 4.;
- A copy has been obtained or visually observe proof of full vaccination against COVID-19 for every current Contractor employee, (including subcontractor and other employees performing Work on-site) or a disability or religious exemption and corresponding accommodation has been granted in accordance with the Proclamation;
- All current Contractor employees, including subcontractors and other employees performing Work on-site are fully vaccinated against COVID-19 or have been granted an exemption and corresponding accommodation due to a disability or a conflict between the vaccination requirement and their sincerely held religious beliefs, practice, or observance, in accordance with the Proclamation;

- All future Contractor employees, including subcontractors and other employees, will be fully vaccinated against COVID-19 or have been granted an exemption and corresponding accommodation due to a disability or a conflict between the vaccination requirement and their sincerely held religious beliefs, practice, or observance, in accordance with the Proclamation, prior to performing any Work on-site.

I acknowledge that, _____ [name of contractor] is prohibited from allowing any Worker to engage in on-site Work under the Contract unless they have complied with the requirements of the Proclamation.

I acknowledge that, WSDOT has the right to request and obtain records pertaining to processes and records related to the enforcement and implementation of the Proclamation, except as prohibited by applicable law, and will cooperate with any investigation or inquiry pertaining to the same.

I acknowledge that, WSDOT has the right to request and obtain an updated declaration at any time during the term of the Contract, and enforce the terms and requirements of the Contract, if such is not provided.

I declare under penalty of perjury under the law of the State of Washington that the foregoing is true and correct.

Contractor's Signature

Contractor Signer's Printed Name

Date

{Instructions}

For existing contracts, the contractor must fill out and sign this declaration prior to October 18, 2021, before allowing any Worker on site on or after October 19, 2021.

For contracts awarded after September 10, 2021, which contain the amendment or GSP for COVID-19 Vaccinations and if Work starts prior to October 18, 2021, the contractor must fill out and sign the declaration prior to October 18, 2021, before allowing any Worker on site on or after October 19, 2021.

For contracts awarded after September 10, 2021, with the amendment or GSP for COVID-19 Vaccinations included and Work does not start prior to October 19, 2021, the contractor must fill out and sign the declaration prior to allowing any Worker on site.