



OFFICE OF THE UNDER SECRETARY OF DEFENSE

3000 DEFENSE PENTAGON
WASHINGTON, DC 20301-3000

ACQUISITION
AND SUSTAINMENT

In reply refer to
DARS Tracking Number: 2020-OZZZZ

MEMORANDUM FOR COMMANDER, UNITED STATES CYBER
COMMAND (ATTN: ACQUISITION EXECUTIVE)
COMMANDER, UNITED STATES SPECIAL
OPERATIONS COMMAND (ATTN: ACQUISITION
EXECUTIVE)
COMMANDER, UNITED STATES TRANSPORTATION
COMMAND (ATTN: ACQUISITION EXECUTIVE)
DEPUTY ASSISTANT SECRETARY OF THE ARMY
(PROCUREMENT)
DEPUTY ASSISTANT SECRETARY OF THE NAVY
(PROCUREMENT)
DEPUTY ASSISTANT SECRETARY OF THE AIR FORCE
(CONTRACTING)
DIRECTORS, DEFENSE AGENCIES
DIRECTORS, DEFENSE FIELD ACTIVITIES

SUBJECT: Class Deviation—Section 3610 Reimbursement Requests

Effective immediately, contracting officers shall follow the guidance provided in this class deviation when reviewing and processing contractor requests for reimbursement under section 3610 of the Coronavirus Aid, Relief and Economic Security (CARES) Act (Pub. L. 116-136). Section 3610 authorizes, but does not require, contracting officers to modify contracts and other agreements, without consideration, to reimburse contractors for paid leave a contractor provides to keep its employees or subcontractors in a ready state, including to protect the life and safety of Government and contractor personnel during the public health emergency declared on January 31, 2020, for Coronavirus Disease 2019 (COVID-19). Class Deviation 2020-O0013, CARES Act Section 3610 Implementation, issued on April 8, 2020, established DFARS 231.205-79, CARES Act Section 3610 Implementation, as a framework for contracting officers to use when implementing the authority of section 3610, as revised on August xx, 2020.

In accordance with Office of Management and Budget Memorandum M-20-27, Additional Guidance on Federal Contracting Resiliency in the Fight Against the Coronavirus Disease (COVID-19), dated July 14, 2020, the effective date of section 3610 is March 27, 2020, which is the date the CARES Act was enacted into law. Section 3610 does not contain language to provide retroactive coverage, as a matter of law; therefore, the authority conferred by section 3610 does not apply to reimbursements for paid leave provided prior to March 27, 2020.

Section 3610 does not prohibit the Department from reimbursing a contractor for paid leave prior to March 27, 2020, using contract authorities otherwise available to the Department; therefore, contracting officers may, at their discretion, consider reimbursing such paid leave costs as other COVID-19 related costs. For additional guidance on the reimbursement of other COVID-19 related costs not authorized under section 3610, refer to Defense Pricing and

Contracting (DPC) Memorandum, Guidance for Assessment of Other COVID-19 Related Impacts and Costs, dated July 2, 2020. Any reimbursement for paid leave provided prior to March 27, 2020, should not be identified as a payment made under section 3610 for purposes of tracking and reporting.

A. Notice of Intent to Request Reimbursement under Section 3610: Early Engagement

If a contractor contacts a contracting officer about its intent to submit a request for reimbursement under section 3610, early discussions may be beneficial. These early engagements may be used to review the requirements of this guidance and which of the attached checklists is appropriate to use in conjunction with the contractor's section 3610 reimbursement request. These early engagements may also address the following:

- The information required by the class deviation, including the checklist(s);
- The requirement that the contractor's status as an affected contractor must be established by the contracting officer in writing, in order for the contractor to receive reimbursement under section 3610;
- Whether funding is available for the section 3610 reimbursement request;
- What costs are and are not authorized in a section 3610 reimbursement request;
- The expected submission frequency of the section 3610 reimbursement requests; and
- The contractor's estimate of the amount of its section 3610 reimbursement request.

No section 3610 reimbursements shall be made to a contractor unless and until funds are available for reimbursement of section 3610 costs. That funds may be legally available for reimbursement under section 3610, among other purposes, does not imply or require that such funds must be used for section 3610 reimbursements. Until such time as a section 3610 reimbursement request is submitted by the contractor and evaluated by the contracting officer, any discussion of the availability of funds is notional and for planning purposes only.

A final decision of affected contractor status and the amount of section 3610 reimbursement, if any, will be made only after submission and analysis of each section 3610 reimbursement request, including subsequent requests.

B. Submission of Requests for Reimbursement under Section 3610

A contractor may submit a section 3610 reimbursement request for a single contract, multiple contracts, or an entire business unit (or segment) level. Notwithstanding to whom a contractor submits its request, the Department may choose to address a section 3610 reimbursement request at any level in any DoD Component for any reason, including administrative convenience. Further, the Department may unilaterally decide to group together separate requests.

Three checklists are provided in the attachments to this class deviation to provide the type of information the contracting officer may need to assess a contractor's section 3610 reimbursement request. These checklists provide guidance for processing reimbursement requests and may be tailored, at the contracting officer's discretion, to fit specific circumstances. For example, a contracting officer may require a contractor to provide additional information

necessary to assess its eligibility to receive a reimbursement under section 3610, verify the accuracy and allocability of incurred costs, or ensure that the contractor is not paid or reimbursed for the same costs via any other source.

The attached checklists are:

- *Abbreviated Reimbursement Checklist* (Attachment 1). Guidance for section 3610 reimbursement requests when the request applies only to reimbursement under a single contract of direct charged employees provided with paid leave, and the amount of reimbursement requested is below \$2,000,000 in total. This checklist may also be used in conjunction with either the multipurpose or global reimbursement checklist for subcontractor reimbursement requests that meet the conditions of this checklist. Section 3610 reimbursement requests meeting these conditions should be provided to the contracting officer.
- *Multipurpose Reimbursement Checklist* (Attachment 2). Guidance for section 3610 reimbursement requests that apply to a single contract, when Attachment 1 is not applicable, or to multiple contracts when Attachment 3 is not being used. Section 3610 reimbursement requests using this checklist should include homogeneous groups of contracts, such as contracts for a single program or with a single contracting activity or DoD Component. Section 3610 reimbursement requests meeting these conditions should be provided to a contracting officer in the applicable contracting activity or Component. At their discretion, when multiple contracts are involved, contracting activities or DoD Components may appoint a lead contracting officer to ensure consistency and efficiency in considering the section 3610 reimbursement request.
- *Global Reimbursement Checklist* (Attachment 3). Guidance for section 3610 reimbursement requests that seek a global reimbursement at a business unit (or segment) level (see Attachment 3). Section 3610 reimbursement requests meeting these conditions should be provided to the contractor's assigned Cognizant Federal Agency Official (CFAO).

A contractor may also choose to submit subsequent section 3610 reimbursement requests for additional paid leave costs incurred after the initial section 3610 reimbursement request, so long as the paid leave was provided no later than September 30, 2020. Contractors should use a consistent methodology in calculating the quantum of the section 3610 reimbursement request. In no event should a contractor receive multiple reimbursements for the same incurred costs.

Section 3610 reimbursement requests may be inclusive of both cost-type and fixed-price contracts. The contractor is responsible to properly support the impacts to each contract included in any section 3610 reimbursement request. A contractor's initial section 3610 reimbursement request should cover the period from the latter of the date that the contractor began providing paid leave reimbursable under section 3610 or March 27, 2020, through the close of the latest accounting cycle prior to the contractor's section 3610 reimbursement request. For example, if a company began providing section 3610 paid leave on March 27, 2020, and incurs paid leave costs through July 31, 2020; the company should provide sufficient information for the costs incurred from March 27, 2020, through July 31, 2020, to support an initial section 3610

reimbursement request in August 2020. Subsequent section 3610 reimbursement requests should be coordinated with the contracting officer, prior to submission, and submitted in a similar manner to the initial section 3610 reimbursement request.

Reimbursements under section 3610 are limited to the costs incurred by the contractor allocable to its DoD contracts, including applicable subcontractor costs allocable to DoD contracts. Reimbursements under section 3610 shall not include costs incurred by the contractor allocable to work performed as a subcontractor. Any requests for reimbursement of section 3610 paid leave costs incurred as a subcontractor should be submitted to the appropriate prime contractor.

A contractor's section 3610 reimbursement request should include any of its subcontractors' section 3610 reimbursement requests for the same time period for the same contracts. Contracting officers shall only consider subcontractor section 3610 reimbursement requests that are submitted through the prime contractor. The contracting officer should require the prime contractor to evaluate each subcontractor's section 3610 reimbursement request and provide, with its own section 3610 reimbursement request, an opinion as to whether the subcontractor is an affected contractor and, if so, its analysis of the subcontractor's paid leave costs allowable under section 3610.

The contracting officer should review the contractor's evaluation of each subcontractor's submission requesting section 3610 reimbursement, and the contractor should provide, with its own section 3610 reimbursement request, an opinion to the contracting officer as to whether the subcontractor is an affected contractor and, if so, its analysis of the subcontractor's paid leave costs allowable under section 3610. If the subcontractor does not routinely provide similar information to the contractor, the subcontractor should provide the amount of section 3610 reimbursement it is requesting to the contractor for inclusion in the contractor's section 3610 reimbursement request and submit all other supporting information directly to the contracting officer under separate cover.

A contractor is required to segregate and report the actual amounts of section 3610 paid leave costs within its accounting system to support any requests for reimbursement. Contracting officers should advise contractors that the Government may audit the billed section 3610 costs in order to ensure the accuracy and compliance with section 3610. Additionally, contractors must comply with Cost Accounting Standards (CAS) for CAS-covered contracts, or FAR 31.203 for non-CAS covered contracts, in order to be reimbursed for section 3610 costs. Contracting officers may verify a contractor's compliance with CAS in order to properly determine the Department's share of the paid leave costs and the amounts allocable to Department contracts and subcontracts to which the costs are allocable.

Contracting officers shall require contractors to provide a representation with each section 3610 reimbursement request, as follows:

- All paid leave included in the request for reimbursement was specifically paid to keep the employees and/or subcontractors in a ready state;

- The contractor segregated and reported the actual costs of the section 3610 paid leave payments, traceable to the individual employee charges;
- The section 3610 reimbursement request excludes any paid leave costs associated with the contractor's work as a subcontractor to another contractor;
- All impacted subcontractors have been afforded an opportunity to submit a request for reimbursement of section 3610 paid leave costs, and eligible subcontractor section 3610 reimbursement requests received and as appropriate are incorporated into the contractor's section 3610 reimbursement request for the contractor to pay to the subcontractor;
- The section 3610 reimbursement request has been reduced by any applicable credits or loan forgiveness the contractor has received that is/are specifically identifiable to the public health emergency declared on January 31, 2020, for COVID-19;
- The costs included in the section 3610 reimbursement request have not been requested elsewhere in another section 3610 reimbursement request; and
- The section 3610 reimbursement request is made in good faith, and the supporting data is accurate and complete to the best of the contractor's knowledge.

Any exceptions a contractor makes to the content of the above representations should be explained within its section 3610 reimbursement request. The representation should be dated and include the signature and title of a designated individual within the company with the authority to sign and commit on behalf of the contractor. Any subcontractors included in a contractor's section 3610 reimbursement request should also provide to the contractor the same representations with its reimbursement request. Contracting officers shall document their reliance on the contractor's representation in the contract file.

C. Affected Contractor

In accordance with Class Deviation 2020-O0013, contracting officers shall establish, in writing, a contractor's status as an affected contractor prior to authorizing the reimbursement of paid leave costs under the authority of section 3610 for a particular contract and a specific time period. The contracting officer shall establish whether the contractor has incurred costs to provide paid leave for its employees or subcontractors to maintain its workforce in a ready state and otherwise meets all of the requirements of section 3610. The time period for reimbursement of paid leave for an affected contractor under section 3610 is March 27, 2020, through September 30, 2020.

In order to verify that a contractor is an affected contractor, contracting officers must be able to conclude, upon review of a contractor's section 3610 reimbursement request, the following:

- The contractor has provided paid leave to its employees or subcontractors to maintain a ready state, including to protect the life and safety of Government and contractor personnel, during the public health emergency declared on January 31, 2020, for COVID-

19. Any paid leave provided prior to March 27, 2020, is ineligible for reimbursement under section 3610. All paid leave costs requested for reimbursement under section 3610 must have been incurred by the contractor or subcontractor and paid by the employer to the employee during the period of the reimbursement request.

- The reimbursement request does not include paid leave to which an employee was otherwise entitled (e.g., leave that the employee has earned or is provided through company policy, employment contract, or labor agreement);
- The section 3610 paid leave was provided to, and taken by, the employees no earlier than March 27, 2020, and no later than September 30, 2020;
- The leave was paid to contractor employees or subcontractor employees who could not perform work due to facility closures or other restrictions (e.g., quarantine due to exposure to persons infected with COVID-19 or travel restrictions when travel is required for contract performance) during the public health emergency declared for COVID-19;
- The contractor employees or subcontractor employees were unable to telework, because their job duties could not be performed remotely; and
- The section 3610 reimbursement request does not result in a total of paid work and paid leave charges for any contractor or subcontractor employee exceeding an average of 40 hours per week per employee.

Contracting officers shall document the basis for establishing that a contractor is an affected contractor in the contract file and include an affirmative statement of the contractor's affected status in the contract modification (see section F below).

D. Determination of Reimbursement Amount

The determination of the reimbursement amount shall be based on the contracting officer's review of the information provided in the contractor's section 3610 reimbursement request and the criteria in this class deviation and Class Deviation 2020-O0013.

In no event shall a reimbursement under section 3610 include profit or fee on any contractor or subcontractor paid leave costs. Reimbursement shall be made at the appropriate rates for the work performed under the contract. The contracting officer shall document the rationale for the amount eligible for section 3610 reimbursement, including any limitations due to available funding, in the contract file.

The maximum reimbursement a contractor is authorized to receive under section 3610 shall be reduced by the amount of loan forgiveness a contractor receives pursuant to division G of the Families First Coronavirus Response Act (Pub. L. 116-127) or under the CARES Act (Pub. L. 116-136), or any other credit allowed by law that is specifically identifiable with the public health emergency declared on January 31, 2020, for COVID-19. See also FAR 31.201-5 and section G below.

E. Availability of Funds for Reimbursement under Section 3610

Any reimbursement provided under the authority of section 3610 is subject to the availability of funds. Section 3610 reimbursements need not be funded only with CARES Act appropriations. Funds that are otherwise legally available for use under a contract may be used to fund a section 3610 reimbursement under that contract. The decision to provide available funds for section 3610 reimbursement is at the Department's discretion. The Department may choose not to provide funds for section 3610 reimbursement under any particular contract, in which case no reimbursement will be made under such contract.

F. Contract Modifications

Once a contracting officer has established that a contractor is an affected contractor, determined the amount eligible for reimbursement, and validated availability of funds, the contracting officer shall modify the affected contract(s) to provide for the section 3610 reimbursement.

Regardless of the type of contract, a section 3610 bilateral contract modification shall:

- Cite section 3610 of the CARES Act as authority for the modification;
- Include the following (or similar) statement in the preamble of the modification “Because I have established that the contractor is an ‘affected contractor’ for the period of [*insert inclusive dates*] in accordance with section 3610, Federal Contractor Authority, of the Coronavirus Aid, Relief, and Economic Security (CARES) Act (Pub. L. 116-136), the contract is modified as follows”;
- Specify the time period for which section 3610 paid leave costs are being reimbursed;
- If subcontractor leave is included in the section 3610 reimbursement, specify the amount to be reimbursed to each affected subcontractor; and
- Incorporate the contract clause provided in Attachment 4 of this class deviation, which requires the contractor to notify the contracting officer of any credits or loan forgiveness the contractor receives for the same paid leave costs being reimbursed in the modification.

To ensure traceability, it is critical that the contract and supporting documentation clearly identify reimbursement costs paid to contractors under the authority of section 3610, as well as how such costs are identified, segregated, recorded, invoiced, and reimbursed. Guidance on the requirement to create dedicated line items to ensure proper tracking and reporting of section 3610 reimbursements can be found in the DPC memorandum, Implementation Guidance for Section 3610 of the Coronavirus Aid, Relief, and Economic Security Act, dated April 9, 2020.

In executing the contract modification, contracting officers may create a firm-fixed price line item for section 3610 reimbursement to allow the contractor to immediately invoice for the

full price of the line item. If a firm-fixed price line item is created for section 3610 reimbursement, the contracting officer shall insert in paragraph (b) of Defense Federal Acquisition Regulation Supplement (DFARS) clause 252.232-7006, Wide Area WorkFlow Payment Instructions, "Invoice 2in1" (Services Only) as the applicable invoice and receiving report for the contractor to use when invoicing for its section 3610 reimbursement costs.

If a cost type line item (to include time and material and labor hour line items) is created for section 3610 reimbursement, the contractor will use a cost voucher when invoicing for section 3610 reimbursement costs, in accordance with DFARS clause 252.232-7006.

G. Duplicate Reimbursements Related to COVID-19

The contractor is required to notify the contracting officer within 30 days of receiving any credits or loan forgiveness for the same paid leave costs reimbursed under section 3610.

Should the timing of any applicable credits or loan forgiveness be such that the contractor is unable to provide notification to the contracting officer prior to execution of a contract modification resulting from the contractor's section 3610 reimbursement request, the contractor must notify the contracting officer in writing within 30 days of receipt of the credit or loan forgiveness and agree to execute a modification reducing the reimbursed amount under section 3610 by the amount received by the other means, up to the entire section 3610 reimbursement amount.

H. Additional Information

Amplifying information is available at <https://www.acq.osd.mil/dpap/pacc/cc/COVID-19.html>.

This class deviation remains in effect until rescinded. My point of contact is Greg Snyder, who is available by telephone at 703-614-0719 or by email at gregory.d.snyder.civ@mail.mil.

Kim Herrington
Acting Principal Director,
Defense Pricing and Contracting

Attachments:
As stated