



Coronavirus Aid, Relief, and Economic Security Act ("COVID-19 Stimulus Law")

Section 3610

Seeking Relief When Contractor
Employees Cannot Perform
as a Result of the COVID-19
Pandemic



CARES Act

Overview

- Coronavirus Aid, Relief, and Economic Security Act (“CARES Act”)
- \$2 trillion coronavirus economic stimulus bill
- This legislation is aimed at providing relief for individuals and businesses that have been negatively impacted by the coronavirus outbreak.
 - Direct Payment
 - Unemployment
 - Payroll Taxes
 - Etc.
- What does Section 3610 mean for government contractors?

Section 3610

- Section 3610, is specifically applicable to federal government contractors.
- Could provide contractors with the ability to seek reimbursement in connection with inability to perform due to facility access issues.
- Potential additional support for recovery in addition to various FAR clauses (changes, suspension/stop-work, termination, delays, etc.).

Support for Contractors

Government Pronouncements

- The driving force behind Section 3610
 - Defense Industrial Base , essential workforce, mobile-ready state
- DoD pronouncements
 - “agencies . . . should take all prudent actions within their authority to minimize potential negative effects of contract disruptions”
 - “Contracting Officers should use every authority and flexibility at their disposal—including waiving regulations and modifying contract terms and conditions”
- OMB pronouncements
 - “Federal contractors play a vital role . . . Agencies are urged to work with their contractors . . . maximize telework”
 - “[A]gencies should be flexible in providing extensions to performance dates”

CARES Act – §3610 Federal Contractor Authority

*Notwithstanding any other provision of law, and subject to the availability of appropriations, funds made available to an agency by this Act or any other Act **may be used** by such agency to modify the terms and conditions of a contract, or other agreement, without consideration, to **reimburse at the minimum applicable contract billing rates not to exceed an average of 40 hours per week any paid leave, including sick 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**, but in no event beyond September 30, 2020. Such authority shall apply only to a contractor whose **employees or subcontractors cannot perform work on a site that has been approved by the Federal Government, including a federally-owned or leased facility or site, due to facility closures or other restrictions, and who cannot telework because their job duties cannot be performed remotely** during the public health emergency declared on January 31, 2020 for COVID-19: Provided, That the maximum reimbursement authorized by this section shall be **reduced by the amount of credit a contractor is allowed** pursuant to division G of Public Law 116-127 and any applicable credits a contractor is allowed under this Act.*

§3610 – Scope of Relief

Relief provision is not mandatory, and only available for employees (or subcontractors) who:

- cannot perform work on a site that has been approved by the Federal Government, due to facility closures or other restrictions; **and**
- cannot telework because their job duties cannot be performed remotely during the public health emergency.

Maximum reimbursement adjusted by the amount of credit a government contractor is allowed to receive pursuant to the FFCRA and any other applicable credits allowed under Act

Applicable Contract Billing Rates

“reimburse at the minimum applicable contract billing rates not to exceed an average of 40 hours per week ”

- Agencies may argue that relief is only available where contract includes established billing rates and/or prices.
- Credible argument that contractors receiving lump sum payments can still seek reimbursement based on rates that are consistent with federal cost principles.

To Keep Employees in a Ready State

“any paid leave, including sick 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”

- Provision suggests that reimbursement applies to any payment made to keep employee in “a ready state,” i.e. ready to resume performance once crisis subsides, not just for sick leave related to employee having or caring for someone with COVID-19
- Agencies may require contractors to demonstrate the need to continue paying personnel in order to keep employees “in a ready state”

Government Approved Site

“employees or subcontractors cannot perform work on a site that has been approved by the Federal Government, including a federally-owned or leased facility or site, due to facility closures or other restrictions”

- Clause suggests that federally-owned or leased facilities are only examples of sites that are “approved by the Federal Government”
- Credible argument that relief is intended to extend beyond federal government facilities, including classified sites or other locations designated in contract.

Immediate Next Steps – “Big 3” Issues

1. Identifying COVID-19 driven events that delay or frustrate performance, increase the cost of performance, or otherwise harm the company
2. Preserving your rights, while continuing to perform
3. Seeking additional time, money, and/or extraordinary contractual relief when appropriate

Opportunities & Obligations for Recovery

- ***Don't Relinquish Your Rights*** While Trying to Benefit from CARES Act
 - Because CARES Act is discretionary, protect yourself with a backup plan.
- Which FAR clause governs which impact(s)?
 - Was the Action Caused by the Contracting Officer or its Agency?
 - FAR 52.242-15 – **Stop Work Order** – Standard furloughing/leave while in “standby”
 - FAR 52.243-[x] – **Changes Clause**
 - Changed place of performance/delivery? Changed timing of performance/delivery? Deductive change?
 - FAR 52.242-17 – **Government Delay Clause**
 - Gov't “Action” (directing contractor to quarantine, closing facility, etc.)
 - Gov't “Inaction” (delays or refusal to approve teleworking, delays in approving access or security clearance, etc.)
 - Was the Action Caused by a Different Agency, Foreign Gov't, or Local/State Gov't?
 - Excusable Delay – Schedule extension, but not directly compensable. Cost-type contract might be able to recover.
 - Might be a “change” if contract (1) requires you to comply, or (2) warrants lack of interference.

Steps to Take Right Now

- Send Notification Email to Contracting Officer
 - Seek additional time, money, and other contractual relief when appropriate
 - Begin the discussion of Section 3610, and how it applies
- Track & Document Employee Standby Hours (and other costs)
 - For example, set up several new charge codes to track compensable and non-compensable standby hours
- Communicate regularly with legal and business teams
- Identify potential changes, delays and/or other performance disruptions.
- Don't inadvertently “release” your rights to recover more in a Mod
- Continue to Perform

Questions?



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