



May 22, 2020

Mr. Kim Herrington, HQE
Acting Principal Director
Defense Pricing and Contracting
3060 Defense Pentagon, Room 3C958
Washington, DC 20301-3060

Subject: Comments on Draft DOD Section 3610 CARES Act Implementation Procedures

Dear Mr. Herrington:

On behalf of the Aerospace Industries Association (AIA), I am pleased to offer the following comments on the Department of Defense's (DOD) draft implementation procedures for Section 3610 of the CARES Act. Section 3610 is a critical acquisition tool to provide needed support for DOD's mission partners in the defense industrial base as we manage the financial and workforce effects of the global response to the COVID-19 pandemic. Implementing timely and efficient processes and equitable approaches to reimbursements under Section 3610 will help us to maintain a healthy, responsive, and competitive industrial base and workforce.

We appreciate DOD's efforts within the draft guidance to drive consistent implementation of Section 3610 across the Department, while preserving flexibility for dealing with the varied range of contracts, situations, and contractors, and we support DOD's stated desire to administer reimbursements authorized under Section 3610 of the CARES Act above the contract-by-contract level. We remain concerned, however, that the procedures as written would require the assembly and submission of information at a scope and scale that would deter 3610 reimbursement requests, fail to provide critical support in a timely manner if even pursued, and will likely result in inconsistent application and inequitable treatment across DOD that will have significant competitive implications for the defense industrial base.

We believe that DOD can achieve greater efficiency and equity, while still fulfilling statutory obligations, by leveraging existing competencies and authorities in the DCMA CACO/DACO network to administer Section 3610 reimbursement requests at an 'aggregated' (e.g., Division or Corporate level) to the maximum extent practicable. (We view this as consistent with the conceptual approach DOD took on CAS 412 and 413 Pension Harmonization in which DCMA performed company-level analyses and PCOs executed contract modifications.) Although the draft implementation procedures recognize the potential for an aggregated approach, the final version must clearly identify the roles and responsibilities of DCMA ACOs and PCOs in administering both contract-by-contract and aggregated requests, and delineate the requirements and documentation needed to support contract-by-contract versus aggregated requests.

AIA believes the following overarching recommendations are most critical for establishing an efficient Section 3610 reimbursement process:

1. Streamline the "affected contractor" determination process. To obtain an "affected contractor" determination, which is the first step towards being able to seek



reimbursement, the current draft guidance effectively requires collection of all the information necessary for submission of an invoice. This puts contractors at risk of expending significant time and money preparing detailed invoicing data only to find out that they have not met some preliminary hurdles to being eligible for potential Section 3610 reimbursement status. Also, if this determination is made on a contract-by-contract basis, it carries significant risk of inconsistent determinations across different contracts and customers, and even across contracts with the same customer. We recommend that CACOs be provided explicit authority to designate a contractor as “affected” at the corporate or business unit level, or in the event a PCO determination is needed at the contract level, require a smaller set of explanations than those currently required in paragraphs 5a and 5b of the checklist.

2. Leverage DACO/CACOs resident expertise to substantially reduce administrative burdens for contractors and PCOs. DCMA possesses much of the required information and knowledge to effectively oversee the application and composition of indirect costs rates as relevant to Section 3610 reimbursements. Further, DCMA and DCAA already regularly review relevant company policies and procedures pertinent to cost allocation and indirect costs and could readily accomplish any additional requirements in support of Section 3610 requests. AIA recommends that the final implementation procedures assign to DCMA the handling of cost allocation and indirect cost rate questions pertinent to Section 3610 reimbursements. Such direction is consistent with the FAR and government accounting practices and is necessary to ensure contractors follow CAS as well as their disclosure statements and practices.

In addition to these overarching comments and recommendations, we have provided line-in, line-out recommended changes and embedded comments and questions within the enclosed annotated draft overarching guidance, draft checklist, and draft checklist instructions. AIA also requests that, once these implementation procedures are complete, DOD revises prior Section 3610-related guidance, FAQ, etc. issuances accordingly and provides a singular comprehensive and aligned issuance of all Section 3610 implementation materials to avoid any potential conflicts and confusion. For example, we have recommended changes to DOD’s Class Deviation on Section 3610 implementation (see page 9 of our comments on the draft checklist) to align with the necessary flexibility surrounding credits provided in the draft implementation procedures and checklist.

Thank you for your consideration of our comments. Please do not hesitate to contact me directly with any questions.

Sincerely,

A handwritten signature in black ink, appearing to read "J. Luddy", is positioned below the word "Sincerely,".

John Luddy
Vice President, National Security Policy



Subject: AIA Comments on Draft DOD Section 3610 CARES Act Implementation Guidance

aia-aerospace.org

Page 3

Enclosed: 1. AIA Comments on 3610 DOD Draft Overarching Guidance
2. AIA Comments on 3610 DOD Draft Reimbursement Checklist
3. AIA Comments on 3610 DOD Draft Checklist Instructions

DRAFT

DoD Process for Section 3610 Reimbursement: Implementation Guidance

This overarching implementation guidance provides an overview of the key tenants of Section 3610, DFARS Class Deviation 2020-O0013 and other guidance published relevant to requests for reimbursement under this section. The attachments to this guidance provide instructions to contracting officers in support of the use of the Department of Defense (DoD) Checklist for Submission of Section 3610 Reimbursement Requests.

1. Background

Section 3610 of the Coronavirus Aid, Relief and Economic Security (CARES) Act (Pub. L. 116-136), enacted on 27 March 2020, authorizes, but does not require, contracting officers (COs) 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 COVID-19 national emergency. DFARS Class Deviation 2020-O0013 of 8 April 2020, created a new cost principle for the purpose of implementing Section 3610.

Commented [OR1]: DOD should specify that administrative efforts in support of requests for reimbursements under Section 3610 are allowable and reimbursable, to include prime contractor administration of subcontractor requests. We further recommend that the overarching guidance acknowledge the ability of a contractor to dispute an adverse determination of “affected contractor” status.

Commented [OR2]: The cognizant ACO, DACO or CACO should be included as to recognize they would be the recipient of ‘aggregated’ requests.

Commented [OR3]: The statutory definition should be incorporated to clarify that sick leave is eligible for reimbursement.

Commented [OR4]: Directly incorporating DOD’s definition of this term would be helpful.

2. Requests for Reimbursement

A. A contractor request for reimbursement must include sufficient documentation for the CO to make the “affected contractor” determination and support the requested amount of reimbursement. A contractor shall be considered an “affected contractor” for all contracts and programs where it has been provided instructions on billing COVID-19 impacts. The attached checklist describes types of information that will be needed to support a contractor’s request for reimbursement. The checklist is not all inclusive and additional more or less information may be requested. The CO must be able to determine that:

- i. The contractor has provided paid leave to its employees or subcontractor employees “to maintain a ready state, including to protect the life and safety of Government and contractor personnel,” due to the COVID-19 Public Health Emergency (PHE) declared on 31 January 2020;
- ii. The leave was taken between 31 January and 30 September 2020, and all costs for which the contractor requests reimbursement are incurred and paid prior to the date of the contractor’s reimbursement request;
- iii. The contractor has not been reimbursed for the same costs for which it is requesting reimbursement. If the contractor later obtains reimbursement for the same costs as those the contractor requests, or has received, under Section 3610 from any source other than Section 3610, the contractor shall notify the CO in writing immediately. In no event may a contractor be reimbursed more than once for the same expense, including via forgiveness of a Government-backed loan. Should the timing of the reimbursements coincide such that the contractor is unable to provide notification to the CO prior to establishment (via contract modification) or payment of a reimbursable amount under Section 3610, the contractor shall notify the CO and agree to execute a modification reducing the reimbursable amount by the amount of reimbursement provided by other means (e.g., paid by credits allowed under Division G of the Family First Coronavirus Response Act, CARES Act, or any other credit allowed by law associated with the COVID-19 PHE declared on 31 January 2020);
- iv. The leave was paid because the contractor’s employees or subcontractors could not perform work on a Government-owned; Government-leased, contractor-owned, or contractor-leased facility or site, approved by the Federal Government for contract performance, due to COVID-19-related closures or other restrictions;
- v. The employees or subcontractors were unable to telework because their job duties could not be performed remotely; and

Commented [OR5]: It should be recognized that a contractor is “affected” by default in the event the contractor has been instructed to invoice.

Commented [OR6]: Consistent with our comment on the checklist instructions, it may also be tailored such that less information is required.

Commented [OR7]: As applied to the prime contractor for subcontractor costs, the phrasing “incurred and paid” would appear to necessitate a contractor paying its subcontractors for Section 3610 costs prior to knowing whether the agency will exercise its discretion (rather than meeting an existing contractual obligation) to reimburse the costs. We recommend changing the wording from “incurred and paid” to “incurred or accrued.” (To the extent paragraph 2.A.ii is also read as applicable to a contractor’s costs vis-à-vis its own employees, the change is still appropriate.)

Commented [OR8]: Section 2.A.iii of the overarching guidance and Section 6 of the Checklist (as examples) express the correct perspective that credits should be applied to prevent reimbursement more than once for the same costs. Because of the inclusion of DFARS Class Deviation 2020-00013 in the representations, it is important to specifically reference in this paragraph that credits shall be applied in accordance with the FAR cost principle on credits, 31.201-5

Commented [OR9]: AIA recommends that “other restrictions” is expanded to explicitly include self-quarantining requirements related from exposure, travel, or being identified in the CDC high risk category.

DRAFT

- vi. The requested reimbursement does not result in a total of paid work and paid leave charges for any employee or subcontractor employee exceeding an average of 40 hours per week.
- B. A contractor may request reimbursement of Section 3610 leave costs on one representative affected contract, for a single contract, multiple contracts but not all contracts, or all contracts of an entire business unit , or an entire corporation/company, so long as the request satisfies all requirements in A, above.
- C. A contractor shall submit a request for reimbursement of Section 3610 paid leave costs to a CO. The DoD may choose to address any request for reimbursement at any level in any DoD Component for any reason, including administrative convenience.

Commented [OR10]: Overarching Comment:

AIA believes that the preparation and consideration of reimbursement requests, aggregated at the program, business segment, or contractor levels, offers a valuable opportunity to streamline Section 3610 reimbursements for both contractors and the government. However, there may be circumstances where further aggregation increases the administrative burden, adding time and expense to a relatively straightforward reimbursement request with no perceived benefit. Aggregation determinations need to be made in coordination with contractors, and additional guidance and oversight provided to help ensure desired efficiencies are achieved.

Using Representative Contracts for Efficiencies in Reimbursements:

Separately, as an administrative convenience, it would benefit the entire process and relieve significant administrative burden if this section provided for cost recovery on fewer representative contracts. This concept is not unheard of, as CAS 9903.306(f) provides for settling cost impacts related to CAS issues, "Whether cost impact is recognized by modifying a single contract, several but not all contracts, or all contracts, or any other suitable technique is a contract administration matter."

DRAFT

3. Availability of Funds

Any reimbursement under Section 3610 is subject to the availability of appropriations. Any funds that are otherwise legally available for use under the contract may be used to fund Section 3610 reimbursement under that contract. Section 3610 adjustments need not be funded with only CARES Act appropriations.

Allocation of funds for reimbursement under Section 3610 is solely at the discretion of DoD, subject to the terms of the appropriation. If no funds are made available for reimbursement of Section 3610 paid leave costs, no reimbursement can be made. Should funds subsequently be made available, the contractor may resubmit any unanswered or previously declined requests provided that the initial request was previously determined to be valid, but declined solely due to the unavailability of funding.

The manner in which any future appropriation is allocated or made available for reimbursement of the Section 3610 leave costs of any particular contractor is to be determined.

Commented [OR11]: Such recourse should be acknowledged if appropriations are made available for requests previous denied on the basis that appropriations were unavailable.

DRAFT

DRAFT

4. Determination of Eligibility For and Amount of Reimbursement

As specified in DFARS Class Deviation 2020-O0013, reimbursement of a contractor's paid leave costs under Section 3610 requires that the CO establish in writing that the contractor is an "affected contractor." A determination and findings are not required. The determination of "affected contractor" status must be adequately documented, supported by the documentation described in 2.A. above, and included in the contract file along with the contract modification that creates the COVID-19 line item and the funding document. The preamble to the modification might say, "Based on my determination that the contractor is an 'affected contractor' within the meaning of DFARS 231.205-79 (Class Deviation 2020-O0013), the contract is modified as follows:"

Based on review of the information in the contractor's request for reimbursement, the criteria in Section 3610, and the attached checklist, and after the CO has determined the contractor to be an affected contractor, the CO shall determine the amount of reimbursement. The CO shall note in the contract file and/or in the contract modification their reliance on the contractor's representation that the information submitted is accurate. The CO may require the contractor to provide any additional information necessary to assess eligibility under Section 3610, to verify the accuracy and allocability of incurred costs, and that the contractor is not paid or reimbursed for the same costs via any other source. The CO shall determine and document the rationale for the amount of reimbursement, including any limitation due to available funding. In no event shall the reimbursement include profit or fee on paid leave costs under Section 3610.

The contract modification should cite Section 3610 of the CARES Act as authority for the modification.

Regardless of the type of contract, the Section 3610 contract modification may create a firm-fixed price (FFP) line item for reimbursement to allow the contractor to immediately invoice for the full FFP of the line item.

5. Invoicing

The "Invoice 2in1" fixed price service only, combined invoice, and acceptance document in Wide Area Workflow (WAWF), should be used to submit the request for payment under Section 3610. Additional information on structuring modifications and invoicing are available at: Implementation Guidance for Section 3610 of the Coronavirus Aid, Relief, and Economic Security Act, 9 April 2020.

ATTACHMENTS:

1. DoD Checklist for Submission of Section 3610 Reimbursement Requests
2. Instructions for the DoD Checklist for Contractor Requests for Section 3610 Reimbursement on FAR-based Contracts

Commented [OR12]: This section should expressly state DOD's intent to allow for interim billing and clarify how this process will work such that contractors do not need to wait until September 30, 2020 when all costs are known.

Commented [OR13]: This intent of this should be clarified or the sentence should be removed as it is inconsistent with the following sentence that requires a determination of "affected contractor" status.

Commented [OR14]: The guidance is not clear as to how fee should be removed from submitted costs. There needs to be clarity on how fee/profit should be removed from T&M and FFPLOE rates. We suggest that the guidance explicitly reference proposed/bid rates as the reference for fee removal where possible.

Commented [OR15]: On a cost-plus contract, the Section 3610 reimbursement that a contractor can properly invoice may be ongoing or iterative throughout the period covered by the CARES Act. Establishing and negotiating a new fixed-price CLIN for the contract, along with any applicable clauses, for this limited purpose would appear to be both unnecessary and inefficient.

DRAFT

DoD Checklist for Submission of Section 3610 Reimbursement Requests

If a contractor submits a request for Section 3610 reimbursement at the corporate office level, contracting officers will need to determine the extent to which the data specified below must be included with the request for Section 3610 reimbursement.

1. Contractor identification:

- a. Contractor Name: _____
- b. Contractor address: _____

- c. Contractor CAGE and Tax ID Number _____
(All submitted in request) _____

2. Cognizant Government organizations:

Contractor requests for Section 3610 reimbursement should be provided to the cognizant contracting officer administering contracts.

3. Contractor organization:

- a. Is the contractor a subsidiary, division, segment, or otherwise affiliated with another company?

Yes _____ No _____

If yes, the contractor must exclude any paid leave costs included in any other requests for reimbursement. Provide a brief description of the corporate structure and how (subsidiary, division, etc.) requests will be submitted.

- b. Is the contractor submitting Section 3610 reimbursement requests to other contracting officers or Federal Agencies?

Yes _____ No _____

If yes, the contractor must identify all Section 3610 requests being submitted.

Commented [OR1]: This section requires an explanation of the company entity structure. While it may be interesting, it provides little insight into costs or their allocation, and how unrelated requests from other corporate entities will be handled. This requirement should only be applied as necessary when an affiliated entity is somehow related to the reimbursement request.

DoD Checklist for Submission of Section 3610 Reimbursement Requests

4. Contract number(s), task orders, delivery orders, and any other agreements (if applicable):

The contractor should list all DoD contract numbers/order numbers/agreements, etc., and all contracts/orders/agreements, etc., with other Federal Agencies under which the contractor is seeking Section 3610 reimbursement. Each Section 3610 reimbursement request should include the period of performance for each contract/order/agreement, etc., under which the contractor is requesting Section 3610 reimbursement, as well the applicable Product/Service Code(s). The list should be sortable by agency, buying activity, ACO/DACO/CACO/PCO, DUNS number, and CAGE code. Identify the contractor's non-Government commercial work over the period covered by the Section 3610 reimbursement request, and describe the allocation and method of allocation of COVID-19 paid leave costs between Government and commercial customers.

Commented [OR2]: These elements appear to necessitate collecting and reporting for every request for reimbursement a complete listing of all other customers, contracts, tasks orders and other agreements under which Section 3610 reimbursement is being (or may later be) sought without any requirement of relevance to the request at issue. In addition to the administrative burden, this provision could not be complied with across unclassified and classified activities. This could also be clarified such that the listing is limited to requests that may duplicate the costs for which the submitted request is seeking reimbursement.

Commented [OR3]: There is no need for this information, as the contractor's business base and allocation methods are already well known to DCAA/DCMA.

5. Section 3610 Circumstances Narrative and Information:

a. The contractor should provide a narrative identifying the circumstances that impacted paid leave cost and performance under each DoD contract/order for which Section 3610 reimbursement is requested as a result of the COVID-19 national emergency. At a minimum, the narrative should include:

- An explanation as to why Section 3610 applies;
- Identification of facility closures or restrictions that precluded employees from reporting to their normal work location(s), including closure/restriction date range(s) and specifics;
- Identification of all employees who could not telework because their job duties could not be performed remotely; and
- Identify the specific circumstances applicable to each contract/task order/delivery order/etc., or any other agreement(s) under which the contractor is requesting Section 3610 reimbursement. The COVID-19 Paid Leave request for information may include justifications that vary by location, program, contract, etc.

Commented [OR4]: Consistent with our comments on Paragraphs 3b and 4 above, this should be clarified such that requested data only relates to the specific reimbursement request (at whatever level that request is presented). Specific identification of the circumstances giving rise to individual requests should not need to be at the aggregate level and instead should be specific to the requested reimbursement. Further, this paragraph should be revised to reflect that contractors are permitted to make these statements at the program level (in addition to contract/order level), if the request is aggregated at that level.

b. COVID-19 Paid Leave impact on contract cost or pricing. At a minimum, the contractor should provide the following information for each affected contract/order/etc.:

- A full description of the methodology the contractor used to develop the amount requested for reimbursement under Section 3610;

Commented [OR5]: Aside from employees that need to perform their work in a particular physical setting, did not have required IT capability to work under cybersecurity requirements, or were too sick to work, it should be acknowledged that there are other reasons for an employee not being able to work remotely or telework; one of many examples would be when an employee is a sole caregiver of multiple children, schools are closed, and there is not any childcare available.

Commented [OR6]: Consistent with our overarching recommendation, these elements pertaining to rates/cost allocation/accounting practices should be assigned to DCMA.

DRAFT

DoD Checklist for Submission of Section 3610 Reimbursement Requests

- A description of how the contractor developed appropriate rates and what the rates include. Appropriate rates can include labor rates, overhead, and G&A, but may not include profit or fees;
- Financial records used in developing the COVID-19 Paid Leave request for reimbursement and whether financial records were audited;
- Current status of contractor's accounting system for Government contracting purposes: Approved _____ Adequate _____ Not evaluated _____ Not Applicable _____
Disapproved _____ Identified Deficiencies (List):

- Description of the contractor's normal accounting treatment of leave costs (policies and procedures, indirect pools/allocation bases, disclosure statements, etc.);
- The contractor's company-specific guidance on COVID-19 Paid Leave; and
- Adequate data, documentation, and information to support the requested Section 3610 reimbursement (provided in electronic format whenever possible).

Commented [OR7]: The Guidance should provide that the treatment of leave cost, ordinarily treated as an indirect cost, as a direct cost for purposes of 3610 reimbursement will not be deemed a violation of CAS 402 or a change in accounting practice. Otherwise, contractors should comply with their established and/or disclosed cost accounting practices.

DRAFT

DRAFT

DoD Checklist for Submission of Section 3610 Reimbursement Requests

- c. Prime contractor's COVID-19 Paid Leave for direct and indirect employees:
- Identify eligible hours (those hours meeting the criteria identified in DFARS 231.205-79(a)(1)(ii) under Class Deviation 2020-O0013) for each affected contract/order/etc., by labor category/skill level by pay period, not to exceed 40 hours/week/employee for full-time employees.
 - o Part-time employees are limited to their average hours typically worked per week (prior to the COVID-19 pandemic).
 - o Note that if reimbursement is requested for employees who are typically charged indirectly, the contractor should provide a detailed explanation of how each individual indirect employee meets the criteria addressed in DFARS 231.205-79(a)(1)(ii). Further, the contractor must explain how obtaining reimbursement for these indirect employees' paid leave under Section 3610 will not result in a duplication of costs. In most cases, the administrative burden associated with taking indirect employee "paid leave" charges, allocating these charges across all contracts, and crediting the associated indirect leave pools to ensure there is no double counting of these costs would benefit neither the contractor nor the Government.
 - Provide the names of all employees for whom the contractor is requesting reimbursement for COVID-19 Paid Leave, and the COVID-19 Paid Leave hours for which reimbursement is requested:
 - o By labor category and skill level;
 - o Average hours worked, by employee, by contract/order/etc., for the three months prior to the declaration of the COVID-19 national emergency; indicate whether each employee is direct (assigned to a single contract/order); direct supporting multiple contracts; or indirect;
 - o For employees for whom the contractor is seeking reimbursement for COVID-19 Paid Leave, any hours actually worked during the period for which reimbursement is sought and what the contractor charged the Government for the employee's hours worked;
 - o ~~List of annual leave hours or equivalent leave taken by employees for whom the contractor is seeking Section 3610 reimbursement during the claimed period; and~~
 - o ~~List of sick leave hours or equivalent leave taken by employees for whom the contractor is seeking Section 3610 reimbursement during the claimed period outside of COVID-19 Paid Leave (e.g., maternity leave, extended medical leave);~~
 - o ~~The contractor shall provide summary level documentation, such as contractor human resources certifications, to provide evidence of an impacted employees eligibility for paid leave reimbursement under CARES Act Section 3610. Documentation shall not include medical information or other sensitive personally identifiable information (PII);~~

Commented [OR8]: We are unclear of the implication or meaning of this statement and suggest it be removed

Commented [OR9]: Recommend use of unique employee identifier information that is not subject to privacy laws or would otherwise put at risk personal information of affected employees.

Commented [OR10]: The labor category and skill level of the employee is unnecessary because the costs to be reimbursed must be actuals (see bullet "e" below) not based on the labor category or skill level rates. These data elements should be deleted.

Commented [OR11]: Providing 3 months of historical time charging prior to COVID-19 by sales order will be administratively burdensome. New employee starts, rotational assignments, shift between program workloads, and new program start-ups, will all be variables in the data that will require additional documentation, review, and explanation and provide no benefit. This will be further skewed by the multitude of Federal Holidays in November, December and January.

Commented [OR12]: This information is not relevant for the purposes of determining reimbursements under Section 3610, as an employee's paid leave balance need not be exhausted for leave costs to be reimbursable under Section 3610 and it would require the disclosure of medical and sensitive PII. Such information should not be required for the prime contractor submissions to DOD, nor subcontractor submissions to prime contractors. AIA recommends revising as suggested.

DRAFT

DoD Checklist for Submission of Section 3610 Reimbursement Requests

- d. Average sick leave hours budgeted for and included in any forward pricing for the period claimed for Section 3610 reimbursement, to assist the Government in determining how much sick leave is already included in indirect rates. For firm-fixed priced (FFP) contracts, contractors must remove sick leave costs that are included in the indirect rates that were used to price the FFP contract. Contractors shall ensure that any COVID-19 Paid Leave costs requested for reimbursement under Section 3610 is in addition to or outside of established policy or practice or collective bargaining agreement leave amounts. Contracts may not be reimbursed for COVID-19 Paid Leave costs for salaried employees to the extent that the salaried employee is paid whether they are working or not.

Commented [OR13]: "Sick Leave" Exclusion

This exclusion appears to be based on several mistaken assumptions and should be deleted. First, the statute plainly permits reimbursement for "sick leave," which is a type of leave ordinarily provided for in established policies and collective bargaining agreements. Second, there is no potential duplication of costs in this scenario, as FPRPs and billings rates were established prior to the pandemic and did not take into account the additional COVID-19 imposed impacts and restrictions. Third, the negotiation, finalization, and application of indirect costs is part and parcel of what is already overseen by DCMA. It does not require special emphasis and burden in this situation, nor would individual PCOs be well-positioned to assess a contractor's compliance with CAS, its disclosure statements, and established accounting practices and empowered to make such decisions.

Commented [OR14]: Salaried Exclusion:

Any employee (whether paid on a salary or on an hourly basis) is not "working" when they are utilizing "paid leave." The clear purpose of Section 3610 is to reimburse contractors for employees who are on paid leave due to COVID-19-related restrictions. AIA recommends removing this provision.

DRAFT

DRAFT

DoD Checklist for Submission of Section 3610 Reimbursement Requests

- e. Actual paid labor rates. The contractor shall provide the actual, unburdened hourly rates being paid to all personnel for whom the contractor is requesting COVID-19 Paid Leave reimbursement under Section 3610. Upon the Government's request, contractors must provide payroll records to the contracting officer to support the labor rates included in the request for Section 3610 reimbursement.

Commented [OR15]: This is an unnecessary burden on both contractors and PCOs if the contractor has approved accounting and billing systems, as the contractor would follow its existing systems and approach for Section 3610 billings for Section 3610 invoices as any other Government contract. In addition, PII in payroll records would not be appropriate for broad distribution to individual PCOs.

DRAFT

DRAFT

DoD Checklist for Submission of Section 3610 Reimbursement Requests

- f. The contractor shall identify the Forward Pricing Rate Proposal (FPRP), Forward Pricing Rate Agreement (FPRA), or DCMA Forward Pricing Rate Recommendation (FPRR), and provisional billing rates as applicable, in place covering the period of time during which it is requesting Section 3610 reimbursement.
- The contractor must explain and document how it developed the applicable indirect rate(s) prior to the COVID-19 public health emergency declaration on 31 January 2020;
 - The contractor must show the calculations it used to remove the indirect employees' paid leave charges included in its Section 3610 reimbursement request from its indirect rate calculation; and
 - The contractor must provide the revised indirect rate(s).

Commented [OR16]: Contractors are experiencing indirect cost increases and decreases for various COVID-19 related issues (and other issues). This is not limited to paid leave as applies to Section 3610. Accordingly, contractors will not likely know, at the time of seeking reimbursement, the net impact on indirect rates. Guidance should permit contractors to bill 3610 costs without this level of detail as the certification already requires that credits, if applicable and once known, will be adjusted.

Further, consistent with our overarching recommendation, DCMA CACOs have the responsibility for Indirect Rates evaluation, management and negotiation in accordance with the DCMA existing cognizance in this area. Assigning Indirect Rate analysis/evaluation/determinations to a PCO is duplicative of existing DCMA responsibilities and unnecessarily burdensome for PCOs.

DRAFT

DRAFT

DoD Checklist for Submission of Section 3610 Reimbursement Requests

- g. Subcontract labor impacts. For all subcontractor COVID-19 Paid Leave the prime contractor is requesting reimbursement for under Section 3610, the prime contractor must provide the same supporting information for the subcontractor(s) (separated by subcontractor) as required from the prime contractor, including a list of all affected DoD and non-DoD Federal contracts and subcontracts, and the subcontractor's commercial work in total over the period for which Section 3610 reimbursement is being requested. If the subcontractor does not routinely provide such information to the prime contractor due to competition or proprietary data concerns, the subcontractor should provide the amount of Section 3610 reimbursement it is requesting to the prime contractor for inclusion in this checklist and submit all other supporting information directly to the contracting officer under separate cover. If the subcontractor provides the supporting information to the prime contractor, the prime contractor is responsible for performing the same type of analysis that the contracting officer is performing on the prime contractor's request for Section 3610 reimbursement. The prime contractor must not comingle subcontractor information with its own. Subcontractors must make the same representations to the Government as the prime contractor.

Commented [OR17]: Does DOD plan to issue a contract clause? The DFARS Class Deviation only established this as a new cost principle - there is technically no corresponding contract clause or subcontractor flowdown requirement. The supplemental guidance states the contractor can seek reimbursement and can include paid subcontractor leave, but there is no requirement itself in the guidance as to how to flow this to subcontractors. What if a prime decides not to request reimbursement? If a subcontractor requests reimbursement, but the prime has chosen not to, how does that work?

Commented [OR18]: Applying the overly burdensome data collection and assessment requirements across the breadth of suppliers presents a potentially insurmountable administrative burden. Without some greater level of coordination, this could also result in substantial duplication of effort by the many contractors who might be working with a particular subcontractor.

Commented [OR19]: As the prime contractor is responsible for all documents/data justifying the claim, it will be challenging for contractors to substantively account for data/documents that are required, but submitted directly to the contracting officer from a subcontractor. Will there be further communication between the contracting officer and prime contractor when additional documentation is needed or will that communication occur between the contracting officer and subcontractor only. If so, will the prime contractor be made aware of the status?

Commented [OR20]: Requiring each prime contractor to perform this analysis will involve substantial duplication of effort for those subcontractors that work with multiple prime contractors.

DRAFT

DoD Checklist for Submission of Section 3610 Reimbursement Requests

- h. The contractor should submit a spreadsheet (or other format, as directed by the contracting officer) showing its calculation of the requested Section 3610 reimbursement amount, traceable to the supporting data submitted above.
- i. The Truth in Negotiation Act (TINA) applies to non-commercial contracts over the statutory threshold. TINA is handled at the contract level and requires the certification at FAR 15.406-2, Certificate of Current Cost or Pricing Data, for the cost or pricing data submitted in support of the request for reimbursement under Section 3610. If a contractor's request for Section 3610 reimbursement includes both FAR Part 15 and FAR Part 12 work ~~and the combined amount exceeds the TINA threshold, contracting officers will work with their legal counsel to determine whether~~ TINA certification is required for the FAR Part 15 work only.

6. Identification of other credits that will reduce relief provided under Section 3610:

a. Paycheck Protection Program, Section 1102 of the CARES Act

Has the contractor applied for relief under this program? _____ Yes _____ No

If yes, what was the loan amount requested? _____

What was the loan amount received? _____

Does the contractor anticipate meeting the conditions for loan forgiveness identified in Section 1106 of the CARES Act? _____ Yes _____ No

If yes, the loan forgiveness amount must be excluded from any request for reimbursement under Section 3610.

If no, explain why not and provide a copy of the certification already required by Section 1106 of the CARES Act that the contractor submitted to the lending institution:

b. Tax credits under Division G of Pub. L 116-127

Does the contractor anticipate receiving tax credits under Division G of Pub. L 116-127? _____ Yes _____ No

If yes, what is the anticipated amount of the tax credit? _____

c. Any other credit allowed by law (including state or local laws) that is specifically identifiable with the public health emergency declared on January 31, 2020, for COVID-19.

Specify the provision: _____

Commented [OR21]: AIA appreciates the flexibility provided regarding credits at the time of submission. We believe that the Class Deviation 2020-00013 needs to be revised as follows to reflect this:
DFARS 231.205-79 CARES Act Section 3610 - Implementation
(a)(2): "The maximum reimbursement authorized by section 3610 shall be reduced by the amount of credit a contractor ~~is allowed~~ receives pursuant to division G of the Families First Coronavirus Response Act (Pub. L. 116-127) and any applicable ~~and related~~ credits a contractor ~~is allowed~~ receives under the CARES Act (Pub. L. 116-136) or other credit allowed by law that is specifically identifiable with the public health emergency declared on January 31, 2020 for COVID-19."

(b)(6): "Costs made allowable by this section are reduced by the amount the contractor ~~is eligible to~~ receives under any other Federal payment, ~~or related~~ allowance, tax, or other credit allowed by law that is specifically identifiable with the public health emergency declared on January 31, 2020, for COVID-19, such as the tax credit allowed by division G of Public Law 116-127."

Commented [OR22]: It is unclear what laws are envisioned other than the CARES Act and Families First Coronavirus Response Act, especially at the state and local level. Also, it is unclear why this was expanded beyond the express scope of Section 3610 limitations. AIA recommends amending this paragraph as well as the DoD Class Deviation 2020-00013 to remedy the inconsistency.

DRAFT

DoD Checklist for Submission of Section 3610 Reimbursement Requests

Specify the amount of credit anticipated: _____

7. Representations

- a. All information has been submitted to support this request for reimbursement in accordance with DoD Class Deviation 2020-O0013. _____ Yes _____ No

If no, explain: _____

- b. The contractor's representations and certifications in the System for Award Management (SAM) are current, accurate, and complete. _____ Yes _____ No

If no, explain: _____

- c. This request for reimbursement is made in good faith, and the supporting data is accurate and complete to the best of my knowledge and belief. _____ Yes _____ No

If no, explain: _____

Commented [OR23]: This should incorporate the "to the best of my knowledge" standard, consistent with the request for equitable adjustment certification in DFARS 252.243-7002.

(Official's name) (Title)

(Title) (Date)

DRAFT

DRAFT

Instructions for the DoD Checklist for Contractor Requests
for Section 3610 Reimbursement on FAR-based Contracts

Purpose:

These contracting officer instructions are designed to expand on and explain the DoD Checklist for contractor submission of Section 3610 Reimbursement Requests. The checklist is a tool designed to assist contractors in identifying the information that will be needed to evaluate a COVID-19 Paid Leave request for reimbursement as authorized by Section 3610 of the CARES Act. While the checklist and DFARS Class Deviation 2020-O0013 only apply to FAR-based contracts, they may be used as a guidance when completing a request for reimbursement under an other transaction (OT) authority; however any request for reimbursement under an OT shall be submitted separately from any request for Section 3610 reimbursement under a FAR-based contract. Due to the complex issues surrounding a request for reimbursement under Section 3610 and DFARS Class Deviation 2020-O0013; the uniqueness of contractor accounting policies and procedures; and the creation of a COVID-19 Paid Leave cost category; the checklist is not intended to be all-inclusive and contracting officers may require additional information in making their determinations.

Commented [OR1]: The checklist also should not be viewed as a minimum set of requirements and this preface should be revised to specify it may be tailored as appropriate.

Overarching Themes:

- The authority provided by Section 3610 is a permissive authority and the contracting officer is not required to reimburse any or all of the requested paid leave costs;
- Any reimbursement under Section 3610 is subject to the availability of funds;
- The contracting officer has sole discretion to make decisions on a contractor's affected status and the amount of any Section 3610 reimbursement;
- Contractors must not be reimbursed (or otherwise paid) twice for the same costs;
- The contracting officer has the right to determine the amount reimbursed under Section 3610 and at what level (e.g., contract, division, segment, company, corporate) the costs will be reimbursed;
- Contractors must segregate COVID-19 Paid Leave costs in their books and records;
- Contractors may not request, and shall not receive, Section 3610 reimbursement for any hours related to employees a contractor has furloughed or laid off; such hours must be excluded from any request for Section 3610 reimbursement;
- Paid leave reimbursement under Section 3610 excludes any profit or fees; and
- Contracting officers shall document any COVID-19 Paid Leave reimbursement decisions in a memorandum for record (MFR). A template that contracting officers may use to complete the MFR will be provided separately, but this template should be tailored to the specific circumstances and is not a substitute for a contracting officer's independent thought or reasoned judgement.

Commented [OR2]: As written, this leaves open the possibility for inconsistent and inequitable administration of CARES Act reimbursement claims. We recommend the addition of direction/guidance for Contracting Officers to identify and provide notice to potential affected contractors regarding 1) the extent of funding available to reimburse CARES Act costs; and 2) objective criteria the contracting officer will apply in order to equitably exercise discretion to pay claims, particularly in the event of competing claims where funding is not sufficient to pay all of otherwise reimbursable costs.

Commented [OR3]: This must be clarified/limited as appropriate for the various types of contracting officers.

Commented [OR4]: Does this provision also apply to subcontractors? If a subcontractor or supplier to a prime furloughed its employees, is the supplier then not allowed to request for Section 3610 reimbursement?

The latter part of the provision appears to indicate that a contractor may request for reimbursement, but the furloughed time will need to be removed from the request. Is this application correct and does it equally apply to suppliers supporting the prime? Is the prime responsible for confirming that those hours submitted by the supplier hours submitted do not include furloughed time?

Further, does this restriction apply if DOD reduced the manpower of a program and there were covered hours/costs prior to the reduction of the contract?

DRAFT

Instructions for the DoD Checklist for Contractor Requests
for Section 3610 Reimbursement on FAR-based Contracts

Early Engagement Discussions:

If a contractor contacts the contracting officer about its intent to submit a request for reimbursement under Section 3610, the contracting officer may decide that early engagement discussions with the contractor would be beneficial. The following could be discussed:

- The requirement that the contractor must be classified as an affected contractor to receive reimbursement under Section 3610, and that the contracting officer will make this determination;
- What can and cannot be included in COVID-19 Paid Leave in a request for reimbursement under Section 3610;
- Frequency of the Section 3610 requests for reimbursement;
- Information required to support any Section 3610 reimbursement request; format for required information; and what information needs to be provided with the request;
- If the contractor does not intend to seek Section 3610 reimbursement on a single contract basis, the companies, segments, division, etc., that will be included in any requests;
- Where and how requests for Section 3610 reimbursement should be submitted;
- How appropriate rates will be defined and calculated (Section 3610 references “minimum applicable contract billing rates,” due to limited application, the DFARS Class Deviation applies the term “appropriate rates”); and
- How requested COVID-19 Paid Leave reimbursement will be allocated to Government and other (i.e., commercial) contracts.

Until the contractor submits a request for reimbursement, the contracting officer can neither determine that the contractor is an affected contractor eligible for Section 3610 reimbursement, nor calculate the amount of any Section 3610 reimbursement. Early engagement may reduce the administrative burden to both the contractor and the contracting officer. These conversations between the contractor and the contracting officer should not be construed as a substitute for a written decision by the contracting officer.

Government Coordination:

Contracting officers should coordinate with, or request assistance from, available resources such as the Defense Contract Management Agency (DCMA) and the Defense Contract Audit Agency (DCAA) to help determine whether the contractor is an affected contractor and evaluate the contractor’s request for Section 3610 reimbursement. Furthermore, contracting officers need to evaluate the circumstances of the contractor’s reimbursement request and decide how to proceed in terms of the level-type of settlement (contract, contractor, corporate, etc.). This decision may

Commented [OR5]: The guidance should encourage, not merely permit, early engagement discussions, particularly as to “affected contractor” status and the availability of funding.

Commented [OR6]: Consistent with our overarching recommendation, a fully supported request for payment should not be necessary for at least a preliminary determination of “affected” contractor status.

Commented [OR7]: While we recognize that each reimbursement request will contain its own level of complexity, we are concerned that a reasonable time frame for CO evaluation is not identified here. Absent timeframes, there will may be inequitable resolutions based on the complexity of requests as available appropriations are depleted.

DRAFT

Instructions for the DoD Checklist for Contractor Requests
for Section 3610 Reimbursement on FAR-based Contracts

need to be elevated/coordinated with other Federal agencies (both DoD and non-DoD) receiving Section 3610 reimbursement requests from the contractor.

Checklist Questions:

Questions 1 through 4:

The answers to questions 1 through 4 prompt the contractor to identify the who, what, where, when, and why of the request for Section 3610 reimbursement. This information is critical to the contracting officer's determination as to whether the contractor is an "affected contractor." If the contracting officer determines that the contractor is an affected contractor, the contracting officer will need to determine the appropriate reimbursement amount using the information provided in response to the remainder of the checklist. If the contracting officer determines that the contractor is not an affected contractor, no further evaluation by the contracting officer is necessary but the determination that the contractor is not an affected contractor, and the rationale therefore, shall be documented in the contract file.

Question 5:

The answers to Question 5 prompt the contractor to detail how the contractor developed its appropriate rates and the records used to develop those rates. Furthermore, the status of the contractor's accounting system may impact the amount of data needed by the contracting officer and the ability of the contracting officer to rely on contractor provided data.

The definition of appropriate rates and what is included in those rates is critical to the contracting officer's determination of the costs to be reimbursed. The contracting officer will use this information to determine whether the contractor has appropriately defined its submitted rates and whether that definition complies with Section 3610, the DFARS Class Deviation, and guidance issued. The contracting officer has sole discretion to determine the appropriate rates and the composition of those rates. Finally, this section of the checklist requires the contractor to identify any other requests for COVID-19 Paid Leave reimbursement under Section 3610.

In addition, the answers to Question 5 should assist the contracting officer in evaluating the eligibility of the number of COVID-19 Paid Leave hours requested by the contractor to reimburse paid leave hours provided to individual employees and the actual calculation of the appropriate rates. Paid leave is capped at no more than an average of 40 hours per week (full-time) for eligible employees. There may be instances in which an employee could perform some but not all of their duties. In those instances, the contracting officer needs to know what they were working on to ensure that the contractor excludes any work-related hours from COVID-19 Paid Leave requests. Furthermore, employees may have taken leave unrelated to COVID-19 Paid Leave and those hours should be excluded from any Section 3610 reimbursement. Those hours are already being reimbursed through the appropriate indirect rates.

DRAFT

Instructions for the DoD Checklist for Contractor Requests
for Section 3610 Reimbursement on FAR-based Contracts

The contractor's justification and explanation for requesting Section 3610 reimbursement will vary depending on the labor category and the type of employee (senior executive/management/supervisor/employee, direct vs. indirect, etc.). For example, some employee job responsibilities can be performed using telework. For those employees, the contracting officer needs to understand the contractor's explanation as to why they could not telework.

Prime contractors requesting reimbursement for subcontractor COVID-19 Paid Leave should obtain the same information about the subcontractor as they provide to the contracting officer and evaluate that data. It is the prime contractor's responsibility to do so. However, in some instances, the contracting officer may have to work with the subcontractor directly.

Under no circumstances should prime contractors or subcontractors be reimbursed more than once for COVID-19 Paid Leave costs. Therefore, neither prime contractors nor subcontractors shall include hours/costs in a Section 3610 reimbursement request if funding or reimbursement has been, or will be, received for the same hours/costs.

Finally, the Truth in Negotiation Act (TINA) applies to non-commercial contracts over the statutory threshold. **If a contractor's request for reimbursement includes both negotiated and commercial government work and the combined amount exceeds the TINA threshold, contracting officers will work with their legal counsel to determine whether TINA certification is required.**

Question 6:

The answers to Question 6 help to identify potential credits or reductions that should be applied to the COVID-19 Paid Leave requests for reimbursement.

Question 7:

The contractor must sign its request for reimbursement at least at the Vice President level.

Commented [OR8]: Only the non-FAR Part 12 portion of the request should be subject to TINA (see recommended change at subparagraph 5i of checklist).

Commented [OR9]: This requirement is unnecessary and should be removed. First, what this means for who would execute and such a person's level within a company will vary considerably across contractors of various sizes and how they use titles. That effectively makes it meaningless when applied broadly. Second, it adds yet another burden on top of normal Government contract business practices, particularly for individual contract submissions, that has no commensurate impact on a contractor's responsibility for the accuracy of its representations, which already exists.