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May 22, 2020

Via email

Mr. Kim Herrington
Acting Principal Director, Defense Pricing and Contracting
Office of the Under Secretary of Defense
3000 Defense Pentagon
Washington, DC 20301-3000
Email: osd.dfars@mail.mil

**Re: Comments on Early Engagement Draft Department of Defense
("DoD") Process for Section 3610 Reimbursement**

Dear Mr. Herrington:

On behalf of the American Bar Association ("ABA") Public Contract Law Section ("Section"), I am submitting comments in response to the early engagement opportunity cited above. The Section consists of attorneys and associated professionals in private practice, industry, and government service.¹ The Section's governing Council and substantive committees include members representing these three segments to ensure that all points of view are considered. By presenting their consensus view, the Section seeks to improve the process of public contracting for needed supplies, services, and public works.

The views expressed herein are presented on behalf of the Section. They have not been approved by the House of Delegates or the Board of Governors of the ABA and, therefore, should not be construed as representing the position of the ABA.²

¹ Mary Ellen Coster Williams, Section Delegate to the ABA House of Delegates, and Scott Flesch and Douglas Mickle, members of the Section's Council, did not participate in the Section's consideration of these comments and abstained from the voting to approve and send this letter.

² This letter is available in pdf format at https://www.americanbar.org/groups/public_contract_law/resources/prior_section_comments/ under the topic "Acquisition Reform & Emerging Issues."

I. BACKGROUND AND INTRODUCTION

The Section commends DoD on providing the contracting community with continued guidance on implementation of Section 3610 of the Coronavirus Aid, Relief, and Economic Security (“CARES”) Act and the opportunity to respond in the face of this evolving pandemic, recognizing the critical need to support the Defense Industrial Base through expeditiously implementing Section 3610. Many of the provisions in the three documents contained in the Draft Guidance are welcome changes or supplements to prior guidance. The Section has carefully reviewed the Draft Guidance and provides comments and proposed revisions for DoD’s consideration to address Section concerns about several interpretive statements in the Draft Guidance and the DPC’s proposed process for both early engagement discussions and contracting officer processing of reimbursement requests.

II. COMMENTS

A. Comments Concerning Proposed Early Engagement Discussions.

1. The Section Encourages Earlier Discussions Regarding “Affected Contractor” Status and Available Funding. (Checklist Instructions and Reimbursement Checklist)

The Section appreciates the inclusion of Early Engagement Discussions in the Checklist Instructions and agrees that early engagement between contracting officers and contractors may reduce administrative burdens for both the Government and contractors and facilitate faster contracting officer approval and payment of requests for reimbursement. Because the Checklist Instructions expressly provide that a contracting officer cannot decide whether a contractor is an “affected contractor” until the contractor submits a completed, possibly certified, request for reimbursement, the early engagement provided here misses the opportunity to reduce administrative burdens and facilitate approval and payment of reimbursement requests. Given the significant information and supporting documentation required by the draft Reimbursement Checklist, and the internal contractor approvals and validation that are typically required for any submission subject to the Truthful Cost or Pricing Data Act (formerly known as the Truth in Negotiations Act and hereinafter referred to as “TINA”), we are concerned that such delay in determining whether a contractor is an “affected contractor” may result in the unnecessary expenditure of significant resources and time both by contractors preparing the quantum portion of a reimbursement and by contracting officers in reviewing this information.

We recommend revising the Early Engagement Discussions to allow a two-step process. Under this two-step process, the contractor could submit responses to the **Reimbursement Checklist** questions related to “affected contractor” status during Early Engagement Discussions.³ If the contracting officer determines, based on these responses, that the contractor

³ The draft Checklist Instructions state: “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.’” The accompanying draft Reimbursement Checklist, however, requests the core information necessary to determine “affected contractor” status in question 5(a), which directs contractors to describe the circumstances giving rise to their reimbursement

likely is an “affected contractor,” the contracting officer would apprise the contractor of this interim determination so that the contractor may then proceed to prepare and submit its request for reimbursement with the required supporting documentation, responses to all remaining Checklist Questions and, if required, a certification. If the contracting officer makes the interim determination that the contractor is not an “affected contractor,” then the contracting officer likewise would apprise the contractor. At this juncture, the contractor would advise if it determines it will not proceed further, enabling the contracting officer to discontinue review. Alternatively, if the contractor advises that additional information will demonstrate its “affected contractor” status, the contracting officer can prepare for a submission that addresses any questions from the interim determination and provides the additional detailed information contemplated by the remaining Checklist Questions. As noted below, this proposed preliminary determination would help the contracting officer and contractor conserve resources regardless of the determination made.

We recommend that the following bullet be added to the draft **Checklist Instructions** following the first bullet under Early Engagement Discussions:

- The contractor may request a preliminary, non-binding determination of “affected contractor” status based on responses to Checklist Questions 1-4, and such requests may be granted at the contracting officer’s discretion;

This change is consistent with the May 19, 2020 Executive Order on Regulatory Relief to Support Economic Recovery, which directs agencies to accelerate procedures for pre-enforcement rulings as to whether an entity’s conduct in response to the COVID-19 outbreak is consistent with statutes and regulations.⁴

We are similarly concerned that contractors may expend significant resources preparing reimbursement requests under contracts or programs for which the contracting officer has determined there is no funding available for Section 3610 reimbursements. We therefore recommend adding “the general magnitude of the contractor’s reimbursement request and the contracting officer’s current assessment of the availability of funding” to the list of topics for Early Engagement Discussions in the **Checklist Instructions**.⁵

The Section also notes that Section 3610 emphasizes agency discretion and permits using any funds for such reimbursements, including, potentially re-allocating O&M funds: ***“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***

request and to explain why Section 3610 applies. DoD should consider revising its draft Instructions Checklist to clarify that the questions underlying the “affected contractor” determination include question 5(a). Alternatively, DoD should consider reordering or renumbering question 5(a) making it question 4(b).

⁴ We recommend similar revisions to the Overarching Guidance below to de-couple the “affected contractor” determination from the analysis of the amounts requested.

⁵ We recognize that funding availability depends on numerous factors, including the amount of the contractor’s reimbursement request and the amount and type of funds that are available, which matters may not be fully known during Early Engagement Discussions, and that such communications cannot substitute for a full assessment when the contracting officer receives a reimbursement request.

modify the terms and conditions of a contract, or other agreement,” (emphasis added). We encourage DoD to re-evaluate whether the statute limits, as current DoD interpretive guidance suggests, or actually expands the pool of appropriations available for Section 3610 reimbursements, as suggested by the statutory text.

Nonetheless, we believe that early discussions of the potential availability of funds for Section 3610 reimbursements will assist both the Government and contractors by setting reasonable expectations and allowing both contractors and the Government to allocate resources accordingly.

2. The Section Recommends Addressing Disputes in the Draft Guidance. (Checklist Instructions)

The Draft Guidance does not address how to resolve a contractor’s disagreement with a contracting officer’s determinations for Section 3610 reimbursements. We believe that an efficient dispute resolution procedure is necessary to provide the emergency relief contemplated by the CARES Act. To that end, we recommend adding a paragraph to the Overarching Themes section of the **Checklist Instructions** noting that parties should try to resolve any disagreements about a contractor’s “affected contractor” status or the reimbursement amount under Section 3610 before any submission of a claim under the Contract Disputes Act. Claims, contracting officer’s final decisions, and appeals are lengthy processes that may stretch well beyond the COVID-19 crisis and undermine the CARES Act purpose of providing contractors and subcontractors, and their employees, with speedy relief.

To that end, consistent with FAR 33.204, agencies should be encouraged to settle disputes by mutual agreement at the contracting officer’s level if possible and, if a settlement is not achieved, by employing alternative dispute resolution processes, including those authorized before the Armed Services Board of Contract Appeals or the U.S. Court of Federal Claims. We recommend that the **Checklist Instructions** also note that the contractor may elect to submit a claim under the Contract Disputes Act if the parties are unable to informally resolve their differences. Our recommended revisions to Section 2 of the Overarching Guidance made to reflect this recommendation are provided in the next section of these comments.

3. The Section Recommends Separating the “Affected Contractor” Determination from the Examination of Costs. (Overarching Guidance).

We recommend that Section 2 of the **Overarching Guidance** be re-organized to clarify that the contracting officer must first find that the contractor is an “affected contractor” under DFARS 231.205-79 before determining whether the requested costs should be reimbursed. To do so, we recommend moving Sections 2.A.i., 2.A.ii., 2.A.iii. and 2.A.vi. to a new Section 2.B. Thus, after the contracting officer makes the determination under Section 2.A. that a contractor is an “affected contractor,” the contracting officer would then consider whether the costs claimed by the contractor meet the conditions for reimbursement under the revised Section 2.B.

We recommend that Section 2 be revised as shown in Attachment A.

B. The Section Recommends Modifying the Guidance to Clarify the Prime Contractor’s Responsibilities for Subcontractor Reimbursement. (Overarching Guidance, Reimbursement Checklist, and Checklist Instructions)

Section 3610 states that the Government “may” modify a contract to provide reimbursement of paid leave “a contractor provides to keep its employees or subcontractors in a ready state.” Given that Section 3610 uses the term “may,” DoD states that “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.” Further, “[t]he contracting officer has sole discretion to make decisions on a contractor’s affected status and the amount of any Section 3610 reimbursement.” At the same time, the Checklist Instructions state that “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.” As such, the Draft Guidance creates ambiguity and confusion concerning whether different standards apply to the evaluation of prime contractor and subcontractor reimbursement requests under Section 3610.

The Section recommends two primary measures to address responsibility for determining subcontractor reimbursement under Section 3610 and ensure reasonable subcontractor access to such reimbursement: (i) the Overarching Guidance, Reimbursement Checklist, and Checklist Instructions should be modified to clarify prime contractors’ responsibilities for subcontractor reimbursement requests; and (ii) the Government should clearly define the availability of reimbursement under Section 3610 to subcontractors at all tiers. The Section recommends changes to the Draft Guidance documents to address these measures as provided below.

1. The Section Recommends Changes to the Draft Guidance to Clarify Prime and Subcontractor Responsibilities.

Several provisions in the Draft Guidance raise questions as to a prime contractor’s obligations regarding a subcontractor request for relief under Section 3610. For instance, the Reimbursement Checklist and Checklist Instructions are unclear about the contractor’s responsibility and the Government’s ultimate responsibility to assess a subcontractor’s eligibility under Section 3610 when a subcontractor provides documentation directly to the contracting officer. Accordingly, the Section suggests that DoD clearly delineate the responsibilities between the prime contractor and contracting officer in reviewing subcontractor reimbursement requests under Section 3610:

a. Assessment of Subcontractor Ready State. (Overarching Guidance)

The Overarching Guidance states that a contracting officer must be able to determine whether “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.” See Overarching Guidance at p. 1, 2(A)(i). Question 5(g) of the Reimbursement Checklist further states: “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, ...” Based on this language, it is unclear whether it is the prime contractor’s obligation to determine a subcontractor’s “ready state,” or if the prime contractor is obligated to pass-through the information it receives for determination by the contracting officer. The Section recommends either that this responsibility be assigned to the contracting officer or that more definitive criteria be provided to the prime contractor.

b. Notification of Subsequent Overlapping Payments. (Overarching Guidance)

The Overarching Guidance also notes that the contracting officer must determine that a contractor has not been reimbursed for the same costs for which it is requesting reimbursement. *See* Overarching Guidance at p. 1, 2(A)(iii). This provision notes further that if the contractor later obtains reimbursement for the same costs as those being requested, it must notify the contracting officer in writing immediately to prevent double-reimbursement. The provision, however, is unclear as to a prime contractor’s obligation regarding notification and credit of subcontractor reimbursements for the same costs a subcontractor recovered under Section 3610. As above, either this responsibility should be assigned to the contracting officer or more definitive criteria should be provided to the prime contractor.

c. Evaluation of Ability to Telework. (Overarching Guidance)

The Overarching Guidance requires the contracting officer to determine whether employees or subcontractors were unable to telework because their job duties could not be performed remotely. *See* Overarching Guidance at p. 2, 2(A)(v). Again, the Guidance refers to the contracting officer’s obligations and does not clarify whether a prime contractor also is responsible for determining whether a subcontractor’s employees were unable to telework. Here too, either this responsibility should be assigned to the contracting officer or more definitive criteria should be provided to the prime contractor.

d. Verifying 40-Hour Maximum. (Overarching Guidance)

Finally, the Overarching Guidance requires the contracting officer to determine that 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. *See* Overarching Guidance at p. 2, 2(A)(vi). It is unclear whether a prime contractor also must verify this limitation for subcontractors and their employees. Either this responsibility should be assigned to the contracting officer or more definitive criteria should be provided to the prime contractor about its obligations.

2. The Section Recommends Changes to the Checklist Instructions to Clarify Prime and Subcontractor Roles.

The Section further recommends that the Checklist Instructions relevant to subcontractors be clarified to clearly delineate prime contractors’ roles and responsibilities for subcontractors’ reimbursement requests. *See* Checklist Instructions at 4 (setting forth instructions regarding Question 5).

a. Prime Contractor Responsibility for Information-Gathering. (Checklist Instructions)

The Checklist Instructions state that “[p]rime 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.” The instructions further state that “[i]t is the prime contractor’s responsibility to do so.” They leave unclear where the prime contractor’s responsibility to gather the information and evaluate it begins and ends. Consistent with the recommendations above, either this responsibility should be assigned to the contracting officer or more definitive criteria for information collection and evaluation should be provided to the prime contractor.

b. Subcontractor Submission of Information to the Contracting Officer. (Checklist Instructions)

The Checklist Instructions state that “in some instances, the contracting officer may have to work with the subcontractor directly.” One such instance no doubt includes submission of a subcontractor’s proprietary commercial or financial data directly to the contracting officer. The Checklist Instructions thus suggest that in such instances, the contracting officer will determine whether a particular subcontractor reimbursement request is merited and adequately documented. Consistent with the recommendations above, either this responsibility should be assigned to the contracting officer or more definitive criteria for information collection should be provided to the prime contractor.

c. Subcontractor Certification Regarding Double-Counting. (Checklist Instructions)

The Checklist Instructions state that “[u]nder no circumstances should prime contractors or subcontractors be reimbursed more than once for COVID-19 Paid Leave costs.” They further state that “subcontractors shall [not] include hours/costs in a Section 3610 reimbursement request if funding or reimbursement has been, or will be, received for the same hours/costs.” The Section recommends clarifying that the prime contractor may reasonably rely on the subcontractor’s certification that its request is proper.

d. Notification of Subcontractor Errors. (Checklist Instructions)

The Section further recommends clarifying the Checklist Instructions regarding a subcontractor’s obligation to notify both the prime contractor and the contracting officer of errors that surface after the fact.

3. The Section Recommends Changes to Harmonize Documentation Requirements for Subcontractors. (Reimbursement Checklist)

The Section also encourages DoD to revise the language in the Reimbursement Checklist that relates to subcontractor labor impacts to accurately reflect requirements that are more specific to subcontractors. *See* Reimbursement Checklist at 5 (setting forth instructions regarding Question 5).

**a. Subcontractor Supporting Documentation Same as Prime.
(Reimbursement Checklist)**

The Reimbursement Checklist states: “For all subcontractor COVID-19 Paid Leave the Prime Contractor is requesting reimbursement 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.” As drafted, this provision places an undue administrative burden on subcontractors that do not, in the regular course of their business, collect all of the cost information required under the Reimbursement Checklist. Consistent with the recommendations relating to small businesses below, this information should not be a barrier to subcontractors receiving the congressionally intended assistance simply because they do not have mature cost-accounting systems. Subcontractors should be afforded the flexibility to submit information in the form of actual business records sufficient to satisfy the contracting officer’s determination. The Section recognizes that a best practice for seeking relief would be for a party to segregate its costs for ease of future identification and proposes that this best practice be recommended, but that actual business records would be a permissible means to support a request for relief.

**b. Conditions for Submission of Subcontractor Supporting
Documentation to Contracting Officer. (Reimbursement Checklist)**

The Reimbursement Checklist states: “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.” Because some subcontractors may not have previously had any occasion to provide such information to the contracting officer (e.g., in the context of firm-fixed price or commercial-item subcontracts), we recommend modifying this provision of the Guidance to read as follows: “The Subcontractor may submit information of the type not routinely provided to the Prime Contractor due to competition or proprietary data concerns directly to the Contracting Officer.”

**c. Prime Analysis of Subcontractor Information. (Reimbursement
Checklist)**

The Reimbursement Checklist states: “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.” At the same time, the checklist allows the contracting officer to request additional information that is not defined. Because the prime contractor may not have under its subcontract terms the same authority as the Contracting Officer to request additional, undefined information, and the prime contractor cannot know what level of analysis any particular contracting officer (or its supporting organizations, such as DCMA and DCAA) would perform, the prime contractor may not be able to perform the same type of analysis. The Section recommends, consistent with the recommendations above, that either this responsibility should

be assigned to the contracting officer or more definitive criteria should be provided to clarify in this area.

d. Subcontractor Representations to the Government. (Reimbursement Checklist)

The Reimbursement Checklist states: “Subcontractors must make the same representations to the Government as the Prime Contractor.” The Government is requiring the prime contractor to represent the following: “a. All information has been submitted to support this request for reimbursement in accordance with DoD Class Deviation 2020-O0013; b. The Contractor’s representations and certifications in the System for Award Management (SAM) are current, accurate, and complete; and c. This request for reimbursement is made in good faith, and the supporting data is accurate and complete.” This requirement seeks compliance that is not required under existing FAR rules. Under the FAR, subcontractors that do not also perform as prime contractors are not required to register in SAM. Thus, the Section recommends that this provision be revised to reflect that subcontractors should only be required to provide the certification in Item b. if they are already registered in SAM. Further, we recommend that the Reimbursement Checklist be modified to require that subcontractors provide the representations as ultimately identified to the prime contractor, not the Government, because there is no privity of contract between subcontractors and the Government.

4. The Section Suggests the Government Modify the Guidance to More Clearly Facilitate and Promote Subcontractor Access to Reimbursement under Section 3610. (Overarching Guidance)

The Government, prime contractor and all subcontractors benefit from having a clear process with established roles and responsibilities for each party. The Government should modify the Overarching Guidance to address unique considerations for determining subcontractor reimbursement. The Section recommends that the Government emphasize that Section 3610 does not change certain substantive rules and requirements applicable to subcontractors before the COVID-19 crisis. For example, the Overarching Guidance should expressly state that:

a. All Section 3610 payments to small-business subcontractors shall be counted towards the agency’s and prime contractor’s small business goals in the same manner as other payments under the prime contract; and

b. The location of the subcontractor’s previous performance under the subcontract is an “approved work site” under Section 3610 and FAQ Implementation Guidance, Question #6 even if that location is not identified in the prime contract.

C. Comments on the Draft Guidance’s Interpretation of “Minimum Applicable Contract Billing Rates” and Related Terms.

Section 3610 permits compensating contractors for “any paid leave, including sick leave.” The Section therefore recommends adding to the **Overarching Guidance** a definition of “paid leave” that includes:

any paid time off from work for employees such as (a) vacation or other PTO, (b) paid “family leave” under any applicable federal, state or local statute, (c) paid sick leave pursuant to any applicable federal, state, or local statute, (d) paid leave under FAR Clause 52.222-62, Paid Sick Leave Under Executive Order 13706, or (e) any other form of paid leave provided as a direct result of COVID-19.

The Section also recommends changing the references to “sick leave” in questions 5(c) and (d) of the **Reimbursement Checklist** to “paid leave” to reflect these different types of leave.⁶

The Reimbursement Checklist Questions 5(c), 5(d), and 5(f) appear to envision that the contractor and the contracting officer will, in determining the Section 3610 reimbursement, identify impacts on forward pricing rates and indirect rates. The Reimbursement Checklist at Question 5(d) suggests that, for firm-fixed price contracts, contractors should not include in Section 3610 reimbursement requests any sick leave costs already included in the indirect rates used to price the contract. Likewise, Question 5(c) suggests that indirect employee paid leave costs are not reimbursable because they cannot be reallocated from indirect pools. The rationale appears to be to avoid the Government paying the contractor twice for the same costs.

We suggest that it would be more efficient not to address potential forward-pricing and indirect-pool impacts while negotiating Section 3610 reimbursement and instead (a) rely on contractor certification that costs are not being double-counted and that it will notify the contracting officer of any double counting the contractor later discovers (Overarching Guidance at 1-2) and (b) defer addressing any potential residual double payments to when the contractor normally adjusts or negotiates new forward-pricing rates.

The **Reimbursement Checklist** at 5(d) also provides that “[c]ontracts 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.” If a salaried employee is normally a direct charge to a contract and otherwise meets the definitional requirements in the CARES Act, the fact that the employee is still being paid is not relevant to CARES Act reimbursement. The purpose of Section 3610, which authorizes reimbursement for the costs of paid leave provided to employees, should include salaried employees who cannot work due to COVID-19-related restrictions. The Section believes that the intent of the CARES Act and Section 3610 was to reimburse contractors for paid leave costs incurred when employees are unable to perform their usual job duties on a contract, regardless of whether they would ordinarily be paid “whether they are working or not.” The Overarching Guidance contains sufficient definitional constraints to preclude reimbursements for salaried employees who did not work on a project impacted by the pandemic. We suggest deleting the language in **Reimbursement Checklist** question 5(d) that “[c]ontracts 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.”

⁶ We also recommend that the Draft Guidance clarify that CARES Act reimbursement for hourly employees under the Davis-Bacon Act and Service Contract Labor Standards (formerly known as the Service Contract Act) will be made at the hourly wage identified in the appropriate Wage Determination and that the applicable Health and Welfare rate applies. In addition, even-numbered (or “averaging”) Wage Determinations only allow for Health and Welfare payments for every hour “worked.” DoD should clarify that paid sick leave hours under Section 3610 are considered working hours solely for the purposes of reimbursement under Section 3610.

The **Overarching Guidance** suggests that not only may a contractor aggregate requests for reimbursement for multiple contracts, business units, or even an entire company, but that “DoD may choose to address any request for reimbursement at any level in any DoD Component for any reason, including administrative convenience.” Individual reimbursement requests may require more expeditious approval to support small-business prime contractors and subcontractors that would be harmed by delayed approval of aggregated reimbursement requests across multiple contracts from one large organization. Therefore, while approval of the discretionary Section 3610 reimbursement requests can come from any level within DoD, the Section suggests that the Overarching Guidance bar contracting agencies from including small business subcontractor request for relief in aggregated prime contractor requests without contractor agreement .

D. The Section Recommends Clarifying the Draft Guidance Applicable to “Credits.”

The Section agrees that a contractor should not receive compensation, reimbursement, or relief more than once for the same costs for which it seeks reimbursement under Section 3610. Both contractors and the Government alike should take precautions in this regard. The Section encourages DoD to align the Reimbursement Checklist and Checklist Instructions with its Overarching Guidance Section 2.A.iii., which states that the contracting officer must determine that:

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).

(emphasis added). The Overarching Guidance appropriately emphasizes certainty (i.e., “has not been reimbursed”) and specificity (i.e., “same costs”) consistent with the established FAR cost principles for “contingencies” (FAR 31.205-7) and “credits” (FAR 31.201-5).

The Section concurs with the Overarching Guidance insofar as a contractor must repay certain costs reimbursed under Section 3610 if those same costs are later reimbursed from another source (i.e., no double-dipping). The Overarching Guidance does not require a contractor to reduce its Section 3610 reimbursements unless the “same costs” are reimbursed by tax credits, forgiveness of a Government-backed loan, etc. (i.e., the FAR “specificity principle”). The Overarching Guidance also recognizes that contractors may not know, with certainty, whether or not other forms of cost recovery will occur when it submits a Section 3610

reimbursement request and, accordingly, does not require the contractor to speculate (*i.e.*, the FAR “certainty principle”).

As explained below, other documents in the Draft Guidance and the Class Deviation, however, are inconsistent with both the Overarching Guidance and the above FAR cost principles. Specifically, to bring these other Guidance documents into harmony with the Overarching Guidance, the Section highlights below the provisions that warrant DoD’s attention, and offers alternative language to improve alignment with the Overarching Guidance.

The sixth paragraph of the **Checklist Instructions for Question 5** is misaligned with the Overarching Guidance’s certainty principle. It states:

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.

(emphasis added). The Section encourages the Department to delete the phrase “or will be” from the last sentence.

Reimbursement Checklist Question 6 is also misaligned with DoD’s certainty principle. It bears the description “Identification of other credits ***that will reduce*** relief provided under Section 3610.” (emphasis added). The Section encourages the Department to retitle the item, “Identification of other credits that ***reduced*** relief provided under Section 3610.” If, in response to Question 6, DoD desires visibility into potential reimbursements or credits that may, in the future, duplicate recovery of the “same costs” in a contractor’s Section 3610 reimbursement, the Department could add the phrase “or could reduce in the future” as follows: “Identification of other credits that ***reduce, or could reduce in the future***, relief provided under Section 3610.”

Reimbursement Checklist Question 6(a) is also misaligned with DoD’s certainty and specificity principles. It indicates that the Section 3610 adjustment sought by the contractor must be reduced by the full amount of any anticipated forgiveness of a Paycheck Protection Plan (“PPP”) loan. This reduction would occur, as currently phrased, regardless of (1) whether forgiveness has occurred, and (2) whether the PPP loan proceeds were in fact applied to cover the same paid leave costs included in the Section 3610 reimbursement request. The Section appreciates and understands that contractors receiving both a PPP loan and a Section 3610 adjustment should not end up with a double recovery, and that any reimbursement made under Section 3610 should be reduced to the extent that a contractor has (1) applied PPP loan proceeds to defray payroll costs for the same employees and pay periods for which it seeks a contract adjustment and (2) that applicable portion of the PPP loan was forgiven. This aligns with the Overarching Guidance.

But Reimbursement Checklist item 6(a) goes beyond the Overarching Guidance and statutory requirements, and conflicts with the CARES Act’s goals. For example, a contractor that has substantial commercial operations may choose to use PPP loan proceeds to cover payroll costs for its employees engaged in non-governmental work to avoid furlough or lay-offs of those

employees, while separately seeking Section 3610 reimbursement as an “affected contractor” for COVID-19 paid leave to retain and maintain employees who are unable to work on its government contracts but who must be kept in a ready state. Similarly, a contractor that performs exclusively governmental work but does not receive a Section 3610 adjustment for some of its contracts might choose to use a PPP loan to cover payroll for employees supporting those contracts, while paying up to 40 hours of COVID-19 paid leave per week for employees assigned to contracts under which it can receive a Section 3610 adjustment. Moreover, the CARES Act allows businesses to use PPP loan funds for a number of reasons other than paying payroll—such as paying vendors, making rent/facility payments and meeting ongoing debt obligations—all of which are necessary to maintain operations.

Furthermore, the Reimbursement Checklist presents a single approach for all contractors regardless of business size and financial capital. Small businesses are in the most dire and critical need of relief mechanisms such as PPP loans to continue operations. Small businesses are more likely to receive PPP loans and obtain forgiveness of such loans. As a result, including all PPP loan funds (regardless of whether they were used to pay for employee leave on contracts for which Section 3610 reimbursement is sought) and/or forgiveness of such loans in the credits calculation for Section 3610 recovery disproportionately limits small-business contractors’ ability to recover Section 3610 paid leave costs.

Accordingly, the Section recommends that DoD revise **Reimbursement Checklist Question 6(a)** from “If yes, the loan forgiveness amount must be excluded from any request for reimbursement under Section 3610” to “If yes, any request for reimbursement under Section 3610 must be reduced to exclude any forgiven PPP loan amount applied to cover the same payroll costs for such employees.”

We recommend that the Department also clarify or revise the other elements of **Reimbursement Checklist Question 6(a)** by:

1. Clarifying the question concerning the loan amount received by adding the phrase “net of any funds returned pursuant to the SBA’s safe harbor provisions” and recognizing that the amount of anticipated loan forgiveness may be for an amount less than the amount of net loan proceeds (i.e., the contractor may repay some portion of the loan pursuant to the original loan terms).
2. Adding a request that the contractor identify the amount of Section 3610 reimbursement relating to the same costs paid with PPP loan proceeds for which the contractor anticipates forgiveness.

Reimbursement Checklist Question 6(b) is also misaligned with DoD’s specificity principle. This question seeks general information regarding tax credits under Division G of Pub. L 116-127. The Section recommends that the Department align this area by clarifying the question “Does the contractor anticipate receiving tax credits under Division G of Pub. L 116-127” by adding to the end of the sentence “that relate to the same costs for which it seeks Section 3610 reimbursement?”

Additionally, the Section recommends clarifying the question “If yes, what is the anticipated amount of the tax credit?” by restating it as follows: “If yes, what amount of costs

within the contractor's Section 3610 reimbursement request relates directly to the anticipated tax credit?"

Reimbursement Checklist Question 6(c) is also misaligned with the Department's specificity principle. This question seeks general information about other credits allowed by law (including state or local laws) that are specifically identifiable with the public health emergency declared on January 31, 2020, for COVID-19. The Section encourages the Department to align this section of the checklist with the Overarching Guidance by rephrasing "Specify the amount of credit anticipated" to instead say "Specify the amount of credit anticipated that relates directly to costs within the contractor's Section 3610 reimbursement request."

And, finally, **DFARS Class Deviation of 231.205-79(b)(6)** is misaligned with DoD's certainty principle and the Overarching Guidance. To be allowable and reimbursable Section 3610 costs, the current version of the DFARS Class Deviation states that the paid leave costs must be "reduced by the amount the contractor *is eligible to receive* under any other Federal payment, allowance, or 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." (Emphasis added). Section 3610 did not mandate such an expansive view of potential credits. To be consistent with Section 3610 and harmonize the Class Deviation with the clear guidance in the Overarching Guidance, the Section recommends deleting the phrase "is eligible to receive" and replacing it with the word "receives." Although the existing FAR 31.205-7, Credits, cost principle will apply to most Section 3610 reimbursement requests, the Section offers the following new language in a new paragraph (b)(7) for the Class Deviation to ensure alignment with Section 3610 and the Overarching Guidance as follows:

If the contractor later obtains reimbursement for the same costs as those determined to be allowable herein, the contractor shall notify the contracting officer in writing promptly. In no event may a contractor be reimbursed more than once for the same expense, including via forgiveness of a Government-backed loan.

E. The Section Recommends Revising the Draft Guidance Regarding Compliance with TINA and the Cost Accounting Standards.

The Checklist Instructions state, without further explanation, that TINA applies to non-commercial contracts over the statutory threshold. We recommend expanding the TINA section by expressly obligating the prime contractor to pay subcontractor(s) any amounts that the contracting officer has allocated to the subcontractor(s), and also clarifying the mechanism for addressing any defects in the certified cost or pricing data submitted by the prime or subcontractor. Accordingly, we propose that the **Checklist Instructions for Question 5** be revised by adding the following language at the end of the section:

The contracting officer shall issue a contract modification: (i) separately identifying the reimbursement allocated to the contract and any reimbursement allocated to any subcontractor(s), and (ii) including language requiring the contractor to pay to its subcontractor(s) any reimbursement allocated on account

of its subcontractor(s). If the Contracting Officer required certified cost or pricing data from the contractor to support its Section 3610 request, the Contracting Officer shall include in the modification the clause at FAR 52.215-11, Price Reduction for Defective Certified Cost or Pricing Data – Modifications or other appropriate language to implement the Government’s right to repayment if the Contracting Officer later determines that the contractor’s, or its subcontractor(s)’ cost or pricing data was not current, accurate and complete.

The Overarching Guidance also does not mention any impacts related to the requirements of the Cost Accounting Standards (“CAS”). Question 5b in the Reimbursement Checklist indicates that the contractor could cite its CAS disclosure statement, among other supporting documentation, to explain its typical treatment of leave costs. Based on the unusual circumstances here and the differences between the specific DoD requirements for accounting for COVID-19 paid leave and the way most contractors typically account for paid leave, the **Overarching Guidance** should be updated to encourage contracting officers to defer review of CAS requirements related to proposed/claimed Section 3610 direct costs until after the current emergency declaration expires because there is a high risk that contractors cannot fully comply with CAS 401 (consistency between estimating, accumulating and reporting) and 402 (consistency with allocating costs incurred for the same purpose). Furthermore, the administrative burden across the fully CAS-covered industry base to update disclosure statements for this situation—which DCAA must then review and approve—could add an unnecessary, non-value added exercise to this already administratively challenging situation. As such, guidance should be added to instruct DoD administrative contracting officers to waive the requirement to update disclosure statements related to the treatment of COVID-19 paid leave.

Accordingly, we recommend that the following language be added to the **Overarching Guidance** at the end of Section 4:

Contracting officers should defer enforcement of Cost Accounting Standards requirements as they apply to any claimed direct CARES Act Section 3610 cost until after the termination of the National Emergency Concerning the Novel Coronavirus Disease (COVID-19) Outbreak. Contracting officers still must evaluate the proper allocability of costs per the supporting documentation provided by the contractor, including the application of indirect costs. Administrative contracting officers who oversee fully CAS-covered contractors are encouraged not to require disclosure statement revisions related to accounting practices that are temporarily adjusted to conform to these unusual circumstances.

F. The Section Recommends Addressing Issues that Create Additional Potential Burdens on Small Businesses.

As previously discussed, COVID-19 has had a disproportionately greater impact on small business prime contractors and subcontractors, most of which lack the capital of their large-business counterparts. Large businesses are better positioned to rapidly mobilize telework environments and repurpose/reconfigure facilities to accommodate necessary changes to continue contract performance/production. Small businesses, however, are faced with the

difficult trade-off decisions between keeping employees employed at the risk of not recovering their costs or continuing operations.

For this reason, it is critical that DoD consider the impact of its guidance on small-business contractors and avoid adding requirements that would adversely impact small businesses disproportionately.

Section 2 of the Overarching Guidance uses the term “costs” to define the types of reimbursement permissible under Section 3610. The Section recommends revising the Overarching Guidance to use the terms “amount” or “reimbursable amount” to avoid creating the impression that CAS applies to all requests for Section 3610 reimbursements. This clarification would be particularly appropriate to reduce potential burdens on small businesses that have been disproportionately impacted by the COVID-19 pandemic.

Question 3 of the Reimbursement Checklist requires a contractor to identify whether it is a “subsidiary, division, segment, or otherwise affiliated with another company.” A contractor checking “yes” must then “exclude any paid leave costs included in any other requests for reimbursement” by those other entities.

The Section recommends clarifying whether exceptions to affiliation exist. For example, is a joint venture created pursuant to a SBA-approved mentor-protégé agreement included in this question? Applying affiliation to the mentor/protégé and small-business joint venture may deny the protégé small business reimbursement based on paid leave costs included in reimbursement requests made by the mentor for costs unrelated to the joint venture. The Section recommends adopting affiliation exceptions for small businesses as set forth in 13 CFR § 121.103.

Additionally, the Section believes that clarification is needed as to how DoD will engage in reimbursement analysis overall regarding a mentor/protégé joint venture. For example, clarification is needed as to whether a mentor/protégé joint venture can be reimbursed for administrative personnel performing tasks for the benefit of an unpopulated joint venture.

Question 5(a) of the Reimbursement Checklist instructs the contractor to list all employees “who could not telework because their job duties could not be performed remotely.” The language of Section 3610 provides reimbursement, in relevant part, to “a contractor whose employees or subcontractors cannot perform work on a site . . . due to facility closures or other restrictions, and who cannot telework because their job duties cannot be performed remotely” Agencies need not receive personally identifiable information regarding all employees beyond any identifiers normally utilized in the company’s invoices. The Section, therefore, recommends amending the question to read “Identification of all employees, by identifiers required in the contract, who could not telework because their job duties could not be performed remotely.”

The **Reimbursement Checklist** includes several items without clearly indicating how the information will be used by contracting officers when determining whether a contractor is an “affected contractor” or evaluating COVID-19 paid leave costs and its impact on contract cost or pricing. The information includes the current status of the contractor’s accounting system and other accounting practices in Questions 5(b) and 5(f).

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These guidelines, as currently written, are likely to have unintended consequences when contracting officers evaluate small-business contractors. Small-business contractors are all exempt from CAS, and they are not likely to have had formal accounting-system approval determinations, or similar requirements.

The **Reimbursement Checklist** should consider exceptions and alternatives to the evaluation and accounting requirements for small businesses that are not required to account for costs under a CAS or other formal cost accounting system. Such alternatives could include providing contract/commercial time-and-materials rates with a profit decrement and/or cost information that is regularly available within the contractor's commercial accounting system.

III. CONCLUSION

The Section appreciates the opportunity to provide these comments on the early engagement process and is available to provide additional information or assistance as you may require.

Sincerely,
/s Linda Maramba
Chair, Section of Public Contract Law

cc:

Susan Warshaw Ebner
Jennifer L. Dauer
Annejanette Heckman Pickens
Patricia H. Becker
Amy Conant Hoang
Council Members, Section of Public Contract Law
Craig Smith
Samantha S. Lee

Overarching Guidance

2. Requests for Reimbursement

A. Contracting officer determination of “affected contractor.” 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. The attached checklist describes information determination that will be needed to support a the contractor qualifies as an “affected contractor” under DFARS 231.205-79 CARES Act Section 3610 – Implementation. To qualify as an “affected contractor,” the contractor’s request employees or subcontractor employees must be or have been:

i. Unable to perform work on a government-owned, government-leased, contractor-owned, or contractor-leased facility or site approved by the federal government for reimbursement. The checklist is not all inclusive contract performance due to COVID-19 related closures or other restrictions as discussed in Office of Management and Budget Memorandum M-20-18, *Managing Federal Contract Performance Issues Associated with the Novel Coronavirus*, dated March 20, 2020; and

ii. Unable to telework because their job duties cannot be performed remotely during the public health emergency declared on January 31, 2020, for Coronavirus (COVID-19).

B. Reimbursable costs. Subject to any additional information may be requested. The CO must be able to determine that conditions set forth in DFARS 231.205-79, a contractor’s costs of paid leave (including sick leave) are reimbursable under CARES Act Section 3610 so long as:

i. The leave was required as a result of the contractor’s “affected contractor” status;

ii. The contractor has provided paid leave to its employees or subcontractor employees “to maintain for the purpose of keeping contractor employees and subcontractor employees in a ready state, including to protect (i.e., able to mobilize in a timely manner) and/or for the purpose of protecting the life and safety of Government and contractor personnel,” due to the COVID-19 Public Health Emergency (PHE) declared on 31 January 2020;

iii. 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;

iv. 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; and

v. The contractor has not been reimbursed for the same costs for which it is requesting reimbursement.

a. 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.

b. 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~~

~~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.~~

~~A contractor~~C. An affected contractor (as determined by the Contracting Officer) may request reimbursement of Section 3610 leave costs for a single contract, multiple contracts, an entire business unit, or an entire corporation/company, so long as the request satisfies all requirements in A, above each request satisfies all requirements in B, above. Each request should 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.

D. 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.

E. Dispute resolution. Any dispute between a CO and a contractor about either the CO's determination of "affected contractor" status or the amount of a reimbursement under CARES Act Section 3610 shall give rise to a dispute under FAR 52.233-1, Disputes and the Contract Disputes Act. Pursuant to FAR 33.204, agencies are encouraged to resolve disputes at the lowest possible level and to make use of pre-claim alternative dispute resolution procedures to the maximum extent practicable.