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**RE: DoD Process for Section 3610 Reimbursement: Implementation Guidance  
Early Engagement**

Thank you for allowing us the opportunity to provide comments to the draft DoD Process for Section 3610 Reimbursement: Implementation Guidance, Reimbursement Checklist, and Checklist Instructions.

We believe the guidance and supporting documents need to provide additional clarification as to the advantages to both industry and the Government of attempting to work an agreement for reimbursement above the individual contract level. While there appears to be a benefit to getting the determination of an “affected contractor” at a company/segment level, that is where the benefit ends as detail for each and every contract, including the names and pay rates of all employees for each contract, is required. Additionally, the key to any potential reimbursement is the availability of funding on each contract. We recommend that DPC state in the guidance that agreement for reimbursement will be handled using the FAR 30.606, Resolving cost impacts, process. The Cognizant Federal Administrative Officer (CFAO) shall coordinate with the affected contracting officers; however, the CFAO has the sole authority for negotiating the 3610-reimbursement agreement. Additionally, the CFAO may agree to adjusting a single contract, several but not all contracts, all contracts, or any other suitable method to support the reimbursement.

We have also identified additional questions, recommendations, and concerns with each document:

**Overarching Guidance**

Section 2.A.i. – Contracting Officer (CO) determination the contractor provided paid leave to its 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.”

When the emergency was originally declared many contractors took creative measures to keep employees that could no-longer report to locations where they could perform direct contract effort engaged and on the payroll. This included additional training and indirect effort that benefited the contracts they were working on. These hours were reported as indirect charges at the time but were simply to keep employees from having to charge paid leave codes. We believe these hours should also be eligible for reimbursement under 3610 and the guidance should be expanded to address these situations.

Section 2.A.ii. – CO determination the contractor has incurred and paid its employees for reimbursable paid leave prior to the date of the contractor’s reimbursement request.

We recommend the guidance make it clear that this determination is part of the payment process and not a requirement during the negotiation of the amount to be reimbursed.

Section 2.A.iii. – CO determination the contractor has not been reimbursed for the same costs for which it is requesting reimbursement. If the contractor receives relief after reimbursement under 3610, the contractor will notify the CO in writing.

While a determination to ensure no duplicate reimbursement during the negotiation process is reasonable, the guidance needs to make it clear that the contract modification will require the contractor to return any reimbursed paid leave cost resulting in a duplicate reimbursement subsequent to the negotiation process such as forgiveness of a Government-backed loan. While the provisions of FAR 31.201-5, Credits, are likely to apply to most contracts, it is not included in all potentially affected contracts. To ensure recovery DPC should develop specific wording to be included in all contract modifications providing 3610 reimbursement. Additionally, if DPC believes a penalty and/or interest is applicable, the guidance and modification language should make that clear.

Section 2.A.v. – CO determination the contractor employees were unable to telework.

We believe this is a very subjective determination and very likely to raise significant disagreements. Some employees may have been able to telework for a time and then need to go on paid leave. Historically, contracting officers and especially auditors have taken advantage of 20/20 hindsight to question the reasonableness of contractor decisions made during a significantly uncertain time. The guidance should either make it clear that questioning contractor decision to put employees on paid leave should be limited to egregious situations or provide specific objective criteria for determining that an employee is was unable to telework.

Section 2.B. – Level at which the request for reimbursement is made.

The guidance needs to address how the determination of available funds will be handled when the request is made for an entire business unit or company. Consideration should be given to the FAR 30.606, Resolving cost impacts, process discussed at the beginning of this letter.

Section 2.C. – DoD chooses the level at which the request for reimbursement will be addressed.

The guidance needs to address that this choice should be part of the early engagement between the contractor and DoD as recommended in the Checklist Instructions. This will help ensure the efficient use of resources by all parties.

Section 3. – Allocation of funds for reimbursement under Section 3610.

The guidance needs to require the CO, that will be negotiating the agreement, to determine the availability of funding prior to the contractor investing resources to calculate the impact of paid leave. The availability of funds will significantly impact the contractor’s decision to invest resources and help limit any unnecessary impact on indirect expenses on current contracts and pricings.

Section 3. – “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.”

This statement is unclear. The intent of the statement needs to be explained.

Section 4. – Determination of Eligibility For and Amount of Reimbursement.

We believe this section needs to clarify that the process for 3610 reimbursement is a two-step process. The guidance should make it clear that Step 1 the determination that the contractor is an “affected contractor” should be completed and placed in writing to the contractor prior to the investment in resources to support negotiation of the amount of reimbursement.

The required wording “Based on my determination” in the modification could be problematic if the determination that the contractor is an “affected contractor” is made at the company level by CO that is not administering all affected contracts. This is very likely the case in the intel community, for example.

This section also makes it clear that profit or fee on paid leave under Section 3610 is not allowed. While we take no issue with this requirement, we believe additional guidance is necessary to support the negotiation of appropriate rates of reimbursement for the paid leave. For both Firm-fixed Price (FFP) and Time and Material (T&M) contracts the contractor and DoD may have had significantly different profit position when the original pricing action was negotiated.

At the end of the section it states: “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.” The use of the word “may” implies this is just one of many possible ways of creating a contractual provision to reimburse the paid leave. While this may be an appropriate method for contractors that are no longer incurring paid leave; for many contractors, especially those with OCONUS effort, the negotiation of hourly rates by labor category billed on a bi-weekly basis will certainly be a more effective method of reimbursement. The guidance should be clear that an FFP line item is not required and other methods of immediate invoicing for reimbursement are also acceptable.

## **Reimbursement Checklist**

Section 2. – Cognizant Government Organizations

We recommend this section provide for other than DoD organizations impacted by paid leave to be included in this section so that a process similar to FAR Part 30, CAS Administration, and FAR Part 42, Contract Administration and Audit Services, can be used to establish a single Government Contracting Officer to coordinate the determination of an “affected contractor” and ensure consistency across the individual contracts for the calculation of the amount to be reimbursed.

Section 3. – Contractor Organization

We recommend this section be made a required part of the early engagement between the contractor and DoD as recommended in the Checklist Instructions. This will significantly improve consistency and improve the handling of interdivisional effort.

#### Section 4. – Impacted Contracts

The guidance needs to clarify whether notification of subsequent relief should be made to all COs for each individual contract or to the CO that negotiated a higher-level agreement for reimbursement.

#### Section 5. – Circumstances Narrative and Information

If a narrative identifying the circumstances that impacted the need for paid leave cost and performance under each DoD contract/order is required, there does not appear to be any advantage for a contractor to consider a higher-level agreement?

Identification of all employees is likely to result in Personally Identifiable Information (PII) that the Government will need to appropriately safeguard. We recommend a requirement for the contractor to maintain the information and provide appropriately safeguarded access to a limited number of Government representative.

The statement: “Appropriate rates can include labor rates, overhead, and G&A, but may not include profit or fees” appears to allow for the hours of paid leave to be treated as direct charged hours under the affected contracts. While we take no issue with this requirement, we believe the Overarching Guidance should make it clear that paid leave hours can be accounted for as direct chargeable hours and as these paid leave hours are not incurred under like circumstances as other paid leave hours there is **no** noncompliance with Cost Accounting Standard 402 with respect to this treatment. The guidance should also clearly state that for this limited situation, accounting for this paid leave as a direct cost is not considered an accounting practice change under Cost Accounting Standards requirements.

Some contractors use an average labor rate (i.e. booking rate) to both record and estimate labor costs. The guidance and checklist should make it clear use of an average labor rate is an acceptable method to calculate paid leave reimbursement.

The current statement providing for the reimbursement of paid leave hours incurred by indirect employees is confusing. It reads as if reimbursement of hours for indirect employees is allowable, but it should not be done. This should be revised. Additionally, the reimbursement of indirect employee paid leave hours is likely to significantly impact indirect rates and present cost accounting standard/practice issues. The guidance should address this complex area and provide examples on how it can be addressed.

The statement: “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” is unclear. We believe this refers to indirect effort or direct hours that could be accomplished using telework that may have been incurred by some employees at the beginning of the emergency. If that is the case, it raises the concern as to how those hours should be treated. A significant spike in indirect time is likely to shift costs to cost type contracts that would not have benefited from this indirect effort had normal business been conducted.

The guidance should clarify the DoD’s intended use of the required listings of annual and sick leave by employee. It is very likely that due the emergency and the Families First Coronavirus Response Act (FFCRA) that some employees used accrued paid leave to ensure they received a paycheck. The contractor may have adjusted leave balances in a later period that

needs to be considered. Additionally, because FFCRA had very low employee limits, many contractors paid their employees at their normal rates even though FFCRA limited their tax credit. How DoD intends to treat these complications should be clear and consistent. Therefore, additional guidance is necessary to address these complications.

Section 5.d. – Adjusting sick leave already priced in FFP contracts.

While this may be a point for negotiation, it is extremely complex. Most FFP price negotiations are completed on a bottom-line basis, therefore for each pricing action there are likely to be different positions on indirect rates and expenses between the contractor's and the contracting officer. Additionally, as a result of FFCRA employees have likely taken leave in addition to what was originally priced into FFP contracts. The guidance needs to make it clear whether or not DoD intends to effectively require the reopening of these FFP contract negotiations.

Section 5.e. – Actual paid labor rates.

Again, identification of employee's individual pay rates is likely to result in Personally Identifiable Information (PII) that the Government will need to appropriately safeguard. We recommend a requirement for the contractor to maintain the information and provide appropriately safeguarded access to a limited number of Government representative.

Section 5.f. – Contractor Rates.

The guidance needs to make it clear that DoD is only looking for current pricing or billing rates, not the rates used to price affected contracts that may have been negotiated with different rates in the past.

Section 5.g. – Subcontractor.

The following statement is concerning: "Subcontractors must make the same representations to the Government as the prime contractor." The statement should be removed, and reference made to TINA requirements of the prime and subcontractor. The DoD does not have privity of contract with the subcontractor, so the weight, if any, these representations would carry is in question. Based on the guidance, DoD plans to rely on the Truth in Negotiation Act (TINA) process to protect DoD. This process already provides that the prime is responsible for the subcontractor pricing and requires prime contractors to reimburse the Government for any defective pricing at the subcontract level.

Section 5.i. – Truth in Negotiation Act.

The guidance should be updated to clearly state that higher-level agreements will be treated under TINA the same way Forward Pricing Rate Agreements are handled.

## Checklist Instructions

### Overarching Themes

It states, "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." The intent of all of the Government relief provided to date, including Section 3610, was to retain employees on employer's payrolls. Accordingly, we believe contractors should be able to use the Section 3610 funds to back pay employees that were initially laid off or furloughed due to the contractor's initial lack of funding or work and were later returned to the payroll. This would effectively treat these employees the same way they would have been treated had they never been laid off or furloughed. In our opinion, the CARES Act in other sections clearly allows for and in fact encourages return of employees to the payroll and inclusion in the relief provided. There was clearly a period of time during which contractors made prudent business decisions that they would not have, had Section 3610 and other relief been in place.

### Early Engagement Discussions

This section states, "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." This statement is not clear and needs to be explained.

This section also states, "How requested COVID-19 Paid Leave reimbursement will be allocated to Government and other (i.e., commercial) contracts." This statement is not clear and needs to be explained. The guidance provides that even if a higher-level agreement is requested, the impact and reimbursement is on a contract by contract basis, so it is hard to understand the impact of any allocation. If this is to address the reimbursement of indirect employee paid leave, it should state that. Also, the term "commercial" is confusing. Does it relate to FAR Part 12 contracts or truly commercial contracts with non-Government parties? It does not appear logical that Section 3610 was intended to allow Government contracts to reimburse paid leave for employee working on truly commercial contracts.

### Government Coordination

While support from DCMA and DCAA is a normal part of any FAR Part 15 pricing action, significant and complex pricing actions have been taking DoD in some cases over a year to complete an award. DCAA alone, in its last report to Congress, was averaging 85 days to complete a pricing audit. As the intent of the CARES Act and Section 3610 was to support businesses in maintaining employees on their payroll, extended periods of time to award contract modifications is not acceptable. If the plan is for DCMA and DCAA to follow the normal pricing review and audit process with respect to Section 3610 funding, can undefinitized CLINs with Not to Exceed amounts be put in place to provide more immediate funding support to contractor cashflow?

## Checklist Questions

### *Question 5*

The question refers to “the definition of appropriate rates.” There is no clear definition of what appropriate rates are. The guidance provides for the collection of extensive amounts of information but there is no guidance on how that data is to be used.

This section states, “Finally, this section of the checklist requires the contractor to identify any other requests for COVID-19 Paid Leave reimbursement under Section 3610.” Is the intent of this statement to require contractors to provide DoD with copies of requests for reimbursement under section 3610 submitted to other organizations?

The section also states, “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.” Depending on the way you read this statement it could be seen as allowing the same hour of paid leave to be covered under FFCRA or Payroll Protection Program (PPP) and the cost of that hour above the limits of the applicable program be eligible for reimbursement under section 3610. We believe that is the appropriate interpretation, but clarification would significantly improve the guidance.

### *Question 7*

Specifically requiring the signature of a Vice President may be problematic as not all contractors have a designated employee assigned that title. We recommend the language be changed to officer of the company or equivalent.

Thank you again for the opportunity to provide comments on this important guidance.