

Issue:

In the draft Overarching Implementation Guidance that DOD intends to provide its Contracting Officers, under section 2 (Requests for Reimbursement), it states that “The CO must be able to determine that [t]he contractor has provided paid leave,” that the “leave was taken between 31 January and 30 September 2020, and all costs . . . paid prior to the date of the contractor’s reimbursement request.” (See 2.A.i and 2.A.ii) Given that the requirement in 2.A.i to confirm paid leave is stated in the past tense, and in 2.A.ii it is stated that all costs for the period of 31 January and 30 September 2020 must be paid and incurred prior to submitting a request, this means that all requests must be backward looking.

There are several problematic results of this approach. First, it restricts any possibility of addressing known forward looking requirements—the parties can either implement Section 3610 in multiple backward-looking modifications or wait until October 1, 2020 to do a single backward-looking modification. Additionally, in the case of a contractor that is not currently paying, nor is required to pay, leave for impacted employees, the Government can receive the ready-state benefit without paying for it—if such a contractor is required to incur new non-mandated costs prior to any agreement to reimburse them, the contractor has no recourse should the Government deny reimbursement, whereas, the contractor could have not incurred the leave costs and sought relief from performance as an excusable delay. Therefore, requiring that all costs be incurred prior to seeking and obtaining an agreement to pay defeats the purpose of implementing Section 3610 to achieve ready-state capability to mitigate known future performance impacts when new costs are to be incurred and where agreement is needed prior to their incurrence.

Other DOD guidance on implementation of section 3610 of the CARES Act, does not indicate that it is DOD’s intent to require that all modifications are only backward-looking. If this is the approach, it will make it impractical and virtually impossible to implement a plan to keep a ready-state group of employees on a contract that does not currently provide for any paid leave. It is also, however, acknowledged that it is appropriate for the Government to only pay for such leave costs if paid, and this objective can be addressed through the invoice submission and review process and the fact that invoices are subject to the conditions and penalties of the False Claims Act.

Recommendations:

1. Paragraph i. under 2.A should be revised to reference the potential for future leave costs, as such: “The contractor has provided or will provide 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;”
2. Paragraph ii. under 2.A should be revised to reference the potential for future leave costs, as such: “The leave was taken between 31 January and 30 September 2020 , and all costs for which the contractor requests reimbursement are or will be incurred and paid prior to the date of the contractor’s ~~reimbursement~~ request for payment,”