

Information Technology Industry Council

Feedback on DoD Draft CARES Act Section 3610 Overarching Guidance

Thank you for the opportunity to engage in the DRAFT DoD Process for Section 3610 Reimbursement: Overarching Guidance. The Information Technology Industry Council (ITI) respectfully submits the following feedback on behalf of its member companies:

I. Feedback on DRAFT DoD Process for Section 3610 Reimbursement: Implementation Guidance

a. Section 2(A): Requests for Reimbursement; Section 3: Availability of Funds; Section 4: Determination of Eligibility For and Amount of Reimbursement

Section 2(A) of DoD's draft Implementation Guidance provides helpful clarification for when a contractor may be considered an "affected contractor" for purposes of qualifying for Section 3610 reimbursement.

Section 4 of DoD's draft Implementation Guidance states: "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" (emphasis added).

Notwithstanding these two sections, Section 3 of DoD's draft guidance states: "If no funds are made available for reimbursement of Section 3610 paid leave costs, no reimbursement can be made."

ITI respectfully requests clarification on whether DoD will deny Section 3610 reimbursement requests based on unavailability of funds when a Contracting Officer has determined that a contractor otherwise meets all requirements for "affected contractor" status, and has properly submitted all required documentation in DoD's Checklist for Section 3610 reimbursement requests. Additionally, if the aggregate dollar amount of qualified reimbursement requests exceeds the aggregate amount of available funds, ITI respectfully requests clarification regarding how DoD will prioritize affected contractors for reimbursements.

b. Section 3: Availability of Funds

DoD's draft guidance states: "Any reimbursement under Section 3610 is subject to the availability of appropriations.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" (emphasis added).

In contrast, the text of CARES Act Section 3610 states that reimbursements may be made with “funds made available to the Agency through this Act or any other Act.” Section 3610 does not tie the universe of available funds to the specific contract for which a contractor is requesting reimbursement.

ITI respectfully requests clarification on whether DoD intends to condition Section 3610 reimbursement under a particular contract on the availability of funds *under that contract*, or whether DoD may consider the availability of other agency appropriations when making reimbursement decisions.

II. Feedback on DRAFT DoD Checklist for Submission of Section 3610 Reimbursement Requests

a. Section 5: Section 3610 Circumstances Narrative and Information

Section 5, Subsection (b) states that contractor requests for 3610 reimbursements must include, in part, “[a] full description of the methodology the contractor used to develop the amount requested for reimbursement under Section 3610; [and 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...”

Additionally, Section 5, Subsection (e) states: “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.”

These Subsections do not distinguish between commercial and non-commercial or cost-type contracts. However, strict application of this guidance to commercial item contracts—especially where a contractor is not subject to Cost Accounting Standards—would seemingly conflict with the existing framework of commercial contract pricing requirements. For example, Federal Acquisition Regulation (FAR) 15.403-1(b)(3) states that Contracting Officers *shall not* require cost and pricing data when acquiring commercial items. Under FAR Part 12 streamlined contracting procedures, adequate price competition is generally considered to exist within the commercial marketplace, allowing Contracting Officers to determine price fairness and reasonableness based on the market and historical pricing practices. Accordingly, commercial item contractors may not have accounting systems or other mechanisms in place to readily identify or allocate costs, develop an unburdened hourly rate, or deliver detailed cost data for commercial item contracts. Based on the existing language of DoD’s Section 3610 checklist, to complete a comprehensive Section 3610 reimbursement package, commercial contractors may be required to identify and segregate costs in a manner that amounts to creating new pricing information (that was never

requested or evaluated as part of the initial contract award decision) or artificially creating unburdened hourly rates. This additional barrier to reimbursement may serve as a deterrent to commercial item contractors taking steps to maintain their employees in a “ready state,” which could impact the long-term availability of critical services to DoD.

ITI respectfully requests clarification regarding how DoD intends to consider Section 3610 reimbursement for commercial item contracts, including the supporting documentation required for Section 3610 reimbursement packages for commercial item contracts, and the circumstances when the commercial item prices will be acceptable as the “minimum applicable contract billing rates” as stated in the Act.

III. ITI Feedback on DRAFT Instructions for the DoD Checklist for Contractor Requests for Section 3610 Reimbursement on FAR-based Contracts

a. Government Coordination

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

ITI respectfully requests clarification regarding when DoD will require coordination with non-DoD agencies before approving Section 3610 reimbursement requests submitted for DoD-specific contracts. ITI also respectfully requests clarification regarding the level of consideration DoD will provide for reimbursement requests submitted to non-DoD agencies, when evaluating reimbursement requests for DoD-specific contracts.

ITI sincerely appreciates your consideration of this feedback and clarification of these important issues.

Very Respectfully,

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