



May 22, 2020

Mr. Kim Herrington
Acting Principal Director
Defense Pricing and Contracting
Office of the Under Secretary of Defense
for Acquisition and Sustainment
3010 Defense Pentagon
Washington, DC 20301-3010

Subject: Draft DoD Process for Section 3610 Reimbursement: Overarching Guidance

Dear Mr. Herrington:

Attached please find input from two anonymized INSA member firms regarding Draft DoD Overarching Guidance for Section 3610 Reimbursement.

Please let me know if you have any questions regarding this submission.

As INSA member firms continue to identify challenges with 3610 implementation, we will be happy to share these insights with you. Thank you for your willingness to consider industry suggestions.

Very truly yours,

A handwritten signature in blue ink, appearing to be "L. Hanauer".

Larry Hanauer
Vice President for Policy



**INPUT FROM INSA MEMBER FIRM #1
REGARDING
DRAFT DOD PROCESS FOR SECTION 3610 REIMBURSEMENT: OVERARCHING GUIDANCE**

The below is from a large government contractor that serves the Department of Defense as one of its primary customers. This firm has experienced varying impacts across its operations as a result of COVID-19.

Reference:

- a) DRAFT DoD Process for Section 3610 Reimbursement Implementation Guidance
- b) DRAFT DoD Checklist for Submission of Section 3610 Reimbursement Requests
- c) DRAFT Instructions for the DoD Checklist for Contractor Requests for Section 3610 Reimbursement on FAR-based Contracts

Overarching Comments:

- Responding to the COVID-19 pandemic and the impact it has on all of our businesses and employees is uncharted territory for everyone. DoD Contracting Officers and Industry Contractors need to partner together to work through the various challenges in an expedient manner to reduce the risk for all parties, to maintain the workforce in a ready state and to mitigate overall impact to the mission.
- While this is a time of uncertainty, the review and decision making process needs to be expedited as much as possible in order to help reduce financial and operational impacts. It seems many Contracting Officers are not clear on the guidance or how to proceed which is delaying the process and ability for businesses to make informed decisions on making investments to continue incurring these paid leave costs.

Reference (a) DRAFT DoD Process for Section 3610 Reimbursement Implementation Guidance:

- Section 2. Requests for Reimbursement:
 - We understand that leave needs to be taken between 31 January and 30 September 2020, although there may be impacts that continue past this fiscal year and assume future guidance will be released or revised to address any longer term impacts.
 - There are many businesses that are not able to sustain paying employees for this leave time in order “to maintain a ready state” without advance written approval or confirmation by the Government that the costs will be reimbursed. We recommend changing the requirement to allow for proof that the leave has been paid at the time of request OR at the time of billing once Government approval and funding has been provided. The Contractor can sign a representation or other document stating the leave will be paid or reimbursed to the employee prior to invoicing the Government.
 - The guidance issued to date including this draft guidance only discusses paid leave for any employee or subcontractor employee **up to an average of 40 hours per week**. This does not address how to handle overseas operations in support of the DoD where the standard workweek may be higher than 40 hours due to contract specific schedule requirements and/or compliance with host nation labor laws. The intent is clearly to keep the employee(s)

in a status quo position in terms of compensation in order to maintain a ready state and return to work immediately once COVID-19 related restrictions are lifted. Therefore, we recommend the final guidance expressly address overseas operations and that Contracting Officers have the authority to approve reimbursement at the agreed upon billing rates for a standard workweek which may be greater than 40 hours for specific contract locations. This would allow for the employee to receive full compensation based on a typical workweek schedule and to remain in a status quo position which is the overarching intent of the CARES Act, Section 3610.

- The final guidance needs to expressly state paid leave costs **and any applicable indirect costs** are reimbursable if approved by the Contracting Officer. Additionally, this is not paid leave that would typically be reimbursed or recovered through already negotiated indirect rates but special leave paid as a result of COVID-19 to maintain the workforce in a ready state in direct support of a contract.
 - If a contractor is able to request reimbursement of Section 3610 leave costs for the entire corporation/company, how would that be realistic with large contractors supporting many different DoD contracts and having to provide the level of detail required in this Section? It seems that would take months or possibly longer for a determination to be coordinated between many Contracting Officers with various customers and funding sources all while the business is continuing to incur costs and without reimbursement.
 - CARES Act, Section 3610 reimbursement guidance focuses on paid leave costs; however, in many cases COVID-19 has created situations of increased Other Direct Costs (ODCs) that should be considered for reimbursement such as medical and mobilization costs directly impacted by efforts to ensure the workforce is maintained in a ready state.
- Section 3: Availability of Funds:
- It would be extremely beneficial if the guidance allows for existing contract funding readily available to be used for reimbursement of Section 3610 leave and indirect costs. Currently, it seems DoD Contracting Officers are waiting for additional guidance on where the funding will come from before even making a determination on allowability and/or reimbursement of the costs. To expedite the review and approval process, if there are funds available on the contract, there should be authority to re-align funding as needed to cover these costs and allow for affected Contractors to start billing even provisionally as all parties work through the process together.
 - While we understand availability of funds is required, Contractors need to be notified immediately if funds are not going to be made available as they are not able to make such significant financial investments without reimbursement by the Government. This will allow the Contractor to make an informed business decision on how to proceed during this challenging time. For some businesses, they have already been incurring such costs for two (2) months without confirmation by the Contracting Officers that the costs will be reimbursed which seems to be an unfair position in which the Contractor carries the burden of all risk and financial detriment.
- Section 4: Determination of Eligibility for and Amount of Reimbursement:
- The initial determination of an “affected contractor”, which seems to be Step 1 of the process, needs to be expedited as much as possible again so the Contractor is able to know immediately whether the Contracting Officer agrees the criteria has been met under the CARES Act, Section 3610 and able to make an informed business decision on how to proceed

with incurring the paid leave costs. It would be beneficial to industry to mirror standardized invoicing procedures in which an established suspense timeframe, without any Contracting Officer response, is deemed equivalent to an approval.

- Section 4 makes it clear this two-step process (Step 1 – affected contractor determination and Step 2 – negotiation of request for reimbursement) is handled on a contract by contract basis but Section 3 allows for a company to submit a request for reimbursement at various levels in the organization. How would that realistically be handled at a higher level if the affected contractor designation and funding availability is determined at the individual contract level?
- We agree with the availability of this option to create a firm-fixed price (FFP) line item for reimbursement to allow the contractor to immediately invoice for the full FFP amount and assume this would include applicable indirect costs (but excluding additional profit). However, to expedite the process, it may be easier for some contracts to reach agreement to use the existing bill rates on contract and allow for regular billing especially for those projects where the impact is continuing for an indefinite period of time.

Reference (b) DRAFT DoD Checklist for Submission of Section 3610 Reimbursement Requests:

➤ Questions:

- Is this checklist only used if the Contractor is submitting a request for Section 3610 reimbursement at the entire business unit or entire corporation/company level? Otherwise, it would be an administrative burden to list all contracts where other requests have been submitted and should not be relevant to the request submitted for a specific contract so long as the Contractor is providing a representation they have not been reimbursed and are not seeking reimbursement of the same costs through any other source.
- What if a Contractor has already been designated an “Affected Contractor” and submitted a request for reimbursement? Does the Contractor now have to re-submit based on this checklist? Please consider making an exception for those requests already submitted as it will just further delay the review and approval process if Contractors have to wait until the guidance is finalized.
- Section 5b. states “Financial records used in developing the COVID-19 Paid Leave request for reimbursement and whether financial records were audited.” What financial records would need to be provided and how could they have already been audited relating to the COVID-19 paid leave costs included in the request for reimbursement?
- Section 5b. states “Adequate data, documentation and information to support the requested Section 3610 reimbursement (provided in electronic format whenever possible).” Will examples of adequate data, documentation and information be included with this guidance so both the Contracting Officers and Contractors know in advance what should be acceptable to further expedite the review process?
- Section 5b. states “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 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).” Why is this information required when this is not standard paid time off or sick leave? All that should be required is for the Contractor to confirm in writing that these costs are not included in the indirect rates to

provide validation there is no double recovery of costs. If the employee was on maternity leave or extended medical leave (the examples provided in the checklist) during this time, then a Contractor should not be seeking reimbursement of those costs under Section 3610.

- Section 5d. states “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.” Does this mean these costs for salaried employees would just be reimbursed through normal billing and existing funding under the contract? Recommend clarification as these costs should still be reimbursed regardless of whether it is for a salaried employee or not.
- Recommendations:
- Recommend a separate checklist be provided for those Contractors who choose to consolidate their requests for reimbursement and submit to the CACO/DACO. A more simplified checklist can be used for requesting reimbursement under a single contract.
 - Section 5b. states “Appropriate rates can include labor rates, overhead, and G&A, but may not include profit or fees;” Please add “Fringe and/or other applicable indirect rates in accordance with the Contractor’s disclosed accounting practices”. Also recommend stating “but may not include additional profit or fees.”
 - The guidance should clearly state that Contractors are allowed to treat this special leave as direct costs under the contract and it should not be considered a change to cost accounting practices.
 - Section 5c. states “...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.” As stated previously, this does not take into consideration OCONUS/overseas contracts where the standard workweek and total compensation is based on higher than 40 hours per week. In some locations, the standard workweek is 72+ hours but the intent should be the same as CONUS locations which is to pay each employee the compensation they would typically receive for a standard workweek and not limit it to 40 hours per week only.
 - Section 5d. states “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.” Why would a Contractor need to remove the sick leave costs that were included in the indirect rates used to price the FFP contract? Those are standard sick leave hours in which the employee should be entitled to use when they are actually sick and not in this pandemic situation where they may not be sick at all but simply not able to work as a result of Government directed quarantine or imposed restrictions to work site access, etc. The sick leave costs built up into the FFP amount should not be used to offset the Section 3610 request for reimbursement as it is not the same type of paid leave.
 - Section 5e. states “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.” Recommend allowing for situations where a Contractor is choosing to reimburse employees after they have already used their paid time off (PTO) hours or leave without pay for those businesses who may not have the financial resources to pay the employees in advance without confirmation or approval from the Government that the costs will be reimbursed. The requirement should be that the Contractor provides a representation in writing that they have already incurred these paid leave costs or intend to pay the employees for the COVID-19 leave time, the Government agrees such costs will be reimbursed and the Contractor provides proof of payment at the time of invoicing.

- Section 5f. states “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).” We assume this only applies if the leave taken as a result of COVID-19 has been accounted for in the fringe or other indirect rate pools. Otherwise, the contractor should not have to revise the indirect rate to remove these costs as these are not the same type of paid leave (vacation or sick leave) that is typically built in those indirect rates.

Reference (c) DRAFT Instructions for the DoD Checklist for Contractor Requests for Section 3610 Reimbursement on FAR-based Contracts:

➤ **Overarching Themes Questions/Recommendations:**

- “The authority provided by Section 3610 is a permissive authority and the contracting officer is not authorized to reimburse any or all of the requested paid leave costs.” While we recognize it is within the Contracting Officer’s authority to make this determination, a decision on whether any or all of the requested paid leave costs will be reimbursed should be made as expeditiously as possible. There should be a reasonable timeframe provided in the guidance; for example, the Contracting Officer has five (5) business days to make a determination upon receipt of a request for Section 3610 reimbursement.
- “The contracting officer has sole discretion to make decisions on a contractor’s affected status and the amount of any Section 3610 reimbursement.” Again, this decision should be made and communicated in writing to the Contractor as expeditiously as possible. Recommend providing a reasonable timeframe in the guidance; for example, the Contracting Officer has five (5) business days to make a determination upon receipt of a request to be designated an “Affected Contractor” as defined under DFARS Class Deviation 2020-O0013.
- “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;” What if a Contractor provides a representation of the intent to pay the employee(s) for time furloughed or taken leave without pay and confirms the employee(s) did not receive unemployment benefits or other form of compensation during this time? Again, the reason for this would be to maintain the employee(s) on company payroll and in a ready state to be able to return to work as soon as the COVID-19 related restrictions are lifted.

➤ **Early Engagement Discussions Questions/Recommendations:**

- As stated above, we recommend including a reasonable timeline (e.g. within five (5) business days) for engaging in the discussions and making an initial determination of “Affected Contractor” to communicate both verbally and in writing to the Contractor.
- Are Other Direct Costs (ODCs) as a result of COVID-19 impact authorized for reimbursement?
- Recommend providing clearer guidance that indirect costs associated with the leave time (direct costs) should also be reimbursable and that “Paid leave” costs are not considered standard leave which would be recovered under normal indirect rates as this leave should be directly reimbursable under the contract.
- Section 3610 is structured for a CONUS contract, standard 40-hour workweek. How will it address OCONUS contracts where the standard workweek exceeds 40 hours per week especially when there may be other contractual obligations (e.g. DFARS 252.222-7002(a)(1))

Compliance with Local Labor Laws (Overseas)) to continue paying the employee(s) their total compensation?

➤ Checklist Questions:

- Question 7: Recommend changing this to “Vice President or other level within the company that is authorized to submit such requests and negotiate on behalf of the Contractor”.



**INPUT FROM INSA MEMBER FIRM #2
REGARDING
DRAFT DOD PROCESS FOR SECTION 3610 REIMBURSEMENT: OVERARCHING GUIDANCE**

- 3610 was intended to allow for continuity of invoicing to maintain a ‘ready state’ workforce. Maintaining a ‘ready state’ workforce presumes continuity of monthly invoicing, particularly as government/agencies slowly return to 100% capacity through the end of the GFY.
- The DoD is not taking this view in their DRAFT guidance.
- Instead, the DoD’s proposed approach and accompanying checklist to facilitate 3610 invoicing guidance adopts and appears to rigidly mandate a Request for Equitable (REA) approach.
 - Specifically, the guidance imposes an exhaustive checklist of cost and pricing detail, reps and certs that are similarly akin to the FAR based claims process that runs the risk of imposing a substantially greater burden on industry and undercutting the legislative intent of the CARES Act.
 - For example, the applicable REA ([DFARS 252.243-7002](#)) and/or claims process (FAR § 33.207(c)) require certification and must be submitted to the Contracting Officer in a manner that clearly provides the factual, technical, and legal basis for an equitable adjustment to the contract. Still, even that process affords contractors substantially greater flexibility than the draft checklist appears to provide.
 - This proposed approach by DoD emphasizes capturing the totality of the costs after they are incurred, and risks such a high burden that contractors will be unable to seek monthly costs in the manner intended and the delay in reimbursement for costs renders the intent of Section 3610 useless.

Our recommendation is to further streamline the process by requiring a contractor to certify they are an “affected contractor” and submit appropriate invoices under this certification with any additional certifications regarding the amounts versus the government requiring submittal of substantial supporting evidence for each invoice. DoD can retain the certification requirements they deem necessary to affirm contractor costs fall under the Act’s definitional criteria but permit contractors substantially greater flexibility to select and provide the amounts they believe sufficiently support their requests. Such an approach will afford contractors the agility to seek and recover costs in a timely manner and to ensure the retention of the essential workforce 3610 was enacted to protect.