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By Electronic Submission

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Re: DRAFT DoD Process for Section 3610 Reimbursement: Implementation Guidance (“Guidance”); DRAFT DoD Checklist for Submission of Section 3610 Reimbursement Requests (“Checklist”); DRAFT Instructions for the DoD Checklist for Contractor Requests for Section 3610 Reimbursement on FAR-based Contracts (“Instructions”)

Jenner & Block represents a number of defense contractors and submits the following comments for your consideration.

On May 18, 2020, the Department of Defense (DoD) issued three draft documents (a Checklist, Instructions, and Guidance) which, together, implement DoD’s new guidance on seeking reimbursement under Section 3610 of the CARES Act. The documents are intended to unify the approach taken by the various DoD services in evaluating contractor requests for covered paid leave costs under Section 3610 of the CARES Act while preserving needed flexibility for contracting officers.

The COVID-19 pandemic has presented an unprecedented set of circumstances that required urgent Congressional action. The urgency of that legislative response, however, does not diminish DoD’s need to adhere to core principles in implementing the statute. These key principles include:

1. Congressional Intent: Signed into law by President Trump on March 27th, 2020, the CARES Act is intended to provide fast and direct economic assistance for American workers and families, small businesses, and to preserve jobs for American industries.
2. Cost/Benefit Analysis: Agencies must assess all costs and benefits and, if regulation is necessary, to select an approach that maximizes net benefits. Agencies must be mindful of quantifying both costs and benefits, of reducing costs, and of promoting flexibility.
3. Small Business Impact: Due to limited resources, small businesses often face disproportionate challenges when complying with federal regulations.

These principles arguably play an even more vital role when implementing crisis-driven legislation aimed to provide relief to key segments of the population. When held up against these guiding principles, DoD’s Checklist, Instructions, and Guidance are decidedly off balance.

DoD's legitimate concern in seeking information sufficient to evaluate contractors' request for Section 3610 reimbursement has resulted in a process so burdensome that even those most in need would question whether the benefits outweigh the burdens. This is particularly true where there is no guarantee of relief when embarking upon such effort.

DoD's draft Checklist, despite its good intentions, falls short of both the specific Congressional intent here – to provide fast and direct economic assistance—as well as cost/benefit principles of statutory implementation more generally. We urge DoD to balance the need for information against the burdens imposed. We also provide suggestions for clarifying a number of provisions in each document.

Comments on the Checklist

We appreciate that DoD accommodated industry's request to enable a choice in whether to seek reimbursement on a contract-by-contract level or at a higher corporate level. In its current form, however, DoD's Checklist tries to be "all things to all people," and in doing so, creates needless work for simple or low cost requests under Section 3610. There is real risk here that contracting officers will seek total compliance with the Checklist and require every contractor to fulfill the Checklist in its entirety, even when there is no rational reason for doing so and regardless of the amount of reimbursement sought.

We believe a better approach would be to create different versions of the Checklists according to the complexity and amount of the request under Section 3610. Although creating different Checklists may require a bit of extra work at the outset, the end result is a tailored approach that would lessen the overall burden (for both contractors and DoD).

We further specifically recommend:

1. Designing a streamlined process/simplified Checklist for reimbursement requests below \$150,000 (as the simplified acquisition threshold) or even below \$50,000 or \$25,000, somewhat resembling the process of quick contract close-outs. Otherwise, the cost of the administrative burden associated with the existing Checklist will outweigh the benefit of the potential cost reimbursement. Contractors might provide a rough order of magnitude ("ROM") estimate of Section 3610 costs with their "affected contractor" request. Contracting officers could then use that ROM to determine whether a simplified process/Checklist would be appropriate. The benefit to such a system is that it would allow the contracting officer some reassurance that a simplified process is appropriate, while also allowing contractors some immediate relief before having a fully mature or finalized number.
2. Tailoring a checklist for "corporate level" relief vs. contract-level relief to alleviate unnecessary requests about seeking Section 3610 relief from other contracting officers or Federal Agencies (i.e., Checklist Question 3.b, 3.c, and 4) when that information would be irrelevant. This is particularly true for contract-specific 3610 requests to a contracting officer, which should not require a list of all other Section 3610 requests from a given contractor, and certainly not from across that contractor's corporate parent and/or affiliates (which could include hundreds of entities). Indeed, such information would not even be static, but rather always changing and fluid.

3. In Checklist Question 4, to the extent this information is necessary for a corporate-level request, clarifying whether the contractor must provide each ACO/DACO/CACO/PCO or only one from that list.
4. In 5.b, clarifying the statement: “Financial records used in developing the COVID-19 Paid Leave request for reimbursement and whether financial records were audited.” Does this mean providing time card records for each employee with every invoice? Such a process would seem overly burdensome. It also seems odd to inquire regarding the audit status when in all likelihood the costs were just incurred.
5. In 5.b, amending the requirement for a “contractor’s company-specific guidance on COVID-19 Paid Leave” to include the phrase “if any” since many contractors and subcontractors, including small businesses, may not have a company “COVID-19 Paid Leave” policy. It would be burdensome for contractors and their subcontractors to create such guidance solely to comply with the Checklist. Especially because DoD recognizes in 5.a that, “the COVID-19 Paid Leave request for information may include justifications that vary by location, program, contract, etc.”, it may well be that a “single” COVID-19 Paid Leave policy does not exist, but instead is contingent on the worksite.
6. In 5.b, deleting the last, broadly worded requirement for “adequate data, documentation, and information to support the requested Section 3610 reimbursement (provided in electronic format whenever possible).” Instead, if the goal is to allow the contractor to include additional, helpful information that is not already requested, we suggest replacing that statement with “Any additional data, documentation, and information the contractor believes would be beneficial to supporting its request for Section 3610 reimbursement.”
7. In 5.c, modifying the first paragraph to read, “not to exceed **an average of 40** hours/week/employee for full-time employees.” The current language does not conform to the Guidance, Section 2.A.vi, which states, “The requested reimbursement does not result in a total of paid work and paid leave changes for any employee or subcontractor employee exceeding *an average of 40 hours per week.*” (emphasis added) The Guidance and Instructions need to account for contractors with such things as 9-80 work schedules where qualifying labor costs will accrue at 36 hours per week one week and 44 hours per week another week.
8. In 5.c, clarifying why a contractor must provide “Average hours worked, by employee, by contact/order, etc., for the three months prior to the declaration of the COVID-19 national emergency; indicate whether each employee is direct (assigned to a single contract/order); direct supporting multiple contracts or indirect.” An employee’s charging history prior to COVID-19 should have no bearing on seeking reimbursement under the CARES Act. As a Government Contractor, each employee has an obligation to accurately report his/her time. Furthermore, any invoice submitted will include a representation to its accuracy.
9. In 5.c, clarifying this 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.” In our view, this may be impossible to calculate by employee. The amount charged to the Government for hours worked will vary by contract type.

10. In 5.c, clarifying the description of how to calculate the effect on indirect rates of paid leave reimbursement for indirect employees. As currently stated, it does not take into account the other COVID-19 factors that have increased indirect rates by stretching out performance or otherwise increasing costs. Contractors should be allowed to apply their actual indirect rates being experienced at the time the request is submitted.
11. In 5.c, ensuring the provision of the names of all employees for whom the contractor is requesting reimbursement is in accordance with HIPPA or other legal guidelines. We suggest adding the phrase, "In accordance with relevant law and guidance" at the beginning of that sentence.
12. In 5.c, clarifying why the Checklist seeks "List of annual leave hours or equivalent leave taken by employees for whom the contractor is seeking Section 3610 reimbursement during the claimed period." This requirement seems incongruent with guidance that employees do not have to use paid leave first. If this is related to employees who may have taken leave unrelated to COVID-19 Paid Leave, rather than ask for all employees' data, which would be onerous, a better method would be to identify whether there are any employees who fall in that category, and if there are, indicate how those hours are excluded from any Section 3610 reimbursement. An alternative suggestion is that if an employee is dedicated to a single contract, the CDRL personnel reports often required by contract should be an acceptable substitute.
13. In 5.d, deleting or significantly editing the last sentence that, "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." It is unclear what is intended with regard to non-reimbursement for costs of salaried employees where the qualifications for paid leave under Section 3610 are otherwise met. For example, a group of design engineers may have been directed by DoD to stay home from working at a SCIF due to COVID-19 outbreak. Working exclusively with classified information, these engineers could not telework. They would seem to qualify for Section 3610 reimbursement even though they are salaried employees.
14. In 5.g, subcontractors overwhelmingly will opt against providing the requested information to the prime and instead will submit directly to the contracting officer under separate cover as allowed by this paragraph. This is going to create an influx of work to be done by individual contracting officers and may cause a backlog. That backlog, in turn, could cause disruption to company cashflow. Clarification is also needed on whether subcontractors must follow the requirements within section 4 to create a listing of all DoD contract numbers/order numbers/agreement with all of DoD and other Federal Agencies under which they are seeking reimbursement and if so, to whom that list is submitted. Again, a significant portion of these burdensome requests could be reduced if DoD were to adopt a streamlined Checklist for low-value, single-contract requests. Subcontractors, many of whom are small businesses, face disproportionate challenges when complying with these components of the existing Checklist.
15. The requirement to add a FFP CLIN to a cost-type subcontract creates unnecessary administrative burdens and could result in increased cost due to compliance to newly added clauses that are required to be included in any contract with FFP elements. Moreover, the Checklist requires a significant level of indirect and forward pricing back up, even for FFP and Fixed Labor Hour/T&M Orders. Because prime contractors are already asking their

subcontractor to remove fee, for fixed negotiated rates we would like clarification on why DoD is also requesting indirect buildups and backup data on those contract types.

16. In 5.g, creating better integration of the last sentence that, “Subcontractors must make the same representations to the Government as the prime contractor” with section 5.i, where TINA certification will be determined at a later time with assistance from agency legal counsel. Non-CAS, commercial suppliers will not have cost accounting to provide cost-based pricing data. Therefore, some subcontractors cannot “make **the same** representations to the Government as the prime contractor” (emphasis added) where the prime contractor provides a TINA certification to attest to the validity of section 3610 costs. The last sentence to section 5.g should be revised to read, “Subcontractors must make a written representation to the Government, in a form acceptable to the Contracting Officer, in support of reimbursement of requested labor costs.” In some cases, this would be a TINA cert where a non-commercial, CAS subcontractor meets the TINA certification threshold.
17. In 7.b, understanding that subcontractors may not be registered in SAM, providing an “N/A” box and an opportunity to explain that response, with clarification that subcontractors are not required to be registered in SAM.
18. In Instructions to Question 7, DoD indicates that the contractor must sign its request for reimbursement by at least a Vice President level. This seems excessive unless justified by a high dollar value, such as above the \$2 million TINA threshold, for the Section 3610 reimbursement request.

Comments on the Instructions to the Checklist

1. We are in favor of the “Early Engagement Discussions” and believe that the contracting officer **should be required** to schedule that discussion within 30 days of a contractor’s request for such engagement. At a minimum, the contracting officer should be **strongly encouraged** to participate in early engagement discussions once requested by the contractor. As it stands, the Instructions indicate that the contracting officer “may decide that early engagement discussions with the contractor would be beneficial,” and that “[e]arly engagement may reduce the administrative burden.” This language is not strong enough for such a valuable collaborative tool.
2. The “Early Engagement Discussions” section, last paragraph, should be modified to allow contractors the option to engage with contracting officers on an “affected contractor” determination in advance of submitting a complete reimbursement request package. In other words, if requested by a contractor, contracting officers would first evaluate whether a contractor qualifies as an “affected contractor” prior to the contractor gathering and submitting the extensive information concerning reimbursement quantum. This process change would lessen the administrative burden for both the Government and the contractor. We suggest re-writing the last paragraph of the “Early Engagement Discussion” as follows:

“Early engagement is likely to reduce the administrative burden to both the contractor and the contracting officer. In order to alleviate burdens associated with submitting reimbursement requests, contractors may seek a separate “affected contractor” determination from the contracting officer, in advance of submitting a complete reimbursement request package. Contractors must submit

the subset of information (the basic who, what, where, when, and why) that would allow contracting officers to issue a written “affected contractor” determination. Until the contractor submits a complete request for reimbursement package, the contracting officer cannot calculate or provide the amount of any Section 3610 reimbursement. Discussions between the contractor and the contracting officer should not be construed as a substitute for a written decision by the contracting officer.”

3. We recommend modifying the “Government Coordination” section. The lead sentence that “Contracting officers should coordinate with, or request assistance from, [DCMA and DCAA]” detracts from the single point of responsibility granted to contracting officers under the statute and DFARS. The need to coordinate with DCMA/DCAA also removes the immediacy of action and flexibility afforded contracting officers and recognized in existing guidance provided by DPC. Moreover, we are unclear as to how DCMA/DCAA could provide insight on evaluating operationally whether an entity is an “affected contractor.”

DCMA and DCAA should serve as a resource and not as a recommendation. Unless viewed as an available resource rather than a requirement or recommendation, engagement by these agencies presents another administrative layer to the process, which could slow reimbursement for contractors with straight-forward and/or low quantum requests. This will undo the immediacy of payments sought by OUSD A&S and Congress.

Consistent with the Instruction’s “Overarching Themes” that it is the contracting officer’s “sole discretion to make decisions on a contractor’s affected status”, and “the right to determine the amount of reimbursement under Section 3610”, we suggest the following approach:

“Contracting officers need to evaluate the circumstances of the contractor’s reimbursement request, commensurate with the discretion granted in these Instructions, 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. Contracting officers may request assistance from available resources such as the Defense Contract Management Agency (DCMA) and the Defense Contract Audit Agency (DCAA) to help evaluate the contractor’s reimbursement amount.”

If DCMA review/approval is needed for cost allocation methods, contractors should be entitled to immediate reimbursement if certain conditions are met: (1) the contractor has an approved accounting system; (2) the costs for recovery are otherwise consistent with the contractor’s disclosure statement, including their FPRA and FPRR; and (3) the contractor has provided the required Section 3610 back-up and certification. Any reductions shall be credited immediately upon conclusion of the negotiation.

4. The “Checklist Questions” section describe Questions 1 -4 as critical to the determination of the affected contractor status, but Question 5.a seems to answer the “why” of COVID-19 impacts. Separately, given the emphasis in Question 1 – 4 on the volume and scope of the contractor’s 3610 request, this suggests that contracting officers may factor the amount of the request in their determination of an “affected contractor.” Please clarify how contracting officers will consider questions of volume and scope of 3610 requests in making the affected contractor

determination. Does a contractor need to meet a certain monetary threshold to be deemed an affected contractor, or, conversely, does a contractor risk not being deemed an affected contractor if seeking too much under a program with insufficient funding? Will the absence of sufficient funds ever bear on whether a contractor will be deemed an affected contractor? We believe the consideration of whether an entity is an affected contractor should be divorced from any consideration of funding, as funding may at some point become available in the future, allowing the potential for future reimbursement under Section 3610 provided the contractor meets the definition of an “affected contractor.”

Comments on the Implementation Guidance

1. We object to the notion that the contractor is unable to seek reimbursement under Section 3610 until costs are incurred and paid. This places tremendous risk on prime contractors, both in relation to seeking costs from their federal government customer, and in terms of their subcontractors’ COVID-related costs, which the prime would have to pay (under this theory) to enable their subcontractors to seek such costs.

The statute does not require this result. Section 3610 of the CARES Act (reproduced below) allows a contracting officer “to modify the terms and conditions of a contract, or other agreement, without consideration, . . . to reimburse . . . any paid leave.” We read Section 3610 to permit a contracting officer to modify a contract to allow the reimbursement of future costs that meet the requirements of Section 3610. Indeed, such a reading would comport with other standard contract provisions such as change orders and REAs.

Section 3610 of the CARES Act states:

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 modify the terms and conditions of a contract, or other agreement, without consideration, to reimburse at the minimum applicable contract billing rates not to exceed an average of 40 hours per week any paid leave, including sick leave, a contractor provides to keep its employees or subcontractors in a ready state, including to protect the life and safety of Government and contractor personnel, but in no event beyond September 30, 2020.*** Such authority shall apply only to a contractor whose employees or subcontractors cannot perform work on a site that has been approved by the Federal Government, including a federally-owned or leased facility or site, due to facility closures or other restrictions, and who cannot telework because their job duties cannot be performed remotely during the public health emergency declared on January 31, 2020 for COVID–19: *Provided*, That the maximum reimbursement authorized by this section shall be reduced by the amount of credit a contractor is allowed pursuant to division G of [Public Law 116–127](#) and any applicable credits a contractor is allowed under this Act. (Emphasis added).

2. The Guidance would benefit from a deadline for a contracting officer determination of a contractor’s Section 3610 request to be an “affected contractor” of 14 days when tied to a

specific contract, and 30 days when tied to corporate-level request, as well as a mechanism for contractors to dispute that determination.

3. The Guidance would benefit from a definition of “affected contractor,” without which, contracting officers would likely apply this term inconsistently. We recommend a simple, easily applied definition like “a company that had one or more open Federal Government contracts during the period 31 January to 30 September 2020 and provided unreimbursed paid leave to its employees or subcontractor employees (who could not otherwise telework) due to the COVID-19 PHE during that period.” We also urge consideration be given to DoD providing a blanket “affected contractor” status on an entity-wide basis for those contractors who: (1) seek Section 3610 reimbursement on an entity-wide basis, or (2) can demonstrate that COVID-19 has or will impact the full breadth of its operation by representation. By doing so, DoD will alleviate the burden of needless, successive “affected contractor” determinations when unnecessary.
4. The Guidance should indicate whether the costs of preparing Checklist documentation are recoverable under Section 3610 or alternatively, under an accompanying REA for other COVID-related costs.
5. Under “Requests for Reimbursement,” Section 2.A.ii should read, “The leave was taken from January 31, 2020 up to and including, September 30, 2020.” See DFARS 231.207-79(b)(5).
6. Under “Requests for Reimbursement,” Section 2.A.iv, the Guidance references a Government-owned; Government-leased, contractor-owned, or contractor-leased facility or site, **approved by the Federal Government for contract performance**. Although this is a broad definition, additional clarification would be useful given that the FAQs on Section 3610 reference sites that are “specifically identified in the contract.”

FAQ 6: The approved work site is the contractor’s location and any other places of performance **specifically identified in the contract**. This includes any contractor or subcontractor facility at which contract administration services are performed in support of those contracts or that has been cleared by the National Industrial Security Program (NISP) Contract Classification System (NCCS) on a DD form 254 or electronic equivalent. Depending on the contract, it may include multiple work sites and/or locations. (emphasis added).

Because it would be an administrative burden to add all the feeder plants and subcontractors to a contract, we suggest:

- Removing the statement that an approved site must be “specifically identified in the contract;”
- Changing the definition to state: “... contractor-owned, or contractor-leased facility or site, **used by the contractor** for contract performance;”
- Using SAM as an avenue for approved site by the Federal Government; or
- As a last resort, having the contracting officer determine a site is approved during determination of “affected contractor.”

7. Under "Availability of Funds," at page two, we recommend clarifying the following statements, which seem to contradict one another:

"Any funds that are otherwise legally available for use under the contract may be used to fund Section 3610 reimbursement under that contract." This statement, which seems consistent with other pre-existing guidance, seems to contradict this statement: "If no funds are made available for reimbursement of Section 3610 paid leave costs, no reimbursement can be made."

8. Under "Determination of Eligibility For and Amount of Reimbursement," we suggest greater clarity regarding which contracting officer will take action, if multiple contracts are being considered.

We appreciate your consideration of these comments. Please do not hesitate to reach out should you have questions or wish to discuss.

Sincerely,



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