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May 22, 2020

Mr. Kim Herrington
Acting Principal Director
Defense Pricing and Contracting

Re: Provide input regarding draft guidance on requests for reimbursement under Section 3610 of the Coronavirus Aid, Relief, and Economic Security (CARES) Act

Dear Mr. Herrington:

As an association, NDIA represents more than 1,700 corporate and over 70,000 individual members from small, medium, and large contractors; our members and their employees are currently under tremendous strain as a result of the COVID-19 crisis and associated responses. In recognition of this challenge, Congress included language in Sec. 3610 of the CARES Act to provide some relief to the government contracting community. We offer the following comments on how the Department's proposed invoicing guidance to support successful implementation in a manner that can both maximize the beneficial impacts to industry and fulfill the letter and spirit of the law.

- **While we appreciate OSD's efforts to seek out a one-size-fits-all solution to implementation, the proposed guidance as written suggests an approach more akin to Requests for Equitable Adjustments rather than direct invoicing, which will result in delays in payments, leading to federal contractor employee losses in critical areas as businesses have varying levels of sophistication and familiarity with processes and actors necessary for implementing this guidance. Small businesses in particular stand at a potential disadvantage for receiving funds associated with this section due to the current levels of administrative documentation required in the draft guidance. DPC should strive to reduce information collection requirements where possible to speed the delivery of funds to affected contractors, including small businesses.**
- **Neither OSD nor Industry have the resources to pursue claims for reimbursement on a contract by contract basis across all contractors. Thus, we support the Department's goal in the guidance of elevating and consolidating claims where possible and appropriate. DoD should adopt a centralized process with DCMA leading the efforts for collecting consolidated claims.**
 - Every company is likely to have a different set of circumstances and different contracting officers are likely to review those circumstances in a different manner. In some cases, it may make sense for companies to work with contracting officers on the contract level that understand the nuances of the contract at hand. In other cases, it may make sense for a company and for the government to be able to elevate the

decision to a CACO, DACO, or another authority to consolidate the adjudication and reduce the bureaucracy across multiple contracts.

- Clearer direction and guidance for differing pathways to seek eligibility decisions should be established. It is not currently clear which pathway the Government wishes for contractors to take and this ambiguity may lead to confusion, unnecessary duplication of work and costly delays for all.
- The current guidance is insufficient in that it needs to clearly lay out an alternate (and preferred) pathway for submitting requests for reimbursement through the DCMA CACO or CAS Segments (Divisions) of a Company through the DACOs.
- While some situations may warrant consideration at the contract level, doing this on a contract by contract basis across the board will create gridlock and massive amounts of data being generated by individual PCOs requests.
- The vast number of PCOs do not understand and have the in-depth detailed knowledge on rates, disclosure statements, etc., at our segments that the CACOs and DACOs do and would require costly and time consuming additional training to be effective in the prescribed process.
- Aggregating through the CACO or DACO level as an option will greatly relieve PCOs and contractors' workforce of a tremendous amount of excessive and recurring work.
- There are concerns with proliferation of Personally Identifiable Information (PII) if individual employee labor records are shared and re-shared across the Department rather than controlled by the CACO/DACO.
- **DOD should establish a small sub-group of industry accounting/compliance experts to work with the DCMA Cost and Pricing Center to discuss methodologies for collecting COVID-19 costs at the Division CAS 410 Segment Level or the Corporate Level.**
 - We recommend that every consideration be given to pooling these costs and allocating across contracts through engagement with the CACO/DACO, where possible.
 - Cost pooling can help to ensure consistent treatment of costs as direct or indirect on all affected contracts and significantly reduce the possibility of duplication of cost recovery through a single process of centralized submission to CACO/DACO and centralized audit by DCAA.
 - DPS and DCMA should seek to determine a way to distribute recoverable cost through a representative mix of contracts reflective of the contractor's overall business base – rather than modifying each and every affected contract.
- **We recommend segregation of affected contractor determination versus cost claim submission into two distinct steps**
 - Due to the large amount of administrative work necessary, the Department should consider bifurcating the decision as to whether a contractor is "affected" from the extensive documentation requirements. The minimal amount of information necessary to make an "affected" decision should first be provided so that the appropriate official can apply that decision criteria against the availability of funds and other requirements of 3610 and deem the contractor as "affected" before



requiring extensive documentation be created for future auditability that may not be necessary if an “affected status” is not granted. It may be possible that contractors who are already audited on a regular basis by DCAA/DCMA can move to invoicing with fewer requirements as their rates, policies, and systems are already undergoing regular reviews and floor checks with the oversight of their CACO.

- The overall volume of data to be potentially collected in accordance with the checklist is voluminous and will result in extensive administrative man-hours and burden which could be particularly problematic for small businesses that lack the infrastructure to respond. The expense to the contractor of complying will end up being paid by the Department and taxpayer in the form of the resulting higher rates. Though the guidance mentions contracting officers using discretion “to determine the extent to which the data specified” is required, there is a high probability that contracting officers will request the entire checklist be provided by contractors out of an abundance of caution unless additional direction is provided on when each factor is truly required to make determinations or establish traceability.

- **DoD should clarify that 3610 costs can be invoiced intermittently and in a timely manner.**
 - Section 2(A)(ii) Requests for Reimbursements states:
 - The leave was taken between 31 January and 30 September 2020, and all costs for which the contractor requests reimbursement are incurred and paid prior to the date of the contractor’s reimbursement request;
 - Ability to invoice quickly and intermittently is needed to maintain cashflows. As written, this guidance would seemingly require a contractor to wait until after 30 September and all costs are accounted for to request relief. We do not believe this is the intent of the legislation or the guidance and request clarification. A company should be able to request AC determination as a situation is occurring to ensure cost reimbursement prior to investment of resources between both industry and government on approval of cost allocation methods and negotiation.
- **Availability of Funds**
 - OSD and Industry recognize funds have not been appropriated, and the Services will have to look across programs to determine best use. Difficult discussions to cancel programs, etc. must occur if appropriations are not approved by Congress.
 - Question: Can companies use funding/credits owed on contract to offset the amount for CARES Act costs? For example: If a company owes money back to the Government for a contract, can those funds be used to offset money owed to the company for CARES ACT costs. Would the same package requirements apply?
- **In addition to the above strategic comments, specific concerns are included in the attachments as comments on the draft documents released by DPC.**

We thank you for the opportunity to engage with industry and accept on comments on the implementation of this important provision. We intend these comments and attachments as a



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constructive contribution to the conversation around Sec. 3610. We look forward to continuing to work with you and your staff.

If you or your staff have any questions, please contact Wesley Hallman, Senior Vice-President Strategy & Policy, at WHallman@NDIA.org or (703) 247-2595.

Sincerely,
Wesley Hallman
Senior Vice President Strategy & Policy
National Defense Industrial Association

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Attachments

- 1: DoD Process for Section 3610 Reimbursement: Implementation Guidance
- 2: DoD Checklist for Submission of Section 3610 Reimbursement Requests
- 3: Instructions for the DoD Checklist for Contractor Requests for Section 3610 Reimbursement on FAR-based Contracts



Attachment 1: DoD Process for Section 3610 Reimbursement: Implementation Guidance

This overarching implementation guidance provides an overview of the key tenants of Section 3610, DFARS Class Deviation 2020-O0013 and other guidance published relevant to requests for reimbursement under this section. The attachments to this guidance provide instructions to contracting officers in support of the use of the Department of Defense (DoD) Checklist for Submission of Section 3610 Reimbursement Requests.

1. Background

Section 3610 of the Coronavirus Aid, Relief and Economic Security (CARES) Act (Pub. L. 116-136), enacted on 27 March 2020, authorizes, but does not require, contracting officers (COs) to modify contracts and other agreements, **without consideration**, to reimburse contractors for paid 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 during the COVID-19 national emergency. DFARS Class Deviation 2020-O0013 of 8 April 2020, created a new cost principle for the purpose of implementing Section 3610.

2. Requests for Reimbursement

- A. A contractor request for reimbursement must include sufficient documentation for the CO to make the **“affected contractor”** determination and support the requested amount of reimbursement. The attached checklist describes information that will be needed to support a contractor’s request for reimbursement. The checklist is not all inclusive and additional information may be requested. The CO must be able to determine that:
- i. The contractor has provided 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;
 - ii. **The leave was taken between 31 January and 30 September 2020, and all costs for which the contractor requests reimbursement are incurred and paid prior to the date of the contractor’s reimbursement request;**
 - iii. The contractor has not been reimbursed for the same costs for which it is requesting reimbursement. If the contractor later obtains reimbursement for the same costs as those the contractor requests, or has received, under Section 3610 from any source other than Section 3610, the contractor shall notify the CO in writing immediately. In no

Commented [A1]: Add clarification that supports the hours to prepare documentation in accordance is allowable and reimbursable via CARES Act.

Commented [A2]: Contractor Rights:
-Include a turnaround time for CO determination / disposition.
-Include contractor rights to dispute a CO determination/disposition.

Commented [A3]: The Guidance does not provide a definition for “affected contractor,” which could lead to inconsistencies between COs in implementing the guidance.

Recommendation: Suggest that the definition be something broad like “a company that had one or more open Federal Government contracts during the period 31 January to 30 September 2020 and provided paid leave to its employees or subcontractor employees due to the COVID-19 PHE during that period.”

Commented [A4]: Requires company to make a business decision with no validation that the costs will be covered.

Recommendation: Require early engagement decision upfront for circumstantial evidence to be submitted having the CO determine as an “affected contractor”. Therefore, there is an agreement the circumstance is within the bounds of Section 3610, however the cost portion is subject to the remaining requirements, validation and negotiation.



event may a contractor be reimbursed more than once for the same expense, including via forgiveness of a Government-backed loan. Should the timing of the reimbursements coincide such that the contractor is unable to provide notification to the CO prior to establishment (via contract modification) or payment of a reimbursable amount under Section 3610, the contractor shall notify the CO and agree to execute a modification reducing the reimbursable amount by the amount of reimbursement provided by other means (e.g., paid by credits allowed under Division G of the Family First Coronavirus Response Act, CARES Act, or any other credit allowed by law associated with the COVID-19 PHE declared on 31 January 2020);

- iv. The leave was paid because the contractor's employees or subcontractors could not perform work on a Government-owned; Government-leased, contractor-owned, or contractor-leased facility or site, approved by the Federal Government for contract performance, due to COVID-19-related closures or other restrictions;
- v. The employees or subcontractors were unable to telework because their job duties could not be performed remotely; and
- vi. The requested reimbursement does not result in a total of paid work and paid leave charges for any employee or subcontractor employee exceeding an average of 40 hours per week.

B. A contractor may request reimbursement of Section 3610 leave costs for a single contract, multiple contracts, an entire business unit, or an entire corporation/company, so long as the request satisfies all requirements in A, above.

C. A contractor shall submit a request for reimbursement of Section 3610 paid leave costs to a CO. The DoD may choose to address any request for reimbursement at any level in any DoD Component for any reason, including administrative convenience.

3. Availability of Funds

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.

Commented [A5]: How to ensure it is a site approved? Reference FAQ6 – not all site are “specifically identified in the contract”. Administrative burden to add all feeder plants and subcontractors.

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 (NISIP) 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.

Recommendation:

- 1) Remove statement for it so be “specifically identified in the contract”
- 2) Change definition to state: “... contractor-owned, or contractor-leased facility or site, USED BY THE CONTRACTOR for contract performance.”
- 3) Use SAM as avenue for approved site by the Federal Government, or
- 4) Have the CO to determine it is an approved site during determination of affected contractor (least preferable)

Commented [A6]: Clarification of other restrictions that it should include personnel who had to quarantine due to work related travel who could not telework and those that are probable positive (potential exposure) to ensure safety of workforce. Additional legislation to be considered for per diem and other travel dollars tied to paid leave incidents identified as an affected contractor. Recommend you provide some representative examples to better clarify.

Commented [A7]: Inconsistencies in higher level vs. contract by contract. Still appears to be an administrative burden

Commented [A8]: Has there been an established time frame in which contractors must request reimbursement? How long will DoD have to make a decision on Contractor requests?

Commented [A9]: This section seems to lack clarity. It first states that any funds legally available for use under the contract may be used for reimbursement and that adjustments need not be funded with only CARES Act appropriations. It next states, that if no funds are made available, there will be no reimbursement. It ends with the statement that the manner of future appropriations and their availability is TBD. Clarification of this paragraph is needed.



Allocation of funds for reimbursement under Section 3610 is solely at the discretion of DoD, subject to the terms of the appropriation. If no funds are made available for reimbursement of Section 3610 paid leave costs, no reimbursement can be made.

Commented [A10]: Concern with wording – brings question to allowability. If there is no funding, allow DFARs and deem affected contractor to make it allowable, however would impact margins.

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.

4. Determination of Eligibility For and Amount of Reimbursement

As specified in DFARS Class Deviation 2020-00013, reimbursement of a contractor's paid leave costs under Section 3610 requires that the CO establish in writing that the contractor is an "affected contractor." A determination and findings are not required. The determination of "affected contractor" status must be adequately documented, supported by the documentation described in 2.A. above, and included in the contract file along with the contract modification that creates the COVID-19 line item and the funding document. The preamble to the modification might say, "Based on my determination that the contractor is an 'affected contractor' within the meaning of DFARS 231.205-79 (Class Deviation 2020-00013), the contract is modified as follows:"

Commented [A11]: Why state not required? What would draw the CO to think this?
Comments: Reduces administrative burden for COs.

Commented [A12]: This section requires the CO to establish in writing that the contractor is an "affected contractor", states that "A determination and findings are not required.", followed later by "The determination...must be adequately documented. These two statements seem to conflict, so clarification is needed.

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. The CO shall note in the contract file and/or in the contract modification their reliance on the contractor's representation that the information submitted is accurate. The CO may require the contractor to provide any additional information necessary to assess eligibility under Section 3610, to verify the accuracy and allocability of incurred costs, and that the contractor is not paid or reimbursed for the same costs via any other source. The CO shall determine and document the rationale for the amount of reimbursement, including any limitation due to available funding. In no event shall the reimbursement include profit or fee on paid leave costs under Section 3610.

Commented [A13]: Recommend new cost principle to allow for segregation of these costs from a margin perspective.

The contract modification should cite Section 3610 of the CARES Act as authority for the modification.

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.

5. Invoicing



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The “Invoice 2in1” fixed price service only, combined invoice, and acceptance document in Wide Area Workflow (WAWF), should be used to submit the request for payment under Section 3610. Additional information on structuring modifications and invoicing are available at: [Implementation Guidance for Section 3610 of the Coronavirus Aid, Relief, and Economic Security Act, 9 April 2020](#).



Attachment 2: DoD Checklist for Submission of Section 3610 Reimbursement Requests

If a contractor submits a request for Section 3610 reimbursement at the corporate office level, contracting officers will need to determine the extent to which the data specified below must be included with the request for Section 3610 reimbursement.

1. Contractor identification:

- a. Contractor Name: _____
- b. Contractor address: _____

- c. Contractor CAGE and Tax ID Number _____
(All submitted in request) _____

2. Cognizant Government organizations:

Contractor requests for Section 3610 reimbursement should be provided to the cognizant contracting officer administering contracts.

3. Contractor organization:

- a. Is the contractor a subsidiary, division, segment, or otherwise affiliated with another company? _____

Yes _____ No _____

If yes, the contractor must exclude any paid leave costs included in any other requests for reimbursement. Provide a brief description of the corporate structure and how (subsidiary, division, etc.) requests will be submitted.

- b. Is the contractor submitting Section 3610 reimbursement requests to other contracting officers or Federal Agencies? _____

Yes _____ No _____

If yes, the contractor must identify all Section 3610 requests being submitted.

Commented [A14]: Though the guidance mentions contracting officers using discretion "to determine the extent to which the data specified" is required, there is a high probability that contracting officers will request the entire checklist be provided by contractors out of an abundance of caution unless additional direction is provided on when each factor is truly required to make determinations or establish traceability.

Commented [A15]: This requirement is potentially burdensome

Commented [A16]: This appears to add administrative burden – what will be required of the CO once they obtain this information?

Understand if handling "at a higher level" but contract by contract doesn't make sense to include.

Purpose was for the CO to be cognizant of other 3610 requests coming in. Industry commented should only consider if at a higher level; USD agreed if not contract by contract.

if a contractor is submitting multiple requests, it is unclear why a contracting officer would need this information or what the contracting officer is to do with the information once they receive it.

The checklist and guidance lacks direction to the contractor on the reporting of requests to restricted customers. This is particularly problematic for item number four also. This lack of clarity again amplifies the need for guidance on the level to which a contractor should be submitted the request – at the individual contract level or a higher contracting officer with better visibility.

If the purpose of Checklist items 3b and 4 are to identify appropriations or funding sources for Section 3610 relief, any of the contracting authorities receiving this data would not have privity to pull appropriations from other agencies so it is not apparent as the purpose of providing information across agencies.



4. Contract number(s), task orders, delivery orders, and any other agreements (if applicable):

The contractor should list all DoD contract numbers/order numbers/agreements, etc., and all contracts/orders/agreements, etc., with other Federal Agencies under which the contractor is seeking Section 3610 reimbursement. Each Section 3610 reimbursement request should include the period of performance for each contract/order/agreement, etc., under which the contractor is requesting Section 3610 reimbursement, as well the applicable Product/Service Code(s). The list should be sortable by agency, buying activity, ACO/DACO/CACO/PCO, DUNS number, and CAGE code. Identify the contractor’s non-Government commercial work over the period covered by the Section 3610 reimbursement request, and describe the allocation and method of allocation of COVID-19 paid leave costs between Government and commercial customers.

Commented [A17]: This also adds administrative burden.

Commented [A18R17]: It is not clear what DoD intends for individual COs to do with the requested information. The information does not appear to be relevant to individual contracts where contractors are submitting requests for a determination that we are an affected contractor and that we want to seek coverage under the CARES Act, Section 3610

Recommend deleting the requirement for company’s who have or will be submitting individual requests, by contract, to individual COs. Not only is the information irrelevant, but COs who receive this voluminous data on thousands of contracts from a company will have no idea what to do with the information and it is likely not to be used (not to mention the administrative burden on the company to assemble the information).

Commented [A19]: Provide all or one?

5. Section 3610 Circumstances Narrative and Information:

- a. The contractor should provide a narrative identifying the circumstances that impacted paid leave cost and performance under each DoD contract/order for which Section 3610 reimbursement is requested as a result of the COVID-19 national emergency. At a minimum, the narrative should include:
- An explanation as to why Section 3610 applies;
 - Identification of facility closures or restrictions that precluded employees from reporting to their normal work location(s), including closure/restriction date range(s) and specifics;
 - Identification of all employees who could not telework because their job duties could not be performed remotely; and
 - Identify the specific circumstances applicable to each contract/task order/delivery order/etc., or any other agreement(s) under which the contractor is requesting Section 3610 reimbursement. The COVID-19 Paid Leave request for information may include justifications that vary by location, program, contract, etc.

Commented [A20]: This item requires a large amount of information that will be administratively burdensome to pull from across contracts and suppliers. The government should weigh the utility of this information in making decisions against the cost and risks associated with producing and providing the information. For instance, Privacy Act concerns will make the collection, sharing and storage of this information more burdensome and costly which will be especially problematic for small companies and suppliers who are already taxed. Contracting officers may feel compelled to ask for any or all of this data even if it is only minimally applicable to the contractor requesting relief. Perhaps the requests are applicable to a subcontractor down the supply chain but the return for requesting and securely providing all of this information up the chain is of little value to the government in comparison to the privacy and security risks created and financial burden that will be associated with the collection.



b. COVID-19 Paid Leave impact on contract cost or pricing. At a minimum, the contractor should provide the following information for each affected contract/order/etc.:

- A full description of the methodology the contractor used to develop the amount requested for reimbursement under Section 3610;
- 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;
- Financial records used in developing the COVID-19 Paid Leave request for reimbursement and whether financial records were audited;
- Current status of contractor's accounting system for Government contracting purposes: Approved _____ Adequate _____ Not evaluated _____ Not Applicable _____
Disapproved _____ Identified Deficiencies (List):

Commented [A21]: This is a particularly labor-intensive process to develop

- Description of the contractor's normal accounting treatment of leave costs (policies and procedures, indirect pools/allocation bases, disclosure statements, etc.);
- The contractor's company-specific guidance on COVID-19 Paid Leave; and
- Adequate data, documentation, and information to support the requested Section 3610 reimbursement (provided in electronic format whenever possible).

Commented [A22]: Is this a necessary requirement? We assume several companies would not have a covid-19 paid leave guidance

Commented [A23]: Overly broad

c. Prime contractor's COVID-19 Paid Leave for direct and indirect employees:

- Identify eligible hours (those hours meeting the criteria identified in DFARS 231.205-79(a)(1)(ii) under Class Deviation 2020-O0013) 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.
 - o Part-time employees are limited to their average hours typically worked per week (prior to the COVID-19 pandemic).
 - o Note that if reimbursement is requested for employees who are typically charged indirectly, the contractor should provide a detailed explanation of how each individual indirect employee meets the criteria addressed in DFARS 231.205-79(a)(1)(ii). Further, the contractor must explain how obtaining reimbursement for these indirect employees' paid leave under Section 3610 will not result in a duplication of costs. In most cases, the administrative burden associated with taking indirect employee "paid leave" charges, allocating these

charges across all contracts, and crediting the associated indirect leave pools to ensure there is no double counting of these costs would benefit neither the contractor nor the Government.

- Provide the names of all employees for whom the contractor is requesting reimbursement for COVID-19 Paid Leave, and the COVID-19 Paid Leave hours for which reimbursement is requested:

Commented [A24]: In conjunction with HIPPA guidelines

- o By labor category and skill level;
- o Average hours worked, by employee, by contract/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;
- o 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;
- o 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
- o 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).

Commented [A25]: Average hours worked, by employee, by contract/order/etc. for the three months prior to the declaration of the COVID-19 national emergency is unnecessary. Instead, companies should be asked to certify that hours billed for employees do not exceed their "standard" work week number of hours, or something similar.

Commented [A26]: Recommend removal – purpose is unclear based upon guidance clearly advises employee does not have to use paid leave first. Defense Contractors are subject to audit by DCAA, to include Incurred Cost Audits, Audits of Monthly Vouchers, Post-Payment Voucher Audits, and Labor Floorcheck Audits, all of which would review to ensure contractors bill only for those Direct Hours recorded on an employee's timesheet

- d. Average sick leave hours budgeted for and included in any forward pricing for the period claimed for Section 3610 reimbursement, to assist the Government in determining how much sick leave is already included in indirect rates. 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. Contractors shall ensure that any COVID-19 Paid Leave costs requested for reimbursement under Section 3610 is in addition to or outside of established policy or practice or collective bargaining agreement leave amounts. 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.

Commented [A27]: List of sick leave hours or equivalent – not all company's provide sick leave. Rather, they provide PTO, Comprehensive Leave, or similar that does not differentiate between sick, vacation, or other personal reasons that an employee may take leave

- e. 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. Upon the Government's request, contractors must provide payroll records to the contracting officer to support the labor rates included in the request for Section 3610 reimbursement.

Commented [A28]: As stated above, this is not necessarily relevant. Not all companies provide differentiated sick leave for employees. Further, the statement in 5d 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" should be clarified. This could be interpreted as not allowing for reimbursement of salaried employees which is directly contrary to the legislative intent of Section 3610.

- f. The contractor shall identify the Forward Pricing Rate Proposal (FPRP), Forward Pricing Rate Agreement (FPRA), or DCMA Forward Pricing Rate Recommendation (FPRR), and



provisional billing rates as applicable, in place covering the period of time during which it is requesting Section 3610 reimbursement.

- The contractor must explain and document how it developed the applicable indirect rate(s) prior to the COVID-19 public health emergency declaration on 31 January 2020;
- 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).

g. Subcontract labor impacts. For all subcontractor COVID-19 Paid Leave the prime contractor is requesting reimbursement for under Section 3610, the prime contractor must provide the same supporting information for the subcontractor(s) (separated by subcontractor) as required from the prime contractor, including a list of all affected DoD and non-DoD Federal contracts and subcontracts, and the subcontractor's commercial work in total over the period for which Section 3610 reimbursement is being requested. If the subcontractor does not routinely provide such information to the prime contractor due to competition or proprietary data concerns, the subcontractor should provide the amount of Section 3610 reimbursement it is requesting to the prime contractor for inclusion in this checklist and submit all other supporting information directly to the contracting officer under separate cover. If the subcontractor provides the supporting information to the prime contractor, the prime contractor is responsible for performing the same type of analysis that the contracting officer is performing on the prime contractor's request for Section 3610 reimbursement. The prime contractor must not commingle subcontractor information with its own. Subcontractors must make the same representations to the Government as the prime contractor.

h. The contractor should submit a spreadsheet (or other format, as directed by the contracting officer) showing its calculation of the requested Section 3610 reimbursement amount, traceable to the supporting data submitted above.

i. The Truth in Negotiation Act (TINA) applies to non-commercial contracts over the statutory threshold. TINA is handled at the contract level and requires the certification at FAR 15.406-2, Certificate of Current Cost or Pricing Data, for the cost or pricing data submitted in support of the request for reimbursement under Section 3610. If a contractor's request for Section 3610 reimbursement includes both FAR Part 15 and FAR Part 12 work and the combined amount exceeds the TINA threshold, contracting officers will work with their legal counsel to determine whether TINA certification is required.

6. Identification of other credits that will reduce relief provided under Section 3610:

a. Paycheck Protection Program, Section 1102 of the CARES Act

Commented [A29]: This focus on subcontractors is extremely welcomed but needs additional implementation guidance and details. Primes have been eagerly awaiting implementation guidance to flow information, templates and direction to their subcontractors but many of the same concerns as outlined already apply when flowing this guidance to subcontractors. We appreciate the understanding of the proprietary data concerns involved in working with subcontractors on this issue. However, just as prime contractors will struggle with who, when and where to submit the requests for relief associated with 3610; subcontractors will be at an even greater disadvantage in navigating where the documentation should be sent. Again, separating the affected decision of who is impacted from the documentation and invoicing may provide some direction and relief to this complex issue. Additional guidance to primes on how to handle and route subcontractor concerns would be helpful and would be a nice supplement to Checklist item number 6. Checklist item 6 is welcomed as it provides a template that can be used by primes and can be easily flowed to subcontractors to identify double dipping concerns.

Commented [A30]: This creates confusion for some contractors as to why there would be a requirement for a TINA certification. Again, if the affected status and the available appropriations are determined up front and the level of 3610 submission better defined, it would be easier for a contracting officer or other authority to deem whether a TINA certification is needed rather than having the request be sent to all contractors applying for relief.



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Has the contractor applied for relief under this program? Yes No

If yes, what was the loan amount requested? _____

What was the loan amount received? _____

Does the contractor anticipate meeting the conditions for loan forgiveness identified in Section 1106 of the CARES Act? Yes No

If yes, the loan forgiveness amount must be excluded from any request for reimbursement under Section 3610.

If no, explain why not and provide a copy of the certification already required by Section 1106 of the CARES Act that the contractor submitted to the lending institution:

b. Tax credits under Division G of Pub. L 116-127

Does the contractor anticipate receiving tax credits under Division G of Pub. L 116-127? Yes No

If yes, what is the anticipated amount of the tax credit? _____

c. Any other credit allowed by law (including state or local laws) that is specifically identifiable with the public health emergency declared on January 31, 2020, for COVID-19.

Specify the provision: _____

Specify the amount of credit anticipated: _____

7. Representations

a. All information has been submitted to support this request for reimbursement in accordance with DoD Class Deviation 2020-00013. Yes No

If no, explain: _____

b. The contractor's representations and certifications in the System for Award Management (SAM) are current, accurate, and complete. Yes No

If no, explain: _____

c. This request for reimbursement is made in good faith, and the supporting data is accurate and complete. Yes No



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If no, explain: _____

(Official's name)

(Title)

(Title)

(Date)

Commented [A31]: Can contractor charge costs associated with preparation of cares act claim?
Many questions are steering towards handing at a higher level.



Attachment 3: Instructions for the DoD Checklist for Contractor Requests for Section 3610 Reimbursement on FAR-based Contracts

Purpose:

These contracting officer instructions are designed to expand on and explain the DoD Checklist for contractor submission of Section 3610 Reimbursement Requests. The checklist is a tool designed to assist contractors in identifying the information that will be needed to evaluate a COVID-19 Paid Leave request for reimbursement as authorized by Section 3610 of the CARES Act. While the checklist and DFARS Class Deviation 2020-O0013 only apply to FAR-based contracts, they may be used as a guidance when completing a request for reimbursement under an other transaction (OT) authority; however any request for reimbursement under an OT shall be submitted separately from any request for Section 3610 reimbursement under a FAR-based contract. Due to the complex issues surrounding a request for reimbursement under Section 3610 and DFARS Class Deviation 2020-O0013; the uniqueness of contractor accounting policies and procedures; and the creation of a COVID-19 Paid Leave cost category; the checklist is not intended to be all-inclusive and contracting officers may require additional information in making their determinations.

Overarching Themes:

- The authority provided by Section 3610 is a permissive authority and the contracting officer is not required to reimburse any or all of the requested paid leave costs;
- Any reimbursement under Section 3610 is subject to the availability of funds;
- The contracting officer has sole discretion to make decisions on a contractor's affected status and the amount of any Section 3610 reimbursement;
- Contractors must not be reimbursed (or otherwise paid) twice for the same costs;
- The contracting officer has the right to determine the amount reimbursed under Section 3610 and at what level (e.g., contract, division, segment, company, corporate) the costs will be reimbursed;
- Contractors must segregate COVID-19 Paid Leave costs in their books and records;
- 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;
- Paid leave reimbursement under Section 3610 excludes any profit or fees; and
- Contracting officers shall document any COVID-19 Paid Leave reimbursement decisions in a memorandum for record (MFR). A template that contracting officers may use to complete the MFR will be provided separately, but this template should be tailored to the specific



circumstances and is not a substitute for a contracting officer's independent thought or reasoned judgement.

Early Engagement Discussions:

If a contractor contacts the contracting officer about its intent to submit a request for reimbursement under Section 3610, the contracting officer may decide that early engagement discussions with the contractor would be beneficial. The following could be discussed:

- The requirement that the contractor must be classified as an affected contractor to receive reimbursement under Section 3610, and that the contracting officer will make this determination;
- What can and cannot be included in COVID-19 Paid Leave in a request for reimbursement under Section 3610;
- Frequency of the Section 3610 requests for reimbursement;
- Information required to support any Section 3610 reimbursement request; format for required information; and what information needs to be provided with the request;
- 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;
- Where and how requests for Section 3610 reimbursement should be submitted;
- How appropriate rates will be defined and calculated (Section 3610 references "minimum applicable contract billing rates," due to limited application, the DFARS Class Deviation applies the term "appropriate rates"); and
- How requested COVID-19 Paid Leave reimbursement will be allocated to Government and other (i.e., commercial) contracts.

Until the contractor submits a request for reimbursement, the contracting officer can neither determine that the contractor is an affected contractor eligible for Section 3610 reimbursement, nor calculate the amount of any Section 3610 reimbursement. Early engagement may reduce the administrative burden to both the contractor and the contracting officer. These conversations between the contractor and the contracting officer should not be construed as a substitute for a written decision by the contracting officer.

Government Coordination:

Contracting officers should coordinate with, or request assistance from, available resources such as the Defense Contract Management Agency (DCMA) and the Defense Contract Audit Agency (DCAA) to help determine whether the contractor is an affected contractor and evaluate the contractor's request for Section 3610 reimbursement. Furthermore, contracting officers need to evaluate the circumstances of the contractor's reimbursement request and decide how to proceed

Commented [A32]: Recommend addressing contracting basics for CO and PM to determine scope requirement to support the "mission" in totality. While the contractor may be affected, there is only so much money to go around. Need to make the tough decisions like our own households on the items needed for the mission so difficult business decisions can be made and contractors not found to be in default.

Commented [A33]: Agree – step 1 – does the CO agree I was affected before I submit the remainder of the checklist information. Recommend removing requirement that paid leave be already "paid" to employee – we should be engaging CO early and often to deem affected and we will be reimbursable.

Commented [A34]: This current timing is backwards and needs to happen in advance.

Commented [A35]: Affected contractor criteria still unclear as they are adding DCAA and DCMA- how would they have insight on operational perspective.



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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.

Checklist Questions:

Questions 1 through 4:

The answers to questions 1 through 4 prompt the contractor to identify the who, what, where, when, and why of the request for Section 3610 reimbursement. This information is critical to the contracting officer's determination as to whether the contractor is an "affected contractor." If the contracting officer determines that the contractor is an affected contractor, the contracting officer will need to determine the appropriate reimbursement amount using the information provided in response to the remainder of the checklist. If the contracting officer determines that the contractor is not an affected contractor, no further evaluation by the contracting officer is necessary but the determination that the contractor is not an affected contractor, and the rationale therefore, shall be documented in the contract file.

Question 5:

The answers to Question 5 prompt the contractor to detail how the contractor developed its appropriate rates and the records used to develop those rates. Furthermore, the status of the contractor's accounting system may impact the amount of data needed by the contracting officer and the ability of the contracting officer to rely on contractor provided data.

The definition of appropriate rates and what is included in those rates is critical to the contracting officer's determination of the costs to be reimbursed. The contracting officer will use this information to determine whether the contractor has appropriately defined its submitted rates and whether that definition complies with Section 3610, the DFARS Class Deviation, and guidance issued. The contracting officer has sole discretion to determine the appropriate rates and the composition of those rates. Finally, this section of the checklist requires the contractor to identify any other requests for COVID-19 Paid Leave reimbursement under Section 3610.

In addition, the answers to Question 5 should assist the contracting officer in evaluating the eligibility of the number of COVID-19 Paid Leave hours requested by the contractor to reimburse paid leave hours provided to individual employees and the actual calculation of the appropriate rates. Paid leave is capped at no more than an average of 40 hours per week (full-time) for eligible employees. There may be instances in which an employee could perform some but not all of their duties. In those instances, the contracting officer needs to know what they were working on to ensure that the contractor excludes any work-related hours from COVID-19 Paid Leave requests.



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Furthermore, employees may have taken leave unrelated to COVID-19 Paid Leave and those hours should be excluded from any Section 3610 reimbursement. Those hours are already being reimbursed through the appropriate indirect rates.

The contractor's justification and explanation for requesting Section 3610 reimbursement will vary depending on the labor category and the type of employee (senior executive/management/supervisor/employee, direct vs. indirect, etc.). For example, some employee job responsibilities can be performed using telework. For those employees, the contracting officer needs to understand the contractor's explanation as to why they could not telework.

Prime contractors requesting reimbursement for subcontractor COVID-19 Paid Leave should obtain the same information about the subcontractor as they provide to the contracting officer and evaluate that data. It is the prime contractor's responsibility to do so. However, in some instances, the contracting officer may have to work with the subcontractor directly.

Under no circumstances should prime contractors or subcontractors be reimbursed more than once for COVID-19 Paid Leave costs. Therefore, 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.

Finally, the Truth in Negotiation Act (TINA) applies to non-commercial contracts over the statutory threshold. If a contractor's request for reimbursement includes both negotiated and commercial government work and the combined amount exceeds the TINA threshold, contracting officers will work with their legal counsel to determine whether TINA certification is required.

Question 6:

The answers to Question 6 help to identify potential credits or reductions that should be applied to the COVID-19 Paid Leave requests for reimbursement.

Question 7:

The contractor must sign its request for reimbursement at least at the Vice President level.

Commented [A36]: Do not agree on level – overly burdensome. "Vice President" also varies widely across companies.