



May 22, 2020

Mr. Kim Herrington
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Office of the Assistant Secretary of Defense for Acquisition
Washington, DC 22202

Submitted via email: osd.dfars@mail.mil

Subject: Input regarding draft guidance on requests for reimbursement under Sec 3610 the CARES Act

On behalf of the member companies of the Professional Services Council (PSC),¹ we are pleased to respond to the request for input on the Department of Defense (DoD) draft guidance on requests for reimbursement under Section 3610 the Coronavirus Aid, Relief, and Economic Security (CARES) Act, released on Monday evening, May 18, 2020.² PSC appreciates the level of engagement DoD has had with PSC throughout the implementation of Section 3610 and the efforts to address contractor issues that ensure the continued availability of a ready workforce throughout the COVID-19 pandemic. We remain supportive of Under Secretary of Defense Lord's 20 March memo wherein she emphasized the importance of the DIB workforce to be mission ready. We also understand and appreciate the effort that went into the rapid implementation of Section 3610 and the development of this draft additional guidance. However, PSC has numerous concerns, questions and recommendations regarding the draft implementation guidance, the accompanying checklist for submission, and the related instructions for the checklist, as detailed further in the attachment to this letter.

DoD Process for Section 3610 Reimbursement: Implementation Guidance

PSC recognizes that the reimbursement process will demand more of DoD's contracting officers (COs) while also requiring companies to use manpower to provide the required information and supporting

¹ PSC is the voice of the government technology and professional services industry, representing the full range and diversity of the government services sector. As a trusted industry leader on legislative and regulatory issues related to government acquisition, business and technology, PSC helps build consensus between government and industry. Our over 400 member companies represent small, medium, and large businesses that provide federal agencies with services of all kinds, including information technology, engineering, logistics, facilities management, operations and maintenance, consulting, international development, scientific, social, environmental services, and more. Together, the trade association's members employ hundreds of thousands of Americans in all 50 states.

² Available at https://www.acq.osd.mil/dpap/dars/early_engagement_opportunity/guidance_on_section_3610_cares_act.html.

documentation. As we see it, there are essentially three major components to the DoD's implementation guidance that overlays key activities in the process.

- The determination of who is an “affected” contractor
- The documentation required to support a reimbursement request; and
- The availability of funding.

In summary, we view the totality of the information requested as too long, too complicated, too intrusive, and too inflexible for all contractors, whether a prime or a sub, and particularly for our small business members. In its current form, it treats requests for small amounts of reimbursement the same as requests for millions of dollars of coverage. Data such as a company's legal structure is already in the government's SAM database, in CAS disclosure statements, and other information that is readily available to the government and should be relied on as accurate, and certainly should not have to be resubmitted with each invoice covering the same individuals and contracts but a different covered timeframe. Spreadsheets should be used in lieu of “narratives” wherever possible.

In our view, the process can be greatly simplified by bifurcating the determination of whether an applicant is an “affected contractor” from the documentation necessary to validate the amount requested. DoD should be able to make an initial determination of eligibility based on the submission of the first four questions in the guidance checklist; a contracting officer's determination that a contractor is not an “affected contractor” avoids the contractor having to waste time and resources to compile a huge amount of information.

We recommend that the Department also make the determination of the availability of funds as part of an initial review of eligibility. While in the detailed comments attached we address what we believe to be too narrow a definition of “available” funding, both DoD and the contractor would benefit from knowing that decision up front before either party invests in the collection and analysis of the volume of details and supporting information spelled out in the checklist. However, even here, the availability of funds should not preclude a contractor from submitting a request for reimbursement because of the possibility of funds being made available in the future, as provided for in the statute.

PSC also recommends streamlining and standardizing approaches across the department wherever possible by reducing the submission of unnecessary documentation, tailoring the information demand (in effect, a “RegFlex” type adjustment) to fit the nature and scope of the likely request. In addition, all policies and information that either the contracting officer or the contractor needs to know to be able to pursue the reimbursement request through to decision should be incorporated into the final version of the guidance, either in full text or by clear cross-references to applicable public documents. For example, underlying this reimbursement guidance is the 8 April 2020 DFARS Class Deviation 2020-O0013 and the 9 April DoD Implementation Guidance.

Given the limited time available for comment, DoD should not consider this an exhaustive summary of our concerns or potential recommendations regarding the 18 May guidance. We are continuing to receive input from our member companies and will do our best to submit any supplemental information to you as soon as possible.

Thank you for your attention to these comments. If you or your team have any questions or need additional information, please do not hesitate to let me know. I can be reached at (703) 875-8059 or at chvotkin@pscouncil.org.

Sincerely,

A handwritten signature in black ink, appearing to read 'Alan Chvotkin', written in a cursive style.

Alan Chvotkin, Esq.
Executive Vice President and Counsel

Attachment

Attachment: PSC 5/22/20 Comments on DoD 5/18/20 Section 3610 Reimbursement Guidance

Document: DoD Process for Section 3610 Reimbursement

Section 1 provides Background Information.

As noted in the cover letter, this paragraph should at least reference all of the public documents that contractors and contracting officers will need to know of and apply when a contractor is submitting, and the government is evaluating and determining a request for reimbursement.

Section 2 addresses Requests for Reimbursement.

Paragraph A begins with three sentences about supporting documentation before getting to the critical four-part determination of eligibility. We recommend that these decision points precede any discussion of the documentation necessary for the contracting officer to make the determination. In addition, as noted in our cover letter, we believe these decisions can be bifurcated to decide initially whether a contractor is an “affected contractor” eligible for coverage and the subsequent determination of the amount of eligible reimbursement based on the specifics of the request and the supporting documentation. See Section 4 of the guidance for the CO’s determination of an “affected contractor.”

The introductory statement is made that “The checklist is not all inclusive and additional information may be requested.” While we are hard-pressed to see what information may have been left off the checklist, in our view the required information in the checklist is overly broad and its submission may be unnecessary if the documentation is retained for review at any time by the department. Furthermore, as stated in the cover letter, the contracting officer should have the flexibility to significantly reduce, or tailor, the information required to support a decision of both eligibility and amount. Such flexibility may already be implicit in the heading of the checklist and below we recommend that it be made explicit. As an alternative, DoD could just require invoice representations/certifications that address the elements – but not the documentation – stated in Section 3610.

Paragraph A(ii) requires that all costs must have been incurred and paid prior to the date of the contractor’s reimbursement request. Such a requirement is inconsistent with the Allowable Cost and Payment clause (FAR 52.216-7). The statement is also inconsistent with provisions elsewhere about the option of creating a FFP line item. Furthermore, the term “all costs” is not defined and could be inappropriately defined by some after-the-fact as including payroll and statutory taxes, for example.

In paragraph A(iii), the statement is made that “if the contractor later obtains reimbursement for the same costs as those the contractor requests or receives...”. The word “requests” should be deleted and the comma after “other than Section 3610” should be deleted. The phrase “the reimbursement

coincide” should be replaced with the phrase “any subsequent reimbursement be”. Further in this subparagraph, all “other sources” of reimbursement, whether from the forgiveness of a government-backed loan or Division G of FFRCA, etc. should be grouped together. However, we disagree that forgiveness under the Paycheck Protection Program disqualifies the recipient from any reimbursement under Section 3610; we know of circumstances where the two programs do co-exist without the government having to “pay twice” for the same coverage.

We support the alternative approaches for coverage of the reimbursement request as provided in Paragraph B. The flexibility here should be matched with the tailoring of the information required in the Checklist.

In Paragraph C, the first sentence is unclear as to whom a contractor should make its initial reimbursement request. This paragraph conflicts with the mandate to submit to the ACO, as provided in Item 2 of the accompanying Checklist. Rather than leave it amorphous as to “a contracting officer,” we recommend providing that the request be made to the contracting officer responsible for the greater portion of the initial reimbursement request, either of the potential dollar amount of the reimbursement request or for the contract with the largest contract value. This recommendation does not suggest the need for any change to the second sentence of the paragraph.

Section 3 addresses the Availability of Funds

We concur in the statements in the opening undesignated paragraph.

In the second undesignated paragraph, while we acknowledge that the availability of funds is a statutory requirement, and even the reimbursement of validly incurred paid leave is discretionary, we also highlight the language that the availability and subsequent allocation of appropriations is at the department, not the contract, level. As such, this paragraph needs additional information (or a reference to the source of additional information) for how the contracting officer is to be made aware of the availability of funds. We reject the idea that Congress must enact a separate appropriation specifically for Section 3610 for there to be “funds available.” The specific language of Section 3610 uses well-understood terms of fiscal law regarding the source of funds available to the department.

We concur with the statement in the third undesignated paragraph.

As to credits, is a contractor entitled to use credits due to it under the contract to “offset” the amount of CARES Act costs?

Section 4 addresses the “Eligibility For and Amount of Reimbursement

We concur with the text of the first undesignated paragraph. However, while this paragraph references “the documentation described in 2.A., the fact is that 2.A lists only the elements of a determination that

a CO must make, not the documentation required (or desired) to support that determination. In addition, a determination that a contractor is an “affected contractor” is only one of the decisions that a CO must make, pursuant to 2.A. We concur that the final determination of coverage or non-coverage should be documented by the CO, without the need for a D&F, and included in the contract file. While we have no comment on the text of the proposed contract modification, we note that it fails to include the elements stated in the second and the fourth undesignated paragraphs, namely that the modification cite to Section 3610 and that the modification acknowledge the CO’s reliance on the contractor’s representation that the information submitted is accurate; these two additional statements should be included in the model modification language.

The second undesignated paragraph acknowledges, and we concur, that the CO’s determination of the contractor as an “affected contractor” must precede a review of the specific request for reimbursement. Thus, we reiterate the value to both the government and the contractor to getting an early determination of the contractor’s status as an “affected contractor,” before extensive documentation is submitted supporting the quantum of reimbursement. In addition, we recommend that the sentence providing that the CO “may require the contractor to provide any additional information” should be modified to cross-reference to the Checklist and the authority to tailor the required information –more or less – as appropriate for the CO to make the required determinations.

The last undesignated paragraph, while accurate, should be aligned with the other language in this section relating to the contract modification.

Section 5 addresses “Invoicing”

The undesignated paragraph combines the separate issues of the terms of a contract modification and the structure of an invoice. We recommend moving the language relating to the contract modification to Section 4, including the cross-reference to the 9 April Implementation Guidance. We support retaining a redundant reference to the 9 April guidance with respect to invoicing that is covered by this Section.

We also recommend that the guidance make clear that valid invoices can be submitted after the September 30 expiration of the entitlement for paid leave incurred on or before that date.

Document: DoD Checklist for Submission of Section 3610 Reimbursement Requests

As noted in our cover letter and above, the contracting officer who has to make the required determinations must have the flexibility to significantly reduce, or tailor, as well as in rare cases increase, the information required to support the decisions of both eligibility for and amount of the

reimbursement request. Such flexibility may already be implicit in the heading of this checklist and we recommend that such flexibility be made explicit.

In Item 2, the sentence is that the contractor requests (plural, as in original) “should be provided to the cognizant contracting officer administering the contract. This direction conflicts with the coverage in Section 2.C of the Process document. As noted above, we support an alternative formulation as to which CO a contractor should submit the initial application for determination of eligibility. The use of the plural “contracts” creates confusion for both the government and the contractor as to whom the initial and any subsequent requests for reimbursement should be submitted. Similarly, the use of DCMA should be at the option of the contractor.

Item 3 need only be submitted with the first submission and request for contracting officer determination. Subsequent invoices arising under the same contract or for the same covered employees but for a different period of time (such as billing period) should not have to complete this checklist item. We are concerned about the requirement for identifying other requests for reimbursement – not because we want to encourage multiple invoices from different COs or agencies for the same coverage, but rather that each contract will be different and the “ready-to-work” determination different. The choice of individual submissions or submission at the segment or corporate level or via grouped invoices, should be at the discretion of the contractor. DoD has a right to know that a contractor has not received reimbursement for the same set of circumstances as an invoice being submitted to it, but this could be dealt with in the representation accompanying the invoice or submission. As noted elsewhere, the requirement for the submission of all other reimbursement requests may be meaningless and administratively unwieldy and will require continuous updating. It is only exceeded in its burden by the list of contract vehicles required by Item 4.

Item 4 requires a list of all contracts, task orders and other agreements for DoD or any other Federal Agency where reimbursement is sought, and then sorted by agency, buying activity, DUNS number, etc. The item header adds “as applicable” in parentheses. Is the “as applicable” meant to apply to all items in the string or only to “other agreements”? In our view, the requirement to compile such a list with so many variables separately identified is unreasonable and unnecessary, and would impose an expectation on the contracting officer that they are to “do something” with this information – which could number into the hundreds if not thousands of entries. FAR 52.21-2 already provides for the examination and audit by the contracting officer of the contractor books and records relevant to this submission, if and where necessary.

We are particularly concerned with the required to identify non-Government commercial work over the period covered by the 3610 request, to be accompanied by a further description of the allocation and method of allocation of COVID-19 paid leave costs between the government and the commercial customers. Contractors subject to CAS already have made their disclosure of the allocation method for government and non-government contracts in their CAS Disclosure and in any provisional billing rates.

Item 5 asks for a detailed narrative of the circumstances that impacted paid leave costs, including an identification of facilities; identification of all employees who could not telework, and the “specific circumstances applicable to each contract for which reimbursement is sought, which “may include” justifications that vary by location, program, contract, etc. We also view this enormous data call as unreasonable and unnecessary, particularly for singular or small dollar submissions and even more so for multiple locations or if a contractor chooses to submit information on a segment or corporate basis covering dozens or hundreds of contracts. This is a perfect item for making a significant reduction in the data required to be submitted and for tailoring the request to the nature of the submission.

Item 5.b. requires a cost impact analysis of the paid leave impact on each contract, including “a full description of the methodology used to develop the amount of reimbursement.” In our view, the methodology is simple: the sum is the total for all covered employees based on, for each covered employee, the hours of paid leave (not to exceed an average of 40 hours per week) times the person’s minimum billing rate. Why is more needed?

Item 5.b further requires a description of the contractor’s rates. This is not the time or place to second-guess the contract rates, as long as the rates are the same that the contractor has used to invoice for work prior to the employee being placed on paid leave to be in a “ready state.” Further, here, as elsewhere, there is no guidance on how a contractor can provide assurances that the billing rates do not include profit or fees. The 9 April DoD guidance does provide some limited information on that, and it would be beneficial to refer here to the specific coverage of that matter in the 9 April document.

Stuck in the middle of this Item 5.b is the question of whether a contractor has an approved accounting system. This should be part of the early contractor identification questions in Item 1; an affirmative answer to an approved accounting system should be used during the early engagement discussion to significantly reduce the burden of information that is required from such contractors. While we recognize that such an approach would differentiate larger contractors from smaller firms or those with primarily fixed price work and who do not typically have “approved” business systems, it is nevertheless a useful data point for the government to assess the information the contractor would be required to submit in a phased decision-making and implementation plan.

Item 5.b reiterates the need for “adequate data and documentation” to support the requested reimbursement. What data or documentation could possibly exist that has not already been asked for? And why is so much information required to verify that the employee is on paid leave and in a “ready state” and the request is at the minimum billing rate, without profit or fee?

Item 5.c. is a redundant request for information, duplicating the information elsewhere in this Item 5.c, but it should be deleted. Requests for imbursement for leave under 3610 has nothing to do with a contractor employee’s labor category or skill level.

Item 5.c. also asks for detailed information on how each individual who is charged as an indirect employee meets the criteria in the Class Deviation. We oppose the gratuitous comment at the end of this paragraph that the administrative burden “would benefit neither the contractor nor the Government” and it should be deleted; yet this statement is a very transparent acknowledgment of the burden this Checklist and the entire reimbursement scheme in these documents imposes on contractors and contracting officers.

Item 5.c. further asks for the names of all employees for which reimbursement is requested. We do not believe the names of employees should be listed in a request for reimbursement. However, we acknowledge that the company must have that information available to prepare its submission.

Data requested in 5.c. relating to average hours worked, a list of annual leave hours taken, a list of annual sick leave hours, including maternity leave (which most contractors do not count as “sick leave”) taken during the claimed period are also irrelevant to the contractor’s validated claim for hours of “paid leave” while in a ready state. These items should be deleted entirely from the Checklist. Furthermore, here and in item 5.d. below, many contractors have moved away from the concept of “annual” or “sick” leave and simply provide employees with an entitlement to a number of hours of “PTO” without further differentiation. How are such modern companies to respond under those circumstances?

Item 5.d. introduces new concepts not previously discussed in the Class Deviation or elsewhere by including the need for sick leave budgets. More significantly, this paragraph directs contractors with FFP contracts to remove sick leave costs that are included in their indirect rates! There is no basis to require such action by a contractor for each FFP contract and such action is contrary to most of PSC member companies’ accounting practices.

Item 5.f. requires the disclosure of how the contractor developed its indirect rates prior to COVID-19. This has no relevance to whether an employee was validly on “paid leave in a “ready state” during the covered period. It may be impossible for contractors to provide forward pricing rates and a rate impact for each individual contract; these are assembled and more typically prepared and tracked at a higher level within a contractor.

Item 5.g requires the same information for each subcontractor requesting reimbursement through the prime as the prime would be required to submit for its own employees. Our comments above in this paragraph 5 are equally applicable to subcontractors. However, we do support the acknowledgment that required data may be submitted directly to the government without having to submit such information to the prime.

Item 6 requires the identification of other credits.

In item 6.a., we believe it only relevant whether a contractor has received a Paycheck Protection Program (PPP) loan and a portion (or all) of that loan amount has been forgiven.

We disagree with the last statement in this paragraph that if some or all of the loan is forgiven, the forgiveness amount must be excluded from any 3610 reimbursement request. We are aware of numerous circumstances where a 3610 submission and the forgiveness of a PPP loan can co-exist without creating “double counting” or denying the government the appropriate credit where there is coverage, particularly where the forgiveness is not associated with contractor expenses for payroll costs. This sentence should be more explicitly tied to the duplication of labor costs for the same individual over the same period of time.

In item 6.c, the proper question to be asked is whether there are any other credits received that are applicable to the same workforce who is on paid leave in a “ready state,” as covered under Section 3610 and whether the contractor has received or anticipates receiving such credits.

In item 7, it should be clear in a new introductory sentence here that the representation to be made goes only to the information the contractor submitted. As displayed here, there could be an assumption that the contractor is making a representation against the items in the Checklist.

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

In the section on “early engagement,” we welcome and encourage contracting officers having an early engagement with contractors about the elements of the reimbursement request. Based on our earlier recommendation to bifurcate the determination of “affected contractor” – and also the question of whether funding is available – from the requirement to submit the extension documentation in the Checklist, we suggest that the opening sentence of the last paragraph be modified accordingly. We also suggest moving the last sentence of this paragraph to the top to align with the introduction to the early engagement discussion.

In the section on “checklist questions”:

Questions 1 through 4 address the entitlement to coverage and we recommend that it be separate from and come before any requirement to submit further documentation about the dollar value of the request. This is borne out by the last sentence in this portion that acknowledges that if the contractor is not an “affected contractor,” no further assessment need be made.

Question 5 is the heart of the Checklist. Nothing in the checklist directs a contracting officer to consider tailoring the data requirements based on whether a contractor has an approved accounting system. We recommend that words that encourage/authorize the CO to tailor the data request based on the status of the accounting system be added to the section on “Early Engagement” and added as an additional sentence in the appropriate place under Item 5.b. We disagree that the contracting officer can make a unilateral rate determination (or redetermination), even based on the information provided

in the Checklist. The contracting officer does have the responsibility to determine the amount of the 3610 reimbursement.

The discussion then highlights hypothetical instances in which an employee may be engaged in work or is taking leave unrelated to COVID-19. The contracting officer doesn't need to know such information. It is the contractor's responsibility to ensure that the employee is on "paid leave," is in a ready state, and is otherwise unable to work. If the employee is able to work or is on leave unrelated to COVID-19, there is no coverage under Section 3610 or the Class Deviation and there should be no contractor claim for such coverage. These examples should be eliminated here. It may or may not be a true statement that those hours are already being reimbursed through the indirect rates.

Similarly, the next paragraph addresses information relating to labor category and type of employee, which has nothing to do with the status of the employee. It is the contractor's responsibility to ensure that the employee is on "paid leave," is in a ready state, and is otherwise unable to work. If the employee is able to work or is on leave unrelated to COVID-19, there is no coverage under Section 3610 or the Class Deviation and there should be no contractor claim for such coverage. These examples should be eliminated here, as well.

Question 7 introduces for the first time anywhere in the 3610 evolution a requirement that the "representation" be signed by a person at the Vice President level of the organization. We know of no justification for such an arbitrary requirement. The representation need only be signed by an individual who is authorized by the company to make such submission and who can bind the company to the representation made.