



OFFICE OF THE UNDER SECRETARY OF DEFENSE

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WASHINGTON, DC 20301-3000

ACQUISITION
AND SUSTAINMENT

In reply refer to
DARS Tracking Number: 2020-O0013, Revision 1

MEMORANDUM FOR COMMANDER, UNITED STATES CYBER
COMMAND (ATTN: ACQUISITION EXECUTIVE)
COMMANDER, UNITED STATES SPECIAL OPERATIONS
COMMAND (ATTN: ACQUISITION EXECUTIVE)
COMMANDER, UNITED STATES TRANSPORTATION
COMMAND (ATTN: ACQUISITION EXECUTIVE)
DEPUTY ASSISTANT SECRETARY OF THE ARMY
(PROCUREMENT)
DEPUTY ASSISTANT SECRETARY OF THE NAVY
(PROCUREMENT)
DEPUTY ASSISTANT SECRETARY OF THE AIR FORCE
(CONTRACTING)
DIRECTORS, DEFENSE AGENCIES
DIRECTORS, DEFENSE FIELD ACTIVITIES

SUBJECT: Class Deviation—CARES Act Section 3610 Implementation

Effective immediately, this class deviation revises and supersedes Class Deviation 2020-O0013 issued on April 8, 2020. The purpose of this revision is to reiterate the statement that reimbursements under section 3610 are subject to the availability of funds and change the start date of the time period for which paid leave must be taken to be eligible for reimbursement under section 3610. In the attachment to this deviation, a new paragraph (b)(7) is added at DFARS 231.205-79 to clarify that the allowable amount under this deviation is limited to the amount of funds obligated on a separate line item specifically for the purpose of reimbursement under section 3610. Where appropriate, the time period for which paid leave must be taken is changed from January 31, 2020, through September 30, 2020, to March 27, 2020, through September 30, 2020.

Pursuant to FAR 31.101, Objectives, this class deviation to FAR 31 and DFARS 231 is effective immediately and authorizes contracting officers to use the attached DFARS 231.205-79, CARES Act Section 3610 Implementation, as a framework for implementation of section 3610, Federal Contractor Authority, of the Coronavirus Aid, Relief, and Economic Security (CARES) Act (Pub. L. 116-136).

The CARES Act was enacted on March 27, 2020, in response to the Coronavirus Disease 2019 (COVID-19) national emergency. Section 3610 of the CARES Act allows agencies 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 from March 27, 2020, through September 30, 2020, including to protect the life and safety of Government and contractor personnel, during the public health emergency declared for COVID-19 on January 31, 2020.

As expressed in the OUSD(A&S) Defense Pricing and Contracting Memorandum, Managing Defense Contracts Impacts of the Novel Coronavirus, dated March 30, 2020, it is important that our military, civilian, and contractor communities work together to withstand the effects of COVID-19 and maintain mission readiness. Currently, many Department of Defense (DoD) contractors are struggling to maintain a mission-ready workforce due to work site closures, personnel quarantines, and state and local restrictions on movement related to the COVID-19 pandemic that cannot be resolved through remote work. It is imperative that we support affected contractors, using the acquisition tools available to us, to ensure that, together, we remain a healthy, resilient, and responsive total force.

It is also important that our contracting officers are good stewards of taxpayer funds while supporting contractor resiliency. Therefore, contracting officers shall use the attached DFARS 231.205-79, CARES Act Section 3610—Implementation, when implementing section 3610, to appropriately balance flexibilities and limitations.

Some contractors may receive compensation from other provisions of the CARES Act, or other COVID-19 relief scenarios, including tax credits, and contracting officers must avoid duplication of payments. For example, the Paycheck Protection Program (PPP) established pursuant to sections 1102 and 1106 of the CARES Act may provide, in some cases, a direct means for a small business to obtain relief. A small business contractor that is sheltering-in-place and unable to telework could use the PPP to pay its employees and then have the PPP loan forgiven, pursuant to the criteria established in the interim rule published by the Small Business Administration. In such a case, the small business should not seek reimbursement for the payment from DoD using the provisions of section 3610.

Contractors are responsible for supporting any claimed costs, including claimed leave costs for their employees, with appropriate documentation and for identifying credits that may reduce reimbursement under section 3610. Contracting officers are encouraged to work with contractors to understand how they are using or plan to use the COVID-19 relief provisions and encourage contractors to use existing contract terms or the relief provisions available to them in response to COVID-19. In addition, it is important that contracting officers secure representations from contractors regarding any other relief claimed or received stemming from COVID-19, including an affirmation that the contractor has not or will not pursue reimbursement for the same costs accounted for under their request, to support their requests for reimbursement under section 3610.

When implementing section 3610, contracting officers shall consider the immediacy of the specific circumstances of the contractor involved and respond accordingly. The survival of many of the businesses the CARES Act is designed to assist may depend on this efficiency. For example, the impact of COVID-19 on a contractor providing labor services will differ from the impact on a contractor that develops information systems. Some contractors may be unable to conduct any business during the COVID-19 pandemic. As a result, such contractors would generate no new revenue, and may have difficulties making payroll, retaining employees, and meeting other financial obligations. In contrast, other contractors may still have incoming revenue, and be able to conduct work remotely. While impacts will certainly be experienced by many contractors, some will have a more immediate need for relief than others.

Section 3610 seeks to provide many flexibilities for contracting officers, including the authority to:

- Enable the contractor to stay in a ready state (*i.e.*, able to mobilize in a timely manner) by treating as allowable paid leave costs a contractor incurs to keep its employees and subcontractor employees in such a state.
- Use any “funds made available to the agency” by Congress to reimburse contractors for workers’ lost time, not otherwise reimbursable, between March 27, 2020, and September 30, 2020, if the contractor provides leave to its employees or subcontractor employees “to maintain a ready state, including to protect the life and safety of Government and contractor personnel,” which include, but are not limited to, quarantining, social distancing, or other COVID-19 related interruptions, as discussed in Office of Management and Budget Memorandum M-20-18, *Managing Federal Contract Performance Issues Associated with the Novel Coronavirus*, dated March 20, 2020;
- Modify contracts to provide for reimbursement of allowable paid leave costs, not otherwise reimbursable, without securing additional consideration; and
- Provide such reimbursement on any contract type.

Section 3610 also provides limitations on reimbursements:

- A contractor may only receive reimbursement if its employees or subcontractor employees:
 - Cannot 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 closures or other restrictions; and
 - Are unable to telework because their job duties cannot be performed remotely during the public health emergency declared on January 31, 2020, for COVID–19.
- Reimbursement is authorized only:
 - At the appropriate rates under the contract for up to an average of 40 hours per week; and
 - For contractor or subcontractor payments made for costs incurred, not otherwise reimbursable, not earlier than March 27, 2020, and not later than September 30, 2020;
- The Government must reduce the maximum reimbursement authorized by the amount of credit the contractor is allowed pursuant to division G of the Families First Coronavirus Response Act (Pub. L. 116–127) and any applicable credits the contractor is allowed under the CARES Act or other credit allowed by law that is specifically identifiable with the public health emergency declared on January 31, 2020 for COVID–19; and

- Reimbursement is contingent upon the availability of funds.

We anticipate the need for additional guidance and will continue to provide answers to frequently asked questions and provide additional implementation information and guidance as appropriate.

This class deviation remains in effect until rescinded. My point of contact is Mr. Greg Snyder, who is available by telephone at 571-217-4920 or by email at gregory.d.snyder.civ@mail.mil.

Kim Herrington
Acting Principal Director,
Defense Pricing and Contracting

Attachment
As stated

DFARS 231.205-79 CARES Act Section 3610 - Implementation

(a) *Applicability.*

- (1) This cost principle applies only to a contractor:
 - (i) that the cognizant contracting officer has established in writing to be an affected contractor;
 - (ii) whose employees or subcontractor employees:
 - (A) Cannot 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 closures or other restrictions, and
 - (B) Are unable to telework because their job duties cannot be performed remotely during the public health emergency declared on January 31, 2020, for Coronavirus (COVID-19).
- (2) The maximum reimbursement authorized by section 3610 shall be reduced by the amount of credit a contractor is allowed pursuant to division G of the Families First Coronavirus Response Act (Pub. L. 116- 127) and any applicable credits a contractor is allowed under the CARES Act (Pub. L. 116-136) or other credit allowed by law that is specifically identifiable with the public health emergency declared on January 31, 2020 for COVID-19.

(b) *Allowability.*

- (1) Notwithstanding any contrary provisions of FAR subparts 31.2, 31.3, 31.6, 31.7 and DFARS 231.2, 231.3, 231.6, and 231.7, costs of paid leave (including sick leave), are allowable at the appropriate rates under the contract for up to an average of 40 hours per week, and may be charged as direct charges, if appropriate, if incurred for the purpose of:
 - (i) Keeping contractor employees and subcontractor employees in a ready state, including to protect the life and safety of Government and contractor personnel, notwithstanding the risks of the public health emergency declared on January 31, 2020, for COVID-19, or
 - (ii) Protecting the life and safety of Government and contractor personnel against risks arising from the COVID-19 public health emergency.
- (2) Costs covered by this section are limited to those that are incurred as a consequence of granting paid leave as a result of the COVID-19 national emergency and that would not be incurred in the normal course of the contractor's business. Costs of paid leave that would be incurred without regard to the existence of the COVID-19 national emergency

remain subject to all other applicable provisions of FAR subparts 31.2, 31.3, 31.6, 31.7 and DFARS 231.2, 231.3, 231.6, and 231.7. In order to be allowable under this section, costs must be segregated and identifiable in the contractor's records so that compliance with all terms of this section can be reasonably ascertained. Segregation and identification of costs can be performed by any reasonable method as long as the results provide a sufficient audit trail.

- (3) Covered paid leave is limited to leave taken by employees who otherwise would be performing work on a site that has been approved for work by the Federal Government, including on a government-owned, government-leased, contractor-owned, or contractor-leased facility approved by the federal government for contract performance; but
 - (i) The work cannot be performed because such facilities have been closed or made practically inaccessible or inoperable, or other restrictions prevent performance of work at the facility or site as a result of the COVID-19 national emergency; and
 - (ii) Paid leave is granted because the employee is unable to telework because their job duties cannot be performed remotely during public health emergency declared on January 31, 2020, for COVID-19.
- (4) The facility at which work would otherwise be performed is deemed inaccessible for purposes of paragraph (b)(3) of this subpart to the extent that travel to the facility is prohibited or made impracticable by applicable Federal, State, or local law, including temporary orders having the effect of law.
- (5) The paid leave made allowable by this section must be taken no earlier than March 27, 2020, and no later than September 30, 2020.
- (6) Costs made allowable by this section are reduced by the amount the contractor is eligible to receive under any other Federal payment, allowance, or tax or other credit allowed by law that is specifically identifiable with the public health emergency declared on January 31, 2020, for COVID-19, such as the tax credit allowed by division G of Public Law 116-127.
- (7) The allowable amount is limited to the amount of funds specifically obligated on a separate line item that cites the purpose of the funds is for reimbursement under section 3610 of the CARES Act.