

Government Contracts

DOD Issues Final Guidance Implementing Section 3610 of the CARES Act



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After months of consideration and review, on August 18, 2020, Kim Herrington, Acting Principal Director of Defense Pricing and Contracting (DPC), released guidance to assist defense contractors in drafting, and contracting officers in evaluating, requests for reimbursement under Section 3610 of the CARES Act. Section 3610 of the CARES Act offers discretionary authority for contracting officers to use available funds to reimburse contractors and their subcontractors for certain expenses used to keep their workforces in a “ready state.” Among other things, the guidance offers three distinct methods of obtaining recovery under Section 3610: (1) single contracts with reimbursement under \$2 million; (2) multiple contracts that are logically grouped under a single program or contracting activity; and (3) enterprise wide.

This long-awaited guidance consists of four documents. We provide highlights of each below.

1. [Class Deviation 2020-O0021 Memo](#): A new DFARS Class Deviation containing a new DFARS Clause 252.243-7999 for inclusion in Section 3610 reimbursement modifications

Effective immediately, this new Class Deviation provides more detailed guidance to contracting officers for reviewing and processing contractor requests for reimbursement under section 3610 of the CARES Act. (Pub. L. 116-136). It also identifies three reimbursement pathways and provides checklists for each. [Class Deviation 2020-O0021 Memo](#)

a. The new Class Deviation provides the following guidance to contracting officers:

- Section 3610 “authorizes but does not require” contracting officers to modify contracts and other agreements, without consideration, to reimburse contractors for paid leave to keep employees or subcontractors in a ready state during the public health emergency declared on January 31, 2020.
- Section 3610 reimbursements may be inclusive of both cost-type and fixed-price contracts.
- Section 3610 reimbursement requests are limited to those allocable to DOD contracts, and include applicable subcontractor costs, which are to be evaluated and submitted by the prime contractor.
- There should be no mingling of a single contractor’s costs as both prime and subcontractor, unless allocable to the same contract. Subcontractors always submit costs through their relevant prime contractor.
- Section 3610 costs should be segregated and contractors seeking reimbursement should anticipate audits.
- Important Dates:
 - Contrary to prior guidance from DOD, the Deviation establishes that Section 3610 costs may be

sought only for paid leave costs from March 27, 2020 through September 30, 2020.

- The CARES Act, passed on March 27, 2020, does not contain retroactive coverage.
- Yet, DOD may still reimburse a contractor for paid leave and other COVID costs prior to March 27, 2020 (and though not addressed, presumably back through January 31 at a minimum) using contract authorities otherwise available.
- Any reimbursement for paid leave provided prior to March 27, 2020 should not be identified as a payment made under Section 3610 for purposes of tracking and reporting.
- Early Engagement is recommended to discuss checklist information; “affected contractor” status; available funding; and frequency and estimate of reimbursement request.
- Funding:
 - Available funding is a necessary prerequisite but no guarantee of reimbursement.
 - At the date of this writing, no additional COVID-19 funding to support Section 3610 reimbursements has been authorized by Congress.
- Affected Contractor Status:
 - A final decision that a contractor is an “affected contractor” and the amount of Section 3610 reimbursement, if any, will be made only after submission and analysis of each Section 3610 reimbursement request.
 - The contracting officer will make a written decision based on six factors after reviewing a contractor's Section 3610 reimbursement.
- Reimbursement Amount:
 - The amount of reimbursement may not include profit or fee and is subject to the availability of funds
- Seven-Part Representation Required:
 - Contractors must verify accuracy, good faith, represent they are not seeking duplicate reimbursement (via loan programs or other requests).
 - Contractors must also represent that appropriate subcontractor costs have been included.
- Contract Modification Language:
 - Contract modifications will be done on a bilateral basis and will designate the contractor as an “affected contractor.”
 - Contract modifications also designate the time period of coverage and whether there is subcontractor coverage.

b. The new Class Deviation identifies three paths for addressing reimbursement with checklists for each:

- For a single contract (Attachment 1 Checklist)

- This request must be submitted to contracting officer.
- This request is for employees charged directly to a contract and requests less than \$2 million.
- Contractors must identify the contract, provide a narrative explaining entitlement, and demonstrate actual costs.
- This request is used in conjunction with the other two checklists for subcontractor reimbursement requests that meet the criteria of this checklist.
- May be tailored at contracting officer's discretion to fit specific circumstances.
- For multiple contracts (Attachment 2 Checklist)
 - This request is submitted to contracting officer in the contracting activity/component and DOD has discretion to designate a lead contracting officer.
 - This request is intended for homogenous groups of contracts, such as those for a single program or with a single contracting activity or DOD Component.
 - This request may include costs of employees charging indirectly to the contract.
 - Along with the requirements in Attachment 1 Checklist, contractors must identify affiliated companies submitting Section 3610 reimbursements, list its other Section 3610 reimbursement requests, describe its methodology in developing the appropriate billing rate (and identify the applicable pricing agreement) for employees charging indirectly to the contracts, and provide cost or pricing data, when applicable.
 - This request may be tailored at contracting officer's discretion to fit specific circumstances.
- For an entire business unit (or segment) (Attachment 3 Checklist)
 - This request is submitted to Cognizant Federal Agency Official/CFAO).
 - Contractors should, through early engagement, provide a rough order of magnitude so that a funding inquiry may proceed.
 - If funding may be available, the process moves forward.
 - This request must be limited to incurred costs – no estimates are permitted.
 - As was expected, extensive information is required, including a narrative regarding “affected contractor” status, list of all included contracts/task orders/delivery orders, cost accounting practices used, and impacts to direct labor rates, and for indirect costs – a calculation of the relevant pools, allocation bases, and rates used to allocate cost objectives, among other detailed information.
 - The same extensive information is required for subcontractors' requests, unless they qualify for an abbreviated checklist in Attachments 1 or 2.
 - Subcontractors may provide “amount only” data to their prime contractors and provide supporting documents directly to CFAO due to competition or proprietary data concerns.
 - This request triggers certified cost or pricing data only on an individual contract/subcontract basis, not on a cumulative basis.

- Regardless of to whom a contractor submits its request, DOD may choose to address a Section 3610 reimbursement request at any level at DOD, and may unilaterally decide to group together separate requests.

c. The new Class Deviation contains a new DFARS Clause 252.243-7999 for Section 3610 reimbursements

- DFARS 252.243-7999 – Section 3610 Reimbursement (DEVIATION 2020-O0021) is to be used when modifying contracts, task orders, or delivery orders, including those using part 12 procedures for the acquisition of commercial items, to provide for the reimbursement of paid leave to an "affected contractor" pursuant to Class Deviation 2020-O0021.
- The Clause provides a definition of "affected contractor," which means "a contractor that has incurred costs to provide paid leave for its employees or subcontractors to maintain its workforce in a ready state and otherwise meets all the requirements of Section 3610 of the Coronavirus Aid, Relief, and Economic Security Act (CARES Act) (Pub. L. 116–136)."
- The contractor must notify the contracting officer in writing within 30 days of receiving COVID-19 related loan forgiveness under available statutes.
- The government will modify the contract to reduce the reimbursed amount by the credit or loan forgiveness amount received.
- The government reserves the right to audit "to ensure accuracy and compliance with law and any applicable regulations."
- Contractors shall flow down the clause in any subcontract modification that involves the reimbursement of paid leave under Section 3610 of the CARES Act to affected subcontractors, including subcontracts for commercial items.

2. Class Deviation 2020-O0013: An update to DOD's prior Class Deviation establishing a cost principle at DFARS 231.205-79 for Section 3610 CARES Act reimbursements

In addition to the guidance documents above, DPC also released a revision to Class Deviation 2020-O0013 (originally issued on April 8, 2020) that had established a cost principle at DFARS 231.205-79 for Section 3610 CARES Act reimbursements:

<https://www.acq.osd.mil/dpap/policy/policyvault/USA001745-20-DPC.pdf> [acq.osd.mil]

Most significantly, this revised class deviation changes the time period during which paid leave must have been taken to be reimbursable: from the earlier version's start date of January 31, 2020 (the beginning of the public health emergency) to a start date of March 27, 2020 (the date of passage of the CARES Act). This reflects DOD acquiescence to OMB's direction—and the position taken by several other agencies—regarding the point at which Section 3610 reimbursement may begin. In addition, the revised class deviation reiterates that reimbursement under Section 3610 of the CARES Act is limited to allowable funds.

Both revisions are reflected in changes to DFARS 231.205-79, the clause created by the original class deviation to add a new cost principle allowing for reimbursement of costs pursuant to Section 3610 of the CARES Act. Specifically, DFARS 231.205-79 is modified at:

- (b)(5): The start date for reimbursement is changed—"The paid leave made allowable by this section must be taken no earlier than March 27, 2020 [changed from January 31, 2020], and no later than September 30, 2020."
- (b)(7): A new paragraph is added stating "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.”

3. A Memorandum for Record (MFR) template for contracting officers to document contracting actions taken in response to Section 3610 CARES Act reimbursement requests

DPC also issued a Memorandum for Record Template for contracting officers to evaluate Section 3610 reimbursement requests, available here <https://www.acq.osd.mil/dpap/policy/policyvault/USA001648-20-DPC.pdf>. This draft MFR contains important clues for how the government will evaluate Section 3610 requests and how contractors may best shape their applications for relief. Among the most relevant topics:

- In the “Description of the Requirement” section, the contracting officer must draft an overview that includes number of locations and personnel, as well as a summary of state/local restrictions that impact contractor personnel.
- The contracting officer should use a summary table including labor category, number of hours, direct rates and a separate table including direct labor, fringe, overhead, and G&A to reach the total cost.
- The contracting officer, a Program Office representative, and DCMA/ACO coordination and review will be required, including DCAA assistance with rate verification.
- Under Pricing and Reimbursable Amount, the template suggests the amount provided will be less than the amount requested, with descriptions for amounts reduced. Possible categories of reductions include funding unavailability, different program priorities, differences in rates used, exclusion of fee/profit, and receipt of compensation/funds from other sources of relief.
- And, relevant to future enforcement risk, the template has an express statement that the contracting officer “relied in part on the signed representations . . . to substantiate and/or validate the request for section 3610 reimbursement. . . .”

4. Updates to DOD’s FAQs on implementation of Section 3610 of the CARES Act

Finally, DPC also issued an updated Frequently Asked Questions, available here https://www.acq.osd.mil/dpap/pacc/cc/docs/covid-19/FAQ_Implementation_Guidance_CARES_Act_Sec_3610_2020.08.17.pdf. Though minimal, the update offers one additional insight into the government’s approach for Section 3610. Specifically, Question 28 includes additional language highlighting that “color of money” (or, fiscal law considerations), and “bona fide need” are legitimate considerations in determining what funds are available for use under Section 3610.

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