

DoD issues draft guidance for contractor reimbursement under Section 3610 of the CARES Act

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Recently, the Defense Pricing and Contracting (“DPC”) unit under the Secretary of Defense issued¹ draft implementation guidance for Department of Defense (“DoD”) contracting officers tasked with assessing contractor requests for reimbursement in accordance with Section 3610 of the Coronavirus Aid, Relief, and Economic Security (“CARES”) Act and applying the recent cost principle implemented by DFARS Class Deviation 2020-00013 — topics covered in depth by this blog.² This draft guidance was first alluded to in the May 1, 2020, memorandum from Kim Herrington, the DPC Acting Director, to address “the reimbursement process from requesting the contracting officer’s determination of an ‘affected contractor’ to providing a checklist to guide collection[] and evaluation of costs from the [contractor] seeking reimbursement [under Section 3610].”

Composed of general reimbursement implementation guidance along with two attachments — a checklist for review of a contractor’s reimbursement request and instructions for using the checklist — the DPC’s draft is, to date, the most comprehensive guidance addressing contractor requests for reimbursement under Section 3610 since the DFARS Class Deviation 2020-00013 issued on April 8. The final guidance is expected to be released shortly.

At bottom, the draft guidance makes clear that reimbursement requests will require a significant amount of information. Thus, eligible contractors (and their eligible subcontractors) should begin compiling the requested information in accordance with the DPC’s guidance without delay.

To help contractors get a head start on this task, we’ve summarized the key takeaways for DoD contractors seeking reimbursement under Section 3610.

REIMBURSEMENT IS DISCRETIONARY AND SUBJECT TO AVAILABLE APPROPRIATIONS

As an initial matter, the implementation guidance reinforces that DoD contracting officers are authorized, but not mandated, to reimburse for any (or all) of an “affected contractor’s” paid leave costs incurred to keep its employees or subcontractors in a ready state during the COVID-19 pandemic. Providing the contracting

officer with sufficient information to make this determination is the key to a successful reimbursement request.

Information submitted in a contractor’s request must ultimately support the contracting officer’s determination that an affected contractor:

- Provided paid leave to its employees or subcontractor employees because (1) the employees could not perform work on an approved government- or contractor-owned or leased site due to COVID-19-related closures or other restrictions, and (2) their job duties prevented telework;
- Provided paid leave between January 31 and September 30, 2020;
- Incurred and paid all costs claimed for reimbursement prior to the date of the contractor’s request;
- Has not been reimbursed from another source for the same costs for which it is requesting reimbursement (e.g., under the Paycheck Protection Program); and
- Is not requesting reimbursement for a total of paid work and leave charges in excess of 40 hours per week for any employee.

Further, contractor reimbursement, when warranted, remains subject to available funding.

If neither contract funds nor CARES Act appropriations are available for reimbursement of Section 3610 paid leave costs, no reimbursement can be made. Thus, even if a contractor believes its reimbursement request should be granted, it’s ultimately the cognizant contracting officer’s call.

Finally, if a reimbursement request is granted, the contract will be modified to include a firm-fixed price line item for immediate invoicing.

Contractors must be prepared to submit a significant amount of information to receive reimbursement

As to the specific information required in the contractor’s request for reimbursement, the DPC’s draft checklist provides details on this significant undertaking.

Among other information in the checklist, a contractor must provide:

- (1) information on its corporate structure and affiliations, including whether the contractor is seeking similar reimbursement from other federal agencies,
- (2) information regarding the subject DoD contract(s) and/or task order/delivery numbers, and
- (3) identification of similar reimbursements or credits received under competing relief programs (e.g., the Paycheck Protection Program, Division G of Public Law 116-127).

However, the most daunting part of any contractor's reimbursement request is likely to be the required narrative justifying the contractor's eligibility for reimbursement under Section 3610 for all affected DoD contracts and contractor employees, along with significant information regarding the contractor's claimed costs for reimbursement.

As to the cost information, a contractor is expected to provide an exhaustive description of the methodology it used to develop the costs for reimbursement, including, *inter alia*:

- (1) how the contractor developed the appropriate rates and what the rates include (e.g., labor rates, overhead, G&A, but not profit or fee);
- (2) information on the contractor's accounting system;
- (3) a breakdown of each affected employee's length of paid leave and average number of hours worked prior to the COVID-19 pandemic;
- (4) information on the contractor's actual, unburdened hourly rates for all affected employees; and
- (5) identification of the contractor's forward pricing and revised indirect rates. But that's not all — a contractor must also submit a spreadsheet "showing its calculation of the requested Section 3610 reimbursement amount" traceable to the other supporting data in its submission package.

On top of this substantial list of information, contractors should be aware that the draft checklist is not all-inclusive — a contracting officer may, at his or her discretion, request additional information from the contractor in addition to the information in the checklist.

Subcontractors seeking reimbursement are subject to similar informational requirements

In the event a prime contractor is requesting reimbursement under Section 3610 on behalf of its subcontractor, the prime must obtain the same information about the subcontractor from the draft checklist as the prime itself provided to the contracting officer, including, *inter alia*, "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."

However, the draft instructions accompanying the checklist note that in some instances the contracting officer may work directly with the subcontractor to evaluate a reimbursement request.

For example, section (g) of the draft checklist provides that if the subcontractor does not routinely provide its prime with information concerning the subcontractor's other federal and commercial contract work "due to competition or proprietary data concerns," the subcontractor may provide the prime with only the amount of reimbursement requested, and submit the information required to support its request "directly to the contracting officer under separate cover."

Early engagement discussions between the parties may ease administrative burdens

The draft instructions accompanying the checklist permit a contracting officer to engage in "Early Engagement Discussions" with a contractor regarding reimbursement requests under Section 3610, and contractors should be ready for such an invitation.

As an initial matter, the implementation guidance reinforces that DoD contracting officers are authorized, but not mandated, to reimburse for any (or all) of an "affected contractor's" paid leave costs incurred to keep its employees or subcontractors in a ready state during the COVID-19 pandemic.

Should a contracting officer choose to engage a contractor, the contractor should not be shy in obtaining an understanding of the contracting officer's expectations, including the expected type and formatting of the information, and obtaining an understanding of how appropriate rates of reimbursement will be defined and calculated.

To the extent possible, contractors considering requests for reimbursement under Section 3610 should take advantage of and invite this early dialogue.

But it's important to recognize that while the Early Engagement Discussions may ease administrative burdens on the parties, the discussions are nonbinding and, as a result, shouldn't be seen as anything more than a dialogue between the parties.

To ensure the enforceability of any of the topics covered in these discussions, contractors will need the contracting officer's written decision on the reimbursement request.

Although Section 3610 was implemented to aid federal contractors affected by the COVID-19 pandemic, the evolving guidance for the process of requesting reimbursement may militate against the potential monetary recovery for certain DoD contractors.

Under the current incarnation of the DPC's guidance, reimbursements under Section 3610 require contractors to develop and submit a significant amount of information, along with supporting documentation, to the cognizant contracting officer. This task is made exponentially more time-consuming and daunting if a prime contractor is also seeking reimbursement for one or more of its affected subcontractors.

In sum, that's a lot of additional work to be borne by a contractor for what may be a relatively small reimbursement, not to mention the risk of future prosecution under the False Claims Act if the information in a reimbursement request intentionally or recklessly contradicts the contractor's certifications.

Of course, the final draft of this guidance and future edits all may change the reimbursement requirements significantly,

so contractors should keep an eye out for subsequent iterations of the DPC's guidance.

But assuming no major changes to the DPC's draft, contractors with paid leave costs eligible for reimbursement under Section 3610 should weigh the benefit of potential short-term monetary relief against the risk of incurring additional overhead in compiling and drafting a reimbursement request.

For small contractors or contractors minimally affected by the COVID-19 pandemic, the "juice" may not be worth the squeeze.

Notes

¹ <https://bit.ly/2Cbskfx>

² <https://bit.ly/37Hrgfc>

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