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PRATT'S GOVERNMENT CONTRACTING LAW REPORT



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DOD Issues Class Deviation and Implementation Guidance for CARES Act Section 3610 Authorizing Potential Recovery by Federal Contractors Due to COVID-19

*By Edward V. Arnold and Donald G. Featherstun**

The authors of this article discuss a recent Department of Defense Class Deviation authorizing contracting officers to deviate from certain principles listed in Federal Acquisition Regulation and Defense Federal Acquisition Regulation Supplement in order to implement Section 3610 of the Coronavirus Aid, Relief, and Economic Security Act.

The Department of Defense (“DOD”) has issued Class Deviation Number: 2020-00013 authorizing contracting officers (“COs”) to deviate from the principles listed in Federal Acquisition Regulation (“FAR”) Part 31 and Defense Federal Acquisition Regulation Supplement (“DFARS”) Part 231. This Class Deviation requires COs to use DFARS 231.205-79 as a framework for implementing Section 3610 of the Coronavirus Aid, Relief, and Economic Security Act (“CARES Act”), which became law on March 27, 2020. Subsequently, on April 9, 2020, the Acting Principal Director, Defense Pricing and Contracting (“DPC”) of the Office of the Under Secretary of Defense issued previously promised guidance for implementation of Section 3610 of the CARES Act.

SECTION 3610 OF THE CARES ACT

Section 3610 of the CARES Act authorizes agencies to use any available funds to modify the terms and conditions of covered contracts, without consideration, to reimburse any paid leave, including sick 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.

DOD CLASS DEVIATION IMPLEMENTING DFARS 231.205-70

The Class Deviation memorandum acknowledges that many DOD contractors are currently struggling to maintain a mission-ready workforce due to work

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site closures, personnel quarantines, and state and local restrictions on movement related to COVID-19, and that the government should provide support to affected contractors, while at the same time being good stewards of taxpayer dollars. In balancing these flexibilities and limitations, DOD provides a new regulatory provision identifying which costs are recoverable. The Class Deviation memorandum attaches DFARS 231.205-70, which implements much of Section 3610's statutory mandate, while providing some additional guidance.

WHAT CONTRACTORS ARE COVERED?

Covered contractors are those contractors (1) whom the CO has deemed, in writing, to be an affected contractor; and (2) whose employees or subcontractor employees either (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 due to COVID-19.

Although implicit in Section 3610, the new regulation expressly applies to *both* government and contractor owned or leased facilities. It also requires a written determination to be made by the CO that the contractor is covered, i.e., has sustained the requisite impacts due to COVID-19.

WHAT IS REFERENCED BY “CLOSURES OR OTHER RESTRICTIONS”?

The employee or subcontractor employee must be unable to work at their regular facility—either government or contractor owned or leased—due to the facility either being (1) closed, or (2) from “other restrictions” as a result of COVID-19. While the regulation does not clearly define “other restrictions,” it does provide specific examples. For instance, even if the employee's facility is not closed, the facility could be rendered practically inaccessible or inoperable—for instance, where travel to the facility is prohibited or made impracticable by applicable federal, state, or local law, including temporary orders having the effect of law. The Class Deviation memorandum further provides that reimbursable costs include those where the contractor provides leave to its employees due 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.”

WHAT COSTS ARE ALLOWED TO BE REIMBURSED?

DFARS 231.205-70 further outlines what types of costs are allowable. Specifically, the 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.” These costs may be direct charges to the contract 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, or (ii) protecting the life and safety of government and contractor personnel against risks arising from COVID-19. The paid leave made allowable must be taken during the period of the public health emergency declared on January 31, 2020, for COVID-19, up to and including September 30, 2020.

Although Section 3610 refers to “minimum applicable contract billing rates,” DFARS 231.205-70 states that contractor’s costs for paid leave (including sick leave) will be for “appropriate rates under the contract.” While there is no guidance for what is an “appropriate rate” under the contract, it is perhaps implicit that these reflect the contract billing rates, which would likely include a contractor’s fully burdened labor rates.

The regulation also lends little guidance on what it means to keep employees and subcontractors in a “ready state”—defined as able to mobilize in a timely manner—other than that it would be for the purpose of protecting of protecting life and safety of government and contractor personnel, whether from COVID-19 or from other risk.

The regulation provides that contractors may only be reimbursed for paid leave that arises as a result of COVID-19, and not for paid leave to an employee for a non-COVID-19 purpose. In addition, the regulation states that contractors may only be reimbursed for paid leave paid to employees who otherwise would have been performing work at the closed facility, but are now unable to nor can they telework. Thus, contractors may not attempt to recover costs for employees who are not impeded by these disruptions.

WHAT IF CONTRACTORS RECEIVE COMPENSATION UNDER OTHER PROVISIONS OF THE CARES ACT?

The Class Deviation memorandum makes clear that contractors who receive compensation pursuant to other provisions in the CARES Act are not eligible for double payments. Thus, maximum reimbursement will be reduced by recovery under any other provision. The Class Deviation memorandum specifically uses the Paycheck Protection Program (“PPP”) established pursuant to Sections 1102 and 1106 of the CARES Act, as an example. Small business contractors who are sheltering-in-place and unable to telework could use the PPP to pay its employees and then have the PPP loan forgiven. Those same small business contractors are not permitted to seek reimbursement for those payments from DOD using the provisions of Section 3610 or DFARS 231.205-70.

To prevent double recovery, the Class Deviation memorandum encourages COs to work with contractors to discuss how they will use the COVID-19 relief provisions. It also emphasizes the importance for COs considering reimbursement requests to obtain representations and affirmations from contractors that they will not pursue reimbursement for the same costs already recovered elsewhere under the CARES Act or through existing contract remedies.

There is an ambiguity between the Class Deviation memorandum and DFARS 231.205-70 that is worth noting. While the memorandum expressly states that reimbursement received under other provisions of the CARES Act will not be reimbursed twice, the regulation states that 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. Thus, it is possible that if a small business contractor is eligible for relief under the PPP, but fails to apply, that small business contractor could be prohibited by the regulation from recovering those costs. This disconnect highlights the importance of contractors to exhaust all avenues of recovery before seeking reimbursement under Section 3610.

WHAT RECORDKEEPING IS REQUIRED?

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. Although the statute made no reference to a contractor's record keeping practices, DFARS 231.205-70(b)(2) states—not surprisingly—that contractors must maintain good recordkeeping by segregating and identifying those costs. Although lacking in anything other than practical advice, implicit in this provision is that the better a contractor's presentation of costs, the more likely those costs will be reimbursed. Additionally, no specific cost accounting method is prescribed other than something that is “reasonable” and “provide[s] a sufficient audit trail.”

DPC IMPLEMENTATION GUIDANCE FOR SECTION 3610 OF THE CARES ACT

DOD's implementing guidance primarily focuses on how contractors working under different contract types are to track and submit reimbursement requests for covered paid employee leave under Section 3610. The guidance emphasizes the need for contractors submitting reimbursement requests to clearly identify how these costs are segregated, recorded, invoiced, and reimbursed, in addition to providing guidance to COs on how to handle such requests based on contract type.

FIXED-PRICE CONTRACTS

The guidance offers a suggested approach for fixed-price contracts, which are generally for lump sum amounts, and do not contain “billing rates” as contemplated by Section 3610. The guidance suggests that contractors create separate line items identified as “Labor Force Retention COVID-19” at a fixed price per appropriate unit of measure (i.e., hours or days). These paid leave hours should be clearly segregated from actual hours worked and should also be exclusive of profit. Contractors are directed to submit monthly invoices with supporting documentation explaining why these paid leave hours could not be worked. In addition, contractors must make an express statement that these paid leave costs are not being claimed “under other authorities.” Contractors are instructed to submit request for payment using specific forms on the Wide Area Workflow website.

The guidance further provides instructions to the CO on how to review a contractor’s reimbursement request. Upon receipt, the government official must “verify that the conditions exist and accept the effort under that line item.” No specific instructions are provided as to how the CO is to make such verification. In negotiating an equitable adjustment to the price and delivery schedule, profit shall not be increased—such exclusion of profit is different from a traditional equitable adjustment pursuant to the changes clause which allows for profit.

Furthermore, to the extent employees work across multiple contracts, the Administrative Contracting Officer is tasked with coordinating a reasonable allocation of costs. When making payments, COs are required to establish separate line items for Section 3610 COVID-19 payments, and state whether or not the payments constitute acceptance of supplies or services.

COST-REIMBURSEMENT CONTRACTS

Less specific guidance is provided to contractors working under cost-reimbursement contracts, who are normally reimbursed for their allowable costs of performance of the work subject to certain cost principles. These contractors are instructed to charge their covered paid leave costs to a separate account such as “Other Direct Cost - COVID-19,” and work with the government to establish appropriate cost procedures. Contractors must submit all supporting documentation to the government, which would be subject to audit like any other reimbursement request.

TIME AND MATERIALS OR LABOR HOUR CONTRACTS

Similar to cost-reimbursement contracts, contractors are instructed to create separate line items for reimbursement under Time and Material or Labor Hour Contracts that clearly segregate covered paid leave costs. Contractors must submit all supporting documentation to the government, which would be subject to audit like any other reimbursement request.

GOVERNMENT OVERSIGHT

The memorandum emphasizes the government's need to provide appropriate surveillance to the reimbursement process under Section 3610. To that end, contracting procedures and administration need to be highly scrutinized by COs, Contracting Officer's Representatives ("COR"), and Defense Contract Audit Agency ("DCAA").

COs are required to document the following:

- (1) The contractor's starting and ending dates of the affected conditions;
- (2) The extent of the conditions;
- (3) Specific reasons why the CARES Act applies, i.e., why they are covered;
- (4) Impact on cost and pricing; and
- (5) The effect on contract performance.

COs are also required to issue to contractors the payment instructions to be used—specifically, use of the Wide Area WorkFlow system, which provides the method to electronically process vendor payment requests and receive reports, as authorized by DFARS 252.232- 7003, Electronic Submission of Payment Requests and Receiving Reports.

Furthermore, CORs are required to use the Surveillance and Performance Monitoring ("SPM") Module to document actions impacting contract performance due to COVID-19. The CO and COR are also required to work together to ensure that only *completed* services under fixed-price contracts are accepted. Lastly, the memorandum notes that DCAA has oversight billings and audit responsibilities over flexibly-priced contracts.

CONCLUSION

DOD continues to refine and clarify the scope of the relief through authorization of DFARS 231.205-79 as a framework for reimbursement, as well as through further implementing guidance aimed at the mechanics of payment under different contract types. While contractors should be prudent in following the guidance as stringently as possible, contractors should be mindful that nothing herein is guaranteed. The implementing guidance is clear that reimbursement under 3610 is contingent on the availability of funds—thus, no equitable adjustments will be made in the absence of sufficient funding. It is particularly important for contractors working under cost-reimbursement contracts to be mindful of where they stand in regard to the funding allocated to the contract.

These are no doubt uncertain times, and the government will likely issue further guidance as the dust starts to settle and the true impacts of COVID-19

are revealed. In the meantime, contractors should continue to be diligent in their labor management and cost accounting.

Specifically, we recommend the following measures be put in place:

- Document facility closures, including a federally owned or leased or contractor-owned or leased facilities, due to COVID-19;
- Document which employees are impacted by facility closures;
- Document which employees are impacted by any “other restrictions,” such those impacted where travel to the facility is prohibited or made impracticable by applicable federal, state, or local law;
- For employees impacted by facility closures or other restrictions, document the basis for why telework is not an option. This includes any mitigation efforts for employees who are able to telework;
- Segregate costs paid to covered employees to keep them in a ready state consistent with the contract type, i.e., cost reimbursable and fixed priced;
- Consider seeking an advance agreement with the contracting officer as to what constitutes “appropriate rates under the contract” that the contracting officer will pay;
- Review eligibility for any other federal payment, allowance, or tax or other credit allowed by law that is specifically related to COVID-19; and
- Keep track of any cost recovery under other provisions of the CARES Act, as those will reduce any recovery under Section 3610.