

June 2, 2020

## **Equitable Adjustments for Federal Contractors Under the Coronavirus Aid, Relief, and Economic Security Act**

### **-BACKGROUND-**

On March 27, 2020, the President signed into law the Coronavirus Aid, Relief, and Economic Security Act, more commonly known as the CARES Act. The CARES Act allocated more than \$2.2 trillion in response to the Coronavirus pandemic and its effects on the economy. The CARES Act contained a number of provisions intended to directly support certain businesses, including loans under the Paycheck Protection Program and advance tax credits for employers that provide paid leave to their employees under the Families First Coronavirus Response Act.

While these and other provisions of the CARES Act received significant coverage from the media and other sources, one aspect of the CARES Act important to federal contractors – *Section 3610, Federal Contractor Authority* – has not garnered the same attention. Section 3610 allows some federal contractors to obtain equitable adjustments to a contract price for certain impacts caused by the pandemic and is a tool that federal contractors should understand.

### **-SPECIFICS-**

Section 3610 authorizes a contracting officer to make a unilateral contract modification to compensate a contractor for any paid leave, including sick leave, provided to keep its employees and subcontractors in a ready state. Payments are limited to an average of 40 hours per week at the minimum applicable contract billing rates and can be made for leave provided by the contractor or subcontractor through September 30, 2020.

For fixed-price contracts in which no “billing rate” for contractor employees is specified in the contract, agency guidance indicates that a fixed price for an appropriate unit of measure (such as hours or days), exclusive of profit, can be negotiated. Contractors would be expected to distinguish all leave paid from actual hours worked and to submit a monthly invoice under a newly created line item or set of line items with the number of hours of eligible leave per labor category.

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This memorandum, prepared by **Alex Gorelik, Jake Scott, and Doug Tabeling of Smith, Currie & Hancock LLP**, is for general informational purposes only and is not legal advice. Readers should contact an attorney to obtain specific legal advice with respect to the particular facts and circumstances of their situation.

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An adjustment made under Section 3610 of the CARES Act is available only to cover the costs of leave paid to contractor employees if that leave is taken as a result of COVID-19. A Section 3610 adjustment may only cover the costs for paid leave where, as a result of facility closures or other restrictions, a contractor finds itself in the following situation:

1. Its employees cannot perform work on a site that has been approved by the Government for contract performance, including any contractor-owned, contractor-leased, federally-owned, or federally-leased site; **and**
2. Those same employees also cannot telework because their jobs cannot be performed remotely; **and**
3. The contractor has to act to keep those employees in a ready state (presumably by continuing to pay those employees).

On April 8 and April 9, 2020, the Department of Defense issued written guidance and FAQs explaining how it plans to address contractor requests for price adjustments under Section 3610. A copy of each of the guidance memoranda is available [here](#) and [here](#). DoD's guidance includes a class deviation to FAR 31 and DFARS 231 **effective immediately**, authorizing contracting officers to use DFARS 231.205-79, CARES Act Section 3610 Implementation, as the framework for processing requests for equitable adjustments. DoD issued further Draft Implementation Guidance on May 18, 2020 (available [here](#).) The Office of Management and Budget published a guidance memorandum on April 17, 2020, a copy of which is available [here](#). Many agencies have since followed with their own guidance. The guidance issued by the General Services Administration and the Department of Energy, for example, can be found [here](#) and [here](#), respectively.

Contractors interested in taking advantage of Section 3610 under a contract with any federal agency should be aware of several key points:

- **Broad Definition of Eligible Contractors.** Any entity with a federal contract in place from January 31, 2020, through September 30, 2020, may request an adjustment under Section 3610 of the CARES Act. Unlike many of the other relief programs in the CARES Act, there are no limitations on the size or industry of the requesting entity. The primary limit of Section 3610 is the narrow situation and costs that it is meant to address. DoD's current guidance would allow adjustments for paid leave provided as early as January 31, 2020, (the date of the declaration of a public-health emergency), but OMB's guidance only allows payments for workers' time beginning March 27, 2020, (the date the CARES Act became law).
- **Applies to Both Contractors and Subcontractors.** Section 3610 does not prohibit pass-through claims for subcontractor employee leave costs incurred as a result of COVID-19.

- **Adjustments Available Over Longer Time Than Other CARES Act Programs.** Because price adjustments under Section 3610 extend to eligible costs incurred from January 31, 2020, through September 30, 2020, they might be particularly useful to federal contractors incurring applicable costs outside the time periods set for other relief programs. (For example, Paycheck Protection Program loans only cover costs through June 30, 2020). GSA's guidance limits the time period for which it will allow these adjustments, saying that the "authority may only be used for leave that a contractor has provided during the period of March 27, 2020 through September 30, 2020."
- **Duplicate Recovery Is Prohibited.** The existing guidance consistently warns contracting officers processing these requests to "avoid duplication of payments" because some contractors may be able to recover the costs for the covered leave through other means, such as Paycheck Protection Program (PPP) loans or Families First Coronavirus Response Act (FFCRA) credits. Any adjustment under Section 3610 will be reduced by the amount of credit a contractor is allowed to take under the FFCRA and the CARES Act.

In the answer to one of its FAQs, DoD said that "the Government should receive a credit or a reduction in billing for any PPP loans or loan payments that are forgiven, to the extent that PPP credits are allocable to costs allowed under a contract." DoD added that "any reimbursements, tax credits, etc. from whatever source that contractors receive for any COVID-19 Paid Leave costs should be treated in a similar manner and disclosed to the government." At present, DoD's most recent draft guidance requires that the full amount of forgiveness of any Paycheck Protection Program (PPP) loan that a contractor merely anticipates receiving must be excluded from any request for reimbursement under Section 3610.

- **Contractors Must Make Representations.** In order to obtain an adjustment, a contractor will have to affirm that it has not or will not seek recovery of the same costs by other means. Contractors should take these representations seriously, particularly in light of the extensive audit provisions contained in the CARES Act and the severe penalties that result from making false certifications to the Government.
- **Documenting and Segregating Increased Costs is Critical to Recovery.** Contractors must be able to clearly identify the requested costs in their records. Segregation and identification of costs can be achieved in any reasonable manner that provides a sufficient audit trail.
- **Immediacy of Need Will Be Considered.** DoD, in particular, has recognized that "while impacts [of the virus] will certainly be experienced by many contractors, some will have a more immediate need for relief than others." For example, it notes that "the impact of COVID-19 on a contractor providing labor services will differ from the impact on a contractor that develops information systems." For this reason, DoD intends to "consider the

immediacy of the specific circumstances of the contractor involved and respond accordingly.” Civilian agencies might apply similar prioritization when processing any adjustment requests.

- **Reimbursements Are Available for Any Contract Type.** Section 3610 applies to all contract types and both commercial and non-commercial contracts. Regardless of contract type, reimbursement will not include any profit or fee.
- **Recovery is Limited to Paid Leave Costs that the Contractor Would Not Incur But For the National Emergency.** Section 3610 “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.” (Emphasis added.) That includes instances where travel to approved facilities “is prohibited or made impracticable by applicable Federal, State, or local law, including temporary orders having the effect of law.” Many state and local stay-at-home and shelter-in-place orders and other work restrictions exempt “essential” businesses and industries, and the Government has indicated its desire to ensure that local authorities allow contractors doing “essential work” to travel to work facilities of this sort. A contractor’s ability to obtain a Section 3610 modification will depend on the facts and the location of each project.
- **Each Contract Identifies Its “Approved Work Sites.”** Since price adjustments under Section 3610 of the CARES Act are only available when “employees cannot perform work on a site that has been approved by the Federal Government for contract performance,” contractors must be able to identify all of the locations that the Government approved for work under their contracts. DoD, for example, has made clear that “the approved work site is the contractor’s location and any other places of performance specifically identified in the contract. This includes any contractor or subcontractor facility at which contract administration services are performed in support of those contracts or that has been cleared by the National Industrial Security Program Contract Classification System on a DD form 254 or electronic equivalent. Depending on the contract, it may include multiple work sites and/or locations.”
- **Reimbursement is Contingent Upon the Agency’s Availability of Funds.** Perhaps one of the most significant limits on adjustments under Section 3610 is that any reimbursements are limited by the availability of appropriated funds. DoD acknowledges, for instance, that “any funds that are otherwise legally available for use under a contract may be used to fund section 3610 reimbursement under that contract. Section 3610 adjustments need not be funded with only CARES Act appropriations.”
- **Additional Guidance Will Be Forthcoming.** The recent guidance indicates that DoD “anticipate[s] the need for additional guidance and will continue to

provide answers to frequently asked questions and provide additional implementation information and guidance as appropriate.” The FAQs reinforce that additional guidance from DoD is forthcoming.

#### **-POTENTIAL APPLICATIONS-**

Section 3610 adjustments are made at the contracting officer’s discretion. These are some circumstances in which contractor or subcontractor employees might be unable to perform work at an approved work site or to work remotely but must be compensated in order to maintain their ready state:

- Employees have been infected with the coronavirus, are caring for others who have been infected, or are quarantined because of exposure.
- Employees are prohibited from entering Government facilities for a period after returning from international travel.
- Employees are prohibited from entering Government facilities by directive or restriction imposed by the Government.
- Employees are unable to report for work as a result of state and local “shelter-in-place” and “stay-at-home” orders.

#### **-CHECKLIST FOR REQUEST SUBMISSIONS-**

A contractor requesting a Section 3610 adjustment must make sure to comply with all of the requirements addressed above. Below is a non-exhaustive checklist of the documentation that a contractor should consider providing with its request and keeping for its own records.

- A list identifying (1) the relevant employees, (2) the contract(s) the employees were performing under, and (3) the amount and dates of the paid leave provided to the employees for which reimbursement is requested.
- A brief narrative addressing the actions that the contractor has taken to continue performing work under the contract, the circumstances that made it necessary to grant the employee leave, and how the leave served to keep employees in a ready state.
- Documents confirming the payments that were made to the relevant employee for the eligible paid leave.
- Documents supporting the contractor’s determination that the work is “essential” and required to be kept in a ready state (for example, contract references to DFARS 252.237-7023, any DO/DX rated orders, or direction from the contracting officer).
- Contract documents or communication(s) with the Government identifying approved location(s).

- Documentation of the prohibition on entry to the approved facility, including communications with the contracting officer, the “shelter-in-place,” “stay-at-home,” or other orders, where applicable, with the relevant sections highlighted.
- Documentation of the contractor’s company-specific guidance on COVID-19 Paid Leave and a brief description of the contractor’s normal accounting treatment of leave costs (e.g., policies and procedures).
- A brief narrative addressing why Section 3610 of the CARES Act applies, confirming that the costs being claimed are only for paid leave meeting all of the following conditions, and explaining that the employees:
  - But for the COVID-19 pandemic, would be working on a site approved by the Government pursuant to the contract(s) under which claimed costs are sought;
  - Could not perform work on such Government approved site due to closures or other restrictions resulting from the COVID-19 pandemic;
  - Were unable to telework or otherwise work remotely under the applicable contract(s) during the COVID-19 pandemic;
  - Received paid leave for a period following January 31, 2020, or March 27, 2020, (depending on the agency involved) and prior to September 30, 2020;
  - Were provided paid leave at the same rates that the contractor would have paid employees if it were providing paid leave for another reason.
- If applicable, identification of any credits that may reduce reimbursement under Section 3610, including any pre-planned leave by the employee or payments/credits under other programs and contracts.
- If applicable, a brief narrative addressing any special factors related to the request, such as an explanation of a contractor’s “immediate need” for reimbursement and a detailed description of the harms from delay in processing.
- A brief narrative addressing the effect of the leave on the contract performance.
- A breakout of the costs being sought under Section 3610 (in a spreadsheet format or as otherwise directed).
- A statement identifying any related requests being made under other contracts with the same agency and the contact information for relevant contracting officers.

- A statement that the claimed costs constitute the only reimbursement or payment the company is receiving for this purpose, and that it is not being paid or reimbursed for the same costs via any other source or funding.
- The request must be signed by a corporate representative at the Vice President level or above.

### **-STRENGTHENING YOUR CASE-**

The success or failure of a Section 3610 request will depend, at least in part, on the completeness of the contractor's documentation. Accordingly, contractors should make sure that they consistently and exhaustively document these issues over the next several months. Contractors also should not hesitate to require employees to provide supporting documentation of prior instances of eligible paid leave.

Frequent communication and requests for confirmation from the relevant contracting officer will be critical. This is particularly true when the contractor is verifying whether a particular contract is truly "essential" or if a waiver is available for a particular "prohibition" on access to a facility. Try to obtain any communications from the contracting officer that relate to such requests in writing or follow-up with the contracting officer in writing about your understanding of their direction.

Contractors should provide all relevant details possible. Contractors should also include all of the routine documents and information typically required to accompany a request for equitable adjustment, such as the certification required for REAs under DoD contracts (which is not, please note, the same certification as the one used for certified claims).

### **-CONCLUSION-**

Unilateral equitable adjustments arising from a pandemic are uncharted territory for contracting officers and contractors alike. The inconsistent agency guidance on certain issues highlights that flexibility will be required of all involved. Contractors can aid both themselves and contracting officers by preparing comprehensive REAs supported by detailed contemporaneous documentation of their and the Government's actions and the associated costs.