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Kim Herrington  
Acting Principal Director  
Defense Pricing and Contracting  
3060 Defense Pentagon  
Room 3B938  
Washington, DC 20301-3060

**RE: DoD Process for Section 3610 Reimbursement: Implementation Guidance**

Dear Mr. Herrington:

Thank you for the opportunity to comment on the Draft Implementation Guidance issued by Department of Defense on contractor requests for reimbursement under Section 3610 of the CARES Act. For background, the Associated General Contractors of America (AGC) is the nation's leading association for the construction industry, representing both union and open-shop prime and specialty contractors. AGC represents more than 27,500 firms, including more than 6,500 of America's leading general contractors and more than 9,000 specialty contractors. More than 10,500 service providers and suppliers are also associated with AGC, all through a nationwide network of 88 chapters in all fifty states, the District of Columbia, and Puerto Rico. AGC contractors build the nation's factories, warehouses, schools, hospitals, retail centers, offices, highways, bridges, tunnels, airports, waterworks facilities, waste treatment facilities, dams, water conservation projects, defense facilities, multi-family housing projects, utility infrastructure, and more.

In Section 3610, Congress authorized federal agencies to modify contracts to reimburse contractors for paid leave that a contractor provides to keep its employees or subcontractors in a ready state provided that, among other things, reimbursements are reduced by the amount of "any applicable credits a contractor is allowed" under the Act. The Department's draft guidance applies that condition to require an immediate and undifferentiated credit for the full amount of forgiveness of any Paycheck Protection Program (PPP) loan that a contractor merely anticipates receiving. This approach is far too

broad and exceeds both the statutory direction and the underlying principles of Section 3610 and the PPP. The guidance should be revised and clarified to be limited to appropriately defined “applicable credits.”

The Department’s draft guidance on contractor requests for reimbursement under Section 3610 of the CARES Act requires contracting officers to determine that the contractor has not been reimbursed via forgiveness of a Government-backed loan for paid leave provided to employees. More specifically, however, Question 6 of the Department’s draft Checklist for Submission of Section 3610 Reimbursement Requests indicates that the full amount of anticipated forgiveness of any PPP loan must be excluded from any request for reimbursement under Section 3610 without any further analysis. But the statutory language of Section 3610’s condition on reimbursements is limited to “applicable credits,” which requires a more detailed analysis of PPP loan forgiveness and the relationship between the use of PPP loan proceeds and an equitable adjustment for paid leave under a particular contract.

### **1. Not All Forgiven PPP Loan Amounts are Applicable to Paid-Leave Costs Expended on Employees Dedicated to Performing Certain Federal Contracts**

A proper implementation of CARES Act Section 3610 requires an appropriate application of the statute’s condition that “the maximum reimbursement authorized by this section shall be reduced by the amount of credit a contractor is allowed pursuant to division G of Public Law 116–127 and any applicable credits a contractor is allowed under this Act.” The key to this is the definition and understanding of “applicable credits.”

The Department’s draft guidance presumes that PPP loan proceeds must be applied first and foremost—and perhaps even in their entirety—only to paid-leave costs on a contractor’s federal contracts qualifying for reimbursements under Section 3610 before anything else, but neither Section 3610 nor the remainder of the CARES Act suggests any such thing. The PPP protects the paychecks of more employees than just those dedicated to performance of current, qualifying federal contracts. It protects home-office employees and support personnel and employees working on other contracts, too, including employees dedicated to other federal, state and local, and private contracts that do not qualify for reimbursements under Section 3610. To do so, it also allows some PPP loan proceeds to be forgiven if they are spent on qualifying costs for other employment-related, non-payroll expenses such as rent and utility payments for the space where those same employees work.

Since up to 25% of PPP loan proceeds can be spent on qualifying non-payroll costs and still be forgiven, the amount of PPP loan proceeds spent on those costs cannot be “applicable credits” to paid-leave payroll expenses. Similarly, since the PPP does not differentiate between payroll costs paid to employees solely dedicated performing to federal contracts qualifying under Section 3610 and payroll costs paid to any other employee, not all of those costs are “applicable credits” to paid-leave expenses.

“Applicable credits” should be defined as PPP loan amounts forgiven to the extent that the payroll-costs portion of an employer’s forgiven PPP loan proceeds exceeds the employer’s payroll expense for employees not covered by a reimbursement under Section 3610. This definition would address payroll costs that can be specifically identified and allocated and would eliminate true “double-dipping” while implementing Congress’s multiple intentions to support small businesses, to preserve the Government’s contractor base, to promote the health and safety of federal employees and contractor personnel, and to ensure that performance of affected federal contracts can resume as soon and as quickly as possible for the Government’s benefit. In the alternative, the applicable credit should be, at most, the percentage of its total payroll costs paid with forgiven PPP loan proceeds represented by the paid-leave costs qualifying for reimbursement under Section 3610.

## **2. The Department’s Guidance Treats Federal Contractors Inequitably**

Federal contractors seeking equitable adjustments under Section 3610 should not be required to allocate PPP loan proceeds to paid leave costs for specified employees when other employers receiving PPP loan forgiveness are not similarly restricted. For federal contractors, the Department’s guidance inequitably changes the effect and flexibility of the PPP. There is no obligation for employers not performing federal contracts to grant credits to other parties with which they contract.

## **3. The Department’s Guidance Makes PPP Loan Forgiveness Illusory**

If the forgiven amount of a PPP loan must be credited to the Government against fully justified equitable adjustments to a federal contract for paid leave costs expended to ensure the health and safety of federal employees and contractor personnel and to ensure that performance of the affected contract can resume as soon and as quickly as possible for the Government’s benefit, then the forgiveness of that loan is illusory. The loan is in fact being repaid through credits against payments that should be made and

received under a contract properly performed. This was not Congress's intent in establishing either PPP loan forgiveness or Section 3610 reimbursements.

#### **4. Credits Should Not Be Based On Anticipated Loan Forgiveness**

The Department's draft guidance requires an immediate credit for the full amount of any PPP loan for which contractor merely anticipates meeting the conditions for forgiveness. At a minimum, appropriate credits should not be required or applied until the loan forgiveness amount is confirmed.

#### **Conclusion**

AGC appreciates the opportunity to share our insights with you and to help advance our common goals of ensuring federal contractors and subcontractors maintain mission readiness and ongoing operations. If you would like to discuss this matter with us further, please do not hesitate to contact AGC of America.

#### ***Submitted by:***

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