

THE GOVERNMENT CONTRACTOR®



THOMSON REUTERS

Information and Analysis on Legal Aspects of Procurement

Vol. 62, No. 22

June 10, 2020

FOCUS

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FEATURE COMMENT: Maximizing Recovery: Contractor Reimbursement For COVID-19 Paid Leave Under § 3610 Of The CARES Act

Section 3610 of the Coronavirus Aid, Relief, and Economic Security (CARES) Act allows agencies to reimburse contractors for certain costs incurred in allowing employees and subcontractors paid leave during the pandemic. After the CARES Act was passed, several agencies published guidance for reimbursement under § 3610, and the Office of Management and Budget published its own Government-wide guidance. The direction from OMB sometimes contradicted individual agencies' guidance and left important questions (including questions about the reimbursement process) unresolved.

The Health and Economic Recovery Omnibus Emergency Solutions (HEROES) Act, passed by the U.S. House of Representatives and currently pending before the Senate, would correct some of the problems left by the OMB guidance but would not address a central issue: OMB told federal agencies to reimburse contractors for paid leave only if doing so furthered the *agencies' own* missions, and OMB arguably ignored Congress' broader goals in the CARES Act—public health and economic goals that may justify contractor reimbursement.

The Department of Defense (by far the largest federal buyer) has now issued draft process guidance for contractors submitting § 3610 requests for reimbursement. The draft process guidance explains how contractors should prepare and submit requests for reimbursement, and frames how those requests will be processed. The draft Defense Department guidance does not resolve the important

questions left by the OMB guidance—it does not fully clarify the grounds for recovering paid leave during the pandemic—but the DOD draft guidance may open the door to recovering a broader range of costs, based on the expansive goals of the CARES Act.

Purposes of the CARES Act—Senate Majority Leader Mitch McConnell explained the purposes of the CARES Act when he presented the legislation on the Senate floor on March 25, 2020. 166 Cong. Rec. 2021 (March 25, 2020). Sen. McConnell noted that the pandemic had forced over half the U.S. population to “shelter-in-place”—to remain home to restrict the spread of the virus. He then explained Congress' priorities in framing the CARES Act. To “help our Nation through this crisis,” he said, Congress hoped to “get direct—direct—financial assistance to the American people.” To do so, Sen. McConnell said, Congress wanted “to get historic aid to small businesses to keep paychecks flowing, stabilize key industries to prevent mass layoffs, and, of course, flood more resources into the frontline healthcare battle itself.”

Sen. McConnell stressed that the final CARES Act legislation, while reflecting those priorities, also included numerous ideas put forward during negotiations on the bill. *Id.* at S2022. Those included § 3610, which was not part of the original bill. Section 3610 provided for contractor reimbursement for leave paid to employees and subcontractors who cannot work due to the COVID-19 pandemic.

In passing the CARES Act, Congress sought to provide a fiscal stimulus (both to individuals and to businesses) and to protect public health. The language of § 3610—the only CARES Act provision focused on Government contractors—reflected these overall CARES Act priorities. (Other long-established contractual provisions provided contractors some shelter from risk in the pandemic. See Daniels, Holman, Ittig & Pettit, Feature Comment, “Prepare, Communicate, Document And Segregate—A Government Contractor's Guide To Addressing Performance Disruptions And Delays Related To COVID-19,” 62 GC ¶ 74; Schipma, Schaengold & Straus, Feature

Comment, “CARES Act: Changes To Government Contracting Authority,” 62 GC ¶ 92). Section 3610 facilitated a fiscal stimulus by making *any* agency appropriations available for contractor reimbursement, and § 3610 furthered Congress’ public health goals by allowing reimbursement for paid leave afforded employees to “protect the life and safety of Government and contractor personnel.” Section 3610 also suggested another goal: to preserve the contractor base by keeping “employees or subcontractors in a ready state.”

Agencies’ Implementing Guidance Under the CARES Act—A number of agencies issued guidance on § 3610 (available at www.acquisition.gov/coronavirus) in the weeks following passage of the CARES Act. See 62 GC ¶ 84; 62 GC ¶ 121. The guidance varied from agency to agency:

- The intelligence community guidance, for example, recognized the public health purposes behind § 3610 and strongly encouraged intelligence agencies “to make full use of the flexibility provided by this Act” in order to “enable the maximum number of contract personnel to convert to staying home” so as “to mitigate the spread of the COVID-19 pandemic.”
- The Department of Energy issued special clauses and guidance that recognized the need to “preserve the resilience of the federal contracting base ... by helping the acquisition workforce ensure the health and safety of federal contractors and subcontractors in light of COVID-19.” www.energy.gov/management/downloads/pf-2020-22-guidance-using-doe-s-clauses-developed-implement-section-3610.
- The Department of Homeland Security issued guidance that did little more than restate the requirements of the statute itself. www.dhs.gov/blog/2020/04/21/implementing-cares-act-section-3610.
- The General Services Administration issued guidance, see interact.gsa.gov/document/guidance-section-3610-cares-act-fas-indefinite-delivery-vehicles-eg-schedules-gwacs-etc, and a class deviation (a provisional, agency-specific deviation from the Federal Acquisition Regulation) which emphasized that contracting officers should consider both the effects on contractor employees and the impact on contractor readiness when assessing relief under § 3610. See GSA, *GSAR Class Deviation—CARES Act Section 3610 Implementation* (April 21, 2020), www.acquisition.gov/sites/default/files/page_file_uploads/CD-2020-12.pdf.
- NASA’s guidance, while recognizing the need to preserve “the health and safety of our NASA Community” and the “evolving Coronavirus situation and the impact to the world,” emphasized NASA’s desire “to preserve Space Industrial Base and Mission Operational Readiness.” NASA anticipated that § 3610 relief would be coordinated with other forms of support and flexibility in contracting, all of which could be reflected in an advance agreement between a contractor and the agency. See NASA, *Frequently Asked Questions (FAQ) Regarding COVID-19 Impacts & the Advance Agreement for NASA Contractors*, www.nasa.gov/sites/default/files/atoms/files/external_faqs_preserve_readiness_of_space_industrial_base_4.6.20.pdf.
- While the Office of Personnel Management did not issue guidance specifically addressed to contractor reimbursement under § 3610, OPM did issue guidance for federal employees that recognized—with caveats—that paid leave may be warranted in limited circumstances because of federal employees’ caregiving obligations. See OPM, *Coronavirus Disease 2019 (COVID-19), Options for Telework-Eligible Employees with Caregiving Responsibilities*, www.opm.gov/policy-data-oversight/covid-19/options-for-telework-eligible-employees-with-caregiving-responsibilities. Contractors may attempt to use this guidance in explaining their own paid leave policies during the pandemic.
- Guidance issued on May 12, 2020, by the U.S. Agency for International Development touched on important points that may be relevant to other agencies’ reimbursement, as well. See Director, Office of Acquisition & Assistance, USAID, *Acquisition & Assistance Policy Directive (AAPD) 20-03 Paid Leave Under Section 3610 of the CARES Act* (May 12, 2020), www.usaid.gov/sites/default/files/documents/1868/AAPD-20-03.pdf. USAID appeared to acknowledge the need to fund contractor employees during the COVID-19 economic downturn—part of the fiscal stimulus integral to the CARES Act—when USAID noted that other forms of relief (such as the Paycheck Protection Program) “may provide a more efficient means of payments to contrac-

tor employees.” Like OMB (but unlike other agencies, discussed below), USAID would allow reimbursement only from March 27, 2020. USAID also said that paid leave could be used “as a bridge to hold over employees where a contract may be retooled for pandemic response”—a relatively expansive approach to allowable paid leave. The USAID guidance said that, in “making a determination to use this relief provision,” a CO “should consider the impact of funding or not funding additional paid leave and document each alternative.” Contractors may point to this USAID guidance to argue that, while it is contractors’ burden to support a request for reimbursement, it is the agency’s burden to document the reasons for *denying* relief—especially if relief is denied due to the agency’s internal funding imperatives.

- The Air Force issued interim guidance dated May 6, 2020, which anticipated the draft DOD process guidance discussed below. See *Air Force Interim Implementation Guidance for Section 3610 of the CARES Act* (May 6, 2020), www.acq.osd.mil/dpap/pacc/cc/docs/covid-19/PM20-C-08AFInterimImplementationGuidanceunderSec3610oftheCARESAct.pdf. A few days before the Air Force guidance was issued, by memorandum of May 1, 2020, the Defense Department had said to expect the more extensive § 3610 guidance discussed below; the Defense Department’s May 1, 2020 memo, www.acq.osd.mil/dpap/pacc/cc/docs/covid-19/PM20-C-08AFInterimImplementationGuidanceunderSec3610oftheCARESAct.pdf, noted the need to “provide the flexibility our contracting professionals need to resolve the numerous reimbursement requests expected under Section 3610 at the contract, business unit or the corporate level”—a recognition (later echoed in the draft process guidance discussed below) that a contractor may submit a request for § 3610 relief which spans more than one contract. The Air Force guidance stressed that any § 3610 reimbursement could cause “mission requirements [to] be jeopardized, as there is no guarantee that program funds used for this purpose will be reimbursed with CARES Act appropriations.” The Air Force guidance therefore said that COs

should “not modify a contract [to allow § 3610 reimbursement] until ... the program manager or requirements owner has made a decision to reimburse the contractor”—which in effect may have shifted the § 3610 reimbursement decision from COs to program officials, contrary to the Defense Department guidance discussed below.

- From early on, the Defense Department’s April 8, 2020 class deviation regarding § 3610, see DOD Class Deviation 2020-O0013, www.acq.osd.mil/dpap/policy/policyvault/ClassDeviation2020-O0013.pdf; 62 GC ¶ 105, DOD’s initial guidance, see *Implementation Guidance for Section 3610 of the Coronavirus Aid, Relief, and Economic Security Act* (April 9, 2020), www.acq.osd.mil/dpap/policy/policyvault/ImplementationGuidanceCARES3610DPC.pdf, and the Department’s Frequently Asked Questions (FAQs) regarding § 3610 implementation, see www.acq.osd.mil/dpap/pacc/cc/docs/covid-19/FAQImplementationGuidanceCARESActSec36102020.04.24.pdf, all focused on the costs and administrative aspects of reimbursement, emphasized the goal of mission-readiness, and stressed the need for contractors to support requests for reimbursement with adequate documentation. See, e.g., McGill & Pompeo, “*Inside DOD Guidance on CARES Act Paid Leave Relief: Parts 1 & 2*,” Law360 (April 24, 2020), available at www.law360.com. This early Defense Department direction would be addressed by the “overarching” Defense Department guidance, since issued in draft form and discussed below.

OMB § 3610 Government-wide Guidance—Many hoped that OMB (or the Federal Acquisition Regulatory Council) would present system-wide administrative guidance to reconcile the various agencies’ (sometimes conflicting) guidance. But when OMB issued Government-wide guidance implementing § 3610, OMB Memorandum M-20-22 (April 17, 2020), www.whitehouse.gov/wp-content/uploads/2020/04/M-20-22.pdf, that OMB direction deferred to the individual agencies’ guidance and class deviations—and OMB sometimes contradicted the agencies’ guidance, some of which was issued later. See, e.g., Jason Miller, *Vendors Who Can’t Work Due to Coronavirus Asking for More Clarity, Consistency*, Federal News Network, April 21, 2020 (noting that while some agencies would date § 3610 relief from Jan.

31, 2020 (the day the health emergency was declared), OMB used March 27, 2020 (the date the CARES Act became law)), *federalnewsnetwork.com/reporters-notebook-jason-miller/2020/04/vendors-who-cant-work-due-to-coronavirus-asking-for-more-clarity-consistency*. Instead of crafting a uniform, Government-wide approach for implementing § 3610, OMB instead focused on the policy goals that COs might consider when considering requests for relief.

The OMB guidance pointed contracting officials to only one goal in affording CARES Act relief: to support the contracting base. The title of the OMB guidance (“Preserving the Resilience of the Federal Contracting Base”) confirmed that narrow interpretation of the statute, and the OMB guidance did not reference the economic and public health goals of § 3610—although those priorities arguably were woven into § 3610 and the broader CARES Act, as noted above.

Under the OMB guidance, agencies are to “consider if reimbursement for paid leave to keep the contractor in a ready state is in the best interest of the Government for meeting current and future needs.” *Id.* at 2. Agencies are to “use their discretion to make reimbursements only when they find that making such payments are in the best interest of the government,” based on whether (1) funding paid leave advances the agency’s mission, and (2) other relief might be available to contractors.

Nowhere does the OMB guidance call out the public health and fiscal stimulus goals of the CARES Act, which contractors may argue were an integral part of § 3610.

This narrow OMB guidance has serious practical implications. If a contractor has, for example, asked workers to stay home to avoid the health risks of crowded public transportation—a critical issue in poorer and minority communities, which suffered a severe impact from the pandemic, Centers for Disease Control and Prevention, *COVID-19 in Racial and Ethnic Minority Groups*, *www.cdc.gov/coronavirus/2019-ncov/need-extra-precautions/racial-ethnic-minorities.html*—the OMB guidance would not directly address reimbursement under § 3610, although the language of § 3610 itself would support reimbursement to “protect the life and safety of Government and contractor personnel.” Nor would the OMB guidance call on an agency to afford rapid reimbursement where economic assistance did not further the agency’s own goals—even though § 3610 was part of a broader

economic package passed by Congress, intended to provide prompt fiscal stimulus to the nation.

While other contract clauses might provide a basis for contractor relief, see, e.g., Daniels, Holman, Ittig & Pettit, *supra*, 62 GC ¶ 74, and the guidance from OMB (and the agencies) could be read more expansively to include § 3610’s broader goals, the problem was one of clarity: OMB’s guidance did not explicitly speak beyond the agencies’ narrow goal of preserving the contractor base.

HEROES Act—Passed the House, Pending Before the Senate—Although H.R. 6800, the HEROES Act (the latest round of COVID-19 legislation, now pending before Congress), acknowledges that the OMB guidance was flawed, the pending legislation would not resolve the narrow approach of the OMB guidance. Section 70402 of the HEROES Act, as passed by the House, would make technical corrections to the earlier OMB guidance. Among other things, the HEROES Act would require OMB to issue corrected guidance pushing the effective date for relief back from March 27 (the date of the CARES Act’s passage) to Jan. 31, 2020 (the date the COVID-19 emergency was declared by the Secretary of the Department of Health and Human Services, Alex M. Azar II, *www.hhs.gov/about/news/2020/01/31/secretary-azar-declares-public-health-emergency-us-2019-novel-coronavirus.html*). But the HEROES Act would not address what some see as a deeper problem with the OMB guidance: the OMB guidance largely ignored the broader economic and public health purposes of § 3610 relief.

Draft Defense Department Process Guidance—While the HEROES Act would not resolve all the problems left by the OMB guidance, draft process guidance published by the Defense Department may leave the door open for contractors that seek to maximize reimbursement by citing the broader purposes—the public health and fiscal stimulus goals—of the CARES Act and § 3610 itself.

The draft process guidance, see 62 GC ¶ 144(b), consists of three documents, published for comment by the Department: (1) a draft DOD process for § 3610 reimbursement, (2) a draft DOD checklist for submission of § 3610 reimbursement requests and (3) draft instructions for the DOD checklist for contractor requests for reimbursements. See Defense Pricing & Contracting, U.S. Department of Defense, *www.acq.osd.mil/dpap/dars/early_engagement_opportunity/guidance_on_section_3610_cares_act.html*. In summary, these draft documents provide as follows:

1. The **draft process** for assessing requests for reimbursement would be “overarching,” and would seek to incorporate the § 3610 statute, the prior Defense Department guidance and the DOD class deviation. The draft process would ask the contractor to submit documentation regarding the leave paid employees or subcontractors, in accordance with the criteria set out in the CARES Act’s § 3610. The draft process would allow the contractor to consolidate its requests, across multiple contracts or even across an entire corporation—a major efficiency—and would allow the Defense Department to review the request at any level of the Department (presumably because requests may touch many units across the Department, and may raise higher-level cost and policy issues). The draft process would emphasize that the allocation of funds for reimbursement is at the Department’s discretion, and would instruct contracting officials on how to document and submit their decisions regarding reimbursement.
2. The **draft checklist** is in fact a form for contractors to fill out when submitting for § 3610 reimbursement. (The use of the term “checklist” may be an effort to avoid the Defense Department’s onerous forms-management process. See DOD Forms Management Program, www.esd.whs.mil/directives/forms/.) The draft checklist calls for the contractor to identify all other requests for § 3610 reimbursement that the contractor is submitting; this argues for consolidating § 3610 requests across a business, to minimize confusion. The draft checklist would allow a contractor to submit its own narrative explaining the basis for reimbursement. Importantly, as is discussed below, this would allow the contractor both to address the Defense Department’s explicit goals for reimbursement and, at least in principle, to draw on the broad goals of the legislation to explain why reimbursement is warranted. The draft checklist would provide detailed direction to both prime contractors and subcontractors regarding the kinds of costs that warrant reimbursement, and would explain the mechanics of how subcontractors might submit sensitive commercial information separately, in support of their requests for reimbursement.
3. The **draft instructions** expand upon the draft checklist discussed above; they provide

important guidance to COs, and should be read carefully in conjunction with the draft checklist. The draft instructions state that the CO has “sole discretion to make decisions on a contractor’s affected status and the amount of any § 3610 reimbursement,” and “the contracting officer is not required to reimburse any or all of the requested paid leave costs.” This legal assertion of absolute discretion may become an issue in litigation if reimbursement requests are denied (discussed below), for affording COs “sole discretion” (a) is not reflected in the statutory language; (b) raises concerns regarding possible corruption and favoritism; and (c) is at odds with the Department’s own draft checklist (see above), which says that reimbursement requests may be resolved at a level in the Department *above* the CO. That said, because the draft instructions emphasize the importance of the “contracting officer’s independent thought” and “reasoned judgement” in assessing requests for reimbursement (from both prime contractors and subcontractors), the instructions leave open the door to a request for reimbursement that presents unique circumstances warranting reimbursement, grounded in the language and purposes of § 3610. Under the draft instructions, for example, the CO would be expected to “understand the contractor’s explanation as to why [certain employees] could not telework”—which suggests that rationales for reimbursement (such as special circumstances making telework impossible) may be unique to an individual contractor. Under the draft instructions, the contractor (or subcontractor, if necessary) would have an opportunity to discuss those unique circumstances in early oral exchanges with the CO. The CO would be expected to coordinate with other officials (including higher-level officials in the Defense Department, and at other agencies) to assess those circumstances.

These draft documents are subject to change by the Defense Department, based upon comments being submitted by industry and others. See, e.g., Marjorie Censer, “PSC: New Section 3610 Guidance Is ‘A Lot More Complicated’ Than Anticipated,” *Inside Defense* (May 20, 2020), insidedefense.com/insider/psc-new-section-3610-guidance-lot-more-complicated-anticipated.

Maximizing § 3610 Reimbursement—As was discussed above, contractors seeking reimbursement under § 3610 for leave paid during the pandemic face a confusing welter of guidance, class deviations and draft instructions from OMB, the Defense Department and other agencies. See, e.g., Turner, Major & Wulf, Feature Comment, “Just What The Doctor Ordered—Remedies For Federal Contractors During The COVID-19 Pandemic And Beyond,” 62 GC ¶ 116. Going forward, contractors may want to:

- Carefully compile and review the available guidance and regulatory materials (which may be updated), especially those issued by the contractor’s customer agency. (It is also possible that a class deviation, or even a new rule, may be issued for § 3610 reimbursement under the FAR.) Although the Government’s direction has at times been contradictory, taken as whole the materials issued to date—especially the detailed guidance issued by the Defense Department—provide a useful roadmap for requesting reimbursement, even to other agencies.
- Develop a strategy and process for seeking reimbursement, to reduce costs and confusion at the contractor. This may mean consolidating requests for reimbursement across contracts or gathering special types of substantiating data in light of the contractor’s special circumstances. In framing requests for reimbursement, be sensitive to the agencies’ primary concern in awarding § 3610 relief—to ensure contractor readiness—but be prepared to address other CARES Act goals, such as public health concerns or the economic downturn, which may warrant reimbursement for paid leave.
- Retain and present all relevant supporting documentation, including proof of the leave paid, documents supporting the amounts paid, and any documentation that relates to unique circumstances warranting reimbursement. The Government has made clear that it expects contractors to support any request for reimbursement.
- Engage from early on with the CO and other officials, to confirm that the materials being provided offer adequate substantiation, and to explain the contractor’s rationales for reimbursement.
- As is normal contracting practice, prepare a request for reimbursement, but be prepared (if

the request is ignored or denied by the CO) to submit a formal claim. Under the Contract Disputes Act, if a contractor’s request for equitable adjustment is denied, the contractor may submit a formal claim to the CO directly, and if that is denied, the contractor may appeal to the U.S. Court of Federal Claims or to one of the boards of contract appeals (civilian or armed services).

- In appealing the CO’s denial of reimbursement under § 3610, the contractor may choose to explain why reimbursement would accord with the language and goals of § 3610. If the CO denied relief due to OMB’s narrow guidance which said that reimbursement should turn solely on the agency’s own interest in contractor readiness, the contractor might appeal, arguing that OMB lacked the authority under applicable principles of administrative law and the language of the CARES Act itself to narrow Congress’ broader goals in enacting § 3610. See, e.g., *U.S. v. Mead Corp.*, 533 U.S. 218 (2001) (discussing limits to *Chevron* deference); cf. *Indus. Union Dep’t, AFL-CIO v. Am. Petroleum Inst.*, 448 U.S. 607 (1980) (potential violation of nondelegation doctrine if Congress’ delegation of authority was open-ended). But an appeals process could take years to resolve, see, e.g., *Pernix Serka Joint Venture v. Dep’t of State*, CBCA No. 5673 (April 22, 2020) (appeal regarding ebola-related claims dating back to 2014 not resolved for six years); Arnold & Wagner, Jr., “*Recovering Additional Costs Due to COVID-19—Guidance for Contractors for the CBCA*,” 20-6 Briefing Papers 1 (May 2020), which would undercut the CARES Act’s goal of a rapid fiscal stimulus to the U.S. economy; both the agency and the contractor, therefore, may favor mediation or other forms of alternative dispute resolution, to resolve outstanding claims quickly.

Conclusion—Section 3610 of the CARES Act reflected an extraordinary experiment in U.S. emergency legislation—an effort to ensure a resilient supply chain, effect fiscal stimulus and reduce public health risks through the procurement system. So far, the Government’s implementing direction under § 3610 has been uneven and sometimes internally contradictory. The Government’s direction (including the Government-wide guidance issued by OMB) may have taken too narrow an approach to reimbursement for paid leave—an approach focused only on the agencies’

own interest in protecting their supplier base, without recognizing the CARES Act's broader public health and economic goals.

As a practical matter, however, contractors need to move forward with their requests for reimbursement, especially given the economic downturn which threatens the U.S. economy through the rest of 2020. Contractors should consult the available direction carefully and prepare their requests for reimbursement in a thoughtful and strategic manner, conscious of the Government's first priority (maintaining the contractor base) but recognizing that there may be broader grounds for recovery under § 3610. Contractors may want to challenge any denial of their requests

for reimbursement, but contractors should be prepared to engage constructively with their Government customers in an effort to resolve claims for reimbursement under § 3610 quickly and in a businesslike manner.



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