

COFFEE TALK:

JAMIS & Capital Edge discuss COVID-19's Regulatory Compliance, Financial, and Performance Impacts on Government Contractors



Part 2: CARES Act, Section 3610 - What Contractors Need to Know

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Today's Presenter



Craig Stetson, Partner, CPA, CGMA, MBA
Capital Edge Consulting, Inc.

Experienced Government Contract Regulatory Compliance Specialist with demonstrated history of working in the federal government procurement industry. 30 years of direct experience assisting government contractors interpret and apply the myriad of accounting and regulatory compliance requirements associated with federal government contracts. Skilled in a wide range of compliance matters related to accounting, pricing, contract administration, business systems and financial reporting. Significant experience i) working with and interpreting the requirements of the Federal Acquisition Regulation (FAR) and Cost Accounting Standards (CAS); ii) preparing and negotiating termination settlement proposals, claims and requests for equitable adjustment; iii) designing and assessing cost allocation structures and cost accounting practices; iv) interpreting and auditing cost allowability in accordance with FAR SubPart 31.2 requirements; and, v) assessing business systems and internal control adequacy and effectiveness pursuant to pertinent federal procurement regulation requirements.

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Agenda

- Overview – CARES Act, Section 3610
- Published Agency Guidance
- Not Well Defined
- Contractor Requirements and Risk Mitigation
- Summary and Takeaway

Overview – CARES Act, Section 3610

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SECTION 3610. FEDERAL CONTRACTOR AUTHORITY. Notwithstanding any other provision of law, and subject to the availability of appropriations, funds made available to an agency by this Act or any other Act may be used by such agency to modify the terms and conditions of a contract, or other agreement, without consideration, to reimburse at the minimum applicable contract billing rates not to exceed an average of 40 hours per week 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, but in no event beyond September 30, 2020. Such authority shall apply only to a contractor whose employees or subcontractors cannot perform work on a site that has been approved by the Federal Government, including a federally-owned or leased facility or site, due to facility closures or other restrictions, and who cannot telework because their job duties cannot be performed remotely during the public health emergency declared on January 31, 2020 for COVID-19: Provided, 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.

Overview – CARES Act, Section 3610

Basic Statutory Provisions

- Subject to availability of funds
- Authorization, not mandate
- Reimbursement of employee paid leave to keep employees in a ready state
- Employees cannot perform work at a federal government approved facility or site
- Employees cannot telework because job duties cannot be performed remotely
- Reimbursement subject to reduction due to applicable credits allowed to contractors
- Limited to costs incurred through September 30, 2020

Overview – CARES Act, Section 3610

- Public Law 116-136, Effective March 27, 2020
- Overarching Framework
 - “It is imperative that we support affected contractors, using the acquisition tools available to us, to ensure that, together, we remain a healthy, resilient, and responsive total force.”
 - “It is also important that our contracting officers are good stewards of taxpayer funds while supporting contractor resiliency.”
 - “When implementing section 3610, contracting officers shall consider the immediacy of the specific circumstances of the contractor involved and respond accordingly.”
 - “In addition, it is important that contracting officers secure representations from contractors regarding any other relief claimed or received stemming from COVID-19....”

DPC Class Deviation, “Class Deviation – CARES Act Section 3610 Implementation”, April 8, 2020

Published Agency Guidance

Agency Guidance - DoD

- DPAP Class Deviation; issued April 8, 2020, effective immediately; CARES Act Section 3610 Implementation --- [New DFARS Cost Principle](#) ---
- DPAP Memo; issued April 9, 2020; Implementation Guidance for Section 3610
- DPAP Frequently Asked Questions; issued April 17, 2020; Implementation Guidance for CARES Act Section 3610
- DPAP Frequently Asked Questions (updated and revised); issued April 24, 2020
- DPAP Memo; issued May 1, 2020; DoD Process for Section 3610 Reimbursement

Agency Guidance - DoD

- DFARS 231.205-79 CARES Act Section 3610 Implementation; effective April 8, 2020
 - Applicability
 - Affected contractor – written CO determination
 - Reimbursement reduced for allowed credits pursuant to Families First Act, CARES Act or other credit allowed by law specifically identifiable with COVID-19
 - Allowability
 - Appropriate rates
 - Costs may be direct charged, if appropriate
 - Paid leave as a consequence of COVID-19, ready state (mobilize quickly)
 - Closed or practically inaccessible facility, other restrictions, travel prohibited
 - Unable to telework
 - Costs segregated and identifiable

Agency Guidance - Other

- OMB Memo; April 17, 2020; Preserving the Resilience of the Federal Contracting Base in the Fight Against the Coronavirus Disease 2019 (COVID-19)
 - High level guidance, discretion left to individual agencies
- DOE Policy Flash (PF) 2020-22; April 15, 2020
 - New cost reimbursement and fixed-price clauses
 - Contractors required to identify all potential sources of relief
 - Representations required regarding other relief – credits or otherwise
 - Representations required regarding future credits if currently unknown
- DHS Chief Procurement Officer message to DHS Contractor Community; April 16, 2020
 - Vague and low on guidance; work closely with contractors to determine applicability to specific contracts

Agency Guidance - Other

- NASA Frequently Asked Questions; April 7, 2020
 - No additional processes required, onsite vs. off-site work clauses
 - Telework options
- GSA Class Deviation; April 21, 2020, effective immediately; GSAR clause 552.222-70
 - Applicable March 27, 2020 – September 30, 2020
 - Does not expect heavy reliance on deviation due to existing other measures
 - Contractors may assume all sites are approved, unless determined by CO in writing to not be approved
 - ‘Sole and absolute discretion of the Government’
- ODNI Memo; March 27, 2020
 - Applicable March 27, 2020 – September 30, 2020

Not Well Defined

Not Well Defined

- Government discretion
- Telework
- Other restrictions
- Minimum applicable rate vs. appropriate rate
- Direct vs. indirect reimbursement
- Implementation on FAR Part 12 contracts
- Disputes process

Contractor Requirements and Risk Mitigation

Communication and Notice

- Early communication with the CO with informed notice of situation and effect on meeting contractual performance requirements
- Ongoing communication regarding status and expectations
- Document all communication, including
 - Emails
 - Letters or memos
 - Meeting minutes
 - Telephone discussion logs
 - Presentations

Documentation

- Preparation and submission of detailed **written documentation** to COs to demonstrate why reimbursement under Section 3610 is appropriate and in accordance with the overarching framework – including
 - ‘Affected contractor’ status, specific employees involved, expected duration of paid time, efforts to mitigate situation and potential workarounds, description of impediments to access to facilities, unique circumstances, alternative work arrangements, etc.
 - Explanation of cost impact methodology and applicable cost accounting and pricing practices
- Creation and maintenance of supporting documentation throughout the period of reimbursement requests regarding entitlement and quantum aspects of individual requests

Discrete Cost Accumulation and Change Order Accounting

- Discrete capture and segregation of employee time and costs related to inability to perform contractual work due to COVID-19
 - Establish separate charge numbers with appropriate explanation
 - Communicate with applicable employees the importance of accurate time and expense capture and monitor discipline
 - Create and retain adequate accounting records to segregate and support claimed costs within a reasonable basis
- Follow established cost accounting practices to maximum extent possible

Representations, Records Retention

- Specific representations regarding credits or duplicate payments
- Downstream refunds due to credits unknown at time of reimbursement
- Retain all records in anticipation of potential future audit
- Incurred Cost Proposals under cost reimbursement contracts
- FAR Part 4, as applicable
- Unique contractual clauses (GSA, for example)

Summary and Takeaway

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- Recovery of costs is discretionary, the government is not mandated to make reimbursement
- Not an entitlement or bailout, government may explore or pursue other 'remedies' in lieu of Section 3610; government has discretion to prioritize reimbursements based on contractors' needs or situations
- Inconsistencies exist across agencies; one size does not fit all
- Significant government oversight of agencies' use of funds is expected through various watchdog groups – Congress, GAO, IGs
- Contractors may be entitled to legitimate reimbursement; thorough documentation and abundant communication are critical

Summary and Takeaway

DPAP Memo, May 1, 2020 – DoD Process for Section 3610 Reimbursement [draft ~ May 11; final release ~ May 22)

- “With this policy framework in place and the **number of potential approaches** to implement the section, the Department of Defense (DoD) must now move rapidly to provide overarching implementation guidance to our workforce.”
- “This guidance will 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 industry partner seeking reimbursement **within the parameters** of the section and the class deviation.”
- “This guidance must also provide the **flexibility.....to resolve the numerous reimbursement requests expected** under Section 3610 at the contract, business unit or the corporate level.”

QUESTIONS?

JOIN US FOR PART 3 NEXT TUESDAY!

PART 3 - Tuesday May 12th at 11am Eastern:
COVID-19 – Prospective Government Contracts, Things to Consider



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