Implementation Guidance for Section 3610 of the Coronavirus Aid, Relief, and Economic Security (CARES) Act

Frequently Asked Questions:

Listed below are responses to the most frequently asked questions. In addition, please refer to the following DPC issuances related to Section 3610 of the CARES Act:
-- Class Deviation - CARES Act Section 3610 Implementation, 8 April 2020.
-- Implementation Guidance for Section 3610 of the Coronavirus Aid, Relief, and Economic Security Act Memorandum, 9 April 2020.
-- Class Deviation – Section 3610 Reimbursement Requests, August 17, 2020.
FAQs will be available at: https://www.acq.osd.mil/dpap/pacc/cc/COVID-19.html.

The questions are listed in the order they were issued. Questions 1, 4, 7 and 28 were updated on 8/17/20.

FAQ Q28 through Q31
(Issued 4/24/2020)

8/17/20: Q28 UPDATED

Q31: Would medical Personal Protective Equipment (PPE) a contractor purchased to protect their employees and enable continued performance be an allowable cost that can be reimbursed?

A31: While not directly reimbursable under section 3610, these costs may be allowable, in accordance with existing cost principles and the contractor's accounting system.

Q30: Does a contractor employee have to deplete their own leave before they are eligible for reimbursement under section 3610?

A30: Section 3610 does not require that employees deplete their own leave balances before contractors may seek reimbursement for the costs of paid leave provided to keep employees in a ready state.

Q29: How do contractors receive reimbursement for labor payments on firm fixed price contracts?

A29: This question is answered in DPC's Memorandum dated April 9, 2020, Subject: "Implementation Guidance for Section 3610 of the Coronavirus Aid, Relief, and Economic Security Act" at subparagraph 1, (available at: https://www.acq.osd.mil/dpap/policy/policyvault/Implementation_Guidance_CARES_3610_DPC.pdf)

Q28: Section 3610 of the CARES Act states: "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." Does this mean program managers and mission owners can use currently available funding to fund section 3610 related costs?

A28: Any funds that are otherwise legally available (i.e., subject to the restrictions of the "color of money" and bona fide need) 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. *(Updated: August 17, 2020)*

FAQ Q27 through Q20
(Issued 4/17/2020)

4/24/20: Q23 UPDATED

Q27: DoD uses the term appropriate documentation to be submitted by contractors in the FAQs, what would be considered appropriate documentation to allow reimbursement under section 3610?

A27: The documentation contracting officers require contractors to provide in the course of negotiations should include identifying the employees that were provided paid leave for which the contractor is seeking reimbursement, the contract(s) the employees are performing under, and the amount and dates of the paid leave provided to the employees for which the contractor is seeking reimbursement. The contractor should also be required to explain, with respect to the employees for whose paid leave the contractor is seeking reimbursement, that the employees: (1) but for the COVID-19 pandemic, work on a site approved by the Federal Government pursuant to the contract(s) under which the claimed costs are sought; (2) could not perform work on such Federal Government approved site due to closures or other restrictions resulting from the COVID-19 pandemic; (3) were unable to telework or otherwise work remotely under the applicable contract(s) during the COVID-19 pandemic; (4) received paid leave for a period beginning no earlier than January 31, 2020, and ending no later than September 30, 2020; and (5) were provided paid leave at rates calculated based on the rates the contractor would have paid the employees it is providing paid leave to but for the COVID-19 pandemic. The contractor should also state that: (a) the costs it is claiming are only for paid leave meeting all of the previous numbered conditions; and (b) that its claimed costs constitute the only reimbursement or payment it is receiving for this purpose, and that it is not being paid or reimbursed for the same costs via any other source or funding. Additionally, contractors must provide appropriate documentation to support any claimed costs, including claimed costs for their employees' paid leave and documentation supporting all of the above information and explanations. Contractors must also identify any credits that may reduce entitlement to reimbursement under section 3610.

Q26: Does a contractor or subcontractor employee have to be unable to perform 100% of his or her normal schedule for leave paid to them to be eligible for reimbursement under section 3610?

A26: No, there is no "100% inability to perform rule" in section 3610. Any paid leave provided to contractor or subcontractor personnel, for the purpose described in section 3610, is potentially reimbursable if the necessary conditions for reimbursement have been met.

Q25: I have a firm fixed price services contract for $2 million with a $10,000 cost no fee line item for travel. Should the line item for reimbursement under COVID-19 3610 be cost type or fixed price?

A25: We generally recommend against mixing contract types in a situation like this, as the administrative costs of the cost type line generally exceed the amount at risk. Therefore, in this situation, we recommend approaching this as a fixed price contract. **However, contracting officers should determine how to handle it based on their particular situation.**

Q24: Would a failure of the contractor and the contracting officer to agree on the contractors reimbursement request be settled under the disputes clause of the contract?

A24: No, the disputes clause does not apply to requests for equitable adjustment.

Q23: Please confirm that neither the FAR Credits provision, FAR 31.201-5, the credit provision in the Allowable Cost and Payment Clause, FAR 52.216- 7(h)(2), nor any other FAR or DFARS provision imposes an obligation on a contractor to credit any amount of a Payroll Protection Program (PPP) loan that is forgiven to any flexibly priced government contract or subcontract. We consider a contractor that has received a PPP loan will use the loan proceeds as it would any other funds in its corporate treasury to pay costs of doing business.

A23: We disagree, any PPP loan that has been forgiven necessarily can be treated as though it belongs to the company to use as it pleases. FAR 31.201-1, Composition of Total Cost, states that total cost is the sum of the direct and indirect costs allocable to the contract less any allocable credits. Accordingly, to the extent that PPP credits are allocable to costs allowed under a contract, the Government should receive a credit or a reduction in billing for any PPP loans or loan payments that are forgiven. Furthermore, 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. *(Updated: April 24, 2020)*

Q22: When can the contractor start billing against any section 3610 costs?

A22: The starting point for a contractor to bill for section 3610 costs is dependent on a number of things. In all cases, the contracting officer has to determine that the requisite conditions for section 3610 recovery are met and confirm the contractor's status as an "affected contractor." In a cost-plus context the latter step will take place when the contracting officer transmits his or her written determination required pursuant to

DFARS 231.205-79(a)(1)(i), as outlined in the class deviation. In the context of a fixed-price contract or where recovery will take place under a fixed-price line item, a formal contract modification will be required and the execution of such a modification will necessarily entail the "affected contractor" determination. A contractor's ability to bill will depend upon the terms of that necessary modification, but certainly no billings can be made before such a modification is executed.

Q21: Does this deviation apply to contracts performed outside of the United States (e.g., overseas contracts)?

A21: Section 3610 does not prohibit reimbursement of COVID-19 paid leave costs for contracts performed outside of the United States, nor does it prohibit such reimbursement to foreign contractors.

Q20: Are contractors required to certify that they have met all of the necessary conditions when requesting reimbursement under section 3610?

A20: No. While contractors will not be required to certify their request, all contractor invoices will require applicable certification(s) under existing regulations and statutes.

FAQ Q19 through Q1
(Issued 4/09/2020)

8/17/20: Q1, Q4 and Q7 UPDATED
4/17/20: Q14 UPDATED

Q19: FAR 4.1005-1(a)(3) and DFARS PGI 204.7103(a) both require that line items include the Product Service Code (PSC). As there is no product or service being delivered under line items used to compensate contractors under section 3610, what code should be used?

A19: The predominant PSC for the contract efforts should be used. This is also the PSC that should be used on the contract action report in FPDS.

Q18: What is meant by maintaining the contractor in a "ready state?"

A18: Ready state refers to a contractor's ability to mobilize and resume performance in a timely manner.

Q17: Section 3610 requires reimbursement to be reduced by the amount of credit a contractor is allowed within division G of Public Law 116–127 and any applicable credits a contractor is allowed under the CARES Act. What about any State or local benefits that a contractor is offered and accepts?

A17: There may be available State and local programs to mitigate impacts to industry from COVID-19. Contractors should disclose any State and local reimbursement

received for employee leave and should not request duplicate reimbursements from the Federal Government where other bases for relief have been accepted.

Q16: Will profit or fee be reimbursed under this deviation?

A16: No.

Q15: May contracting officers add CLINs to existing fixed-price contracts to reimburse contractors for this cost?

A15: Yes, contracting officers can implement an equitable adjustment of fixed price type contracts by the addition of a unique CLIN.

Q14: What about commercial item contracts?

A14: Section 3610 does not prohibit reimbursement of COVID-19 paid leave costs under contracts for commercial items. Commercial contractors would be expected to provide appropriate documentation and justification to support any claimed costs, including claimed costs for their employees' paid leave and supporting documentation. These costs should be recognized separately as a fixed price CLIN. *(Updated: April 17, 2020)*

Q13: How does this cost principle provide relief for contracts and CLINs that are other than cost-reimbursement type?

A13: The deviation does not provide specific relief to any contract; instead it authorizes reimbursement for certain costs, under certain conditions, that are related to COVID-19. Fixed-price contracts and CLINS remain fixed-price. Section 3610 provides authority for agencies to "modify the terms of a contact" to reimburse the described costs. The Defense Pricing and Contracting (DPC) implementation memo, "Implementation Guidance for Section 3610 of the Coronavirus Aid, Relief, and Economic Security Act," provides guidance on how to treat these costs under different contract payment paradigms.

Q12: Isn't the agency required to reimburse these costs?

A12: No, section 3610 is permissive, not mandatory. Agency decisions to reimburse these costs should take into account the Congressional intent to reduce the impacts of the COVID-19 pandemic on the Defense Industrial Base and small business entities supporting the DoD, but also fiscal constraints on the ability to fill Defense needs through contracts.

Q11: How will charging this cost affect the contractor's responsibilities under the Limitations of Cost and Limitations of Funds clauses?

A11: Nothing in this deviation alters the terms of any FAR, Defense Federal Acquisition Regulation Supplement (DFARS), or agency supplement clause nor any other preexisting contract unique terms that might exist, including those that address cost or funding limits.

Q10: What cost pool should this cost be charged to?

A10: We recommend that the paid leave costs be charged to a newly created cost category, Other Direct Costs (ODC) COVID-19. Costs from ODC-COVID-19 may be allocated to the applicable contracts based on some reasonable, agreed upon allocation. In some situations, it may be more appropriate to charge these costs through indirect cost pools (overhead, G&A, etc.). In either case, the contracting officer should work with DCMA/DACO/ACO as appropriate and the contractor to determine how the costs should be charged to the contracts.

By creating a new category of costs, any potential issues with disclosed accounting policies and procedures, cost accounting standards, or a contractor's cost accounting standards disclosure statement may be avoided. Expect further guidance in this area.

Q9: Should the costs of leave made allowable by section 3610 be charged as direct or indirect?

A9: This should be discussed and resolved between the contractor and the contracting officer for each contractor or business unit. In most cases, the cost is not likely to be directly identified to a particular contract, and would meet the definition of "indirect cost." There may be circumstances in which the cost can be directly identified with particular contracts. Coordination with the Defense Contract Management Agency (DCMA) through the applicable Divisional Administrative Contracting Officer (DACO)/Administrative Contracting Officer (ACO) is recommended to ensure consistency. We expect further additional guidance to be added in this area.

Q8: Isn't paid leave an allowable cost under contracts anyway?

A8: Some paid leave is an allowable cost under the cost principles of FAR 31.2, specifically FAR 31.205-6(m). However, it is likely contractors may not have an established provision in their compensation plans for granting leave for the specific purposes stated in section 3610 of the CARES Act and, without such a provision, leave of that kind would normally not be an allowable cost. It is important that contractors segregate costs that would be allowable under existing Cost Principles from leave costs that are only allowable if the leave complies with this new cost principle, to provide a basis for audit and allowability determinations.

Q7: Many work sites remained open and available. However, what about contractor personnel that have child care issues due to school closures, those on leave to care for themselves or others due to contracting COVID-19, or employees under quarantine because of actual or potential exposure?

A7: There may be cases where the work sites are open and accessible, but, for public health reasons, contractor employees cannot be in the workplace and cannot otherwise work remotely. As addressed in Office of Management and Budget (OMB) April 17, 2020 guidance and echoed within the DoD, contractors are part of the total force of

military and civilians (both government and contractor personnel) and are required to ensure a safe work environment, balanced with the need for continued mission support and readiness.

Therefore, contractor employees who did not report to an open work site due to the COVID-19 pandemic may be viewed as being kept in a "ready" state if all other criteria under Section 3610 have been met. Section 3610 provides considerable discretion to treat paid leave as an allowable cost. However, contractors also bear the burden of supporting any claimed costs, including claimed leave costs for their employees, with appropriate documentation. In seeking a determination of affected contractor status that would make this new cost principle applicable, a contractor must also identify any applicable credits it is allowed under the CARES Act or Division G of Public Law 116-127 that will reduce reimbursements. *(Updated: August 17, 2020)*

Q6: What does the section 3610 mean by "a site that has been 'approved' by the Federal Government"?

A6: Section 3610 states: "Such authorities 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..."

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 (NISP) Contract Classification System (NCCS) on a DD form 254 or electronic equivalent. Depending on the contract, it may include multiple work sites and/or locations.

Q5: Is it possible to request advance payments using this clause?

A5: No, the deviation does not apply to advance payments.

Q4: When is the Deviation effective? Does it apply only to new contracts?

A4: The deviation is effective immediately and could apply to contracts in place from March 27, 2020 through September 30, 2020. It applies to new and existing contracts with periods of performance that include March 27, 2020 through September 30, 2020. March 27, 2020 is the date the CARES Act was enacted into law. Because section 3610 does not contain language to provide retroactive coverage, as a matter of law, the effective date of the section begins on the date of enactment of the CARES Act.

Section 3610 is additional discretionary authority. As such, this section does not prohibit an agency from reimbursing a contractor for paid leave prior to March 27, 2020, under contract authorities otherwise available to the agency. Any reimbursement for paid leave made prior to March 27 should not be identified as a payment made under section 3610 for purposes of tracking and reporting. (Reference OMB M-20-27, 14 Jul 20, FAQ# 17). *(Updated: August 17, 2020)*

Q3: I have a contract with a nontraditional supplier utilizing Other Transaction Authority (OTA), would this deviation apply to my contract?

A3: The language in section 3610 provides the authority to "modify the terms and conditions of a contract, or other agreement," to include Federal Acquisition Regulation (FAR) based contracts and other forms of agreements like OTAs. While OTAs are not FAR based actions, they are contracts or other agreements within the meaning of section 3610. The same principles of the deviation may be applied by the agreements officer to resolve COVID-19 impacts on an OTA.

Q2: What should be considered in assessing and negotiating requests for equitable adjustment of contracts under section 3610?

A2: Contractor requests for determinations of affected contractor status that would make the new cost principle applicable should describe the actions the contractor has taken to continue performing work under the contract, the circumstances that made it necessary to grant employee leave, an explanation of why it was not feasible for employees to continue performance via telework or other remote work, and how the leave served to keep employees in a ready state. Where the contractor is considered part of the essential critical infrastructure workforce, as described in the Defense Pricing and Contracting Memo, Defense Industrial Base Contract Considerations, dated March 20, 2020, or when the contractor was directed to implement the Continuation of Essential Services Plan in the contract, the contractor must demonstrate that all reasonable efforts were made to continue contract performance.

Contractor requests made in relation to this deviation must be considered on a case-by-case basis, in consideration of the particular circumstances of each contract, including, among other things, the impacts realized from COVID-19, Defense Industrial Base telework or remote work efforts, the availability of funds for reimbursement, applicable laws and regulations, and any relief the contractor has secured or may secure through the CARES Act and/or other laws enacted in response to this national emergency.

Q1: When would Class Deviation – CARES Act Section 3610 Implementation not be appropriate for consideration?

A1: Pursuant to this deviation, the new cost principle is inapplicable when employees or subcontractor employees were able to work, including remote or telework; when costs were not associated with keeping employees in a ready state; for costs incurred prior to March 27, 2020, or after September 30, 2020; or when the contractor has been or can be reimbursed for employee leave costs by other means. Additionally, it is inapplicable for costs not related to COVID-19 and is subject to the availability of funds. *(Updated: August 17, 2020)*