THE COALITION
for Government Procurement

May 22, 2020

Kim Herrington
Acting Principal Director, Defense Pricing and Contracting
Department of Defense
3060 Defense Pentagon
Washington, DC 20301

RE: DoD Process for Section 3610 Reimbursement: Implementation Guidance Early Engagement

Dear Mr. Herrington,

Members of the Coalition for Government procurement appreciate the opportunity to provide comments on the guidance implementing Section 3610 of the CARES Act. At the outset, given the large universe of contract types and business structures, flexibility in "to whom," "when," and "how" the requirements of Section 3610 are applied may also be warranted. Each of these subjects is addressed below.

To Whom – Every company is likely to have a different set of contracting circumstances, and different contracting officers are likely to review those circumstances in a different manner. In some cases, it may make sense for companies to work with COs on the contract level that understand the nuances of the contract at hand. In other cases, it may make sense for a company and for the government to be able to elevate the decision to a CACO or another authority to consolidate the adjudication and reduce the bureaucracy across multiple contracts.

An increase in the clarity of direction and guidance for differing pathways to seek eligibility decisions should be established. Right now, it is not clear which pathway the Government wishes for contractors to take, and this ambiguity may lead to confusion, unnecessary duplication of work and costly delays for all. One recommendation would be for companies that already regularly work with DCAA/DCMA and have assigned CACOs to work with those CACOs on "affected status." These companies may already have the appropriate safeguards in place to allow for traceability without additional data collections and this could eliminate unnecessary work streams.

When – Additional clarification guidance is needed on invoicing timing. Guidance paragraph 2aii appears to indicate that costs could only be paid after all costs incurred. The ability to invoice quickly and intermittently is needed to maintain cash flow. As written, this guidance would seem to require a contractor to wait until after 30 September when all costs are accounted for to request relief. We do not believe this is the intent of the legislation or the guidance and request clarification.

How – Because of the large amount of administrative work necessary, the Department should consider bifurcating the decision as to whether a contractor is "affected" from the extensive documentation requirements. The minimal amount of information necessary to make an

"affected" decision should first be provided so that the appropriate official can apply that decision criteria against the availability of funds and other requirements of Section 3610 and deem the contractor as "affected" before requiring that extensive documentation be created for future auditability, as that documentation may not be necessary if an "affected status" is not granted. It may be possible that contractors who already are audited on a regular basis by DCAA/DCMA can move to invoicing with fewer requirements, as their rates, policies, and systems undergo regular reviews and floor checks with the oversight of their CACO.

It also needs to be recognized that the overall volume of data potentially collected in accordance with the checklist is voluminous and will result in extensive administrative man-hours and burden, which could be particularly problematic for small businesses that lack the infrastructure to respond. The expense to the contractor of complying will end up being paid by the Department and taxpayer in the form of the resulting higher rates. Though the guidance mentions COs using discretion "to determine the extent to which the data specified" is required, there is a high probably that contracting officers will request the entire checklist be provided by contractors out of an abundance of caution, unless additional direction is provided on when each factor truly is required to make determinations or establish traceability. For instance, under Checklist Item number 3b regarding "contractor organization," if a contractor is submitting multiple requests, it is unclear why a CO would need this information or how it would be used once it is received.

Checklist item 5 requires a large amount of information that will be administratively burdensome to pull from across contracts and suppliers. The government should weigh the utility of this information in making decisions against the cost and risks associated with producing and providing the information. For instance, Privacy Act concerns will increase the cost and burden of collecting, sharing, and storing this information, which, again, is problematic for small companies and suppliers who are already taxed.

For item 5c, the request for average hours worked, by employee, by contract/order/*etc.* for the three months prior to the declaration of the COVID-10 national emergency is unnecessary. Instead, companies should be asked to certify that hours billed for employees do not exceed their "standard" work week number of hours, or something similar. In addition, a list of annual leave hours or equivalent taken by employees for whom the contractor is seeking Section 3610 reimbursement is irrelevant. Defense Contractors are subject to audit by DCAA, to include Incurred Cost Audits, Audits of Monthly Vouchers, Post-Payment Voucher Audits, and Labor Floorcheck Audits, all of which would review to ensure contractors bill only for those Direct Hours recorded on an employee's timesheet. Regarding the list of sick leave hours or equivalent, not all companies provide sick leave. Rather, they provide personal time off (PTO), comprehensive leave, or or similar leaves that do not differentiate between sick, vacation, or other personal reasons that an employee may take leave.

Checklist item 5d requests average sick leave hours budgeted for and included in any forward pricing for the period claimed for Section 3610 reimbursement. As stated above, this information is not necessarily relevant. Not all companies provide differentiated sick leave for employees. Further, the statement in 5d that "Contracts may not be reimbursed for COVID-19 Paid Leave costs for salaried employees to the extent that the salaried employee is paid whether they are working or not" should be clarified. This language could be interpreted as not allowing

for reimbursement of salaried employees, which is directly contrary to the legislative intent of Section 3610.

Checklist 5g concerning subcontract labor impacts was appreciated, but it needs additional implementation guidance and details. Primes have been eagerly awaiting implementation guidance to flow information, templates, and direction to their subcontractors, but many of the same concerns as outlined already apply when flowing this guidance to subcontractors. We appreciate the understanding of the proprietary data concerns involved in working with subcontractors on this issue. Just as prime contractors will struggle with who, when, and where to submit the requests for relief associated with 3610, however, subcontractors will be at an even greater disadvantage in navigating where the documentation should be sent. Again, separating the affected decision of who is impacted from the documentation and invoicing may provide some direction and relief to this complex issue. Additional guidance to primes on how to handle and route subcontractor concerns would be helpful and would be a nice supplement to Checklist item number 6. Checklist item 6 is welcomed as it provides a template that can be used by primes and can be easily flowed to subcontractors to identify double dipping concerns.

Checklist item 5i creates confusion for some contractors as to why there would be a requirement for a TINA certification. Again, if the affected status and the available appropriations are determined up front, and the level of 3610 submission better defined, it would be easier for a contracting officer or other authority to deem whether a TINA certification is needed, rather than having the request be sent to all contractors applying for relief.

Finally, at a general level, the Coalition notes that there have been conflicting aspects of the 3610 guidance issued by different agencies. It would be helpful for the government to rationalize these inconsistencies. In addition, guidance is needed regarding how to remove profit/fee amounts from T&M contracts to provide accuracy in the reporting of those numbers. Such guidance would need to recognize that fee/profit amounts may fluctuate, even month-to-month, for contractors depending upon working hours in a given month and staffing changes. In addition, certification of the T&M hourly rate is a significant challenge for contractors and subcontractors because the actual profit on T&M efforts may not reflect bid profit. Thus, the government should consider having any certification it requires be associated with the methodology used for removing the hourly profit, not to the whether all fee/profit has been removed.

Again, the Coalition appreciates the opportunity to comment on this guidance. We hope that you find this guidance useful.

Sincerely,

Roger Waldron
President