

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 Deviation, 8 April 2020
- Implementation Guidance for Section 3610 of the Coronavirus Aid, Relief, and Economic Security Act Memorandum, 9 April 2020

Due to the complexity of implementing Section 3610, these FAQs will expand as new issues are asked and answered. A current version of the FAQs will be available at

<https://www.acq.osd.mil/dpap/pacc/cc/COVID-19.html>.

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 January 31, 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.

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.

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.

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 January 31, 2020, through September 30, 2020.

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

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

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.

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 or family care issues, contractor employees cannot be in the workplace and cannot otherwise work remotely. As established in Office of Management and Budget (OMB) 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.

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.

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.

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.

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.

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.

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 contract" 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.

Q14: What about commercial item contracts?

A14: Section 3610 does not prohibit reimbursement of COVID-19 paid leave costs under contracts for commercial items. However, section 3610 is permissive and not mandatory. There will be more guidance forthcoming on application of 3610 to commercial item contracts.

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.

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

A16: No.

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.

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.

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.

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