



August 2020

## DoD Issues New and Revised Guidance on Section 3610 Reimbursement<sup>1</sup>

Jill Pettibone, Senior Manager | DHG Government Contracting

On August 17 and August 18, the DoD issued new and revised guidance for review of contractor requests for reimbursement under Section 3610 of the Coronavirus Aid, Relief, and Economic Security (CARES) Act (Pub. L. 116-136).

- On August 17, the DoD issued Revision 1 to Class Deviation **2020-O0013** (*CARES Act Section 3610 Implementation*), previously issued on April 8.
- On August 18, the DoD issued new Class Deviation **2020-O0018** (*Section 3610 Reimbursement Requests*). The DoD had also previously issued Draft Guidance on May 18 and Frequently Asked Questions (FAQs) posted on the Defense Pricing and Contracting (DPC) COVID webpage.

Major changes to Section 3610 guidance are discussed below, along with elements clarified.

### Covered Period

Prior to August 17, the DoD has allowed for reimbursement to cover the period from January 31 through September 30. In Revision 1 to Class Deviation 2020-O0013, **January 31 was changed to March 27** consistent with Office of Management and Budget Memorandum M-20-27 (*Additional Guidance*

*on Federal Contracting Resiliency in the Fight Against the Coronavirus Disease (COVID-19)*), July 14, 2020, which said the effective date of Section 3610 is March 27, the date the CARES Act was enacted, and there is no language on retroactive coverage. Hence, Section 3610 does not apply to reimbursements for paid leave provided prior to March 27.

Both Revision 1 to Class Deviation 2020-O0013 and Class Deviation 2020-O0018 note that DoD contracting officers can consider contractor requests for reimbursement of costs incurred prior to March 27, but these costs cannot be considered Section 3610 costs. Contracting officers are referred to DPC Memorandum (*Guidance for Assessment of Other COVID-19 Related Impacts and Costs*) dated July 2, for handling these pre-March 27 paid leave (and other) costs. That memo stresses that funds must be available and absent that, no price increases can be granted without additional appropriations.

<sup>1</sup> For the subscribers to DHG's GovCon Digest, this alert supersedes the discussion of Department of Defense (DoD) guidance on Section 3610 in our Q1/Q2 2020 edition.

## Availability of Funds

Although the availability of funds was always stated as a condition of reimbursement, Revision 1 to Class Deviation 2020-O0013 adds a new paragraph to the cost principle at DoD Federal Acquisition Regulation (DFARS) Supplement 231.205-79 (*CARES Act Section 3610 – Implementation*) to clarify that the allowable amount is limited to the amount obligated specifically for the purpose of reimbursement under section 3610.

Class Deviation 2020-O0018 clearly states that no reimbursement will be made “unless and until” funds are available. It also emphasizes that: (i) just because funds are available does not mean that they must be used for Section 3610; (ii) any discussion of funds availability is notional until there is a final decision on a request; (iii) final decision will only be made after analysis of each Section 3610 request, including subsequent requests.

## Review/Submission Checklists

Draft DoD guidance included a checklist for contracting officers in reviewing requests from contractors. It was implied that contractors should follow the checklist in preparing submissions.

Class Deviation 2020-O0018 includes three checklists, which seem intended to assist contractors more than contracting officers. The three checklists include:

1. Abbreviated Reimbursement Checklist – Applies to a single contract for reimbursement less than \$2 million and should be handled by a contracting officer.
2. Multipurpose Reimbursement Checklist – Applies when neither the Abbreviated nor the Global Checklists fit. Should include homogeneous groups of contracts, e.g., contracts for a single program, and should be handled by a contracting officer in the applicable contracting activity.
3. Global Reimbursement Checklist – Applies to contractors seeking global reimbursement at a business unit (or segment) level. Should be handled by the assigned Cognizant Federal Agency Official.

## Subcontractor Costs:

Previous guidance stated that prime contractors should include subcontractor costs in their reimbursement requests. Class Deviation 2020-O0018 makes it clear that subcontractor costs can only be included in prime contractor requests. A prime contractor submitting a request cannot include

costs it incurred as a subcontractor. The costs it incurred as subcontractor must be submitted through the applicable prime contractor(s).

## Audit

Class Deviation 2020-O0018 provides more clarity than draft guidance about audit. Contracting officers are to tell contractors the government may audit the billed costs. Contractors must comply with FAR 31.203 or Cost Accounting Standards (CAS) if contracts are CAS covered. Regarding applicability of the Truthful Cost or Pricing Data, Class Deviation 2020-O0018 clarifies it applies on a contract by contract basis – when the value of a price adjustment for an individual contract or subcontract included in a global 3610 reimbursement request exceeds the threshold – either \$750,000 or \$2,000,000 based on the contract terms.

## Deductions for Other Credits or Reimbursements

All previous guidance required 3610 reimbursement to be decremented by any other credits or reimbursement. Class Deviation 2020-O0018 includes a contract clause – to be used in the modification to execute the reimbursement – that requires the contractor to notify the government of any subsequently received credits or reimbursements.

## Early Engagement

The draft guidance encouraged contractors to discuss reimbursement with contracting officers. Class Deviation 2020-O0018 does this as well so that contracting officers can indicate whether funds are available. The deviation does not describe what happens if funds are not available.

We encourage all clients with 3610 paid leave costs to review Class Deviation 2020-O0018 and select the checklist best suited to their situation. You may wish to discuss with your contracting officer(s) if you have not already. If the contracting officer(s) express hesitancy due to lack of funds, you may still wish to submit a request or try to negotiate for some other relief.

If you have paid leave costs prior to March 27, you can still submit a request for reimbursement, which should be separate from the requests for reimbursement for costs after March 27. Be sure to review the guidance in the July 2 DPC Memorandum. If you are a subcontractor and have not yet confirmed with your prime(s) their willingness to submit reimbursement requests, you may wish to have more dialogue to be sure they will pursue.

For more information, reach out to us at [govcon@dhg.com](mailto:govcon@dhg.com).