



UNITED STATES DEPARTMENT OF COMMERCE
Chief Financial Officer
Assistant Secretary for Administration
Washington, D.C. 20230

PROCUREMENT MEMORANDUM 2020-08

ACTION

MEMORANDUM FOR: Senior Bureau Procurement Officials

FROM: Barry E. Berkowitz
Senior Procurement Executive
and Director for Acquisition Management

SUBJECT: COVID-19 Response: Implementation of OMB M-20-22 and Section 3610 of the CARES Act

1. Purpose:

This memorandum supplements the guidance in Office of Management Budget (OMB) Memo M-20-22 regarding implementation of Section 3610 of the Coronavirus Aid, Relief, and Economic Security (CARES) Act (Attachment A).

2. Background:

Section 3610 of the CARES Act authorizes agencies to reimburse contractors for up to 40 hours per week of any paid leave per employee that 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, where their employees or subcontractors cannot perform work on a site approved by the Federal Government and cannot otherwise telework. The maximum reimbursement authorized is to be reduced by amounts allowed under certain tax credits.

Section 3610 addresses the narrow example where a contractor cannot access the worksite or otherwise is impeded in doing the work, the Government has not otherwise directed the contractor to remain in a standby status, and the Government elects to compensate the contractor upon proof the contractor has paid employees leave in accordance with the authorization.

OMB M-20-22 provides guiding principles to help agencies determine the appropriate role of Section 3610 in supporting the needs of their contractors and subcontractors, both small and large.

3. Required Actions:

In applying the principles of OMB M-20-22 Contracting Officers must:

- A. Work with Program Officials and the contractor to understand how the contractor is planning to use the relief provisions in the CARES Act and identify any contractor and subcontractor employees to whom Section 3610 of the CARES Act may apply.
- B. Use sound business judgment in determining if it is in the best interest of the Government to use model contract terms developed to implement section 3610 (Attachment B):
 - i. Determine the impact on the mission if contractors are unable to perform critical operations.
 - ii. Consider the scarcity of the required skills for the critical operation or the challenge for the contractor to resume operations if existing staff is no longer available.
 - iii. Consider where the contract is in its lifecycle, such as contract expiration.
 - iv. Weigh the costs and benefits of using the Section 3610 reimbursement authority and discuss the opportunity costs with your program office.
- C. Begin the description field in Federal Procurement Data System-Next Generation (FPDS-NG) with “COVID-19 3610” for modifications that are issued authorizing reimbursement under Section 3610 and incorporate the model contract terms prescribed herein.
- D. Ensure that National Interest Action (NIA) Code P20C is selected when reporting the action in the FPDS-NG as a means of tracking actions in the response to COVID-19 pandemic.
- E. Work with the contractor to secure necessary documentation and representations to prevent duplication of payment and ensure the correct reimbursement, including applicable credits.
- F. Ensure that payments for ongoing services do not include paid leave costs unless and until they have been authorized by contract modification.
- G. Ensure that Contracting Officer’s Representatives (CORs) and others involved in invoice review and approval separately track all payments made under the authority of Section 3610. The minimum data points tracked shall include: Contract Number, Vendor Name, Invoice Number, Amount of payment authorized. COs and CORs may consider requiring separate invoices for 3610 payments. The Task Code CV9 has been reserved in all three instances of CBS and may be used to avoid manual tracking.
- H. Ensure contractors make representations and provide documentation showing they are not applying under Section 3610 to receive payment for an expense that has or will be covered by another contract provision or by another provision of the CARES Act or any other Act.
- I. Obtain representations from contractors regarding offset credits in accordance with the requirements of Section 3610 using the model contract terms provided below.

- J. Modify contracts to include the appropriate terms prescribed in Attachment B below after considering the guidance above and making a determination that it is in the Government's best interest to do so.

4. Point of Contact:

Any questions regarding this memo may be directed to OAM_Mailbox@doc.gov.

5. Attachments:

A: CARES Act, Section 3610

B: Model Contract Terms to Implement Section 3610 of the CARES Act

C: Frequently Asked Questions

Attachment A
CARES ACT
SEC. 3610. FEDERAL CONTRACTOR AUTHORITY

Coronavirus Aid, Relief, and Economic Security Act (CARES Act) (Pub. L. 116-136)

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.

Attachment B

Model Contract Terms to Implement Section 3610 of the CARES Act

Contracting officers may insert the following terms in fixed-price, labor hour, and time-and-materials type contracts.

Reimbursement of Paid leave under Section 3610 of the Coronavirus Aid, Relief, and Economic Security Act (CARES Act) to maintain employees and subcontractors in a ready state.

(a) In any request for equitable adjustment to the price (for a fixed-price type contract) or to the hourly rates (for a time-and-materials or labor hour type contract) of this contract, the Contractor may request that the Government treat--for the purpose of beginning negotiations--as allowable (if otherwise allowable per federal regulations) the incurred or estimated costs of paid leave (including sick leave) the Contractor or its subcontractors provide to keep employees in a ready state if--

(1) The Contractor's employees or subcontractors cannot perform work on a site approved by the Federal Government (including a Federally-owned or leased facility or site) due to facilities closures or other restrictions; and cannot telework because their job duties cannot be performed remotely during the public health emergency declared on January 31, 2020, for COVID-19;

(2) The costs were incurred or will be incurred from March 27, 2020, through September 30, 2020;

(3) The costs do not reflect any amount exceeding the minimum applicable contract billing rates for an average of 40 hours per week for paid leave; and

(4) The costs do not include profit or fee.

(b) Where other relief provided for by the CARES Act or any other Act would benefit the contractor or its subcontractors, including, but not limited to, funds available under Sections 1102 and 1106 of the CARES Act, contractors should apply for these alternative forms of compensation first before seeking reimbursement under a request for equitable adjustment.

(c) The contractor must represent in any request for equitable adjustment

(1) Either: it has not received or claimed any other reimbursement from federal funds available under the CARES Act (including, but not limited to, funds available under sections 1102 and 1106) or any other Act; or if it has received or claimed any other reimbursement under the CARES Act or any other Act, that the rationale and dollar amount of the claim or reimbursement have been fully disclosed in the request for equitable adjustment.

(2) Its request does not include costs that have been claimed as:

(i) Tax credits, including credits allowed pursuant to Division G of Public Law 116-127; and

(ii) Applicable credits allowed under the CARES Act, including applicable

credits for loan guarantees.

(3) It will immediately notify the Government of any overpayment of costs and refund the overpayment in the manner stipulated by the contracting officer.

(4) It will immediately notify the Government if it makes any future claims or requests for relief from federal funds available under the CARES Act (including, but not limited to, funds available under sections 1102 and 1106) or any other Act.

(d) The Government's treatment of the proposed costs as allowable, does not constitute automatic acceptance or that the Government will agree to the Contractor's proposed equitable adjustment on its face value. The Government reserves the right to negotiate with the prime contractor or otherwise analyze the proposed costs and to determine what a fair and reasonable reimbursement is.

(e) Repayment: The affected contractor is not allowed to keep any double reimbursements after the application of credits. Therefore, if the affected contractor receives covered credits then the Contractor shall notify the Contracting Officer, in writing. The Contractor shall repay the Government the amount of the reimbursement up to the amount of the covered credits. The amount of repayment owed to the Government is considered an overpayment. See Federal Acquisition Regulation 3.1003(a)(3).

Contracting officers may insert the following terms in Cost-Reimbursement type contracts.

Paid leave under Section 3610 of the Coronavirus Aid, Relief, and Economic Security Act (CARES Act) to maintain employees and subcontractors in a ready state.

(a) The contractor may submit for reimbursement and the Government may treat as allowable (if otherwise allowable per Federal regulations) the costs of paid leave (including sick leave) the contractor or its subcontractors provide to keep employees in a ready state if--

(1) The employees: cannot perform work on a site approved by the Federal Government (including a Federally-owned or leased facility or site) due to facilities closures or other restrictions; and cannot telework because their job duties cannot be performed remotely during the public health emergency declared on January 31, 2020, for COVID-19;

(2) The costs are incurred from March 27, 2020, through September 30, 2020;

(3) The costs do not claim any amount exceeding the minimum applicable contract billing rates for an average of 40 hours per week for paid leave; and

(4) The costs do not include any profit or fee.

(b) Where other relief provided for by the CARES Act or any other Act would benefit the contractor or its subcontractors, including, but not limited to, funds available under Sections 1102 and 1106 of the CARES Act, the contractor should evaluate the applicability of such benefits in seeking reimbursement under the contract.

(c) The contractor must represent in any request for reimbursement--

(1) Either: it has not received or claimed any other reimbursement, including claims for reimbursement via letter of credit, from federal funds available under the CARES Act (including, but not limited to, funds available under sections 1102 and 1106) or any other Act; or if it has received or claimed any other reimbursement under the CARES Act or any other Act, that the rationale and dollar amount of the claim or reimbursement have been fully disclosed in its request for reimbursement under the contract.

(2) Its request does not include costs for expenses that have been claimed as:

(i) Tax credits, including credits allowed pursuant to Division G of Public Law 116-127; and

(ii) Applicable credits allowed under the CARES Act, including applicable credits for loan guarantees.

(3) It will immediately notify the Government of any overpayment of costs and refund the overpayment in the manner stipulated by the Contracting Officer.

(4) It will immediately notify the Government if it makes any future claims or requests for relief from federal funds available under the CARES Act (including, but not limited to, funds available under sections 1102 and 1106) or any other Act.

(d) Repayment: The affected contractor is not allowed to keep any double reimbursements

after the application of credits. Therefore, if the affected contractor receives covered credits then the Contractor shall notify the Contracting Officer, in writing. The Contractor shall repay the Government the amount of the reimbursement up to the amount of the covered credits. The amount of repayment owed to the Government is considered an overpayment. See Federal Acquisition Regulation 3.1003(a)(3).

Attachment C
Frequently Asked Questions:

1. What criteria should be used in considering contractor requests to authorize reimbursement under a given contract?

Contracting officers must work cooperatively with CORs and program managers (PMs) in considering requests to authorize reimbursement for paid leave to contractor employees. Since separate funding has not been appropriated, contracting officers and PMs must consider the impact to the deliverables or services the contract was intended to provide and whether or not the program will be able to absorb the resulting reduction in those services or deliveries.

Contracting officers must work with contractors to ensure effective stewardship of taxpayer funds when negotiating reimbursement claims including the following;

- Is the authority under Section 3610 the best authority to address the claim?
 - o Would a performance or delivery extension or an option exercise alleviate the need for paid leave? (Delivery schedule extensions can be combined with progress payments to increase immediate cash flow. Other contract extensions provided for in the contract, and where appropriately exercised, can provide the contractor with additional support for their banking institutions to improve loan terms and increase cash flow where it may not be in the best interest for the government to reimburse paid leave under 3610.)
 - o If telework isn't currently allowed, can it be allowed or expanded to enable continued performance?
 - o Is the contractor seeking relief under the other provisions of the CARES Act?
 - o Was a stop work or suspension of work order issued? Has a change order been issued? Did either action address government's expectation of changed performance so as to make reimbursement under 3610 inconsistent with previous action?
 - o Does the contractor's employee(s) split time on multiple projects, including multiple clients?

2. Does Section 3610 provide an appropriation of funds?

No. Section 3610 language is an authority, not an appropriation. However, agencies are permitted to use any "funds made available to the agency" by Congress meaning that most reimbursements under Section 3610 will be funded through existing appropriations.

3. Are we required to reimburse contractors if they submit a request?

No. The authority is discretionary.

4. Are prior year funds already obligated on the contract considered available to reimburse paid leave or to maintain the contractor in a ready state?

Generally, yes though contracting officers should consult with their program office and OGC and identify any consequent impact on scope, schedule, and/or delivery. Once a determination has been made that reimbursement of paid leave is in the best interest of the Government and the best course of action for addressing the contractor's request, inserting the prescribed contract terms is a within scope change to the contract.

5. Do I have to modify the contract to reimburse the contractor for paid leave or to maintain the contractor in a ready state even if I am not adding funding?

Yes. Per OMB M-20-22 Section 2.d. “Agencies should process modifications allowing payments authorized by this statute and report them to the Federal Procurement Data System.”

6. If the Government’s interest is better served by a remedy other than the authority under Section 3610 of the CARES Act, i.e. change order, telework, excusable delay, do I need to process a modification?

A modification may not be required in all cases; however, if a change is made to the method of performance, the type of performance, the schedule, or the price, it should be codified through a contract modification.

7. If rates in the contract are based on fully burdened commercial rates (e.g. GSA FSS rates) how can the Contracting Officer know if the billing rate proposed by the contractor reimbursement includes profit or fee?

Contracting officers must request documentation (e.g. payroll documentation) and representations from contractors regarding the billing rates proposed. Many factors may be involved in setting the value of fully burdened commercial rates that are not allowable under the Section 3610 authority. Contractors bear the burden and responsibility to demonstrate that the proposed rates comply with the restrictions and the obligation to prevent and, if necessary, remedy any overpayment due to inaccurate estimates.

8. If a contractor submits a Request for Equitable Adjustment or Claim, including non-monetary requests for contract interpretation, how should it be answered.

Contracting officers should consult legal counsel and the program office when answering requests for contract interpretation and the allowability of paid leave costs under a given contract.

The Disputes Clause (FAR 52.233-1) defines a written demand or written assertion by one of the contracting parties seeking, as a matter of right... the adjustment or interpretation of contract terms, or other relief arising under or relating to the contract as a claim. Therefore, such requests should be handled in accordance with the terms of the Disputes Clause. In order to meet the intent of the CARES Act, contracting officers are encouraged to be thoughtful and expeditious in considering such claims and to provide requesting contractors with a response as quickly as possible.

- Is this a time-and-materials contract? Has the contractor demonstrated that the covered contractor employee(s) would have been performing work during the covered time period?
- Is this a cost-type contract where the leave costs may be covered in indirect rates?
- Has the contractor demonstrated that the billable rates for paid leave do not include profit?

9. Does the NIA Code apply to actions taken under the authority of Section 3610 of the CARES Act?

Yes. OMB Memo M-20-22 states this explicitly. In addition, the Office of Federal Procurement Policy (OFPP) expanded the use of the NIA code via notice issued April 06, 2020, and updated the FAQs in OMB Memo M-20-18 as follows:

“The purpose of this note is to advise you that OFPP is broadening application of the National Interest Action (NIA) code (P20C) that was added to FPDS on March 13, 2020, to track procurement actions related to COVID-19. Effective immediately:

Agencies should assign this NIA code to all procurement actions reported into FPDS that are issued in response to the pandemic. This includes new awards for supplies and services as well as modifications that are issued to address COVID-19, irrespective of whether the contract being modified was originally awarded to address COVID-19.

The code should also be used in connection with any procurement authority, including but not limited to special emergency procurement authorities identified under FAR Subpart 18.2.

With the passage of the CARES Act, the Government’s response to the COVID-19 pandemic will continue to grow. These changes will better support full, clear, and consistent transparency in the tracking of COVID-related procurement actions in FPDS.

Please note that this guidance modifies the guidance provided in FAQ # 11 regarding the scope of activities covered by the NIA and supersedes FAQ #12 in OMB Memorandum M-20-18. These changes will be reflected in future OMB guidance.”

10. What is the correct Emergency Acquisition drop down when in FPDS-NG when using the NIA Code?

The “NIA code” field is linked in the system to the “Emergency Acquisition” field - for COVID-19 actions, the appropriate entry is “Presidential issued emergency declaration.”

11. When can contractors begin requesting reimbursement under Section 3610?

Contractors can request relief immediately.

12. What kind of documentation should CORs, COs, and others involved in the invoice process maintain when paying invoices authorized by Section 3610?

At a minimum, the COR should maintain a copy of the modification authorizing payment, the billing rate, number of hours, and the total amount reimbursed under the Section 3610 authority in each invoice.

13. What kinds of additional documentation should COs request from Contractors to support Requests for Equitable Adjustment under Section 3610?

COs may consider requesting the following types of information if it will assist them in evaluating a request for equitable adjustment:

- Actions taken to continue to perform work
- Circumstances that made using leave necessary

- Explanation of why remote work was not feasible
- How leave served to keep employees in ready state
- Actions taken to mitigate costs
- Payroll documentation or other documentation to support proposed billing rate