
CARES Act Relief for DOD Contractors

By J. William Eshelman / Apr 15, 2020

Among the several statutes recently enacted by Congress, there is a consistent, interlocking series of programs designed to address urgent needs of both individuals and businesses in a methodical and broadly prioritized way. There have been, are, and will be, continued hiccups and bumps as we proceed through the uncharted waters ahead.

In recognition of the special importance of federal contractors generally, and that of Defense Contractors specifically, the CARES Act contains a section addressing their unique challenges, section 3610, FEDERAL CONTRACTOR AUTHORITY. In those regards, the Office of Management and Budget sent the Heads of Executive Departments and Agencies a Memorandum (M-20-18) on March 20, 2020, *Managing Federal Contract Performance Issues Associated with the Novel Coronavirus* (COVID-19). That Memorandum was promptly followed by a March 30, 2020, Memorandum from the Acting Principal Director, Defense Pricing and Contracting to Defense Departments, Agencies and Commands, *Managing Defense Contracts Impacts of the Novel Coronavirus*, then the issuance on April 8, 2020 (DARS Tracking Number: 2020-O0013) of a *Class Deviation – CARES Act Section 3610 Implementation*.

The significant points of importance to Defense Contractors in section 3610 and the DOD's new DFARS 231.205-79 CARES Act Section 3610 – Implementation are:

- The acquisition flexibility provided in the new DFARS is immediately available to DOD Contractors.
- To prevent “double-dipping” among COVID-19 programs, contracting officers are instructed to reduce any relief authorized under section 3610. Significantly, the DFARS includes a reduction for any credit “allowed by law that is specifically identifiable with the public health emergency declared on January 31, 2020, for COVID-19.” This provision will capture future as well as existing credits.
- The reimbursement is limited to costs of paid leave in certain circumstances (including sick leave) at “appropriate rates” if such leave is necessary to keep contractor and subcontractor employees in a “ready state” notwithstanding the risks associated with the public health emergency declared on January 31, 2020; or protect life or safety of personnel (Government of contractor) against the risk arising from the COVID-19 health emergency.
- To be reimbursable, costs must be segregated and identifiable (traceable) in a contractor's records for ease of ascertaining compliance. Contractors may use any means to segregate costs provided that it establishes a sufficient audit trail.
- Perhaps the most important feature of section 3610 (not appearing in the Implementing DFARS) is the authority to amend contracts without consideration “subject to the availability of appropriations, funds made available to an agency by [the CARES Act] or any other Act” to reimburse covered leave costs. That is, provided that the leave and associated costs meet all the required criteria for reimbursement.

In summary, an agency may reimburse leave costs, amending a contract without consideration, as necessary. Such costs are to be paid at the rates allowed to the extent of funds already in the contract or as otherwise may be made available in response to the health emergency associated with or in response to COVID-19.

Like many things involved in federal contracting, the fine details undertaken by contractors and contracting agencies to obtain and provide rapid and often critically necessary relief in immediately exigent circumstances are almost certainly to be accomplished without fastidious attention to the finer details prescribed by the regulations. This is because regulations most often seek to take a safe course when implementing a broader authority. This seems to be almost an undeniable fact of life in the risk-averse culture that generally characterizes the federal acquisition function. Consequently, months or even years after the fact, legions of reviewers, auditors and their federal lawyers will scrutinize in exquisite detail every action taken by contractors. Contractors, therefore, must use caution in seeking relief in these circumstances. This is the area where the Clark Hill team stands ready to assist contractors in meeting the challenges presented by this health emergency.