Guidance on Recovery of Paid Leave Costs for Defense Contractors Pursuant to the CARES Act

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Categories:

Coronavirus Response Team

Publications

The Coronavirus Aid, Relief, and Economic Security Act (CARES Act), a sweeping third-wave relief package in response to the COVID-19 pandemic, became law March 27. To read the full overview of the bill, click here.

Section 3610 of the CARES Act provides potential relief to defense contractors who are unable to perform their government contracts due to closures or access restrictions to federal or contractor worksites. Specifically, Section 3610 of the CARES Act provides, in part that government funds:

> 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.

On April 8, 2020, the Department of Defense issued a class deviation to the Federal Acquisition Regulation and the Defense Federal Acquisition Regulation Supplement entitled, "CARES Act Section 3610 Implementation", and issued separate answers to Frequently Asked Questions related to Section 3610 to provide guidance to contractors for when the relief would be appropriate. On April 9, 2020, DoD issued additional "Implementation Guidance for Section 3610."

The purpose of Section 3610 is to ensure that contractors vital to the federal government remain ready. It applies to federal contractors and subcontractors performing work on government-owned, government-leased, contractor-owned, or contractor-leased facilities or any other site approved by the federal government for contract performance whose performance is hindered due to facility or site closures related to COVID-19. It is important to note that the provision is not without limitations and restrictions. It applies to contractors and subcontractors regardless of business size or contract type including contracts for commercial items and other transactions. However, the relief is permissive and not mandatory, and reimbursement of paid leave must be necessary to keep employees in a "ready state." Additionally, for a contractor to recover, the contractor must demonstrate that the leave was taken by employees who would be performing on a government contract, but the work cannot be performed because the facilities have been closed or made practically inaccessible, inoperable or subject to other restrictions that prevent the performance of work at the side as a result of the COVID-19 national emergency; and then, it is only to reimburse contractors for paid leave granted because the employee is unable to telework because the job duties cannot be performed remotely.

Recovery is limited to costs incurred between Jan. 31, 2020, and Sept. 30, 2020, and is contingent on the availability of funds. Reimbursement is discretionary, not mandatory. The class deviation directs contracting officers to assess the immediacy and the specific circumstances of each contractor's needs seeking relief. Importantly, there is no "double-dipping." The class deviation specifically states that contractors that obtain relief under the small business Paycheck Protection Program should not seek the same relief under Section 3610.

Federal contractors and subcontractors that have been impacted by COVID-19 that plan to seek relief under Section 3610 should immediately begin segregating their costs and gathering evidence to support any request for relief, including documenting the reasons why work could not be performed at the site and why teleworking was not available. When submitting requests for relief to the contracting officer, contractors 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 and an explanation of how the leave was used to ensure that the workforce remained in a ready state. Contractors and subcontractors must be sure to disclose other government benefits that they are claiming and receiving and, as appropriate, deduct those amounts from any request for reimbursement under Section 3610.

For more information, please contact Holly Clarke or any attorney in Frost Brown Todd's Government Contracting practice group.

To provide guidance and support to clients as this global public-health crisis unfolds, Frost Brown Todd has created a Coronavirus Response Team. Our attorneys are on hand to answer your questions and provide guidance on how to proactively prepare for and manage any coronavirus-related threats to your business operations and workforce.

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