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PRATT'S
**GOVERNMENT
CONTRACTING
LAW**
REPORT



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CARES Act Includes Assistance to Federal Contractors Who Offer Employees Paid Leave

*By Kevin J. Cosgrove and Lawrence K. DeMeo**

This article explains which contractors are eligible to request Section 3610 benefits under the CARES Act, how to make such a request, how much assistance a contractor can potentially receive and related issues including certain tips about some potential risks in making a request and how to minimize those risks.

The COVID-19 pandemic is a crisis of both public health and economic well-being. Every business wants to help its employees get through this difficult time with as little hardship as possible. Some businesses can continue to operate, and some employees can continue to perform, with remote working capabilities. For many others, such as businesses that must engage with people in person or those producing goods with manufacturing equipment, this is impossible. Such employers are faced with managing their competing desire to maintain their employees' wages while finding some means to meet their payroll with operations suspended. For businesses with federal government contracts, the recent CARES Act (the "Act") offers potential assistance to such employers who place employees on paid leave during the crisis. This portion of the Act allows the government to help mitigate the economic hardship suffered by employees, while also ensuring that businesses remain prepared to meet the obligations of government contracts once the crisis passes.

Section 3610 of the CARES Act provides a mechanism whereby the federal government may – at its discretion – reimburse its contractors for the cost of leave that they pay to their employees who cannot work during the pandemic. The text of Section 3610 reads as follows:

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.*

* Kevin J. Cosgrove and Lawrence K. DeMeo are counsel at Hunton Andrews Kurth. They may be contacted at kcosgrove@huntonak.com and ldemeo@huntonak.com.

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. (Emphasis supplied.)

The Office of the Under Secretary of Defense has also issued guidance memorandum and Defense Federal Acquisition Regulation Supplement (“DFARS”) advising federal contracting officers as to how to implement Section 3610.¹

This article explains which contractors are eligible to request this benefit, how to make such a request, how much assistance a contractor can potentially receive and related issues including certain tips about some potential risks in making a request and how to minimize those risks.

AM I ELIGIBLE TO APPLY FOR RELIEF UNDER SECTION 3610?

Any federal contractor with employees or subcontractors who cannot perform work at a federally approved worksite due to facility closure or other restrictions, *and* who cannot perform their job duties remotely, is eligible to apply for Section 3610 relief. Contracting officers have been advised to make the funds available to those contractors with a more immediate need for relief than others.² Therefore, when applying, contractors should explain how dependent their business is on the income from the contract and why it is impossible to complete the contracted work remotely, and should expect that they will be asked to prove the following points when submitting their application:

- Identification of the federally approved worksite at issue: The statute makes clear that these sites are not limited to sites that are federally owned or leased. Many contractor-owned or leased facilities will be deemed “federally approved.” Make certain you have your documentation on this point in order.

¹ See OUSD(A&S) Defense Pricing and Contracting Memorandum, Class Deviation – CARES Act Section 3610 Implementation, dated April 08, 2020; DFARS 231.205-79 CARES Act Section 3610 – Implementation.

² See OUSD(A&S) Defense Pricing and Contracting Memorandum, Class Deviation – CARES Act Section 3610 Implementation, dated April 08, 2020, p. 2, para. 4.

- Identification of the “facility closure or other restrictions” that prevent your people from accessing their worksite: Is your facility closed because of a mandate from your state? Because of a directive from your agency? Whatever the reason, have the supporting documentation in order when you make your submission.
- An explanation regarding why the job duties at issue cannot be performed remotely.³ Sometimes the answer to this question will be straightforward (i.e., security concerns). Sometimes it may be more nuanced, such as technical factors that are not subject to remote workarounds. Since this program is discretionary, expect pushback on this question from your contracting officer. Be sure that you have a solid answer to this question before submitting your application.
- An explanation as to why your affected employees cannot be transferred to perform other contract services that can be performed remotely.
- An explanation of your plans to keep your workforce ready to perform work: The CARES Act requires that your purpose must be to keep your employees in a “ready state” so that they will be able to get back to work immediately after the crisis is declared over. Your contracting officer will inquire about your plan to meet this obligation; therefore you should have a plan in place and be prepared to explain it in detail.

HOW MUCH ASSISTANCE CAN I RECEIVE?

Since assistance under Section 3610 is discretionary and is contingent upon the availability of funds, it is in many ways like any other request to modify the terms of your contract. Since the contractor is offering no consideration for the modification in this case, however, it is paramount that your request meet the terms and the purpose of the Act. Your employees or subcontractors must be placed on paid leave in order to maintain that workforce at a “ready state.” If you have already laid off workers you cannot include them in your application for assistance. But you should be able to request assistance for all of your employees who fall within the two-part eligibility test outlined above, as the purpose of the Act is to help maintain those employees’ wages. The amount of assistance per employee is limited to the “minimum established contract billing rates” and is capped at 40 hours per week.⁴

This assistance is designed to help employees survive the current crisis and keep contractors in a ready state to perform once the crisis is passed. Therefore, it expires on September 30, 2020.

³ See DFARS 231.205-79(a)(1)(ii)(A)-(B).

⁴ See DFARS 231.205-79(b).

Contractors should also keep in mind that the amount of the assistance will be reduced dollar for dollar for any other assistance or credit claimed under the CARES Act.⁵ One of the most important claims that may reduce the amount of assistance available under Section 3610 is any credit you the contractor claims pursuant to Division G of the Families First Coronavirus Response Act, which covers tax credits for paid sick and paid family and medical leave.

HOW DO I APPLY FOR ASSISTANCE?

The government has not promulgated a specific application form. Reach out to your contracting officer to start the process at once. Keep the following tips in mind as you proceed through the application process:

- Remember this program is discretionary, not mandatory. Your contracting officer may decline to provide such assistance. So be prepared to make a compelling case during your very first discussion. Remember what your mother told you—first impressions matter.
- Assuming that your contracting officer agrees to consider providing such assistance, you must next reach agreement as to the amount of your “minimum established contract rate.” If you have a cost-type contract that should not be a problem. If you are working on a firm fixed price contract you will need to calculate that figure and obtain your contracting officer’s blessing.

Be creative. Remember that your contract may include provisions that could help the contracting officer give you the relief you need. For example, Federal Acquisition Regulation (“FAR”) Section 52.242-15 permits a contracting officer to issue a stop-work order. Once such an order is issued, you would then be entitled to submit a request for equitable adjustment, including a request for CARES Act assistance.⁶

WHAT ARE SOME POTENTIAL RISKS OF REQUESTING ASSISTANCE?

As every business knows, nothing good comes without some risk. Although the risk is relatively limited with an application under Section 3610 of the

⁵ See DFARS 231.205-79(a)(2) (“The maximum reimbursement authorized by section 3610 shall be reduced by the amount of credit a contractor is allowed pursuant to division G of the Families First Coronavirus Response Act (Pub. L. 116-127) and any applicable credits a contractor is allowed under the CARES Act (Pub. L. 116-136) or other credit allowed by law that is specifically identifiable with the public health emergency declared on January 31, 2020 for COVID-19.”).

⁶ For more detail about the application procedure, the Defense Department has a website that provides answers to frequently asked questions about this program. It can be accessed at <https://www.acq.osd.mil/dpap/pacc/cc/COVID-19.html>.

CARES Act, some risk does exist. In this case, there is a very high likelihood that contractors receiving assistance under Section 3610 will be audited at some point in the future. Therefore, applicants should document *everything*. This is always good practice for a government contractor, but where the contract is modified without consideration solely for the contractor's benefit, failure to keep or maintain careful records showing that the funds received are used to meet the purpose of the Act will not be looked upon with favor by the government. It is a good idea, for example, to set up special cost codes for CARES Act assistance received, and to make sure you can document how those funds were spent and that they were spent on eligible items.

CONCLUSION

The CARES Act offers a host of assistance programs to American businesses that have been adversely impacted by the COVID-19 pandemic. Section 3610 offers particular help to federal contractors who wish to offer their employees paid leave. This serves the dual purpose of keeping contractors in a ready state to perform when the crisis passes, and ameliorates some of the economic harm to workers from the crisis. Framing any request to meet those dual purposes increases a federal contractor's chances of receiving assistance, and documenting that the use of the funds is actually directed to those purposes is a prudent practice in anticipation of a likely audit.