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OFFICE OF MANAGEMENT AND BUDGET
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M-20-22

MEMORANDUM TO THE HEADS OF EXECUTIVE DEPARTMENTS AND AGENCIES

FROM: Michael J. Rigas
Acting Deputy Director for Management

SUBJECT: Preserving the Resilience of the Federal Contracting Base in the Fight Against the Coronavirus Disease 2019 (COVID-19)

Office of Management and Budget (OMB) Memorandum M-20-21 outlines the Administration's commitment to both rapid delivery of COVID-19 relief legislation funding and accountability mechanisms to help safeguard taxpayer dollars. The guidance references OMB Memorandum M-20-18¹ which is intended to help the acquisition workforce ensure the health and safety of federal contractors in light of COVID-19, while maintaining continued contract performance in support of agency missions. This memorandum supplements Memorandum M-20-18 with guidance for the implementation of section 3610 of the Coronavirus Aid, Relief, and Economic Security (CARES) Act (Pub. L. No. 116-136). Section 3610 provides agencies an additional discretionary authority to reimburse costs of paid leave to federal contractors and subcontractors, subject to conditions described below. (See attachment for text of section 3610.)

Background

OMB Memorandum M-20-18 states that maintaining the resilience of the federal contracting base requires a multi-faceted strategy to combat the significant disruptions, both to health and economic well-being, caused by COVID-19. Such strategy includes maximizing use of telework, extending performance dates if telework or other flexible work solutions are not possible, and, where appropriate, reimbursing contractors for paid leave or negotiating other forms of equitable adjustment necessary as a direct result of COVID-19. For example, the memorandum explains that it may be beneficial to reimburse contractors for paid leave to keep personnel in a mobile ready state for activities so the contractor can resume supporting the agency's mission as soon as possible when circumstances permit.²

¹ M-20-18 *Managing Federal Contract Performance Issues Associated with the Novel Coronavirus (COVID-19)* (March 20, 2020), available at <https://www.whitehouse.gov/wp-content/uploads/2020/03/M-20-18.pdf>.

² For example, OMB M-20-18 states that it may be beneficial to keep personnel, such as national security professionals or skilled scientists, in a mobile ready state for activities the agency deems critical to national security or other high priorities or to pay leave as a bridge to hold over employees where a contract may be retooled for pandemic response.

Section 3610 of the CARES Act reinforces the legitimate role paid leave may play in maintaining the contractor in a ready state (*i.e.*, the ability to mobilize in a timely manner) by making clear that such costs may be reimbursed. At the same time, section 3610, like OMB's guidance, recognizes that an effective resiliency strategy is multi-faceted and places certain offsets on the reimbursement of paid leave, such as where certain other forms of relief are available, as well as prohibitions on the availability of paid leave, including where telework is possible.

This memorandum 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.

Guiding principles

The following guiding principles are designed to support continued exercise of sound business judgment by agencies and the acquisition workforce in the use of section 3610.

Using these principles is expected to result in different applications of this authority across buying offices within agencies and across the Federal Government. This variance is no different than would typically be expected in the application of any equitable remedy to different mission requirements, contractual arrangements, and funding situations, especially in exigent circumstances. Application of these guidelines will support rationally based decisions that reflect the best interest of the Government in any given situation, fully supported by contractor records that are subject to oversight, and that safeguard the taxpayers funding these efforts.

1. Support contractor resiliency

- a. *Carefully consider if reimbursing paid leave to keep the contractor in a ready state is in the best interest of the Government for meeting current and future needs*

Contractors that are unable to perform on their contracts because telework is not suitable and the work has not been deemed essential and exempt from shelter-in-place and stay at home orders may face unprecedented hardships as a result of COVID-19. Agencies should carefully consider if reimbursement for paid leave to keep the contractor in a ready state is in the best interest of the Government for meeting current and future needs. In considering paid leave, agencies should keep in mind that section 3610 provides agencies with considerable discretion to treat paid leave as a reimbursable cost. Agencies are permitted to:

- use any “funds made available to the agency” by Congress to reimburse contractors for workers’ lost time from March 27 to September 30, if the contractor provides leave to its employees or subcontractors “to maintain a ready state, including to protect the life and safety of Government and contractor personnel,” which would include, but not be limited to, the circumstances addressed in M-20-18;

- modify contracts unilaterally or bilaterally to reimburse allowable paid leave costs, without securing additional consideration;
- provide reimbursement on any commercial or non-commercial contract with any contract type without invoking the need for terms and conditions associated with a reimbursable item; and
- reimburse at contractor billing rates, which might include certain overhead costs in addition to labor, but shall not include profit or fees.

b. *Be mindful of the challenges faced by small businesses*

Small businesses whose work must be stopped because of COVID-19 may face the most difficult economic hardships. Navigating the various relief provisions in the CARES Act and other recent relief legislation to determine the best approach for maintaining readiness may be complicated for small businesses. Agency contracting offices are strongly encouraged to work closely with their Offices of Small and Disadvantaged Business Utilization to ensure their small business contractors are aware of the available support resources to help them in understanding the various relief provisions. For a list of resources that can support COVID-related challenges, see the Small Business Administration (SBA) local assistance finder³ and SBA's COVID-19 relief options and resources site.⁴ Contracting officers should also work with small businesses to help them understand what documentation may be required beyond that normally submitted to support costs claimed for reimbursement under section 3610.

Agencies are reminded additional mechanisms, beyond those recently provided in the CARES Act, might assist with cash flow for small businesses. For example, section 873 of the National Defense Authorization Act for FY 2020 (Pub. L. No. 116-92) provides for accelerated payments to contractors that are small businesses, and to small business subcontractors where the government has accelerated its payment to the prime contractor. Agencies should consider issuing class deviations to exercise this authority now while the Federal Acquisition Regulatory Council completes the rulemaking process for implementing this provision in the Federal Acquisition Regulation.⁵

2. Exercise good stewardship

The Federal Government's aggressive response to COVID-19 includes an unprecedented economic relief package, including multiple mechanisms to support federal contractors and their employees. To ensure this relief achieves its desired impact and federal funds are not being used to make multiple payments for the same purpose, agencies should take the following steps.

³ <https://www.sba.gov/local-assistance/find/>.

⁴ <https://www.sba.gov/funding-programs/loans/coronavirus-relief-options>.

⁵ On April 6, 2020, the Civilian Agency Acquisition Council (CAAC) issued CAAC Letter 2020-02 to facilitate agency issuance of class deviations for the immediate implementation of accelerated payment in accordance with section 873. See https://www.acquisition.gov/sites/default/files/page_file/uploads/CAAC-Letter-2020-02-Accelerated-payments-to-SB-contractors-and-subcontractors040620.pdf.

a. *Maintain mission focus and evaluate use of section 3610 in the broader context of all strategies to promote contractor resiliency*

Congress made clear that reimbursements made pursuant to section 3610 are subject to the availability of funds. In addition, section 3610 does not compel reimbursement of paid costs.⁶ Instead, it simply authorizes payment of these costs such that agencies may use their discretion to make reimbursements only when they find that making such payments are in the best interest of the government. Accordingly, in determining where and how to implement additional paid leave, agencies should:

- first look at the funding they have available, the impact of funding or of not funding additional paid leave and the mission impact of each alternative; and
- evaluate the benefits of paid leave under section 3610 in the context of the broader universe of available options to determine where it is best applied in light of potential budget constraints. The CARES Act contains a wide-range of relief for federal contractors, including loan relief, loans, favorable tax-changes, and other assistance. Also, continued efforts to help contractors address the disruptions of COVID-19 using a multi-faceted approach, as called for by M-20-18, could help uncover untapped opportunities for telework or other virtual workplace strategies, schedule extensions, option exercises and contract extensions that may alleviate the need for paid leave.

b. *Follow restrictions in section 3610*

Section 3610 restricts the circumstances under which reimbursement may be made, and the amount of reimbursement allowed. Specifically, section 3610:

- applies only to a contractor whose employees or subcontractors:
 - cannot perform work on a government-owned, government-leased, contractor-owned, or contractor-leased facility or site approved by the federal government for contract performance due to closures or other restrictions, and are unable to telework because their job duties cannot be performed remotely during the public health emergency declared on January 31, 2020 for Coronavirus (COVID-19).⁷
- authorizes reimbursement only:
 - at the actual amount paid but not more than the minimum applicable contract billing rates for up to an average of 40 hours per week, and

⁶ By contrast, section 18006 states that educational institutions that receive funding “shall, to the greatest extent practicable” continue to pay their contractors during the period of any disruptions or closures related to the coronavirus. Section 19005 states that the Architect of the Capitol is to “continue to make payments provided for under . . . contract for the weekly salaries and benefits of . . . [contractor] employees” who are “furloughed or otherwise unable to work” during closures.

⁷ For example, a contractor could not claim paid time off for childcare under section 3610, as that would presume that the contractor’s employees are able to work but must take leave for these purposes.

for contractor or subcontractor payments made no earlier than March 27, 2020 and no later than September 30, 2020.

In addition, the Government is required to reduce the maximum reimbursement authorized by this section by the amount of credit a contractor is allowed pursuant to division G of Public Law 116–127 (Families First Coronavirus Response Act) and any applicable credits a contractor is allowed under this Act. See paragraph c for additional discussion regarding this reduction.

c. Work with the contractor to secure necessary documentation to support reimbursement and prevent duplication of payment

Contractors are responsible for the well-being of their workforce. They also bear the burden of supporting any claimed allowable costs, including claimed leave costs for their employees, with appropriate documentation and identifying credits that may reduce reimbursement. Contractors must fully support and maintain documentation for claims made under section 3610. Agencies are encouraged to work with their contractors to understand how they are using or plan to use the relief provisions available to them under the CARES Act and the Families First Act to address the health and economic hardships created by COVID-19.

In some cases, provisions other than section 3610 may provide a more efficient means of getting payment into the hands of contract employees. In other cases, a contractor may find it beneficial to take advantage of a combination of resources. For example, a business may wish to use the Paycheck Protection Program (PPP) established pursuant to sections 1102 and 1106 of the CARES Act for certain relief and request agency support under section 3610 for other relief. For this reason, it is important to secure fully supported documentation from contractors regarding other relief claimed or received, including credits allowed, along with the financial and other documentation necessary to support their requests for reimbursement under section 3610.

Fully supported documentation, which may involve representations, will help to prevent incidence of double-dipping, as would be the case, for example, if a federal contractor that was sheltering-in-place and could not telework were to use the PPP to pay its employees, have the loan forgiven pursuant to the criteria established in the interim rule published by SBA⁸ and then seek reimbursement for such payment from a federal contracting agency under section 3610. Fully supported documentation also will be necessary to offset credits in accordance with the requirements of section 3610. If the amount of a credit cannot be determined at the time reimbursement is claimed by the contractor, the contractor will be responsible for reporting to the contracting officer to ensure the government is able to recover any improper payments.

d. Track use of section 3610

OMB Memorandum M-20-21 sets forth principles and guidance on spending transparency and regular reporting to provide accountability mechanisms that help safeguard taxpayer dollars. As an initial step to support accountability and transparency in connection with section 3610, agencies should process modifications allowing payments authorized by this statute and report them to the Federal Procurement Data System (FPDS); entering “COVID-19

⁸ <https://content.sba.gov/sites/default/files/2020-04/PPP--IFRN%20FINAL.pdf>.

3610” at the beginning of the Description of Requirements data field on the contract action report (CAR) for the modification. Such CARs must also include the National Interest Action Code established for identifying all COVID related procurement actions (COVID-19 2020). Central collection of these data will support federal-wide analysis of contractor payments, both pre and post award, to support oversight in the implementation of section 3610 and help safeguard taxpayer dollars against duplicative and wasteful spending.

Additional Information

Acquisition policy questions regarding this guidance may be directed to the Office of Federal Procurement Policy at MBX.OMB.OFPPv2@OMB.eop.gov. OMB will continue to provide updates and additional information, including additional “frequently asked questions” as needed, to support the implementation of section 3610 and other COVID-related procurement policy issues and the resiliency of the federal acquisition community generally.

Attachment

Section 3610 of the CARES Act, Pub. L. No. 116-136

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.