

Working with the U.S. Government During the  
COVID-19 Pandemic

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# **Updates and Advice for Federal Prime and Subcontractors in Guam/Micronesia**

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# A Note About Us ....

- C-leaders of the Government Contracts & Global Trade Practice Group at McCarter & English, LLP
- Decades of collective experience representing contractors of all types and sizes in connection with a broad variety of matters across the United States and throughout the world
- Experience in regulatory counseling, contract claims, bid protests, contract negotiation, compliance reviews, investigations, export controls and cross-border issues, customs

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# Overview

- COVID-19: Background and Status
- Setting the Stage
- The CARES Act Legislation
- OMB Application of the CARES Act
- DoD Application of the CARES Act
- So Now What?

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# COVID-19: Background and Status

- Coronavirus disease, COVID-19, is one of several coronaviruses known to cause respiratory infections ranging in humans
  - Over 5 million confirmed cases worldwide causing over 329,000 deaths as of May 21, 2020 – and climbing
  - In the U.S., at least 1.5 million confirmed cases and over 93,000 deaths
  - Numbers are likely dramatically underreported due to testing shortfalls
- March 11, 2020: WHO characterized the COVID-19 outbreak as a pandemic
- March 13, 2020: The President declared the COVID-19 outbreak a National Emergency
- CDC advises that the best way to avoid illness is to avoid exposure

# Setting the Stage – the Stafford Act and OMB Guidance



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# The Stafford Act – Emergency Relief (42 U.S.C. § 5121-5207)

- Allows under FAR 18.202 to substantially increase:
  - (i) the micro-purchase threshold (from \$10,000 to \$20,000 for domestic purchases and to \$30,000 for purchases outside the United States), (ii) the simplified acquisition threshold (increased from \$250,000 to \$750,000 for domestic purchases and to \$1.5 million for purchases outside the United States), and (iii) the threshold for using simplified procedures for certain commercial items (increased to a ceiling of \$13 million)
- Triggers GSA Disaster Purchasing Program – permitting state and local authorities to purchase goods and services from the GSA Schedule
- Allow under FAR 4.1104 use of Disaster Response Registry on SAM. Corps of Engineers seeking Field Medical Units, Buildouts, and Temporary Medical Enclosures

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# OMB Guidance Memo M-20-18 (3/20/20)

- Memo M-20-18 (March 20, 2020) encourages telework and administrative flexibility in extension of performance dates, keeping key personnel “in a mobile ready state,” and retooling existing contracts for pandemic response.
- Key issues include:
  - Changes to acquisition thresholds as result of Stafford Act
  - SAM registration “relief”
  - Guidance on handling business disruptions
  - Remains agency/task specific



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# OMB Guidance Memo M-20-18 (3/20/20)

## Compensation for Delays and Disruptions

- Contemplates that contractors may file REAs to receive compensation for increased costs associated with measures taken to protect employees and fight the spread of COVID-19
  - REAs will be reviewed by agencies on a **case-by-case basis**, “taking into account, among other factors, whether the requested costs would be allowable and reasonable to protect the health and safety of contract employees as part of the performance of the contract”
  - “Reasonable” will be measured by whether the contractor (1) acted as a “prudent person,” (2) took actions consistent with the CDC guidelines, and (3) discussed the actions with the CO/COTR



# The Cares Act



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# Coronavirus Aid, Relief, and Economic Security (CARES) Act

- Signed into law on March 27, 2020
- \$2 trillion piece of legislation passed in response to COVID-19 pandemic and resulting in broadscale disruption of US workforce
- Provides opportunity for specific relief for federal government contractors

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# CARES Act

## SEC. 3610. FEDERAL CONTRACTOR AUTHORITY

- Makes funds available for agencies to modify a contract for reimbursement at minimum contract billing rates of any paid leave (e.g., sick leave) provided to employees and subcontractors to keep them “in a ready state” through September 30, 2020.
- Applies only to contractor employees/subcontractors who cannot: (1) perform work on a Government approved site due to facility closures in response to COVID-19, and (2) telework due to inability to perform work remotely.

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# CARES Act

## SEC. 3610. FEDERAL CONTRACTOR AUTHORITY

- LIMITATION: Maximum reimbursement authorized by Sec. 3610 is subject to reduction by the amount of credit a contractor is allowed pursuant to related appropriations legislation, and any applicable credits a contractor is allowed under the CARES Act.
- Contractors should closely monitor and track the amount of paid leave granted through September 30 to ensure an accurate basis for any reimbursement claims.

# CARES Act: Paycheck Protection Program (PPP)

- Eligible small businesses may borrow up to 250% of their average monthly payroll costs (NTE \$10 million) from most banks and certain other SBA-approved financial institutions
  - < 500 employees; small businesses, nonprofits, 501(c)(19) veteran organizations, including religious organizations, self-employed individuals operating as sole proprietors, and independent contractors
  - > 500 employees may also be eligible if meeting NAICS/SBA standards
- Qualified recipients are eligible for loan forgiveness, up to the total loan amount, for loan proceeds used to pay payroll costs, rent, utilities and certain other operating related expenses during 8-week forgiveness period (after disbursement)
  - Eligible if all employees are kept on the payroll during the Forgiveness Period
  - No more than 25 percent of the forgiven amount may be for non-payroll costs
- PPP Loan Applications may be submitted online to an existing SBA-lender through 6/30/2020

**\$349B ran out in two weeks/Second round (\$310B)  
working smoother**

# CARES Act: Economic Injury Disaster Loan (EIDL)

- Existing rules still apply: Must be an independently owned and operated business with a physical presence in the declared disaster area
- Modifications include:
  - Adds businesses < 500 employees to already eligible small business concerns, private nonprofit organizations, and small agricultural co-ops
  - Interest rates: 3.75% without Credit Available Elsewhere or 2.75% (nonprofit)
  - Quick turnaround advances up to \$10,000 for allowable purposes (sick leave, rent, debt, etc.)
    - Repayment forgiveness/avoidance
  - Changes to loan restrictions: personal guarantees, duration of business, credit worthiness
- Covered period runs from January 31, 2020 through December 31, 2020 – but may vary state by state depending on disaster declaration

**Limited now to only agricultural businesses**



# OMB Application of the CARES Act





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# OMB Guidance Memo (M-20-22) (4/17/20) Providing Guiding Principles on Implementation of the CARES Act

- **Supporting Contractor Resiliency**: Urges agencies to carefully consider reimbursement for paid leave to keep contractor in ready state is in “best interest of the Government” and be mindful of hardships faced by small businesses
  - Use “any funds made available to the agency” by Congress
  - Modify contracts to reimburse allowable paid leave costs w/o additional consideration
  - Applicable to all contracts regardless of type and commerciality without invoking need for cost reimbursable T’s & C’s
  - Reimburse at “contractor billing rates, including “certain” OH costs but not profit or fees.
  - Make small businesses available of resources available to understand relief provisions and documentation necessary to support costs claimed for reimbursement under 3610
  - Consider class deviations to implement Section 873 of FY20 NDAA allowing for accelerated payments

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# OMB Guidance Memo (cont.)

- **Exercise Good Stewardship**. Reminds agencies that reimbursements are subject to availability of funds and discretionary, follow the restrictions in the statute and obtain proper documentation to support reimbursement and avoid duplication
  - Evaluate benefits of paid leave under 3610 within broader universe of other available relief options and mindful of budget restraints
  - Secure supported documentation regarding other relief claimed, including credits allowed, in addition to documentation supporting 3610 requests for reimbursement
  - Suggests “representations” to avoid double dipping (e.g., PPP loan forgiveness)
  - Track modifications and report them to FPDS under “COVID-19 3610”

# Initial DoD Actions and Guidance



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# March 30, 2020 Memorandum from Undersecretary of Defense for Acquisition and Sustainment



- Recognizes “historic” impact of COVID-19 as being “borne across the total force”
- Specifically mentions:
  - Inability to access worksites
  - Quarantined contractor employees
  - Use of “Regulatory tools” to address impacts
- Focuses on DoD clauses that “excuse performance delays” those clauses that permit adjustments to contract price

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# DoD Guidance (cont.)

- Excusable Delays clauses – *e.g.*, 52.249-14; 52.212-4
  - Relief from default if failure to perform “arises beyond control and without the fault or negligence of the contractor”
  - Equitable adjustment to contract schedule
- Changes clauses – *e.g.*, 52.243-1, 52.243-2
  - Potential for equitable adjustment to the contract price
  - Considered on a case-by-case basis
  - COs must consider allowability, allocability and reasonableness of costs
  - Focus and potential relief, in these circumstances, is on the protection of “health and safety of contract employees as part of the performance of the contract”
  - Also notes that implementing guidance for Section 3610 of the CARES Act will be forthcoming “as soon as practicable”

# Progress Payments Class Deviation (3/20/20)

- Progress payments - form of contract financing where the Government pays the contractor based on cost throughout performance of the contract, up to a cap dictated by the terms of the contract
- DARS Tracking Number 2020-00010 - Adjusts DFARS 252.232-7004 and FAR 52.232-16:
  - Large Business: 80%  90%
  - Small Business: 90%  95%
- Existing contracts will require a modification – Ask the CO

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# DoD Issues Commercial Item Determination (3/31/20)

- March 31, 2020 Memorandum attaching a class Commercial Item Determination (CID) by the Defense Contract Management Agency Commercial Item Group
- Products listed are deemed Commercial Items under FAR 2.101
  - Includes: vaccines; treatments; emergency medical supplies; certain facility-related services (orderly shutdowns of building, equipment and building maintenance and deep cleaning)
- Government may use FAR Part 13 Simplified Acquisition Procedures
  - OMB previously increased threshold from \$7 million to \$13 million for FAR part 13 commercial items acquisitions



# DoD Application of the CARES Act



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# DoD Class Deviation No. 2020-00013 (4/8/2020)

- Issued by Office of Under Secretary of Defense for Acquisition and Sustainment
- Authorizes COs to use a new cost principle, DFARS 231.205-79, CARES Act 3610 Implementation, as a framework for the implementation of Section 3610
  - Allows agencies 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, that a contractor provides to keep its employees or subcontractors “in a ready state”
  - Includes actions intended to protect the life and safety of Government and contractor personnel in response to the COVID-19 pandemic
  - Effective from January 31, 2020 through September 30, 2020

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# DoD Class Deviation No. 2020-00013 (4/8/2020)

Formal recognition that:

- “Many” DoD contractors are “struggling to maintain a mission-ready workforce” as a result of
  - Worksite closures
  - Personnel quarantines
  - State and local restrictions on movement
- It is “imperative” to support contractors using available acquisition tools in order to ensure that DoD remains “a healthy, resilient, and responsive total force”
- As stewards of taxpayer funds, COs are to use DFARS 231.205-79 “to appropriately balance flexibilities and limitations”
- Contractors may receive compensation from other provisions of the CARES Act, or other COVID-19 relief scenarios, including tax credits

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# DoD Class Deviation No. 2020-00013 (4/8/2020)

- COs are instructed to “avoid duplication of payments”
  - A small business contractor may use PPP to pay its employees/costs and then have the PPP loan forgiven
  - Small business should not seek reimbursement for the same costs twice
- COs are encouraged to work with contractors to understand how they use or plan to use the COVID-19 relief provisions and encourage contractors to use existing contract terms or the relief provisions available to them in response to COVID-19

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# DoD Class Deviation No. 2020-00013 (4/8/2020)

- COs directed to consider the “immediacy” of the circumstances
  - Tasked to understand that the “survival” of many businesses may depend on CO efficiency
- Recognizes the key aspects of Section 3610 “authority” vested in COs:
  - Modify contracts to provide for reimbursement of allowable paid leave costs, not otherwise reimbursable, without securing additional consideration
  - Enable the contractor to stay in a ready state – *i.e.*, to mobilize in a timely manner by treating as allowable paid leave costs a contractor incurs to keep its employees and subcontractor employees in such a state
  - Use any “funds made available to the agency” to reimburse contractors for workers’ lost time, not otherwise reimbursable, between January 31, 2020 and September 30, 2020
  - Provide such reimbursement for any contract type (including fixed-price and cost-reimbursement instruments)

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# DFARS 231.205-79, CARES Act Section 3610 - Implementation

- New *cost principle* that applies when:
  - The cognizant CO has established in writing that the contractor is “affected,” meaning:
    - The contractor’s employees or subcontractor employees 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
    - Whose employees are unable to telework because their job duties cannot be performed remotely during the public health emergency declared on January 31, 2020 for COVID-19
- The maximum reimbursement authorized by Section 3610 must be reduced by the amount of a credit the contractor is allowed pursuant to Division G of the FFCRA and any applicable credits allowed by law that is specifically identifiable with the COVID-19 health emergency

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# DFARS 231.205-79, CARES Act Section 3610 - Allowability

Allowability is critical –

- Notwithstanding any contrary provisions of FAR subparts 31.2, 31.3, 31.6, 31.7 and DFARS 231.2, 231.3, 231.6 and 231.7, costs of paid leave (including sick leave) are allowable at the appropriate rates under the contract for up to an average of 40 hours per week, and may be charged as direct charges, if appropriate, if incurred for the purpose of:
  - Keeping contractor employees and subcontractor employees in a ready state, including to protect the life and safety of Government and contractor personnel, notwithstanding the risks of the public health emergency declared on January 31, 2020 for COVID-19; or
  - Protecting the life and safety of Government and contractor personnel against risks arising from the COVID-19 public health emergency



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# DFARS 231.205-79, CARES Act Section 3610 - Allowability

- Allowable costs are limited to those that are incurred as a consequence of granting paid leave as a result of the COVID-19 national emergency and that would not be incurred in the normal course of the contractor's business
  - Costs of other paid leave incurred without regard to the existence of the COVID-19 national emergency subject to the other applicable provisions of the FAR and DFARS
- Allowability is conditioned on the costs being segregated and identified in the contractor's records so that compliance with all terms of the cost principle can be ascertained
  - Segregation and identification of costs can be performed by any reasonable method "as long as the results provide a sufficient audit trail"

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# DFARS 231.205-79, CARES Act Section 3610 - Implementation

- Covered paid leave is limited to leave taken by employees who otherwise would be performing work on a site that has been approved for work by the federal government, including on a government-owned, government-leased, contractor-owned or contractor-leased facility approved by the federal government for contract performance, but
  - The work cannot be performed because such facilities have been closed or made practically inaccessible or inoperable, or other restrictions prevent performance of work at the facility or site as a result of the COVID-19 national emergency; and
  - Paid leave is granted because the employee is unable to telework because their job duties cannot be performed remotely during the public health emergency
- The facilities are “deemed inaccessible” to the extent that travel to the facility is prohibited or made impracticable by applicable Federal, State, or local law, including temporary orders having the effect of law

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# DoD Section 3610 Draft Implementation Guidance - Overview

- On May 18, 2020, the DoD issued draft implementation guidance regarding contractor reimbursement under Section 3610 of the Coronavirus Aid, Relief and Economic Security (CARES) Act (27 March 2020)
  - First direct guidance on how the DoD and its contractors should interpret and implement Section 3610 and DFARS Class Deviation 2020-O0013 (8 April)
- Reinforces that Section 3610 authorizes, but does not require, COs to modify contracts and other agreements, without consideration, to reimburse contractors for paid 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 during the COVID-19 emergency

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# DoD Section 3610 Draft Implementation Guidance – Key Points

- Contractor Requests for Reimbursement Must Be Sufficiently Documented
  - The CO must be able to make a determination, based on the contractor’s submitted information and documents, that:
    - The contractor provided paid leave to its employees or subcontractor employees because (1) the employees could not perform work on an approved government or contractor-owned or leased site due to COVID-19-related closures or other restrictions, and (2) their job duties prevented telework;
    - The leave was taken between 31 January and 30 September 2020;\*
    - The contractor has not been reimbursed for the same costs for which it is requesting reimbursement from another source (e.g., under the PPP); and
    - The requested reimbursement does not result in a total of paid work and paid leave charges for any employee exceeding an average of 40 hours per week

***\*Note: OMB has issued a different time frame for Section 3610 reimbursement***

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# DoD Section 3610 Draft Implementation Guidance – Key Points (cont.)

- Reimbursement is Subject to the Availability of Funds
  - Allocation of funds for reimbursement under Section 3610 is solely at the discretion of DoD, subject to the terms of the appropriation
    - In other words, if no funds are made available for reimbursement of Section 3610 paid leave costs, no reimbursement can be made
- The CO's Determination of the Reimbursement Amount
  - The CO determines and documents the rationale for the amount of reimbursement, including any limitation due to available funding, in accordance with the appropriate DFARS cost principle (*i.e.*, DFARS 231.205-79) established under DFARS Class Deviation 2020-O0013)

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# DoD Section 3610 Draft Implementation Guidance – The Contractor Checklist

- Attached to the DoD’s draft guidance is a draft “checklist” for contractors “designed to assist contractors in identifying information that will be needed” to evaluate contractor reimbursement requests under Section 3610, such as:
  - Identification of the affected contracts, task orders, or other agreements;
  - A narrative explanation as to why Section 3610 applies to the contractor;
  - A description of the contractor methodology used to calculate the amount of its reimbursement request, with accompanying financial records;
  - An accounting of employee paid leave hours for reimbursement; and
  - Identification of other contractor relief received (e.g., under the PPP), if applicable
- **NOTE:** the checklist is not all inclusive—a CO may request additional information from the contractor not included in the checklist
  - The key takeaway for contractors is to “paper their files” with documentation substantiating their request for reimbursement under Section 3610.

# DoD Ongoing Guidance through FAQs





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# DoD's Expanding Guidance

## Applicability

- Deviation applies to traditional FAR-based contracts as well as “other forms of agreements” like Other Transaction Agreements
- Applies to all contracts in place from January 31, 2020 through September 30, 2020
- Applies to all “approved” worksites, meaning the contractor’s location and any other places of performance specifically identified in the contract, including contractor or subcontractor facilities at which contract administration services are performed in support of those contracts or that has been cleared by the National Industrial Security Program Contract Classification System on a DD form 254 or electronic equivalent.
- Applies in circumstances when worksites are open and accessible but, for public health reasons or family care issues, contractor employees cannot be in the workplace and cannot otherwise work remotely
- Applies to contracts performed outside the United States (*e.g.*, overseas contracts) and foreign contractors may also be reimbursed
- Applies in circumstances where the contractor or subcontractor employee can perform some, but not all, of their tasks due to the COVID-19 health emergency; there is no “100% inability to perform rule”
- Applies to commercial item contracts as well

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# DoD's Expanding Guidance

## Inapplicability

- Contractor or subcontractor employees were able to work (including remote or telework)
- Costs were incurred prior to January 31, 2020 or after September 30, 2020
- The contractor has been or can be reimbursed for leave costs by other means
- The costs are not related to COVID-19
- In the advance payments context
- Funds are unavailable

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# DoD's Expanding Guidance

## Affected Contractor Status

- Contractors requesting a determination of “affected contractor status” 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;
  - An explanation of why it was not feasible for employees to continue performance via telework or other remote work; and
  - How the leave served to keep employees in a “ready state”
- Contractors who are part of the “essential critical infrastructure workforce” and/or those who have been directed to implement the Continuation of Essential Services Plan in the contract must demonstrate that all reasonable efforts were made to continue contract performance

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# DoD's Expanding Guidance

## Allowability

- Some paid leave is an allowable cost pursuant to FAR 31.205-6(m)
  - Unlikely that contractors have an established provision in their compensation plans for granting leave for the specific purposes stated in Section 3610 and, without such a provision, leave of that kind would not normally be an allowable cost
- To provide a basis for audit and allowability determinations contractors should segregate
  - Costs that would be allowable under existing Cost Principles
    - from*
  - Leave costs that are **only** allowable if the leave complies with this new cost principle
- Costs may be allowable to the applicable contracts based on some reasonable, agreed-upon allocation

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# DoD's Expanding Guidance

## Allowability

- Coordination with DCMA through the applicable Divisional Administrative Contracting Officer/Administrative Contracting Officer is recommended to ensure consistency
- Paid leave costs should be charge to a newly created cost category, “Other Direct Costs (ODC) COVID-19”
  - Creation of new cost category may avoid “potential issues” with disclosed accounting policies and procedures, cost accounting standards, or a CAS disclosure statement.
- There is no bright line rule on whether the costs should be charged as direct or indirect expenses
  - The cost is not likely to be directly identified with a specific contract and would meet the definition of an “indirect cost”
  - It may be more appropriate to charge the costs through indirect pools (overhead, G&A, etc). In either case, the CO should work with DCMA/ACO/DACO as appropriate and the contractor to determine how the costs should be charged to contracts

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# DoD's Expanding Guidance

## “Credits”

- Contractors receiving state/local reimbursement for these costs should not request duplicate reimbursement from the Federal Government
- To the extent that any PPP loans or payments are allocable to costs allowed under the contract, the Government should receive a credit or a reduction in billing for the loans or payments, regardless of whether the loan is forgiven

## Certifications

- There are no express certification requirements associated with Section 3610
- However, “all contractor invoices will require applicable certification(s) under existing regulations and statutes.”
- Significant False Claims Act and termination-related risks for improper bills

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# DoD's Expanding Guidance

## Documentation Requirements

- “Appropriate documentation” supports any claimed costs for employees’ paid leave for which the contractor is seeking reimbursement, including
  - The identity of the employee
  - Specific identification of the contract(s) the employees are performing under
  - The amount and dates of the paid leave provided to the employees for which the contractor is seeking reimbursement
  - Acknowledgement that (1) the costs claimed are only for paid leave meeting the foregoing conditions, (2) the claimed costs constitute the only reimbursement or payment it is receiving for this purpose, and (3) no payment or reimbursement is being paid for the same costs via any other source of funding
  - All credits that ‘may reduce entitlement’ to Section 3610 reimbursement must also be specifically identified to the CO



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# DoD's Expanding Guidance

## Documentation Requirements

- Be prepared to explain that, with respect to each affected employee for whom the contractor is seeking reimbursement:
  - But for the COVID-19 pandemic, work on a site approved by the Federal Government pursuant to the contract(s) under which the claimed costs are sought, could not be performed due to closures or other restrictions resulting from COVID-19
  - The employee was unable to telework or otherwise work remotely under the applicable contract(s) during the COVID-19 pandemic
  - The employee received paid leave for a period beginning no earlier than January 31, 2020 and no later than September 30, 2020
  - The employee was provided paid leave at rates calculated based on the rates the contractor would have paid the employees it is providing leave to but for the COVID-19 pandemic

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# DoD's Expanding Guidance

## Remember

- The “starting point” for contractor billing of these costs is fact-dependent, but in all cases, the CO must determine that the requisite conditions for Section 3610 recovery have been met
- Relief may be provided under both fixed-price and cost-type contracts
  - In a cost-plus context, the determination takes effect when the CO transmits his or her written determination of affected contractor status
  - In a fixed-price contract, a formal modification will be required and the execution of the modification will “necessarily entail the ‘affected contractor’ determination.” No billings can be made prior to the execution of the modification
- CLINs may be added to fixed-price contracts to reimburse contractors for these costs vis-à-vis the modification/equitable adjustment process
- When seeking reimbursement, use the “predominant” Product Service Code for the contract efforts

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# DoD's Expanding Guidance

## But Also Remember

- Nothing in the Deviation alters the terms of any FAR, DFARS or agency supplement clause
- Preexisting contract-unique terms that might exist remain unaffected
- The Agency is not required to reimburse any 3610 costs
- Reimbursement considered on a case-by-case basis - permissive, not mandatory
- Congressional intent to reduce the impacts of COVID-19 on the contractor community must be balanced with the “fiscal constraints” of the department
- Profit/fee may not be reimbursed through the Deviation

# FEMA and GSA Guidance



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# FEMA Responses

- Provides information for doing business with FEMA for non-medical suppliers
  - Provides portal for donations of medical supply and equipment
  - Combined Solicitation for Medical and Surgical Instruments, Equipment and Supplies
  - FAR 12 Commercial Items procured under FAR Parts 15 (IDIQs and Direct Contracts using LPTA), and FAR Part 13 (Purchase Orders and BPAs) and FAR Part 8 (Federal Supply Schedule)
  - No closing date for offers; Certain domestic provisions waived
- **Opportunity**: Submissions to aid FEMA in COVID-19 response with non-medical goods and/or services can be sent to the Department of Homeland Security (DHS) Procurement Action Innovative Response Team (PAIR) team at: [DHSIndustryLiaison@hq.dhs.gov](mailto:DHSIndustryLiaison@hq.dhs.gov)
- Restrictions: Certain items now restricted from export under Temporary Rule

# GSA Class Determination & Findings (4/3/2020)

- On 3 April 2020, GSA declared certain supplies needed to combat COVID-19 may be acquired without regard to the Trade Agreements Act (TAA) and the Buy American Act (BAA)
  - “Temporarily unavailable in sufficient quantity or satisfactory quality”
  - Not “mined, produced, or manufactured in the United States in sufficient and reasonably commercial quantities of a satisfactory quality.”
- Applies to purchases of certain Federal Supply Classes (FSCs) at any dollar value; effective through July 1, 2020
  - N95 masks – FSC 4240
  - Sodium hypochlorite (bleach) – FSC 6810
  - Disinfectants including cleaners, sprays and wipes – FSC 6840
  - Cleaners including sanitizing surface and floor cleaners – FSC 7930
  - Hand sanitizers, soaps and dispensers – FSC 8520
- May be manufactured in any country except Cuba, Iran, Sudan, Burma and North Korea
- Avoids new contracting efforts and modifications are encouraged
- **Note:** Rated orders may be issued for non-TAA-compliant items under the CD&F.

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# Accelerated Payments to Small Businesses & Subcontractors

- Class Deviation CD-2020-08 allows GSA to provide accelerated payments to small business contractors, with a goal of 15 days after receipt of a proper invoice.
  - Provides accelerated payments to prime contractors that are small businesses
  - Establishes goal of 15 days after receipt of proper invoice for payments to small business primes and primes that subcontract with small businesses
  - Prohibits primes from charging consideration or a fee to subs when issuing accelerating payments



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# April 21, 2020 Class Deviation

- Creates a new GSA Acquisition Regulation contract clause prescribing controls for contractor reimbursement (GSAR 552.222-70)
- Section 3610 reimbursement may apply to task orders issued under GSA contract vehicles (e.g., FSS, GWACs), but not to indefinite-delivery vehicles at the contract level or to “non-FAR based contracts,” such as leases for real property.
- Contractors to make “limited use” of the reimbursement authority; Guidance in the Deviation is primarily for the benefit of contracting officers administering GSA contracting vehicles for use by other agencies.
- Reimbursement under Section 3610 should only be contemplated “after other methods to maintain key contractors in a ready state have been considered,” such as contract extensions, the use of progress payments, or the use of accelerated payments to small-business contractors.

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# April 21, 2020 Class Deviation (cont.)

- GSAR 552.222-70 begins eligibility period at *March 27, 2020* and ending September 30, 2020.
- The contractor may initiate the request for reimbursement “immediately after making the payment to the contractor’s employee(s), or making the payment to the subcontractor that has already made the payment to the subcontractor’s employee(s).”
- Contractor must “provide any documentation requested by the Contracting Officer,” including, at a minimum, (1) the total estimated amount of reimbursable leave and (2) a representation from the contractor that (i) “[t]he reimbursement request for paid leave is only for reimbursable leave for applicable work, at the applicable rate in accordance with clause 552.222-70”; (ii) “[i]f the contractor receives covered credits, the contractor will timely notify the contracting officer of the circumstances of receiving the covered credits (e.g., dates and amounts)”; and (iii) all information submitted is true, accurate, complete, and correct at the time of submission.

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# Other Key Issues to Consider

## ■ Labor and Employment

- Federal Response: Department of Labor: Families First Coronavirus Response Act (FFCRA) emergency sick and family leave; Expanded Paid Sick Leave Act (EPSLA) and the Expanded Family and Medical Leave Act (EFMLA)
  - Limited tax credit eligibility from April 1 through December 31
- WARN Act & State Plant Closure/Mass Layoff Laws
- Check for state leave law issues
- Unemployment Benefits & COBRA

## ■ Insurance Recovery – check insurance policies

## ■ Real estate/lease provisions

# So Now What?



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# Telework Under Federal Contracts

- Agencies “strongly encouraged” to work with contractors to evaluate and maximize telework for contractor employees
  - Reinforces & expands FAR 7.108 dictate to “not discourage” telecommuting
- Instructs agencies to contemplate modifying the contract to provide for telework
- If physical presence is required, agencies should “consider being flexible on delivery schedule contract completion dates”

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# Flexibility Given to Contracting Officers

- **Remember**: Cognizant agency contracting officers have the authority and flexibility to make adjustments to contract performance requirements and key personnel requirements
- Flexibility Endorsed by Many Agencies; Guidance Offered by DoD's Acting Principal Director for Defense Pricing and Contracting and GSA Office of the Procurement Ombudsman

*As a result of the current COVID-19 situation, contracting officers are strongly encouraged to engage with their Government program managers and requirements owners to determine what, if any, measures should be taken to ensure the welfare and safety of the total force, while ensuring mission continuity.*

*Contracting officers, in consultation with Government program managers and requirements owners, are the authority in the event contract performance is affected due to the COVID-19 situation (e.g. the need for alternate work locations, travel restrictions, or schedule changes). Therefore, contracting officers should be as transparent as possible as they make decisions potentially impacting contract performance or contractor personnel.*

- Contractors should consult their subcontractors, and be transparent with their cognizant contracting officers about the need for flexibility in, *inter alia*, adjustments to contract performance and key personnel requirements, as a result of the COVID-19 response

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# Delays and Disruptions

- Standard clauses permit adjustments to delivery schedules if performance is disrupted due to causes beyond the contractor's control
  - FAR 52.249-14 (Cost Reimbursement and Time and Materials Contracts)
  - FAR 52.249-9 (Fixed Price Contracts)
  - FAR 52.212-4 (Contract Terms and Conditions - Commercial Item Contracts)
- NOTE: these clauses do not entitle a contractor to additional compensation or damages
  - Additional compensation through a stop-work order (FAR 52.242-15)
  - An equitable adjustment to the price or cost ceiling may be warranted because of a “constructive change” to the contract
- Subcontractors should carefully review subcontracts to confirm that they contain identical or similar clauses (whether in the body of the terms and conditions or incorporated by reference)



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# Recovering Costs Associated with Measures Taken to Protect Employees and Complying with Shut-Down Orders

## What is Allowable?

- FAR Part 31 still applies

## Indirect vs. Direct

- Discuss recovery of direct costs proactively with contracting officer – modification? REA?
- Carefully document increased overhead, G&A, etc.
  - By the time DCAA conducts an audit, all this will be a memory – make sure you have a record that justifies the costs

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# COVID-19 Contractor “To-Do” List

- ✓ Prime contractors: coordinate with your contracting officer – in writing – on the scope and need for contractor employees (leave, telecommute, COVID-19 costs, etc.)
- ✓ Subcontractors coordinate with your Prime contractor – in writing – on the scope and need for subcontractor employees (leave, telecommute, COVID-19 costs, etc.)
- ✓ Collect and track all appropriate costs and impacts including, for fixed-price contracts, (a) allowable costs incurred in the performance of the work, (b) a reasonable profit for work performed, (c) reasonable settlement expenses, and (d) certain “continuing” (post-termination) costs
- ✓ Continue to follow existing or necessary compliance and supply chain obligations

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# COVID-19 Contractor “To-Do” List

- ✓ Follow the guidelines and guidance provided by the CDC, the OMB, your cognizant federal agency, and the states/communities in which contractor employees are performing their respective tasks
  - Location matters - facilities in different parts of the nation/world may be operating under different rules and requirements
- ✓ Be wary of out-of-scope modifications and cardinal changes
- ✓ Remind all employees of the importance of social distancing and the availability of virtual technologies in and away from the workplace
- ✓ And remember...

# ...Compliance Has No “Downtime”

- Continue to manage teaming agreements, JVs, and subcontracts pursuant to their terms; make/negotiate/document necessary changes – don’t assume!
- Carefully review existing contracts to identify provisions providing for cost/schedule relief due to impacts beyond your control (e.g., excusable delays)
- Track all requests for excess work and receive the CO’s written permission prior to undertaking any work (engage changes clause as necessary)
- Costs – properly document and identify costs associated with varying work conditions; ensure all contract expenditures remain allowable and allocable – don’t assume!
  - Confirm CO’s concurrence prior to charging travel costs for any essential work
  - Ensure time entry policies and procedures are followed (even if in pajamas)
- Cybersecurity – watch for “shadow IT;” ensure usage and security policies are being followed; examine procedures for “lessons learned”
- Supply chains should be carefully monitored; remind vendors and suppliers – as needed – that regulatory mandates (BAA, TAA, etc.) need to be maintained unless expressly provided otherwise
- Prepare to perform pursuant to DPAS requirements, as applicable
- Document, document, document – retain, retain, retain



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## Questions? Call Us

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