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Instructions for the DoD Checklist for Contractor Requests for Section 3610 Reimbursement on FAR-based Contracts

Purpose:

These contracting officer instructions are designed to expand on and explain the DoD Checklist for contractor submission of Section 3610 Reimbursement Requests. The checklist is a tool designed to assist contractors in identifying the information that will be needed to evaluate a COVID-19 Paid Leave request for reimbursement as authorized by Section 3610 of the CARES Act. While the checklist and DFARS Class Deviation 2020-O0013 only apply to FAR-based contracts, they may be used as a guidance when completing a request for reimbursement under an other transaction (OT) authority; however any request for reimbursement under an OT shall be submitted separately from any request for Section 3610 reimbursement under a FAR-based contract. Due to the complex issues surrounding a request for reimbursement under Section 3610 and DFARS Class Deviation 2020-O0013; the uniqueness of contractor accounting policies and procedures; and the creation of a COVID-19 Paid Leave cost category; the checklist is not intended to be all-inclusive and contracting officers may require additional information in making their determinations.

Overarching Themes:

- The authority provided by Section 3610 is a permissive authority and the contracting officer is not required to reimburse any or all of the requested paid leave costs;
- Any reimbursement under Section 3610 is subject to the availability of funds;
- The contracting officer has sole discretion to make decisions on a contractor's affected status and the amount of any Section 3610 reimbursement;
- Contractors must not be reimbursed (or otherwise paid) twice for the same costs;
- The contracting officer has the right to determine the amount reimbursed under Section 3610 and at what level (e.g., contract, division, segment, company, corporate) the costs will be reimbursed;
- Contractors must segregate COVID-19 Paid Leave costs in their books and records;
- Contractors may not request, and shall not receive, Section 3610 reimbursement for any hours related to employees a contractor has furloughed or laid off; such hours must be excluded from any request for Section 3610 reimbursement;
- Paid leave reimbursement under Section 3610 excludes any profit or fees; and
- Contracting officers shall document any COVID-19 Paid Leave reimbursement decisions in a memorandum for record (MFR). A template that contracting officers may use to complete the MFR will be provided separately, but this template should be tailored to the specific circumstances and is not a substitute for a contracting officer's independent thought or reasoned judgement.

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Early Engagement Discussions:

If a contractor contacts the contracting officer about its intent to submit a request for reimbursement under Section 3610, the contracting officer may decide that early engagement discussions with the contractor would be beneficial. The following could be discussed:

- The requirement that the contractor must be classified as an affected contractor to receive reimbursement under Section 3610, and that the contracting officer will make this determination;
- What can and cannot be included in COVID-19 Paid Leave in a request for reimbursement under Section 3610;
- Frequency of the Section 3610 requests for reimbursement;
- Information required to support any Section 3610 reimbursement request; format for required information; and what information needs to be provided with the request;
- If the contractor does not intend to seek Section 3610 reimbursement on a single contract basis, the companies, segments, division, etc., that will be included in any requests;
- Where and how requests for Section 3610 reimbursement should be submitted;
- How appropriate rates will be defined and calculated (Section 3610 references “minimum applicable contract billing rates,” due to limited application, the DFARS Class Deviation applies the term “appropriate rates”); and
- How requested COVID-19 Paid Leave reimbursement will be allocated to Government and other (i.e., commercial) contracts.

Until the contractor submits a request for reimbursement, the contracting officer can neither determine that the contractor is an affected contractor eligible for Section 3610 reimbursement, nor calculate the amount of any Section 3610 reimbursement. Early engagement may reduce the administrative burden to both the contractor and the contracting officer. These conversations between the contractor and the contracting officer should not be construed as a substitute for a written decision by the contracting officer.

Government Coordination:

Contracting officers should coordinate with, or request assistance from, available resources such as the Defense Contract Management Agency (DCMA) and the Defense Contract Audit Agency (DCAA) to help determine whether the contractor is an affected contractor and evaluate the contractor’s request for Section 3610 reimbursement. Furthermore, contracting officers need to evaluate the circumstances of the contractor’s reimbursement request and decide how to proceed in terms of the level-type of settlement (contract, contractor, corporate, etc.). This decision may

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need to be elevated/coordinated with other Federal agencies (both DoD and non-DoD) receiving Section 3610 reimbursement requests from the contractor.

Checklist Questions:

Questions 1 through 4:

The answers to questions 1 through 4 prompt the contractor to identify the who, what, where, when, and why of the request for Section 3610 reimbursement. This information is critical to the contracting officer's determination as to whether the contractor is an "affected contractor." If the contracting officer determines that the contractor is an affected contractor, the contracting officer will need to determine the appropriate reimbursement amount using the information provided in response to the remainder of the checklist. If the contracting officer determines that the contractor is not an affected contractor, no further evaluation by the contracting officer is necessary but the determination that the contractor is not an affected contractor, and the rationale therefore, shall be documented in the contract file.

Question 5:

The answers to Question 5 prompt the contractor to detail how the contractor developed its appropriate rates and the records used to develop those rates. Furthermore, the status of the contractor's accounting system may impact the amount of data needed by the contracting officer and the ability of the contracting officer to rely on contractor provided data.

The definition of appropriate rates and what is included in those rates is critical to the contracting officer's determination of the costs to be reimbursed. The contracting officer will use this information to determine whether the contractor has appropriately defined its submitted rates and whether that definition complies with Section 3610, the DFARS Class Deviation, and guidance issued. The contracting officer has sole discretion to determine the appropriate rates and the composition of those rates. Finally, this section of the checklist requires the contractor to identify any other requests for COVID-19 Paid Leave reimbursement under Section 3610.

In addition, the answers to Question 5 should assist the contracting officer in evaluating the eligibility of the number of COVID-19 Paid Leave hours requested by the contractor to reimburse paid leave hours provided to individual employees and the actual calculation of the appropriate rates. Paid leave is capped at no more than an average of 40 hours per week (full-time) for eligible employees. There may be instances in which an employee could perform some but not all of their duties. In those instances, the contracting officer needs to know what they were working on to ensure that the contractor excludes any work-related hours from COVID-19 Paid Leave requests. Furthermore, employees may have taken leave unrelated to COVID-19 Paid Leave and those hours should be excluded from any Section 3610 reimbursement. Those hours are already being reimbursed through the appropriate indirect rates.

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The contractor's justification and explanation for requesting Section 3610 reimbursement will vary depending on the labor category and the type of employee (senior executive/management/supervisor/employee, direct vs. indirect, etc.). For example, some employee job responsibilities can be performed using telework. For those employees, the contracting officer needs to understand the contractor's explanation as to why they could not telework.

Prime contractors requesting reimbursement for subcontractor COVID-19 Paid Leave should obtain the same information about the subcontractor as they provide to the contracting officer and evaluate that data. It is the prime contractor's responsibility to do so. However, in some instances, the contracting officer may have to work with the subcontractor directly.

Under no circumstances should prime contractors or subcontractors be reimbursed more than once for COVID-19 Paid Leave costs. Therefore, neither prime contractors nor subcontractors shall include hours/costs in a Section 3610 reimbursement request if funding or reimbursement has been, or will be, received for the same hours/costs.

Finally, the Truth in Negotiation Act (TINA) applies to non-commercial contracts over the statutory threshold. If a contractor's request for reimbursement includes both negotiated and commercial government work and the combined amount exceeds the TINA threshold, contracting officers will work with their legal counsel to determine whether TINA certification is required.

Question 6:

The answers to Question 6 help to identify potential credits or reductions that should be applied to the COVID-19 Paid Leave requests for reimbursement.

Question 7:

The contractor must sign its request for reimbursement at least at the Vice President level.