

## DoD Releases Draft Guidance on Implementation of Section 3610 Relief

Alert

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By Susan Warshaw Ebner

Under the CARES Act, Congress issued Section 3610 which authorized executive branch agencies to provide contractors certain reimbursement where the contractors used paid leave to keep their employees or subcontractors in a ready state and, inter alia, protect the life and safety of government and contractor personnel during the COVID-19 national emergency. On April 17, 2020, the Office of Management and Budget (OMB) issued [M-20-22](#), to preserve the resilience of the federal contracting base in the face of this pandemic. That OMB memorandum left it to individual agencies to address Section 3610 on their own terms.

The Department of Defense (DoD) issued a [DFARS Class Deviation 2020-00013](#) on April 8, 2020 to establish a new cost principle for the purposes of implementing this section. On April 24, 2020, the Office of Defense Pricing and Contracting, in the Office of the Under Secretary of Defense (Acquisition & Sustainment) subsequently issued implementation guidance through the form of an FAQ.

On May 18, 2020, the DoD released [draft versions](#) of its implementation guidance, checklist and instruction for the consideration and processing of Section 3610 relief requests from contractors. Under the guidance, contractors are advised that they may notify their contracting officer of the provision of paid leave to contractor and subcontractor employees for purposes of maintaining the requisite “ready state,” discuss the terms of their request for relief, and then submit a request for relief for consideration by the contracting officer.

Unfortunately, the devil is always in the details. The current draft guidance and checklist do not assure contractors that they will receive compensation. When issued, this part of the CARES Act was an unfunded mandate. Under the guidance, contractors are directed to discuss their basis for relief and terms of

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addressing it with their contracting officer. And, contracting officers will need to locate funds to pay for claims under Section 3610. The guidance and checklist also contain a number of provisions on how costs are to be identified, rates are to be affected, and they provide for relief in the form of a contract change to add a firm fixed price contract line item number.

DoD does not intend that any guidance from the contracting officer will be binding. Rather, DoD's draft would leave any determination on the contractor's entitlement to relief to the stage where the contractor submits its claim and the contracting officer (and others, such as the Defense Contract Management Agency or Defense Contract Audit Agency) formally considers it. Under the draft guidance, a contractor (or its subcontractor) first must be found to have been impacted in a way covered by Section 3610 in order for the contracting officer to proceed to consider the contractor's claim.

These and other aspects of the draft guidance and checklist raise numerous questions and concerns. For example, one wonders whether and to what extent the terms of the guidance and checklists will impact established traditional contractual relief mechanisms available under the contract changes, stop work, or excusable delay clauses, and the Contract Disputes Act. If contractors and subcontractors have already taken steps to ensure the "ready state" of their workforce because the DoD prevented them from coming on to a base to work, they were instructed by their contracting officers to not come to work (whether directly or implicitly issuing a stop work or change to the contract), or state or local governments mandated closure of their facilities, will this later guidance do anything to foreclose relief to contractors under existing contracting terms or principles?

One can expect claims to be filed, audits to be conducted, and disputes to arise. The guidance is still in draft, but there is an opportunity to submit comments until May 22.

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