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**To:** Acquisition Workforce

**Subject:** Implementing Section 3610 of the CARES Act

## **Background**

This guidance and procedures document provides information to assist USDA's acquisition workforce with management of Section 3610 of the Coronavirus Aid, Relief, and Economic Security (CARES) Act (Pub. L. No. 116-136). Office of Management and Budget (OMB) Memorandum [M-20-18](#) provides the initial implementation of the CARES Act while Memorandum [M-20-22](#) supplements with specific guidance for promulgation of Section 3610. Section 3610 provides agencies an additional discretionary authority to reimburse costs of paid leave to federal contractors and subcontractors, subject to conditions described herein and in the memorandums. Furthermore, Memorandum M-20-21 outlines the government's commitment to rapid delivery of funding and accountability measures to help relieve the impact of COVID-19. Ultimately, this guidance will provide USDA's acquisition workforce with steps to assist federal contractors in ensuring the health and safety of federal contractors throughout the COVID-19 pandemic, while maintaining readiness for contract performance in support of Mission Areas.

## **Procedures**

In order to maintain readiness, where the Mission Area Senior Program Manager (MASPM) deems appropriate and contingent upon availability of funds, Contracting Officers (CO) should consider requests for contractor incurred costs between March 27, 2020 through September 30, 2020, to reimburse contractors for paid leave or negotiate other forms of equitable adjustment caused by COVID-19. This may assist in keeping contractor personnel in a ready state for activities so the contractor can resume supporting the agency's mission as soon as possible when circumstances permit. Consider the contractor's request urgency and specific circumstances and respond accordingly. Although adverse impacts will be experienced by many contractors, some will have a more immediate need for relief than others. Some contractors may be extremely limited in the business they may conduct during the COVID-19 pandemic. As a result, such contractors would generate minimal or no new revenue causing difficulties making payroll, retaining employees, and meeting other financial obligations.

For each contractor reimbursement request, the acquisition workforce and the supervisory chain, as appropriate, should ensure compliance with the following:

### **1. How is the decision made to reimburse?**

Prior to use of any “funds made available to the agency” by Congress to modify applicable contracts of all types and reimburse contractors for workers’ lost time, not otherwise reimbursable, between March 27, 2020, and September 30, 2020, COs in coordination with contracting officer representatives (COR)/program offices(PO) must consider the following alternative solutions to assist contractors and ensure best use of Government funds:

- A. Delivery schedule extensions, option extensions, and contract extensions as other means to ensure continuation of a robust industry supply base.
- B. Delivery schedule extensions may be combined with progress payments to increase immediate cash flow.
- C. Other contract extensions may provide the contractor with additional support for their banking institutions to improve loan terms and increase cash flow.
- D. Use accelerated payments to small business contractors and subcontractors to pay eligible contractors within 15 days of an approved invoice as opposed to 30 days, see USDA’s related Class [Deviation](#).

### **2. Other Items to be considered:**

Ensure the contractor cannot perform work on a government-owned, government-leased, contractor-owned, or contractor-leased facility or site approved by USDA for contract performance due to pandemic-related closures or other restrictions; and the contractor is unable to telework because their job duties cannot be performed remotely. Lost time includes the contractor providing leave to its employees or subcontractor employees “to maintain a ready state, including to protect the life and safety of Government and contractor personnel,” which include, but are not limited to, quarantining, social distancing, or other COVID-19 related interruptions, as discussed in Memorandum M-20-18.

In addition to the aforementioned considerations, COs in collaboration with the COR/PO should also, at a minimum, contemplate the following:

- A. Whether the service is able to be recovered and the funds will expire if the contract is descope.
- B. If there are deliverables that are outstanding which will still need to be completed within the fixed contract price (or if not, are the funds available).

### **3. Who makes the decision to reimburse?**

Contracting Officers in collaboration with the COR/PO may make the decision. However if the decision is made to deny the request for reimbursement, MASPM, on a non-delegable basis, may issue a determination identifying program(s) otherwise within the scope of and covered by Section 3610 for which the MASPM determines is not in the interest of the Government to exercise the discretionary authority of Section 3610 and the associated rationale. The MASPM shall notify their MASCO and Chief Operating

Officer of any such determination. The CARES Act does not allocate or provide any specific funding for this authority. Therefore, USDA's mission capability could be impacted if this authority is exercised. The authority for paid leave reimbursement can only be used if the funding has been certified.

#### **4. What can be reimbursed?**

For fixed price contracts, only the hours the contractor pays its employees or subcontractors not able to perform their functions due to COVID-19 related restrictions are eligible for reimbursement requests, provided the work cannot be performed remotely or via telework. Where practicable, it shall not include profit or fees or exceed the applicable rate. Requests are at the minimum applicable contract billing rates (not to exceed an average of 40 hours per week) of any paid leave, including sick leave, a contractor provides to keep its employees or subcontractors in a ready state between March 27, 2020, and September 30, 2020. Other forms of compensation, if applicable, must be documented by the contractor and deducted. Whether to reimburse, and how much to reimburse, are at the sole and absolute discretion of USDA.

#### **5. What are the other relief methods?**

Some contractors may receive compensation from other provisions of the CARES Act, or other COVID-19 relief scenarios, including tax credits, credits listed in division G of the Families First Coronavirus Response Act (Pub. L. 116-127), etc. and COs must avoid duplication of payments. For example, the Paycheck Protection Program (PPP) established pursuant to Sections 1102 and 1106 of the CARES Act may provide, in some cases, a direct means for small business contractors to obtain relief. A small business contractor that is sheltering-in-place and unable to telework could use the PPP to pay its employees and then have the PPP loan forgiven, pursuant to the criteria established in the interim rule published by the Small Business Administration. In this and similar examples the contractor must appropriately deduct other relief from the amount of reimbursement they are requesting from USDA.

Contracting Officers should work with contractors to understand how they 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. Additionally, contractors must document any other relief claimed or received stemming from COVID-19, including an affirmation that the contractor has not or will not pursue reimbursement for the same costs accounted for under their request, to support their requests for reimbursement under Section 3610.

#### **6. How should the amount of contract relief be determined?**

If USDA has determined the use of reimbursement for paid leave is in the best interest of the Government, the CO will need to negotiate equitable adjustments due to the impact of COVID-19. Contracting Officers should obtain contractor documentation supporting any claimed costs, including claimed leave costs for their employees, with appropriate documentation and for identifying credits that may reduce reimbursement under Section 3610. The CO must evaluate the requested reimbursement for leave which a contractor has paid or will pay for leave provided during the period of March 27, 2020 through September

30, 2020 and determine the maximum funds needed to grant the request. Analysis should be conducted in collaboration with the COR/PO. Once a maximum potential reimbursement amount is identified, the CO should work with their Budget Office to determine if there is funding available to fulfill the possible maximum request.

**7. How should the modification be issued?**

- A. Document the rationale and decision as required by FAR 43.204. Incorporate the attached clause, 452.231.71 CARES ACT CONTRACTOR REIMBURSEMENT (APRIL 2020).
- B. In accordance with OMB Memorandum M-20-21, to support accountability and transparency related to Section 3610, when processing modifications report them to the Federal Procurement Data System (FPDS) entering "COVID-19 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). This will support USDA and federal-wide analysis of contractor payments, both pre and post award, to support oversight and tracking of Section 3610 implementation.
- C. Additionally, for transparency COs shall establish one or more separate contract line items for Section 3610 COVID-19 payments to ensure traceability of expenditures. Contact the IAS Help Desk for issues with adjusting prior year funds.

The following Attachment provides clause information for use in contracts impacted by Section 3610. Questions regarding this guidance may be sent to [procurement.policy@usda.gov](mailto:procurement.policy@usda.gov).

## ATTACHMENT

### Prescription

431.201-3 Determining Reasonableness.

Section 3610 of the Coronavirus Aid, Relief, and Economic Security (CARES) Act allows contract modifications to reimburse paid leave. Specifically, Section 3610 states “*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.*”

The clause at, 452.231.71 CARES ACT CONTRACTOR REIMBURSEMENT (APRIL 2020), shall be inserted via modification, in all contracts in which a contractor requests reimbursement in accordance with the CARES Act. The clause directs the contractor to provide documentation for the contracting officer and supervisor to approve, prior to contractor reimbursement. Contractor’s documentation must demonstrate that due to national emergency: 1) The contractor cannot perform work onsite; 2) Telework is not an option; 3) The contractor is required to maintain ready state; and 4) Calculations were performed deducting applicable credits to determine the reimbursement amount.

Requests for equitable adjustment should be considered on a case-by-case basis considering, 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. The standard for what is "reasonable," according to FAR § 31.201-3, is what a prudent person would do under the circumstances prevailing at the time the decision was made to incur the cost (e.g., did the contractor take actions consistent with CDC guidance; did the contractor reach out to the contracting officer to discuss appropriate actions).

### Clause

As prescribed in 431.201-3 insert the following clause:

#### **452.231.71 CARES ACT CONTRACTOR REIMBURSEMENT (APRIL 2020)**

(a) When requesting cost reimbursement for cost type contracts or equitable adjustment for fixed price/time-and-materials type contracts in accordance with Section 3610 of the CARES Act, the contractor is required to submit the following documentation, for approval by the contracting officer, demonstrating the following:

- i. Cannot work onsite: Contractor employees 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;
- ii. Cannot telework: Contractor employees cannot telework because their job duties cannot be performed remotely during the COVID-19 public health emergency;

- iii. Maintains Ready State: Contractor agrees to ensure employees remain ready and available to perform contract-related work;
- iv. Protects against Double Dipping: Contractor calculated amount of the tax credits entitled to under Division G of Public Law 116–127 and other CARES Act sections. The maximum amount of relief Contractor can receive under Section 3610 will be reduced by this amount, as determined by the Contracting Officer after collaborating with the COR/program office and receipt of MASCO approval; and
- v. The costs do not reflect any amount exceeding an average of 40 hours per week for paid leave during the period March 27, 2020 and September 30, 2020.

(b) When submitting requests for equitable adjustment contractors should demonstrate, among other factors, that 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. The standard for what is "reasonable," according to FAR § 31.201-3, is what a prudent person would do under the circumstances prevailing at the time the decision was made to incur the cost.

(c) Contractors must demonstrate they have not received, claimed, and will not claim any other reimbursement(s) including: via letter of credit, federal funds under CARES Act Sections 1102 and 1106, credits pursuant to division G of Public Law 116-127, other credits; or if it has received, claimed, or will claim other reimbursements they will be made prior to request for funds and in sufficient time to determine allowable incurred costs.

(End of clause)