



Office of the Secretary
of Transportation

April 1, 2021

MEMORANDUM TO: DOT Chiefs of the Contracting Offices (COCOs)

FROM: Willie H. Smith
Senior Procurement Executive

SUBJECT: Transportation Acquisition Regulation (TAR) Class Deviation
(CD) No. 2020-01 Amendment No. 2 – TAR Subpart
1252.231– Implementation Guidance for Section 3610 of the
Coronavirus Aid, Relief, and Economic Security Act

- I. Purpose:** This class deviation is issued in accordance with TAR 1201.404 to revise Subpart 1252.231 of the TAR as outlined herein. This CD provides guidance for the implementation of Section 3610 of the Coronavirus Aid, Relief, and Economic Security Act (CARES Act) (Public Law 116-136) regarding paid leave reimbursement authority to contractors during the Novel Coronavirus Disease 2019 (COVID-19) public health emergency. In addition to guidance, this CD prescribes a contract clause, which implements controls required for application of authority available under Section 3610. See Attachment A for the text included in Section 3610 in the CARES Act.
- II. Effective Date:** Immediately
- III. Background:** The CARES Act was enacted on March 27, 2020, in response to the COVID-19 national public health emergency. Section 3610 of the CARES Act (Section 3610) permits Government 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, 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 public health emergency declared for COVID-19 on January 31, 2020.

On April 17, 2020, the Office of Management and Budget (OMB) issued Memorandum [M-20-22](#), which provided guidance to the Executive Branch on understanding and applying the contractor paid leave authority under Section 3610. The OMB guidance explains that Section 3610 provides agencies discretionary authority to reimburse contractors for paid leave, and that agencies should carefully consider if reimbursement for paid leave to keep contractors in a ready state is in the best interest of the Government.

This CD:

1. Provides considerations for Contracting Officers to use in determining when to include the paid leave reimbursement authority in contracts/orders;
2. Prescribes the process for consideration of a contractor's request under Section 3610;
and

3. Provides a new TAR clause to include in contracts when using the Section 3610 authority.

- IV. Applicability:** This CD applies to DOT contracts where contractor employees or subcontractor employees are unable to continue work, including remote or telework options, as a result of COVID-19, and where the contractor requests reimbursed paid leave associated with keeping contractor/subcontractor employees in a ready state.
- V. Expiration Date:** This CD may only be used to reimburse for applicable contractor/subcontractor paid leave requests in accordance with Section 3610 during the period of March 27, 2020 through September 30, 2021.

Questions or comments regarding this class deviation may be directed to DOTAcquisitionPolicy@dot.gov.

Attachments:

- A. Section 3610 of the CARES Act, Public Law No. 116-136; Section 1002 of The Consolidated Appropriations Act of 2021; and, Section 4015 of The American Rescue Plan Act of 2021, Pub. L. No. 116-159 117-2
- B. Guidance to Contracting Officers on Implementation of the CARES Act
- C. TAR Deviation Text - 1252.231-71 Implementation Guidance for Section 3610 of the Coronavirus Aid, Relief, and Economic Security Act (APRIL 2021)

ATTACHMENT A

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.

Section 1002 of The Consolidated Appropriations Act of 2021, Pub. L. No. 116-159

CONTRACTOR PAY

Section 3610 of division A of the CARES Act (Public Law 116-136) shall be applied by substituting “March 31, 2021” for “September 30, 2020”.

Section 4015 of The American Rescue Plan Act of 2021, Pub. L. No. 116-159 117-2

EXTENSION OF REIMBURSEMENT AUTHORITY FOR FEDERAL CONTRACTORS

Section 3610 of the CARES Act (Public Law 116–136; 134 Stat. 414) is amended by striking “September 30, 2020” and inserting “September 30, 2021”.

ATTACHMENT B

- I. Contracting Officer Considerations:** Authority to grant paid leave under Section 3610 is discretionary, not mandatory. Therefore, if a contractor submits a request, Contracting Officers must closely review the request to determine whether to use the authority to reimburse affected contractors for paid leave. The specifics and unique nature of each contract arrangement vary widely and the circumstances of each contractor's delivery and performance situation must be evaluated on a case-by-case basis by each program/requirements office, contracting office, and legal counsel when making determinations for exercising flexibilities under Section 3610. The spread of COVID-19 may affect contractors in several ways, so communication with contractors is critical during this period of uncertainty.

A Contracting Officer must weigh various factors when determining how to move forward, taking into consideration the abilities of the contractor to perform remotely or via telework, and the best interest of the Government. Considerations shall include documentation of the following within the contract file, as appropriate:

1. Initial Considerations:
 - Use of this CD should only be contemplated after other methods to maintain key contractors in a ready state have been considered and deemed inappropriate or otherwise unfeasible. At a minimum, Contracting Officers must have first considered other authorities and flexibilities to assist contractors and ensure best use of Government funds, such as:
 - i. Delivery schedule extensions, option extensions, and contract extensions as other means to ensure continuation of a robust industry supply base;
 - ii. Delivery schedule extensions can be combined with other contract extensions and can provide the contractor with additional support for their banking institutions to improve loan terms and increase cash flow; and,
 - iii. Any other flexibilities allowable under the FAR, TAR, or contract.
2. Determine if the contractor is eligible for reimbursable paid leave on a contract-by-contract basis:
 - Contractor requests for determinations of affected contractor status that would allow the use of the paid leave authority should describe the actions the contractor has taken to continue performing work under the contract, the circumstances that made it necessary to grant employees leave, an explanation of why it was not feasible for employees to continue performance via telework or other remote work options, and how the leave served to keep employees in a ready state. If the Contracting Officer determines that work can be performed by

telework or other remote means, then the Contracting Officer should authorize the contractor to telework or use such other remote means. Contractor employees that can continue work by remote means are not eligible for reimbursement under Section 3610. Further, leave provided for contractor employees who choose not to telework or work remotely in instances where the Government has determined that the work is eligible for remote performance is not eligible for reimbursement.

3. Determine if it is in the Government's best interest to keep the contractor in a ready state by considering the following:
 - The impact on the mission if contractors are unable to perform critical operations;
 - The scarcity of the required skills for the critical operation or the challenge for the contractor to resume operations if previous staff is no longer available;
 - Where the contract is in its lifecycle, such as contract expiration;
 - The costs and benefits of using the Section 3610 reimbursement authority and the opportunity costs within the program office; and
 - Any other areas deemed appropriate/relevant.
4. Determine if the requested reimbursable paid leave on a contract is appropriate:
 - Only the hours the contractor pays its employees or subcontractors where the employees are unable 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.
 - Within the CARES Act and the Families First Coronavirus Relief Act (FFCRA), there are multiple forms of assistance available to contractors including a paycheck protection program, economic injury disaster loans, employer-portion payroll tax credits, employee retention tax credits, and other assistance. Contracting Officers should discuss with the contractor what other assistance a given contractor has utilized, and use that in determining whether and how much paid leave to reimburse. The Government is required to reduce the maximum reimbursement authorized by this CD by the amount of credits a contractor is allowed under other provisions of the CARES Act or Division G of the FFCRA¹.

II. Contracting Officer Requirements: For applicable contracts where this CD may be used, the request should be initiated by the contractor by submitting a written request addressing the items outlined in this section below. Contracting Officers shall refer contractors to the TAR clause in Attachment C, which will be used to modify contracts

¹ Contracting Officers are not required to determine this in advance of making payment. The clause in Attachment C will require the contractor to notify the CO, and repay any double payment.

when the reimbursement of paid leave under section 3610 is deemed appropriate. The TAR clause includes safeguards, such as the requirement that the contractor repay double reimbursements and allow audits.

1. Request from Contractor:

- When a Contracting Officer receives a contractor request for reimbursement for paid leave, the Contracting Officer shall consider the items noted in Section I above.
- The Contracting Officer shall obtain a representation from the contractor in accordance with the clause in Attachment C.

2. Funding Availability and Impact Assessment:

- The Contracting Officer shall evaluate the request for reimbursement of paid leave which a contractor has paid or will pay for leave provided during the period of March 27, 2020 through September 30, 2021, and determine the maximum funds needed to grant the request. Analysis should be conducted in collaboration with the program manager/requirements official, the Contracting Officer's Representative, legal counsel, and/or budget officials as needed/appropriate.
- Once a maximum potential reimbursement amount is identified, the Contracting Officer should work with the program office to determine if there is funding available to fulfill the maximum potential request.
- Under Section 3610, any "funds made available to the agency" may be used for the reimbursable paid leave for up to 40 hours per week through September 30, 2021.
- Reimbursement should be reduced by any amount of credits the contractor receives under division G of the FFCRA or other provisions of the CARES Act.

3. Obtain Approval:

- The Head of Contracting Activity (HCA) or the Chief Acquisition Officer (CAO) must approve use of this authority prior to execution of the modification to include clause 1252.231-71. This approval authority is delegable, but shall not be delegated to a position below the level of Senior Executive.

4. Modify the Contract:

- For contracts where this CD will be used, the Contracting Officer shall modify contracts to incorporate the clause found in Attachment C.
- The Contracting Officer is responsible for documenting the contract file with the rationale supporting approval or disapproval of reimbursement for a paid leave request. The file must contain the representation required by the affected contractor in the clause outlined in Attachment C.

5. Reimbursement by Contract Types:

- If the Contracting Officer has determined the use of reimbursement for paid leave is in the best interest of the Government, the Contracting Officer shall negotiate equitable adjustments due to the impact of COVID-19. The reimbursement should be evaluated and executed based on contract type as follows:
 - i. Fixed Price: Contracting Officers shall establish one or more separate contract line items for Section 3610 COVID-19 payments to ensure traceability of expenditures. In the case of fixed price contracts with incentives, this should be a separate fixed price line item and not subject to the incentive structure.
 - ii. Time and Materials or Labor Hour: Contracting Officers shall create separate line item(s) for this reimbursement under Section 3610 authority to enable segregation of these costs. The information on supporting documentation must be retained for audit, while the interim voucher would be provisionally approved and paid under existing procedures.
 - iii. Cost-Reimbursement: Contracting Officers shall create a separate line item for cost. Contracting Officers will need to work with the contractor to establish appropriate cost procedures. Additional efforts will be required to adjust the estimated costs. The information on supporting documentation would be retained for audit, while the interim invoice would be provisionally approved and paid under existing procedures.

6. Double Reimbursement:

- The clause in Attachment C requires the contractor to refund the Government any reimbursements made pursuant to section 3610 if the contractor receives employment tax credits under Division G of the FFCRA or elsewhere in the CARES Act.

7. Reporting:

- The Contracting Officer shall report the following for each contract action (new awards or modification) where Section 3610 of the CARES Act is used:
 - i. “COVID-19 3610” shall be included in the Description field (Field 6M) in the FPDS contract action report (CAR).
 - ii. Any information required by internal agency procedures and/or as requested by the Office of the Senior Procurement Executive (OSPE).

ATTACHMENT C

1252.231-71 Paid Leave Reimbursement under Section 3610 of the Coronavirus Aid, Relief, and Economic Security (CARES) Act (APRIL 2021)

(a) Definitions:

- (1) Affected contractor means a contractor under a services contract or a construction contract whose employees or subcontractors cannot perform work on a site that has been approved by the 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 COVID-19 public health emergency (which was declared on January 31, 2020), from March 27, 2020, through September 30, 2021.
- (2) Applicable rate means the lowest contract billing rate for the specific applicable work categories for which reimbursement is requested.
- (3) Applicable work means work that an affected contractor (or its subcontractors) cannot perform 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 that cannot be performed via telework or other remote means because the job duties cannot be performed remotely during the COVID-19 public health emergency (which was declared on January 31, 2020), from March 27, 2020, through September 30, 2021.
- (4) Reimbursable leave means any paid leave, including sick leave, which an affected contractor provides during the period of March 27, 2020, through September 30, 2021, to keep its employees or subcontractors in a ready state. For affected contractors or their subcontractors, reimbursable leave shall not exceed an average of 40 hours per week.
- (5) Covered credits means the amount of any credit an affected contractor is allowed pursuant to any section of the Coronavirus Aid, Relief, and Economic Security (CARES) Act of 2020, including the employee retention credit under section 2301 of the CARES Act, or Division G of the Families First Coronavirus Response Act of 2020 (Public Law 116-127).

(b) Authority: Section 3610 of the CARES Act, Public Law 116-136, states that 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, 2021. 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 a facility closures or other restrictions, and who cannot telework – or otherwise work remotely – 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 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 the CARES Act.

(c) General rule: An affected contractor may request an equitable adjustment for, and the Government may reimburse, reimbursable leave paid by the affected contractor for leave during the period of March 27, 2020 through September 30, 2021. Such reimbursements shall only cover actual reimbursable leave paid by the affected prime contractor, including payments to a subcontractor to cover paid leave paid to the subcontractor's employees. Paid leave may be reimbursed at contractor billing rates, which might include certain overhead costs in addition to labor, but shall not include profit or fees and shall not exceed the applicable rate. Whether to reimburse, and how much to reimburse, are at the sole and absolute discretion of the Government.

(d) Time of reimbursement: The contractor may submit 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). The submission is allowed notwithstanding restrictions in an interim payment clause or advance payment clause in this contract, and no advance payment bond or other security or lien is required for the reimbursement.

(e) Request:

- (1) Any affected contractor requesting reimbursement shall provide any documentation requested by the Contracting Officer. At a minimum, the documentation must contain:
 - i. A representation by the affected contractor that—
 - (A) The reimbursement request for paid leave is only for reimbursable leave for applicable work, at the applicable rate in accordance with TAR clause 1252.231-71.
 - (B) If the contractor is allowed covered credits, the contractor will timely notify the Contracting Officer of the circumstances of receiving the covered credits (e.g., dates and amounts).
 - (C) All information submitted is true, accurate, complete, and correct as of the date of its submission to the Contracting Officer.
 - ii. The total estimated amount the contractor expects to request for reimbursable leave.
- (2) The affected contractor shall provide a representation in accordance with paragraph (e)(1)(i) for all requests for reimbursement.
- (3) Any affected contractor shall maintain records of the documentation supporting their request, including those requested by the Contracting Officer, in an auditable format, for three years after final payment on the contract.

(4) The Contracting Officer, or an authorized representative of the Contracting Officer, including an Inspector General, the Comptroller General (under Section 19010 of the CARES Act), and the Pandemic Response Accountability Committee (under Section 15010 of the CARES Act), shall have the right to examine all the pertinent financial records in the contractor's records so that compliance with all terms of this section can be reasonably ascertained. Segregation and identification of costs can be performed by any reasonable method as long as the results provide a sufficient audit trail.

(f) Repayment: The affected contractor is restricted from retaining any double reimbursements after the application of covered credits. Therefore, if the affected contractor is allowed covered credits then the Contractor shall notify the Contracting Officer, in writing. The Contractor shall repay the Government the amount of the reimbursement up to the amount of the covered credits. The amount of repayment owed to the Government is considered an overpayment. See Federal Acquisition Regulation 3.1003(a)(3).

(g) Work sites: All contractor and subcontractor work sites are considered approved for purposes of this clause, except for work sites which the Contracting Officer identifies specifically in writing as not approved.

(End of Clause)