



April 15, 2020

Mr. Kim Herrington
Acting Principal Director
Defense Pricing and Contracting
Office of the Under Secretary of Defense
for Acquisition and Sustainment
3010 Defense Pentagon
Washington, DC 20301-3010

Subject: Input to DPC FAQs Regarding Implementation of Section 3610 of the CARES Act

Dear Mr. Herrington:

INSA and its member companies appreciate the Department's efforts to ensure that industry remains financially viable and available to serve the Department now and in the future. The April 8 [DFARS class deviation](#) regarding implementation of Section 3610 of the Coronavirus Aid, Relief, and Economic Security (CARES) Act was both clear and comprehensive, and the [implementation guidance memo](#) and [Frequently Asked Questions \(FAQ\)](#) documents issued the following day provided helpful detail on how the statute will be applied in different scenarios.

We understand that the Department will periodically update its guidance on 3610 implementation to address emerging requirements and situations that had not previously been envisioned. INSA welcomes this opportunity to provide the below insights to inform the Department's updated guidance and FAQs.

1. Billing rates to be reimbursed: The Department's guidance does not clearly define the billing rates that should be considered – the term "minimum applicable contract billing rates" as used in the statute. The guidance should be interpreted as applying to costs *that are incurred as a consequence of granting paid leave*, including all such costs, including overhead and indirect costs.
 - a. Proposed Solution: *Department guidance could specify that "the term 'minimum applicable contract billing rates' as used in the statute means an employee's base hourly wage rate, plus indirect costs, fees, and general and administrative expenses."*
2. Reimbursement for fixed price contracts and delayed deliverables: The current guidance documents' focus on paid leave at appropriate time & material rates does not clearly explain how to account for, or schedule payment for, labor on firm fixed price contracts. Similarly, it does not address whether/how to account for contracts that require a deliverable if such deliverable is provided late or cannot be provided at all due to COVID-related restrictions.
 - a. Proposed Solution: *Implementation guidance could clarify these situations with two statements:*
 - i. *(1) Where no minimum billing rate is specified, the statute's reference to reimbursement at "the minimum applicable contract billing rates" should be interpreted as the contractor's standard burdened rates; and*
 - ii. *(2) If a contractually required deliverable cannot be completed because of COVID-19 restrictions, progress payments should continue on the contract's original schedule, and no penalties for late delivery should be imposed.*

3. Stop-work orders: Current guidance does not clearly address stop-work orders issued by the government based on a determination that the work is not sufficiently essential to continue in the current environment. In the case of a stop-work order issued because the government has reprioritized or reassessed its requirements in light of the COVID-19 health emergency, the specific purpose of stopping work would not be to keep employees in a ready state per paragraph (b)(1)(i), since the work is not to be continued; nevertheless, in such cases the government's decision to stop work would protect life and safety per paragraph (b)(1)(ii) by minimizing contractors' exposure, which would seem to permit reimbursement.
 - a. *Proposed Solution: This situation could be clarified by implementation guidance that states, "Payment of contractor costs is allowable if the government issues a stop-work order because COVID-19 has led the government to reassess the need for the work in the current environment."*
4. Representation regarding relief sought: The DPC Memorandum that attaches the class deviation requires contracting officers to secure representations from contractors regarding any relief they have sought or may seek under other COVID-19-related legislation. The class deviation does not address this representation for either contractors or their subcontractors.
 - a. *Proposed Solution: We recommend that Department FAQs include this guidance:*
 - i. *That COs be authorized to accept a single representation from a contractor at the time that contractor is deemed an "affected contractor," as opposed to periodically or with each invoice.*
 - ii. *That COs be required to seek and be authorized to accept the following representation: "Contractor represents that the costs for which it seeks reimbursement are not now and will not in the future be the subject of a contractor request for relief under any other COVID-19-related legislation, and that subcontractor will obtain the same or similar representations for each subcontractor whose costs are included in the contractor's claim for reimbursement."*

As INSA member firms continue to identify challenges with 3610 implementation, we will be happy to share these insights with you. Thank you for your willingness to consider industry suggestions.

Very truly yours,



Larry Hanauer
Vice President for Policy