



April 21, 2020

MEMORANDUM FOR GSA CONTRACTING ACTIVITIES

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SUBJECT: GSAR Class Deviation - CARES Act Section 3610 Implementation

1. Purpose.

This memorandum approves a class deviation from the General Services Administration Acquisition Regulation (GSAR) to provide guidance to implement Section 3610 of the Coronavirus Aid, Relief, and Economic Security Act (CARES Act) (Pub. L. 116-136) (See Attachment A) regarding paid leave reimbursement authority to contractors for Novel Coronavirus Disease 2019 (COVID-19). In addition to guidance, this memorandum prescribes a contract clause which implements controls.

2. Background.

Section 3610 of the CARES Act 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, for COVID-19 during a specified time period discussed below.

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 of Section 3610 of the CARES Act (Section 3610). 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.

Recognizing the importance of the mission support, services, and facilities GSA provides to agencies throughout the Federal Government, GSA has already taken numerous aggressive measures to ensure contractor safety while keeping GSA contractors performing their work.

Steps such as actively promoting telework, GSA's critical infrastructure policy¹, accelerating payments², and a series of FAR and GSAR class deviations to aid contractors have permitted GSA to keep stop work orders or suspension of work orders to a minimum. As a result of GSA's aggressive actions, nearly all GSA contractors are able to continue to perform their work safely and, thus, paid leave is not at issue as to those contracts.

Therefore, GSA, itself, does not expect significant use of the paid leave reimbursement authority. However, both in establishing contracts for use by other agencies and in performing assisted acquisition, it is important for GSA to establish clear direction.

This deviation provides instructions for GSA Contracting Officers (CO) to follow in determining when to include the paid leave reimbursement authority in contracts. It provides the process to consider a contractor's request and a new GSAR clause if using the Section 3610 authority. For GSA Government-wide Indefinite Delivery Vehicles (such as Federal Supply Schedules, GWACs, OASIS, etc.) it makes clear that the Section 3610 authority applies at the order level. For assisted acquisition, it sets forth guidelines for when a requesting agency has and has not issued its own implementation for Section 3610.

3. Authority.

This class deviation is issued under the authority of General Services Administration Acquisition Manual (GSAM) 501.404.

4. Deviation.

See Attachment B for the new GSAR clause created by this deviation.

5. Effective Date.

This deviation is effective immediately.

The authority may only be used for leave that a contractor has provided during the period of March 27, 2020 through September 30, 2020.

¹ See SPE Memo [SPE-2020-08](#).

² See class deviation [CD-2020-08](#).

6. Scope and Applicability.

This deviation applies to FAR-based contracts and agreements³. It does not apply to non-FAR based contracts such as the leasing of real property.

This deviation does not apply to indefinite delivery vehicles (IDVs) at the contract level. However, it may apply to task orders issued under an IDV (See Section 9.F for additional information on IDVs).

For assisted acquisitions (See Section 9.C. for required approvals):

- If the requesting agency has a policy to implement the authority in Section 3610, based upon instruction from the requesting agency, GSA contracting activities shall use the requesting agency's policy, unless the GSA HCA and the requesting agency agree to use GSA's policy.
- If the requesting agency does not have a policy implementing Section 3610 authority, but wishes to authorize reimbursement of paid leave, the contracting activity shall follow the guidance in this deviation.

Due to the nature of programs across GSA, Heads of Services, on a non-delegable basis, may issue a determination identifying the program(s) otherwise within the scope of and covered by this deviation for which the Head of Service determines it is not in the interest of the Government to exercise the discretionary authority of Section 3610 and the associated rationale. The Head of Service shall notify spe.request@gsa.gov of any such determination; determinations will be available at <http://gsa.gov/node/133315>.

The CARES Act does not allocate or provide any specific funding for this authority. Therefore, GSA'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.

Reimbursement is only for contractor paid leave to its employees or subcontractors "to maintain a ready state, including to protect the life and safety of Government and contractor personnel," and applies only to a contractor whose employees or subcontractors:

- Cannot perform work on a Government-owned, Government-leased, contractor-owned, or contractor-leased facility or site approved by the Federal Government for contract performance due to closures or other restrictions, and
- Are unable to telework or otherwise work remotely because their job duties cannot be performed remotely during the public health emergency.⁴

³ Per FAR Subpart 16.7: Agreements are written instruments of understanding containing contract clauses (not an actual contract), applying to future contracts. They may contemplate separate future contracts; descriptions of supplies or services to be provided; and/or methods for pricing, issuing, and delivering future orders. The two main agreement strategies are: Basic Agreement and Basic Ordering Agreements.

⁴ See CARES Act Section 3610.

7. Contracting Officer Considerations.

Paid leave authority is discretionary not mandatory. Therefore, if a contractor submits a request, the COs must determine whether or not to use the authority to reimburse affected contractors for paid leave. The spread of COVID-19 may affect contractors in several ways, so communication with contractors is critical during this period of uncertainty. There are various considerations a CO must weigh when determining how to move forward taking into consideration the challenges a contractor may be facing and what is in the best interest of the Government.

- A. Determine if the contractor is eligible for reimbursable paid leave on a contract by contract basis.
 - Check the list of programs referenced in Section 6 (at <http://gsa.gov/node/133315>) to determine whether Heads of Services have made a decision that Section 3610 is not applicable to the program/contract.
 - If the work can be performed by telework or other remote means, you should authorize the contractor to telework or use such other remote means. Such contractors are not eligible for reimbursement under Section 3610. Further, leave provided for contractor employees who choose not to telework or work remotely is not eligible for reimbursement.

- B. Determine if it is in the Government's best interest to keep the contractor in a ready state.
 - Determine the impact on the mission if contractors are unable to perform critical operations.
 - Consider 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.
 - Consider where the contract is in its lifecycle, such as contract expiration.
 - Weigh the costs and benefits of using the Section 3610 reimbursement authority and discuss the opportunity costs with your program office.

- C. Determine if the requested reimbursable paid leave on a contract is appropriate.
 - 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.

- 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. COs should discuss with the contractor what other assistance a given contractor has utilized, and use that in determining whether and how much to reimburse.
- The Government is required to reduce the maximum reimbursement authorized by this deviation by the amount of credit a contractor is allowed under the CARES Act or Division G of the FFCRA. The CO is not required to determine this in advance of making payment. The clause in Attachment B will require the contractor to notify the CO and repay any double payment.
- The CO shall consider the information provided by the contractor to evaluate whether or not the contractor request is eligible for the reimbursement for paid leave and whether the CO should provide reimbursement.

8. Additional Authorities.

As described above, GSA expects limited use of the paid leave reimbursement authority; use of this deviation should be only contemplated after other methods to maintain key contractors in a ready state have been considered. Other authorities to assist contractors and ensure best use of Government funds can instead be used such as:

- Delivery schedule extensions, option extensions, and contract extensions as other means to ensure continuation of a robust industry supply base.
 - Delivery schedule extensions can be combined with progress payments to increase immediate cash flow.
 - Other contract extensions can provide the contractor with additional support for their banking institutions to improve loan terms and increase cash flow.
- Use progress payments as applicable. GSA plans to issue a Class Deviation CD-2020-09 to increase caps on progress payments to 90 percent for large business concerns and 95 percent for small business.
- 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 Class Deviation CD-2020-08.

9. Contracting Officer Requirements.

For applicable contracts where this deviation may be used, the request will be initiated by the contractor submitting a request. COs shall refer contractors to the clause in Attachment B, which will be used to modify contracts as necessary. The clause includes safeguards such as the requirement that the contractor repay double reimbursements, and to allow audits.

A. Request from Contractor

When a CO receives a contractor request for reimbursement for paid leave, the CO should consider the items noted in Sections 6, 7, and 8 above.

The CO shall obtain a representation from the contractor in accordance with the clause in Attachment B.

B. Funding Availability and Impact

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 requirement owner and/or the COR.

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.

C. Obtain Approval

- For GSA-funded actions, the HCA must approve before execution of the modification to include clause 552.222-70. The CO must ensure any additional funding is approved in Pegasys or EASi.
- For assisted acquisitions, the use of this authority must be explicitly identified and agreed upon, the requesting agency must certify the funds, and the acquisition strategy must be approved by the GSA HCA before execution of the modification to include clause 552.222-70.

D. Contract File Documentation

- The CO 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 clause 552.222-70.

E. Modify the Contract

- For contracts where this deviation will be used, modify contracts to incorporate the clause found in Attachment B.

F. Reimbursement by Contract Types

If the CO 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. The reimbursement will be evaluated based on contract type:

- Fixed Price: COs 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.
- Time and Materials or Labor Hour: COs 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.
- Cost-Reimbursement: COs shall create a separate line item for cost. COs 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.
- Indefinite Delivery Vehicles (IDVs): This deviation may apply to task orders issued under IDVs. However, because Section 3610 specifies use of “minimum applicable contract billing rates”, (e.g. Federal Supply Schedule, GWAC) rates would not change. If the ordering agency negotiated a lower hourly rate, then that lower hourly rate becomes the minimum applicable contract rate for the purpose of this authority.

G. Double Reimbursement

The clause in Attachment B requires the contractor to refund the Government if the contractor receives reimbursement herein and also receives employment tax credits under Division G of the FFCRA or elsewhere in the CARES Act.

H. Reporting

The CO shall report the following for each contract action where Section 3610 CARES Act is used:

- Any contract actions (new awards or modification) shall write “COVID-19 3610” in the beginning of the description field (Field 6M) in the FPDS contract action report.
- In addition to the FPDS report, any contract action shall be reported to OGP using the [CARES Act Section 3610 Paid Leave Summary Google Sheet](#).

10. Point of Contact.

Any questions regarding this deviation may be directed to GSARPolicy@gsa.gov.

Attachments Attachment A – CARES Act, Section 3610 Federal Contractor Authority
Attachment B – Line-In/Line-Out, GSAR Text

**ATTACHMENT A
CARES ACT
SEC. 3610. FEDERAL CONTRACTOR AUTHORITY
FOR CLASS DEVIATION CD-2020-12**

Coronavirus Aid, Relief, and Economic Security Act (CARES Act) (Pub. L. 116-136)

Section 3610. 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.

ATTACHMENT B
GSAR DEVIATION LINE-IN/LINE-OUT TEXT
FOR CLASS DEVIATION CD-2020-12

GSAR Baseline: Change 106 effective 02/19/2020

- Additions to baseline made by deviation are indicated below

552.222-70 CARES Act Sec. 3610 Paid Leave Reimbursements (APR 2020)

(a) Definitions:

(1) Affected contractor: shall mean 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, 2020.

(2) Applicable rate: shall mean the lowest contract billing rate for the specific applicable work categories for which reimbursement is requested.

(3) Applicable work: shall mean 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 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, 2020, and such work cannot be performed using telework or other remote means.

(4) Reimbursable leave: shall mean any paid leave, including sick leave, which an affected contractor provides during the period of March 27, 2020, through September 30, 2020, 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: shall mean the amount of any credit received by an affected contractor pursuant to any section of the Coronavirus Aid, Relief, and Economic Security (CARES) Act of 2020 or division G of the Families First Coronavirus Response Act of 2020.

(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, 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 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, 2020. 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 subcontractor's employees. Where practicable, it shall not include profit or fees. It 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 clause 552.222-70.

(B) If the contractor receives 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 (3) 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 and audit all the pertinent records and affected contractor employees.

(f) Repayment: The affected contractor is not allowed to keep any double reimbursements after the application of covered credits. Therefore, if the affected contractor receives 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)