It seems like a long time ago, but it was only March when President Trump signed into law the Coronavirus Aid, Relief, and Economic Security Act, also known as the CARES Act. Particularly relevant to government contractors was Section 3610, which threw "an immediate lifeline to qualifying firms whose workforce has been displaced by coronavirus COVID-19 shutdowns," according to one legal summary. The statutory lifeline permits contracting officers to pay contractors to keep their workforces in a ready state by treating certain paid leave costs as allowable direct labor costs, even if the impacted contracts would not ordinarily permit direct reimbursement of those costs.

Since then, we have been reporting on issues and concerns and interesting tidbits associated Section 3610. Of special note has been the DOD's struggles to figure out how to implement Congressional direction.

DOD has published several Class Deviations, FAQs, and other guidance intended to address the conundrum we discussed in **this article** —i.e., that "any [Section 3610] payments must come out of funds already appropriated for the contract's SOW. In other words, the contracting officer has to decide which is more important: funding the work that was planned or funding the contractor employees' stand-by time. It is fairly obvious that as the contractor employee's stand-by time is funded, there is less money left to perform the work that was contracted-for."

DOD keeps publishing its documents and we keep criticizing those documents, saying that they are either superfluous or else don't address the real issues. This article will not be an exception.

Thus, when DOD published a new (undated) **Class Deviation** (No.2020-O0021) addressing Section 3610 contractor reimbursement requests, and when DOD
revised
a previous Class Deviation, and when DOD
updated
its FAQ, readers should not be surprised that we were unimpressed.

First, the new (undated) Class Deviation.

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Stated that the earliest date for reimbursable Section 3610 costs is March 27, 2020, despite earlier guidance that said the earliest date was the date of the National Emergency

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Stated that the final date for reimbursable Section 3610 costs is September 30, 2020

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Established three tracks for reimbursement:

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Abbreviated: individual contract reimbursement less than $2 million

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Multipurpose: individual contract reimbursement greater than $2 million, or multiple contract reimbursements aggregated into one request

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Global: business unit or business segment aggregation of all contracts

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Stated that prime contractors are responsible for analyzing and including all subcontractor claims for reimbursement in their prime contract Section 3610 reimbursement request

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Had additional requirements and certifications for the contractor seeking reimbursement to execute

Second, the revised Class Deviation.

- Revised the earliest date for reimbursement of Section 3610 costs to March 27, 2020, despite the language in the prior version of the Class Deviation

- Added a new paragraph to the DFARS cost principle associated with Section 3610 reimbursements (252.231-79). The new paragraph (b)(7) "clarifies" that "the allowable [Section 3610] amount is limited to the amount of funds specifically obligated on a separate line item that cites the purpose of the funds is for reimbursement under section 3610 of the CARES Act."

Finally, the updated/revised FAQ. Basically, all changes conform the FAQs with the new and revised Class Deviations. That's not to say that's all there is – because there is more – but there is not much of interest to us.

Now, the criticism.

Let's start with the new DFARS cost principle, 252.231-79. How, exactly, is that cost principle to be applied? Let's be clear: any contract that was impacted by COVID-19 almost certainly was awarded before the National Emergency was declared. If that's the case, then the contract was awarded with the cost principles in effect at that time—i.e., there was no 252.231-79 cost principle at the time the contract was awarded. The Allowable Cost and Payment clause requires that "The Government will make payments to the Contractor when requested as work progresses … in amounts determined to be allowable by the Contracting Officer *in accordance with Federal Acquisition Regulation (FAR) subpart 31.2 in effect on the date of this contract* and the terms of this contract." (Emphasis added.)

In other words, that's a nice shiny new DFARS cost principle, but it's very likely that contractors with Section 3610 reimbursement payments will not have to comply with it.

The next issue we raise is with respect to the new cost principle paragraph (b)(7). It states "the allowable [Section 3610] amount is limited to the amount of funds specifically obligated on a separate line item that cites the purpose of the funds is for reimbursement under section 3610 of the CARES Act." Now if that were a contract term, it might make some sense. As in "allowable Section 3610 amounts to be reimbursed *under this contract* are limited to …" Okay. That would be saying that the contractor can seek reimbursement only for the amounts funded. That would work.

But to put that in a cost principle seems to imply that the costs are unallowable unless they are funded. That simply does not work. We don't use funding to determine cost allowability; at least, that's not how any of the other cost principles work. A cost is allowable or it is not. Allowable costs may be reimbursed up to, but not in amounts exceeding, the funding provided. That's how it works. The new language sets a standard not found in the FAR cost principles and, indeed, seems to conflict with the language of FAR 31.201-2 (Determining Allowability), which establishes five criteria for determining allowable costs. None of the five criteria mention funding.

And although the new cost principle was issued via Class Deviation (which permits an agency to conflict or be inconsistent with FAR cost principles), the new cost principle was not published in the Federal Register and no public comment was solicited. This appears to violate the requirements of FAR 1.301(b) and the requirements of 41 U.S.C. §1707. Since there was no finding that the public comment requirements needed to be waived because of urgent and compelling circumstances, some might argue that the cost principle is unenforceable.

So whether you say the cost principle was promulgated illegally and is therefore unenforceable, or that the cost principle cannot apply to contracts issued prior to its creation, the DOD would seem to have a problem on its hands.

Meanwhile, contractors—including defense contractors—are getting ready to start submitting their Section 3610 reimbursement requests.

We hope the DOD and its DCMA contracting officers are ready.