



**Federal Aviation
Administration**

Memorandum

Date: April 17, 2020

To: AAQ, AAP, APM, AFN, and AGC

From: Nathan Tash, Deputy Assistant Administrator for Acquisition and Business Services (ACQ-1)

Subject: **Managing the Impacts of the Novel Coronavirus on FAA Contracts and Interim AMS Guidance – CARES Act Section 3610 Implementation**

The historic challenges of the novel coronavirus (COVID-19) pandemic have impacted the cost, schedule and performance of many FAA contracts. The impacts are varied, and contractors may experience increased costs, both in contract performance and as a result of costs incurred maintaining a “mission-ready” workforce.

In these unprecedented times, it is the FAA’s policy to balance the imperatives of expediency and good stewardship. The FAA acknowledges the immediate burden of its contractor-community and the need to exercise prudence in distribution of federal funds. To achieve these goals, this memo provides the Procurement Team guidance on addressing the impacts of COVID-19.

Existing AMS Provisions to Manage Contract Impacts

The Acquisition Management System (AMS) provides policy and guidance to address contractual impacts related to the COVID-19 related disruption. FAA contracts contain clauses that allow for Excusable Delays, AMS 3.10.6-7, and/or requests for equitable adjustment under AMS clauses for Stop Work, Termination, or Changes. Contractors may request relief under one or more clauses. The Contracting Officer (CO) is advised to review each request in terms of the particular contract clause, and to respond accordingly.

Under the Excusable Delay clause, the Contractor’s failure to perform *solely* as a result of COVID-19 epidemic is excusable; thus, the contract may be extended or terminated for

convenience at the CO's discretion. If the CO opts to extend the contract's period of performance, he/she may issue a non-compensable extension of time under this clause.

Requests for Equitable Adjustment (REAs) for the increased costs of performance under the Stop-Work, Suspension of Work and/or Changes Clauses must be considered on a case-by-case basis. In the instant case, a contractor may claim costs associated with Stopping/Suspending Work and for securing the site, or for costs associated with unanticipated telework requirements. As always, the CO is responsible for reviewing claim costs and determining whether each claim is allowable, allocable, and reasonable.

Maintaining Contractors in a "Mission-Ready" State – The CARES Act and Guidance for FAA Contracts and subsequent Implementation of Interim Guidance

In addition to, or in place of, the costs referenced above, contractors may seek relief for costs associated with maintaining contractors in a "mission-ready" state, as their employees are unable to access work sites, or because their employees are unavailable due to quarantine restrictions. On March 27, 2020, the President signed into law the Coronavirus Aid, Relief, and Economic Security (CARES) Act (Pub. L. 116-136), which allows contractors to make this type of compensation request.

Specifically, Section 3610 of the CARES Act provides agencies with the discretion to use any available funds appropriated under the CARES Act or other laws to modify affected contracts (without requiring consideration) **to reimburse paid leave, including sick leave, for contractor employees that cannot access work sites or telework in order to keep its employees or subcontractors in a ready state.** (Attachment 1). Section 3610 is included for reference.

Section 3610 provides many flexibilities for agency contracting officers, including the authority to:

- Enable the contractor to stay in a ready state (i.e. be ready to perform in a timely manner) by treating as allowable paid leave costs a contractor incurs to keep its employees and subcontractor employees in such a state;
- Use any "funds made available to the agency" by Congress to reimburse contractors for workers' lost time, not otherwise reimbursable, between January 31, 2020, and September 30, 2020, if the contractor provides 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 Office of Management and Budget Memorandum M-20-18, *Managing Federal Contract Performance Issues Associated with the Novel Coronavirus*, dated March 20, 2020;

- Modify contracts to provide for reimbursement of allowable paid leave costs, not otherwise reimbursable, without securing additional consideration; and
- Provide such reimbursement on any contract type.

Section 3610 also provides specific limitations on reimbursements:

- A contractor may only receive reimbursement if its employees or subcontractor employees:
 - ✓ 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 because their job duties cannot be performed remotely during the public health emergency declared on January 31, 2020, for COVID-19.
- Reimbursement is authorized only:
 - ✓ At the appropriate rates under the contract for up to an average of 40 hours per week; and
 - ✓ For contractor or subcontractor payments made for costs incurred, not otherwise reimbursable, not earlier than January 31, 2020, and not later than September 30, 2020;
- The Government must reduce the maximum reimbursement authorized by the amount of credit the contractor is allowed pursuant to division G of the Families First Coronavirus Response Act (Pub. L. 116-127) and any applicable credits the contractor is allowed under the CARES Act or other credit allowed by law that is specifically identifiable with the public health emergency declared on January 31, 2020 for COVID-19¹; and
- Reimbursement is contingent upon availability of funds.

¹ Some contractors may receive compensation from other provisions of the CARES Act, or other COVID-19 relief scenarios, including tax credits, and contracting officers 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 a small business 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 such a case, the small business would not be entitled to reimbursement for the payment from FAA using the provisions of section 3610.

The CARES Act allows for, but does not mandate, reimbursement of paid leave to contractors even if services cannot be provided in order to maintain employees in a ready state. The Agency appreciates that under certain circumstances, unique to each program, such reimbursement may be in the best interests of the government. For these reasons, program offices and contracting officers should consider the immediacy of the specific circumstances of the contractor involved and respond accordingly. The survival of many of the businesses the CARES Act is designed to assist may depend on this efficiency. For example, the impact of COVID-19 on a contractor providing labor services will differ from the impact on a contractor that develops information systems. Some contractors may be unable to conduct any business during the COVID-19 pandemic. As a result, such contractors would generate no new revenue, and may have difficulties making payroll, retaining employees, and meeting other financial obligations. In contrast, other contractors may still have incoming revenue, and be able to conduct work remotely. While impacts will certainly be experienced by many contractors, some will have a more immediate need for relief than others. These are some of the factors that the Procurement Team may consider with each REA for costs incurred to maintain a contractor in a “mission-read” state.

To assist in implementation, the attached interim AMS Guidance, Allowable Cost under CARES Act Section 3610, is effective immediately (Attachment 2).

The Agency’s contracting officers are trusted and empowered to make decisions regarding contractual adjustments. Both during and after the COVID-19 emergency, contracting officers must work closely with our customers and industry partners to ensure continuity of operations and mission effectiveness as we provide critical support for the National Airspace System.

CONTACT FOR QUESTIONS. Contracting Officers (COs), may forward questions to their management, who will respond or consult with AAQ/AAP management, as needed.

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Attachment (1) CARES Act, Section 3610, Federal Contractor Authority

Attachment (2) Interim AMS Guidance-Allowable Cost under CARES Act Section 3610

ATTACHMENT 1

CORONAVIRUS AID, RELIEF, AND ECONOMIC SECURITY ACT (CARES) ACT

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 <https://www.congress.gov/bill/116th-congress/house-bill/6201/> and any applicable credits a contractor is allowed under this Act.

ATTACHMENT 2

Interim AMS Guidance-Allowable Cost under CARES Act Section 3610

(a) *Applicability.*

(1) This cost principle applies only to a contractor:

i. that the cognizant contracting officer has, by written finding, established to be affected;

ii. whose employees or subcontractor employees:

(A) 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

(B) Are unable to telework because their job duties cannot be performed remotely during the public health emergency declared on January 31, 2020, for Coronavirus (COVID-19).

(2) The maximum reimbursement authorized by Section 3610 shall be reduced by the amount of credit a contractor is allowed pursuant to division G of the Families First Coronavirus Response Act (Pub. L. 116- 127) and any applicable credits a contractor is allowed under the CARES Act (Pub. L. 116-136) or other credit allowed by law that is specifically identifiable with the public health emergency declared on January 31, 2020 for COVID-19.

(3) Reimbursement of allowable costs under this guidance are contingent upon availability of funds.

(b) *Allowability.*

(1) Notwithstanding any contrary provisions of AMS Guidance T3.3.2, Contract Cost Principles, costs of paid leave (including sick leave), are allowable at the appropriate rates under the contract for up to an average of 40 hours per week, and may be charged as direct charges, if appropriate, if incurred for the purpose of:

i. Keeping contractor employees and subcontractor employees in a mission ready state, including to protect the life and safety of Government and contractor personnel, notwithstanding the risks of the public health emergency declared on January 31, 2020, for COVID-19, or

ii. Protecting the life and safety of Government and contractor personnel against risks arising from the COVID-19 public health emergency.

(2) Costs covered by this section are limited to those that are incurred as a consequence of granting paid leave as a result of the COVID-19 national emergency and that would not be incurred in the normal course of the contractor's business. Costs of paid leave that would be incurred without regard to the existence of the COVID-19 national emergency remain subject to all other applicable provisions of AMS Guidance T3.3.2. In order to be allowable under this section, costs must be segregated and identifiable 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.

(3) Covered paid leave is limited to leave taken by employees who otherwise would be performing work on a site that has been approved for work by the Federal Government, including on a government-owned, government-leased, contractor-owned, or contractor-leased facility approved by the federal government for contract performance; but

i. The work cannot be performed because such facilities have been closed or made practically inaccessible or inoperable, or other restrictions prevent performance of work at the facility or site as a result of the COVID-19 national emergency; and

ii. The employee is unable to telework because their job duties cannot be performed remotely during public health emergency declared on January 31, 2020, for COVID-19.

(4) The facility at which work would otherwise be performed is deemed inaccessible for purposes of paragraph (b)(3) of this guidance to the extent that travel to the facility is prohibited or made impracticable by applicable Federal, State, or local law, including temporary orders having the effect of law.

(5) The paid leave made allowable by this section must be taken during the period of the public health emergency declared on January 31, 2020, for COVID-19, up to and including September 30, 2020.

(6) Costs made allowable by this section are reduced by the amount the contractor is eligible to receive under any other Federal payment, allowance, or tax or other credit allowed by law that is specifically identifiable with the public health emergency declared on January 31, 2020, for COVID-19, such as the tax credit allowed by division G of Public Law 116-127.

(c) Implementation

(1) A program office that wants to reimburse contractor leave payments, in order to maintain a mission-ready contractor workforce, should contact their contracting officer (CO) and provide the CO with a brief rationale why it is in the Government's best interest to continue payment and an indication that the program office understands that increased funding to provide for such payments is unlikely to be available. The rationale must be approved at the Executive level within the program office.

- (2) A contractor may contact the CO directly and request equitable adjustment relief, citing Section 3610 of the CARES Act. Any such request shall be forwarded to the program office for consideration. If the program office supports the contractor's request for reimbursable leave payments, the program office must provide the rationale for such payment as described above to the CO.
- (3) The CO shall request from the contractor a proposal, in writing, to include the following:
 - i. A brief explanation why the requested reimbursement is consistent with the Act;
 - ii. A breakdown of the proposed relief in terms of employees, direct labor rates, number of labor hours requested for reimbursement, and any associated benefit/fringe costs (Profit and/or fee are not recoverable for purposes of these costs); For construction contracts, the Contractor may submit a labor cost breakdown based upon an average of the last three active weeks of the project;
 - iii. Identification of the method used to segregate and allocate reimbursed leave costs; including any costs incurred on or after 31 January 2020 if reimbursement is requested from the date of the National Emergency Declaration. Costs incurred shall be supported by evidence such as timecard records;
 - iv. Any adjustment applied to reduce the proposed relief amount related to the amount of credit a contractor is allowed pursuant to Division G of Public Law 116-127 and any other applicable credits, and
 - v. Certification as provided in section (d) of this guidance.
- (4) The CO shall review the contractor's proposed reimbursement costs and consult with the program office, acquisitions counsel, and the Cost and Price Analysis Division, as applicable. Any questions regarding the proposed costs are to be resolved expeditiously with the contractor.
- (5) Subject to program office approval, available funding, and the CO determination that the proposed amount is allowable, allocable and reasonable, the CO may bilaterally modify the contract to authorize the contractor to invoice the approved amount.
 - i. If the modification is solely for maintaining contractors in a "mission ready" state, then the SF-30 should cite the appropriate CHANGES CLAUSE (See AMS 3.10 CONTRACT ADMINISTRATION) and the CARES Act, Pub. L. 116-136, Section 3610. If the modification makes an adjustment for other costs associated with COVID-19, then the CO should cite the appropriate clause(s) as authority.
- (6) In the BODY OF THE MODIFICATION, The CO should incorporate the Contractor's supporting documentation, and outline the terms of the Agreement (if payments are going to be made, when and for how long). Given the uncertainty of pandemic situation, the CO should only authorize reimbursement of contractor costs for a period of thirty (30) days at a time, or for a specified amount for costs already incurred. The CO and program office must ensure that funds are still available prior to the CO extending the

authorization in writing for another 30 days. If no funding is available, the authorization cannot be extended. This must be made clear in the contract modification.

- (7) Payments may be made against existing obligations under any contract line item (CLIN), and are invoiced as Other Direct Costs. If additional funding is provided, the modification should establish a separate cost-reimbursable CLIN for the authorized payment amount.
- (8) At the end of the period for which the contractor is provided reimbursement payments, the overall amount paid to the contractor must be reconciled. The contractor must submit a certification as to any credits allowed pursuant to division G of the Families First Coronavirus Response Act (Pub. L. 116– 127) and any applicable credits allowed by law that are specifically identifiable with the public health emergency declared on January 31, 2020 for COVID–19. The revised amount will be incorporated via contract modification revising the authorized reimbursement amount, and adjustments through an invoice or credit applied accordingly.

(d) *Certification*

I (Contractor) hereby certify, to the best of my knowledge and belief, that-

- (1) This request arises exclusively from costs that would not have otherwise been incurred but for the COVID-19 national emergency;
- (2) The requested relief is recoverable by the CARES Act, Section 3610;
- (3) The amount requested is accurate, complete, current, and fully allowable under the CARES Act, Section 3610;
- (4) The requested relief does not include any amounts recoverable under any other provision of the CARES Act;
- (5) The Contractor has not sought, and does not intend to seek additional economic aid from any source for the same purposes for the same time period of this request;
- (6) If after the FAA provides the requested relief, the Contractor receives other economic aid (to include tax credits) for the same purposes and for the same time period of this request, the Contractor will promptly notify the FAA and, if determined necessary by the Contracting Officer, reimburse the FAA for any duplication in recovery; and
- (7) The Contractor acknowledges the application of AMS Clause 3.2.2.3-8, Audit and Records (July 2010), wherein the Contracting Officer or authorized representatives of the Contracting Officer, in order to evaluate the accuracy, completeness and currency of the cost data, shall have the right to examine and audit all of the Contractor's records.

Signed:

(Name) _____

(Title) _____

(Date) _____