

CARES Act's "Ready State" Provision – The Government to Pay Federal Contractors for Unperformed Work?

by Alex Hontos, Chris DeLong, and Caitlin L.D. Hull

Although the SBA and Federal Reserve lending programs are getting the most coverage, a provision buried in the nearly 900 page Coronavirus Aid, Relief, and Economic Security ("CARES") Act might have more immediate and important affect for existing Federal contractors. Section 3610 of the CARES Act authorizes federal agencies to modify contracts and other agreements with contractors to reimburse contractors for the costs of keeping its "employees and subcontractors" in a "ready state" during the COVID-19 crisis.

There are several notable considerations and unknowns on this potential reimbursement, however.

First, the modification and reimbursement appears to be discretionary. An agency "may" exercise its authority under Section 3610. Second, the reimbursement rate is limited to minimum applicable contract billing rates and cannot exceed an average of 40 hours per week, presumably per affected employee. Thus, the extent of this benefit will be different for each contractor and may not amount to a full reimbursement of the actual cost of the paid leave. Third, to be reimbursable, paid leave must have been provided to keep employees or subcontractors in a "ready state, including to protect the life and safety of Government and contractor personnel." Although only limited guidance exists as to which contractors must be maintained in a "ready state," the White House recently emphasized the importance of maintaining the readiness of "skilled professionals or key personnel" and the Defense Department has declared that the entire defense industrial base is "essential." Fourth, the authority applies where a contractor's employees or subcontractors are unable to perform work on their approved worksite because of facility closures or other restrictions. As a corollary, this authority does not apply to teleworkers or those whose work can be performed remotely. Fifth, reimbursements under Section 3610 must be offset by any other credits a contractor receives under the CARES Act or the Families First Coronavirus Response Act. Finally, the reimbursement authority extends only to September 30, 2020.

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- Alex Hontos
- Chris DeLong
- Caitlin L.D. Hull

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Beyond these limitations, this untested authority and the text of Section 3610 do offer notes of caution. The text does not provide a definition for “facility closures” or “other restrictions.” It is unclear whether orders to stay home, curfews, or other limits on commerce from state or local authorities will qualify. Similarly, agencies have no current guidance in determining whether paid or sick leave was used to keep employees or subcontractors in a “ready state.” It is unclear who should make that determination and whether a decision simply to offer paid or sick leave in lieu of layoffs would be covered.

But with these limitations and unknowns is real promise: the potential for a revenue source for contractors to maintain their personnel even if they are unable to perform their Federal contracts during the pendency of the COVID-19 crisis.