



ACQUISITION LETTER

This Acquisition Letter is issued under the authority of the Senior Procurement Executives of DOE and NNSA. It is intended for use by procurement professions of DOE and NNSA, primarily Contracting Officers, and other officials of DOE and NNSA that are involved in the acquisition process. Other parties are welcome to its information, but definitive interpretations of its effect on contracts, and related procedures, if any, may only be made by DOE and NNSA Contracting Officers.

Subject: Post CARES ACT Paid Leave Costs

Reference:

FAR Part 31 – Contract Cost Principles and Procedures

When is this Acquisition Letter (AL) effective?

This Acquisition Letter (AL) is effective immediately upon issuance.

When does this AL expire?

This AL remains in effect until superseded or canceled.

Who is the intended audience for this AL?

Contracting Officers (COs) within the Department of Energy (DOE) and the National Nuclear Security Administration (NNSA) are the intended audience.

Who are the points of contact?

For DOE Contracting Officers, contact MA-611, DOE_oapmpolicy@hq.doe.gov.

For NNSA Contracting Officers, contact Ariane S. Kaminsky, Ariane.Kaminsky@nnsa.doe.gov and Drake Russell, Drake.Russell@nnsa.doe.gov.

For additional information on ALs and other issues, visit our website at:

<http://energy.gov/management/office-management/operational-management/procurement-and-acquisition>

What is the purpose of this AL?

The purpose of the AL is to provide guidance to DOE/NNSA COs regarding the allowability of paid leave costs, including those defined in Section 3610 of the CARES Act, after September 30, 2021 (the date agencies may use Section 3610 as the authority for recognizing the costs Section 3610 covers as allowable).

What types of M&O and non-M&O contracts are affected by this AL?

All types of M&O contracts and non-M&O contracts are affected by this AL.

What is the background information?

The CARES Act's Section 3610 and OMB's Guidance

The CARES Act's Section 3610 and OMB's guidance on the paid leave costs related to the COVID-19 pandemic recognized that paid leave costs were not expressly unallowable costs. In its guidance (OMB's memoranda are discussed below in the "Discussion of OMB's Guidance on Reimbursement of Contractor Paid Leave" section), OMB emphasized that agencies and Contracting Officers have discretion to reimburse contractor paid leave, particularly to maintain the resilience of the federal contracting base and to keep contractor personnel in a ready state so that the contractor could resume supporting the agency's mission as soon as possible when circumstances permitted. OMB did not require agencies to reimburse contractor paid leave costs; OMB recognized that agencies must make that decision based on whether or not it was in the Government's best interest.

General Discussion of Cost Allowability Requirements

FAR's five requirements for a cost to be "allowable."

A cost is "allowable" only if it complies with each of FAR's five requirements:

Reasonableness;

Allocability;

Applicable cost accounting standards and appropriate generally accepted accounting principles and practices;

The terms of the contract; and

The limitations in FAR subpart 31.2. These include the limitations in FAR 31.205 "Selected costs," which include expressly unallowable costs. Examples are alcohol costs (always expressly unallowable), lobbying costs (mostly expressly unallowable), and compensation costs (expressly unallowable above stated amounts).

Paid leave costs are not expressly unallowable costs.

Paid leave costs are not expressly unallowable. Therefore, in determining paid leave costs' allowability, if the costs are otherwise allowable and a Contracting Officer elects to reimburse them, it is not important whether the Contracting officer treats them like all other costs that are otherwise allowable or—in the specific case of the CARES Act's Section 3610 defined costs—the Contracting Officer treats them as special costs authorized by a specific authority.

Contract type, allowability of costs, and reasonableness of costs.

Contract type does not affect the analysis of FAR's five requirements for a cost to be "allowable." There are differences between fixed-price contracts and cost-reimbursement contracts, for example, but the potential allowability of the costs (or unallowability) and the reasonableness of the costs have a role in both—sometimes before award, sometimes after award, sometimes both before and after award—in, among other things, establishing prices, including establishing profit and fee formulas; estimating costs; recognizing estimated costs' allowability or unallowability; recognizing incurred costs' allowability or unallowability; and calculation of profit or fee earned or loss sustained.

While not comprehensive, FAR 31.102, FAR 31.103, and FAR 31.204, among other portions of FAR Part 31, nonetheless provide some useful background on the applicability of the

FAR's cost principles. Although also not comprehensive, FAR 15.404-1 and FAR 15.405, among other portions of FAR Part 15, nonetheless provide some useful context regarding the effect of the FAR's cost principles on proposal analysis and price negotiation.

The most relevant criterion Contracting Officers should use in deciding to reimburse or not reimburse otherwise allowable paid leave costs is: will reimbursing them be in the government's interest?

Even if paid leave costs meet FAR's five requirements to be allowable costs, Contracting Officers should not reimburse them unless it's in the government's interest. Even if paid leave costs are, for example, the special costs that the CARES Act's Section 3610 defines, meet all of Section 3610's criteria to be allowable, and are otherwise allowable, Contracting Officers must determine whether reimbursing the costs is in the government's interest. Additionally, Contracting Officers should refer to FAR 31.205-6 Compensation for Personal Services for regulatory coverage of compensation pursuant to labor management agreements and work with their local general counsel if there are labor management agreements under the contract.

Reimbursing paid leave costs the CARES Act's Section 3610 defines is neither required nor, in some cases, appropriate; Contracting Officers may do so at their discretion, if: it is in the Government's best interest; and they modify—without requiring consideration but precluding additional profit or fee—their contracts congruent with their contracts' terms and conditions (if any modifications are necessary). Contracting Officers must work with their programs, and if there are labor management agreements to be considered, local general counsel, to determine what is in the Government's best interest.

Examples of what Contracting Officers might consider to determine if reimbursing paid leave costs would be in the Government's best interest are, among other things: the funding available for the leave; the impact of funding or not funding the leave; relevant labor management agreements; and the mission impact of each alternative. This would include considering, among other things: the skills required for critical operations; the challenge for their contractors to resume operations if their existing staffs are no longer available; and where their contracts are in their lifecycles (such as how close to contract expiration). After taking all relevant information under consideration, Contracting Officers should weigh the costs and benefits of reimbursing paid leave costs and discuss the opportunity costs with their program offices (requirements owners).

A specific example regarding Section 3610, its lack of direct funding, and the wide variety of circumstances necessitating a wide variety of responses, was OMB's explicit statement that Congress's not appropriating funds for reimbursing the costs of paid leave under Section 3610 meant agencies would have to take budget constraints into account in determining if reimbursing the costs was in the best interest of the government; and because all agencies and their contracting bases were not similarly situated, the extent to which agencies would reimburse their contractors under Section 3610 would vary from agency to agency.

Numerous scenarios are extant; Contracting Officers must choose (in their best judgement) the most effective way to proceed. Fixed-price type contracts may or may not be affected; level of effort support services contracts in many cases will not be affected; complex, long term contracts may require considering contractors' requests for equitable adjustments. Again drawing from Section 3610 experience, it is noteworthy that OMB suggested possible modifications based on contract type (Q and A # 27 in OMB M-20-27 of July 14, 2020). The

suggested modifications, however, are neither mandatory nor appropriate in every situation. OMB also stated a multi-faceted strategy was required to combat the significant disruptions caused by COVID-19, including, among other things, extending performance dates, reimbursing contractors for paid leave, or negotiating other forms of equitable adjustment. OMB observed it may be beneficial to keep personnel, such as national security professionals or skilled scientists, in a mobile ready state for activities the agency deems critical to national security or other high priorities or to offer reimbursement for leave as a bridge to hold over employees where a contract may be retooled for pandemic response (OMB M-20-18 of March 20, 2020). OMB shared two of its expectations about agencies' use of Section 3610—different applications across buying offices within agencies and across the Federal Government would occur and the variance would be no different than typically expected in the application of any equitable remedy to different mission requirements, contractual arrangements, and funding situations, especially in exigent circumstances; and rationally based decisions that reflected the best interest of the Government in any given situation (OMB M-20-22 of April 17, 2020).

FAR 31.109 advises to avoid disputes Contracting Officers should seek advance agreements on the treatment of special or unusual costs. The paid leave costs associated with the current pandemic are unusual; Contracting Officers should consider seeking advance agreements on the costs, regardless of their determination of whether it is or is not in the Government's best interest to reimburse the costs. DOE Acquisition Guide's chapter 31.201-2 "Allowability of Incurred Costs - April 2018" provides guidance on cost allowability.

Section 3610 supplemented existing agencies' broad discretion in deciding to reimburse or not reimburse paid leave costs.

Consistent with regulations relevant to contract pricing, cost allowability, and cost reimbursement, Section 3610 added to the existing broad discretion agencies enjoyed by telling agencies the costs the Act defined were not expressly unallowable costs. Even before the CARES Act was enacted, OMB noted paid leave may be available in some circumstances to support contractor resiliency, such as to keep national security professionals or skilled scientists in a mobile ready state for activities the agency deems critical to national security or other high priorities, or to offer reimbursement for leave as a bridge to hold over employees where a contract is being retooled for pandemic response.

Section 3610 did not diminish existing agency broad discretion.

With or without Section 3610, agencies have broad discretion in deciding to reimburse or not reimburse paid leave costs (such as those defined in the CARES Act's Section 3610).

OMB's guidance issued prior to and subsequent to Section 3610 was unambiguous: paid leave costs are not expressly unallowable.

Agencies can, but need not, reimburse costs that are not expressly unallowable and meet the other requirements for allowability.

Before the CARES Act was enacted, paid leave costs were not expressly unallowable costs. Indeed, OMB's guidance on paid leave costs that predates the CARES Act indicates agencies should consider paid leave costs not expressly unallowable and reimburse them (if they are otherwise allowable) when it is in the government's interest.

After the CARES Act was enacted, paid leave costs were not expressly unallowable costs.

OMB's guidance on paid leave costs Section 3610 of the CARES Act defines is the costs are not expressly unallowable; OMB's guidance is silent regarding the paid leave costs that Section 3610 does not define.

After Section 3610 is no longer applicable, paid leave costs will remain not expressly unallowable costs, including the paid leave costs Section 3610 defined.

Discussion of OMB's Guidance on Reimbursement of Contractor Paid Leave

OMB issued guidance on the reimbursement of contractor paid leave both prior to and after the CARES Act was enacted.

OMB's March 20, 2020, Memorandum M-20-18 was issued prior to the CARES Act and includes the following:

- states that maintaining the resilience of the federal contracting base requires a multi-faceted strategy, which includes, where appropriate, reimbursing contractors for paid leave or negotiating other forms of equitable adjustment necessary as a direct result of COVID-19.
- explains that it may be beneficial to reimburse contractors for paid leave to keep personnel in a mobile ready state for activities so the contractor can resume supporting the agency's mission as soon as possible when circumstances permit.
- acknowledges it may be beneficial to keep personnel, such as national security professionals or skilled scientists, in a mobile ready state for activities the agency deems critical to national security or other high priorities or to pay leave as a bridge to hold over employees where a contract may be retooled for pandemic response.
- predates the March 27, 2020, CARES Act.

The CARES Act was enacted on March 27, 2020; its Section 3610 includes the following:

- states funds made available to an agency by the CARES Act or any other Act may be used to reimburse the costs of 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.
- only applies 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.

OMB's April 17, 2020, Memorandum M-20-22:

- supplements OMB's March 20, 2020, Memorandum M- 20-18 with guidance for the implementation of section 3610
- does not replace OMB's March 20, 2020, Memorandum M- 20-18
- states Section 3610 reinforces the legitimate role paid leave may play in maintaining the contractor in a ready state (i.e., the ability to mobilize in a timely manner) by making clear that such costs may be reimbursed.
- states using its principles is expected to result in different applications of this authority across buying offices within agencies and across the Federal Government. This variance is no different than would typically be expected in the application of any equitable remedy to different mission requirements, contractual arrangements, and funding situations, especially in exigent circumstances.

- states that in considering paid leave, agencies should keep in mind that section 3610 provides agencies with considerable discretion to treat paid leave as a reimbursable cost.

OMB's July 14, 2020, Memorandum M-20-27:

- supplements OMB Memorandum M-20-18 and OMB Memorandum M-20-22 with additional guidance.
- states Section 3610 is additional discretionary authority. As such, it does not prohibit an agency from reimbursing a contractor for paid leave prior to March 27, 2020, under contract authorities otherwise available to the agency. (Any reimbursement for paid leave made prior to March 27 should not be identified as a payment made under Section 3610 for purposes of tracking and reporting).

Two Concepts: A Cost Being “Allowable”; and the Government’s Obligation To Reimburse Allowable Costs

The concept of a cost being “allowable” is often misunderstood, as is the Government’s obligation to reimburse “allowable costs.” FAR’s use of the term allowable indicates not only the cost meets the five requirements for a cost to be allowable, but also the cost is not expressly unallowable (which is one of the five requirements). Further, the reasonableness requirement is complex. What is reasonable is subjective, which creates a myriad of issues. In determining costs’ allowability the Contracting Officer must consider the contract’s provisions (the fourth of FAR’s five requirements), including, among other things, any applicable labor management agreements.

A key consideration in determining paid leave costs’ allowability during the COVID-19 pandemic is whether reimbursement of paid leave is needed to maintain the resilience of the federal contracting base and to keep contractor personnel in a ready state so that the contractor can resume supporting the agency’s mission as soon as possible when circumstances permit.

FAR suggests the Contracting Officer make it clear to the contractor when the Contracting Officer has determined it is not in the government’s interest to reimburse certain costs and to do so before the contractor incurs the costs. To unequivocally establish in a contract that certain costs will not be reimbursed is the preferred method regardless. It precludes a contractor’s credible assertion that the costs were “reasonable” (one of the five requirements a cost must meet to be allowable) because the contractor knows the Contracting Officer has deemed the costs not to be reasonable in the specific circumstances of the contract. It thus precludes a contractor’s assertion that such costs are allowable and must be reimbursed.

What is the guidance contained in this AL?

Paid leave costs (such as those defined in the CARES Act’s Section 3610) are not expressly unallowable costs. No special authorities are necessary to recognize them as reimbursable.

To be reimbursable, however, paid leave costs must meet the five requirements of the Federal Acquisition Regulation (FAR) for a cost to be allowable. Contracting Officers may reimburse the paid leave costs of contractor or subcontractor employees who 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 (which may include restrictions due to quarantines) and who are unable to

telework because their job duties cannot be performed remotely during the COVID-19 pandemic if Contracting Officers: (1) determine (working with their programs) it is in the Government's best interest to reimburse the costs; and (2) modify (without requiring consideration but precluding additional profit or fee) their contracts (if any modifications are necessary) congruent with their contracts' terms and conditions. Additionally, Contracting Officers should refer to FAR 31.205-6 Compensation for Personal Services for regulatory coverage of compensation pursuant to labor management agreements.

If the Contracting Officer, working with Program Officials, determines that reimbursing contractor paid leave costs during the COVID-19 pandemic is in the best interest of the Government, the Contracting Officer should work with the contractor to understand how the contractor is planning to offer and implement the paid time off during the COVID-19 pandemic for both prime and subcontractor employees. The Contracting Officer should work with the contractor to secure necessary documentation, representations, or both to prevent duplication of payment and ensure the correct reimbursement. If the Contracting Officer determines a contract modification is required, the Contracting Officer should preclude providing the contractor any additional profit or fee related to the modification.

Contractors are responsible for ensuring federal funds are not being used to make multiple payments for the same purpose; Contracting Officers must ensure appropriate contract administration and oversight. The Contracting Officer's discussions with the contractor must include the contractor's accounting for COVID-19 costs.

DOE Contracting Officers may reimburse the paid leave costs of contractor or subcontractor employees who 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 COVID-19 pandemic.