



CARES Provisions Relating to Federal Contractors

The [Coronavirus Aid, Relief, and Economic Security Act](#) (CARES) provides potential reimbursement to federal contractors whose employees (1) cannot perform work on a “site that has been approved by the Federal Government” during the coronavirus (COVID-19) public health emergency due to facility closures or other restrictions, and (2) cannot telework because their job duties cannot be performed remotely.

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.*

Summary (from Holland & Knight Government Contracts Blog, March 30, 2020):

Many contractors are grappling with the issue this section addresses: an inability to perform contracts due to facility closures, or other government (federal, state and local) restrictions. As discussed below, this new provision of law gives contractors a potentially useful tool, along with other clauses in the Federal Acquisition Regulation (FAR) and contract terms and conditions, to seek continued payment during periods of work disruption. Here's our initial break down of the text:

- A contractor may be "reimbursed" for the cost of keeping certain employees "in a ready state." Presumably this means on payroll, although the act does not use that term, but given that this provision is included in the Labor title of the act, it appears Congress's intent is to have these funds be used to keep employees on the payroll. Contractors should be prepared to demonstrate they used these funds to maintain readiness, i.e., by continuing to compensate their employees. It is important to note that while FAR provisions, such as those related to suspension of work, already give some support for maintaining readiness, this provision makes entitlement to reimbursement for that purpose more clear.
- The potential for reimbursement arises only when access to an approved worksite (contractor or federal) has been curtailed due to COVID-19 restrictions and only if the affected employees cannot telework. Contractors will need to document 1) that the worksite is a federally owned or leased site, or that it has been approved by the government; 2) that work at the facility has actually been disrupted as a result of COVID-19; and 3) that telework is not an option (more on this one below).
- Compensation is limited to the "minimum established contract billing rates" and capped at 40 hours per week. Paid leave, including sick leave, is reimbursable but will be reduced to the extent of any tax credits taken. Note: By prescribing "billing rates" (as opposed to wage or labor rates) this appears to permit a claim for loaded labor rates as set forth in the contract. Arguably, "billing rate" could even include a monthly lump sum, but that is not entirely clear. Absent agency guidance, contracting officers may interpret the term "billing rate" differently, so be prepared for more rigid interpretations. If a contract is firm fixed price (lump sum) and does not have billing rates, per se, it is likely that loaded labor rates would need to be established consistent with cost principles.
- As a process matter, a contract "modification" will probably be required, meaning the contractor will likely have to present a Request for Equitable Adjustment for amounts it believes it is owed, and the contracting officer should issue a contract modification to reflect the negotiated adjustment in contract price associated with maintaining contractor and subcontractor employees in a ready state. But note in some cases, there may not be an adjustment in contract price at all; optimally, a contractor would continue to be compensated at the stated contractual rates.

- The provision also requires contractors to mitigate the effect of the disruptions by allowing employees to telework if they can. This duty to mitigate is consistent with other bases for cost recovery during work suspensions, stoppages or delays. Contractors should document their mitigation efforts, including factors that make mitigation impossible.

Section 3610 presents an important potential remedy for contractors and should be considered in concert with other FAR-based and contractual remedies, such as suspension of work/stop work orders, contract changes clauses and excusable delay clauses.

ERA will continue to follow developments relating to Section 3610. There is an expectation that an all-agency guideline will be published that will help in determining which federal contractors might benefit from Section 3610.