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Acquisition & Assistance Policy Directive (AAPD)

From the Director, Office of Acquisition & Assistance Issued: **November 5, 2020**

AAPD 20-03 (**Revision 2**)

Paid leave under Section 3610 of the CARES Act

Subject Category: Acquisition Management
Type: POLICY

AAPDs provide information of significance to all agency personnel and partners involved in the Acquisition and Assistance process. Information includes (but is not limited to): advance notification of changes in acquisition or assistance regulations; reminders; procedures; and general information. Also, AAPDs may be used to implement new requirements on short-notice, pending formal amendment of acquisition or assistance regulations.

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This AAPD: <input type="checkbox"/> Is New <input type="checkbox"/> Replaces/ <input checked="" type="checkbox"/> Amends CIB/AAPD 20-03	
Applicable to: <input checked="" type="checkbox"/> Existing awards; <input checked="" type="checkbox"/> Modification required <input type="checkbox"/> No later than <input checked="" type="checkbox"/> As noted in guidance below <input type="checkbox"/> All applicable RFPs and new awards issued after the effective date of this AAPD. <input checked="" type="checkbox"/> Other	Precedes change to: <input type="checkbox"/> AIDAR Part(s) Appendix <input type="checkbox"/> Code of Federal Regulations <input type="checkbox"/> Federal Acquisition Regulations <input type="checkbox"/> No change to regulations
<input checked="" type="checkbox"/> New or Revised Provision/Clause Provided Herein: If checked, scheduled update to GLAAS:	

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Date: 2020.11.05 16:39:58 -05'00'

Mark Walther
Senior Procurement Executive

I PURPOSE:

The purpose of this AAPD is to provide a special contract requirement and instructions for determining when to include the paid leave reimbursement authority in USAID contracts when implementing section 3610 of the Coronavirus Aid, Relief, and Economic Security (CARES) Act (Pub. L. No. 116-136). Section 3610 provides agencies additional discretionary authority to reimburse costs of paid leave to federal contractors and subcontractors, subject to conditions described below when in the best interest of the Government. The authority may only be used as described in Section 3 below, for leave that a contractor has provided during the period of March 27, 2020 through September 30, 2020. Revision 1, issued on September 3, 2020, provided further information on the supporting documentation a contractor must provide for claims made under Section 3610. This revision #2 extends the authority to provide reimbursements for leave that a contractor has provided through December 11, 2020. The special contract requirement in Attachment 1 has been updated to incorporate this change.

This AAPD is effective through December 11, 2020, unless rescinded or extended.

I Required CO Actions:

- A. COs must carefully review and evaluate any request from a contractor for reimbursement of leave under Section 3610. When submitting the request to the CO, the contractor must include the total number of employees to whom the contractor plans to provide such leave and the amount the contractor has paid or will pay for leave provided during the period March 27, 2020 through December 11, 2020.
- B. When a request is received from a contractor, the CO, in collaboration with the COR, must determine if there is funding available to fulfill the possible maximum request and the impact on the total estimated cost of the contract.
- C. The CO, in collaboration with the COR, must use sound business judgment when applying the mandatory guidance in paragraph III below, to determine if it is in the best interest of the Government to allow the contractor or subcontractor to be reimbursed for paid leave as further explained below. When considering whether to use this relief in the CARES Act, the COR must confirm to the CO in writing whether the contractor employees who are being paid leave are necessary for the contractor to maintain a "ready state".

Note that other provisions of the CARES Act (e.g. Paycheck Protection Program (PPP) established pursuant to sections 1102 and 1106) may provide a more efficient means of payments to contractor employees. In making this determination the CO must request the contractor to provide detailed information on what other assistance under the CARES Act and other similar statutes the contractor has used for relief to its employees. This information will help the CO determine whether, and how much, to reimburse the contractor for the paid leave, as authorized under Section 3610.

- D. If the total estimated cost of the contract is not sufficient to meet these additional costs and if it is necessary to negotiate an equitable adjustment, the Act authorizes reimbursement only at the minimum applicable contract billing rates not to exceed an average of 40 hours per week of paid leave (based on full time employment), including sick leave. The contractor's billing rates may include certain overhead costs in addition to labor; however, such reimbursements shall not include profit or fees.

Creating award modifications:

- A. The Act allows modification of contracts to reimburse allowable paid leave costs, without securing additional consideration from the contractor. When modifying the award, the CO must include the appropriate special contract requirement prescribed in Attachment 1 in the modification, and if necessary, negotiate an equitable adjustment to the total estimated cost/total price of the contract/TO. The special contract requirement in the Attachment contains a representation that the contractor must submit with each request for payment of paid leave authorized under Section 3610. The contractor must explain in the representation, why the claimed hours cannot be worked and provide details regarding other relief claimed or received, including credits allowed, along with the financial and other documentation necessary to support their requests for reimbursement. The special contract requirement also includes safeguards such as the requirement that the contractor repay any amount reimbursed under another part of the statute and allow audits.
- B. For any awards that already include the special contract requirement in Attachment 1, COs must issue a modification to include the revised requirements.
- C. When executing the award modification in GLAAS, the CO must enter "COVID-19 3610" at the beginning of the "Description of Requirements" data field to enable proper tracking in FPDS. The modification must also include the National Interest Action Code (NIA) code of COVID-19 2020. See the GLAAS notice at <https://drive.google.com/file/d/1mBUjqFFHUOYEx1Rmdyv-EmdKe5HIVzn/view> for further details on this.

Reimbursement by Contract Types:

- A. For a fixed price or Time and Materials type contract, the CO will need to negotiate an equitable adjustment to the price, and if necessary, the schedule to recognize the impact of any COVID-19 caused shutdowns. Note that the equitable adjustments must compensate the contractor only for the costs of providing paid leave as permitted by section 3610 and must not increase profit or fee. In the case of incentive contracts, the adjusted amount must not be subject to the incentive structure.

- B. For cost reimbursement or Labor Hour contracts equitable adjustments and revision of the total estimated cost may also be necessary. For a hybrid contract, to the extent practicable, all payments reimbursed under the section 3610 must be made under the cost reimbursement portion of the contract.
- C. For IDIQs, authorizations under Section 3610 must be made at the TO level.

Upon receipt of an invoice:

- A. While it is the contractor's responsibility to ensure federal funds are not being used to make multiple payments for the same purpose, the COR must provide appropriate contract administration and oversight. This includes documenting the contract file with the rationale supporting approval or disapproval of reimbursement for a paid leave request. The file must contain the contractor's representation required in the special contract requirement (Attachment 1).
- B. Given other sources of contractor relief available under the CARES Act and the Families First Coronavirus Relief Act (FFCRA), if the contractor has claimed or received other relief, including credits allowed, the contractor must submit supporting documentation along with the financial and other information necessary to support their requests for reimbursement under section 3610, as required in the special contract requirement in Attachment 1.
- C. The contractor must submit a separate report of the actual costs of the leave payments for each employee (i.e., actual cost for each employee's paid leave, including names of employees and number of leave hours) when submitting their invoice for reimbursement.
- D. When evaluating a contractor's request for reimbursement of paid leave under the CARES Act, the COR must ensure the appropriate documentation is provided to address the following:
 - 1) Identify -
 - (i) The employees that were provided paid leave for which the contractor is seeking reimbursement, and
 - (ii) The amount and dates of the paid leave provided to the employees for which the contractor is seeking reimbursement, which may be no earlier than March 27 and no later than **December 11, 2020.**
 - 2) Confirm that the identified employees -
 - (i) Work on a site approved by the Federal Government pursuant to the contract(s) under which the claimed costs are sought;
 - (ii) Could not perform work on such Federal Government approved site due to closures or other restrictions resulting from the COVID-19 pandemic;
 - (iii) Were unable to telework or otherwise work remotely under the applicable contract(s) during the COVID-19 pandemic;

- (iv) Have been kept in a ready state and the contractor is prepared to resume performance in a timely manner; and
- (v) Were provided paid leave at rates calculated based on the rates the contractor would have paid the employees but for the COVID-19 pandemic.

3) Validate that the costs claimed -

- (i) Are only for paid leave meeting all of the previous numbered conditions; and
- (ii) Constitute the only reimbursement or payment it has received or expects to receive for this purpose.

- E. When approving payments the COR must ensure that: 1) the contractor provided the information in paragraph C. above; 2) To the COR's knowledge, the information, the contractor provided, for example why claimed hours could not be worked is accurate; and 3) the contractor has submitted a signed representation regarding other relief claimed or received, including credits allowed, along with the financial and other documentation necessary to support their requests for reimbursement. CORs must retain all supporting documentation received from the contractor for audit purposes.
- F. The Act specifically requires the reduction of the maximum reimbursement authorized by the amount of credit a contractor is allowed pursuant to division G of Public Law 116-127 (Families First Coronavirus Response Act) and any applicable credits a contractor is allowed under the CARES Act. This may not always be possible at the time of reimbursement. For example, a contractor may receive employment tax credits under Division G of the FFCRA or elsewhere in the CARES Act long after submitting an invoice for a reimbursement of paid leave. Therefore, the special contract requirement in Attachment 1 requires the contractor to notify the CO and repay any double payments.

Tracking of Section 3610 payments.

To ensure traceability of expenditures and comply with mandated reporting requirements, for all awards modified to allow for reimbursement of paid leave the CO must fill out the CARES Act Tracking form with the following information. This can be done at the time of award modification.

- Contract or order number, including modification number;
- Name of contractor;
- Cognizant Bureau, Independent Office or Mission;
- Total amount approved by the CO for reimbursement of paid leave through the modification;
- If applicable, the amount of any equitable adjustment; and
- Number of contractor employees receiving payments under section 3610;

I GUIDANCE:

There are various considerations a CO must weigh when determining whether to authorize payment of leave, taking into consideration the challenges a contractor may be facing and the impact on the Government.

The CO must follow the guidance in this section to determine whether it is in the best interest of the Government to authorize paid leave for contractors and subcontractors. This section also provides examples of appropriate use of Section 3610 authorities.

CO considerations:

Section 3610 restricts the circumstances under which reimbursement may be made, and the amount of reimbursement allowed. The CO must consider the following restriction in the Act when determining whether making payments authorized under section 3610 is in the best interest of the government:

- A. The relief provision in Section 3610 of the CARES Act provides authorization to reimburse contractors or subcontractors for payments made **no earlier than March 27, 2020 and no later than December 11, 2020**. It does not mandate that such payments are made.
- B. **The CARES Act relief provision may only be used when funds are available.** When making a determination to use this relief provision, the CO should consider the impact of funding or not funding additional paid leave and document each alternative. If there are any budget constraints, the CO should evaluate whether the benefits of paid leave under section 3610 is the best possible solution.
- C. In accordance with OMB Memo M-20-22 the CARES Act relief can be applied to contractor or subcontractors whose employees: 1) **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 2) are unable to telework because their job duties cannot be performed remotely during the COVID-19 pandemic. As such, this provision may be applied to contractors and subcontractors whose employees have physical access to USAID facilities, or whose worksite has been approved and is paid for as a direct cost under a USAID contract, for performance in the U.S., or overseas. Note that leave provided for contractor employees who are able to telework and choose not to telework or work remotely are not eligible for reimbursement.
- D. Payments to contractors are made to keep its employees or subcontractors in a ready state (i.e., the ability to mobilize in a timely manner), including to protect the life and safety of Government and contractor personnel, such as 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. This provision can also be used to help contractors retain skilled contractor employees and reduce the challenge associated with resuming operations if previous staff is no longer available. With regard to a contractor's

local employees or subcontractors, the COs must consult with the RLO to ensure consistency with local labor laws.

- Examples of work that cannot be performed by contractor’s staff via telework that is appropriate for compensation include:
 - ✓ Key personnel or technical experts that need to be retained for the continuation of a project.
 - ✓ Locally-employed professional staff who are not able to telework but are necessary to resume operations.
 - ✓ Staff who are necessary for security and safety and those who were required to have security or background checks, in order to maintain readiness when work resumes.
- The CAREs relief provision should not be used for non-essential and non-skilled staff who are not required to maintain readiness.

E. The Act authorizes reimbursement only at the minimum applicable contract billing rates not to exceed an average of 40 hours per week of any paid leave, including sick leave. The contractor’s billing rates may include certain overhead costs in addition to labor; however, such reimbursements shall not include profit or fees.

BACKGROUND:

The CARES Act and the Families First Coronavirus Relief Act (FFCRA) contain a wide-range of relief for federal contractors, including loan relief, favorable tax-changes, paycheck protection program, economic injury disaster loans, employer-portion payroll tax credits, employee retention tax credits and other assistance. For more information see resources available on the Small Business Administration’s websites at <https://www.sba.gov/local-assistance/find/> and <https://www.sba.gov/funding-programs/loans/coronavirus-relief-options>.

Section 3610 of the Coronavirus Aid, Relief, and Economic Security (CARES) Act(Pub. L. No. 116-136) Act gives agencies the authority, subject to the availability of appropriations, to modify contracts so they can reimburse contractors for paid leave (up to 40 hours per week, including sick leave), in cases where employees or subcontractors cannot telework or access work sites but must maintain a “ready state” during the coronavirus/COVID-19 pandemic. Under section 3610 of the CARES Act, a ready state includes activities that protect the life and safety of government and contractor personnel.

This authority may be applied 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.”

Per OMB guidance in M-20-22, the relief provision in Section 3610 of the CARES Act provides authorization to reimburse contractors or subcontractors for payments made no earlier than March 27, 2020 and no later than September 30, 2020.

OMB guidance in M-20-27 establishes Frequently Asked Questions (FAQs) to assist agencies in addressing the impact due to COVID-19. FAQs related to implementation of this section, modified to include the necessary agency-specific responses are included in Attachment 2 of this AAPD.

The continuing resolution enacted on October 1, 2020, extended the Section 3610 reimbursement period through December 11, 2020.

I POINTS OF CONTACT:

COs may direct their questions about this AAPD to “[Ask M/OAA Policy](#)”.

For assistance with the CARES Act Tracking form please reach out to oaasystemssupport@usaid.gov.

Attachment 1

Paid leave under Section 3610 of the CARES Act.

Insert the following special contract requirement in Section H when modifying a contract to authorize the contractor reimbursement of paid leave under Section 3610 of the CARES Act.

Paid leave under Section 3610 of the CARES Act.

(a) Definitions. As used in this clause —

Covered credits: shall mean the amount of any credit received by an affected contractor pursuant to any section of the Coronavirus Aid, Relief, and Economic Security (CARES) Act of 2020 or division G of the Families First Coronavirus Response Act of 2020.

Reimbursable leave: shall mean any paid leave, including sick leave, which the contractor provides during the period of March 27, 2020, through **December 11, 2020**.

(b) The contractor is responsible for the well-being of the contractor's personnel. Prior to seeking reimbursement under this clause, the contractors should identify all available sources of relief provided for by the CARES Act, including, but not limited to, funds available under sections 1102 and 1106 of the Act, or any other Act and evaluate the applicability of such benefits under the contract.

(c) The Contractor may submit for reimbursement the costs of reimbursable leave authorized by a contract modification, for the Contractor or its subcontractors to keep employees in a ready state, including to protect the life and safety of Government and contractor personnel when--

(1) The contractor and subcontractor employees 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 cannot telework because their job duties cannot be performed remotely during the public health emergency declared on January 31, 2020 for COVID-19.

(2) The costs of paid leave are incurred from March 27, 2020 through **December 11, 2020**; and

(3) The costs submitted for reimbursement reflect the minimum applicable contract billing rates not to exceed an average of 40 hours per week of 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. Such reimbursements shall only cover actual reimbursable leave paid by the contractor, including payments to a subcontractor to cover paid leave paid to subcontractor's employees. It shall not include profit or fees.

(d) Subject to availability of funds, the Government will treat the costs specified in paragraph (c) above as allowable, if otherwise allowable per federal regulations.

(e) The Contractor must include in any request for reimbursement under this clause the following: statement--

(1) The contractor represents that it:

(i) Has not received or claimed, and will not claim any other reimbursement, including claims for reimbursement via letter of credit, for federal funds available under the CARES Act or any other act for the same purpose, including, but not limited to, funds available under sections 1102 and 1106 of the CARES Act; or

(ii) Has received, claimed, or will claim other reimbursement(s), and such reimbursement(s) has been reflected, or will be reflected when known, in requests for reimbursement but in no case reflected later than in its final proposal to determine allowable incurred costs.

(2) The request for reimbursement reflects or will reflect as soon as known all applicable credits, including:

(i) Tax credits, including credits allowed pursuant to division G of Public Law 116-127; and

(ii) Applicable credits allowed under the CARES Act, including applicable credits for loan guarantees.

(3) Supporting documentation to identify and explain why claimed hours could not be worked.

(f) The contractor must maintain for three (3) years after final payment on the contract and make available to the contracting officer upon request, documentation supporting any claimed cost of paid leave for employees and appropriate documentation identifying credits that may reduce reimbursement claimed. The Contracting Officer, or an authorized representative of the Contracting Officer, including an Inspector General, the Comptroller General (under Section 19010 of the CARES Act), and the Pandemic Response Accountability Committee (under Section 15010 of the CARES Act), shall have the right to examine and audit all the pertinent records and affected contractor employees.

(e) The contractor is not allowed to keep any double reimbursements after the application of covered credits. Therefore, if the Contractor receives covered credits, the Contractor shall notify the Contracting Officer in writing. The Contractor shall repay the Government the amount of the reimbursement up to the amount of the covered credits. The amount of repayment owed to the Government is considered an overpayment. See Federal Acquisition Regulation 3.1003(a)(3).

Attachment 2.

Frequently Asked Questions:

[OMB memo](#) lists 17 different FAQs on implementing the CARES Act. Below are the OMB FAQs that are most relevant to USAID's procedures. Note that some FAQs have been revised to adjust for the agency's implementation of this statutory requirement:

Question (OMB FAQ #13): What are examples of considerations that might be made in determining if reimbursing paid leave is in the best interest of the government?

Answer: As explained in OMB Memorandum M-20-22, agencies should look at the funding they have available, the impact of funding or not funding additional paid leave and the mission impact of each alternative. For example, the agency might:

- Consider the skills required for the critical operation or the challenge for the contractor to resume operations if existing staff is no longer available.
- Consider where the contract is in its lifecycle, such as contract expiration.
- Weigh the costs and benefits of using the Section 3610 reimbursements authority and discuss the opportunity costs with the CORs.

Question (OMB FAQ#14): Section 3610 states that any reimbursement for paid leave must support maintaining the contractor in a "ready state." What is a "ready state?"

Answer: Per OMB Memo M-20-027, "ready state" refers to a contractor's ability to mobilize and resume performance in a timely manner as local conditions permit. For performance in the US, this should be done consistent with the national guidelines for [Opening Up America Again](#).

Question (OMB FAQ #15): Section 3610 and AAPD 20-03 state that the authority to reimburse for paid leave apply only to a contractor whose employees or subcontractors **cannot** perform work on a site that has been approved by the Federal Government. What is meant by "a site approved by the Federal Government?"

Answer: Any place of performance identified in the contract or otherwise agreed upon between the contracting parties in accordance with the terms of the contract would qualify as an approved site for purposes of Section 3610 and AAPD 20-03. This may include a contractor or subcontractor facility at which contract services are performed.

Question (OMB FAQ#16): If a contractor's work has been deemed essential and its employees have been provided an exemption to shelter-in-place orders, but it must operate on a scaled back schedule with fewer employees, as agreed upon with the contracting officer, in order to meet social distancing guidelines and related steps to ensure a safe work environment, may it be reimbursed for paid leave for those employees who are not working?

Answer: Yes. In this scenario, employees who are not working may be viewed as being kept in a "ready state" if all other criteria under Section 3610 and section III (guidance: CO considerations) of AAPD 20-03 have been met. In addition, because Section 3610 authorizes paid leave for a contractor's inability to perform due to restrictions other than facility closure, reimbursement might be available even if the work site is open and accessible, if for public health reasons, contractor employees cannot be in the workplace and the other criteria of Section 3610 and section III (guidance: CO considerations) of AAPD 20-03 have been met, including inability to work remotely.

Question (OMB FAQ#18): Must a contractor or subcontractor employee deplete his or her own leave before they become eligible for reimbursement under Section 3610?

Answer: No, Section 3610 and AAPD 20-03 do not require that employees deplete their own leave balances before contractors may seek reimbursement for the costs of paid leave provided to keep employees in a ready state.

Question (OMB FAQ#25): Under Section 3610, may a contractor be reimbursed for actual costs and, if so, how does the statutory requirement that the rate be "minimum" applicable contract billing rate affect reimbursement?

Answer: Contractors may be reimbursed for actual costs incurred, but the costs must be reasonable. Contractors must also comply with the representation, documentation and file retention requirements in the Attachment 1 of the AAPD 20-03. For time-and-materials, laborhour, and cost-reimbursement contracts, reasonableness will take into consideration prenegotiated rates. If an employee could be charged at different rates depending on the task performed, reimbursement should be made at the lowest applicable rate for work that could be performed under the contract. For fixed-price contracts, a contractor may be asked to represent that the reimbursement reflects labor and other related costs the contractor would have incurred for performance under the contract less profit and is consistent with the contractor's general policies for paid leave, where they exist. Some non-labor costs, such as HR costs for processing paid leave, may be properly included in overhead rates while certain other costs may be sought under requests for equitable adjustment.

Question (OMB FAQ#26): May a contractor be reimbursed for profit under Section 3610?

Answer: Reimbursement should be limited to actual cost incurred and should not include profit. Contractor resiliency depends not only on maintaining the readiness of contractors whose existing work has been disrupted, but also funding new work. As a general matter, paying profit goes beyond what is necessary for maintaining a ready workforce and potentially reduces the funds available to support new work opportunities for contractors, which could hurt the resiliency of the contracted workforce at large.

Question (OMB FAQ#26): OMB Memorandum M-20-22 states that contractors must fully support and maintain documentation for claims made under Section 3610. What type of documentation should an agency seek to support a request for reimbursement under Section 3610?

Answer: It is important to secure fully supported documentation from contractors regarding claimed reimbursement, including relief claimed and received, along with the financial and other documentation necessary to support their requests for reimbursement under Section 3610. Please refer to AAPD 20-03(revised), Section II, “Upon receipt of an invoice” for further details.

As required in the clause entitled Paid leave under Section 3610 of the CARES Act (see Attachment 1 of the AAPD 20-03), contractors are responsible for reporting on the status of credits requested and received and making any repayment necessary to be in compliance with Section 3610.