One thing's for sure. You can't believe the hit counts on our website. I mean, yes, they provide an indication of the popularity of each article, primarily in terms of who came to the article after it left the front page or who printed it or downloaded it. But it's an *indication only*. The exact number of hits can be very misleading. Some of the hit counts have been inflated by hackers trying to get into the site. I mean, really inflated. Big time. And obviously the older the article, the more hits it would be expected to receive. We don't use the hit counts for anything more than an indication of popularity.

Still, the *indications* are that the three most popular topics are (1) DCAA stuff, (2) CAS stuff and—more recently—(3) COVID-19 stuff. We thought "what if we combine all three of those popular topics into one article? Yeah, that will be *huge*."

So here it is.

As many readers know, the CARES Act—especially Section 3610—authorizes Federal agencies to reimburse contractors for impacts related to COVID-19 in certain circumstances. Importantly, it does not mandate reimbursement; it simply authorizes it.

Many may be wondering why anybody needed specific statutory authorization. After all, the cost principle at 31.205-13 already made reasonable costs associated with efforts to maintain employee well-being allowable. It is hard to imagine some auditor or contracting officer (or, perhaps, a judge) finding that costs incurred to protect worker health and safety during the pandemic were somehow unallowable. Especially if a contractor has DPAS-rated contracts. At a bare minimum, contractors are expected to take actions to mitigate cost and schedule impacts to their government contracts.

What's the deal then?

The deal is that Section 3610 seemingly permits a contractor to deviate from its standard practices—and its disclosed or established cost accounting practices—with respect to some of its COVID-19-related costs.

Let’s quote Section 3610 so you can see what we’re talking about.

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 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.

Let’s break that down a bit.

1.

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 because of a facility closure or other restrictions.

2.

When the closures or restrictions are related to the COVID-19 health emergency.

3.

And the contractor's (or subcontractor's) employees cannot perform their job duties (with respect to the contract) remotely; they must be performed at the (closed or restricted) site.

4.

When the contractor grants affected employees or subcontractors paid leave, including sick leave, in order to keep its workforce in a "ready state" to resume contract performance when the facilities are reopened or the restrictions are lifted; or, "to protect the life and safety of Government and contractor personnel."

Thus, for contractors that qualify under the conditions above, their Federal contracts may be modified (without consideration) to reimburse them "at the minimum applicable contract billing rates not to exceed an average of hours per week" for the costs of the paid leave.

From a CAS perspective, the interesting thing about the above is that contractors may have to deviate from their disclosed or established practices in order to comply. Costs of paid time off (PTO) are not normally charged direct to contracts, because it's not customary to charge contracts for time not actually spent working on contract tasks. Instead, contractors typically charge PTO costs to an indirect cost pool (often the pool the captures all costs of fringe benefits, including the employer's portion of payroll taxes, the employer's portion of medical insurance costs, and etc.), for subsequent allocation to contracts (or to other indirect cost pools) on a chosen allocation base. Therefore, charging indirect costs as direct costs is going to require a change in cost accounting practice.

And it's not just that. "Normal" PTO costs associated with employees not impacted by COVID-19 are still going to be accumulated and allocated in accordance with the disclosed or established practices. It's only the PTO costs associated with maintaining impacted employees in a "ready state" that are going to be direct costs of the impacted contracts. Which brings up a CAS 402 compliance question—is this the same cost, incurred for the same purpose in like circumstances, being treated two different ways (both direct and indirect)?

Sure, we'll all assert that COVID-19 circumstances are different than the norm, and we'll all point to the Section 3610 language. But will it be sufficient? That remains to be seen.

Looking at published Section 3610 implementation guidance (especially **guidance** published by DOD), it seems that there are even more options available to a contractor. "To the extent that the contractor workforce is shared across multiple contracts, contracting officers will need to coordinate on a reasonable allocation of costs, ideally through the administrative contracting officer." That implies (if not expressly states) that contractors can pool their Section 3610 PTO

costs and allocate them to contracts. We're betting no contractor has a disclosed or established cost accounting practice for pooling COVID-19-related PTO costs and then allocating them to contracts. Note the guidance does not specify that the contracts that receive an allocation of such costs must have been impacted by COVID-19 facility closures or restrictions, only that the allocation of the costs to contracts must be made on a "reasonable" basis. In our view, that gives contractors a lot of flexibility to accumulate and allocate their Section 3610 costs.

Contracting officers are given the authority to determine what contractor Section 3610 costs they decide to reimburse. Who do you think they are going to lean on for an opinion regarding the costs claimed by contractors? That's right, their contract auditors. Chances are that means DCAA.

The DOD guidance (link above) anticipates that DCAA auditors are going to get to express an opinion regarding whether the contractor has (a) accumulated legitimate Section 3610 costs, (b) accounted for them properly, and (c) allocated them to contracts in a reasonable manner. (And don't forget to propery credit those costs for any other COVID-19-related reimbursements, such as insurance settlements.) Auditors are going to be looking at previous contractor cost accounting practices related to PTO, and asking contractors to support/justify everything. (As we've noted before, a failure to document circumstances and decisions now will lead to potential audit issues downstream.) The guidance states "Proper administration and traceability of actions under section 3610 will require special attention to contracting procedures and contract administration by contracting officers, the Defense Contract Audit Agency (DCAA), and contracting officer's representatives (CORs). … DCAA has oversight of billings under cost-reimbursement, time and materials, and labor hour line items."

Certain contractors (Hi KBR!) were rather famously burned by DCAA second-guessing their decisions and questioning the resulting costs. They had to engage in expensive, protracted, litigation in order to recover the questioned costs, and many millions of dollars ended-up being left on the table, never reimbursed. Let's use their painful lessons-learned to guide our decision-making today, during the current pandemic crisis.

We'll note here that DCAA very recently issued **audit guidance** addressing how audits should be conducted under the current state of pandemic lock-downs. It states:

If audit teams are unable to obtain sufficient appropriate evidence (e.g., audit teams receive electronic documents from the contractor via e-mail and are unable to validate to original

records), the audit team should continue with the audit and validate the electronic documents to original records when the Agency and/or contractor resumes normal operations. When normal operations resume, the audit team should validate the electronic data previously accepted and then issue the audit report. Audit teams are reminded to appropriately document the audit evidence received, including the methods used to obtain the evidence. … The lack of access to original documents, lack of access to contractor personnel, or the inability to validate the source of original documents (e.g., contractor records and contractor downloads) will generally result in a reservation about the engagement (i.e., scope limitation). In most cases, this scope limitation will result in a qualified opinion. However, the audit team should assess the evidence collected and use professional judgment in determining whether a scope limitation is necessary.

There is a FAQ in the back of the MRD that everybody should read. It discusses, among other things, the conduct of “floorcheck” audits using telephone or video conference, and the performance of “walk-throughs” via teleconference and/or Webex. Interesting stuff—but we hope the guidance will become obsolete in a few more weeks or months.

So: COVID-19; Cost Accounting Standards; DCAA. A jam-packed article covering all the popular topics. We trust you enjoyed it.