

OMB Opines on Section 3610

Written by Nick Sanders
Monday, 20 July 2020 00:00

Governor Ritchie: Now, he's going to throw a big word at you: 'unfunded mandate.' If Washington lets the states do it, it's an unfunded mandate. But what he doesn't like is the federal government losing power. But I call it the ingenuity of the American people.

President Bartlet: Well, first of all, let's clear up a couple of things. 'Unfunded mandate' is two words, not one big word.

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The West Wing, "Game On"

An unfunded mandate is a statute or regulation that requires an entity to perform certain actions, with no money provided for fulfilling the requirements. Examples include the Clean Air Act, the Americans with Disabilities Act, and the No Child Left Behind Act. Each of those statutes requires action at the state or local level, without providing funding to support those actions.

And it looks like the CARES Act needs to be added to the list.

How can that be? Wasn't the CARES Act supported by more than \$340 billion in public funds?

Yes. Yes, it was.

The problem is that no appropriations were set aside for implementation of Section 3610 of the CARES Act, the section that authorizes the Federal government to reimburse contractors for "stand-by" or other paid leave time when employees cannot perform planned work. We've written about Section 3610 [before](#) . We expect we will again.

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If you're not hip to Section 3610, you may want to follow the link in the above paragraph, or perhaps find another article to bring you up to speed. We're going to assume you've got the basics.

Since you've got the basics, you understand that contractors can submit invoices to receive reimbursement of their Section 3610 costs—but that contracting officers have discretion as to whether or not to pay those invoices. One important aspect of contracting officer decision-making involves funding. At the moment, any payments must come out of funds already appropriated for the contract's SOW. In other words, the contracting officer has to decide which is more important: funding the work that was planned or funding the contractor employees' stand-by time. It is fairly obvious that as the contractor employee's stand-by time is funded, there is less money left to perform the work that was contracted-for.

Which is kind of a tough decision, isn't it?

Until and unless Congress appropriates funding expressly earmarked for Section 3610 reimbursements, every contracting officer is going to have to wrestle with that choice. And—as we've written before—at the moment guidance from DoD and DCMA in particular is woefully short.

Meanwhile, on July 14, the Office of Management and Budget [issued](#) guidance in the form of Frequently Asked Questions (FAQs) to help agencies deal with some of the issues. Section 3610 issues are discussed on pages 10 through 17. There are 18 FAQs addressing aspects of contractor reimbursements under Section 3610. We are not going to repeat the relevant FAQs and associated answers here. You should go read it for yourself. However, here are some interesting quotes, for your information.

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Because the [Section 3610] provision is limited to needs arising in FY 20 that are not otherwise provided for in the underlying contract, an appropriation available to fund an FY 20 need must be used for reimbursements made pursuant to Section 3 610.

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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. ... Agencies should secure the contractor's agreement to segregate and report 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). The agency should further advise that the government may audit the billed costs in order to ensure the accuracy and compliance with the law. Contractors are responsible for supporting their requests for reimbursement.

But for many contractors, it's all speculation at this point. Their contracts are likely to have insufficient funding available for Section 3610 reimbursement and, even if they do have funds, as noted above the contracting officers are going to have to wrestle with some tough decisions regarding whether to pay contractors for doing the contracted work or paying contractors for not working.

Meanwhile, the Department of Defense is [pressuring](#) Congress for the necessary appropriations. And defense contractor executives are doing the same thing, according to [reports](#). However, those same reports state that Republicans are "skeptical" about providing additional relief funding on top of the funding already provided.

We'll have to wait and see where this goes. And while we wait, we'll see what government contracting officers—and DCMA contracting officers in particular—decide to do when they start to receive contractor requests for reimbursement of Section 3610 costs.