If 2020 will be remembered for anything in the government contracting world, we bet it will be CARES Act Section 3610 reimbursements of contractor paid leave expenses. Actually, we should probably say 2021 not 2020, because that's when we expect the majority of reimbursement requests to be submitted. Or maybe we should say 2022, because that's when we expect the appeals of Contracting Officer Final Decisions denying reimbursement to be filed.

No matter. Let's just say that CARES Act Section 3610 reimbursements are going to be a thing and we expect they will be a litigious thing. We've written quite a few blog articles about the topic already, and we expect to write a bunch more in the next couple of years.

Today's article is about a recent Government Accountability Office (GAO) report (**GAO-20-662**) addressing "observations" on how Federal agencies have implemented CARES Act Section 3610. As one might expect, the GAO folks "observed" a mixed bag, with some agencies moving forward decisively and others (
hi DOD!
) moving forward via a different approach.

Importantly, the "intelligence community" implementation was not "observed," because *reasons*.[1]

This is important because, as readers know, the intelligence community figured out Section 3610 early and gave clear implementation directions to contracting officers and contractors. Accordingly, the intelligence community was not "observed" because (we suspect) the story would have been positive. And GAO does not seem to have an appetite for reporting positive news to Congress.

The key observation in the GAO report is that "publicly reported obligations data may not capture full amount of paid leave reimbursements to date." What this means is that, as of July 20, 2020, only three agencies (DOD, NASA, and DOE) had reported making any Section 3610 obligations—and the amount reported aggregated to a paltry $22 million on 39 contract actions. DOD accounted for $18.3 million (83%) of the total.

But GAO "observed" that the amounts reported in FPDS-NG were misleading. For example, "DOE reimbursed contractors for almost $550 million in paid leave costs—far more than its publicly reported new obligations for this purpose of $0.5 million." The cause of this discrepancy

was simple: DOE didn't use earmarked CARES Act funding to make its contractor reimbursements. Instead, DOE used existing contract obligations and, therefore, "agency officials said they did not need to issue a contract modification to obligate additional funding and … these amounts would not be reported to FPDS-NG as section 3610 reimbursements."

And that hits home on the crux of the issue. DOD (and other agencies) keep harping on the notion that Section 3610 reimbursements are limited by funds available to make them, but the intelligence community (and now, apparently, DOE) feel otherwise. They are going forward and making contractor paid leave reimbursements out of current contract funds, which is a bold strategy that, at the same time, undercuts the planned reporting methodology.

Even DOD reported challenges in the reporting area. GAO observed that DOD "agency officials identified certain data reported to FPDS-NG as section 3610 obligations that differed from the actual amount obligated for that purpose. For example, officials from DOD's Defense Pricing and Contracting office told us they review such FPDS-NG records to check that they are accurately coded and request corrections where necessary." According to these officials, "these reviews identified instances in which obligations reported in FPDS-NG as uses of section 3610 authority actually reflected a combination of section 3610 and non-section 3610 obligations, such as for general services or test operations."

Importantly, there's absolutely nothing wrong with the situation. Contracting officers are working to make contractors whole, to implement the spirit of the public law, and the results of those decisions are, well, the results.

The GAO observed a "reluctance" among some agencies' officials "to use funding from other priorities—such as DOD's modernization and readiness efforts—for section 3610 reimbursements." But those reluctant officials may not have a choice.

Now, we are not attorneys and you would do well to ignore our layperson's interpretation of judicial decisions, but we want to talk about a 2005 decision of the Supreme Court of the United States entitled *Cherokee Nation of Oklahoma v. Leavitt*. (Link to decision **here** .) One summary of the decision stated—

The Supreme Court … sustained breach actions by several Indian tribes against the

Department of Interior, which had tried to avoid its contractual obligations by saying that it didn't have enough appropriated funds to meet all of its various responsibilities. In so doing, the Court reaffirmed the long-established rule for procurement contracts that, if Congress has not earmarked funds specifically for a program and 'if the amount of an unrestricted appropriation is sufficient to fund the contract, the contractor is entitled to payment even if the agency has allocated the funds to another purpose or assumes other obligations that exhaust the funds,' even if the contract has language such as 'subject to the availability of funds.'

Consequently, it is our completely unreliable opinion that DOD and other agencies *must* pay contractors' Section 3610 reimbursement requests, regardless of whether or not they have sufficient funding earmarked for that purpose.

Obviously, we'll see how this goes. But if we were advising contractors on this topic, we'd be telling them to put forward the most accurate and complete reimbursement request that they could as soon as possible. Then be prepared to negotiate from a position of strength.

Fun times ahead!

[1] Okay. GAO said they didn't look at IC agencies because one Inspector General (out of 17 agencies) "is conducting a separate evaluation of the National Reconnaissance Office's implementation of section 3610 authorized by the CARES Act and will share its scope and methodology across the Intelligence Community Inspector General community." As we said, *reasons*
. And not good reasons, in our view.