April 5, 2020

The SBA Has Issued Incorrect Guidance Regarding Eligibility for Loans under the Paycheck Protection Program

The CARES Act Eligibility Provision Clearly Covers any Business Meeting the Employee Count Test

On March 27, the president signed the Coronavirus Aid, Relief, and Economic Security (CARES) Act[1] into law. Section 1102 of the CARES Act establishes the Paycheck Protection Program. Eligibility for the program is based on the following

> (D) Increased eligibility for certain small businesses and organizations.—
>
> (i) In general--During the covered period**, in addition to small business concerns**, **any business concern** . . . shall be eligible to receive a covered loan if the business concern . . . employs not more than the greater of--
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> (I) 500 employees; or
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> (II) if applicable, the size standard in number of employees established by the Administration for the industry in which the business concern . . . operates. (Emphasis added)

The statute clearly distinguished between "small business concerns" and "any business concern" in subsection (D)(i) by using the two phrases highlighted above. In addition, the statute established a test based on a threshold number of employees for "any business concern" to be eligible: not more than 500 employees or the size standard in number of employees, whichever is greater. As discussed below, the Small Business Administration has ignored this plain language when it issued its guidance on the programs as an Interim Final Rule ("IFR").

The use of the phrase "in addition to" before the term "small business concern" clearly increases the coverage of the program to other businesses, not just small business concerns, if that firm meets the employee count requirement. Congress could have limited eligibility to small businesses by using words or phrases like "only" or "restricted to" before "small business concern. Congress did the opposite and used the phrase "in addition to". Therefore, under a plain language reading of the statute program eligibility would be broader than just only small business concerns.

The Treasury Department Guidance Follows the Plain Statutory Language

The Treasury Department's guidance—*Paycheck Protection Program (PPP Information Sheet: Borrowers*[2]—unambiguously states:

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[1] Public Law No: 116-136

[2] https://home.treasury.gov/system/files/136/PPP--Fact-Sheet.pdf (as of April 4, 2020)

Who can apply? All businesses – including nonprofits, veterans organizations, Tribal business concerns, sole proprietorships, self-employed individuals, and independent contractors – with 500 or fewer employees can apply.

This guidance does not restrict the construction industry to the standard gross receipts size-standard determination. This guidance clearly articulates that "[a]ll businesses . . . with 500 or fewer employees can apply." There is absolutely no reference in this guidance to businesses, like those in construction, about having to use the gross receipts size-standard determination to confirm their eligibility for this program. And, like the statute, this guidance provides for "any business concern" to be eligible "in addition to a small business concern" using the 500 or fewer employees test.

The SBA's Eligibility Criteria Incorrectly Restricts the Construction Industry's Participation in the Paycheck Protection Program

The SBA's criteria in its IFR for small business eligibility are unclear, perplexing and contrary to the plain language of the statute. The provision within the IFR at issue is the following:

2. What Do Borrowers Need to Know and Do?

a. Am I eligible?

You are eligible for a PPP loan if you have 500 or fewer employees whose principal place of residence is in the United States, or are a business that operates in a certain industry and meet the applicable SBA employee-based size standards for that industry, and:

i. You are:

A. A small business concern as defined in section 3 of the Small Business Act (15 USC 632), and subject to SBA's affiliation rules under 13 CFR 121.301(f) unless specifically waived in the Act;

B. A tax-exempt nonprofit organization described in section 501(c)(3) of the Internal Revenue Code (IRC), a tax-exempt veterans organization described in section 501(c)(19) of the IRC, Tribal business concern described in section 31(b)(2)(C) of the Small Business Act, or any other business; and

ii. You were in operation on February 15, 2020 and either had employees for whom you paid salaries and payroll taxes or paid independent contractors, as reported on a Form 1099-MISC.

The SBA contradicts the plain language of the statute by the use of the conjunction "and" linking the first clause of the first hanging paragraph of IFR Section 2.a. to IFR Section 2.a.i.A. The IFR Section 2.a.i.A. refers to how the SBA defines a small business concern under the Small Business Act and accompanying regulations. For construction, size is determined according to its gross receipts (average annual receipts) as

identified by NAICS codes. To AGC and its construction firms the IFR eligibility section thus reads as follows:

> You are eligible for a PPP loan if you have 500 or fewer employees whose principal place of residence is in the United States (2.a.) AND [y]ou are [a] small business concern as defined in section 3 of the Small Business Act (15 USC 632) (2.a.i.A.) . . .

Many construction firms have 500 or fewer employees whose principal place of residence is in the United States. However, the conjunction "and" then subjects these firms to also meeting the average annual receipts size standard, which generally applies to construction firms. This greatly narrows the eligible firms in the construction industry for the Paycheck Protection Program and contradicts the statute, congressional intent and U.S. Treasury guidance. The SBA's interpretation effectively nullifies the 500 or fewer employee test put forth by Congress in the CARES Act and Treasury in its guidance and makes the traditional gross receipts test the only one applicable to the construction industry.

The AGC has submitted a formal request to the Small Business Administration in a letter dated April 4, 2020. In that letter the AGC has detailed the basis for its conclusion that the SBA's guidance is incorrect and requires revision. The association has also shared that letter with the White House and congressional leaders demanding clarification in line with a clear reading of the statute.