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April 4, 2020

Jovita Carranza
Administrator
Small Business Administration
409 3rd Street SW
Washington, D.C. 20024

RE: SBA-2020-0015 Business Loan Program Temporary Changes; Paycheck Protection Program

Dear Administrator Carranza,

On behalf of the Associated General Contractors of America (AGC), I write you to strongly urge the U.S. Small Business Administration (SBA) to correct and clarify your interim final rule for the Paycheck Protection Program (herein “the IFR”) in regards to the criteria for construction firm participation in the program. **The IFR is causing significant confusion within the construction industry, as it contradicts statute and U.S. Department of Treasury guidance.**

During these uncertain times where many construction projects are facing delays and shutdowns, construction contractors are being forced to make difficult and immediate decisions about the future of their workforce. As such, there is no time for confusion. The businesses and jobs of millions are at stake.

For background, AGC is the leading association for the construction industry, representing both union and open shop prime and subcontractor/specialty construction companies. AGC represents more than 27,500 firms—a majority of which are small businesses of 500 or fewer employees—including over 6,500 of America’s leading general contractors and over 9,000 specialty-contracting firms. More than 10,500 service providers and suppliers are also associated with AGC, all through a nationwide network of 88 chapters in all fifty states, the District of Columbia and Puerto Rico. AGC contractors are engaged in the construction of the nation’s commercial buildings, shopping centers, factories, warehouses, highways, bridges, tunnels, airports, waterworks facilities, waste treatment facilities, dams, water conservation projects, defense facilities, multi-family housing projects, site preparation/utilities installation for housing development, and more.

The IFR’s Small Business Eligibility Criteria Severely Restricts the Construction Industry’s Participation in the Paycheck Protection Program

The IFR’s criteria for small business eligibility are unclear, perplexing and counter to any plain language requirements put forth under Executive Order (E.O.) 12866 and E.O. 12988.¹ The provision within the IFR at issue is the following:

¹ E.O. 12866 says that regulations must be “simple and easy to understand, with the goal of minimizing uncertainty and litigation” (Sec. 1, Par. (b)(12)) and E.O. 12988 says that each regulation must specify its effect “in clear language” (Sec. 3 Par. (b)(2)).

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.

Under the SBA's size standards, a construction firm's size is determined according to its gross receipts (average annual receipts) as identified by North American Industry Classification System (NAICS) codes, not the total number of employees.² As such, the criterion of 500 or fewer employees is applicable to construction firms per the first clause of the first hanging paragraph of IFR Section 2.a, and not the second clause therein relating to a applicable SBA employee-based size standards.

The confusion stems from 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. As noted above, this definition for construction 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 requirement of meeting the average annual receipts size standard, which generally applies to construction firms. This

² 13 CFR §121.201

greatly narrows the eligible firms in the construction industry for the Paycheck Protection Program and contradicts statute, congressional intent and U.S. Treasury guidance. Such a construction 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 IFR's Small Business Eligibility Criteria Contradicts a Plain Language Reading of the CARES Act Eligibility Provision

On March 27, the president signed the Coronavirus Aid, Relief, and Economic Security (CARES) Act into law. Section 1102 of the CARES Act establishes the Paycheck Protection Program. The relevant subsection within Section 1102 sets forth eligibility for the program as:

(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--

(I) 500 employees; or

(II) if applicable, the size standard in number of employees established by the Administration for the industry in which the business concern . . . operates.

The statute clearly distinguished between “small business concerns” and “any business concern” in subsection (D)(i) as it not only explicitly uses those phrases therein, but also puts forth 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.

While this eligibility provision in the statute is also applicable to “small business concerns,” it is constructed to be applicable more broadly than to only small business concerns as defined under the Small Business Act and implementing SBA size standard regulations. As further evidence of this plain language reading of the statute, the provision reads “in addition to small business concerns, any business concern . . . shall be eligible” (emphasis added). The use of the phrase “in addition to” before the term “small business concern” clearly qualifies other-than-small business concerns—“any business concern”—to be considered eligible for a loan under this program, not just small business concerns based on the size standards the SBA uses to determine small business status. Congress could have used words or phrases like “only” or “restricted to” before “small business concern” to limit eligibility to small businesses. However, Congress did not do so and those phrases are not included in the provision. As such, a plain language reading of the statute could only allow one to conclude that eligibility under this program would be broader than that of only small business concerns as traditionally defined in the context of construction.

Again, for these reasons, the definition put forth by SBA in the IFR serves to severely restrict that broad eligibility provided under statute to the traditional small business size standards in construction based on gross revenues. The SBA must address this issue in a revised IFR.

The IFR's Small Business Eligibility Criteria Contradicts Treasury Guidance

The IFR squarely contradicts guidance from Treasury to borrowers concerning the Paycheck Protection Program eligibility criteria. The Treasury guidance--Paycheck Protection Program (PPP) Information Sheet: Borrowers—unambiguously states:

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.

As opposed to the IFR, 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 Must Revise the IFR to Clearly Allow the Construction Industry to Use the 500 or Fewer Employee Test for Eligibility for Construction Firms to Receive Loans under the Paycheck Protection Program as Clearly Articulated in the CARES Act and Treasury Guidance

For the reasons articulated above, AGC strongly recommends that the SBA adopt language like the Treasury guidance above to make clear the eligibility criteria for the Paycheck Protection Program for construction firms.

Thank you for your consideration AGC's comments to the IFR. Again, we strongly urge you to revise the eligibility criteria in the IFR to allow construction firms to utilize the 500 or fewer employee test for loan eligibility.

Sincerely,



James V. Christianson
Vice President, Government Relations