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Mr. Curtis Rich
Agency Clearance Officer
U.S. Small Business Administration
409 3rd Street SW, 5th Floor
Washington, DC 20416
Emailed to curtis.rich@sba.gov and filed via www.regulations.gov

Re: Comments on SBA Form 3509 – Loan Necessity Questionnaire (For-Profit Borrowers)

Dear Mr. Rich,

On behalf of the Associated General Contractors of America (AGC), I am pleased to respond to the notice that the SBA published in the Federal Register on October 26, 2020 and entitled “Reporting and Recordkeeping Requirements Under OMB Review.” See 85 Fed. Reg 67809 (2020). In that notice, SBA made reference to *SBA Form 3509 – Loan Necessity Questionnaire (For-Profit Borrowers)* (the “Questionnaire”) ¹ and it solicited public comment on that form. Following are AGC’s comments on the particulars of the Questionnaire. Enclosed is a letter that AGC addressed to SBA on September 18, 2020, on the process that SBA has used to develop the Questionnaire. Please include both in the record of this proceeding.

AGC is the leading association in the construction industry. It represents more than 27,000 companies, a number that includes more than 6,500 of the nation’s leading general contractors, and over 9,000 specialty-contracting firms. To better serve and support AGC members at the state and local level, AGC also has 88 chapters that stretch from Puerto Rico to Alaska and Hawaii. AGC members construct public and private buildings, including offices and apartment buildings, hospitals, laboratories, schools, shopping centers, factories and warehouses. AGC members also construct public and private infrastructure, such as highways, bridges, tunnels, dams, airports, industrial plants, pipelines, power lines, and both clean and wastewater facilities. For statistical purposes, some of these projects are considered residential, but it remains extremely rare for AGC members to engage in the construction of single-family homes.

As a threshold matter, AGC submits these comments under protest and handicapped by the SBA’s failure to make any official copies of the Questionnaire available to the public. Following SBA’s publication of its notice, AGC did manage to obtain what it believes to be true and accurate copies of the Questionnaire from several of its members but the resulting delay in its review of the Questionnaire has prejudiced the association. In addition, the 30 days that SBA provided for public comment are far fewer than the 60 days that the Paperwork Reduction Act requires. That 30-day limit on the time available to the association to review and submit comments has also prejudice the association. Before going further, AGC respectfully requests SBA to make official copies of the Questionnaire readily available to the public, and thereafter, to provide an additional 60 days for public comment.

Going forward, AGC hopes that SBA will consider the many unique circumstances that AGC members were facing when they submitted the vast majority of their applications for Paycheck Protection Program (PPP)

¹ While SBA released loan necessity questionnaires for both for-profit (Questionnaire) and non-profit (Form 3510) entities, these comments will only focus Questionnaire.

loans. Following is a summary of many, but certainly not all, of those circumstances. In short, AGC believes that the form neither asks about, nor provides meaningful space for, construction contractors to recount those circumstances, and instead, it focuses on largely if not entirely irrelevant events that may have transpired since such contractors filed their loan applications.

Background

Section 1102(a) of the Coronavirus Aid, Relief, and Economic Security (CARES) Act² created the PPP loan program. The program was initially designed to provide up to \$349 billion in forgivable loans to qualifying small business, who would then use the money “to remain open and keep their workers employed,” and provide “small businesses with the resources they need to get through this unprecedented time.”³ Subsequent legislation provided an additional \$320 billion in funding for the program,⁴ expanded the timeframe for eligibility, expanded the amount of non-payroll expenses eligible for loan forgiveness, and made additional changes.⁵

Included in the CARES Act was a requirement for PPP loan applicants to “make a good faith certification...that the uncertainty of current economic conditions makes necessary the loan request to support the [the applicants’] ongoing operations.”⁶ Significantly, the CARES Act did not define the required “uncertainty of current economic conditions,” or the meaning or duration of “ongoing operations,” or what Congress considered “necessary . . . to support” such operations. Nor has the SBA, either by rule or guidance (e.g., Frequently Asked Question (FAQ)), or otherwise, provided any insight into those vague terms. From the beginning, loan applicants have been left to guess their meaning.

SBA’s and Treasury’s Public Comments on PPP from March and April 2020

Under these circumstances it is helpful to revisit the public statements that the SBA Administrator and Treasury Secretary made about the program back in March and April. Their basic message was that the PPP would be broadly available to small businesses, as Congress deemed necessary to prevent significant layoffs and business failures during a period of tremendous economic uncertainty and government-mandated slowdowns and shutdowns.

On March 27, Administrator Carranza issued a press release, upon passage of the CARES Act, praising President Trump for acting in a bipartisan manner to “[s]upport our nation’s 30 million small businesses, which employ nearly half the nation’s workforce.” She added that, “[u]nder the CARES Act, the President took historic action, making available hundreds of billions of dollars in an expedited manner to provide immediate financial relief for small business owners across the country.”⁷

On April 2, the day before the PPP launched, Administrator Carranza and Secretary Mnuchin issued a joint press release. In the release, Secretary Mnuchin was quoted as saying:

² Public Law 116-136

³ Statement from SBA Administrator Carranza, March 27, 2020, SBA Press Release 20-28

⁴ While the *Paycheck Protection Program and Healthcare Enhancement Act* (Public Law 116-139) allocated an additional \$320 billion to the PPP, the program expired with nearly \$134 billion unspent.

⁵ *Paycheck Protection Program Flexibility Act of 2020*, Public Law 116-142

⁶ Section 1102(a), CARES Act

⁷ According to the SBA, there are 31.7 million small businesses in the country. SBA Office of Advocacy, Frequently Asked Questions about Small Businesses, October 2020. Taken literally, the Administrator’s statement suggests that nearly 95 percent of small businesses would be eligible for the PPP, but even if it was meant as a rhetorical flourish, the message was clear: PPP funds would be broadly available to small businesses who met the relevant size standards.

This legislation provides small business job retention loans to provide eight weeks of payroll and certain overhead to keep workers employed... **The loans will be forgiven as long as the funds are used to keep employees on the payroll and for certain other expenses.** [Emphasis added].

On April 3rd, the day PPP formally launched, Administrator Carranza issued a press release where she is quoted saying:

These loans will bring immediate economic relief and eight weeks of financial certainty to millions of small businesses and their employees... We urge **every struggling small business to take advantage of this unprecedented federal resource** – their viability is critically important to their employees, their community, and the country. [Emphasis added].

The release also reminded readers that “[t]he loans, which are 100% backed by SBA, are being provided to small businesses without collateral requirements, personal guarantees, SBA fees, **or credit elsewhere tests.**” [Emphasis added.]

Then, on April 17, Administrator Carranza and Secretary Mnuchin issued a press release, after the PPP had exhausted its first round of funding, touting the success of the program, saying:

The PPP provided funds to a wide variety of industries in all sectors of the economy, including **construction**, manufacturing, food and hospitality services, health care, agriculture, and retail, among many others. This demonstrates the broad diversity of PPP and its support for American workers across the board. [Emphasis added].

Taken together, these public pronouncements deliver a clear and simple message: the PPP was an emergency measure meant to apply broadly to small business who met the relevant size standards, to provide them with assistance to promote employee retention, and to provide support to them during an unprecedented time of economic uncertainty. Additionally, if PPP loan recipients used the loan on specified expenses, such as payroll, mortgage interest, rent, and utilities, their loans would be forgiven.

Notably absent from these pronouncements were any public statements that SBA intended to restrict access to the program to those who refrained from taking certain actions in the following months, or met undefined standards for access to credit or liquidity. Indeed, the opposite is true, as the SBA reminded potential applicants that the CARES Act specifically *waived* the credit elsewhere test—in which the SBA would normally evaluate 7(a) borrowers based on “the availability of credit on reasonable terms and conditions to the individual loan applicant from non-Federal, non-State, or non-local government sources, considering factors associated with conventional lending practices”.⁸

The tone changed later, on April 23, 2020, and well after the vast majority of the interested construction contractors had filed their loan applications, when the SBA and Treasury announced in a FAQ posted on Treasury’s website⁹ that:

[B]efore submitting a PPP application, all borrowers should review carefully the required certification that ‘[c]urrent economic uncertainty makes this loan request necessary to support the ongoing operations of the Applicant.’ Borrowers must make this certification in good faith, taking into account their current business activity and their ability to access other sources of liquidity sufficient to support their ongoing operations in a manner that is not significantly detrimental to the business.”¹⁰

⁸ 15 USC § 632(h).

⁹ <https://home.treasury.gov/system/files/136/Paycheck-Protection-Program-Frequently-Asked-Questions.pdf>

¹⁰ Ibid. FAQ #31.

This FAQ #31, along with FAQ #37, clarified that both public and private companies with access to capital and “substantial market value” would be “unlikely” to make the required economic uncertainty certification in good faith. Treasury and SBA then issued a press release on April 29, 2020, stating that SBA “will review all loans in excess of \$2 million, in addition to other loans as appropriate, following the lender’s submission of the borrower’s loan forgiveness application.” The release also noted that “[r]egulatory guidance implementing this procedure will be forthcoming.”¹¹

As of today, that additional guidance has yet to arrive.

The Construction Industry Faced Unprecedented Economic Uncertainty in the Second Quarter of 2020

According to the loan data that SBA has publicly released, 3,754 construction contractors (as identified by NAICS code) have applied for and received PPP loans of at least \$2 million. Out of that total, 3,166 or 84.3% won approval of their loans before April 23, when Treasury and SBA announced they were intensifying their scrutiny of the certifications of economic uncertainty for all loans over \$2 million. By that point in time, the vast majority of construction industry borrowers had not only won approval of their PPP loans, but were already devoting their loan proceeds to payroll, benefits, and other qualified expenses.

While the Questionnaire requests information that might barely begin to paint an accurate picture of how well a borrower has actually fared since filing its loan application,¹² it neglects to ask the most relevant question: what were the economic realities, and the predictions that were being made, *at the time of the certification?* In this sense, the Questionnaire asks for both too much information *and* too little. The questions contained in the Questionnaire are largely irrelevant to a business owner’s state of mind when he or she applied for the loan. At the same time, the Questionnaire neglects to ask or even invite information about the circumstances that led a borrower, *at the time it applied for the loan*, to make its certification.

As is now generally known, with the benefit of perfect hindsight, the pandemic has affected different businesses in different ways. Some businesses, such as restaurants, hotels, and airlines, have suffered great losses, and many have even gone out of business. Others, though, have fared better and even seen year-over-year improvement in their economic performance because the nature of their work. Throughout the pandemic, the federal government has consistently considered most, if not all, of the construction industry to be essential. A majority of state and local governments have followed suit. And since April, some project owners have actually decided to accelerate the construction of their projects, hoping to take advantage, for example, of the drop in highway traffic volume.

As the pandemic began, and at the time when the vast majority of the borrowers in the construction industry applied for their loans, it was, however, impossible to know how the pandemic would actually progress, or how the federal and both state and local governments would respond to it. It was impossible to know whether,

¹¹ While implementing regulatory guidance was promised, neither SBA nor Treasury have announced the criteria SBA will use in evaluating loan forgiveness applications for loans in excess of \$2 million, nor have the public been granted an opportunity to formally comment on these criteria. While AGC is submitting these comments on SBA Questionnaire, to date, it has never been made public for review. AGC is commenting on the Questionnaire based on “leaked” copies of the questionnaire and AGC member correspondence.

¹² It should go without saying that a construction firm that survived through the worst of the pandemic, and went on to maintain or grow their business as the year went on, is not only what Congress intended when it created the PPP, but should be considered an indicator of the program’s success.

where or to what extent state and local governments would agree that construction is an “essential service.”¹³ Nor was it certain that the construction industry could continue to keep its workers safe. AGC and its members embraced their responsibility for their workers safety, not only for their workers’ protection, but also for the protection of the communities in which they live. Since April, the construction industry has been very successful in doing so. But that success was impossible to predict with any degree of certainty. This pandemic was and remains an unprecedented event.

And today, the construction industry is nowhere close to being out of the woods. Historically, when the economy experiences a downturn, nonresidential construction is one of the last segments of the economy to decline (as contractors continue to construct projects that were years in the making, already in progress and very costly to shut down). The lagging effects of an economic downturn can, however, be quite severe. In the wake of the last recession, total spending on nonresidential construction continued to drop over the 28 months from October 2008 to February 2011, and during that period, it dropped a total of 29 percent. Employment in nonresidential construction similarly continued to decline over the 24 months from February 2008 to February 2010, and during that period, it dropped a total of 23 percent.

In March and April 2020, as the pandemic arrived and then grew, no one knew whether, where, or to what extent state or local governments would permit construction to continue. No one knew how public and private project owners would react. As the year has unfolded, some segments of the construction industry have experienced a short-term increase in the volume of their work. But last spring, such increases were uncertain at best, and they have remained vulnerable throughout the course of the pandemic. Today, the threat to the ongoing operations of the vast majority of non-residential construction contractors remains very far from over.

Appended to these comments are a series of articles and surveys, along with data that AGC has gathered from numerous sources, all showing, in vivid detail, the degree of uncertainty that the construction industry faced in March and April, after the President’s nationwide declaration of a national emergency. A brief summary of just some of the relevant information—which the Questionnaire does NOT request—includes the following:

- Between March 15 and April 5, the number of states that issued “shelter in place” orders rose from 3 to 40. How construction was treated under these orders varied greatly by state.
- According to construction project management software company Procore, between March 1 and the second week of April (the week after SBA began accepting PPP applications) the number of construction work hours fell by 17 percent nationwide.¹⁴
 - This number is not “seasonally adjusted,” and it is the exactly the opposite of what one would expect to see in the spring, when the construction season normally ramps.
 - The drop in many individual states, including several that issued aggressive shelter-in-place orders, was even more dramatic.
 - New Jersey saw a 26 percent decline in construction hours between March and April.
 - Michigan saw a 71 percent decline in construction hours between March and April.
 - Massachusetts saw a 52 percent decline in construction hours between March and April.
 - Pennsylvania saw a 50 percent decline in construction hours between March and April.
 - Washington state saw a 32 percent decline in construction hours between March and April.

¹³ When the initial shelter in place orders were enacted, many states did not specifically exempt construction. For example, on March 20, 2020 Pennsylvania Governor Tom Wolf ordered all non-life sustaining businesses to close physical locations in Pennsylvania, and construction was banned in virtually every category. Additionally, on March 16, 2020, Mayor Marty Walsh announced a two-week suspension of all construction activities in the City of Boston.

¹⁴ Procore COVID Insights, available at: <https://www.procore.com/covid-insights>

- According to the Procore data, construction firms with up to \$20 million in annual revenue experienced a nearly 25 percent drop in worker hours between March and April, and construction firms with up to \$200 million in revenue experienced a nearly 20 percent drop in worker hours over the same period of time.¹⁵
- AGC of America conducted a series of member surveys throughout March and April.¹⁶ The results included the following:
 - Between March 19, when AGC’s first survey concluded, and April 23, the percentage of respondents reporting that an owner (public or private) had halted or cancelled a project due to the pandemic rose from 28 percent to 68 percent.
 - Forty percent of the respondents to an April 9 survey reported that they had found it necessary to furlough or terminate workers.
 - Sixty-seven percent of the respondents to the April 23 survey also reported that they had experienced delays on current projects due to shortages of personal protective equipment (PPE), construction materials, craftworkers, subcontractors or government workers, or because a person potentially infected with COVID-19 had visited a jobsite.

Commercial Construction Must Maintain Strong Balance Sheets and Access to Liquidity

Pay and performance bonds are very commonly required of construction contractors performing public and even private work. The purposes of these bonds are to guarantee that a contractor performs its work, and that its subcontractors are paid. If a bonded contractor defaults on its contract, the project owner can require the contractor’s surety to complete the work on behalf of the contractor. If a bonded contractor fails to pay a subcontractor, the latter can pursue the surety for the unpaid sums.

Any federal construction contract valued at \$150,000 or more requires surety bonds when a contractor bids, or as a condition of contract award, under the Miller Act (40 U.S.C. §§ 3131-3134). Most state and municipal governments have a similar requirement under what are called “little Miller Acts.” Many private owners also elect to require pay and performance bonds to assure lending institutions that any money lent to the owner for the construction project will result in a completed project which can serve as collateral for a loan.

More to the point, sureties always require contractors to provide a general indemnification, as a condition precedent to getting a bond. That general indemnification entitles the surety to go back against a bonded contractor for reimbursement of any costs that the surety must incur on behalf of that firm. And for that reason, sureties regularly review their client’s financial statements, including their liquidity, and typically insist that both be strong, before agreeing to issue a bond.

The bonding capacity of a construction contractor often limits the size of the individual projects and the annual volume of the work a commercial construction contractor can win and perform. It follows that such a contractor must pay careful attention to anything that would impact its surety bonding capacity, which, in turn, requires such a contractor to maintain its financial strength, including its liquidity.

The factors that sureties and/or commercial lenders will typically consider before deciding whether, and if so, how much credit to extend to a commercial construction contractor include the following:

- **Net worth or net equity** (difference between assets and liabilities).
 - This represents the investment and retained earnings in the company. Net worth is sometimes referred to as long-term liquidity because it measures the company’s ability to produce profits over

¹⁵ Ibid.

¹⁶ Available at: <https://www.agc.org/coronavirus/agc-surveys>

the long run, or the long-term aspects of the operating cycle. Net worth also indicates the company's ability to sustain losses.

- **Working capital** (difference between current assets and current liabilities).
 - Current assets are cash and other assets expected to be converted into cash within one year. Current liabilities are those obligations that will be paid or liquidated in the same period. Working capital measures, the short-term aspects of the operating cycle, and creditors use it to evaluate the company's ability to furnish cash in the current year.
- **Cash flow projections.**
 - Cash management is one of the most important aspects of financial management in the construction industry. The financial manager of a growing construction company is responsible for ensuring that enough cash is available at the right time to pay its employees, subcontractors, and suppliers. Cash flow analysis may be required by sureties to evaluate the short-term plans of the construction company.
- **Bank line(s) of credit.**
 - Sureties are generally looking for an unsecured line of credit that can be used for short-term working capital purposes. The surety wants the contractor to have a bank line of credit available to augment working capital as well as to handle temporary cash flow needs. For example, a contractor must demonstrate that it has enough of its own working capital, plus bank credit, to support work on an upcoming project.

It follows that the Questionnaire's simplistic inquiry into cash-on-hand cannot begin to explain whether a commercial construction contractor would find, in good faith, that the economic uncertainty surrounding the pandemic warranted an application for a PPP loan. To repeat, the questionnaire asks for both too much *and* too little.

Conclusion and AGC Requests

In closing, AGC will simply underscore its regret that SBA developed its Questionnaire in complete secrecy and entirely behind closed doors, and indeed that SBA yet to make any official copies of the Questionnaire available to the public. Deprived of public input, the SBA has headed off in the wrong direction.

And again, AGC respectfully requests SBA to make official copies of the form readily available to the public, and thereafter, to provide an additional 60 days for public comment.

Sincerely,

Matthew Turkstra
Director, Tax, Fiscal Affairs, and Accounting
Associated General Contractors of America