Congress of the United States
U.S. House of Representatives
Committee on Small Business

2361 Rayburn House Office Building
Washington, DC 20515–6315

MEMORANDUM

To:	Members, Subcommittee on Contracting and Infrastructure
From:	Rep. Kweisi Mfume, Chairman
Date:	March 23, 2021
Re:	Subcommittee Hearing: "The Interaction Between the Paycheck Protection Program and Federal Acquisition Regulations: What it Means for Government Contractors"

The Committee on Small Business, Subcommittee on Contracting and Infrastructure, will meet for a remote hearing titled: "The Interaction Between the Paycheck Protection Program and Federal Acquisition Regulations: What it Means for Government Contractors." The hearing is scheduled to begin at **12:00 p.m. on Tuesday, March 23, 2021**. Participating members can join the hearing remotely via **CISCO Webex.**

The hearing will examine the extent to which the Federal Acquisition Regulations Credits Clause interplays with the Paycheck Protection Program and if so, its implications for federal contractors. The Committee will learn more about how agencies are handling the matter, available guidance, and industry concerns.

The witnesses for this hearing will be:

- Mr. Greg Bingham, Partner and Co-lead of the Government Contracts Group, HKA, Washington, D.C.
- Ms. Susan Moser, CPA/CITP, Advisory Services Partner, Cherry Bekaert, LLP, Tysons, VA
- Ms. Robin Greenleaf, PE, CEO & Founder, Architectural Engineers, Boston, MA - Testifying on behalf of the American Counsel of Engineering Companies (ACEC)
- Mr. Carlos A. Penin, PE, President, CAP Engineering, Coral Gables, FL

Background

The Federal Acquisition Regulations (FAR) is the primary set of rules governing all executive agencies in their acquisition of goods and services.[1] It sets uniform policies and procedures, including the terms and conditions to be used in federal contracts, which ultimately will bind federal contractors.

[1] FAR, "Foreword," available at: https://www.acquisition.gov/sites/default/files/current/far/pdf/FAR.pdf. *See also*: FAR 1.000-1.101.

The FAR is divided in 53 parts. FAR part 31 is dedicated to cost principles and procedures. Generally, it applies in the pricing of contracts whenever cost analysis is performed (in the formation phase of a contract); to determine reimbursable costs in cost reimbursable contracts and the materials portion of time-and-materials contracts (performance of a contract); and in the calculation of indirect cost rates.[2]

For a cost to be reimbursed under FAR part 31, it needs to be allocable (i.e. chargeable, assignable) to a government contract[3] and allowable.[4] For the most part, the total cost of a contract is the sum of the direct and indirect costs allocable to it minus any allocable credits.[5] Similarly, FAR 31.201-5 defines a credit as "the applicable portion of any income, rebate, allowance, or other credit relating to any allowable cost and received by or accruing to the contractor shall be credited to the Government either as a cost reduction or by cash refund."

The Paycheck Protection Program

Through the CARES Act, which became law on March 27, 2020, Congress created the Small Business Administration (SBA) Paycheck Protection Program (PPP) to help small businesses that were adversely impacted by the COVID-19 pandemic.[6] The PPP was tailored to assist small businesses with meeting payroll costs and other expenses; and can be forgiven in whole or in part, if loan proceeds are spent for such purposes. PPP lending began on April 3, 2020.

Agency Guidance Pertaining the Application of Credits to the PPP

DOD & OMB General Guidance

Since the PPP was enacted, agencies have issued guidance to ensure its adequate implementation. Notably, on April 17, 2020 (updated on April 24, 2020), and in response to inquiries on the application of the credits clause to amounts of PPP loan forgiven, DOD offered the following guidance:

> A23: We disagree, any PPP loan that has been forgiven necessarily can be treated as though it belongs to the company to use as it pleases. FAR 31.201-1, Composition of Total Cost, states that total cost is the sum of the direct and indirect costs allocable to the contract less any allocable credits. **Accordingly, to the extent that PPP credits are allocable to costs allowed under a contract, the Government should receive a credit or a reduction in billing for any PPP loans or loan payments that are forgiven.** Furthermore, any reimbursements, tax credits, etc. from whatever source that contractors receive for any COVID-19 Paid

[2]See: FAR 31.100- 31.110.
[3] FAR 31.201-4.
[4] FAR 31.201-2. An allowable cost is one that is: reasonable allocable, meet the Cost Accounting Standards (CAS) or Generally Accepted Accounting Principles (GAAP) as applicable, in accordance with the terms of the contract and meets any limitations set by the FAR
[5] FAR 31.201-1.
[6] P.L. 116-136.

> Leave costs should be treated in a similar manner and disclosed to the government."[7]

Thus, DOD clarified that, to the extent PPP loan amounts later forgiven were used to pay for costs that would otherwise be reimbursable under a government contract, the Government should receive a credit to avoid duplication of payment or "double dipping." In other words, based on the application of the credits clause, the Government understands that if PPP funds were used, for example, to pay employees performing work under a federal contract, it shouldn't be "charged twice" for those payroll costs. On posterior guidance, OMB[8] reiterated this notion stating that: "[…] payroll costs paid with the Paycheck Protection Program (PPP) loans or any other Federal CARES Act programs must not be also charged to current Federal awards as it would result in the Federal government paying for the same expenditures twice."[9]

Defense Contract Audit Agency (DCAA) Implementation Guidance

On December 11, 2020, DCAA issued guidance as to the treatment of credits, which was recently revised.[10] Some major points about the guidance are the following:

- **The amount of a PPP loan that is forgiven will apply as a credit or cash refund in the same manner in which the PPP loan funds were originally spent by the contractor -** If a portion of the PPP loan was used to pay rent and rent is part of an indirect cost pool, then the indirect cost pool would be credited in the period in which the loan is forgiven. If the loan was used for direct costs and the contract was completed, the credit would be returned in a manner agreed to by the contracting officer.
- **Contractors with cost reimbursable contracts whose PPP loan is forgiven may or may not have to provide a credit due to loan forgiveness -** It will all depend if a portion of the loan was used to pay for costs allocable to a cost type government contract. For example, PPP funds may be used to pay employees for work they would have performed for commercial customers, in which case a credit wouldn't exist.

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[7] Defense Pricing and Contracting, Office of the Under Secretary of Defense (Acquisition and Sustainment), "*Implementation Guidance for Section 3610 of the Coronavirus Aid, Relief, and Economic Security (CARES) Act, Frequently Asked Questions", (Apr. 2020),* available at: https://www.acq.osd.mil/dpap/pacc/cc/docs/covid-19/FAQ_Implementation_Guidance_CARES_Act_Sec_3610_1.13.21.pdf

[8] In accordance with statutory requirements, previous OMB guidance had already stated the importance of ensuring no duplication of payment between assistance programs. For example, see: OMB, "*Preserving the Resilience of the Federal Contracting Base in the Fight Against the Coronavirus Disease 2019 (COVID-19)*," M-20-21, (Apr. 17, 2020), https://www.whitehouse.gov/wp-content/uploads/2020/04/M-20-22.pdf. This guidance stated: "Fully supported documentation, which may involve representations, will help to prevent incidence of double-dipping, as would be the case, for example, if a federal contractor that was sheltering-in-place and could not telework were to use the PPP to pay its employees, have the loan forgiven pursuant to the criteria established in the interim rule published by SBA and then seek reimbursement for such payment from a federal contracting agency under section 3610."

[9] OMB, *"Extension of Administrative Relief for Recipients and Applicants of Federal Financial Assistance Directly Impacted by the Novel Coronavirus (COVID-19) due to Loss of Operations,"* M-20-26, (Jun.18, 2020), https://www.whitehouse.gov/wp-content/uploads/2020/06/M-20-26.pdf.

[10] DCAA, "*Revised Audit Alert on Coronavirus Legislation and Regulations," 20-PIC-006(R)-Revised, (Jan. 28, 2021), https://www.dcaa.mil/Portals/88/Documents/Guidance/MRDs/REVISED%2020-PIC-006(R)%20Revised%20Audit%20Alert%20on%20Coronavirus%20Legislation%20and%20Regulations.pdf?ver=YzOPfZXXXSCdNMfSN1FTQg==*

- **Credits for allocable costs to a Government contract are due when the loan is forgiven, which may not be the same accounting period as loan issuance.**
- **With respect to forward pricing rate agreements,[11] if costs incurred during calendar years 2020 or 2021 are used as part of the basis of estimate for the proposal, auditors needs to understand how the costs incurred are impacted by the CARES Act and what impact they have on the future estimates.**

Department of Transportation (DOT) Implementation Guidance

DOT has not yet issued written guidance as to the application of the FAR credits clause to allocable costs paid with PPP forgivable loans. However, it has been reported that, in a recent meeting to provide guidance to state departments of transportations on how firms should treat PPP loans for DOT contracting purposes, the Federal Highway Administration revealed draft guidance that seemed inconsistent with the FAR credits clause.[12] Ultimately, this guidance will be very important as state transportation projects funded in whole or in part with Federal funds, and therefore the contractors who perform them, are subject to FAR Part 31 cost principles and therefore, the credits clause.[13]

Small Business Position

The Small Business Committee has heard from some small businesses who advocate for the waiver of the FAR credits clause to PPP loans. They contend the application of such a credit is contrary to the intent of the PPP and would harm small businesses by essentially requiring them to repay the loan through such credits. Thus, the loan was not forgivable. The Committee expects to hear more about this position at the hearing.

Arguments and other considerations

Since April 2020, the position of the Government has been that, to the extent PPP forgiven loan amounts are used towards costs that would be covered under a government contract, the Government should receive a credit to prevent duplication of payment. In contrast, some small businesses argue the PPP is not truly a forgivable loan if it will have to be repaid by virtue of a credit due back to the Government.

The credits clause will impact any federal contractor whose contract requires the determination of reimbursable costs for payment, in accordance with FAR Part 31. Thus, it will primarily affect contractors with cost-type contracts. Those in favor of exempting the credits clause from PPP loans anchor their request in the disparate treatment of these government contractors, who different from PPP recipients in the private sector or even government contractors with other types of contract (i.e. firm fixed priced contracts (FFP)), will have to provide a credit back to the Government.

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[11] Forward Pricing Rate Agreements (FPRAs) are agreements negotiated between a contractor and the Government establishing certain rates, primarily indirect costs rates, that will apply for a specific period of time. FPRAs are used in the pricing of contracts and represent estimates of costs. See: FAR 2.101.

[12] Wayne Owens, Stambaugh Ness, *"FHWA Guidance for State DOT's: Treatment of PPP loan Forgiveness,"* (Jan. 25, 2021), https://www.stambaughness.com/blog/fhwa-guidance-state-dots-treatment-ppp-loan-forgiveness/

[13] 23 USC 112(b)(2)

To the Government's position, it is worth recognizing that this disparate treatment is not caused by the PPP, but by FAR cost principles included and agreed-to by the parties in government contracts. Furthermore, the notion of disparate treatment denies that cost reimbursable contracts are inherently different to FFP contracts. FFP contracts are subject to a bottom-line price, generally not subject to adjustment. Thus, FFP contracts place "maximum risk and full responsibility for all costs and resulting profit or loss" on the contractor.[14] In contrast, the government assumes almost all cost risk in cost reimbursable contracts. The Government accepts the risk of increased costs because it must obtain goods and services for which requirements cannot be define sufficiently or there are uncertainties that impede costs to be estimated accurately.[15] Thus, generally speaking, the basic bargain is that the Government assumes the cost risks, with the contractor undertaking an otherwise risky obligation because it will come out whole.

Outside of these considerations, there are others that, in a balance of interests, might persuade Members of Congress one way or another, including: the legislative intent behind the credits clause and the PPP program; the fact that we are still in the midst of a pandemic and economic uncertainty remains; what precedent a waiver might set on other Federal CARES Act assistance programs for which a credit might also be due; and relief already granted such as recent legislation clarifying that forgiven PPP loans are not taxable income and that deductions are allowed for otherwise deductible expenses paid with the proceeds of a forgiven PPP loan.[16]

Current available guidance from DOD/DCAA states that a credit should only exist over the applicable portion of forgiven PPP loan amounts allocable to a contract, not the entirety of the loan, and that the credit should be applied in the same manner in which loan amounts were originally spent, all of which seems consistent with the credits clause and seeks to ensure parity in the application of the credit. That also seems to be the case with forward pricing rates, where the guidance seems to alert auditors of the importance of adequately assessing 2020 incurred costs, acknowledging that those costs may not be realistic due to the impacts of Cares Act benefits, which should result in additional opportunities for contractors to demonstrate what their real costs are. At a minimum, it will be important to ensure consistency in the application of the credits clause across agencies so that it doesn't result in an improper advantage to the government and contractor's wellbeing is protected.

Conclusion

There is nothing inherent to the PPP program that causes different treatment amongst federal contractors. Rather, it is by virtue of the FAR. Members should closely analyze the issue and the implications to determine if relief should be granted and if so, what sort of relief should be granted. This hearing will strive to examine all sides of the issue.

[14] FAR 16.202-1
[15] FAR 16.301-2(a)
[16] Pub. L. 116-260