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PRATT'S
**GOVERNMENT
CONTRACTING
LAW**
REPORT



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Victoria Prussen Spears

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GUIDE TO THE CARES ACT**

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Michael J. Slattery, Tjasse L. Fritz,
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A Federal Contractor's Five-Part Guide to the CARES Act

By Michael Joseph Montalbano, Michael J. Slattery, Tjasse L. Fritz, Adam Proujansky, and Albert B. Krachman

This five-part article discusses discrete portions of the Coronavirus Aid, Relief and Economic Security Act, known as the CARES Act, how they might affect federal contractors, and what federal contractors can do to take advantages of the many programs and opportunities offered under the Act.

On March 27, 2020, the Coronavirus Aid, Relief and Economic Security Act (“CARES Act”) was signed into law. This massive \$2.2 trillion economic package provides a host of opportunities and resources for all varieties of federal contractors—from those who need financial assistance through the coronavirus pandemic to those who can leverage their resources to assist the federal government in its response.

This five-part article discusses discrete portions of the CARES Act, how they might affect federal contractors, and what federal contractors can do to take advantages of the many programs and opportunities offered under the Act.

In particular, the first part discusses the expanded \$349 billion loan program set aside for small businesses under the CARES Act.

The second part discusses Section 3610 of the CARES Act, which provides funds that federal agencies can use to alleviate disruptions to federal contractors caused by the coronavirus pandemic.

The next part discusses the wealth of grant programs available to federal contractors and other businesses under the CARES Act.

The fourth part discusses the billions of dollars in loans, loan guarantees, and other financial assistance available through the Department of Defense to defense industry contractors.

The final part of this article discusses new contracting authorities delegated under the CARES Act as well as sole source opportunities available under the Act.

THE CARES ACT PROVIDES MUCH NEEDED FINANCIAL RELIEF FOR SMALL BUSINESSES

*Michael Joseph Montalbano*¹

One major component of the CARES Act is the \$349 billion set-aside to provide relief for small businesses in the form of loans and other financial resources. What follows is a discussion of the major components of this program that all small businesses need to know before deciding whether they should apply for one of these loans.

Corporations, Sole Proprietorships, and Other Business Organizations and Nonprofits Eligible for Small Business Loans under the CARES Act

- Business concerns, nonprofit organizations, veteran organizations, or tribal business concerns that have 500 or fewer employees or qualify under a size standard established by the North American Industry Classification System.
- Sole proprietors, independent contractors, and eligible self-employed individuals.

Maximum Loan Amount for Small Businesses under the CARES Act

The lesser of two-and-a-half times the average total monthly payroll costs for the one-year period before the loan was made, or \$10 million.

“Payroll costs” include payments for employee compensation; vacation; parental, family, medical, and sick leave; health care benefits; severance; retirement benefits; and state or local taxes assessed on employee compensation.

If the entity was not in business for at least a year, the payroll costs used to calculate the loan size are those incurred from January 1, 2020, to February 29, 2020.

The CARES Act also increases the cap for “express loans” from \$350,000 to one million dollars until January 1, 2021.

Allowable Expenses

The loan may be used to pay any of the following expenses:

- Payrolls costs (see above)
- Mortgage interest
- Rent

¹ Michael J. Montalbano, an attorney in the Philadelphia office of Blank Rome LLP, represents government contractors in a variety of litigation and counseling matters. He may be contacted at mmontalbano@blankrome.com.

- Utilities
- Interest incurred on debts

Loan Forgiveness

- Borrowers are eligible for loan forgiveness equal to what the borrower paid in payroll costs, mortgage interest, rent, and utilities during the eight weeks after the origination of the loan. The amount forgiven cannot exceed the amount borrowed.
- The amount eligible for loan forgiveness may be reduced if the borrower reduces its workforce during the loan period or reduces the wages of any employee by more than 25 percent compared to the previous quarter (excluding employees that made \$100,000 or more during the previous year).
- The amount eligible for loan forgiveness will not be reduced if the borrower reduced the workforce or wages between February 15, 2020, and April 26, 2020, but subsequently restored workforce levels and/or wages by June 30, 2020.

Loan Conditions and Repayment of the Loan

- Eligible small businesses and individuals can apply for these loans until June 30, 2020.
- The loans will be distributed through the Small Business Administration's ("SBA") 7(a) lenders.
- Borrowers must make a good faith certification that the loan is necessary because of the uncertainty caused by "current economic conditions" and acknowledge that the funds will be used for allowable expenses (see above).
- Borrowers do *not* need to certify that they are unable to obtain credit elsewhere.
- The interest rate on the loan cannot exceed four percent.
- Payments on the loan (including interest and fees) are deferred for at least six months and up to a year.
- The maximum duration of the loan is 10 years after the borrower applies for loan forgiveness.
- The SBA is prohibited from assessing fees in connection with the loan or requiring a personal guarantee or collateral.

Main Takeaways

The SBA loans offered under the CARES Act will help small businesses trying to maintain their workforce, and manage expenses such as rent and

utilities, through the coronavirus crisis. If a borrower uses the loan to cover these expenses, while maintaining its workforce and pay levels, then the entire loan amount may be forgiven or substantially reduced. A significant sum (\$349 billion) was set aside for these loans. It is imperative that small businesses in need of these loans apply before the loan application window expires on June 30, 2020.

CARES ACT § 3610: AN IMMEDIATE LIFELINE FOR QUALIFYING FEDERAL CONTACTORS DISPLACED BY COVID-19

*Michael J. Slattery*²

In addition to directly providing many American families with cash stimulus payments, the CARES Act provides federal funds, grants, loan guarantees, and other resources to a wide variety of entities to help them combat the virus and weather the storm of its effects. These include state, local, and tribal governments; hospitals and healthcare workers; law enforcement and first responders; scientific research institutions; small businesses; local schools and universities; and federal contractors.

While contractors should note that the relief window is not open ended and agencies can only provide relief up to September 6, 2020, for federal contractors, the CARES Act provides potential new business opportunities, and throws an immediate lifeline to qualifying firms whose workforce has been displaced by COVID-19 shutdowns.

Eligibility

Section 3610 provides funds to aid government contractors who satisfy two conditions:

1. Their employees or subcontractors cannot perform work on a site that has been approved by the federal government, including a federally-owned or -leased facility or site, due to facility closures or other restrictions; and
2. Their employees or subcontractors cannot telework because their job duties cannot be performed remotely during the COVID-19 public health emergency.

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Purpose

Section 3610 provides funds that federal agencies can use to modify the terms and conditions of a contract to reimburse contractors who provide paid leave, including sick leave, to its employees in order to keep them “on a ready state.”

Restrictions

Section 3610 places restrictions on the amount of relief contractors can receive. Agencies can only reimburse qualifying contractors at minimum applicable contract billing rates not to exceed an average of 40 hours per week.

Finally, Section 3610 prevents double dipping. It reduces the amount of money contractors can receive under this provision by the amount of credit a contractor is allowed pursuant to Division G of Public Law 116-127—which provides tax credits against payroll taxes for employer-paid qualified sick leave wages—and any applicable credits a contractor is allowed under the CARES Act.

Major Takeaways

- *Speed is key:* This relief is only available up to September 6, 2020. Qualifying contractors should immediately contact their Contracting Officer and determine how they can apply for this relief and identify all of the documentation necessary to do so.
- *Ensure your employees remain in a “ready state”:* Ask your Contracting Officer what employees can and cannot do while on leave in order to maintain a ready state footing.
- *Precisely document your steps:* Ensure that all notices placing employees on leave pursuant to Section 3610 cite this portion of the CARES Act and recite all of the conditions necessary to invoke it.
- *Guard against double dipping:* Calculate the amount of the tax credits you are entitled to under Division G of Public Law 116-127 and other CARES Act sections. The maximum amount of relief you can receive under Section 3610 will be reduced by this amount. It is best to know up front how much you can accept to avoid myriad headaches and potential pitfalls down the road.

CARES ACT GRANT PROGRAMS: SEARCHING FOR OPPORTUNITY IN THE CORONAVIRUS RELIEF EFFORT

*Tjasse L. Fritz*³

Included in the CARES Act are a wealth of grant programs that may hold opportunities for companies able to position themselves appropriately during this crisis.

Of particular interest are grant programs related to healthcare, technology, and workforce sustainment, which include:

1. Entrepreneurial Development Grants

Section 1103 of the CARES Act provides a \$240 million grant fund for development of programs to provide education, training, and advising to covered small business concerns. Training topics include:

- How to apply for Small Business Administration (“SBA”) resources, including business resiliency programs;
- COVID-19 transmission prevention practices; and
- How to manage and practice teleworking.

An additional \$25 million grant is available for development of a centralized information hub where these educational materials may be accessed.

2. Emergency Business Grants

Section 1110 of the Act expands eligibility for Economic Injury Disaster Loans to several new categories of businesses, including sole proprietorships, and authorizes the SBA to issue “emergency grants” of up to \$10,000 per business while these loan applications are reviewed.

The grant funds must be disbursed by the SBA within three days, and no repayment is required even if the final loan application is eventually denied.

For prime contractors overseeing multiple subcontracts, this stop-gap measure may hold the key to keeping operations running smoothly.

3. Short-Time Compensation Programs

Section 2110 allocates \$100 million for grants to states implementing and administering short-time compensation programs, also called “work share” programs.

³ Tjasse L. Fritz, an attorney in the Washington, D.C., office of Blank Rome LLP, concentrates her practice on government contracts and other complex litigation matters. She may be contacted at tfritz@blankrome.com.

Among other permitted uses, funds for these grants may be used to automate application systems or create advisement teams to teach employers about alternatives to layoffs.

Short-time programs also provide businesses with incentives to maintain their workforce by splitting a smaller number of hours across more employees; the employees are then given partially reduced unemployment benefits, and the employer is given some relief from sustaining the entire payroll during times of slack labor demand.

4. Telehealth Network and Telehealth Resource Centers Grant Programs

Section 3212 of the CARES Act reauthorizes Health Resources and Services Administration (“HRSA”) grant programs for the development and promotion of telecommunications systems for remote administration of healthcare and health information services.

The \$29 million allocation is aimed at providing remote COVID-19 screening for high-risk individuals and medical care to individuals in remote communities.

5. Rural Healthcare Services Grants

Section 3213 allocates \$79.5 million for HRSA grant programs for development of healthcare networks in rural communities.

Interestingly, the reauthorization of this program includes an amendment that makes for-profit companies eligible for grants if they are entities “with demonstrated experience serving, or the capacity to serve, rural underserved populations.”

6. Geriatric Medicine Education Grants

Section 3403 of the CARES Act authorizes the Secretary of Health and Human Services to issue grants, contracts, and cooperative agreements to organizations for creation and administration of programs designed to provide training on geriatric healthcare to medical professionals. The annual allocation of \$40,737,000 for awards gives priority to entities that submit proposals aimed at serving traditionally underserved and rural communities.

CARES ACT: SIGNIFICANT FUNDS FOR DEFENSE DEPARTMENT AND DEFENSE CONTRACTORS

Adam Proujansky⁴

The CARES Act includes billions of dollars earmarked for the Department of Defense (“DoD”) and defense industry contractors. It does this in two ways:

⁴ Adam Proujansky, a partner in the Washington, D.C., office of Blank Rome LLP, has extensive experience in complex and high-stakes litigation, including False Claims Act actions,

1. By providing billions of dollars in loans, loan guarantees, and other financial assistance to businesses through the Department of the Treasury, including up to \$17 billion specifically for businesses “critical to maintaining national security;” and
2. By providing \$10.5 billion in supplemental appropriations to DoD, much of which is likely to go to procuring goods and services from federal contractors, including in areas ranging from healthcare to information technology. The CARES Act also contains provisions intended to streamline DoD contracting during the present emergency.

Although the procedures to obtain these loans were not established by the CARES Act, the Secretary of the Treasury is required to publish procedures for applying for these loans within 10 days of enactment. It is expected that DoD will issue solicitations very soon to meet these pressing needs. We expect many contractors in the defense industry will be eligible for these loans, or for the parallel loan program for small businesses being administered by the Small Business Administration under the CARES Act.

Section 4003 of the CARES Act

Section 4003 of the CARES Act authorizes \$500 billion in loans, loan guarantees, and investments for businesses, states, and municipalities that have incurred losses relating to the COVID-19 pandemic, giving the Secretary of the Treasury broad discretion as to how the money is distributed, as well as considerable flexibility regarding the rate of interest on the loans and the terms of loan repayment. Businesses are eligible for these loans, loan guarantees, and investments if their continued operations are jeopardized by losses related to the pandemic. The CARES Act requires that the loans and payments be publicly disclosed, and they are subject to strict oversight and conflict-of-interest provisions.

In return for the loans, guarantees, and investments, the businesses must agree to limitations on executive compensation, payment of dividends, and stock buy-backs, and the Government must receive warrants, equity, or debt instruments as collateral.

Of the \$500 Billion Total Fund:

1. Up to \$17 billion is designated for direct loans to “businesses critical to maintaining national security” (a term not defined in the statute);
2. \$25 billion for passenger air carriers (and certain airline industry

bid protests, contract disputes, and antitrust cases. He may be contacted at aproujansky@blankrome.com.

contractors); and

3. Four billion dollars for cargo air carriers.

In addition to possible eligibility for direct loans, contractors in the defense industry are likely to benefit from the \$10.5 billion appropriation for the Department of Defense, which contemplates significant procurements in a variety of areas *including, but not limited to, healthcare*:

1. Approximately \$3.4 billion will go to the purchase of medical equipment to treat military personnel and for the expansion of military treatment facilities.
2. Another one billion dollars is designated for purchases pursuant to the Defense Production Act to increase access to materials necessary for national security and pandemic recovery.
3. An additional \$1.45 billion is set aside by the Act for Defense Working Capital Funds, in order to mitigate the impact of COVID-19 on production lines and supply chains.
4. The stimulus package also includes \$300 million to procure IT equipment and increase bandwidth in order to facilitate telework.

Of particular interest to contractors in the defense industry, the CARES Act also contains provisions designed to streamline DoD contracting in response to the pandemic:

1. *Section 13003* of the CARES Act removes the one-billion-dollar cap on advance billings for Defense Working Capital Funds to improve the Department of Defense's procurement flexibility and ensure supply chain stability.
2. *Section 13004* removes the incurred cost limit on progress payments under undefinitized contract actions to enhance cashflow to federal contractors.
3. *Section 13005* removes restrictions on the Department of Defense's use of undefinitized contract actions to enhance the Department of Defense's emergency response.
4. *Section 13006* allows the Department of Defense to waive certain restrictions on the usage of other transaction authority in contracts to improve liquidity in the defense contracting sector, particularly among small businesses, in connection with the pandemic response.

NEW CONTRACTING AUTHORITIES AND PREFERENCES ESTABLISHED UNDER THE CARES ACT

*Albert B. Krachman*⁵

The CARES Act creates several new contracting authorities that will present new business opportunities to firms offering COVID-19-related supplies and services. In some cases, the CARES Act also establishes specialized contracting priorities or preferences to contractors with particular service experience or qualifications, expertise, or ownership characteristics. The law also permits certain awards to be made without competition—in other words, sole source contracts—without the Justification and Approval normally required for such awards. This part surveys some of these new contracting authorities and award preferences.

New Contracting Authorities

The CARES Act delegates extensive new contracting authorities to the Department of Health and Human Services (“HHS”) and creates many new organizations with specific contracting authority. Here is a brief list of some of the key delegations and new organizations with contracting authority:

Blood Donor Awareness

The CARES Act charges the Secretary of HHS with starting a national campaign about the importance of blood donation. Section 3226(b) of the Act gives the Secretary authority to contract with one or more public or private nonprofit entities to establish this campaign. These nonprofits will then engage advertising and public relations firms to execute the awareness programs. Media firms with public health communications experience will have an edge in securing this work.

Geriatric Healthcare

Unlike virtually all other provisions of the CARES Act, which grant discretion for making contract awards, Section 3403 uses mandatory language in the area of geriatric workforce training. The law provides that the Secretary of HHS “shall award grants, contracts or cooperative agreement to certain described entities, to establish or operate Geriatric Workforce Enhancement Programs.”

This section also features a three-tiered priority for award of contracts, grants, and cooperative agreements:

⁵ Albert B. “Al” Krachman is a partner in the Public Contracts practice group of Blank Rome LLP. Resident in the firm’s Washington, D.C., office, he may be contacted at krachman@blankrome.com.

First Tier: The Secretary must prioritize programs that have coordinated with other federal or state programs, or that benefit rural or underserved areas, including Tribes and Tribal Organizations.

Second Tier: The Secretary must give special consideration to entities that provide services in areas with shortages of geriatric workforce professionals.

Third Tier: A third tier of discretionary priority applies to programs that integrate geriatric care with primary care or have another substantial connection with geriatric care. The law does not define the difference between priorities and special consideration, so this could create confusion in the award process.

Firms entitled to mandatory priority or special consideration will have a significant edge in winning this work. An organization that lacks this experience but is interested in pursuing this business could team with a firm entitled to priority to jointly participate.

Public Health and Social Services Emergency Fund

As part of the Public Health and Social Services Emergency Fund, the CARES Act authorizes the transfer to the Health Resources and Services Administration of \$90 million for modifications to existing contracts, and supplements to existing grants and cooperative agreements, but goes further to specify that these supplements are “to be awarded using data driven methodology” as determined by HHS. This is an unusual prescription that will require clarification by the contracting offices.

Personal Services Contracts

Section 18108 authorizes HHS to award personal services contracts for COVID-19-related support services. These contracts have been exempted from pay caps applicable to other federal employees. Similar authority for award of personal services contracts has been granted to the Department of State and the Agency for International Development at Section 21010.

Emergency and Oversight Contracts

Congress granted itself contracting authority in Section 19003 to enter into emergency contracts for COVID-19-related services, and also authorized the newly created Office of the Special Inspector General for Pandemic Recovery, the Congressional Oversight Commission, and the Pandemic Response Accountability Committee, to enter into contracts to carry out their functions.

Telecommunications Contracts

Sections 20003 and 20004 call for the award of contracts to telecommunications providers to provide broadband services for expanded mental health services to isolated veterans through telehealth or VA Video Connect during the current public health emergency.

Non-Competitive or Sole Source Authority

The new authority delegations are generally silent on the applicability of the competition requirements under the Competition in Contracting Act. But in a few limited instances, the CARES Act expressly authorizes contract awards without competition:

1. In the area of Public and Indian Housing, Tenant Based Rental Assistance, for example, the CARES Act allows certain unobligated funding balances to be used to award COVID-19-related contracts “without competition.”
2. Likewise, for Indian Community Development Block Programs, the Act states that the Secretary “shall prioritize without competition allocation of amounts for activities and projects” for COVID-19 preparedness and response.
3. In the area of community planning and development housing opportunities for people with AIDS, the CARES Act provides that two percent of funding may be used without competition to increase prior awards to existing technical service providers.
4. Very broad flexibility has been granted in the area of Homeless Assistance Grants. Recipients of these grants are permitted to deviate from applicable procurement standards when procuring goods or services for COVID-19 responses.
5. For technical assistance providers with experience in providing health-care services to homeless populations, the Act allows one percent of the funding to be awarded to these organizations without competition.

From a big picture perspective, the CARES Act has created many new and valuable contracting opportunities, some targeted to specialized organizations, but many open to a broader base of qualified offerors. To best position themselves for these opportunities, organizations with the necessary capabilities should move quickly to identify and communicate with the relevant contracting authorities.⁶

⁶ This article was current when written but guidance continues to evolve on the CARES Act.