

**ALL WORK AND NO PAY: CHANGE ORDERS
DELAYED FOR SMALL CONSTRUCTION
CONTRACTORS**

HEARING
BEFORE THE
SUBCOMMITTEES ON CONTRACTING AND
WORKFORCE AND INVESTIGATIONS,
OVERSIGHT, AND REGULATIONS
OF THE
COMMITTEE ON SMALL BUSINESS
UNITED STATES
HOUSE OF REPRESENTATIVES
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ALL WORK AND NO PAY: CHANGE ORDERS DELAYED FOR SMALL CONSTRUCTION CONTRACTORS

THURSDAY, MAY 25, 2017

HOUSE OF REPRESENTATIVES,
COMMITTEE ON SMALL BUSINESS,
SUBCOMMITTEE ON CONTRACTING AND WORKFORCE
JOINT WITH THE
SUBCOMMITTEE ON INVESTIGATIONS, OVERSIGHT, AND
REGULATIONS
Washington, DC.

The Subcommittees met, pursuant to call, at 10:00 a.m., in Room 2360, Rayburn House Office Building, Hon. Steve Knight [chairman of the Subcommittee on Contracting and Workforce] presiding.

Present: Representatives Chabot, King, Knight, Kelly, Blum, Bacon, Fitzpatrick, Marshall, Estes, Evans, Murphy, Lawson, Clarke, and Adams.

Chairman KNIGHT. Good morning. This hearing will come to order. Thank you all for coming.

Before we begin today's joint hearing of the Subcommittee on Contracting and Work Force and the Subcommittee on Investigations, Oversight, and Regulations, I would like to thank our witnesses for taking the time to share their insights with us today and I look forward to their testimony.

In 2016, our Federal Government spent \$90 billion on construction, an industry that is vital to rebuilding our Nation's crumbling and aging infrastructure. Our agencies must have agile, transparent, and fair processes in place in order to ensure high quality structures are built at a reasonable cost. Construction is one particular industry where changes are particularly prevalent and flexibility is crucial. Agencies should be capable of swiftly adapting to changing conditions without engaging in a completely new and lengthy acquisition process. Issuing contract modifications through the use of formally authorized and document change is one way to accomplish this task.

In contracting, a certain degree of reasonable delay is expected when changes are made. However, this becomes inexcusable when Federal agencies are unwilling to formally execute change orders and fail to pay for work that has been completed for months or even years. During this waiting period, small contractors are often left to finance new work out of pocket. Some of these expenses include paying employees' salaries, taxes, building materials, running expensive machinery and other costs a small construction firm

must assume. Unfortunately, this creates untenable situations and can result in financial distress, and in some cases, bankruptcy.

Another common problem occurs. Contractors are directed to perform change orders, work without following proper notice and authorization procedures. If change order work is directed without following protocol, contractors may not get paid even for work they complete. With the added pressures of staying on schedule and not wanting to poison the relationship between the parties, small contractors must choose between working without a guarantee of payment or risk contract termination for nonperformance. Faced with this impossible decision, small contractors often decided to go ahead and do the work.

This issue is not unique to small firms, however. Large firms have the flexibility and capital to bear extended periods of time waiting for change order payments. In contrast, smaller operations require a stable and predictable cash flow to replenish their limited working capital.

Many small contractors rely on bank loans and lines of credit to bridge the gap, raising the risk of bad credit or worse. When resources are tied up on unprofitable projects, small contractors are unable to seek new work. When multiple change orders are delayed, the impact is further compounded. By engaging in these poor change order practices, agencies end up struggling with small construction contractors. We need to make it equitable for small businesses to work with the government and reduce these barriers that hurt or dissuade small businesses from working with government contracts.

I hope through this testimony of our witnesses we can learn more about this issue and discover ways to prevent this unfortunate circumstance. I do look forward to the discussion today.

I would now like to yield time to the ranking member, Ms. Murphy, for her statement.

Ms. MURPHY. Thank you, Mr. Chairman.

For several decades, the Federal Government has relied on the private construction industry to build and repair infrastructure for its day-to-day operations. Accordingly, a thriving small business industrial base has become essential to the U.S. economy and to our national security. However, it is well documented that government contracts are less than perfect when awarded. As we will hear today, more needs to be done to reduce the burdens imposed on small construction firms due to administrative delays.

During performance of a contract, many changes may be required to fix inaccurate specifications, react to new circumstances, or modify the work to better meet agency needs. A change order is a unilateral, written order issued by a contracting officer directing the contractor to make a contract modification. Currently, such directives can be made with or without the contractor's consent.

The ability of Federal agencies to make such unilateral decisions has led to persistent problems in which agencies fail to follow the proper procedures to issue change orders. Agencies routinely delay the approval process for change orders or bundle them to ease the administrative burden on contracting officers.

This Committee is concerned that such actions have been taken without sufficient consideration of the consequences for small con-

struction businesses. Agency delays can create significant financial burdens on contractors. Due to the nature of construction projects, processing a change order can slow down other parts of the project, jeopardizing the ability of contractors to meet their obligations. Firms are often left with little choice but to comply with changes without receiving formal approval of the change order or a guarantee that they will receive payment.

This has created tremendous uncertainty for small contractors that do not have the overhead margins of larger primes and cannot afford to go unpaid for work performed. Without prompt payment, small firms can struggle to meet their payroll, let alone pay their bills. In some of the more egregious cases, businesses have gone over a year without payment for work completed.

Although equitable adjustment in the contract price enables a contractor to receive compensation for additional performance costs incurred by a contract modification, this option falls short of solving the problem. Requests for equitable adjustments (REAs) can allow small business construction contractors to afford continuing performance, but any delay means the contractor must assume the cost and hope for payment after completion of the contract.

Numerous policies and protections have been enacted to incentivize small businesses to continue participating in government contracting, but more are necessary to manage the change order process. Small businesses have approached this Committee with complaints about the effect of bundling or consolidation of change orders on their bottom line. I hope today's hearing will shed light on these challenges, and I look forward to hearing this panel's feedback on legislation that Congressman Fitzpatrick, Chairman Knight, and I recently introduced to address the issue.

Whether it comes to change order delays, reductions in Federal procurement staff, or an increase in multiple award contracts, there will always be new issues for small businesses to overcome. We must ensure that the procurement laws evolve with this changing landscape. Doing so is essential not only for small firms and our Nation's industrial base, but for the overall health of our economy.

I yield back the balance of my time.

Chairman KNIGHT. Thank you very much. And this is a joint hearing, so we have the Chairman from the Subcommittee on Investigations, Oversight, and Regulations with us, Chairman Kelly, to have his opening statement.

Chairman KELLY. Thank you, Chairman Knight.

You know, in the Small Business Committee, I thank our Ranking Member Murphy and Ranking Member Adams. We unite in the Small Business Committee regardless of party, and we are all great advocates for the small business communities that are so important to our economy.

I would also like to thank our witnesses for your willingness to testify on the serious problems endangering our small businesses' construction contractors caused by the actions and often the inactions of Federal agencies.

As the chairman mentioned in his opening statement, small contractors often find themselves at the mercy of Federal agencies while they wait for payment on work that they completed months

ago. Unfortunately, many do not know when that payment might be made or if the payment will be made at all. The danger of delayed change orders to small construction contractors was revealed by the Government Accountability Office's study of the Debarment of Veterans Affairs construction process in 2013. The GAO found change orders took an average of 2 to 3 months to complete from start to finish, and sometimes as long as 6 months. In one instance, the VA halted change order processing all together for one year leaving small contractors without payment or resolution. In 2013, \$41 million in payments to subcontractors from the VA had not been made, leaving 33 businesses in financial distress. Some contractors were waiting for payment for work they completed over 12 months ago and a few filed for bankruptcy. Because of these issues, small businesses would rather work in the private sector than bid on financially risky and potentially unprofitable government projects.

The agencies also suffer from their own poor practices. Projects become less appealing to contractors, which reduces competition. To offset this risk of delayed payment or nonpayment, small contractors will inflate the prices on bids. This forces the agency to accept much higher prices than budgeted. Simply said, change order delays can stretch into years and cost overruns can reach upwards of tens of millions of dollars.

Furthermore, the Committee is concerned that agencies may be engaging in unfair negotiation strategies with construction contractors. One such tactic involved delaying multiple change order payments until the end of a project to try to leverage for a better price.

Agencies may also be forcing small businesses to rely on claims process to litigate their dispute. Small businesses do not have the time or resources to litigate claims and often settle for lesser amounts than owed, rather than face thousands of dollars in legal fees for the potential benefit of being paid pennies on the dollar.

I look forward to hearing more from our distinguished panel about whether agencies are, in fact, engaging in this unfair treatment and what protective measures might be available.

Mr. Chairman, I yield back the balance of my time.

Chairman KNIGHT. Thank you very much.

And we would like to hear from the ranking member, Ms. Adams, for her comments.

Ms. ADAMS. Thank you, Mr. Chairman. Thank you for holding this valuable hearing, and I thank all of the individuals who are here to testify today.

Today's discussion continues our ongoing work to help more small businesses compete successfully in the Federal Marketplace. As this Committee seeks ways to foster small business growth and expansion, we must always carefully consider what's being done to maximize entrepreneurs' participation, including their experience while performing government contracts.

One longstanding barrier to small business participation in the Federal Marketplace has been the practice of bundling contract modifications which delays the payments of contractors while increasing the risk they take on. When Federal agencies group small modification actions together, they reduce the negotiating power of the contract. And while we have discussed formal contract changes,

informal contract change are not issued in writing and often result from government conduct unforeseeing impediments to performance or other factors. Much of the time they are disputed, leaving the business with costly litigations. These costs hinder the small contractors' ability to perform other contracts and cut into the profits of the firm.

Considering the prevalence of this problem, it is vital that we ensure the SBA is doing everything possible to intervene in unnecessary bundling by giving them more power to do so.

This raises a number of important oversight questions, including whether the SBA has sufficient staff to monitor contract actions or performance and is truly privy to agency actions that negatively impact small businesses generally. Because of the nature of the work, construction contracts most often have informal changes. This leads to delays associated with recognizing them as official and receiving compensation for them. As other members have mentioned, this delay greatly affects the capital available to small construction contractors to cover the cost of suppliers or the proper bonding.

Often small businesses do not have the capital to support large bonds that they need to participate in the Federal Marketplace. This difficulty is exacerbated when bundled change orders increases the original contract price, thereby requiring a larger bond. Given the delays associated with bundling modifications that potential increase in bonding could cause a small contractor to not be able to complete performance on the contract. And in other cases, small contractors avoid bidding entirely which diminishes the pool of qualified participants. This Committee must examine how well the SBA rulemaking process functions to boost small businesses' ability to compete for Federal contracts and protect them when completing performance.

Mr. Chairman, this Committee has a long track record of working in a bipartisan manner, particularly when it comes to procurement issues. It is my hope that we can continue that tradition to further small businesses' role as successful Federal contractors. It is all the more critical that this Committee and the SBA work to remove barriers that prevent small firms from successfully performing Federal work and getting paid for all of the work done.

So I look forward to hearing the witnesses' perspectives today on how we can best accomplish the task, and I yield back the balance of my time.

Chairman KNIGHT. Thank you very much. And I firmly agree that this is one of those Committees that is a bipartisan effort to try and make it so that we get our small businesses to work, our small businesses can create opportunities, and we can have a robust economy.

So I am going to go through the rules here real quick. If Committee members have an opening statement prepared, I ask that they submit it for the record.

The lights in front are you are kind of our stoplights. So as it goes green, you have 4 minutes to give your presentation. When it goes yellow, you have a minute to kind of wrap it up. And when it is red, you are wrapped up. So we are pretty easy around here,

but if you can kind of follow that, that would help everyone. And we stick to the 5 minutes up here, too, with our questions.

So I would like to introduce our witnesses. Our first witness is Mr. Edward DeLisle. He serves as the co-chair of the Federal Contracting Group at the Law Firm of Cohen Seglias——

Mr. DELISLE. Seglias.

Chairman KNIGHT. Pallas.

Mr. DELISLE. Pallas.

Chairman KNIGHT. Greenhall and Furman, and is shareholder and member of the firm's board of directors. His practice focuses on Federal contracting, construction law, construction litigation, and he also counsels clients in all aspects of small business procurement. Mr. DeLisle has appeared before this Committee in the past, testifying on challenges facing small business construction contractors. And we thank him and welcome him back today.

Our second witness is Mr. Michael Andy Brown. Mr. Brown is the vice president of Glen/Mar Construction, Inc., a woman-owned and service-disabled veteran-owned small business construction firm. Thank you very much. He has over 18 years of experience in the commercial and industrial at-risk construction market and in government contracting. Glen/Mar holds construction contracts with agencies, including the Department of Veterans Affairs, Army Corps of Engineers, and the General Services Administration. Mr. Brown will be testifying today in his capacity as the co-chair of the Small Business Committee on the Federal and Heavy Division of the Associated General Contractors. We look forward to his testimony.

And now, since we have shuffled chairs back and forth, back and forth, I would like to go to the ranking member to introduce Mr. Long.

Ms. MURPHY. It is my pleasure to introduce Mr. Greg Long, CEO of Long Electric Company in Napa, California. Mr. Long is testifying on behalf of the National Electrical Contractors Association. Mr. Long has been an electrician since 1979. He established Long Electric Company in 1990, which now employs dozens of workers. The firm serves customers in various markets, including biotechnology and pharmaceutical facilities, data centers, wineries, education facilities, and commercial and industrial facilities. In 2015 and 2016, Mr. Long was unanimously elected to serve as the council chair for ELECTRI, NECA's educational foundation. He has also served as a representative for the Council for the Electrical Contractors Trust of Solano and Napa Counties and as chair for the ELECTRI Program Review Committee. Welcome, Mr. Long.

Chairman KNIGHT. Thank you very much.

And our final witness is Ms. Colette Nelson. She is testifying today on behalf of the Construction Procurement Coalition, which includes 14 national trade and professional organizations, including the American Subcontractors Association. Ms. Nelson is the chief advocacy officer of the Association, and in her 30-plus years with the association, she has been involved in most of the major issues impacting the construction industry. We are pleased to welcome Ms. Nelson to the Committee.

We look forward to your testimony. I can tell you that Chairman Kelly and I are here to have a robust and aggressive program. We

are not just here to look pretty as Mr. Kelly and I do; we are to actually build a program that can be put into law that can help small businesses. And I know I speak for the entire, both Committees that that is the goal.

So with that, we will start with Mr. DeLisle.

STATEMENTS OF EDWARD DELISLE, CO-CHAIR, FEDERAL CONTRACTING GROUP, COHEN SEGLIAS PALLAS GREENHALL & FURMAN PC; ANDY BROWN, VICE PRESIDENT, GLEN/MAR CONSTRUCTION; GREG LONG, CEO, LONG ELECTRIC COMPANY; COLETTE NELSON, CHIEF ADVOCACY OFFICER, AMERICAN SUBCONTRACTORS ASSOCIATION, INC.

STATEMENT OF EDWARD DELISLE

Mr. DELISLE. Thank you, Mr. Chairman.

As you indicated, the crux of my practice centers around the representation of construction contractors that perform work for the Federal Government, many of whom are small. So I am very familiar with the issue that we are here to discuss today, which is the problems associated with government delay in issuing contract modifications or change orders. I thank members of the joint Subcommittee for inviting me to testify today.

If you travel to Washington, D.C., as I do from Philadelphia on the train and you take a cab from Union Station toward the White House, if you look across the sky, you will see that it is littered with cranes, and those cranes sit on construction projects. And as you make your way toward the White House and you stop in front of one of those construction projects, you will see teams of people working, going up and down ladders, pouring concrete, setting steel, operating equipment. You see dust and debris everywhere, and it is quite chaotic. And it is quite chaotic to the construction contractors that are performing, but it is something that they are accustomed to. There are a million risks associated with getting a construction project successfully performed, but a good contractor can manage many of the risks that you see as you drive past. Safety plans are in place to keep workers free from harm. Detailed performance and delivery schedules are in place so that work can be accomplished orderly and timely. But what happens when an unexpected change occurs on a project? What happens, for example, when the contractor realizes that it cannot build what is depicted on the plans and specifications? Or a situation where the government decides to change the configuration of a room in the middle of performance? That is where the real risk lies for a construction contractor, especially a small one. And they happen all the time. Changes in and additions to scopes of work represent unknown, and to a large extent, uncontrollable risk that can have an enormous impact on the time of performance and cost.

The keys to mitigating that risk are to quickly identify the problem, modify the contract as soon as possible so that the performance issues can be addressed, fixed, and paid for. Unfortunately, the government often does not move as quickly as it should, which puts the contractor, especially a small government contractor, in a difficult position.

I will discuss by way of example what can happen in a situation where the government fails to act, but first, let us talk about what should happen.

The Federal acquisition regulations provide the contractor with guidance on how to proceed when faced with an unexpected or a change in condition. If a contractor runs into such a situation, it must generally notify government and ask for guidance. If the contracting officer responds with a directive to do something that the contractor thinks is over and above what it is required to do by contract, under FAR part 52.243-4, which is the changes clause that is typically included in a government construction contract, the contractor is supposed to tell the contracting officer that its directive will have a cost and time consequence if that is the case. Most of the time that is precisely what happens. Contractors know when they are going to incur unexpected cost, and it has all the incentive in the world to let the government know that that is the case.

The problem is that the timely recognition of the change by the government does not happen when it should, does not happen like it should. FAR 52.243-4 states that once a change is made or occurs, the contracting officer shall make an equitable adjustment and modify the contract in writing. That notion mirrors FAR 43.204, which is the FAR section that pertains to contract modifications, which states that the contracting officer shall negotiate equitable adjustments resulting from change orders in the shortest, practicable time.

So when there are changes, the contracting officer is supposed to recognize them and negotiate an appropriate adjustment. That process does not happen the way that it should. Oftentimes what happens is that the change is not dealt with or recognized at all, and here is how that can play out in reality.

I represented a service-disabled, veteran-owned small business on a job for the Department of Veterans Affairs. It was a \$6 million renovation project with a performance period of 400 days. There were a myriad of changes that occurred on that project, all of which were obvious. After 700 days of performance and very few change orders issued, and a million dollars of his own money spent, this service-disabled veteran gave up and left. His reward for leaving was a termination for default. After 2 years of litigation, we finally settled. The contractor received \$960,000 in compensation and the termination for default was rescinded, but it was too late. The contractor had already closed its doors. That is precisely why we are here. Thank you.

Chairman KNIGHT. Thank you very much.

And Mr. Brown, you are now recognized for 5 minutes.

STATEMENT OF ANDY BROWN

Mr. BROWN. Thank you. Members of the Committee, thank you for inviting me to testify on this important topic impacting small business contractors.

I am vice president of Glen/Mar Construction, a family-owned and operated general contractor. As a woman-owned and service-disabled veteran-owned small business, Glen/Mar performs vertical building construction, seismic renovations, and horizontal construc-

tion for Federal, state, and local agencies. I currently serve as co-chair of the Small Business Committee for the Associated General Contractors of America. For years, AGC has worked with the House Small Business Committee to establish more protections and better governing policies for America's small business contractors. The agency appreciates and thanks the Committee for its continued efforts to help our Nation's small businesses.

Change orders are an inherent process within the construction industry. Most contractors refer to it as a necessary evil as a perfect construction project simply does not exist. As with any construction project, unforeseen issues may emerge, resulting in a change order. However, in the Federal construction industry, change orders have become the bane of all contractors with significant financial impact to small business.

The financial impact has a ripple effect that extends beyond just the prime contractor. It impacts the prime contractor, our subcontractors, and the project as a whole. Delays in processing change orders disrupt cash flow on the project. Cash flow is critical, and in my business, we often view it to be more important than profitability. Without sufficient cash flow, a company will never reach the finish line where profitability resides.

When a Federal Agency fails to timely process and pay change orders, the contractor is left with few options. The contractor can either finance the work to meet the project schedule or stop work all together. Either option brings real problems to small businesses. To keep the project moving, often small businesses finance the work to complete the project and to avoid unnecessary Miller Act or payment bond claims filed by subcontractors and suppliers.

It should come as no surprise that this adversely impacts our overall bonding capacity, which is necessary to pursue additional Federal contracts. The ripple effect begins when untimely processing and payment of change orders on one project prevents a small business from competing for additional Federal projects.

In the past, my company has been unable to bid on projects because our equity was tied up while waiting on payment of change orders. The result is a decrease in competition for Federal projects, less efficient use of taxpayer dollars, and fewer opportunities for small business.

The current state of change order processing continues to limit the pool of qualified contractors who desire to pursue work in the Federal Marketplace. Simply put, this has become a barrier to entry. Contractors, especially small businesses, can only finance these projects for so long. Slow payment impacts not only the prime contractor but all lower tier subcontractors.

As an example, I have an active VA project in California. From September through December of 2016, we submitted 15 change orders totaling nearly half a million dollars. These change orders are undisputed by the agency, but as of today's testimony, some 5 to 7 months later, the work is done but we have not been paid. Therefore, I have been unable to pay a key subcontractor 100 percent for the additional work they have completed. As a result, this subcontractor is now under a Department of Labor investigation due to their inability to make timely payments in their employees' 401(k)

plan. This example shows the ripple effect small businesses face because of untimely payment of change orders.

Conversely, stopping work due to agency indecision or inaction can lead to negative past performance evaluations. Negative evaluations can adversely impact a contractor's ability to gain future work. And in extreme cases, stopping work could give rise to the agency terminating the contract for default. Either option is detrimental to small business contractors.

What I have described in my testimony today is quickly becoming the norm rather than the exception with regards to timely processing any payment of change orders. Just as Federal agencies try to avoid poor performing contractors, contractors in turn try to avoid poor performing agencies, facilities, and/or government personnel, or at least bids accordingly.

To highlight the irony, when we do not pay our bills, our utilities shut off, our cars are repossessed, our houses foreclosed. However, when the government fails to pay their bills, small businesses go out of business.

In closing, I would like to thank you again for inviting me on behalf of AGC to testify before the Committee today. I look forward to answering any questions you have.

Chairman KNIGHT. Thank you very much.

Mr. Long, you are now recognized for 5 minutes.

STATEMENT OF GREG LONG

Mr. LONG. Okay. First of all, I would like to thank you, Chairman Knight, Chairman Kelly, Ranking Member Murphy, Ranking Member Adams, and members of both Subcommittees for inviting me to testify today on behalf of the National Electrical Contractors Association (NECA). I greatly appreciate the opportunity to speak before you. The Subcommittees are to be commended for holding this important hearing to address the critical issues of change orders.

My name is Greg Long, and I am president of Long Electric Company located in Napa, California. Since founding the company in 1990 at the age of 28, our family-owned business has provided electrical construction services on everything, including schools, hospitals, wineries, and various sustainable energy projects, to name a few.

We at Long Electric are proud members of the National Electrical Contractors Association, where I have had the honor of serving on a number of industry committees and on the Board of Directors for the Northern California chapter since 1994.

NECA is a national recognized voice of the \$130 billion electrical construction industry, and our 4,000 members bring power, light, and communication technology to communities across the United States.

Change orders are a part of every construction project. That said, our focus as contractors is to complete the job on time and under budget with safety as a priority. When we receive a proposed change order, we want to execute and address it in a timely manner. Unfortunately, there is a lot of back and forth negotiating the cost of the change order—direct cost, indirect cost, and consequential cost.

A refusal by a contractor to complete a change order, refusal to begin on a change order until all paperwork is complete can result in loss of payment, potential lawsuits, and other punitive actions. Because of this, contractors typically proceed with the work under a change directive, requiring them to perform the work even prior to an agreement over the contract price and time.

Navigating the challenges presented by change orders often forces us to collide with the very title of this hearing, “All work and no pay.” Change orders thrive in a realm where contractors have limited leverage in agreeing to the work and even less in extracting payment for the hard work they successfully perform. Often, we are not recouping our costs. In some cases, we are not paid in a timely manner. Sometimes we may not be paid for as long as 18 months or longer. This can be crippling to a small business.

According to a study commissioned by ELECTRI International performed by Michigan State University, profits for change orders are slim. On average, a mere 3 percent. This also does not account for the litany of risk factors previously identified. To make matters worse, if this payment process is delayed, subcontractors run the risk of not making any profit at all. It can even impact our ability to bid future work due to lack of working capital.

Despite these challenges, there are a handful of opportunities that have contractors like myself optimistic, but first is the construction industry growth over the past year, with a nearly 4 percent increase since March of 2016, the industry is expanding. And secondly, legislatively it is twofold. The first is Representative Bacon’s recently introduced bill H.R. 2350, the Small Business Know before you Bid Construction Transparency Act of 2017. This legislation aims to address the length of time it takes for the Federal Government to review, approve, and pay for equitable changes. The validity of payment assurances, such as payment bonds and the timeliness of monthly payments.

The second, introduced by Representative Fitzpatrick, Representative Murphy, and Chairman Knight, is H.R. 2594, the Small Business Payment for Performance Act of 2017, offers our contractors the ability to continue work without fear of withheld payments for change orders. The bill requires a partial payment of 50 percent within the timeframe specified by the Prompt Payment Act for any additional work.

These reforms streamline the process of bidding on Federal construction work and allows subcontractors to adequately address the undue risk they assume when completing change order work. We urge the Committee to take positive action on these bills as soon as possible and welcome any and all questioning regarding their intricacies.

With all of this in mind, I would like to thank you again for the opportunity to testify before you. NECA applies the Committee’s unwavering efforts to examine these important components of our expanding construction industry. We are pleased and remain optimistic at this Committee’s efforts to address change order concerns.

Chairman KNIGHT. Thank you very much, Mr. Long.

And Ms. Nelson, you are next for 5 minutes.

STATEMENT OF COLETTE NELSON

Ms. NELSON. Thank you. Thank the members of the Committee.

For those of you who have worked with the construction industry before, and I am sure that is all of you in your capacity, you know that sometimes, frequently, we have trouble coming together and agreeing on anything. On these issues, on this change order issue, we are united, and that is why we have this Construction Industry Procurement Coalition that I am representing today.

You know, change orders are ubiquitous in the construction industry. I live across the street from the Federal Courthouse in Alexandria, and as I was getting ready for this hearing last night, I got a notice that the government sewer connection does not line up with the city's sewer connection, which will create a delay in the project and a change order.

I would like to spend my time talking about solutions that the coalition has identified for this problem that we would ask that you consider. So we have several solutions that we have debated and agreed upon.

The first would be to provide notice of agency policy and procedures on change orders in the RF process. This proposal is incorporated in H.R. 2350, and it is a very simple concept. Contractors and subcontractors are bidding on Federal projects, sometimes without knowing what they are getting into. As a quick example, on the National Geospatial Intelligence Agency campus outside of St. Louis, a several billion dollar, 5-year project at a recent event to brief small and emerging firms and encourage them to bid as subcontractors, a question was asked about, does the Corps of Engineers delay change orders until the end of the project? The answer was yes, and some small businesses who would otherwise have considered bidding left the room. They could not risk a delay of years for what will be certainly change order work.

The second proposal that we make would be to establish deadlines for agency responses to requests for equitable adjustment. The Federal Acquisition Regulation sets a deadline for contractors. Contractors have to respond in 30 days. They have to submit their REA in 30 days. The FAR simply says that the contracting agency has to respond in a reasonable amount of time. That is not defined. We would suggest that at least for projects on which small businesses are the prime contractor, that a specific time be set. If we can compile a bid and a proposal in 30 days, certainly, the agency should be able to review and approve that within the same amount of time.

The third proposal was incorporated in H.R. 2594, and that would be to require provisional payment of 50 percent of a request for equitable adjustment. That is a practice in the private sector, and it does not prejudice either the government or the contractor on future claims, but it keeps the cash flowing. So it is payment for performance that if the contracting officer has directed unilaterally the contractor to perform a change, that the contractor can request payment for up to 50 percent of its actual work on that change. Again, it keeps that cash flowing.

The fourth proposal is to require regular reports on the status of REAs. What we have found is that the REAs go in and get put on

the corner of the contracting officer's desk for the duration of the project. By providing contractors, and thus, subcontractors and suppliers, with regular information, perhaps incorporated with the monthly progress payments, that at least the contractors would know when and if payment would be forthcoming. It would have the additional benefit of providing the Congress and other oversight entities informed on when those contracting orders are being processed. You know, one thing those of us in management know is that you do what is measured. So this would be an opportunity to measure those approvals.

Now, I want to add just two more things. Some payment transparency assistance. Any time the contractor knows what is being done, the better we can perform, so we have two more proposals.

One, to require the government to post in a public environment the prime contractor's payment bond, and secondly, to notify, to provide in a public environment when the prime contractor is paid. So thank you very much for your time, and I am happy to respond to questions.

Chairman KNIGHT. Thank you very much.

And we will go now to our questions. I will take 5 minutes to start off the questioning. And just a basic question because I think you all hit on it, and we have all worked with contractors in a very small arena, whether working on our house or working in a business or something of that nature. And I know a lot of us have been in just that situation that Ms. Nelson said, that we come up with 50 percent, they get going on the job, and as the job gets to its completion, then the second payment is made. And I think that is kind of a regular thing that happens with small contractors around the area.

And so my first question is, what are the reasons that the government gives for withholding a million dollars or withholding payments to small businesses that have completed the work and now they are asking for payment? Is there a reason from the government or is there just no response? And I will—

Mr. DELISLE. Yes, Mr. Chairman. The reasoning that contractors will get can certainly vary. It can vary from "I did not receive all the paperwork that I needed," which oftentimes is not the case. "I have not gotten around to it yet. I am busy." Oftentimes what you will hear is, "Well, we dispute the basis that there is a change," when very clearly you can demonstrate to them that it is a change. So there is this guise of a dispute that really should not be there.

Chairman KNIGHT. So there I am just going to add on to my second question because we are talking about change orders. If I do work in my house and I say, you know what, I want a different door than I requested, that is basically a change order right there. I am asking for an upgrade in door, and I initial there and say now I want this door that is going to cost X number of dollars more. And good contractors will do that, and they will say, okay, well, you acknowledge that you are doing this and you are saying that you are going to pay for this. Is that something that the government or that the subcontractor could require of the government? If we are going through these change orders, then there should be something that goes back and forth. I see a lot of nodding heads

going back and forth like this. But is that something that, you know, this Committee is looking for answers and things that we do not get to these payments at the end where there is a dispute. And if there is no dispute when the work is done, there should not be any dispute when the work should be paid. But if they do not acknowledge it and they say, yes, there is a change order now but 6 months later they say, was that really a change order or did you just do the work?

Mr. DELISLE. I can give you a quick example. I alluded to this contractor that ended up going out of business in my opening statement. In that particular case, there were a series of change order discussions that took place between the government and the contractor. There were 2 weeks' worth of meetings that happened, and at the end of that meeting period there was a handshake deal about what the cost should be. It was a negotiated agreement. What we found out later was despite that handshake agreement, the government simply did not have the money to pay for it. She was then going to try to get the money and it did not happen. So what they did was they forced the contractor into a claim situation, litigation, and the contractor never was able to recover from that.

Chairman KNIGHT. And, you know, I am going to get to another question here but I am kind of going down this road because I know a lot of other questions will come about other things, but we are trying to fix something. And, you know, I would not shake hands with the government, and I am part of the government. So I think that what we are trying to say is things have got to be, you know, more concrete in everything that goes for a project. And especially if we are talking about a mammoth project where you might have 90 subcontractors coming in and doing work on a VA situation or building a hospital in Colorado that who knows when they will get done. You know, it is those kinds of things I would think that we could do something legislatively.

But, and lastly, and I will never be the person to say we should collect more data in the government, but I guess I am this time. Is there a data collecting process of this? Everybody is shaking their head like this. No, there is not that shows that there are this type of activity that is going on year after year and we can kind of chart it and say we did not pay these subcontractors on time last year at a rate of 17 percent and the year before it was 12 percent. There is no data collecting in that arena, is there, Ms. Nelson?

Ms. NELSON. Mr. Knight, there is a requirement in the Prompt Payment Act to report to Congress on late payments, but these are not late payments because they are not approved payments.

Chairman KNIGHT. Okay. Well, we are going to move on to Ms. Murphy for her questions.

Ms. MURPHY. This question is for Mr. Long.

You know, each construction project has its own unique set of factors that help determine the overall cost of the project. For example, a project in Florida would have a different set of conditions than maybe a similar project in New York. Do you think that the change order process allows the agencies to consider the different variables that construction projects face?

Mr. LONG. I think that a lot of times the proper procedures and protocol does not allow for a lot of issues and impacts with regards

to change orders period. They are not recognized by all as far as the circumstance we could have in California or if it is in Florida. It could be taken into effect, but in most cases there is just a lot of—the problem is people are not recognizing the true cost impacts of the change order and, again, those could be the direct costs that are pretty obvious—labor materials, subcontractors and equipment, or it could be the indirect or consequential costs that you are speaking of. So they are just not recognizing the entire costs and allowable overhead and profit on top of that. That is a major problem and that is a major excuse you might say of these change orders getting delayed is the first part of that delay is them recognizing our true costs, followed by then the lack of prompt processing and payment thereof, which basically handcuffs us in doing business when this is just continual, one after the other on each project that we are contracted for.

Ms. MURPHY. And so if you have laid out some of these problems that a lot of the similar, like small businesses are experiencing with change orders, is it possible that other industries are also facing the same challenges? And if they are also facing the same challenges, should the use of consolidation be prohibited for change orders at a certain stage in the performance of the contract?

Mr. LONG. Do you mean the other trades?

Ms. MURPHY. Yes. Other industries.

Mr. LONG. Yeah. It is happening to all of us. So, you know, you could have a change order and it could involve 12 subcontractors in that one change order. It might not be just adding 20 outlets and 40 light fixtures, you know. We could be adding a generator or some mechanical equipment, and there are a lot of people involved in that change order, and it is happening to, like you stated, it is happening all the way down the line. So it is impacting all the industries. They all fill in exactly the same thing.

Ms. MURPHY. And Mr. Brown, you had testified to the follow-on consequences or the flow-down consequences of change order delays and the role that this plays in negatively impacting prime contractors and subcontractors. How can this Committee work to lessen the financial burden of untimely payments on small construction firms at every level in the contracting process?

Mr. BROWN. The way our subcontract typically is set up, and this is universal, and I am sure Mr. Long will confirm, we have a pay-when-pay clause. So if we do not get paid as the prime, the sub does not get paid, unless we decide to finance the job for the benefit of the project and the sub. And oftentimes we have to make that call. So yeah, transparency about the process, I would say it is described as consistently inconsistent across the government, across agencies, within agencies, different divisions. You get different answers about why it is being held up. And I think Ms. Nelson noted it is not late until they have accepted it. So the change order that I described in my testimony this morning, I actually recently had to reach out to VA headquarters to inquire about the status, and coincidentally, that same day I received a follow-on email saying that the additional funds request had been received. That would have been 7 months to the day. In reading the email string, the agency did not submit the request until the end of March. I had

already been talking to the contracting head in October about what is the status and was being told it is going through the process.

Ms. MURPHY. You all have shared really egregious stories. Are there any particular agencies that are worse than others?

Mr. DELISLE. Just in my experience, I will tell you the answer is absolutely yes. I have had my clients, not me personally, but I have suffered through it with them, my clients have had a horrible time with the Department of Veterans Affairs. I, unfortunately, was involved in that mess in Aurora, Colorado. I represented a service-disabled, veteran-owned small business there, and but for the grace of God, we were able to maneuver him through and he survived. But his \$18 million project cost him \$32 million. And this is a small business. And when you do not get paid that kind of money, most of the time it does not work out very well for you. So that was a VA job.

The instance that I described earlier during my testimony, that was a VA job and the list goes on and on. There are many of them.

Ms. NELSON. I might suggest that frequently the differences are by region rather than by agency. And sometimes it is just by the skill and experience of the contracting officer. One of the problems that we face is over the last several decades funding for the number and the education of contracting officers or contracting staff for the Federal Government has deteriorated. Their ability to do things that we would like to have done promptly also has deteriorated. So sometimes it is just administrative convenience for an agency to put these requests for equitable adjustments to the side and audit and process them at the end of the project.

Ms. MURPHY. Thank you. Thank you, Mr. Chairman, for allowing me a couple extra minutes.

Chairman KNIGHT. Absolutely.

And we are graced by the chairman of the Full Committee. Chairman Chabot is here.

And I would like to now yield 5 minutes to Chairman Kelly for his questions.

Chairman KELLY. And I am going to yield my position to Representative Fitzpatrick, who is a leader in pushing legislation in this matter, and he has another engagement, and so I want to yield that to him because I want to make sure he gets his questions. So I yield my time, or yield my position to Mr. Fitzpatrick.

Chairman KNIGHT. Very well.

Mr. FITZPATRICK. Thank you, Chairman Kelly, and Chairman Knight, and also Chairman Chabot, for bringing this important issue to the Committee.

Our small contractors, as we all know, have endured unfair, one-sided treatment for far too long. And as was referenced with the help and leadership of both Chairman Knight and Ranking Member Murphy, together we introduced H.R. 2594, the Small Business Payment for Performance Act, which we believe is a common-sense bill which recognizes that cash flow is the lifeblood of small business contractors. So with that being said, I want to open it up to the panel of experts starting with Mr. Long from NECA, as to what you think this legislation will accomplish and what remains unaccomplished. What steps do we need to take to further close that gap?

Mr. LONG. Well, any time that you are going to put something on a bill out there that is going to provide some kind of payment relief, that is a good thing. The fact that change orders are being recognized as an issue and a problem in all sectors quite frankly, and it will be helpful in that manner. Again, cash flow is really everything, you know, to our small business. And if you have a \$100,000 change order and you have 5 percent profit on it, that means you have \$90,000 out there that you have already spent on that job, on that change order that is not getting approved. That is money out of your working capital. You times that by, you know, 10 or 20 or 50 or 100 change orders and over the course of 10 or 15 or 20 jobs, you know, we are not going to be able to sustain that. So promptly what needs to be done still I would say, if there is anything I could recommend, we need standardized change order protocol. There is a document that ELECTRI put out that is change order guidelines for electrical contractors right here. If that was used in creating a standardized change order document, we would take of a lot of the problems of at least getting to the approval process. Okay? And we still have the issue of timely handling and payment. So I would say another thing that needs to happen is a timeframe that becomes standard as well. You know, a deadline. And there has to be accountability and responsibility with that. In other words, what happens if they do not meet the deadline? You know, there has to be a hammer. There has to be leverage. There has to be something there to not just go over that deadline. But timely processing of change orders and receiving fair payment for those change orders, any legislation that can meet that end is what I know I am after.

Mr. FITZPATRICK. What consequences would you suggest for delayed payments?

Mr. LONG. Well, obviously, the best thing for me is I am not going to keep continuing to do work when I am not getting paid, so I am going to stop work. And I think entities do not want to see that work stop but I want to see payment, too. I do not want to see my whole company go away and all of our team, our employees, and that whole company that was referenced earlier that did not make it. And we are not doing anything wrong. You know, they have asked us to do the change order work. We have priced it fairly. If you follow this document, it is a fair price. Like I said, we are making 5 percent on a change order, possibly 3 to 5 percent. So I do not understand what the hang up is with approving that when we have provided the backup and we are continually dealing with no approval. Because there is no hammer. They have to be held accountable and it has to be if you do not pay, then we are going to stop work.

Mr. FITZPATRICK. I yield back.

Chairman KNIGHT. Thank you very much.

And we will now go to the ranking member, Ms. Adams, for her questions.

Ms. ADAMS. Thank you, Mr. Chair.

To Mr. Long, small businesses play an important role in the American economy and national security. So as we continue to try to grow our economy, it is vital that we provide small businesses with the necessary opportunities to thrive to remain in the supply

chain and to maintain our industrial base. If barriers continue to prevent new and existing small businesses from participating in the Federal Marketplace, such as delays in change orders and packing their bottom line, what will this mean for the industrial base and businesses like yours?

Mr. LONG. Well, again, our company—I can only speak for our company. We will not work under those conditions because we would be out of business. When you are performing a service and paying out that labor and materials, subcontractors, equipment, and you are not getting paid, you are not going to be around long. So I would say that personally, if we find a contract like that, we will not bid it, so we will just go to other sectors to still remain, you know, a growing company in our community.

Ms. ADAMS. Okay. Would other members of the panel like to respond? Mr. Brown?

Mr. BROWN. Could you repeat the question real quick?

Ms. ADAMS. If barriers continue to prevent new and existing small businesses from participating in the Federal Marketplace, such as delays in change orders that impact your bottom line, what will this mean for the industrial base and businesses like yours?

Mr. BROWN. Yeah, I think Mr. Long hit it. There is a huge sector with the government contracting and small business programs that are there to encourage participation and really help start-up companies. It would be fool-hearted to say that that is the right place to go if you are just starting out. And change orders do become a barrier because you are forced to either proceed with the work or not proceed with the work. And as I kind of alluded in my testimony, we are faced with adverse past performance evaluations or the threat of termination for default. And that does not give us a lot of leeway to have any say unless you are prepared to go down that path. It is kind of a buyer beware as you try to enter the government marketplace. But just as the testimony up here earlier, I think one thing that is missing, it is clear in the FAR and in the contract terms that we have timeframes by which we are supposed to provide notice and get in pricing. The back half is missing and it sits there unbeknownst in the process.

Ms. ADAMS. Okay. Thank you very much.

Ms. NELSON. Ms. Adams, may I?

Ms. ADAMS. Yes.

Ms. NELSON. When we talk about the industrial base, we too often talk about other than small businesses, but every other than small business was a small business at some point. And if we do not encourage the development and growth of small businesses, we will not have those large businesses for our industrial base in the future.

Ms. ADAMS. Okay. Thank you very much.

So Mr. Brown, what has been the impact of contract modification delays on small business past performance rating?

Mr. BROWN. Oftentimes, the issues in the past performance when you get an adverse rating, it is dictated by the morale that was created during the project and that issue is never identified as being a source of conflict during the course of construction. So it leaves the contractor to reply to the, I would say misleading or mischaracterization of our performance by having to kind of sling

a little mud about what the other side of the story was. And so, but it is in the record, right? And then it is up for other agencies who are reviewing our past performance as to whether they are going to decide are we qualified enough, or do they want to hire us for the procurement that is in progress?

Ms. ADAMS. Thank you. I am just curious about how change orders impact women and minority-owned construction firms when completing contracts, and do they face any different challenges when they are navigating from this process than their counterparts? If anybody, we have got about 18 seconds.

Ms. NELSON. I think it is a problem for any small and emerging firm. The smaller and less experience you are, the more serious the problem.

Ms. ADAMS. Okay, 7 seconds.

Mr. BROWN. Yes. The change order issues I do not think sees small business versus large, women-owned versus emerging. It is universal.

Ms. ADAMS. Thank you, sir.

I yield back, Mr. Chair.

Chairman KNIGHT. Thank you very much.

And I now yield 5 minutes to Chairman Kelly for his questions.

Chairman KELLY. As a former small business owner, I know cash flow is the lifeblood of a small business. Even if you are not getting paid what you are worth or what it costs you, to not have that cash flow absolutely forces you to appoint a bankruptcy or the inability to honor your obligations to others. So cash flow and timely cash flow is very huge.

That being said, Ms. Nelson, as you noted in your testimony, the Federal Acquisition Regulation, FAR, does not define how long the shortest practicable time is for the government to review and request an equitable adjustment. In fact, you state an agency like the Army Corps waited for all requests for equitable adjustments until the end of the construction project likely for funding reasons. Can you talk about how the small business payment for performance acts would impact how agencies like the Army Corps pay out their change orders?

Ms. NELSON. Well, it is really quite simple. On a unilateral change order, if the Corps of Engineers were to direct a prime contractor to do some extra work, the contractor would be required to submit its request for equitable adjustment within 30 days under the current FAR, and as that prime contractor performed, it could then invoice for up to 50 percent of the request for equitable adjustment that it submitted to the government. That would prejudice neither the government nor the contractor, but it would keep that cash flowing. Under the Prompt Payment Act, the prime contractor has to pay its subs and suppliers within 7 days of receipt of payment by the government, so it would then make sure that that cash flow went to the lower tiers as well so that those who need to pay labor, who need to purchase materials to get the government's work done, will have the cash to do it.

Chairman KELLY. And I have spent my whole life fighting for the little guy. I do not know if it is my southern DNA or what it is, but I have got a chip on my shoulder. But you know, I find they use that leverage, and so they know that small businesses have to

have that cash flow just like I talked about initially, and they use that as leverage to make them take less than what they are worth, and also, the longer they drag it out, the less they will take. And we have just got to break that thing where they cannot do that.

My next question is to Mr. Brown. In your testimony, you identify one of the greatest challenges Federal contractors face is obtaining timely decisions from Federal employees. Could you elaborate on any ideas you might have to motivate the government to act more efficiently and swiftly?

Mr. BROWN. Well, you know, we get the contract thrown at us any chance the agency can. And unfortunately, we do not have much leverage when it comes to getting timely decisions. Even if we are talking about undisputed change orders, maybe just RFIs and submittals. I mean, there is a guideline and a timeline that everybody has to participate in. It is a project. It is a team.

I think the thing that is missing is with regards to the change order FAR is a requirement of the timeliness to get the approval. It cannot just sit on somebody's desk. We cannot just be told it is going through the process. We are requesting prior year funds. As a small business, I do not know what that is. I do not know if it is true. I go talk to another VA employee and that is not the answer I get. So it is hard to figure out what is really going on, and you are trying to just develop some trust and rapport, and I am taking it on face value. But not until I send an email up to headquarters does the tree get rattled. I cannot do that every day. I hope that answers your question.

Chairman KELLY. It does. And I guess one of the things is people have to have skin in the game. There has got to be some personal accountability of those government employees so it costs them, not the agency, it costs them something for bad acts or acts of bad conduct or bad faith. And I do not know what the right answer is but I know this; if people are not held personally accountable and there is some big bureaucracy, they do not have that sense of urgency which is required. And trust me, our small businesses, each and every one, unless they are a whole lot more fortunate than I was and a lot better businessmen, those cash flow and timeliness of that cash flow is very important.

With that, I yield back, Mr. Chairman.

Chairman KNIGHT. I think that says a lot right there.

We are going to go to Mr. Lawson, the ranking member on the Subcommittee on Health and Technology.

Mr. LAWSON. Thank you, Mr. Chairman. I want to thank you all for being here.

And I do not know a lot about this particular area, and so I will need your help because I would like to be able to help you all.

You know, when you are building a house and there is a change order, the contractor normally will inform you. Like your wife said she wants Pella windows, unlike the windows that were being bidden on. And so as a result, then you go back to talk to the bank and say we are going to need a little bit more money in order to do it. In a situation where you all are involved in, who determines the change order? Is it the agency that determines the change order? And when they say that we want different a different kind of fixtures now in our restrooms, better access for handicap and so

forth like that, at that point, do you start to talk dollars with them? Or what really happens? Which I do not quite understand, because I know cash flow ends. I have been in business for 36 years but we did not have change orders in the insurance business. So I have to understand a little bit better about the contract. Maybe some of you all can enlighten me. What happens when this occurs?

Mr. BROWN. In construction, there are really three scenarios that kind of give rise to a change order. One is the one where the agency requests the change. We want a bigger space or a new door or a different type of window. The other is if there is a different site condition. We encounter something typically subsurface that we did not anticipate. There is a sewer line that was not noted on the drawings. We have got to deal with it. Or there are conflicts within the drawings. The drawings and specs are not accurate, and as we are getting out into the field, what is drawn on paper is not really working in the field, and those give rise to change orders when we have to change the course of action or the fix.

Mr. LAWSON. And if I may follow up, Mr. Chairman, then how does the agency start to handle that? When you see those things that did not appear on the specs and it is going to be \$10,000-\$15,000 more to be able to fix it correctly, how long does it take the agency to really determine whether they are going to give you the resources that you need in order to be able to do it?

Mr. BROWN. Well, this is the consistently inconsistent part. It varies from project teams, both the government and the contractor side. Some will acknowledge, yep, this is a change and will go down the change order place. They will say, yes, and the agency will issue us an RFP. Here is how we want you to change it, price it. We negotiate it and we move forward. Other times, they will want to dispute the entitlement of the change order and they will try and find different ways within the contract or a clause in the specs and play that kind of game which only delays the project. And then once the change order finally comes to fruition, your \$20,000 change order became \$40,000 or \$60,000 because of the delay, and there is really no added value on that additional \$20,000 to \$40,000. Nothing. Right? The building did not get any bigger. And as a change order, we do not make any money in change orders. Mr. Long alluded to that. We are recovering costs at that time. Costs. And if we settle for anything less, we are settling for 30 cents on the dollar. Or if they tell us, hey, if it is really egregious, they will say, hey, why do you not file a claim and you can go access money from the judgment fund. And that has been a common response that we have received as a small business.

Mr. LAWSON. And at that point, and then you can talk, Ms. Nelson, what do you do with the subs?

Mr. BROWN. We hold hands. I mean, you know, it depends. We will get subcontractor pricing, and then depending on, as a prime, just a case-by-case basis, and depending how many other projects we have similar, we will fund it ourselves or we will split it and try and give enough cash to the subcontractor to keep them going. Because the worst thing that could happen is they would pull off the job. We do not want that. Or they go out of business and then

the cost to the contractor becomes greater to find a replacement contractor. So it is a dance.

Mr. DELISLE. Representative Lawson, on that Aurora, Colorado project, the prime contractor was very large. It was a joint venture between two very large companies. And what it decided to do in that case was pay millions of dollars to various small, individual companies, service-disabled companies, 8(a) companies, to prevent them from filing bankruptcy, because those companies could not finance carrying on the work. They had to be paid in some way. So luckily, the prime in that case had the wherewithal to pay them or it would have been all over. Two companies filed bankruptcy out of 33. You would have had them all go down but the prime stepped up.

Mr. LAWSON. Well, thank you.

I yield back, Mr. Chairman.

Chairman KNIGHT. Very good. And we are going to take one more. We are voting, but we have got a little bit of time so we will go to Mr. Bacon for his questions.

Mr. BACON. Thank you to both chairmen, and to our ranking members. I appreciate you all being here today.

I heard really loud and clear during our campaign and when I get back to the district that small businesses are struggling with getting their contracts with government delayed payments, the rescinded orders or the change orders like you have already mentioned and so forth, lack of transparency. And so we worked with a variety of folks that put this bill together called Know before You Bid, so I want to thank Mr. Long for your support today during testimony.

I just wanted to ask if the other three may have had a chance to read it. I would love to have your feedback on this bill. And I know Mr. Fitzpatrick is also submitting a bill. But what else do we need to do? What can we do to better support the small business team with contracts for government?

Ms. NELSON. Mr. Bacon, the members of the coalition all support the bill as introduced.

Mr. BACON. Thank you. It is great to hear that.

What other work do we need to do then? Is there another bill here we need to work on or what is some other target areas that we should be focusing on?

Ms. NELSON. I outlined in my written testimony four proposals, including yours. But I would like to expand on one of those items. Mr. Fitzpatrick had asked what is the enforcement mechanism that if you establish a timeframe as we have recommended for when the government must approve a request for equitable adjustment, how does one enforce that?

My response would include two options. The option that the contractors might prefer is that if the government does not respond in a timely manner, the request for equitable adjustment is automatically approved. As a taxpayer, I might suggest that another alternative would be that if the contracting officer does not respond in a timely manner, that the request for equitable adjustment is automatically denied. That allows the contractor to file a claim if it chooses to do so.

Mr. BACON. Thank you very much.

Any other comments from our panel?

Mr. DELISLE. Very quickly. One of the issues I think that still needs to be tackled is this issue of creating a dispute where one does not exist. And Mr. Brown made reference to it. I mean, these construction contracts are 3 and 4 inches thick. And if the government wants to find a dispute in there somewhere, they can. And the problem is when it does find a dispute, it can just simply deny a change order which could very well be legitimate and obviously so. So I think one thing to think about in terms of moving forward is how can we create a resolution process that is quicker than what the contractor has available to him now? Because what is available to him now is filing a claim, waiting 60 days, having that claim denied, appealing that denial and going through a very long, protracted litigation process. There needs to be some mechanism, a better mechanism in place to assist the contractor through that type of problem.

Mr. BACON. Thank you very much. I yield back.

Chairman KNIGHT. Thank you very much.

And we are going to go to Ms. Clarke. And you can wrap this whole thing together and figure everything out in 5 minutes.

Ms. CLARKE. Thank you very much, Mr. Chairman. I am afraid it looks like it is going to take a bit more time from all of us to sort this thing through.

I want to thank all of our witnesses for testifying here this morning. This has been a pretty vexing problem for quite some time. As a New Yorker, I travel across a Brooklyn Bridge that looks like it is suffering from change order-itis.

Mr. DeLisle, in your testimony, you gave an example of a contracting officer that had a practice of issuing unilateral change orders for 10 percent of the value claimed for the additional work. With agencies having so much control in the contract modification process, how can we reverse this trend?

Mr. DELISLE. Well, I think as we have discussed this morning, Congressman Fitzpatrick's bill would certainly assist in doing that because it would not be 10 percent that the contracting officer would be justifying, if you will; it would be 50. Okay? So there would be more cash flow for the contractor, so I think that would certainly help. It is a big part. Cash flow is a big part of the problem.

Ms. CLARKE. And then just to the panel, the covering contract modification process is causing anxiety among small business contractors and in some cases inhibiting them from participating in the Federal Marketplace. In your opinion, what is the number one challenge that small businesses in your industry are facing when it comes to using the change order process? The number one.

Ms. NELSON. Cash flow, cash flow, and cash flow.

Mr. LONG. Yeah, the position we are being put in right now is not one that I do not think we should be responsible for. We are not a bank and that is the position that we are all being put in. We are being put in the position of the bank. We are financing these jobs, and that is the easiest way to explain it, you know. Yeah.

Ms. CLARKE. Anyone else?

Mr. BROWN. I guess part of the cash flow is time, right? So in our world, time is money. Our proposals and our costs are based on time. So the sooner we can close the change order negotiation, the better off we are, and it will help with the cash flow. But cash flow is king.

Ms. CLARKE. Do you agree, Mr. DeLisle?

Mr. DELISLE. For sure. One of the other issues, and Mr. Brown just mentioned, is the time factor. If the government is held to strict accountability in terms of how long it has to resolve these change order issues, it would go a long way for sure.

Ms. CLARKE. Very well. Mr. Chairman, I yield back the balance of my time.

Chairman KNIGHT. Well, thank you very much.

I think this has been a robust Committee hearing. You have already heard two pieces of legislation have come out of this. I would expect we are going to see more. We are going to be continuing to talk about this because it affects every district in every state with every subcontractor and every small business across the country. We have heard that cash is the issue and that is for a small business. Your biggest assets are your employees and how much money you can leverage. Whether you have it or you can get it. And if it is all out, then there is problems. And so we always like to see small businesses bringing more money in than putting out. And so you will see more ideas and more pieces of legislation coming out of small business, but we appreciate you being here. Thank you very much.

And we are, hang on, I always have smart people next to me.

All right. I ask unanimous consent that members have 5 legislative days to submit statements and supporting materials for the record. Every member hear that?

Without objection, so ordered.

This hearing is now adjourned.

[Whereupon, at 11:19 a.m., the Subcommittees were adjourned.]

A P P E N D I X

Statement of

Edward T. DeLisle
Cohen Seglias Pallas Greenhall & Furman PC

to the

U.S. House of Representatives

**Committee on Small Business' Subcommittees on
Contracting and Workforce and Investigations, Oversight,
and Regulations**

For a hearing on

**"All Work and No Pay: Change Orders Delayed for Small
Construction Contractors"**

May 25, 2017



Since its founding in 1988, Cohen Seglias has grown from a three-attorney office in Philadelphia to a Firm with more than sixty lawyers across offices in Pennsylvania, New Jersey, New York, Delaware, Maryland, and Kentucky. We represent more than one thousand clients annually in industries ranging from construction, federal contracting and real estate to manufacturing, health care, automotive, transportation, distribution, technology, hospitality, and professional services.

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Statement of Edward T. DeLisle
Cohen Seglias Pallas Greenhall & Furman PC, Philadelphia,
Pennsylvania
Subcommittees on Contracting and Workforce and Investigations,
Oversight, and Regulations
Committee on Small Business
United States House of Representatives
May 25, 2017

Chairman Knight, Chairman Kelly, Ranking Member Murphy, Ranking Member Adams and members of the committee, thank you for inviting me to testify on the important topic of change order delays in the federal construction market. My name is Ed DeLisle. I am a partner with the law firm of Cohen Seglias, where I co-chaired our federal contracting group and work very closely with our federal construction clients. I regularly counsel federal contractors on a wide variety of small business issues, including advice on affiliation rules; mentor-protégé programs; small business and set-aside strategy and compliance (8(a) contracting, ANC, NAC, HUBZone, SDVOSB); small business subcontracting plan compliance; and small business size protests.

Construction projects are subject to a wide array of variables that may require a federal agency to alter their initial plans. Consequently, reasonable delays and changes may be required to meet conditions on the ground. The concern is not with reasonable delays and changes to the initial contract. Rather, the concern rests with agencies failing to execute change orders and make payment to contractors for months—and even years—at a time. Unsurprisingly, this delay causes serious harm to the project schedule and has a deleterious impact upon payment to the prime and subcontractors, especially small businesses which depend upon that cash flow to remain in business. To avoid these impacts, small business prime contractors, or subcontractors, may walk off a job, as a protracted change order delays can impede the small business's very ability to operate and survive. When that occurs, small businesses can be with non-small business prime contractors or subcontractors.

In this testimony, I will discuss:

- Define change orders;
- How they typically come about on a construction project;
- The steps involved in submitting a change order;
- The FAR provisions giving authority to change orders; and
- The significant challenges small businesses face in the change order and claims processes when working for federal agencies.

Overview of Change Order Process

Change orders and contract modifications describe the same action. You may hear these terms used interchangeably, but these terms are essentially synonymous. In this context, we are referring to contractual changes between construction contractors and the federal government. Broadly speaking, a change order is any change to the scope of work of an already existing contract and the price to be paid, and/or the time to complete, the new work. Federal construction contracts contain a “Changes” clause, which permits the government to make changes in the general scope of the contract, including modifications to the drawings, specifications, materials, manners of performance or method of performance. *See, e.g.,* Federal Acquisition Regulations (FAR) Part 52.243-4. This clause requires the government to make an equitable adjustment in the contract price for these changes. This clause also permits the contractor to assert that a change has occurred if the government gives any written or oral order (such as an instruction, interpretation, direction) that causes a change to the contract. This concept is known as a constructive change. Under the language of the clause, these changes are treated as if the government ordered the change, entitling the contractor to an equitable adjustment.

Differing Site Conditions

Changes orders can arise through several avenues. Federal construction projects are typically large and complex. The agency may realize that a size of a room does not match the intended purpose, and may need to expand, or reconfigure it. This is a common issue for federally owned hospitals, where modern medical equipment, such as Magnetic Resonance Imaging (MRI), may change size in the years since the design specifications were agreed upon. This problem occurred on the much maligned VA hospital project in Aurora, Colorado and resulted in increased costs of approximately \$1.1 billion.

There may be a differing site condition at the worksite that was unknown to either party or not listed in the contract specifications. Differing site conditions¹ generally arise in two way, and are sometimes referred to as “Type 1” or “Type 2.” Type 1 conditions are physical conditions that are materially different from those described in the contract. An example of a Type 1 condition occurs when the contract documents identify the expected ground conditions, do not show rock and the contractor encounters rock during excavation, which requires extensive, unanticipated effort to remove. Type 2 conditions are “unknown physical conditions of an unusual nature which differ materially from those ordinarily encountered and generally recognized as inhering in work of the character provided for in the contract.” For example, the contractor begins to excavate the site and there is an unknown subterranean issue, such as a high, undisclosed water table in a place where water would not be expected. Finding such a condition would require different, extensive excavation efforts and increase the cost to the project.

¹ FAR 52.236-2

When either Type 1 or Type 2 differing site conditions occur, the contractor must notify the federal agency's contracting officer, who is obliged to investigate the site conditions and determine if an equitable adjustment should be made and the contract modified to reflect the actual cost to perform given the unexpected conditions.

Bilateral and Unilateral Change Orders

FAR Part 43.103 discusses the different types of change orders available to a contractor. On a federal construction project, there are bilateral change orders and unilateral change orders. A bilateral change order, or modification, to a contract is a supplemental agreement where the parties have negotiated and agreed the specified additional work that will be accomplished in return for specified consideration, normally additional money and/or time. Where a contractor accepts and signs without reservation or protest a bilateral contract modification, it is generally barred by accord and satisfaction from later claiming an additional adjustment.

A unilateral change order, or modification, is one which is issued by the contracting officer without requiring the consent or signature of the contractor. Unilateral change orders typically arise when the parties agree that there is a changed condition, but cannot agree on the extent of the change, price and/or impact on schedule. It is a one-sided directive from the federal agency to perform and, although a contractor must abide by a unilateral directive, it is free to file a claim for the additional costs or time incurred beyond what set forth in the modification. Since a unilateral change order does not require the contractor's signature, the change order cannot act as a release of further claims.

Submitting a Change Order

Bilateral change orders are common in both the federal and private construction markets. In either context, parties can agree upon changes in scope of work. The difference in the federal market is that a federal agency does not act like a private entity. The federal agency does not have the same incentives to quickly finish a project or act in the best interest of the construction project. The federal agency has the luxury of time and vast resources that small businesses, in particular, simply do not have. To that end, contracting officers will often try to force a contractor to sign a bilateral modification for less time and money than a contractor has requested knowing that the bilateral contains binding release language. A contractor may sign that modification for the sake of certainty, particularly if the CO has indicated that there may be some dispute regarding scope of work. That said, the contractor at least has a choice.

Unilateral change orders are a different story and are unique to the federal market. Here, the government holds all the cards and can decree by fiat that a contractor will change the scope of work. There is no "submission" process per say. The government agency simply issues a modification, requiring the contractor to proceed for the price indicated. The contractor, especially a small business con-

tractor, has little recourse but to comply with the federal agency's directive, or suffer the consequences, financial or otherwise.

The process for submitting a bilateral change order begins when a party to the contract realizes a desire or need to modify the scope of work. A request for a change order may be generated from the contractor and sent to the federal agency, typically to the CO. FAR Part 43.204 states that a CO "shall negotiate equitable adjustments resulting from change orders in the shortest practicable time." Unfortunately, the time is seldom short, but the contractor is told that it must continue to perform and not delay job completion. Failure to comply could result in default, a poor performance rating, or both. Alternatively, a change may be requested or directed by the government and sent to the contractor. The contractor will price the cost for additional work and submit it to the CO. Only contracting officers can sign change orders and bind the government.²

Often the COs are not very involved on a construction project. Typically, the project engineer, or other lower level government personnel, are the only ones who are personally involved in and physically at the project and understand the problem. This is especially problematic when a change order is needed quickly. Lower level government personnel will often tell a contractor to do the extra work prior to receiving a change order. This puts the contractor in a difficult bind. Delays in changing the scope of work can have a ripple effect, costing the government and contractor excess money and delaying the overall completion of the project. If the contractor proceeds without a change order, however, the contractor is put at risk and faces potential liability should an issue arise.

Issues Facing Small Businesses with Claims against Federal Agencies

When small business contractors and federal agencies disagree as to when work is, or is not, covered under a construction contract, a contractor may file a claim for equitable adjustment, or a certified claim, wherein it demands payment from the government. The claims process is often long, expensive and risky. Small businesses neither have the luxury of deep pockets to bear long periods of time without payment, nor can they generally handle such risk. The claims process generally takes years—sometimes five or more years—to conclude. During that time, small businesses may have to pay thousands, or tens of thousands, of dollars in legal fees for the potential benefit of being paid pennies on the dollar later through a settlement that it is forced to accept simply to cut its losses and survive. That is the simple reality of the process.

These problems were most recently publicized on the Department of Veterans Affairs' Aurora Hospital project in Colorado, which was referenced above. On the VA Aurora Hospital project, the refusal of the VA to process appropriate contract modifications left the general contractor and its subcontractors without proper payment for

² FAR 43.102

extended periods of time with severe consequences. The contracting officer there had a practice of issuing unilateral change orders for 10% of the value claimed for the additional work. He promised that these modifications represented “part one” of what would be a “two part” change order. The problem was that “part two” often never came and the costs for additional work totaled tens of millions of dollars. Along the way, the VA simply stopped processing change orders.³ Small companies rely on prompt payments to meet payroll and expenses, often unable to cover those costs for very long.⁴ Many rely on bank loans and lines of credit to bridge the gap, but on the Aurora project some banks balked at letting small business clients rely on its money to continue work.⁵ According to the Colorado SBA, at least 33 small businesses were not paid for work in a timely fashion, and some were waiting more than a year after work was completed for payment.⁶ Of those 33 companies, at least two filed for bankruptcy.⁷ The prime contractor even paid subcontractors several million dollars out of its own pockets while waiting for payment from the VA, which was highly unusual.⁸ While the project in Aurora is a recent and, unfortunately, well-known example, problems with processing change orders happen in every federal construction agency on a regular basis. The problem is that those change order delays are happening on projects worth \$5 million, \$10 million and \$100 million, over which Congress does not ordinarily conduct oversight. The issue is that when the dollar amount is not high, and media attention is not existent, meaning that there’s a lack of public outrage, the problems persist but go unnoticed by everyone except the small business that may have to close its doors.

There will always be legitimate discrepancies between a small business contractor and the government based on the terms and scope of a contract. That’s normal. However, our concern is when the claims process is used unfairly—where the government fails to act in good faith—to the detriment of small businesses. Generally speaking, project funds comes from a different budget account than the funds used to litigate and pay claims. Consequently, with project budgets tight, some federal contracting officers may tell contractors that there will be no change orders issued on a project, or no further change orders issued, regardless of how apparent the need may be for a modification. That happens. If there is an issue, the contractor will have to do the work and file a claim. The expense of litigating the claim, in the long run, will often cost more to the government and taxpayers than issuing the change order in the ordinary course. It will certainly result in additional costs to the contractor. However, forcing a contractor into this situation is not something that will typically impact the contracting officer on

³David Migoya & Mark Matthews, *Aurora VA Hospital Project Spooked Subcontractors, Causing Cost Hikes*, DENV. POST, May 15, 2015 available at http://www.denverpost.com/news/ci_28125325/aurora-va-hospital-project-spooked-subcontractors-causing-cost

⁴*Id.*

⁵*Id.*
⁶Cathy Proctor, *SBA: Progress being made on Helping Unpaid VA Hospital Subcontractors*, DENV. BUS. J., April 4, 2013 available at <http://www.bizjournals.com/denver/news/2013/04/04/sba-urges-va-to-speed-payments-for.html>

⁷*Id.*

⁸*Id.*

the project or that project's budget. As such, it is easier for the government to simply kick the can down the road and use the unlimited time and financial resources of the federal government to wait the small business out until it can no longer afford to continue, forcing it to settle.

Thank you again for inviting me to testify before the committee on this important topic. I look forward to answering your questions.

Statement of

Andy Brown
Glen/Mar Construction, Inc.

on behalf of

The Associated General Contractors of America

to the

U.S. House of Representatives

**Committee on Small Business' Subcommittees on
Contracting and Workforce and Investigations, Oversight,
and Regulations**

For a hearing on

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Construction Contractors"**

May 25, 2017



The Associated General Contractors of America (AGC) is the largest and oldest national construction trade association in the United States. AGC represents more than 26,000 firms, including America's leading general contractors and specialty-contracting firms. Many of the nation's service providers and suppliers are associated with AGC through a nationwide network of chapters. 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.

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Statement of Andy Brown
Glen/Mar Construction, Inc., Clackamas, Oregon
Subcommittees on Contracting and Workforce and Investigations, Oversight, and Regulations
Committee on Small Business
United States House of Representatives
May 25, 2017

Chairman Chabot, Ranking Member Velázquez and members of the committee, thank you for inviting me to testify on this important topic impacting federal small business contracting. My name is Andy Brown. I am Vice President of Glen/Mar Construction, Inc. I have over 18 years of experience in the commercial and federal construction markets. As a Woman-Owned and Service Disabled Veteran Owned Small Business, Glen/Mar performs vertical building construction, seismic renovations, and horizontal construction for federal, state and local agencies including the Department of Veterans Affairs (VA), Army Corp of Engineers (USACE), the General Services Administration (GSA) and other agencies throughout the West Coast and Hawaii.

I currently serve as Co-Chair of the Small Business Committee for the Associated General Contractors of America ("AGC"). AGC is a national association of more than 26,000 businesses involved in every aspect of construction, with 92 chapters representing member companies in every state. For years, AGC has worked with the U.S. House Small Business Committee to establish more protections and better governing policies for America's small construction businesses. These include repealing unnecessary and burdensome regulations, such as the Fair Pay and Safe Workplaces Executive Order, as well as advocating for rules that benefit small businesses, most recently this includes the rule allowing federal prime contractors to count lower tier small business subcontractors towards their small business subcontracting goals. AGC appreciates and thanks the committee for its continued efforts to help our nation's small businesses.

In my testimony today, I will try to highlight some challenges that small businesses face when federal agencies delay processing and paying for change orders on federal construction contracts. Change orders are an inherent process within the construction industry. Most contractors refer to it as a "necessary evil," as the perfect construction project simply does not exist. There is no perfect set of construction drawings and specifications, there is no perfect or accurate existing working condition, and lastly, there is never a design in which the client or end user's entire "wish list" of wants and needs has been inclusive in the construction documents. Each one of these issues can, and too often does, surface during the course of a construction project, resulting in a change order.

Overview

As with any construction project, unforeseen issues may emerge. However, in the federal construction industry, change orders have become the bane of all federal construction contractors, with significant financial impact to small business. The issue is not the additional work that results from a change order, or the potential impact to the project schedule, but rather the financial hardship due to a lack of timely processing and payment of change orders. The financial impact of untimely processing and payment of change orders has a broad and far ranging ripple effect that extends beyond just the prime contractor. It impacts the prime contractor, its subcontractors, and the project as a whole.

Cashflow and Schedule Impact

One of the greatest challenges contractors face with federal agencies' delays in processing change orders is the disruption of cashflow on the project. Cashflow is the oxygen that keeps the construction project functioning. As with most things, if you cut off the oxygen the entity will quickly wither. Construction projects are no different. Cashflow is critical, and in my business, we view it as more important than profitability. Profitability lies at the end of the project. However, without sufficient cashflow, a company will never reach the finish line where profitability resides.

When a federal agency fails to process and pay a change order in a timely manner, the contractor is left with few options. In the interim period, the contractor tries—as best as possible—to work around the issue. Depending on the issue, the contractor can be left in the precarious position of either (1) self-financing the work to meet project schedule; or (2) stopping work altogether. Either option brings real problems and threats to small businesses. When work must be stopped or slowed down because of untimely processing of change orders, overhead costs remain. If demobilization and remobilization are required, that only adds to unnecessary and inefficient costs related to the use of that equipment. Contractors will go to great lengths to keep the project going, but there are times when the agency issued change orders dictate the schedule.

For example, in 2014 my company was awarded a contract to build a new patient simulation learning center, a medical training facility for the Department of Veterans (VA) Affairs Palo Alto Health Care System. However, after award and the issuance of a Notice to Proceed, the agency requested a proposal for additional work, which had to be completed prior to the start of the project. The pricing for the agency's requested additional work, requested by the agency, included both direct costs for construction and additional time and costs for schedule impacts to the original contract schedule. The time to price, negotiate, procure and construct the additional change order added 159 days to the contract schedule, before we could even start the original contract work. The change order pricing was issued to the agency on December 2, 2014. Although we have been paid for the direct construction costs associated with the additional work, after 2 ½ years we have yet to be paid the \$115,000 in costs associated with the delay in schedule. This same project also had a significant design flaw that further impacted the schedule. The initial construction documents failed to incorporate a required exterior wall blast design. This issue greatly impacted the schedule and sequence of work, adding an additional three months to the construction schedule and \$237,000 to the project. The initial change order was issued on May 27, 2016, but nearly a year to the day, my company has yet to be paid for this change order. The agency does not dispute either of these charges and has acknowledged that we are entitled to payment. These two examples demonstrate just a few of the contributing factors that have manifested in a project delay of 15 months with a cost totaling more than \$900,000. I would consider this to be a significant ripple effect. Unfortunately, this project is not an anomaly and small businesses working for various federal agencies are effected in similar ways.

The Miller Act—which applies to all federal construction contracts in excess of \$150,000—requires the prime contractor to provide to the agency performance and payment bonds in an amount equal to 100 percent of the total value of the contract. The performance bond provides security to the government that the project will be performed and completed as contracted. The payment bond provides security to the government that all costs associated with the delivery of the project will be paid for and done in a timely manner. The prime contractor's payment bonds also provide statutory relief to lower-tier subcontractors and suppliers for payment of labor and material, under a federal contract, should a prime or subcontractor be unable to make timely payments. With standard payment terms of "Pay When Paid" contained in

subcontract agreements between prime and subcontractors, it is clear to see how a prime contractor becomes stuck between a rock and a hard place when agencies fail to timely pay for change order work.

Often, to keep the project moving, small businesses self-finance government projects and work that needs to be done to complete the project, to avoid unnecessary Miller Act or payment bond claims filed by subcontractors and suppliers. It should come as no surprise that this adversely impacts our overall bonding capacity, which is necessary to pursue additional work and bid on other federal projects. Thus, begins a common sequence of events where untimely processing and payment of change orders on one project, prevents a small business from competing for additional federal projects. My company has been unable to bid on many projects, public or private, because our equity was tied up while waiting on change orders to be processed and paid. The result is a decrease in competition for federal projects, less efficient use of taxpayers' dollars, and fewer opportunities for small business. Additionally, these barriers prevent prospective construction companies from wanting to enter the federal market. The current state of change order processing has limited, and continues to limit, the pool of qualified contractors who desire to pursue work in the federal marketplace.

Contractors, especially small businesses like mine, can only self-finance these projects for so long. Slow payment impacts not only the prime awardee, but all lower-tier subcontractors. For example, I have an active project for the VA in Menlo Park, California to expand an existing parking lot. From September through December of 2016 there were 15 change orders totaling \$479,000. These change orders are undisputed by the agency, but as of today's testimony, some five months later, the work is done but my company has not received payment. Therefore, my subcontractor has not been paid for the work that was completed. Due to this, I am told by my subcontractor that his company is now under a U.S. Department of Labor investigation due to his inability to timely make payments into his employees' 401(k) retirement plan. This example is among many that shows the flow-down consequences small businesses face as a result of untimely process and payment of change orders. The impact is further magnified when you have the same subcontractor on multiple projects. The current state of change order processing has limited, and continues to limit, the pool of qualified contractors who desire to pursue work in the federal marketplace.

Untimely processing and payment of change orders makes it difficult to maintain a qualified and reliable workforce. It is detrimental to my employer-employee relationship when I must ask my workers to move between projects or lay them off because of such work delays or stoppages. I, and other small construction business, are far too familiar with the negative consequences of stoppages and delays. Stopping work due to indecision can lead to negative past performance evaluations issued by the federal agency against the contractor. Those negative evaluations play a role in whether the agency, or other agencies, will give the contractor another job in the future. Incidents such as those I have described, strains the relationships between prime contractors and federal agencies, between prime contractors and subcontractors, and adversely impacts the overall morale on a project.

Incentivizing Efficient and Timely Construction Execution

The construction business is a people business. The people on the jobsite, both contractor and owner, will ultimately determine project success. In the private sector, owners have various incentives to complete a project on time and on budget, or even ahead of schedule or under budget. These private owners have finite resources. Their employees can be hired, fired, rewarded or held accountable with relative ease based on performance. There are clear incentives for getting the job done as efficiently as possible.

In federal construction, there are not always similar economic or ideological incentives to efficiently or quickly complete the job. Federal employees may be entrenched and protected—in many ways—from

being held accountable. The federal employees may not have the resources necessary to quickly manage administrative tasks. Jobsites can be in remote locations where field staff can be left to their own devices. The agencies are not paid based on how quickly or efficiently they complete work. Rather, they are paid based on the amount of project funding Congress appropriates. To our knowledge, there are no clear, incentives for agencies or their employees to deliver a project on time or on budget, let alone ahead of schedule or under budget.

One of the greatest challenges federal contractors face on their construction projects jobsite is obtaining decisions, especially timely ones, from federal agency employees. As with any construction project, unforeseen issues may emerge. The problem comes with getting the federal agency to make a decision to act—or not. Decisions may have to move up the chain of command. If the right person or persons are not available, the decision sits on their desks.

What I have said above, however, is not applicable to every agency or agency employee. Just as there are good contractors and subpar ones, there are good federal construction employees and not so good ones. Just as the federal government tries to avoid the poor performing contractors, I try to avoid poor performing federal construction employees or, at least, bid accordingly. And, after major disasters like Hurricane Katrina, no agency—state or federal—was more motivated and able to rise to the occasion to rebuild New Orleans better than the Army Corps of Engineers. It's those times when there are not major disasters or the eyes of the country are not on us that we must find ways to ensure federal agencies and employees are properly motivated—economic or otherwise—to perform in an efficient manner.

During this Congress, AGC would like to work with the committee on:

- Ensuring greater transparency in the agency decision making process—to help allow for greater accountability—during the construction execution phase of project delivery;
- Reducing the links in the chain of command necessary to obtain timely decisions during construction;
- Reevaluating how agencies are paid for the projects they deliver; and
- Rewarding federal agency employees based on project performance.

Lastly, I would like to express support for the proposed bills “Small Business Know-Before-You-Bid Construction Transparency Act of 2017” and “Small Business Payment for Performance Act of 2017” as they advance protections and transparency needed for small businesses where federal agencies untimely process and pay change orders.

Thank you again for inviting AGC to testify before the committee today. I look forward to answering any questions you may have.



Statement of Mr. Greg Long
President and Owner of Long Electric Company
on behalf of the
National Electrical Contractors Association

to the

Subcommittee on Contracting and
the Subcommittee on Investigations, Oversight, and
Regulations

U.S. House of Representatives
for a hearing on

"All Work and No Pay: Change Orders Delayed for
Small Construction Contractors"

May 25, 2017

NECA's 4,000 member contractors are the voice of the \$130 billion electrical construction industry that brings power, light, and communication technology to buildings and communities across the U.S. NECA's national office and 119 local chapters advance the industry through advocacy, education, research and standards development.

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Statement of Mr. Greg Long
President and Owner of Long Electric Company
On behalf of the National Electrical Contractors Association
(NECA)
Subcommittee on Contracting and the Workforce
Subcommittee on Investigations, Oversight, and Regulations
Committee on Small Business
May 25, 2017

Thank you Chairman Knight, Chairman Kelly, Ranking Member Murphy, Ranking Member Adams, and members of the both Subcommittees for inviting me to testify today at this very important hearing. On behalf of the National Electrical Contractors Association (NECA), we greatly appreciate the opportunity to submit a statement for the record to the Subcommittee on Contracting and the Workforce and the Subcommittee on Investigations, Oversight, and Regulations on "*All Work and No Pay: Change Orders Delayed for Small Construction Contractors.*" The subcommittees are to be commended for holding this important hearing to address the critical issue of change orders and their effect on small businesses, particularly within the construction industry.

My name is Greg Long and I am the President and CEO of Long Electric Company located in Napa Valley, California. Shortly after graduating from Napa High School, I entered the electrical trades in 1979 and quickly moved through the ranks. Later, I founded Long Electric company in 1990. Over the years, our family-owned business has provided its services for everything from local schools to hospitals, wineries, and various sustainable energy projects. Our business has never seen more exciting times as we continue to promise that "not only are we large enough to do the job, we are small enough to care."

We at Long Electric are proud members of the National Electrical Contractors Association (NECA), where I have had the honor of serving as a member of the NECA Northern California Chapter's Board of Directors since 1994. NECA is the nationally recognized voice of the \$130 billion electrical construction industry, that brings power, light, and communication technology to buildings and communities across the United States. NECA, as a member of the *Construction Procurement Coalition*, continues to build on a legacy of protecting the public and making innovation possible in construction contracting. We, as member contractors, strive to be solution-providers for our customers and our industry expertise benefits everyone working on an electrical construction projects.

Workforce Development and the Apprenticeship Program

One of the ways which Long Electric and NECA are able to provide the highest level of electrical work comes from our involve-

ment in a rigorous and rewarding training program. We are extremely proud of the level of skill and professionalism that is crafted in each-and-every one of our electricians nationwide by these programs. While there is true merit to a traditional college education, our programs offer an experience, education and career path that rivals the colleges and universities of this country, all without the burden of graduating with hundreds of thousands of dollars in student loan debt and no guarantee of employment.

Over 70 years ago, NECA and the International Brotherhood of Electrical Workers (IBEW) embarked on a joint venture to develop the National Joint Apprenticeship Training Program (NJATC). The newly rechristened "*Electrical Training Alliance*" invests \$100 million in private funds annually in what we believe is the largest and most successful apprenticeship and training program in the nation. Today, there are more than 300 jointly administered local programs that are trust financed and together we have trained over 350,000 apprentices to journeyman status.

Our apprenticeship program is a well-organized and supervised method to train people with little or no prior knowledge of a craft or trade to become capable, qualified craftpersons or journeypersons. It is an "earn while you learn program." The "on-the-job" portion of the training is a full-time, well-paid job. The goal is to provide the electrical construction industry with the highest level of training and highly skilled workforce possible. To accomplish this goal, apprentices receive the highest level of training in the industry, with a requirement of 8,000 hours of on-the-job training and 900 hours of classroom time over a five-year period. Upon completion of the curriculum and on-the-job training, apprentices receive certificates documenting their successful completion of the program. Incidentally, all electrical apprentices receive incremental raises as they reach certain set milestones. They are not a burden to the taxpayers because the training is fully funded by the industry without any taxpayer assistance. Perhaps the greatest benefit is that in the end they are earning while they are learning. Each year, participants in the program contribute in excess of \$600 million dollars in federal, state, and local taxes. Lastly, they also receive retirement plans and medial coverage for themselves and their families that are also provided at no cost to the American taxpayer.

Addressing our nation's current and future employment needs is critically important to our industry and we believe the existing apprenticeship infrastructure provided by construction trades is a sure-fire bet for success, particularly for small businesses. More important, the program is 100 percent industry designed and funded and is a wheel that does not need to be reinvented.

The apprentices that graduate from our training centers work across the commercial and industrial sectors and specialize in a broad range of areas including traditional power and lighting, power quality, lighting controls, fire, life safety and security systems, backup power generation, communication and connectivity systems, automation controls and energy efficiency projects.

While successfully completing this work, we on the management side of the business, often run into the topic of today's hearing, change orders.

Change Orders: Their Current State and Effect on Small Construction Businesses

Change orders are an essential part of every construction project. In a perfect world, we would have zero change orders and all jobs would be bid exactly as is, with no hiccups or complications in their completion. But that is not the world we live in. That said, our goal as contractors is to be as adaptable and accommodating as possible to the contracting officer's needs and to respond efficiently and effectively to their request for an equitable change.

Today, a change order is defined as a written order, agreed upon by the owner, contractor and designer, authorizing changes to the scope of the work, the contract sum, and the contract time. While this appears to be a clear-cut definition, the processes that formalizes and compensates a contractor for a change order is not so. Due to the lack of a clear standard for administering change orders, beyond the requirement that they be within the "scope of the project," much of the onus of risk falls directly on contractors like myself to accommodate contracting officers working on behalf of the federal government.

A refusal to complete an order or to challenge the validity of a change order can result in a loss of payment or potential lawsuit by the contracting officer or even the prime contractor. Therefore, contractors proceed with the work and do their best to account for the consequential costs and risks incurred when the timing and scope of a job is altered.

These costs and risk factors generally present themselves in one of three forms, either: 1) project and field conditions, known for delaying project completion like capacity issues, or season and weather changes; 2) added cost factors, including increased contract administration, supervision time for another job, and/or lost profits due to delayed scheduling; and, 3) labor productivity-related factors, involving the stacking of trades, morale and attitude, and/or crew size inefficiency. The combination of these factors amounts to one anxious estimator and project manager. This pair of individuals, in conjunction with the job's foreman, are then expected to issue a hastily revised and accurate bid proposal, where both parties expeditiously and in good faith can negotiate and adjust the contract price and/or the contract timing.

Once we are able to navigate the various challenges change orders present, too often we collide with the very title of this hearing, *All Work and No Pay*. As stated previously, change orders do not exist in a perfect world. Instead, they thrive in a realm where contractors have extremely limited leverage in agreeing to completing the work and even less in extracting payment for their hard work. In some cases, contractors are not paid for as long as 18 months. In some cases, this can last even longer. This elongated period can be crippling to a small business like my own who must balance the books monthly and anticipate capital for upcoming project. If we

are unable to anticipate prompt pay, or to receive prompt payment as guaranteed under the Prompt Payment Act of 1982 (PPA), our business is unable to function, let alone prosper.

When timely payments are made under the PPA by the contracting officer to the prime contractor, subcontractors have no ability for knowing when that transaction takes place. This again adds another layer of complexity for subcontractors when it is time to be paid themselves. Jobs that have multiple layers of subcontractors can be extremely tough to navigate when the date of payment from the government to the prime contractor is unknown. Any solution that requires a notice of payment by the contracting officer would be gratefully welcomed by all contractors involved in this process.

It is clear that the single most common area of dispute in the change order process leading to delayed work or payment is cost. In fact, a 2014 study by Michigan State University found that “among cost-related disputes, items related to recoverable direct cost, overhead-profit percentages, and impact factors resulting in inconsequential costs constitute the clear majority of the disagreements.” Every change order could hypothetically run into these problems, but those that are most prone are the ones that have not addressed an “agreed upon price or percentage amount (for such costs) in the initial contract.” This is disturbingly common as “most standard contract documents do not provide specific guidance” on these percentages. To make matters more complicated, subcontractors must deal with multiple parties, including other subcontractors, designers, prime contractors, and of course the owner of the project.

The ultimate challenge for these issues is the true lack of any real profit for our business in the completion of a change order. In reality, most electrical contractors consider change orders as not profitable. Cases where change orders are truly profitable are few and far between. The same Michigan State University study mentioned previously found that change order work results in a profit of merely two-to-five percent, as opposed to the generally anticipated ten to 15 percent for the job as a whole. Once all other costs like overhead or direct material costs have been accounted for, electrical contractors have been found to make a profit of only 3.54 percent. This is drastically low and does not adequately account for the risk factors previously identified.

Payment Bonds

Branching out from the topic of change orders, one key component of the construction world that comes into play concerns bonds. Payment bonds are an essential investment where a financier provides a prime contractor with the backing of funding necessary to assure payment of its subcontractors and suppliers. These bonds are generally defined for a set amount of time and are held at a fixed interest rate. Typically bonds and the assurance we as contractors receive from them do not come into play until a contractor is unable to complete their work or pay for the work of subcontractors.

tors, in such a case the bonding company would then be obligated to do so.

When considering change orders and the effect they may have on the bonding process it is paramount to recognize that in any dispute that may delay the construction timeline or negate the contract altogether, the bonding agency is obligated to provide services or payment in lieu of the faltering company. As a subcontractor, our main concern for such disputes generally arises over concerns of receiving payment for services. When a prime contractor becomes unable or unwilling to pay for services rendered, subcontractors are able to file a claim to the bonding agent. Under the Federal Miller Act of 1935, Federal Acquisition Regulation requires that payment bonds of this type be utilized on all jobs exceeding \$150,000.

Too often the information for contracting bonding officers or the text of the bond itself is either kept private or it remains privy to a handful of people involved on the job, making it extremely difficult for a subcontractor to extract the information from a contracting officer when needed. There is an industry wide need for an easier method to access bond information which could be fixed through the already existing network of internet platforms that house so many of today's construction documents.

Opportunities Lay Ahead

Although I have painted a gloomy picture of the current state of change orders, there are a handful of opportunities in the near future that have contractors like myself optimistic for the industry as a whole. The first, is the growth that the construction industry has experienced over the past year.

At nearly a four percent increase since March 2016, our markets continue to expand. This growth, combined with the current political support for a nationwide infrastructure plan have the entire industry tinted with a positive glow.

On a legislative note, we at NECA were delighted to learn about two recently introduced bills. The first, introduced by Rep. Bacon, H.R. 2350, the "*Small Business Know-Before-You-Bid Construction Transparency Act of 2017*." This legislation aims at addressing the length of time it takes the federal government to review, approve and pay for equitable changes; the validity of payment assurances, such as payment bonds; and the timeliness of monthly payments. These reforms will streamline the process of bidding on federal construction work and allow subcontractors to adequately address the consistent and undue risk they assume when completing change order work.

The second, introduced by Rep. Fitzpatrick, Rep. Murphy, and Chairman Knight, the "*Small Business Payment for Performance Act of 2017*" offers our contractors the ability to continue work without fear of withheld payments for change orders. The bill requires a partial payment of 50 percent within the time frame specified by the Prompt Payment Act for any additional work per-

formed. This bill does note that the 50 percent payment does not amount to a mutual agreement on price itself.

Conclusion

The issues this Committee is willing to tackle concerning change orders, bonds, and contract information are ones that do not just affect Long Electric's work in California or solely the electrical contracting industry; these are issues that affect each-and-every small business contractor and others bidding on government contracts nationwide.

Thank you for the opportunity to testify at this very important hearing. NECA applauds the committee's unwavering efforts to examine these important components of our expanding construction economy. We are pleased and remain optimistic at this committee's efforts to address change order concerns. We will continue to offer our support in helping advance the committee's agenda and look forward to working with you all as you move forward in enacting smart and sound policy for the entirety of the construction industry.

**Statement of
E. Colette Nelson
Chief Advocacy Officer
American Subcontractors Association, Inc.**

on behalf of the

Construction Industry Procurement Coalition

to the

U.S. House of Representatives

**Committee on Small Business
Subcommittee on Contracting and Workforce
Subcommittee on Investigations, Oversight, and Regulations**

for a hearing on

**“All Work and No Pay: Change Orders Delayed for Small
Construction Contractors”**

May 25, 2017

Statement of E. Colette Nelson
Construction Industry Procurement Coalition

On behalf of the Construction Industry Procurement Coalition, I'd like to thank the Committee on Small Business, its members and staff for taking seriously construction industry concerns about processing and paying for change orders on federal construction projects. The Coalition is a 14-member group of trade associations representing construction design professionals, prime contractors, specialty trade contractors, subcontractors, suppliers, sureties and surety bond producers. For those of you who have worked with the construction industry on other issues, you know that all too frequently it is difficult for us to agree on almost anything. Thus, I am pleased to report to you that the construction industry is united on both the problem and possible solutions to the problem of slow approval and payment of change orders on federal construction projects.

Since the United States government began purchasing construction services and materials—that is, since its inception—there have been disagreements between the government and its suppliers about payment. Indeed, even before the Declaration of Independence was signed, the states issued “war bonds” promising to pay the Continental Army’s suppliers.

In the construction industry, even in the private sector, we have more than our share of payment challenges. While George Washington was in charge of buying for the war effort, one of Virginia’s other founding fathers, Thomas Jefferson, introduced the concept of a mechanics lien into the New World’s statutory system. That is, since a construction contractor’s work is incorporated into the real property and cannot easily be removed, the contractor who has not been paid may reduce its financial risk by acquiring an interest in that real property in the form of a mechanics lien. Eventually, the courts ruled that a contractor cannot lien public property—the king’s land. Congress responded by passing the Heard Act in 1894; this law required a prime contractor to provide a single performance and payment bond to protect the government and subcontractors, respectively. In 1935, Congress replaced the Heard Act with the Miller Act, which requires a federal prime construction contractor to post bonds guaranteeing both the performance of their contractual duties and the payment of their subcontractors and material suppliers.

By the 1980’s, the construction industry was again reporting challenges with getting paid on federal projects. Congress responded by enacting the Prompt Payment Act of 1982, and, when problems persisted, the Prompt Payment Act Amendments of 1988. The law established very specific time frames for the government to pay its construction prime contractors for work performed and for those prime contractors to pay their subcontractors and so on through the construction tiers. These laws have done an excellent job in assuring prompt payment on federal construction for

progress payments and final payment—but, unfortunately, not for requests for equitable adjustment, more commonly called change orders.

I review this history both to show the insidious nature of payment problems on federal construction and to demonstrate Congress's willingness to address them. The legislative history also demonstrates that while the current statutory structure helps assure contractor payment, it also protects the federal government. For example, when a federal prime contractor submits an invoice for payment, it must include the following certification:

“I hereby certify, to the best of my knowledge and belief, that—

(1) The amounts requested are only for performance in accordance with the specifications, terms, and conditions of the contract;

(2) All payments due to subcontractors and suppliers from previous payments received under the contract have been made, and timely payments will be made from the proceeds of the payment covered by this certification, in accordance with subcontract agreements and the requirements of Chapter 39 of Title 31, United States Code;

(3) This request for progress payments does not include any amounts which the prime contractor intends to withhold or retain from a subcontractor or supplier in accordance with the terms and conditions of the subcontract; and

(4) This certification is not to be construed as final acceptance of a subcontractor's performance.”

Penalties for a contractor who falsely certifies to the government are between \$10,781.40 and \$21,562.80 per claim, plus three times the amount of damages that the federal government sustains because of the false claim—certainly a deterrent to a false certification.

As other witnesses will testify, existing payment protections for contractors on federal construction are not working when it comes to changes, more commonly referred to as change orders or requests for equitable adjustment. A change order, in its simplest form, is an agreement to affect a change to the already executed contract. Often, it is necessitated by added, deleted or simply changed work from the plans and specifications already bid and agreed upon. While a change order typically adds value to the contract in exchange for the changed scope, it also can delete funds, change work without affecting price, and add or subtract time to completion of the work. The change order process is complex, and involves the construction owner, the prime contractor and the subcontractor tasked with the change.

In federal construction, the most easily identifiable change orders come from the federal government in what is commonly called a directed change—a “written order designated or indicated to be a change order, make changes in the work within the general scope of the contract.” This includes changes in the specifications, in the method or manner of performance, in the government-furnished property or services, or acceleration of the work.

The Federal Acquisition Regulation requires a contractor to submit a request for payment for the increased cost of performing the revised contract within a fairly tight time frame—within 30 days after receipt of the written change order or notice. The FAR provides an additional incentive for a contractor to act expeditiously by stating that “except for an adjustment based on defective specifications,” no adjustment in cost can be made for any costs incurred by the contractor “more than 20 days before the Contractor gives written notice as required.” That means during a 20 to 30 day window, the prime contractor must consult with its subcontractors, and put together a cost estimate that will stand up to the federal government’s strict pricing and audit requirements.

Yet the federal government’s rules establish no minimum requirements on when the government itself must review and approve the contractor’s request for equitable adjustment. Instead, the FAR requires a contracting officer to “negotiate equitable adjustments from change orders in the shortest practicable time” with no further specificity. Thus, while the prime contractor and its subcontractors must act swiftly to price their increased work, all the while performing the work at the direction of the government, federal agencies apparently have interpreted “shortest practicable time” to mean a time that is administratively convenient for them.

As an example, let’s look at the stated policies and procedures of just one federal construction agency, the U.S. Army Corps of Engineers (USACE). Again, nothing in the FAR, the Department of Defense FAR Supplement (DFAR), the U.S. Army Supplement to the DFAR (AFARS) or the USACE Acquisition Instruction (UCI) [Version 3; 1Nov14] specifies time periods during which a contracting officer is required to act on a contractor’s REA, on the contractor’s request for additional funding or a schedule adjustment to accommodate the government’s unilateral change order. In addition, the UCI specifies that any contract modification in excess of the Simplified Acquisition Threshold (\$150,000) requires a formal Independent Government Cost Estimate (IGE), pursuant to USACE Procurement Instruction Letter (PIL) 2012-03-R1 (Requirements for Development, Review and Approval of the Independent Government Estimates (IGE)).

Further, under USACE procedures, a contracting officer is authorized to bundle the contractor’s requests for written change orders “for ease of administrative processing,” which is exclusively beneficial to the government. The USACE contracting officers routinely defer consideration of all of a contractor’s REAs to the end of the construction project when they can be “resolved as an omnibus settlement.” Again, this is solely to the benefit of the government, since the contractor and all of the subcontractors and suppliers are funding the performance of the multiple unilateral change orders issued by the government during the total duration of contract performance. Most likely, such unconscionable deferral of action by the government flows from the desire to conduct only one IGE and the necessity to make certain that adequate funding is available to fund the “omnibus settlement.”

The Construction Industry Procurement Coalition hereby petitions this Committee and others in Congress to take action to provide relief to prime construction contractors and subcontractors from the slow processing and payment of change orders on federal construction. The Coalition has identified and supports several legislative solutions to the problems experienced by construction contractors and subcontractors with respect to change orders.

Provide Notice of Agency Policy and Procedures on Change Orders

The CIPC recommends that Congress require federal agencies to advise competing offerors about the agencies' policies with respect to the time for processing and paying for change orders, so that they make appropriate business judgments prior to submission of bids or offers.

For example, if this proposal were in place, the USACE would have to tell its prospective bidders that it has the right to "bundle" the processing of change orders until the end of the project. By obtaining this information in advance, prospective offerors could factor into their offers to the federal government the risk and resulting cost of delayed payment for change orders. On projects with a short time frame, businesses simply may increase their bids to take into account the cost of money. On projects with a longer time frame, many businesses, particularly small and emerging firms, may choose not to participate.

The proposed "Small Business Know-Before-You-Bid Construction Transparency Act" (H.R. 2350) takes one approach to this notice requirement by requiring a federal agency to actually report information about the agency's past performance in processing requests for equitable adjustment in its IFBs and RFPs. The Coalition supports H.R. 2350.

Establish Deadlines for Agency Response to an REA

The CIPC recommends that Congress specify deadlines for the issuance of a written change order and a response to the contractor's proposal for modification to the construction contract schedule and additional funding to cover the contractor's estimate of the additional costs associated with performing the work flowing from a unilateral change order. As noted previously, the FAR establishes deadlines for a contractor to submit an REA, but establishes no such deadlines for agency action.

Such a directive, for example, could require that a contracting officer issue a final decision regarding an REA submitted by a small business within 14 days with respect to a request in the amount of \$1 million or less and 28 days with respect to a request in an amount more than \$1 million.

Require Provisional Payment of 50 Percent of an REA

The CIPC recommends that Congress establish a requirement that when an agency issues a unilateral change order, that the contracting officer provisionally authorize the payment of 50 percent of the additional funds requested by the contractor to cover the government's unilateral change order, without an IGE.

Such provisional payment is considered a best practice in the private construction market. For example, model documents published by ConsensusDocs—a coalition of more than 40 construction owner, design professionals, contractor, subcontractor and surety organizations—state in their changes clause:

“8.2.2 The Parties shall negotiate expeditiously and in good faith for appropriate adjustments, as applicable, to the Contract Price or Contract Time arising out of an Interim Directive. As the directed Work is performed, Constructor shall submit its costs for such Work with its application for payment beginning with the next application for payment within thirty (30) Days of the issuance of the Interim Directive. If there is a dispute as to the cost to Owner, Owner shall pay Constructor fifty percent (50%) of its actual (incurred or committed) cost to perform such Work. In such event, the Parties reserve their rights as to the disputed amount, subject to the requirements of ARTICLE 12 [Dispute Resolution and Mitigation]. Owner’s payment does not prejudice its right to be reimbursed should it be determined that the disputed work was within the scope of the Work. Constructor’s receipt of payment for the disputed work does not prejudice its right to receive full payment for the disputed work should it be determined that the disputed work is not within the scope of the Work. Undisputed amounts may be included in applications for payment and shall be paid by Owner in accordance with this Agreement.”

Excerpt from ConsensusDocs Form 200, Standard Agreement and General Conditions Between Owner and Constructor (Lump Sum) (2017).

The CIPC notes that, under the Prompt Payment Act Amendments of 1988, such payment to a prime contractor would be required to flow through to subcontractors for their performance on such change order work.

Require Regular Reports on the Status of REAs

The CIPC recommends that Congress require federal agencies to regularly report to their prime contractors, actions taken on requests for equitable adjustment. Specifically, CIPC suggests that a federal agency include with each progress payment to a prime contractor, information on the status of each REA submitted by the contractor. Contractors, particularly small and emerging firms, must plan and carefully manage their cash flow. A status report on its REAs would alert a contractor whether or when it can expect payment for change order work performed. Alternatively, a federal agency could post such information on an appropriate government Web site.

A requirement for regular status reports on REA would complement other payment transparency provisions supported by the CIPC. This includes language included in H.R. 2350, which would require a federal agency to post on a Web site each payment made to the prime contractor, including the date of payment and the amount paid, specifying any amounts withheld from the amount requested by the prime contractor and a general explanation of why an amount was withheld. This information would allow a subcon-

tractor or supplier to determine when its payment is due, without resorting to contacting directly the already harried federal contracting officer or the prime contractor. Further, the prime contractor would benefit from having a clear statement of why its federal customer did not issue full payment so that it can more expeditiously address and correct any problems.

The CIPC also supports the provision in H.R. 2350, which would require a federal agency to post on a Web site a copy of any payment bond provided for the contract and any modification to such bond required by the agency. This information will allow a subcontractor or supplier to obtain a copy of the payment bond without resorting to contacting directly the contracting officer or the prime contractor. Subcontractors and suppliers need a copy of the bond to determine its existence and validity and where required notices must be provided.

Thank you again for inviting the Construction Industry Procurement Coalition to testify before the committee today. I look forward to answering any questions you may have now or subsequent to the hearing.

Appendix A**Construction Industry Procurement Coalition**

-  American Council of Engineering Companies
-  American Institute of Architects
-  American Society of Civil Engineers
-  American Subcontractors Association
-  Associated General Contractors of America
-  Construction Management Association of America
-  Council on Federal Procurement of Architectural and Engineering Services
-  Independent Electrical Contractors
-  Management Association for Private Photogrammetric Surveyors
-  National Association of Surety Bond Producers
-  National Electrical Contractors Association
-  National Society of Professional Surveyors
-  Sheet Metal and Air Conditioning Contractors National Association
-  Surety and Fidelity Association of America

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SUBCOMMITTEE ON THE
CONSTITUTION AND CIVIL JUSTICE

SMALL BUSINESS

June 7, 2017

In light of the Subcommittees on Contracting and Workforce and Investigations, Oversight, and Regulations joint hearing titled, "All Work and No Pay: Change Orders Delayed for Small Construction Contractors", my boss would like to submit the following statements for the record:

1. When accepting bids from subcontractors and suppliers, Congressman King advises the practice of making the other bids available to the losing bidders, when the winning bid becomes public.
2. He also advises, as a potential remedy, that contractors ensure that when they get paid, their subcontractors and suppliers also get paid.

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