

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

**“All Work and No Pay: Change Orders Delayed for Small  
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, multifamily housing projects, site preparation/utilities installation for housing development, and more.

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**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 Knight, Chairman Kelly, Ranking Member Murphy, Ranking Member Adams 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 Corps 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” and “Small Business Payment for Performance” 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.