Insights: Alerts

Small Business Payment for Performance Act Unanimously Leaves Committee – Will SBC Construction Contractors be able to reduce their financial exposure?

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Currently pending in the House of Representatives is H.R. 2594, the "Small Business Payment for Performance Act of 2017" (the "Bill"). This Bill unanimously passed the House Committee on Small Business earlier today. While not yet a law, passage out of committee is the first step towards enacting this legislation.

In substance this Bill is intended to amend the Small Business Act currently "on the books" to allow small business construction contractors ("SBCs") to receive interim partial payments based upon a request for equitable adjustment where a unilateral change is issued by the agency under construction contracts.

While the FAR Changes Clause allows and recognizes the ability to request an equitable adjustment ("REA"), payment is only allowed once a formal change order/modification is issued or a claim/REA is otherwise resolved, whether through negotiation or litigation, and a change/modification is issued. Many times, where the parties cannot agree on the cost or scope of a change, the Agency will issue a unilateral change in which the Government sets forth the scope and what it sees as the value for a changed condition. This often results in significant financial hardship to contractors, small and large alike, as they and their subcontractors must effectively finance the changed work until the agency agrees to the cost of that unilateral change. If passed and signed into law, the Bill would allow a small business (not large business) performing a construction contract to submit an REA where the agency's "…contracting officer directs a change in the terms of the contract performance without the agreement of the small business concern." Bill §15A. That REA must be timely made and "specify the estimated amount required to cover additional costs resulting from such change…." *Id*. Upon receipt of the REA, the agency is required to provide the small business concern with "…an interim partial payment of the amount that is at least 50 percent of the estimated amount" provided for in the submitted REA. *Id*. at (b). A key additional positive in this Bill is that it precludes the partial payment from being used as evidence of the definitized amount of the REA (in other words, the Agency cannot pay 50% of the value and then claim that this was all the Contractor agreed to receive).

The Bill also requires that where such an REA partial payment is made, the small business must "…pay to a first tier subcontractor or supplier the portion of each interim partial payment received that is attributable to the increased costs of performance incurred by the first tier subcontractor or suppler due to the change…" *Id*. at (d). In turn, the first tier sub must pay relevant portions to lower tier subcontractors and suppliers at any tier.

The Bill does not provide timing for these payments, but it is fair to assume that the Prompt Payment Act periods would apply equally to these interim REA payments. While limited to Construction, one can see a scenario where this opens the door to expansion for other, non-construction SBCs. It also bears noting that accuracy in the claimed

amount is a must as failure to properly account for damages could expose contractors to False Claims Act liability. This is nothing different than before but now this “upfront” interim payment increases the potentiality for liability. The Bill also does not modify the process for finalizing the value and scope of the REA or create any time limits on such actions. As a result, the SBC is receiving a partial payment for the REA based on the 50% value estimated, but the time and breadth of negotiating the balance of the REA and “truing up” those costs can still take time.

Passage of this Bill into law would be a tremendous improvement for Construction SBCs. While not perfect, it is a significant improvement over the *status quo*.