

**Small Business Procurement Reform Omnibus Act of 2019,
Bill 23-608**

Before

**Robert C. White, Jr., Chairperson
Committee on Facilities and Procurement
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**Comments by Dorothy B. Fortune
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Office of the Chief Financial Officer**

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Thank you for the opportunity to provide comments on the Small Business Procurement Reform Omnibus Act of 2019 (Act), Bill 23-608, for inclusion in the hearing record.

The Act amends the Quick Payment Act of 1984, effective March 15, 1985 (D.C. Law 5-164, D.C. Official Code § 2-221.01 *et seq.*) (Quick Payment Act) with the intention of providing remediation for subcontractors in the event of non-payment by contractors or higher-tier subcontractors. The approval of the proposed amendments to the Quick Payment Act will require the District to become involved in payment disputes between a contractor and its subcontractors, or between subcontractors and lower-tier subcontractors.

Subcontractors (at all tiers) will be able to provide the Contracting Officer (CO) with a notice of dispute with a higher tier subcontractor or the prime contractor on funds not being released for payment. The CO will be required to conduct an investigation to determine if a good faith dispute exists between the parties over the unreleased funds. At the conclusion of the investigation, the CO is required to issue a written determination. If the CO finds that funds were not paid and that there is not a good faith dispute over the funds withheld, the Act authorizes the CO to bring an enforcement action against the party that failed to make the payment. The CO will also have the authority to impose penalties and order payments, of the undisputed amount, to the wronged party. Both parties will have the right to appeal the CO's determination to the District of Columbia Contract Appeals Board.

The Act will require the CO to make determinations about a contract to which the District is not a party. These changes would infer privity of contract between the District and the subcontractors. Subcontractors do not have privity of contract with the District. This inference of privity places the CO in an untenable position. The CO does not have contractual authority to intervene in private payment disputes that do not involve the District. The CO would have difficulty investigating these issues to understand the

payment dispute as a non-party to the underlying contract. Further, the underlying contract may have clauses for mandatory arbitration or mediation that would be triggered by this ancillary determination by the CO and unintentionally interplead the District into the dispute. A CO does not typically have mediation experience that would be required to help subcontractors resolve disputes. Also, the CO's warrant of authority does not include the authority to become involved in payment disputes that do not involve the District or the investigative authority to compel parties to produce documents that might be required to make the necessary findings of fact.

The Act also amends the Small, Local, and Disadvantaged Business Enterprise Development Assistance Act of 2005, effective October 20, 2005 (D.C. Law 16-33, D.C. Official Code § 2-218.01 *et seq.*) to enable the CO to authorize an additional payment up to 10 percent of the dollar volume by which the contractor exceeds the subcontracting requirement. A CO makes an award determination based on encumbered government funds. The ability to authorize additional payment to a vendor based on exceeding the 35 percent subcontracting requirement cannot be anticipated during the evaluation of prices for bids or proposals. The CO would need these additional funds to be encumbered prior to a contract award to avoid a potential violation of the District Anti-Deficiency Act of 2002, effective April 4, 2003 (D.C. Law 14-285; D.C. Official Code § 47-355.01 *et seq.*).

The OCFO remains committed to supporting our local and small certified businesses. They are a vital and essential part of our economy. Our organization has contracts with small businesses as prime contractors and subcontractors. We have been successful at holding our prime contractors wholly responsible for fulfillment of contractual terms and conditions. This responsibility includes timely payment to subcontractors. We remain confident that the current clauses in the Quick Payment Act and the standard Disputes clause in District government contracts hold prime contractors responsible for their contractual responsibilities, which include timely payment to subcontractors.