

Written Testimony of Andrew Christ
House Small Business Committee
On behalf of the American Subcontractors Association (ASA)
February 6, 2024

Chair Williams (R-TX), Ranking Member Velázquez (D-NY), members of the committee, thank you for the opportunity to testify before you today as the committee reviews small business contracting reform within the federal government.

My name is Andrew Christ. I, along with my business partner, Allan Arias run Compass Constructors, a small construction business founded in 2012 and located in Kansas City, MO. My partner, Mr. Arias was born in Costa Rica and immigrated to the United States when he was 19 years old. Originally, Compass Constructors was focused on commercial roofing and architectural sheet metal, but we were awarded our first federal construction project with the National Parks Service in 2020, the same year Mr. Arias added me as a partner. Since that time, Compass Constructors has been awarded numerous federal government projects related to petroleum, oils, lubricants, and sensitive compartmented information facilities (SCIF) with the U.S. Army Corps of Engineers, Air Force Civil Engineering Center (AFCEC), Naval Facilities Engineering Systems Command (NAVFAC), and the General Services Administration (GSA). In 2023, Mr. Arias was awarded the Small Business Administration (SBA) Missouri Small Business Person of the Year.

Compass Constructors has a proven track record, and we do this by maintaining the industry's most talented and effective managers and superintendents to ensure that quality, schedule, cost controls, and safety are maintained through all aspects of a project's lifecycle. We value diversity and inclusion, which separates our company from our competitors, and we operate with an open and inclusive atmosphere where different viewpoints are welcomed and encouraged.

I am testifying before you today not only as a small business owner, but as a Board Member of the American Subcontractor Association (ASA), a trade association representing over 3,800 subcontractors and suppliers in the construction industry since 1966. ASA works with their membership on improving the business environment in the construction industry, representing subcontractors at all branches of local, state and federal government. For many years, ASA has had a long-standing working relationship with many of you and your staff on this Committee.

I am honored to offer comments on small business contracting reform within the federal government relating to the requirements for past performance and qualifications, the use of payment and performance bonds, the impact of continuing resolutions (CRs) on small businesses, and the bundling of contracts into Multiple Award Task Order Contracts (MATOCs) or Single Award Task Order Contracts (SATOCs).

Compass Constructors views the **strict requirements for past performance and qualifications** as the largest hurdle for small businesses to enter the federal construction market. We have witnessed unfair competition toward private contractors outside of the federal construction space - with similar past performance records, equivalent size and scopes of work demonstrating satisfactory Contractor Performance Assessment Reporting System (CPARS) or past performance questionnaires (PPQ) ratings - not receive a similarly favorable rating from the federal government. This makes it extremely difficult for a nascent contractor, with no prior experience working with the federal government, to be considered for a project award.

Having worked on federal government projects since 2020, we now have a better understanding of the importance of these past performance and qualification requirements, but we also recognize that many federal agencies and their contracting officers do not have the time to mentor a successful contractor. In most situations, they are managing multiple projects at once. Through this experience, we have learned the value of the myriad Small Business Administration (SBA) resources offered to small businesses to operate within the federal government's contracting system. There does, however, seem to be reluctance by many successful private sector construction contractors to take advantage of their resources.

The Federal Acquisition Regulation (FAR) is the primary regulation used by the federal government for their acquisition of supplies and services and Compass Constructors has been diligent in working within the FAR process. However, when competing for federal contracts, most contracts require a detailed management plan on project staffing and the qualifications of key members of the field execution team. These qualifications often require a minimum number of years performing work for a federal agency in construction. If the company has not previously executed federal contracts, then this requires the contractor to enter the market for additional employees with federal construction experience. This is a significant investment for a small business and hiring new employees with federal experience does not guarantee that a contractor will be awarded a project. It creates financial stress on a company, which many companies do not want to consider or cannot sustain. *We view this as a significant and cost prohibitive barrier to entry for a small business attempting to enter the federal construction market.*

All federal projects are mandated to have a **payment and performance bond** to be in place before any contract can be executed as required by the Federal Miller Act. Through the underwriting process of providing a bond to a contractor, the contractor's surety assesses if the risk of bonding the contractor is tolerable before issuing the bond. This is beneficial to the obligee (the government) because it shows that the surety views the principal (the contractor) as an acceptable risk and is willing to back that view by issuing the bond. Essentially, the surety wants to ensure that the contractor can perform the project from a financial and historical perspective before they will agree to issue the government an "insurance policy" stating that if the contractor defaults, the surety will ensure that the government is provided the agreed to services. The surety is subsidizing the risk to the government to guarantee the project's execution.

From our experience, the financial and historical requirements for a surety to issue a bond have become increasingly more stringent. The underwriter does not simply make a determination based off of working capital within a company. They evaluate many factors when determining if they will issue the guarantee to the obligee such as income statements, cash flow, debts, work in progress schedules, and any other potential liabilities. This examination will include the principal company's credit rating (typically a Dun & Bradstreet rating), which is the institutional equivalent of a personal credit rating. They will evaluate the scope of work compared with past projects and they will evaluate the principal's reputation with past suppliers, projects owners, and subcontractors. As part of the bond application, it is not uncommon for the principal to be required to submit letters of reference from past clients, suppliers, or subcontractors. By requiring these references, the surety gains real-world knowledge of the contractor's payment history and whether the contractor poses a risk to their ability to make on-time payments to subcontractors and suppliers. If the contractor cannot produce favorable references, then it increases the likelihood of the surety not issuing a bond for the project. Finally, the surety will evaluate the ability of the principal requesting the bond to absorb potential project losses.

Compass Constructors, like most small businesses, entertain federal construction contracts to make a profit. These profits grow a small business into a successful and increasingly productive contractor for the federal government. However, unforeseen problems can sometimes lead to losses. Surety companies generally want contractors to take on jobs that are no more than twice the size of the largest projects they have completed with similar scopes in the past. In essence, credibility is key to the federal government and the surety. There are many parallels to the considerations that a surety recognizes versus what the federal government is evaluating from a performance and financial standpoint. We purport that the rigorous evaluation that the surety performs is much greater than the evaluation that the government proposal evaluation team can provide by simply evaluating a small business' response to a solicitation. With the above-mentioned in mind, *we would recommend to the committee that less emphasis be placed on documented past government performance and qualifications and more emphasis placed on whether the contractor can provide the bid, payment, and performance bond.*

I would be remiss if I did not mention ASA's long history in supporting payment and performance insurance bond protections. We currently support H.R. 1740, bipartisan legislation authored by Reps. Bost (R-IL) and Pappas (D-NH) that would ensure these bonding protections are applied to water infrastructure projects where federal funds are being allocated to government contracts. As previously stated, all federal projects are mandated to have a **payment and performance bond** to be in place before any contract can be executed as required by the Federal Miller Act. However, the advent, and increased use, of creative financing measures, such as public-private partnerships (P3s), has created an area of ambiguity, and in some instances, bonding requirements are not especially clear. This potential coverage gap leaves workers, subcontractors, suppliers, small businesses, and taxpayers exposed to unnecessary risks. Congress previously corrected this coverage gap for P3s utilizing the Transportation Infrastructure Finance and Innovation Act (TIFIA) program with broad bipartisan support in both the House and the Senate. H.R. 1740, which is modeled off the TIFIA policy, would close this coverage gap by ensuring proper financial protections are in place for P3 water infrastructure projects receiving Water Infrastructure Finance and Innovation Act (WIFIA) assistance.

The unpredictable and changing federal budget climate is always a challenge for small businesses. As of late, the **instability and ambiguity caused by CRs** make it difficult for federal agencies to have certainty on funding for projects. Traditionally, the process of putting in a solicitation response is very costly. The requirements for the solicitation responses continues to expand and the challenge for a small business is to stand out versus its competitors. Most small businesses that are new to the federal construction market are already at a disadvantage from a past performance qualification standpoint. They must be able to successfully highlight the execution, schedule, and pricing aspects of their proposal. To do this, it requires a small business to expend a significant amount of money to develop a detailed proposal submission. On average, our proposal responses cost approximately \$10,000.00 worth of labor to draft, develop, review, and execute. This is a substantial expenditure for a small business.

With the ever-changing budget climate, there are many times that a solicitation response is submitted only to find that the funding is no longer available and the project must be terminated due to the lack of funding. Since the small business does not have any insight into the budget climate for the project, it can create a situation where the business spends a significant amount of money to develop a proposal response, only to find out that the project has become inactive.

My final concern is the **bundling of contracts into (MATOCs) or (SATOCs)**. These contracts can be extended if the federal contract administrator deems it acceptable. In a MATOC, there are typically four to eight contractor awards and once the award has been made, only those contractors will have the ability to bid on the work. These MATOC contracts traditionally will be extended for a total of five to ten years. Similarly, SATOCs are awarded to a single firm (typically with a unit price structure) and are held by that single contractor for a total of five years. If a small business is not awarded the initial solicitation for the MATOC or

SATOC, they are not allowed to bid on the work for the duration of the contracts – a period of five to potentially ten years. Once again, the emphasis on past performance and project team experience is highly scrutinized and evaluated when making these awards. This can make it extremely difficult for a small business to compete, as they are often deemed not qualified if they cannot provide evidence of past performance or a team meeting the specific resume experience required by the solicitation.

This lack of past performance and/or personnel qualifications for businesses new to federal contracting can create a scenario where small businesses are solicited by larger firms to form joint ventures. Large firms hold the past performance and/or personnel qualifications and will form a contractual joint venture entity in which the small business holds 51% ownership and the larger firm holds 49% ownership. These joint ventures can be extremely beneficial for small businesses. When joint ventures are executed for the proper reasons, it will allow for the small business to tap into the larger firm's robust bonding program, employee pool, and previous government work.

Problems arise when the larger firms simply utilize the small businesses as a vehicle to procure federal work otherwise set-aside for small businesses. The larger firms can do business under the joint venture, as 49% owners of the joint venture entity, but also hold ownership in the small business. The larger firm is receiving profits from both the joint venture entity and its minority ownership stake in the small business. This provides the most advantage to the large firms over traditional small businesses and undermines the goals of small business participation programs.

I would like to conclude my testimony by recognizing Reps. Stauber (R-MN) and Scholten (D-MI), both members of this committee, for their leadership as co-chairs of the Construction Procurement Caucus in the 118th Congress. This caucus serves as a bipartisan forum for the exchange of ideas and information on construction procurement in the U.S. House of Representatives. Additionally, Rep. Stauber and his staff have been stalwarts on change order reform in federal construction contracts for the past three Congresses.

More specifically, Rep. Stauber, along with Rep. Peters (D-CA), introduced H.R. 2726, the "Small Business Payment Performance Act, which was offered as an amendment to the House version of the FY24 NDAA and it would assist small business construction contractors receive timely payment for change orders. Construction firms of all sizes, but especially small businesses, have had to weather the effects of the pandemic and soaring construction materials costs. This commonsense and bipartisan legislation would help ensure that our nation's small business construction contractors do not go bankrupt waiting to be paid for work the federal government ordered them to perform. We will continue to make change order reform a priority in the 118th Congress.

Again, thank you Chair Williams (R-TX), Ranking Member Velázquez (D-NY), members of the committee, for the opportunity to testify before you today as the committee reviews small business contracting reform within the federal government. I am happy to answer any questions.