

Testimony of Michael Owh,
Director of the Mayor's Office of Contract Services, and
City Chief Procurement Officer
Before the New York City Council - Joint Hearing of the Committees on Contracts and
Economic Development
June 22, 2017

Good morning Chairs Rosenthal and Garodnick, and thank you all for the opportunity to share our thoughts on the proposed legislation to create a subcontractors' bill of rights. We believe this bill is a step in the right direction toward providing information to businesses and connecting them with resources.

My name is Michael Owh, and I am the Director of the Mayor's Office of Contract Services (MOCS) and the City Chief Procurement Officer (CCPO). MOCS is responsible for oversight of the City's procurement process, ensuring fairness, transparency and efficiency.

In Fiscal 2016, City agencies procured \$15.3 billion worth of goods, services, and construction through more than 41,300 transactions and 9,000 vendors. New York City vendors seek out relationships with subcontractors to complement, enhance, and deliver the wide range of goods and services for which the City contracts. These diverse relationships vary based on the requirements, needs and structure of the vendor organization, the underlying industry and the prime vendor's City contract. Each relationship between a vendor and a subcontractor results in its own unique independently negotiated contract to which the City is not a party.

Subcontractors seek out contractual relationships with vendors for a number of reasons, as well. Subcontracting provides an opportunity for small businesses, including Minority and Women-owned Business Enterprises, to build capacity and experience through smaller contracts.

Subcontracting also provides these businesses with an invaluable window into government contracting processes, expectations and requirements.

We are supportive of these subcontracting relationships and the benefits that inure to the vendors, subcontractors and the City. We believe a nuanced approach to supporting subcontractors will prove beneficial and ensure that the bill reflects the fact that a subcontractor's relationship with a contractor can often differ based on an individual contract. MOCS would be pleased to work with the Department of Small Business Services (SBS) in prioritizing and developing informational resources which reflect the variability in subcontractor agreements and maximizes impact for businesses.

SBS has a robust understanding of the issues that small businesses face and can provide information about the services they currently offer to subcontractors. I will now turn it over to my colleague, Jackie Mallon, to share more.

TESTIMONY

BY

FIRST DEPUTY COMMISSIONER JACKIE MALLON

NEW YORK CITY

DEPARTMENT OF SMALL BUSINESS SERVICES

BEFORE

THE COMMITTEE ON CONTRACTS

&

THE COMMITTEE ON ECONOMIC DEVELOPMENT

OF THE

NEW YORK CITY COUNCIL

THURSDAY, JUNE 22, 2017

Good morning Chair Rosenthal, Chair Garodnick and members of the Committees on Contracts and Economic Development. My name is Jackie Mallon and I am the First Deputy Commissioner at the Department of Small Businesses Services ("SBS"). At SBS, we aim to unlock economic potential and create economic security for all New Yorkers by connecting them to quality jobs, building stronger businesses, and fostering vibrant neighborhoods across the five boroughs.

As Director Owh mentioned, subcontracting provides an opportunity for small businesses to build capacity through smaller contracts that provide essential experience to win bigger contracts in the future. For the over 5,000 Minority and Women-Owned Enterprises (M/WBEs) that are certified through SBS, subcontracting serves as a launching pad to not only participate in government contracting, but also to expand their business operations. At SBS, we offer a number of capacity building programs targeted at M/WBEs as well as services available to all small businesses.

Through seven **NYC Business Solutions Centers** across the five boroughs, SBS provides free, accessible business services, including how to secure financing and access City benefits. Cash flow is often an issue for small companies working on City projects, particularly for subcontractors, so we recently launched the **Contract Financing Loan Fund**. This revolving fund offers low-interest loans of up to \$500,000 capped at a 3% APR. The fund is available to all small businesses and M/WBEs working on City contracts and to date we've already awarded over \$1 million in loans. Yesterday we also announced the launch of a \$10 million Bond Collateral Assistance Fund. The Fund supports M/WBEs and small businesses facing obstacles accessing surety bonds, bonds that offer collateral to ensure businesses can successfully perform

on City construction contracts. The program allows businesses to apply for surety bonds (collateral assistance) of up to \$500,000 or 50% of the Contract amount, whichever is lesser. These services, along with the number of business development tools available at our Business Solutions Centers, ensure that subcontractors have what they need to successfully complete City contracts.

SBS is supportive of any measure that would provide more information to subcontractors and agree with MOCS that a nuanced approach would prove beneficial. Thank you and I'm happy to take questions about our services.



TESTIMONY
New York City Council
Committee on Economic Development
Committee on Contracts
Hearing on the Creation of a Subcontractor Bill of Rights
Thursday, June 22, 2017

Submitted by Tracie Robinson
Senior Policy Analyst
Human Services Council of New York

Thank you, Chairperson Rosenthal and Chairperson Garodnick, for holding this hearing on the creation of a subcontractor bill of rights, and thank you, Council Member Cumbo, for introducing legislation to protect the rights of subcontractors. My name is Tracie Robinson, and I am the Senior Policy Analyst at the Human Services Council of New York. Subcontracting is of special importance to the nonprofit human services sector because so many human services organizations enter into subcontracts. Many of the problems faced by subcontractors are directly tied to problems faced by contractors, so we urge the Council to view nonprofit contracting holistically as it considers subcontracting reforms.

About the Human Services Council

HSC is a membership association representing nearly 170 of New York's leading nonprofit human services organizations, including direct service providers and umbrella and advocacy groups. Our members foster well-being and uplift communities by providing essential supports to a broad spectrum of New Yorkers, including children, the elderly, the homeless, people with disabilities, individuals who are incarcerated or otherwise involved in the justice system, immigrants, and individuals coping with substance abuse and other mental health and behavioral challenges. We help our members better serve their clients by addressing matters such as government procurement practices, disaster preparedness and recovery, funding, and public policies that impact the sector.

About Human Services Contracting

As you know, the City depends on a network of nonprofit organizations to deliver services that make our communities safer, healthier, more prosperous, and more just. Under 8,214 contracts with City agencies,¹ they provide employment placement services, legal advice, afterschool and adult literacy programming, care for children and the elderly, supports for the disabled, and even shelter and food. As you are also aware, however, this network of human services organizations is still reeling from years of under-reimbursement.

¹ New York City Mayor's Office of Contract Services: [Agency Procurement Indicators Reports: Fiscal Year 2016](#).

Under-reimbursement takes many forms: inadequate indirect cost reimbursement, match requirements, and unfunded mandates are the most common. The impact of chronic under-payment is grave. Nearly one in five of the City's nonprofit human services organizations are insolvent.

The effects of under-reimbursement are aggravated by inefficient and restrictive contracting practices, including:

- An extremely slow contract registration process that, more often than not, leaves nonprofits delivering a substantial portion of contracted services before receiving an initial payment;²
- Consistent lack of provisions in contracts for cost escalation or other contingencies;
- A cumbersome budget modification process that makes nimble decision-making impossible;
- Mandates such as training, certification, staffing ratio, evaluation, and reporting requirements that, while rooted in good intentions, actually compromise service quality by diverting time and other scarce resources from program activities;
- Arbitrary cost allocation that incorrectly designates certain program-related costs as "overhead," making the City less likely to pay for them;³
- "Claw-back" of funds without reasonable notice—sometimes years after a program is completed; and
- Severe restrictions on the use of funds—even in the case of performance-based contracts—which curtails nonprofit autonomy and makes it difficult for organizations to manage their cash flow.

With the Fiscal Year 2018 budget, the Council and the Mayor took important steps to address some of these issues, including funding cost-of-living adjustments, a ten percent indirect cost floor, and a "model budget" process that is intended to bring reimbursement in line with actual service costs. This is a good start, but much remains to be done to streamline human services contracting.

Implications for Subcontractors

Many nonprofit organizations that have government contracts enter into subcontracts. These subcontracts are usually with smaller, neighborhood-based organizations that provide a limited set of services to complement the larger nonprofits' programming. Unfortunately, the problems that prime contractors face often translate into problems for their subcontractors. This is a contracting domino effect.

Contractors often pay subcontractors late because (1) they cannot disburse government funds prior to completion of the service they are paying for, and (2) they themselves are paid late. In addition, Subcontracts are generally structured to *authorize* a certain amount of service but not to *obligate* it. This means that a prime contractor can end the service before reaching the full authorized amount. Although technically allowed, this can be devastating for the organization that expected to receive the full amount set forth in the contract. The prime contractor might also terminate a contract prematurely for reasons beyond its control, such as a disaster or the loss of a license that is required for a particular program.

² This creates serious cash flow problems for nonprofit human services organizations—especially smaller ones that do not have access to lines of credit and cannot easily fundraise their way out of a deficit.

³ In some instances, these restrictions are at odds with federal regulations regarding indirect costs.

Prime contractors tend to be large, sophisticated organizations with relatively sound infrastructure and fundraising capacity,⁴ and they are better able to cope with late payment and other problems. A large organization might have cash reserves or a line of credit or access to the City's loan fund. In contrast, the small organizations that tend to be subcontractors have no cash reserves, no access to credit, and no capacity to raise emergency funds. A single late payment can be catastrophic. An early termination can shutter an organization.

Options

Subcontractors cannot be given more rights vis-à-vis prime contractors than prime contractors have vis-à-vis government. This would create a financially untenable situation for prime contractors, who would likely respond by eschewing subcontracts altogether in favor of hiring individuals as employees.

Furthermore, contracting is within the purview of the Mayor's Office. Accordingly, we encourage the Council to do the following:

- View the contracting processes holistically and continue its work to address the chronic ills of human services contracting;
- As recommended by Lawyers Alliance for New York, provide technical assistance funding for attorneys to work with prime contractors and subcontractors; and
- Give subcontractors access to the loan fund.

We note that while the Administration can impose requirements on prime contractors, it will only do further damage to the already fragile human services sector if it does not provide adequate funding for contractors to comply with those requirements.

Conclusion

Subcontractors play an important role in the City's complex human services delivery system, and they face many challenges in the contracting process. They operate in the context of a broken contracting system. Only if we address the underlying causes of subcontractor instability—problems at the government-contractor level—will we be able to set prime contractors and subcontractors alike up for success.

Contact: Tracie Robinson, Senior Policy Analyst
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⁴ Compared to their smaller subcontractor counterparts



Lawyers Alliance
for New York

Connecting lawyers, nonprofits, and communities

TESTIMONY OF LAWYERS ALLIANCE FOR NEW YORK BEFORE THE NEW YORK CITY COUNCIL COMMITTEES ON ECONOMIC DEVELOPMENT AND CONTRACTS REGARDING INT. 1615

June 22, 2017

Lawyers Alliance for New York provides this testimony in support of Int. 1615, which would require the creation of a bill of rights for organizations entering into subcontracts involving New York City funds.

Lawyers Alliance for New York is the leading provider of business and transactional legal services for nonprofit organizations that are improving the quality of life in New York City neighborhoods. Our network of pro bono lawyers from law firms and corporations and staff of experienced attorneys collaborate to deliver expert corporate, tax, real estate, employment, intellectual property, and other legal services to community organizations. By connecting lawyers, nonprofits, and communities, we help nonprofits to develop affordable housing, stimulate economic development, promote community arts, strengthen urban health, and operate and advocate for vital programs for children and young people, the elderly, and other low-income New Yorkers.

Lawyers Alliance provides assistance to many organizations entering into prime contracts or subcontracts involving City funding. One issue that comes up repeatedly is that our clients have difficulty understanding what the contract means. Many smaller nonprofit organizations do not have in-house attorneys or staff with experience understanding and administering government contracts. City contracts are long, dense, and full of legalese. As a result, nonprofit organizations may take on obligations that they do not understand and cannot fulfill. I have asked clients dealing with an unexpected development what their contract says about that issue, only to hear, "Oh, it's all boilerplate, it's no help." A subcontractor bill of rights can help by encouraging subcontractors to consult counsel before entering into a contract, and whenever they have questions during the life of the contract. The bill of rights should also provide contact information for Lawyers Alliance and other sources of legal assistance.

City contracting agencies should also provide technical assistance funding for attorneys to work with prime contractors and subcontractors. When prime contractors and subcontractors negotiate the terms of their agreement, private parties are essentially determining how government services will be delivered. The City should ensure that those agreements are fair and workable, so that the service delivery will be successful. Providing both sides with access to counsel will further that goal.

It is also essential that both prime contractors and subcontractors be given adequate administrative funding. When a City agency issues a large contract with the understanding that the prime contractor will enter into subcontracts in order to serve particular populations or neighborhoods, the prime contractor is conducting administrative functions that the City would otherwise have to perform itself. Arbitrary caps on administrative costs mean that the City fails

to pay its fair share. They may also mean that a prime contractor uses up a larger share of the administrative cost rate, leaving subcontractors without the resources to carry out essential functions such as record-keeping and reporting.

Finally, I would urge the City to do whatever it can to speed approval of subcontractors and subcontracts. Under Appendix A to the City's standard contract, for subcontracts of \$25,000 or less subcontractors are deemed approved if the City does not act within 45 days. That is a very low threshold. It leaves subcontractors that have larger contracts without any assurance as to when they will be approved. City agencies should provide subcontractors with an agency contact who can explain the status of their approval. City agencies should explore pre-approving subcontractors, particularly those with prior City contracts or subcontracts. And the City should provide model preapproved subcontract agreements to further facilitate the approval process.

For these reasons, we urge the Council to pass Int. 1615, to protect the rights of all entities doing business with the City.



**Testimony of Denise M. Richardson, Executive Director
The General Contractors Association of New York
NYC Council Committees on Contracts and Economic Development
Hearing on Intro 1615
June 22, 2017**

Good morning. Thank you for the opportunity to testify today on Intro 1615. I am Denise Richardson, Executive Director for the General Contractors Association of New York.

The GCA represents the city's unionized heavy civil and public works contractors that build and rehabilitate the city's parks, roads, bridges, water and wastewater network and other public facilities. Our 300 members work both as prime and as subcontractors, and include multi-generation family owned businesses, MWBEs, and large nationally known contractors.

We appreciate the Council's efforts to help small businesses and minority and women owned business better understand the complex rules and contract terms governing efforts to do business with the City of New York.

The GCA is deeply troubled by efforts to impose a subcontractor bill of rights. Many of the challenges subcontractors face on public works projects are the same issues facing contractors. Timely payments, onerous and time-consuming paperwork and notice provisions, government direction to perform disputed work, and extraordinarily slow time period to process and register a change order are just some of the challenges faced when working for the City of New York.

If a bill of rights were to be required, it should be for *all* contractors, and not just subcontractors – especially as the City's programs encourage more emerging and minority and women owned business to become prime contractors.

At the same time, the City together with the Council should explore the onerous contract provisions and procedures that are a barrier to doing business with the city. The factors that impact slow payments to primes and therefore subs, the year plus delays in approving change orders while the contractor is directed to perform the work at risk, the strict notice provisions that focus more on forfeiture rather than fairness are all items that make it difficult and risky to do business with the City.

The GCA offers an annual training program for MWBEs who work in the heavy civil construction field. The three-day course focuses on capacity building for contractors. Items

such as understanding the terms in the typical subcontract and the flow down provisions of the city's standard contract are key elements of the training. Other modules include estimating, safe work practices, and understanding union agreements and project labor agreements.

We are willing and available to work with the Council and the Department of Small Business Services in developing a bill of rights for *all* contractors. We are opposed to developing such a document for subcontractors only.



MEMORANDUM IN SUPPORT

On behalf of the New York and Long Island Lumber Association (NYLILA), we would like to offer our support for INT. 1615, which seeks to create a subcontractors' Bill of Rights.

NYLILA has 78 members, representing independent lumber and building material dealers, manufacturers, wholesalers, distributors, and other associate businesses, and employ more than 3,500 local residents.

Building material suppliers are often one of the largest subcontractors on a construction job, providing all of the materials needed to complete residential and commercial construction projects. Additionally, building material suppliers are often the second largest creditors for projects, second only to the banks themselves.

As subcontractors on projects, especially large commercial and public projects, building material suppliers face a number of complicated issues and challenges, including the growing problem of retainage. Traditionally, owners of public projects withhold retainage on labor, typically up to 10 percent of the overall job, to guarantee that the work is performed in a timely fashion and at the standards set in the contract. While retainage is not a new concept, it has always been applied to labor, not to materials.

Our members provide materials for the contractor to complete their work, but our performance is not tied to that of the contractor. Once the requested materials are successfully delivered, inspected by the contractor, and signed-off on, material suppliers have completed their portion of the job as the subcontractor. Additionally, owners and contractors get further protections as most materials sold are either graded to meet industry standards or are covered by a manufacturer's warranty to protect the contractor in situations where a product is damaged or defective.

Material suppliers are also in the unique situation where the products cannot be repossessed or reused if they fail to get paid – a cut 2-by-4 cannot be reused. Because material suppliers cannot return to a project and "repossess" door frames, lumber, or hardware, it is vital that once they complete their contract they be allowed to be paid in full.

As a result, there is no reason to include material suppliers in retainage; nonetheless, retainage is being used in a greater number of construction projects, placing more of a burden on independently owned and operated building material dealers in the region. Our members are also seeing retainage being used by contractors as leverage for change orders, which places even more of a burden on these small businesses.

NYLILA strongly believes that material suppliers should be exempted from having retainage held on them if they are not serving as the installer of the products and their products are covered by a manufacturer's warranty and/or are graded by an independent agency. We would like to see this issue included in INT 1615 and strongly support the City Council's work on creating a subcontractors' Bill of Rights.

Thank you for your consideration. If you have questions or concerns, please contact Jeff Keller at jkeller@nrla.org or 518-880-6376.

**THE COUNCIL
THE CITY OF NEW YORK**

Appearance Card

I intend to appear and speak on Int. No. 1615 Res. No. _____

in favor in opposition

Date: _____

(PLEASE PRINT)

Name: SBS Jackie Mellon

Address: _____

I represent: SBS

Address: _____

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Name: Quenia Abreu

Address: 177 West 83rd St.

I represent: NY Women's Chamber of Commerce

Address: 1524 Amsterdam

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Name: MICHAEL DOWD

Address: 253 BROADWAY, 9th Fl.

I represent: MAYOR'S OFFICE OF CONTRACTS

Address: 253 BROADWAY, 9th Fl.

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Name: Tracie Robinson

Address: 130 E. 59th St

I represent: Human Services Council of New York

Address: 130 E. 59th St

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Name: Jannel Davis

Address: Senior Advisor + Director of Mgmt

I represent: Office of M/WBES

Address: _____

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Name: Frank Garcia

Address: 201 E 17 NY

I represent: WYS COALITION OF HISPANIC

Address: CHAMBER

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in favor in opposition

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Name: Laura Abel

Address: 171 Madison Ave., NYC 10016

I represent: Lawyers Alliance

Address: same

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Appearance Card

I intend to appear and speak on Int. No. _____ Res. No. _____

w/ modifications in favor in opposition

Date: 6/22/17

(PLEASE PRINT)

Name: DENISE RICHARDSON

Address: _____

I represent: General Contracting Assoc.

Address: _____

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