Each year the Federal Highway Administration, or FHWA, allocates about $40 billion in Federal funds to State departments of transportation, or State DOTs, and local public agencies, or LPAs, to construct and maintain the country’s highway system. These Federal funds provide contract opportunities for prime contractors and their subcontractors to participate in the construction and maintenance of our Nation’s roadways.

Frustration can set in when subcontractors do not receive timely payment from prime contractors for services rendered.

As the LPA, one of the requirements for your federally assisted project is to ensure that your prime contractors adhere to the Disadvantaged Business Enterprise (DBE) Program and promptly pay subcontractors for completed work.

Ensure Prime Contractors Pay Subcontractors PROMPTLY

Prime contractors must adhere to the Disadvantaged Business Enterprise (DBE) Program and promptly pay subcontractors for completed work.

As the LPA, your enforcement of the prompt payment and return of retainage provisions of the DBE program will help remedy this situation.

Over the next few minutes, we will explain prompt payment and return of retainage provisions and how you, as an LPA, can comply with the applicable Federal regulations.

Why are prompt payment provisions needed? In the past, contracts did not include the prompt payment and return of retainage provisions and how you, as an LPA, can comply with the applicable Federal regulations.
against the prime contractor. But small businesses still faced a dilemma of whether to take formal action against their unresponsive prime contractors and risk jeopardizing future opportunities to subcontract with that prime contractor.

Prompt payment can become a problem for small businesses, such as subcontractors, because they tend to have less capital and tighter cash flow than larger businesses, such as prime contractors. Late payment from a prime contractor can create barriers for subcontractors to compete in the marketplace. When the prime contractor is slow in paying, the subcontractor’s revenue flow is disrupted.

The untimely receipt of payment can limit the ability of a small business to pay its employees and keep current with its bills. Small businesses lack the resources of larger companies to supplement needed cash from savings or lines of credit.

In 1999, prompt payment and return of retainage provisions were specifically added as contract requirements under the DBE Program for federally assisted projects. These provisions are intended to remove the late payment barriers not only for DBEs, but for all subcontractors.

A key element to ensure subcontractors are promptly paid is to have your prime contract for federally funded projects include a prompt payment clause. The DBE Program prompt payment provision requires prime contractors to pay all subcontractors, including DBEs, within 30 days of the prime contractor’s receipt of payment from you, the LPA.

The regulations also require prompt return of retainage, which is when a portion of the payment owed to either the prime or the subcontractor is held pending the satisfactory completion of work. Satisfactory completion means that all tasks specified in the contract or subcontract have been accomplished and that the LPA has accepted the work.

Federal regulations require each State DBE program to specify which of three retainage options the State DOT uses. The State DBE program will specify which of the three options is applicable.

The first option is when the State DOT or LPA does not withhold from the prime contractor and the prime contractor does not withhold from subcontractors.

The second option is when the State DOT or LPA does not withhold from the prime contractor, but the prime contractor does withhold from the subcontractor. In this option, the prime contractor must pay all retainage to the subcontractor for completion of accepted work within 30 days of the prime contractor’s receipt of payment from you, the LPA.

In the third option, the State DOT or LPA withhold from the prime contractor and the prime contractor withholding from the subcontractor. In this option, the LPA must make partial retainage payments to the prime contractor as work is completed, and the prime contractor must pay all retainage to the subcontractor for completion of the accepted work within 30 days of the prime contractor’s receipt of payment from you, the LPA.

Consult your State DBE program plan to determine which retainage provision applies in your State.

So, how can you ensure, as the LPA, that subcontractors and DBEs are not being adversely affected due to the prime contractor’s late payments?
First, the prompt payment and retainage clauses must be included in all prime contracts and subcontracts.

Second, do not wait for complaints from subcontractors and DBEs about not receiving their payments. Proactively monitor your prime contractors to ensure they are paying their subcontractors within the contractual 30-day timeframe through a non-complaint-driven tracking mechanism. Refer to your State’s DBE program plan for suggestions on how to monitor your contracts for compliance.

Third, if you find your prime contractors are not in compliance with their contractual obligations regarding prompt payments and return of retainage, initiate enforcement actions. Your State’s DBE program plan outlines enforcement actions, such as withholding payment to the prime contractor. If the DBE program plan does not contain enforcement sanctions, add enforcement language to your contract with the prime contractor.

As the LPA, proactively ensure that the prime contractors follow the prompt payment and retainage requirements. Do this by including the prompt payment and retainage clauses in your contracts, actively monitoring the construction payments, and enforcing the contract specifications before they begin to adversely affect the subcontractor.
Additional Resources

- Information on prompt payment mechanisms

- Information on retainage

- Information on union versus non-union status of a DBE firm

- Regulation on DBE requirements on prompt payment and retainage
  [http://www.ecfr.gov/cgi-bin/text-idx?region=DIV1.rgn1=Section%20Heading;op2=and;rgn2=Section;op3=and;rgn3=Section;view=text;idno=49;node=49%3A1.0.1.1.20.rgn=div5#49:1.0.1.1.20.6](http://www.ecfr.gov/cgi-bin/text-idx?region=DIV1.rgn1=Section%20Heading;op2=and;rgn2=Section;op3=and;rgn3=Section;view=text;idno=49;node=49%3A1.0.1.1.20.rgn=div5#49:1.0.1.1.20.6)

- Regulation on DBE requirements on compliance and enforcement
  [http://www.ecfr.gov/cgi-bin/text-idx?region=DIV1.rgn1=Section%20Heading;op2=and;rgn2=Section;op3=and;rgn3=Section;view=text;idno=49;node=49%3A1.0.1.1.20.rgn=div5#49:1.0.1.1.20.6](http://www.ecfr.gov/cgi-bin/text-idx?region=DIV1.rgn1=Section%20Heading;op2=and;rgn2=Section;op3=and;rgn3=Section;view=text;idno=49;node=49%3A1.0.1.1.20.rgn=div5#49:1.0.1.1.20.6)

- Regulation on DBE requirements on monitoring contract performance
  [http://www.ecfr.gov/cgi-bin/text-idx?region=DIV1.rgn1=Section%20Heading;op2=and;rgn2=Section;op3=and;rgn3=Section;view=text;idno=49;node=49%3A1.0.1.1.20.rgn=div5#49:1.0.1.1.20.2.18.9](http://www.ecfr.gov/cgi-bin/text-idx?region=DIV1.rgn1=Section%20Heading;op2=and;rgn2=Section;op3=and;rgn3=Section;view=text;idno=49;node=49%3A1.0.1.1.20.rgn=div5#49:1.0.1.1.20.2.18.9)