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Civil Rights Disadvantaged Business Enterprise **Prompt Payment and Return of Retainage**

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

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.



**Ensure Prime
 Contractors Pay
 Subcontractors
 PROMPTLY**

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 requirement to promptly pay all subcontractors for completed work.

Let's consider a hypothetical case. Suppose prime contractor, Zenith Construction Inc., contracts with ABC Construction to build retaining walls on a federally funded LPA highway contract. ABC, as the subcontractor to Zenith, notifies you, the LPA, that it has not yet received payment from the prime contractor, even though the work is finished. Your records

show that ABC Construction constructed the retaining walls and that you accepted the retaining walls as complete and paid Zenith Construction for the work. You contact the prime contractor to find out why ABC has not been paid. Zenith advises you that it decided to withhold payment for the retaining walls on the LPA highway contract until ABC fixes a problem on an earlier State DOT contract currently in dispute.

Can Zenith withhold payment from ABC on this contract? The answer is "no." Zenith must abide by what is known as the prompt payment provisions in the LPA highway contract regardless of any problems Zenith may have had with ABC on previous contracts.

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. When small businesses were not promptly paid, little or no recourse was available for them to seek payment for their services from unresponsive prime contractors. Some State statutes do allow subcontractors to file a lien

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 withholds from the prime contractor and the prime contractor withholds 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
<http://www.osdbu.dot.gov/DBEProgram/final/final16.cfm>
- Information on retainage
<http://www.osdbu.dot.gov/dbeprogram/dbeqna.cfm#26.29>
- Information on union versus non-union status of a DBE firm
<http://www.osdbu.dot.gov/DBEProgram/dbeqna.cfm#26.53fIV>
- 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>
- 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>
- 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>

The content of this document is not a substitute for information obtained from State departments of transportation, appropriate FHWA Division Offices, and applicable laws. Scenarios have been simplified for emphasis and do not necessarily reflect the actual range of requirements applicable to the scenario or this topic. This document was created under contract number DTFH63-12-F-00025 by the Federal Highway Administration, U.S. Department of Transportation, and is offered to the public to heighten and focus awareness of Federal-aid requirements within the local public agencies community and reinforces the importance of these necessary policies, procedures, and practices.

This companion resource is the script content for the video production of the same name.