



LEGAL TOPICS IN THE TRANSPORTATION CONSTRUCTION INDUSTRY

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August 28, 2023

Holland & Knight

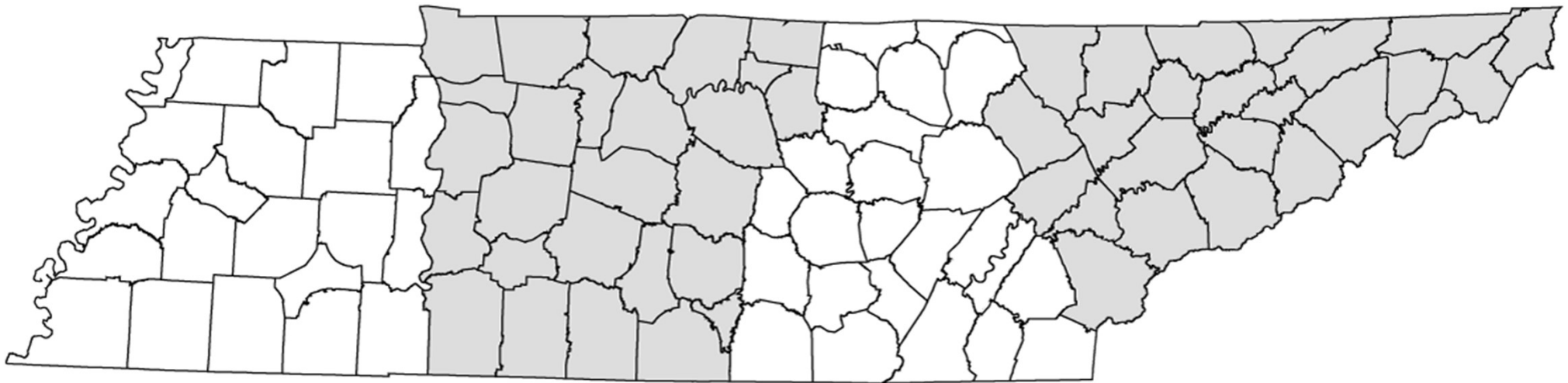
TDOT Transportation Divisions

Region 4

Region 3

Region 2

Region 1



Region 3 Projects- Current Projects

I-24 MOTION	Interstate 24 SMART Corridor
Interstate 40 Donelson Pike Interchange	Interstate 65 Buckner Road Interchange
Interstate 65 Nashville to Kentucky State Line	State Route 1 (US 70) Broadway Viaduct
State Route 6 (Franklin Road)	State Route 11 (Nolensville Road)
State Route 96	State Route 99 (New Salem Highway)
State Route 109 US 70 to Cumberland River	State Route 109 Portland Bypass
State Route 112 (Clarksville Highway)	State Route 149/ State Route 13
State Route 166 Improvements	State Route 266 (Jefferson Pike)
State Route 374	Interstate 65 Widening (Robertson County)
Humphreys & Hickman Co. 2021 Flood Recovery	State Route 13 Improvements
SR 6/ US 43 Horse and Buggy Path	State Route 46 Widening
State Route 48 Widening	

TDOT Resources Available

Construction

Bid Lettings ▼

Alternative Contracting ▼

Construction Division Resources ▼

Contractor Prequalification ▼

Contractor Information ▼

CEI Information ▼

Internal Resources (TDOT) ▼

External Resources (non-TDOT)

Civil Rights & DBE Resources

Constructability Reviews ▼

Labor Compliance

Staff

Civil Rights & DBE Resources

[TDOT Civil Rights Division](#)

[TDOT Disadvantaged Business Enterprise \(DBE\) Plan \(Word\)](#)

[Certified DBE List](#)

[DBE Application](#)

[DBE Truck List \(pdf\)](#)

[DBE Material Supplier/Trucker Contract Certification \(pdf\)](#)

[TDOT DBE Trucking Credit Worksheet \(pdf\)](#)

[Commercial Useful Function Checklist \(pdf\) \(Revised 01/07/20\)](#)

[CC-3 DBE Certification of Monies Paid Form \(pdf\)](#)

[Overview of the TDOT Contracting & Payment Process \(pdf\)](#)

Know Your Contract

Scope of Work

- The scope of work defines what a Contractor is obligated to provide, in exchange for the money that the Owner/ General Contractor is obligated to pay.
- Details materials, labor, equipment, services, etc. required.
- Can be identified through plans, specifications, and other documents identified in the Contract.



Scope of Work- Continued

READ YOUR CONTRACT. KNOW YOUR WRITTEN SCOPE!

- The Contract may include clarifications and exclusion of particular items that are not part of the agreed work or will be provided by the Owner or other contractors.
- Items not included in the written scope will either
 - 1.) Not be provided; or
 - 2.) Will only be provided in the Owner/General Contract pays more.

Construction Changes

- Contract should provide a procedure describing how changes will be handled – binding both parties to the contract.
- Include details regarding impact on schedule, price, and cost.
- PUT Change Orders IN WRITING.

Payment Provisions- Capturing That Money

- Price of the construction project must match up with the agreed upon scope of work.
- If the scope of work increases- so will the price. **MAKE SURE YOU ARE CAPTURING THIS PRICE INCREASE.**



Payment Provisions- Capturing That Money

- Change Orders:
 - Project and contact information
 - Details of changed work/scope
 - Dates of change
 - Updated schedule- how this change impacts completion
 - Updated contract value

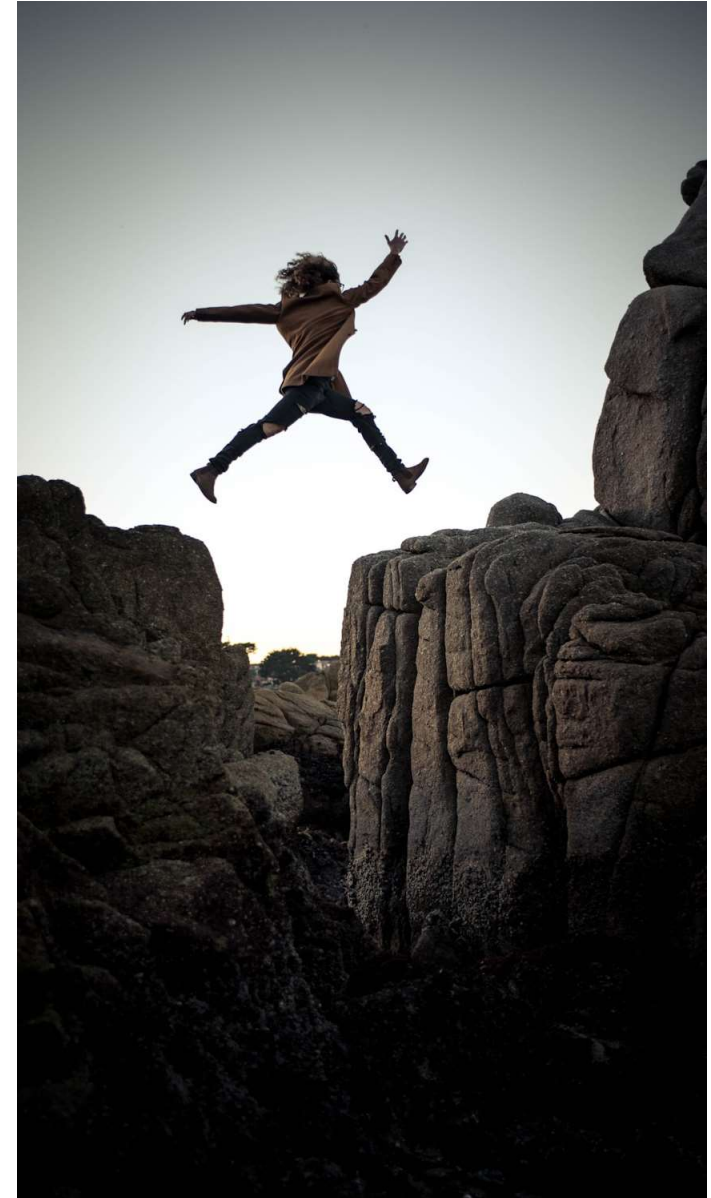
- Practice Pointers:
 - GET IT IN WRITING

 - NEVER START WORK BEFORE YOU HAVE AN EXECUTED CHANGE ORDER

Conditional Payment Provisions

- Pay- If- Paid:
 - Meaning: General contractor does not have to pay their subcontractors unless the general contractor is paid by the Owner.
 - Tennessee will enforce these so long as the provision is explicit.
- Pay-When- Paid:
 - Does not create a condition precedent for payment. Merely establishes a reasonable time for payment from the General Contractor to the Subcontractor.

Both shift the risk downstream.
Provisions do not impact lien rights.



Tennessee Prompt Payment Act- Government Agencies

- Payment From General Contractor to Subcontractors:
 - Payment timeline depends upon when the GC receives payment from the Government Agency.
 - General Contractor must pay subs within 30 days of receiving payment.
 - Subcontractors have 30 days to pay downstream subs and suppliers.



Tennessee Prompt Payment Act- Government Agencies

- All payments wrongfully withheld will accrue interest at a rate of 1.5% per month, beginning the day after payment becomes due.
- General Contractor Payment From Agency:
 - If If the interest remains unpaid for 60-days (or some other period specified in the contract) that interest will be added to the principal amount of the debt and will still continue to accrue interest on the increased amount.

Payment Terms- How Do I Get That Money?

- Identify the particulars of when payment is due.
- Identify your obligations to recover payment.
- Consequences for failure to pay
 - Termination for cause?
 - Can you stop work?
 - Interest?

Schedule

- When will the work begin?
- Substantial Completion?
- Final Completion?
- How is completion verified?
 - Determination by a third party?
 - Issuance of a certificate for occupancy by a building inspection office?
- Liquidated Damages?

Liquidated Damages Provision?

- Typically used to cover the costs of delays, schedule disruptions and other problems that can occur during a construction project.
- Can be a specific amount of \$ per day or a specific percentage of the contract.
- Negotiation Techniques:
 - Seek a lower rate
 - Inclusion of delay days (i.e. weather or construction problems)



Liquidated Damages- Continued

- TDOT Construction Division-
PRIORITIZED THIS TOPIC!
- “The bargain may be an
unfortunate one for the delinquent
party, [but] it is not the duty of
courts of common law to relieve
parties from the consequences of
their own improvidence.”

Guiliano v. Cleo, Inc., 995 S.W.2d 88,
101 (Tenn., 1999)



TDOT Requirements

- TDOT requires all subcontractors to submit weekly certified payrolls electronically on line through our AASHTOWare Project CRL (<https://www.tn.gov/tdot/tdot-construction-division/transportation-construction-division-resources/tdot-labor-compliance/certified-payrolls.html>)
 - Subcontractors will need to get registered and familiar with this program
- Required “paperwork” and Certifications—Subcontractors need to get familiar with the timely submittal of material certifications required for payment (https://www.tn.gov/content/dam/tn/tdot/hq-materials-tests/standard-operating-procedures/SOP_1-1.pdf)

Useful Links

5. Useful Links

5.1. [M&T Forms](#)

All required DT Forms mentioned in Part 1 can be found here.

5.2. [QPL](#)

Materials with a QPL requirement as shown in Part 1 are listed here along with all requirements a product must meet to be on the QPL.

5.3. [Producer List](#)

Producers of these materials must be approved **prior to use**. All requirements to be on the Producer List are available at the link provided.

5.4. [TDOT Specifications & Special Provisions](#)

5.5. [TDOT Standard Operating Procedures](#)

All required Standard Operating Procedures can be found here.

SP 1247 Requirements

- <https://www.tn.gov/content/dam/tn/tdot/construction/special-provisions/Const-1247.pdf>

SP1247

SP1247

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STATE

OF

TENNESSEE

(Rev. 6-20-22)

(Rev. 9-7-22)

(Rev. 3-1-23)

January 1, 2021

SPECIAL PROVISION

REGARDING

DBE CONTRACT GOAL

Electronic Code of Federal Regulations (e-CFR):
49 CFR 26

DBE Contract Requirements

1. Projects where the DBE is the Contractor

The entire portion(s) of the contract to be completed by certified DBE firm's own forces will be counted toward meeting the goal. This will also include the cost of supplies and materials obtained by the DBE for the work of the contract, including supplies purchased or equipment leased by the DBE. Items of the contract subcontracted to non-DBE firms will not be counted toward the goal.

Note: If a DBE does not perform or exercise responsibility for at least 30 percent of the total cost of its contract with its own work force, or the DBE subcontracts a greater portion of the work of a contract than would be expected on the basis of normal industry practice for the type of work involved, the Department must presume that it is not performing a commercially useful function.

Additional Pointers

- Understand TDOT specifications and standard drawings and what the “method of measurement” and “basis of payment” include.
 - (Example- TDOT base concrete payment by the CY or SY based on theoretical quantities, not the quantity of concrete delivered in a ready mix truck)
- Verify the pay items and unit prices on the Subcontract form that TDOT requires are the same as the actual subcontract with the prime contractor. Verify the pay items and unit prices on the Subcontract form that TDOT requires are the same as the actual subcontract with the prime contractor

IMPORTANT TAKEAWAYS

- PUT EVERYTHING IN WRITING
- READ YOUR CONTRACT
- ASK QUESTIONS
- NEGOTIATE UNFAVORABLE TERMS

Questions?