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Prompt Payment & Return of Retainage

The Importance of Paying Small Business Promptly

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Why is Prompt Payment/Return of Retainage Important?

- Prompt Payment remains a compliance priority
- FAST Act emphasizes role of Prompt Payment in DBE program (Pub. L. 114-94, Section 1101(b)(8))
- Addresses the barriers created by delays in payment to subcontractors
- Prompt payment provisions are an important race-neutral mechanism that can benefit DBEs and all other small businesses



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Why is Prompt Payment/Return of Retainage Important?

- Slow payment is a problem affecting many subcontractors, not just DBEs
- Small businesses must receive payments to
 - keep their businesses afloat
 - grow their businesses
 - increase employment

**SMALL
BUSINESS BIG
IMPACT**



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Prompt Payment Regulation [49 CFR 26.29]

- State DOTs must have a contract provision that requires prime contractors to pay all subcontractors for satisfactory performance of their contract no later than 30 days from the prime's receipt of payment from the recipient for the work the subcontractor completed
- States can require shorter timeframes



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Prompt Payment



Prime
submits
invoice that
includes
sub's work
to State



State pays
prime
based on
invoice



Prime
receives
payment



Prime must pay
sub within

30 days*

*Some States require
shorter timeframes



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Not just for DBEs!

- The prompt payment and return of retainage requirements apply to ALL subcontractors: DBE and non-DBE





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Prompt Payment Applies to All Subcontractors

- On and off site
- DBEs and non-DBEs
- Truckers, suppliers, engineering services, etc.
- All firms associated with the project regardless of tier



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Subcontracting Tiering

(See DOT Official DBE Q&As)

<https://www.transportation.gov/sites/dot.gov/files/2020-01/docr-20180425-001part26qa.pdf>

- Tiering of subcontracting makes monitoring complex
- Need to know when firms are working
 - request look ahead schedule
- For each tier of subcontracting another Not to Exceed (NTE) 30-days for payment is added
- Example:
 - 3 Tiers of subcontracting
 - Prime – Paid
 - 1st Tier – NTE 30 days
 - 2nd Tier – NTE 30 days of when 1st tier was paid
 - 3rd Tier – NTE 30 days of when 2nd tier was paid
 - From when prime is paid could take up to 90 days to pay 3rd tier sub



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Contract Clause [49 CFR 26.29(a)]

- Obligates the contractor to pay the subcontractor for satisfactory performance of their work
- No later than 30 days from when the prime or upper tier has been paid
- Must be included in every DOT-assisted contract
- How does the State DOT assure the clause is in contracts between primes and subs?



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Return of Retainage

- Withholding a certain percentage of payment that the recipient owes the prime (or the prime owes the subcontractor), typically until all the work of the prime contractor (or subcontractor) has been satisfactorily completed
- Standard industry practice



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Return of Retainage Options: 3 Methods [49 CFR 26.29(b)]

1. State and prime do not hold retainage
2. State does not hold retainage from prime; prime holds retainage from sub*
3. State and prime both hold retainage (State pays retainage to primes based on prompt and regular incremental acceptances of portions of prime's contract work)*

*Prime must release retainage within 30 days after subcontractor's work is "satisfactorily completed"



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What is “Satisfactory Completion”? [49 CFR 26.29(c)]

**“... When all the tasks called for
the subcontract have been
accomplished and documented as
required by the recipient”**



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What is acceptable work?

- Payment is required only for satisfactory completion of the subcontractor's work
- Check your standard specifications to see the definition of acceptable/completed work
- If work has been paid for by the recipient to the prime then the work has been accepted
- If the prime has been paid, then the subcontractors providing any work under that payment must be paid [49 CFR 26.29(c)]



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Applies to all Forms of Contracts

- All forms of contractual agreements (e.g. trucking leases, task orders, etc.) are covered by the prompt payment requirement
- States and contractors cannot waive or contract out of prompt payment or return of retainage requirements



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Disputes

- Prompt payment does not apply if there is a legitimate dispute over the subcontractor's performance
- State should have a dispute resolution process in place [49 CFR 26.29(e)(1)]

DOT's DBE Q&As:

<https://www.transportation.gov/civil-rights/disadvantaged-business-enterprise/official-questions-and-answers-qas-disadvantaged>



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Dispute Resolution Process (DRP) [49 CFR 26.29(e)(1)]

- DBE Program Plan should describe the process the recipient uses to resolve disputes
- Having a DRP process that is enforced can resolve disputes effectively and efficiently
- Disputed work does not fall under the Prompt Payment provisions since it represents work which is not yet accepted
- Drawn out disputes can put small businesses out of business!



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Contract Specific

- Prompt payment requirements are contract specific
- Prime may not withhold payment from a subcontractor to address a dispute between the prime and subcontractors on an unrelated contract

DOT's DBE Q&As:

<https://www.transportation.gov/civil-rights/disadvantaged-business-enterprise/official-questions-and-answers-qas-disadvantaged>



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Monitoring and Enforcement

- States must have a mechanism to monitor prompt payment [49 CFR 26.37]
- May not rely solely on subcontractor complaints





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Monitoring Mechanisms

[49 CFR 26.37]

- Recipient must have procedures to assure compliance by all program participants
- How will Recipient know:
 - Prompt Payment clause is in contract language
 - Date prime is paid
 - Date when subcontractor is paid
 - When a contract is under dispute
- What is being asked of the prime/sub for data collection?
- What if they don't comply?



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Compliant Prompt Payment Return of Retainage Program

- Payment contract/Return of Retainage clause included in every DOT-assisted contract
 - 30-day (or less if State law requires) payment for accepted work – work prime has been paid for (49 CFR 26.29(a))
 - Retainage option State follows (49 CFR 26.29(b))
- Mechanisms of oversight to ensure compliance by all program participants
 - (USDOT Official Guidance: [DBE Guidance](#) and 49 CFR 26.37(a))
- Enforcement methods if this provision is breached
 - (49 CFR 26.29(d))



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Importance of Accurate & Timely Data

- If recipient does not have a way to provide oversight of all firms on the project then monitoring is really based on complaints
 - Contract language should require the prime to submit information on payments to all subcontractors
 - Subcontractors are responsible for verifying they have been paid



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Relying on Complaints

- Recipients oversight process and assurance of compliance with Prompt Payment CANNOT rely solely on complaints or notifications from subcontractors
- Unpaid subcontractors are reluctant to complain for fear of retaliation
- Recipient must take affirmative steps to monitor and enforce prompt payment and retainage requirements [49 CFR 26.37]
- Must be proactive
 - waiting for complaint is reactive



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Prompt Payment on Projects with Alternative Contracting and Financing Methods

- Prime might not be paid regularly
 - Contract structure
 - Milestone payments
- RFP should address subcontractor/lower tier payments
- Identify sanctions (e.g., point system) in RFP



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Resource for ACM Projects

- Included in FHWA's DBE/ACM Handbook
- Regulation is the same
- Best practice for Major ACM projects - electronic data collection system
- Make sure system allows for tiering
- Every layer of tiering allows the same time period of payment
- Could be very long time before 4th or 5th tier is paid if 30 days is used

DISADVANTAGED BUSINESS ENTERPRISE PROGRAM

Administration and Oversight on Projects with
Alternative Contracting & Procurement Methods

HANDBOOK



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Tappan Zee Bridge, New York State Thruway Authority



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Advice to Recipients

- Review your DBE Program Plan and ensure all provisions of Prompt Pay/Retainage requirements are included
- Ensure the elements of your DBE Program Plan are reflected in Standard Specifications and in contract language
- Ensure internal oversight procedures are aligned with Prompt Payment
- Provide training to oversight staff
- Include training on Prompt Payment in your DBE Supportive Services program
- Reach out to subcontractors – be accessible
- Perform Prompt Payment audits



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Advice to Prime Contractors

- Compliance with Prompt Payment will save time and money
- Assure all subs understand their responsibility of acknowledging payments
- Execute DRP as soon as dispute is evident
- Major projects (>\$500M) contracted under D-B typically allows for tiering of subcontracting
 - make sure all subs know their responsibility under Prompt Payment
- Submit invoice to the State DOT after DBE's work is accepted even if on a different payment schedule



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Advice to Subcontractors

- Read your contract before signing!
- How/when you are paid is super important
- Make sure subcontract contains the prompt payment/release of retainage clause that binds the higher tier contractor to pay the sub at most 30 days after higher tier contractor is paid
- Make sure you understand the requirements for being paid
- Make sure you understand the dispute resolution process
- Know who the oversight agency is for your project



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Best Practices & Lessons Learned

Proactive Monitoring

- Do not rely on just complaints
- Electronic monitoring system
- Posting when state pays contractors
- Periodic auditing of prompt payment files



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Thank You!

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