

Prompt Payment Section Sample Template (Posted - 4/25/2018)

This template may be incorporated into a recipient's DBE Program document. While use of the template is optional, DOT encourages recipients to utilize this sample template to ensure that they comply with the prompt payment requirements to ensure subcontractors are promptly paid in accordance with 49 CFR § 26.29.

49 CFR § 26.29- Prompt Payment Mechanisms

- *[Recipient]* requires that all subcontractors performing work on DOT-assisted contracts shall be promptly paid for work performed pursuant to their agreements, in accordance with all relevant federal, state, and local law.
- In accordance with 49 CFR § 26.29, the *[Recipient]* established a contract clause implementing this requirement and requires prime contractors to pay subcontractors for satisfactory performance of their contracts no later than 30 days from the prime contractor's receipt of each payment from the *[Recipient]*.
- *[Recipient]* ensures prompt and full payment of retainage from the prime contractor to the subcontractor within *[number not to exceed 30]* days after the subcontractor's work is satisfactorily completed. Pursuant to § 26.29, *[Recipient]* has selected the following method to comply with this requirement:
 - *[Insert the ONE method selected from the options listed in § 26.29(b)]*

Additionally, for Federal Aviation Administration (FAA) Recipients, include the following:

- To implement this measure, *[Recipient]* includes the following clause from FAA Advisory Circular 150/5370-10 in each DOT-assisted prime contract:
 - *[Insert clause from AC-150/5370-10 (Section 90-06) pertaining to method selected. Revise instances of "30 days" to reflect state and local prompt payment/return of retainage requirements, if these are less than the 30 day maximum.]*

Section 26.37 Monitoring Responsibilities

- *[Recipient]* implements and carries out appropriate mechanisms to ensure compliance with 49 CFR Part 26 program requirements by all program participants, including prompt payment, and describes and set forth these mechanisms in *[Recipient's]* DBE program.

Monitoring Payments to DBEs and Non-DBEs

- *[Recipient]* undertakes ongoing monitoring of prime payments to subcontractors over the course of any covered contract. Such monitoring activities will be accomplished through the following method(s):

[Detail the SPECIFIC methods that will be utilized. Possible examples include,

but are not limited to:

- *Posting prime contractor payments to a website, database, or other place accessible to subcontractors to alert them to the start of the xx-day clock for payment*
 - *Use of an automated system that requires real time entry of payments to, and receipts by prime contractors and subcontractors and regularly monitoring that system*
 - *Other affirmative steps to monitor prompt payment and retainage requirements (describe specific steps)]*
- *[Recipient] requires prime contractors to maintain records and documents of payments to subcontractors, including DBEs, for a minimum of three (3) years unless otherwise provided by applicable record retention requirements for the [Recipient's] financial assistance agreement, whichever is longer. These records will be made available for inspection upon request by any authorized representative of the [Recipient] or DOT. This reporting requirement extends to all subcontractors, both DBE and non-DBE.*
 - *[Recipient] proactively reviews contract payments to subcontractors including DBEs (indicate how often—DOT recommends not less than quarterly to ensure compliance). Payment reviews will evaluate whether the actual amount paid to DBE subcontractors is equivalent to the amounts reported to [Recipient] by the prime contractor.*

Prompt Payment Dispute Resolution

- *[Recipient] will take the following steps to resolve disputes as to whether work has been satisfactorily completed for purposes of § 26.29.*

[Detail steps here (e.g. meetings between prime and sub, with resident project representative and/or project manager presence as appropriate.) It is recommended that any meeting for the purpose of dispute resolution include individuals authorized to bind each interested party, including recipient representative(s) with authority to take enforcement action.]

- *[Recipient] has established, as part of its DBE program, the following mechanism(s) to ensure prompt payment and return of retainage [examples of mechanisms include the following]:*

(1) Alternative dispute resolution (ADR)

- *[Provide the contract clause(s) you will use to require this, and explain how the alternative dispute resolution mechanism will function. If you do not specify the nature of the ADR mechanism, explain how you will determine a proposed mechanism is sufficient (for example, perhaps consider a contract clause that requires the prime contractor to submit a detailed alternative dispute resolution plan for your approval prior to the issuance of any notice to proceed)].*

(2) A contract clause providing that the prime contractor will not be reimbursed for work performed by subcontractors unless and until the prime contractor ensures that the subcontractors are promptly paid for the work they have performed.

- *[Provide the contract clause(s) that implements this provision. If selecting this option to be an effective enforcement measure, your organization must also include a contract clause requiring prime s to pay subcontractors for completed work prior to requesting payment from the Recipient.]*

(3) Other mechanisms

- *[Detail the mechanisms that will be used and how they will be implemented and enforced. Provide the contract clause(s) that pertain to the mechanisms developed.]*

Prompt Payment Complaints

- Complaints by subcontractors regarding the prompt payment requirements are handled according to the following procedure. *[Escalation steps should follow prime, Recipient, and Operating Administration (OA) in that order, but specific procedures are to be outlined by the Recipient. Procedures and wording below are basic descriptions, and should not be used verbatim.]*
- If affected subcontractor is not comfortable contracting prime directly regarding payment or unable to resolve payment discrepancies with prime, subcontractor should contact DBELO to initiate complaint.
- If filing a prompt payment complaint with the DBELO does not result in timely and meaningful action by *[Recipient]* to resolve prompt payment disputes, affected subcontractor may contact the responsible *[operating administration]* contact.

Enforcement Actions for Noncompliance of Participants

- *[Recipient]* will provide appropriate means to enforce the requirements of § 26.29. These means include:

*[Detail the **SPECIFIC** means that will be utilized. You **must** identify and actively enforce such means to be regarded by the operating administration as implementing your program in good faith. Possible examples per § 26.13 include, but are not limited to:*

- *In accordance with the contract, assessing liquidated damages against the prime contractor for each day beyond the required time period the prime contractor fails to pay the subcontractor*
- *Advise subcontractors of the availability of the payment and performance bond to assure payment for labor and materials in the execution of the work provided for in the contract*
- *Pay subcontractors directly and deduct this amount from the retainage owed to*

the prime

- *Issue a stop-work order until payments are released to subcontractors, specifying in the contract that such orders constitute unauthorized delays for the purposes of calculating liquidated damages if milestones are not met*
- *Other penalties for failure to comply, up to and including contract termination (specify these penalties clearly).*

[These are examples, not recommendations or requirements. Include in your DBE program the samples of the contract language you will use for all means you develop to enforce the requirements of this section.]

- *[Recipient] will actively implement the enforcement actions detailed above.*

The General Counsel of the Department of Transportation has reviewed this document and approved it as consistent with the language and intent of 49 CFR part 26.

The contents of this document do not have the force and effect of law and are not meant to bind the public in any way. This document is intended only to provide clarity to the public regarding existing requirements under the law or agency policies.