



U.S. Department of Transportation

**Departmental Office of Civil Rights (DOCR)
Federal Aviation Administration (FAA)
Federal Highway Administration (FHWA)
Federal Transit Administration (FTA)**

Prompt Payment and Return of Retainage Requirements

Objectives

At the end of this lesson, you will be able to:

- Describe the importance of prompt payment and return of retainage
- Understand prompt payment requirements
- Identify types of monitoring and enforcement a Recipient could employ to comply with program requirements



The Infrastructure Investment and Jobs Act (IIJA), known as the Bipartisan Infrastructure Law (BIL), *Sec.1101 (e)(8)*

It is the sense of Congress that--

(A) the Secretary should take additional steps to ensure that recipients comply with section 26.29 of title 49, Code of Federal Regulations (the disadvantaged business enterprises prompt payment rule), or any corresponding regulation, in awarding Federally funded transportation contracts under laws and regulations administered by the Secretary; and

(B) such additional steps should include increasing the ability of the Department to track and keep records of complaints and to make that information publicly available.



Prompt Payment Regulation

- Recipients 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
- Recipients can require shorter timeframes

[49 CFR 26.29\(a\)](#)



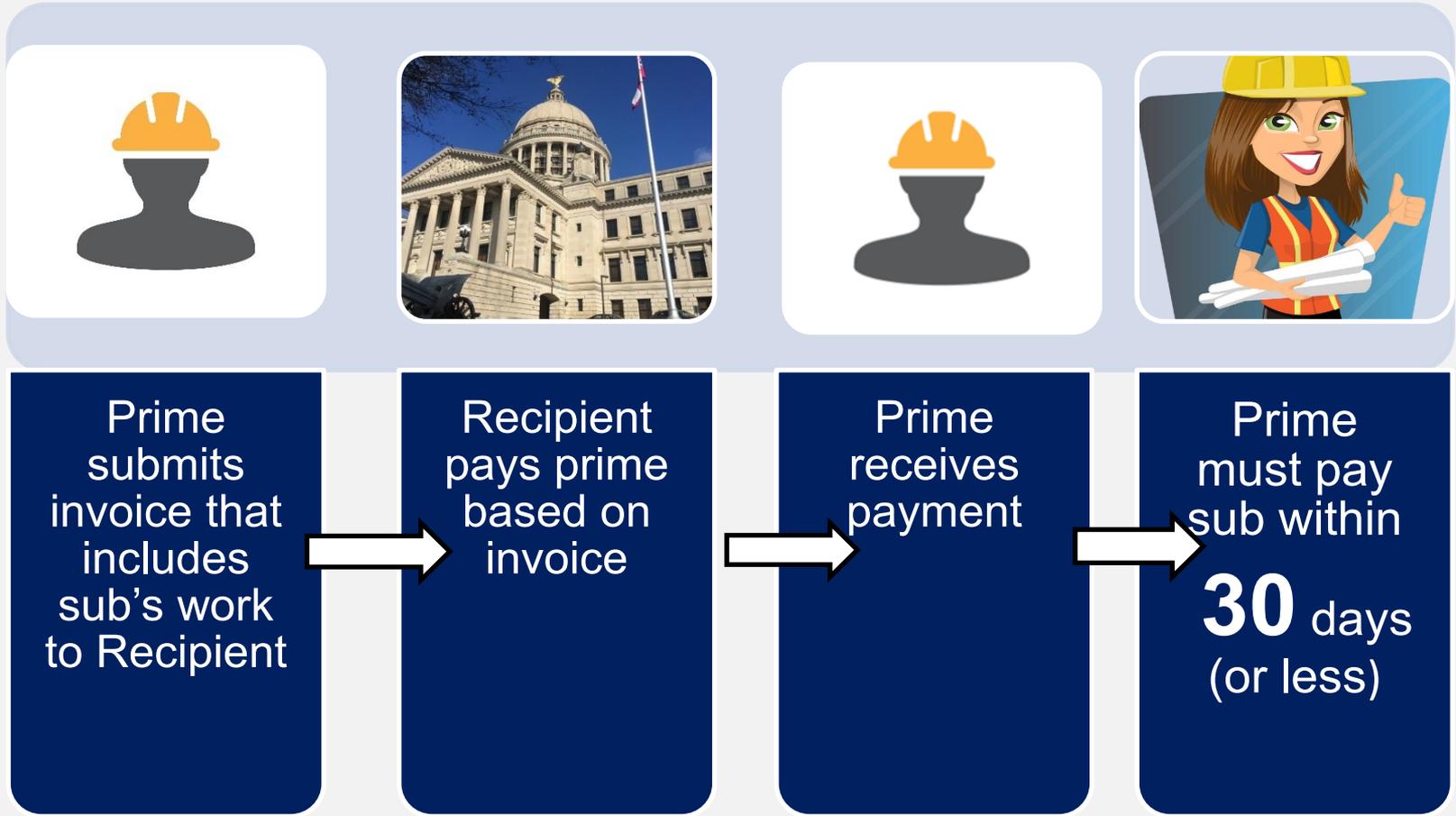
Why is Prompt Payment/Return of Retainage Important

- DBEs are small businesses
- Small businesses must receive payments to
 - keep their businesses afloat
 - grow their businesses
 - increase employment

SMALL
BUSINESS **BIG**
IMPACT



Prompt Payment



Not just for DBEs!

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



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*
- Recipients and contractors **cannot waive** or contract out of prompt payment or return of retainage requirements



Disputes

- Prompt payment does not apply if there is a legitimate dispute over the subcontractor's performance
- Performance disputes should be properly documented
- The recipient should have a dispute resolution process in place



Contract Specific

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



Return of Retainage

What is 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

[49 CFR 26.29\(b\)](#)



Return of Retainage (part 2)

- Regulation is intended to modify common industry practice of withholding all subcontractors' retainage until completion of prime contract
- Prime contractors cannot wait until the recipient has made final payment to the prime to release subcontractor retainage



Return of Retainage (part 3)

Three options for return of retainage:

1. Recipient does not withhold retainage – prohibits prime from withholding it
2. Recipient does not withhold retainage – requires primes to return retainage within 30 days (or less) of subcontractor completed and accepted work
3. Recipient withholds retainage and releases it incrementally to prime – requires prime to release retainage 30 days (or less) after subcontractor completed and accepted work



Satisfactory Completion

- What is “satisfactory completion?”

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

[49 CFR 26.29\(c\)](#)



Monitoring of Prompt Payment

- Recipients must have a mechanism to monitor prompt payment to **ALL** subcontractors
- May not rely solely on subcontractor complaints
- FAA recipients use partial payment language from [Section 90-06 of FAA Advisory Circular 150/5370-10H](#) for airport development projects



Monitoring Mechanisms

Monitoring mechanisms could include:

- Posting prime contractor payment information on website to alert subcontractors that the prompt payment timeframe has begun, supplemented with payment verifications
- Automated systems that require real-time entry of payments and subcontractor confirmation of receipt



Remedies and Enforcement

- The contract **must** contain remedies, penalties, or sanctions that the recipient should use in the event of a breach of the prompt payment or release of retainage contract clause



Enforcement Mechanisms

Contract remedies could include:

- Recipient withholds next payment until subcontractors are paid
- Liquidated damages or other contractual remedies relevant to breach of contract



Prompt Payment on Projects with Alternative Contracting Methods

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



Prompt Payment Complaint Reporting

- [Section 157 of the 2018 FAA reauthorization \(Public Law No. 115-254\)](#)
- Airport sponsors must track and report subcontractors' allegations of non-compliance
- FAA is required to assess and improve airport sponsor compliance based on analysis of reports received



Questions

