



U.S. Department of Transportation  
**Federal Highway Administration**

# Training Webinar

Disadvantaged Business Enterprise (DBE) Program  
Prompt Payment and Return of Retainage



# Welcome



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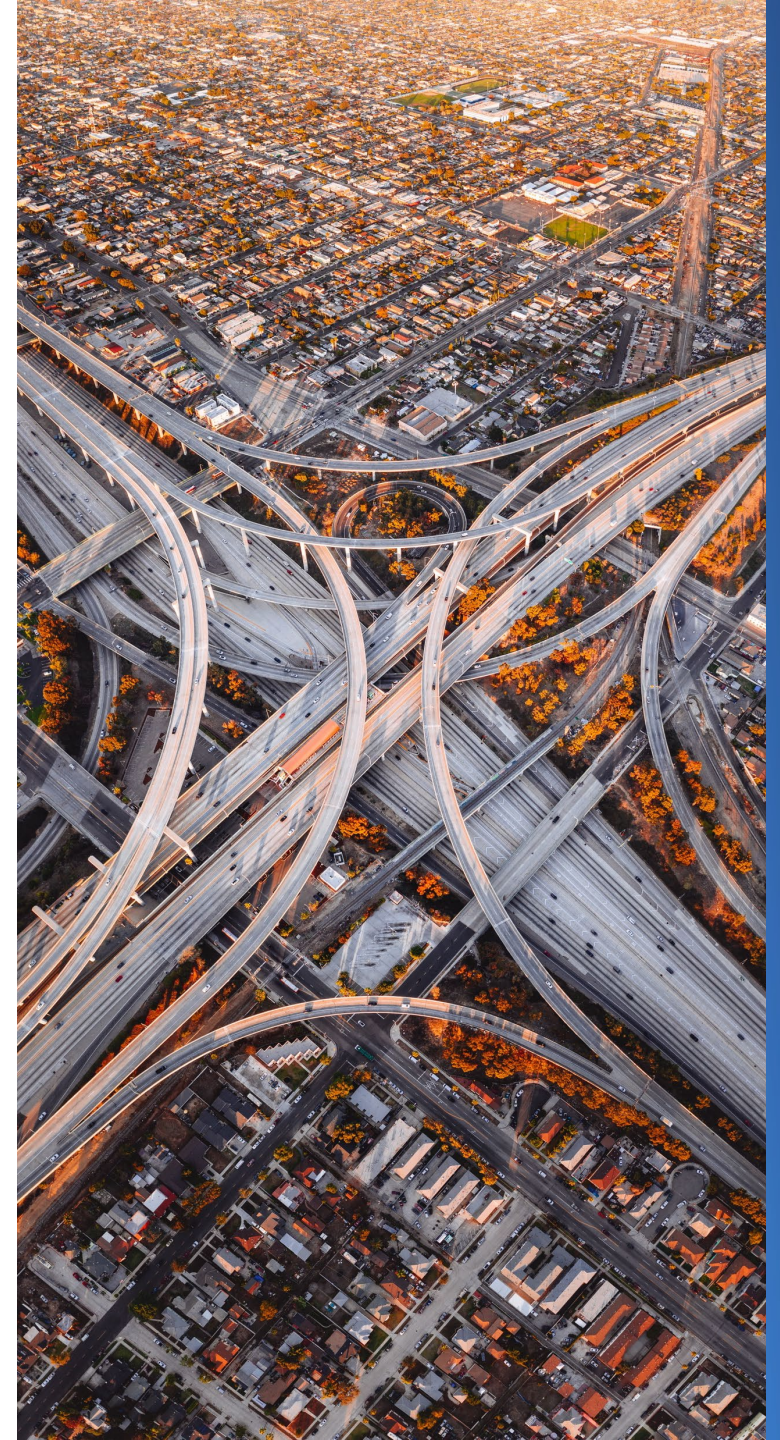




# Agenda

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- Introductions
- Goals of Training
- Review of Prompt Payment and Return of Retainage Monitoring Toolkit
- Monitoring Tool
- Marketing Strategy
- Questions and Answers
- Closing



# Introductions



Martha Kenley  
National DBE Program Manager  
FHWA



Janelle Hinton  
DBE/Support Services Program Analyst  
FHWA



Stephanie James  
DBE Contract and Compliance Analyst  
FHWA





# Goals of Training



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# DBE PROMPT PAYMENT AND RETURN OF RETAINAGE MONITORING TOOLKIT



Toolkit Review



# Our Commitment

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- Access to capital continues to be a barrier for DBEs.
- Prompt payment and return of retainage are imperative for the success of small businesses.
- It applies to **all** subcontractors, not just DBEs.



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## SECTION 1

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USDOT's Commitment to DBEs, Prompt Payment, and Return of Retainage





# Regulatory Requirements

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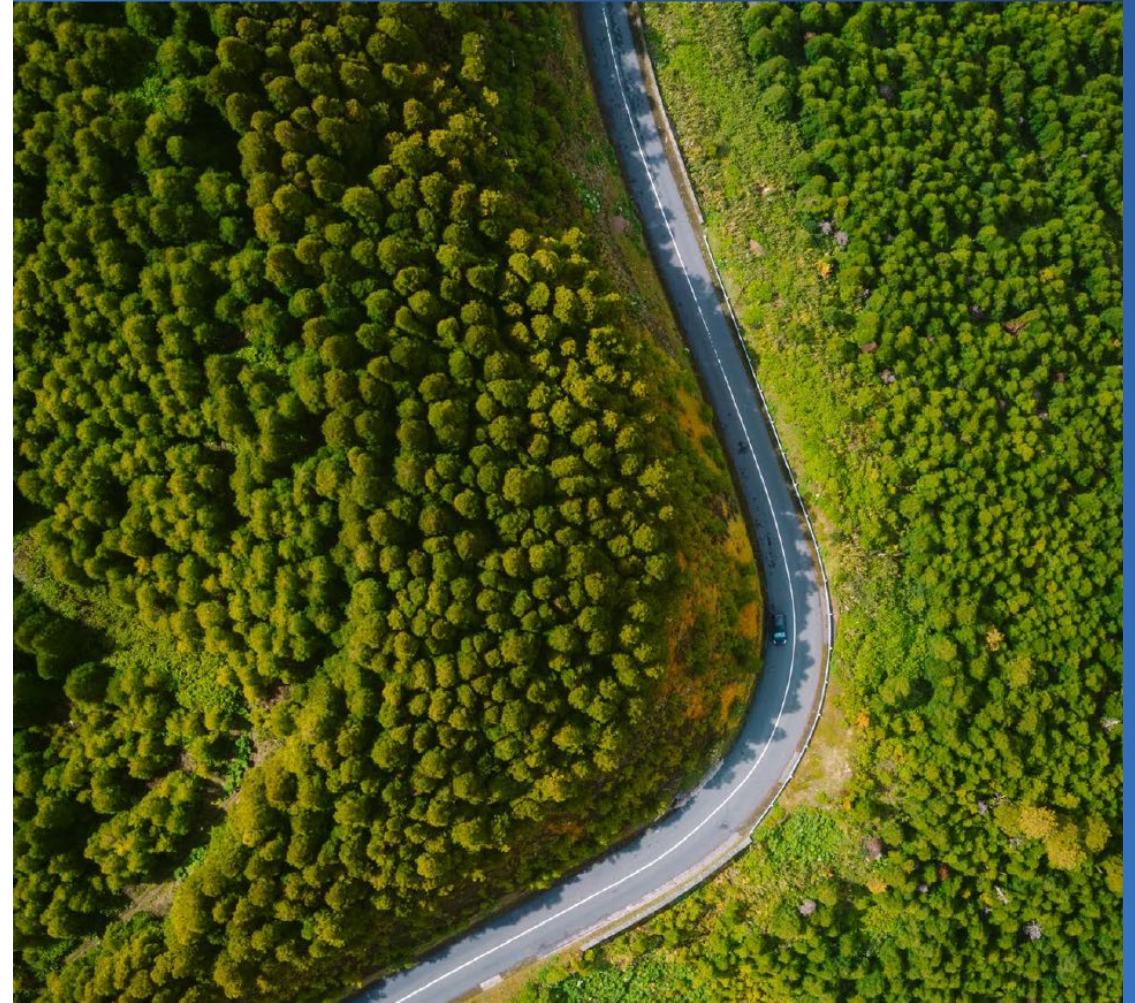
- Prompt payment and return of retainage regulatory requirements are essential to include in State DOT's DBE Program plan.
- Included in the toolkit is a description of §26.29 and its requirements and official guidance.



## SECTION 2

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### Breaking Down the Regulatory Requirements





# Regulatory Requirements, Prompt Payment

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- You must establish a contract clause that requires prime contractors to pay subcontractors for satisfactory performance of their contracts no later than **30 days** from the receipt of each payment you make to the prime contractor.





# Regulatory Requirements, Prompt Payment of Retainage

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1. **Decline** to hold retainage from prime contractors and prohibit prime contractors from holding retainage from subcontractors.
2. **Decline** to hold retainage from prime contractors and require a contract clause obligating prime contractors to make prompt and full payment of any retainage kept by prime contractor to the subcontractor within 30 days after the subcontractor's work is satisfactorily completed.
3. **Hold** retainage from prime contractors and provide for prompt and regular incremental acceptances of portions of the prime contract, pay retainage to prime contractors based on these acceptances and require a contract clause obligating the prime contractor to pay all retainage owed to the subcontractor for satisfactory completion of the accepted work within 30 days after your payment to the prime contractor.





# Regulatory Requirements, Satisfactorily Completed Work

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- A subcontractor's work is satisfactorily completed when all the tasks called for in the subcontract have been accomplished and documented by your standards.
- When you have made an incremental acceptance of a portion of a prime contract, the work of a subcontractor covered by that acceptance is satisfactorily completed.





# Regulatory Requirements, Appropriate Enforcement

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- State DOT's DBE Program plan must provide appropriate means to enforce prompt payment and prompt return of retainage.
- This may include appropriate penalties for failure to comply to your terms and conditions.
- Your program can also stipulate that any delay or postponement of payment among the parties can only take place for good cause, with your prior written approval.



# Regulatory Requirements, Additional Mechanisms to Ensure Prompt Payment

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1. **Contract clause** that requires prime contractors include language in their subcontracts that stipulates prime contractors and subcontractors will use appropriate alternative dispute resolution mechanisms to resolve payment disputes. You can specify the nature of these mechanisms.
2. **Contract clause** providing that the prime contractor will not be reimbursed for work performed by subcontractors unless and until the prime contractor ensures that subcontractors are promptly paid for the work they have performed.
3. **Other mechanisms**, consistent with State and local law.





# Frequently Asked Questions

## PROMPT PAYMENT AND RETAINAGE GUIDANCE FREQUENTLY ASKED QUESTIONS (FAQS)

In March 2016, USDOT issued a comprehensive guidance document that covered mechanisms for implementing and enforcing prompt payment and return of retainage. It also explored issues related to the access to project information related to prompt payment and available remedies for noncompliance. Included below are some key questions answered throughout the guidance:

### When are prime contractors required to return retainage to subcontractors?

- If you hold retainage, you must make incremental acceptances of portions of the prime contract as the work is completed. The retainage that covers that portion of the completed work must be released before the final payment for the entire contract.
- If you hold retainage against a prime contractor or the prime contractor holds retainage against the subcontractor, there must be a contract clause obligating the payment of retainage within 30 days of your incremental acceptance of the work performed by the subcontractor, or payment of retainage by the prime contractor within 30 days of satisfactory completion of the work performed by the subcontractor.

### Does the prompt payment and release of retainage requirements apply only to DBE subcontractors?

- No. It applies to all subcontractors at all tiers.

### When does the time period for payment or release of retainage begin to run?

- The 30-day period for payment of subcontractors begins when the contractor receives payment from the recipient for satisfactory completion of the work.
- In the case of a second or third tier subcontractor, the 30-day time period begins to run when the 1st tier subcontractor receives payment from the prime contractor or when the 2nd tier subcontractor receives payment from the 1st tier subcontractor.

### What effect does the absence of a direct relationship between a State DOT and the subcontractor have on the obligation for prompt payment and release of retainage?

- None. The prompt payment and release of retainage obligation is both a regulatory requirement that recipients are expected to comply with in administering their DBE Program plan and a contractual obligation recipients are expected to enforce.

### Is the obligation to promptly pay subcontractors a material term of a DOT-assisted contract?

- Yes. Every DOT-assisted contract must include a commitment by the parties to carry out all applicable requirements in the administration of the contract.
- Failure by the contractor to honor this commitment is considered a material breach of the contract, subject to certain penalties, sanctions, and remedies.
- The contractual commitment is a material term of the contract between you and the prime contractor, and the prime contractor and the subcontractor.

### Is relying on complaints an appropriate means of enforcing the prompt payment and retainage requirements of the rule?

- No. Relying only on complaints or notifications from subcontractors about a contractor's failure to comply with prompt payment and retainage requirements is not a sufficient mechanism to enforce the requirements.
- Subcontractors are often reluctant to complain about contractors for fear that doing so will make it difficult to get work in the future, despite the prohibition in the regulations against retaliation against individuals who file a complaint. This may result in you not receiving complaints that would timely alert you to noncompliance by contractors.

### What records should you and contractors retain to document compliance with the prompt payment requirement?

- To ensure compliance with the prompt payment provision, you may require prime contractors to provide information concerning payments to subcontractors and release of retainage where held.
- Data collected from contractors may include copies of cancelled checks.
- All participants in State DOT's DBE Program plan, including contractors, are required to cooperate fully and promptly with requests for information.

## TIPS ON SATISFACTORY COMPLETION

### How is "satisfactory completion" defined?

Satisfactory completion is defined by the regulations as "when all tasks called for in the subcontract have been accomplished and documented as required by the recipient."

### What happens when there is a dispute over the satisfactory completion of the work performed by the subcontractor?

The obligation to promptly pay subcontractors or to release retainage does not arise if there is a legitimate dispute over the subcontractor's performance. You are encouraged to develop a dispute resolution process as a mechanism to ensure compliance with the purpose and intent of the prompt payment and release of retainage requirements. The process used should be described in the DBE Program plan and in the relevant contract document.

**Example:** A prime contractor may not withhold payment to a subcontractor that has satisfactorily completed work on the contract (contract A) to address a dispute between the prime contractor on an unrelated contract (contract B). That would not constitute a legitimate dispute over the subcontractor's performance on contract A.



# DBE Program Plan

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- State DOT's DBE Program plan must address several areas concerning prompt payment and return of retainage.



## SECTION 3

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### DBE Program plan Requirements





# Important Components for your DBE Program Plan

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- Selection of prompt payment timeframes
  - ✓ You have flexibility in the number of days to include in State DOT's DBE Program plan, but it must not exceed 30 days.
- Selection of return of retainage method
  - ✓ Decline to withhold retainage from prime contractors and prohibit primes from withholding retainage from subcontractors.
  - ✓ Decline to withhold retainage from prime contractors and allow prime contractors to withhold retainage from subcontractors.
  - ✓ Withhold retainage from the prime contractor and conduct a phased and incremental acceptance of work and return the proportionate amount of retainage to the prime contractor.



# Determination of Appropriate Monitoring Mechanisms

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- Reviewing contract and subcontract documents for inclusion of appropriate prompt payment clauses.
- Reviewing payments to subcontractors from prime contractors to determine amount and time of payments.
- Appropriately monitoring the return of retainage by using one of the below options:
  - ✓ Ensuring that neither you nor the prime are withholding retainage from subcontractors.
  - ✓ Ensuring that primes are returning retainage held from subcontractors promptly.
  - ✓ Ensuring that you conduct phased acceptances of work and return applicable retainage to prime contractors, and that primes return the applicable retainage promptly to subcontractors.





# Template Language

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- In April 2018, USDOT issued template language that you should consider incorporating into State DOT's DBE Program plans related to prompt payment.
- This included language for prompt payment mechanisms, monitoring, dispute resolution, complaints, and enforcement.
- The template is included in Section 11.



# Contract and Bid Documents

- Effective practices to ensure the inclusion of correct prompt payment and return of retainage clauses include:
  - ✓ Noting these as required clauses in your procurement policies and procedures.
  - ✓ Reviewing contracts to ensure that payment terms within contract documents do not conflict.
  - ✓ Many contracts include a section on DBE requirements, so it is important that prompt payment and return of retainage language is consistent throughout your contract documents.



## SECTION 4

### Synergy Between Contract and Bid Documents





# Subrecipients

- A subrecipient is a non-Federal entity that receives a subaward from an entity like a State DOT to carry out part of its Federal program.



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## SECTION 5

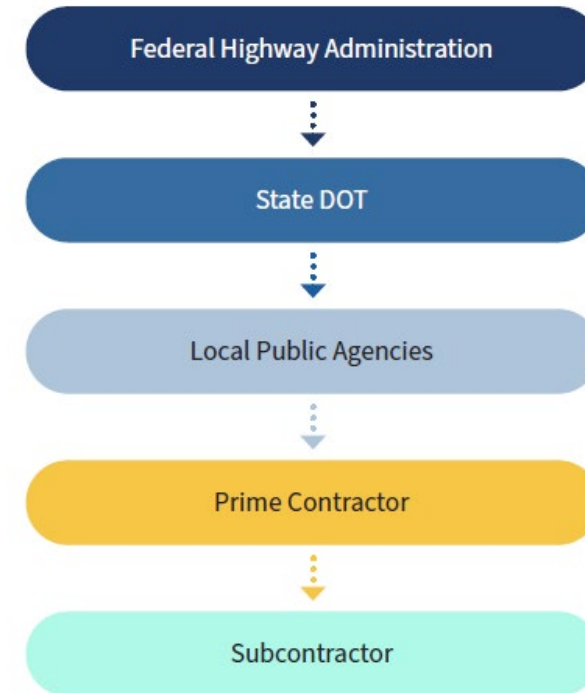
### Understanding Subrecipients



# How Prompt Payment Applies to LPA Procurements

- Subrecipients must adopt the entirety of State DOT's DBE Program plan, including your prompt payment and return of retainage provisions.
- Subrecipients must also perform monitoring and enforcement of the implementation of these requirements by their own agency and prime contractors.
- You must also monitor subrecipients to ensure that they are complying with prompt payment requirements through inclusion of correct terms in contracts and monitoring their implementation.

USDOT Funding Flow Chart





# Monitoring Practices

- While USDOT does not mandate that you employ a specific type of mechanism for monitoring prompt payment, you are expected to be proactive in the monitoring and enforcing of prompt payment and retainage requirements.



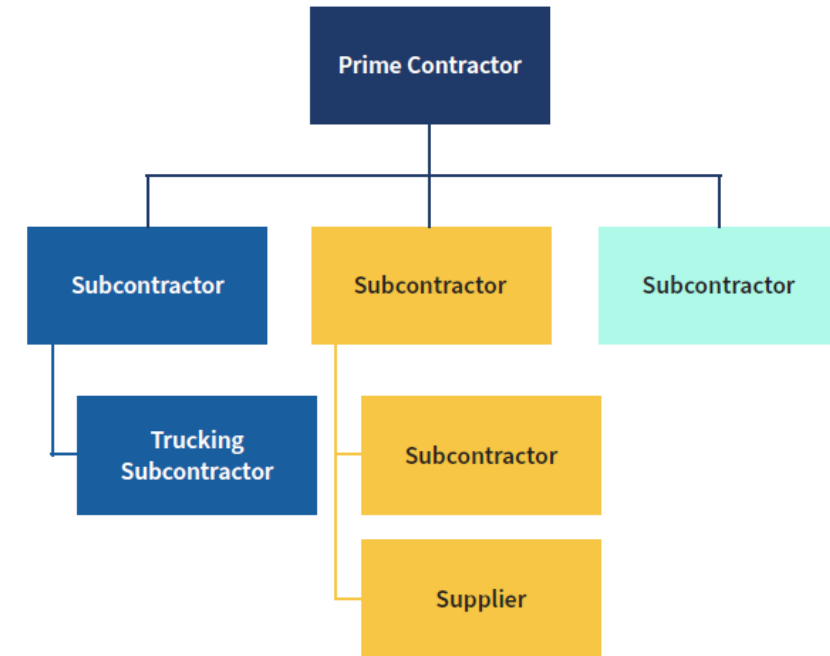
## SECTION 6

### Effective Monitoring Practices



# Tips for Effective Monitoring Practices

- Post prime contractor payment information on places accessible to subcontractors.
- Use automated systems.
- Obtain notarized certification from the prime contractor that payment was made to subcontractors the previous month before authorizing payment.
- Review contract and payment documentation.
- Review subcontracts to ensure the contract terms regarding payment and retainage in the prime contract are included correctly in all subcontracting tiers as shown in the infographic to the right.





# Enforcement

- Standard enforcement procedures can encourage prompt payment and return of retainage and provide a solid foundation for remedies.
- You may impose the below contractual remedies:
  1. Terminating contract
  2. Withholding progress payments
  3. Assessing sanctions
  4. Imposing liquidated damages
  5. Disqualifying the contractor from bidding on future contracts, or
  6. Other remedies that you deem appropriate



## SECTION 7

### Enforcement Obligations





# Case Studies, Part 1

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## Dealing with Multiple Subcontractors

A prime contractor contracts with two subcontractors, one of whom subcontracts 20 percent of their work to a 2nd tier subcontractor.

### DO

Ensure that the prime contractor is paying its subcontractors promptly and that the subcontractor includes the correct prompt payment and return of retainage clause in its contract with the 2nd tier subcontractor. Also instruct the prime contractor to reinforce compliance by monitoring payments to the 2nd tier subcontractor.

### DON'T

Assume that the prime contractor and subcontractor have the correct prompt payment and return of retainage contract clause and are monitoring payments to 2nd tier subcontractors.



# Case Studies, Part 2

## Proactive Monitoring and Contract Coordination

In State DOT's DBE Program plan, you have chosen method one in which you will not withhold retainage from prime contractors and do not allow prime contractors to withhold retainage from their subcontractors. At the beginning of the project, after reviewing all subcontract documents you note that the prime contractor included a clause to withhold five percent retainage from each payment to the subcontractor.

### DO

Review and revise your solicitation documents to note that prime contractors are prohibited from withholding retainage from subcontractors. Send a notification to the prime contractor requiring that it revise its contract terms immediately. Continue to perform routine payment reviews and periodically check payments to the subcontractor to ensure that retainage is not being held

### DON'T

Assume that every employee working for your prime and subcontractors have read and are following the DBE Program plan. If you notice an error, do not assume it will be rectified without sending notifications.



# Case Studies, Part 3

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## Monitoring Prompt Payment

You established a 10-day prompt payment timeframe in State DOT's DBE Program plan and included a clause requiring this in your contracts. While reviewing your cloud-based payment tracking system, you notice the prime contractor routinely paid its subcontractors, on average, 20 days after receiving your payment. Several subcontractors were aware that the payments were late but didn't want to 'rock the boat' by contacting the agency.

### DO

Contact the subcontractors to verify payment information. Then, notify the prime contractor in writing that they are in non-compliance with the DBE Program plan administrative actions that can be taken, which include termination.

**DON'T** Assume the subcontractor has been paid and unless corrected, there are wait for complaints from subcontractors.





# Case Studies, Part 4

## Setting the Tone at the Pre-Construction Conference

A new project has been awarded and a pre-construction conference has been scheduled.

### DO

Review the prompt payment requirements and conduct an overview of how incremental return of retainage will be conducted by your team. Discuss the timeframe for returning the applicable portion of that retainage to subcontractors promptly, the process for entering payment information into a shared file for tracking and monitoring, and the expectation that subcontracts and payment information (invoices and checks) will be selected for review and monitoring.

### DON'T

Leave prompt payment and return of retainage up for interpretation. Do not assume that everyone on your prime contractor's team understands the DBE Program plan and its requirements.



# Monitoring Tool

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- FHWA has developed a template prompt payment tool that, while not required, may assist recipients in monitoring compliance.
- This tool has been developed as an integrated spreadsheet to offer a wide range of applications, from direct use, to use in reviewing items evaluated in current software used by recipients.



## SECTION 9

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### Monitoring Tool



# Fact Sheet



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## DBE PROMPT PAYMENT AND RETURN OF RETAINAGE MONITORING-TOP 10 TIPS

To support the U.S. Department of Transportation's (USDOT) commitment to prompt payment and return of retainage to Disadvantaged Business Enterprises (DBEs) and all subcontractors, follow the tips included below.

1. Prompt payment is a contractual requirement on USDOT-funded projects.
2. Prompt-payment is for all subcontractors, not just DBEs.
3. Payment to a subcontractor should not be conditioned on payment history on other subcontracts with the prime.
4. You must select **ONLY** one of the allowable methods of return of retainage and apply it to every DOT-assisted contract:
  - a. Don't withhold retainage and prohibit primes from doing so.
  - b. Don't withhold retainage, allow primes to, but require that they return any withheld from subs promptly when subs' work is done.
  - c. Hold retainage, conduct phased acceptances of work, and return retainage to primes so they can promptly return it to subcontractors when their work is done.
  - d. Don't allow primes to withhold retainage from their subcontractors until the end of the entire project.
5. Do not rely on complaints to know DBEs haven't been paid; prompt payment monitoring must be proactive (check out our new tool).
6. Train your field staff in understanding prompt payment and return of retainage requirements and engage them in monitoring; it should be an agency-coordinated effort.
7. There is a difference between approving payments to prime contractors and monitoring that subcontractors have been paid promptly.
8. You must monitor prompt payment and prompt return of retainage of subrecipient and ensure that subrecipients have adopted your timeframes and retainage method.
9. At post-award or pre-construction meetings, review prompt payment provisions with prime contractors.
10. Review subcontracts to ensure that the correct payment provisions are included.

For questions regarding prompt payment and return of retainage monitoring, visit or contact:



[www.transportation.gov](https://www.transportation.gov)



(202) 366-4648



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## SECTION 10

### "Top 10 Tips" Fact Sheet





# Information Sources

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- **Official USDOT guidance:**

<https://www.transportation.gov/sites/dot.gov/files/docs/mission/civil-rights/civil-rights-learning-center/307421/guidance-prompt-payment-and-retainage-final.pdf>

- **Prompt Payment Section Sample Template:**

<https://www.transportation.gov/civil-rights/disadvantaged-business-enterprise/prompt-payment-section-sample-template>



## SECTION 11

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### Information Sources



# Definitions

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- Section 12 includes helpful definitions related to prompt payment and return of retainage.

## SECTION 12

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### Important Definitions





# Monitoring Tool Beta Test



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# FHWA Prompt Payment Monitoring Tool Beta Test

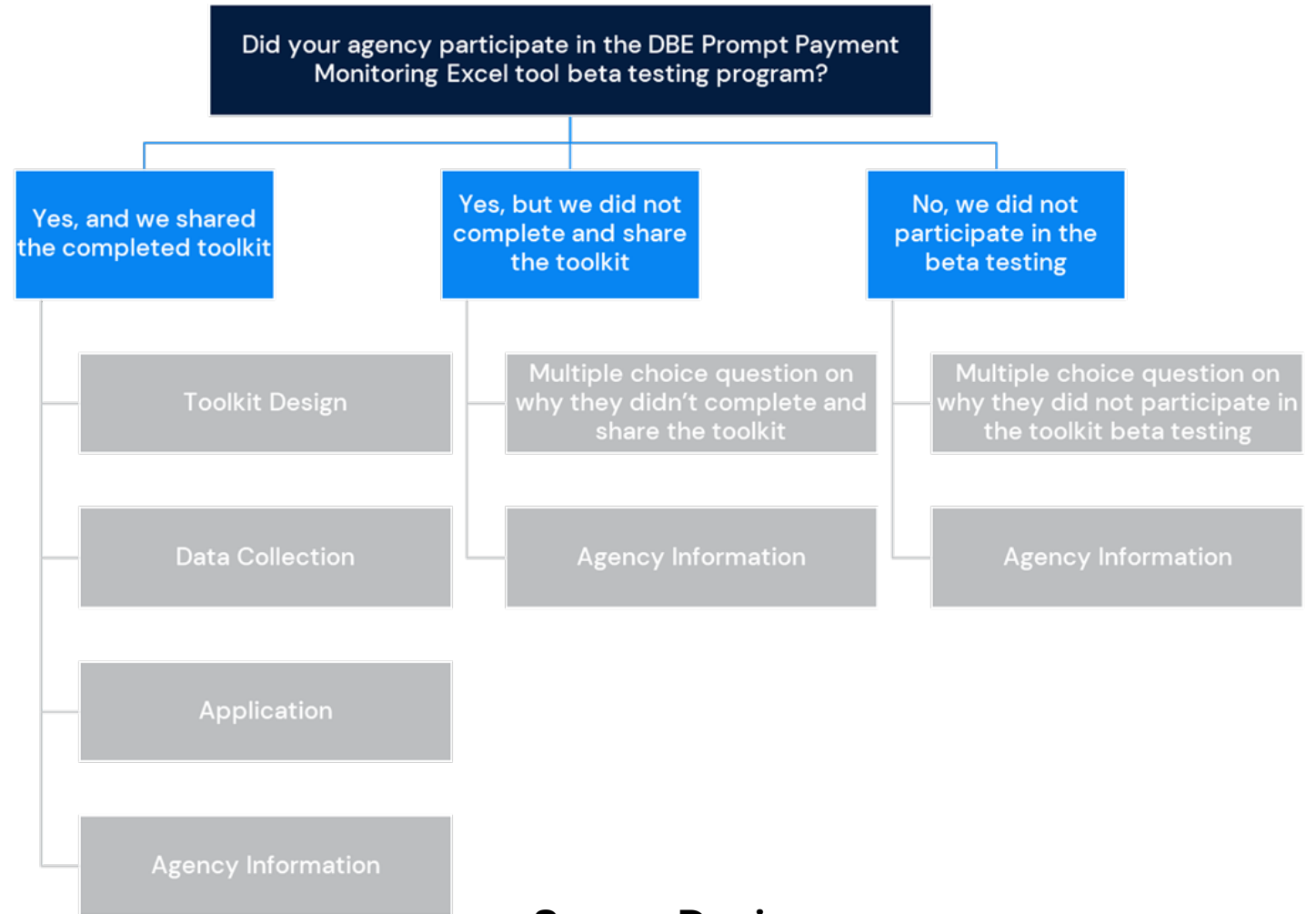
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- **Objective:** Ensure the tool meets the needs of agencies and addresses real-world scenarios
- **Goals:**
  - Identify and fix any toolkit design issues
  - Gather feedback to enhance features and functionalities
  - Ensure accuracy and reliability of payment monitoring data
- **Outcome:** Refine the tool before full-scale implementation



# FHWA Prompt Payment Monitoring Tool Survey

- **Survey Platform:** Qualtrics
- **Purpose:** Collect feedback from participating agencies on the FHWA Prompt Payment Monitoring Tool
- **Screen Question:** Participants were asked about their involvement in the beta testing phase of the tool

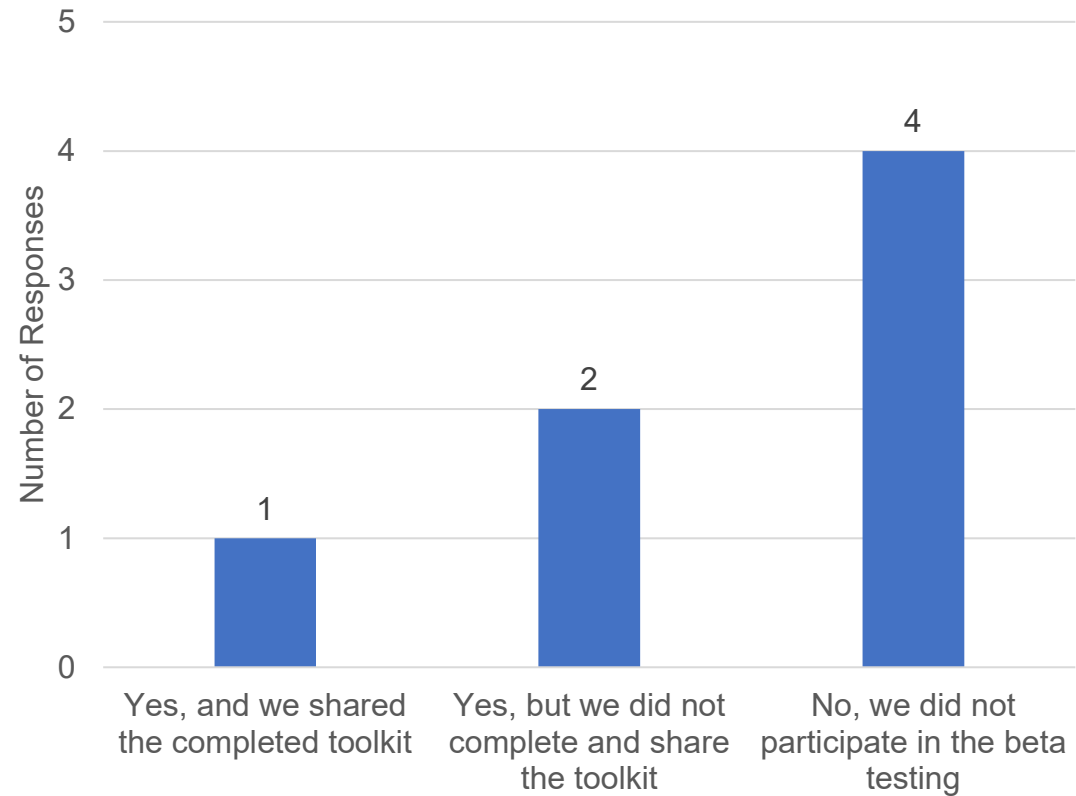


**Survey Design**



# Survey Distribution & Participation

- **Invitation Method:** Email to potential participants
- **Follow-up:** Reminder emails sent throughout the survey period
- **Survey Duration:** 40 days
  - Launch Date: May 13, 2024
  - Close Date: June 21, 2024
- **Number of Participants:** 7



**Summary of Toolkit Beta Testing Participation**





# Ease of Use Feedback

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- **Instructions:** Easy to understand and follow.
- **Toolkit Design:** Easy to identify and collect needed information.
- **Navigation:** Simple and intuitive.
- **Data Elements:** Clear descriptions.
- **Entering Data:** Easy for prime contractor's payment data.
  - Limitation: No place to report discrepancies in subcontractor payment data.
- **Suggestions:**
  - Add more subcontractor forms with color coding for different tiers.
  - Include a column for corrective actions taken.



# Response from Non-participating Agencies

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**Two agencies participated in beta testing but did not complete and share the toolkit:**

One agency utilized the spreadsheet, *“but in a selective sense.”*

*“The Excel spreadsheet did not flow in the order payments were made. The form also included information that was unnecessary for the purpose of the toolkit.”*

**Four agencies reported they did not participate in the beta testing:**

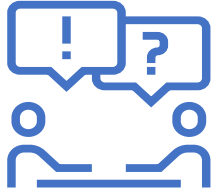
All four agencies reported already having a DBE payment monitoring tool.

One agency also reported that they could not commit the time and resources necessary to participate.

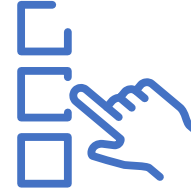


# Key Recommendations

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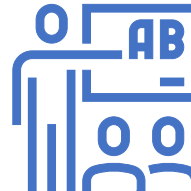
Follow up with agencies that did not complete the survey or share the toolkit



Promote the tool's benefits and advantages



Conduct a comprehensive evaluation of the tool



Provide training and technical support for agencies requesting it





# Next Steps on the Beta Test Project

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Follow Up: Reach out to beta testers who did not complete the survey or share the toolkit to:

- Gain additional feedback regarding the tool.
- Understand barriers to participation and address them.
- Ensure the tool meets the needs of all users.
- Enhance the tool's functionality and experience.
- Timeframe: August 2024



# Marketing Strategy



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# Sharing of Training Tools

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**We encourage State DOTs to share the training materials with their local jurisdictions. This can be done by:**

- Dissemination of the toolkit, training materials, and the oversight and monitoring tool.
- Promotion of effective practices, increasing adherence to the prompt payment monitoring and return of retainage, and making sure all subcontractors are paid in a timely manner by using the checklists in the toolkit.
- Scheduling a virtual brown bag lunch training or hosting a training at a State DOT facility.





# Questions & Answers



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**Thank you!**

