



Speaking With *One* Voice
Civil Rights Virtual Symposium

Gaining the Competitive Edge

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U.S. Department of Transportation

**Office of the Secretary (OST)
Departmental Office of Civil Rights (DOCR)
Policy, Education, and Outreach Division (S-35)**

Show them the Money!

The DBE Program's Prompt Payment Requirements

Introduction

HELLO
my name is

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Overview

During this session, participants will learn

- Importance of Prompt Payment
- Regulatory Requirements (Title 49 CFR Part 26, §26.29)
- Recipients' DBE Program Requirements
- Monitoring & Enforcement



Definitions

- **Prompt Payment** – Mandate that Subcontractors be paid within a set timeframe from the date Prime Contractors receive payment from Recipient
- **Prime Contractor** – Contractor with whom Recipient has entered an agreement for a product or service
- **Subcontractor** – Firm under agreement with Prime Contractor, or another Subcontractor thereunder, to provide a product or service
- **Retainage** – Percentage of payment due withheld as an additional performance guarantee; usually 10% or less
- More details and other terms defined in §26.5



Why are we talking about Prompt Payment?

- Prompt Payment remains a compliance priority
- Prompt Payment runs directly to the purpose and intent of the DBE program
- FAST Act re-emphasizes role of Prompt Payment in DBE program
- Prompt Payment affects all small businesses, including DBEs



Prompt Payment Importance for Businesses

- Meet payroll on time
- Pay suppliers on time
- Keeps operating capital available
- Improves cash flow
- Frees up bonding capacity more quickly



Prompt Payment Importance for Recipients

- Required under §26.29
- Enhanced competition for subcontracts
- Increased likelihood of primes meeting DBE contract goals
- Potential for more race-neutral participation on contracts without DBE goals
- Increased pool of firms competing as prime bidders
- Increased pool of firms applying for DBE certification



Prompt Payment: Regulatory Requirements

- 49 CFR Part 26, §26.29
- Primes must pay subs **no later than 30 days** after receipt of payment from recipient
- Applies to **all DOT-funded agreements**, even when no DBE contract goals
- Applies to both **DBE and non-DBE subcontractors**
- Addresses requirements for **release of retainage**



Prompt Payment: Regulatory Requirements (cont.)

- Prompt Payment “clock” starts when prime receives payment from recipient
- Lower tiers operate similarly – clock starts when tier above receives payment
- Incremental Acceptance triggers release of retainage to subs
- Lack of direct relationship between recipient and subcontractor has no bearing on enforcement requirements
- Only legitimate performance disputes may impact Prompt Payment requirements
- Need for dispute resolution mechanisms



Prompt Payment: DBE Program Requirements

- Contract clause requiring primes to pay subcontractors no more than 30 days after receipt of payment
- Identify retainage option(s) from §26.29(b) recipient has selected
 - Decline to hold retainage from primes, **prohibit primes from holding retainage from subs**
 - Decline to hold retainage from primes, **require primes to pay retainage to subs within 30 days** if sub's work is satisfactorily completed
 - **Hold retainage from primes**, provide for prompt and regular incremental acceptances of portions of prime contract, pay retainage to primes based thereon, and require primes to pay retainage to subs within 30 days if sub's work is satisfactorily completed



Prompt Payment: DBE Program Requirements (cont.)

- Program and contract documents should state what constitutes satisfactory completion, defined in §26.29(c)
- Satisfactory completion of a subcontractor's work should also be identically defined in the prime's contract with the recipient
- FAA recipients must use the retainage language from Section 90-06 of FAA Advisory Circular 150/5370-10G
- Identify dispute resolution mechanisms



Prompt Payment & Retainage: Monitoring Examples

- Monitoring is required by §26.37
- Review Contracts and Subcontracts
- Post prime payments to website, database, etc.
- Automated system
- Other affirmative steps to monitor prompt payment and retainage requirements
- Recipients may NOT rely solely on complaints



Prompt Payment & Retainage: Enforcement Options

- **Delay/postponement of payments** – allowed only for good cause and with recipient's prior approval (§26.29(d))
- Require alternative dispute resolution (**ADR**) **contract clause** in prime and subcontractor agreements (§26.29(e)(1))
- Recipient may require prime to **submit ADR plan for approval** at appropriate time (*e.g.*, before Notice to Proceed can be issued)
- Other mechanisms to be clearly defined in recipient's approved DBE program



Prompt Payment & Retainage: Enforcement

- Recipient must timely investigate complaints about Prompt Payment
- Alert primes to prohibition against retaliation (§26.109(d))
- Recipient must have meaningful enforcement measures in place
- Craft administrative remedies with “teeth”
- Cannot rely solely on litigation/arbitration/other externally dependent remedies
- Recipient’s enforcement options must be laid out in contract with prime



Prompt Payment & Retainage: Enforcement Examples

- §26.13(b) gives examples of penalties recipients may impose:
 - Terminating the contract
 - Withholding progress payments
 - Assessing sanctions
 - Imposing liquidated damages
 - Disqualifying the contractor from bidding on future contracts
 - Other remedies the recipient deems appropriate



What Did We Learn Today?

- Importance of Prompt Payment for recipients and businesses
- Requirements of 49 CFR Part 26
- Prompt Payment requirements for recipients' DBE Programs
- Recipients' monitoring and enforcement of Prompt Payment



Additional Resources

- [Official USDOT DBE Program Q&A page](#) (See heading on Prompt Payment and Retainage)
- [FAA Civil Rights Contact Information](#)
- [FHWA Civil Rights Contact Information](#)
- FTA Civil Rights Contact Information
 - Contact your FTA Regional Civil Rights Officer (RCRO)
 - Use the [Submit a Question or Comment page](#) (Make sure to select “Civil Rights & Accessibility” as the dropdown Category)



Questions



Thank you very much!

Request additional information or pose questions to the following:

Departmental Office of Civil Rights

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