

2nd Annual DBE Small Business Training Symposium

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PRESENTATION OVERVIEW

- Payment Process Overview for MDOT
- Special Provision for Prompt Pay
- Prompt Pay Subcontractor Checklist
- Dispute Resolution
- 2012 Standard Specifications for Construction

Why are there so many complaints related to the time it takes to get paid for MDOT work?

Payment Process Overview

Payment Timeline Example

Field Actions:

- Day 1- Contractor performs work, inspector inspects, tests, checks all documentation, determines “*satisfactory completion*”, and prepares report
- Day 2- Inspector submits daily report to office

Payment Process Overview

Payment Timeline Example

Office Actions:

- Day 3- Office conducts internal QC review
- Day 4-18- Engineer generates bi-weekly pay estimate

Payment Process Overview

Payment Timeline Example

Contractor Payment:

- Day 13-33- Prime Contractor receives payment from agency
- Day 23-43- Prime Contractor required to pay all sub-tier contractors/suppliers within 10 days of receipt of payment from agency

Payment Process Overview

Summary

*Average time until payment is about 35 days
after work meets the requirements of
“satisfactory completion”*

Payment Process Overview

“Satisfactory Completion”

- MDOT determines that the work meets the requirements of the plans and specifications, not the contractor
- MDOT must have received all required documentation, such as material certifications, shop drawings, lab reports, etc
- MDOT must have required test results
- MDOT must have all certified payrolls covering the work

Only when MDOT has all the above info, and has verified the work was performed to specifications, will the payment process begin (Day 1 in the previous example)

Payment Process Overview

What are some of the reasons for payment delay?

- Difference between engineer-contractor on accepted work, disputes, etc
- Quantity disagreements
- Timing of bi-weekly pay estimates.
- “Overrun” status (*110% of contract already paid*)
- Board approval of work required (STC)

(Current STC approval process for extra work and/or overruns is 45-60 days)

Payment Process Overview

MDOT Project Cash Flow

General Advice: In order to help maintain positive cash flow...

- Understand the MDOT requirements for accepting and paying for work
- Understand the prompt pay requirements
- Understand the “Sworn Statement”, “Waiver of Lien” and “Lien Claims” processes

Prompt Pay Issues

Once payment has been made to prime contractor then most delays in payment to subs and suppliers are often due to:

- Prime contractor apprehension of possibly having to pay for work twice. (*bad past experiences*)
- Subs failing to complete other project work as contracted.
- Primes cross withholding for work not done by sub on another job.
- Prime contractor Cash Flow issues.

The Good News, all of the above reasons are not permitted

Prompt Pay

Federal Code of Regulations: 49 CFR 26.29

MDOT Special Provision for Prompt Pay in all proposals 03SP109(A)
and 12SP109(A)

MDOT BOHIM 2011-06

Quick summary of highlights:

- Prohibits primes from withholding any retainage from subcontractors
- Requires primes to pay subs within 10 days of being paid for work
- Acceptance of work determined by engineer, not prime contractor

Special Provision for Prompt Payment

- A. Definitions
- B. Progress Payments
- C. Satisfactory Completion
- D. Less Than Full Payment Release
- E. Non-Payment Claims
- F. Dispute Resolution
- G. Sanctions

A – Definitions

- **Lower-tier subcontractor**
- **Supplier**
- **Sworn Statement**
- **Waiver of Lien**

B – Progress Payments

- First Payment - no later than 10 calendar days from the date the prime Contractor receives:
 - Payment from the Department AND
 - A duly executed Sworn Statement from the subcontractor.

- Subsequent payments - no later than 10 calendar days from the date the prime Contractor receives:
 - Sworn Statement and Waivers of Lien
 - BUT
 - no later than 30 days from the prime Contractor's receipt of payment

- Proof of payment documentation FROM the prime contractor
 - MDOT Form 2124A "Prime Contractor Bi-Weekly Statement of Subcontractor/Supplier Payments"

- Release of payment from the Department for any work is confirmation that the Department has determined the work to have met the standards of *satisfactory completion*

B – Progress Payments (Cont)

The determination of whether work meets the standards of *satisfactory completion* is the responsibility of the Engineer and not the prime Contractor or subcontractors

D – Less than Full Payment Release

- WRITTEN approval of the Engineer required
- Typical reasons for granting approval
 - Failure of subcontractor to pay lower tier subs and/or suppliers
 - Abandonment of the work
 - Unacceptably tardy progress which may result in liquidated damages
 - Failure/refusal to correct deficient work
 - Failure to submit required documentation
 - Failure to submit certified payrolls

E – Non-Payment Claims

- Written notice by Certified Mail to the offending party, copy to the Engineer, within 30 calendar days of when payment was due
- Written response within 10 calendar days of receipt
- Engineer verifies in writing if complaint is valid
- If parties don't agree, then the parties should employ dispute resolution
- BEFORE filing a non-payment claim...

Prompt Payment Checklist

- 1. Is my subcontract signed?
- 2. Has my current certificate of insurance been submitted?
- 3. Is my testing order complete and submitted?
- 4. Are my material certifications complete and submitted?

Prompt Payment Checklist

- 5. Are my certified payrolls complete and submitted?
- 6. Do I have items of work yet to complete?
- 7. Has the prime contractor been paid for my items of work? (check MDOT website)
- 8. Has a lien been placed on the project by one of my suppliers?
Are joint checks required?
- 9. Do I have signed waivers / statements from my last checks?

Prompt Payment Checklist

- 10. Are there pending penalties or disincentives associated with my items of work?
- 11. Is there a pending claim for additional compensation associated with my item(s) of work?
 - a. Have daily force account records been reviewed, signed and submitted?
 - b. Has the "extra" work and compensation been approved by the owner?
- 12. Have I communicated payment issues to the prime's project manager / foreman / superintendent?

Prompt Payment Checklist

➤ References

- Manuals, Guides, Advisories, & Memos
- http://www.michigan.gov/mdot/0,4616,7-151-9622_11044_11367---,00.html
- Minimum Acceptance Requirements for Materials Approvals and Documentation
- http://www.michigan.gov/documents/mdot/MDOT_DocumentationGuide_328761_7.pdf

F – Dispute Resolution

- Within 10 calendar days of written receipt of a complaint, parties must attempt to agree on mediation or arbitration
- If they agree...
 - Process should be completed within 60 days
 - Costs borne by the parties, EXCEPT
 - Costs for certified DBE's paid by the Department
 - DBE must contact OBD for procedures
- If they don't agree, then within 30 days of Engineer verification, the complaining party must...
 - Initiate dispute resolution procedures specified in the agreement OR
 - As available under Michigan law
- Upon resolution of the complaint...
 - Engineer must be notified of the resolution
 - Engineer releases payment

G – Sanctions

- Failure to comply with prompt pay requirements may result in...
 - Withholding of pay estimates
 - Reduction or loss of prequalification
 - Suspension of bidding privileges

- All prompt pay provisions apply to...
 - All subcontractors
 - Lower tier subcontractors
 - Suppliers

Prompt Payment Summary

OK, What did all that really mean?

- Subs & Suppliers have the right to be paid promptly, generally within 10 days of the prime being paid. (covering all levels of subs/suppliers to no more than 30 days after prime contractor payment)
- Prime contractors have new tools to legitimately protect themselves from double payments and bad subs/suppliers.
- If required in their contract with prime contractor; subcontractors & suppliers will now be compelled to provide standard construction waivers of lien and sworn statements on public works projects.
- In general this process allows for greater protection for all parties as failure to promptly pay subs/suppliers has consequences.

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2012 Standard Specifications for Construction

Summary

2012 Standard Specifications for Construction

- Printed copies now available
 - Publication Ordering 517-322-1676 OR online at
 - http://www.michigan.gov/mdot/0,4616,7-151-9622_11044_39444-117479--,00.html
- First Lettings – October 2011 (not all projects)
- When bidding, KNOW what spec book applies (2003 or 2012)
- Several years with both spec books

2012 Spec Book – Division 1

- Active Voice Revision
- More Use of Outline Format
- Significant Re-organization
- All payment provisions in 109
- Sequence for Contract Revisions 109.05
 - Contract Unit Prices
 - Negotiated Prices
 - Force Account

Outline Format

2003 – 105.01

“Unless otherwise specified in the contract documents, only new materials or fabricated items conforming to the requirements of the specifications... the Contractor shall provide the information requested on the Department’s testing order form... The Contractor will be permitted to change the source of supply provided the Department is given reasonable time to carry out required inspection and testing... If accepted materials are transferred from another contract...”

Outline Format

2012 – 105.01

“Unless otherwise required by the contract, the Contractor must:

- A. Provide new materials...
- B. ...provide the information requested on the...Testing Order...
- C. Notify the Engineer...when materials are required on site
- D. Provide...a reasonable time to sample, test or inspect...

2012 Spec Book - 104

- 2012-104.07 “Contractor Obligations” – *Combines other subsections*
 - 2003-103.06 “Maintenance During Construction”
 - 2003-103.07 “Final Clean Up”
 - 2003-104.10 “Safety and Health Requirements”
 - 2003-108.04 “Competence of Contractor Supervision”

2012 Spec Book

- Winter 2012 “Spec Book Rollout Sessions”
- Spec Book Electronic Version available at
 - <http://mdotwas1.mdot.state.mi.us/public/specbook/2012/>
- Major Changes Summary available
 - http://www.michigan.gov/documents/mdot/MDOT_2012_Standard_Specifications_for_Construction_Synopsis_of_Changes_349642_7.pdf

QUESTIONS??