

MDOT 32nd Annual DBE Small Business Development Conference

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PRESENTATION OVERVIEW

- Payment Process Overview for MDOT
- Special Provision for Prompt Pay
- Prompt Pay Subcontractor Checklist
- Dispute Resolution
- Liens
- Lien Waivers
- Sworn Statements

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

Reasons for payment delay?

- Difference between engineer-contractor on accepted work, disputes, etc
- Quantity disagreements
- Timing of bi-weekly pay estimates.
- Approvals for project extras and overruns
 - Up to 5% approved at the TSC
 - 5% to 10% approved at the Region
 - More than 10% Region and Central Office

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.

Liens, Lien Waivers and Sworn Statements

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MDOT Construction Contracts Engineer

LEINS

- What is a Lein?
- Legal method for contractors, suppliers and subcontractors to obtain fair payment for goods and services provided on construction projects.
- Very common usage in Residential Construction (*Michigan Construction Lien Act P.A. 487 of 1980*) a lien can be attached to the deed of “real property” for non-payment of improvements to that property. (*must be paid before property can be sold and/or can begin foreclosure*)
- Lien cannot be applied to publicly owned property or project. (*MDOT work typically not on “Real” property. IE someone cannot foreclose I-94*)
- However on MDOT projects, subcontractors can place liens on the prime contractor’s Payment and Performance Bond that is backing the public project.

Common Construction Contract Payment Terms/Definitions

- **Lower Tier Subcontractor/Supplier** – generally any contractual relationship with another entity below the prime or subcontractor in question.
- **Supplier** – any source of materials or supplies to a construction project. (*Raw materials, labor, parts, leased equipment, etc*)
- **Notice of Furnishing** – legal notice from supplier/contractor that they are providing a good or service on the project. *Required to protect subcontractor rights to file a lien.*
- **Notice of Commencement** – Notification of starting work. *Not normally applicable to MDOT project lien process*
- **Sworn Statement** – legal oath of Prime contractor reflecting current state of all project work under contract. (ALL subs, sub-subs, suppliers, vendors, etc)
- **Waiver of Lien** – legal release of rights to get paid for work or materials (4 types detailed later)

Construction Lien Law

MDOT Construction and Maintenance Contracts

The remedy here is against the Payment Bond furnished by the principal prime contractor. The requirements are:

1. A subcontractor within 60 days after furnishing the last labor or material, shall serve a written notice in duplicate upon the board of agency contracting on behalf of MDOT: (Bond company and Prime)
 - Identify entity, labor or materials furnished, and the name of the prime
 - Declare reliance upon the security of the bond
 - Request the Board to furnish within 10 days, a copy of the Notice to the surety company.
(request copy of notice)

Construction Lien Law

MDOT Construction and Maintenance Contracts

2. A supplier, subcontractor of a subcontractor, and all other except laborers, shall within 60 days after furnishing last labor or material, serve a written notice in duplicate upon the agency stating:
 - That the contractor or subcontractor is indebted a specific amount and describe the labor or materials furnished.
 - Requesting the board to furnish within 10 days, a copy of the Notice of the surety company.

A lawsuit must be started on the payment bond within one year after completion and acceptance of the project.

To preserve Your Rights to File a Lien you Should:

- Provide “Notice of Furnishing” indicating work/materials/supplies to be supplied to project before start of work. These forms should be sent to all contractors in the contractual chain above.
- A sample NOF would be something like *“Blue Seed Co. is providing all grass seed on project XXX under purchase order with Smith Landscape Co.”* (note: labor/installation not mentioned, as this is another company)
- There are often tight time requirements for returning or issuing these notices in order to preserve rights to file a lien. *(typ 10 days)*
- Notice of furnishings protect your rights to file liens and can sometimes help avoid confusion *(prime might not know what supplier a sub was using, primes may have had multiple quotes and not clarified who they were using, etc)*
- *Notice of Commencements do not hurt, but not as critical on highway jobs.*

Lien Waivers

- Think of Lien Waivers like a sort of legal receipt for goods and services. They are proof of payment and release of rights to file any future claim for the work covered. (*A store receipt both proves you paid for an item and prevents the store from asking you to pay for the item a second time when you leave*)
- **Liens are a SUBcontractors tool to insure payment**
- Lien Waivers are for PRIME Contractors and Owners to insure the work was paid for and prevent them from having future claims to pay for the same work twice.
- Most homeowners/primes that do not use lien waivers eventually have to pay for work twice. (fraud, etc)

Lien Waivers

- Normal practice is to exchange a Lien Waiver at the same time as payment is made. (*Think receipt*)
- Good prime contractors never pay subcontractors without obtaining lien waivers. Those that do not collect them, eventually end up having to pay for something twice.
- It is always your responsibility to secure all lien waivers from any entity below you contractually (Sub-Subs, sub suppliers, etc) and send copies to the contractual entity above you.
- This leads into the next topic of “Sworn Statements” but first an overview of the four types of lien waivers

The Four Types of Lien Waivers:

- Full Unconditional Waiver of Lien:

An absolute and complete waiver of all liens (done with entire job) without any conditions. Effective upon actual payment of the amount indicated in the waiver. (*owner favorite*)

- Full Conditional Waiver of Lien:

Also an absolute and complete waiver of all liens (entire job), but has conditions. (*Usually that it is only effective upon actually receiving payment*)

- Partial Unconditional Waiver of Lien:

A full waiver of labor and/or materials furnished through a period of time or completion point. Covers only the work stated and is effective upon payment. (PUWL for all tree clearing work in March or for phase I of project, etc)

- Partial Conditional Waiver of Lien:

Same as above but with conditions. Effective upon actual payment of the amount indicated in the waiver. But with a condition. (PCWL for 1st half of driveway work conditioned upon check clearing bank)

Lien Waivers (Cont)

- Against the law to ask someone to waive lien rights in advance of work performed or payment.
- As a prime contractor or owner you want “Full Unconditional Waivers of Lien” as you are then assured there will be no future claims for payment. (*think “Paid in Full” cash in hand*)
- As a subcontractor you should never sign a full unconditional waiver of lien unless you have already been paid and there are no unresolved claims on the job.
- Subcontractors should generally use the “partial conditional waiver” during the project to mark project milestones and/or MDOT accepted segments of work with the expressed “condition” of becoming effective only upon receipt of payment.
- When payments are exchanged at same time as waivers, generally “unconditional” partial waivers are used.

Sworn Statements

- A written verification under oath reflecting all contracted entities, persons, union benefit funds, sub-contractors, suppliers, etc that have or will furnish labor, equipment, supplies, or materials to entities below or directly to the contractor producing the sworn statement.
- In addition to required information on contractor producing the sworn statement, the statement shall also include original contract amounts, current amounts due, amounts paid to date, and balances to finish for all entities above.
- Sworn Statements reflect all contracts and payments made to ALL entities/suppliers below the contractor producing the statement.

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Additional Useful Small Business Information Resources

- **MDOT** -> “Doing Business” -> “Contractor Service Center”
(Prequalification, Bids, Payments, DBE info, etc)
www.Michigan.gov/mdot



- **Michigan Business One Stop**
(Forming LLCs/DBAs/Corporations, Tax payments, licenses)
<http://www.michigan.gov/business>

- **MI Small Business & Technology Development Center**
www.misbtdc.org

Many Free Services for small businesses: drafting business plans, obtaining finances, insurance, taxes, wages, business formation, etc even assigning a one-on-one mentor or college business students to do marketing plans/competitive analysis for your business.



QUESTIONS??