

From Brenda O'Brien, Engineer of Construction Field Services

MDOT-Construction Field  
Services Division  
P.O. Box 30049  
Lansing, Michigan 48909  
Phone/517-322-1087  
Fax/517-322-5664  
[www.michigan.gov/mdot/](http://www.michigan.gov/mdot/)

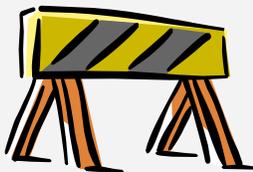
Index: Contracts,  
Subcontracts

Questions regarding this  
Construction Advisory  
should be directed to:

Jason Gutting, Engineer of  
Construction Operations at  
517-636-6334 or  
[guttingj@michigan.gov](mailto:guttingj@michigan.gov)

Or

Jason Clark, Construction  
Contracts Engineer, at  
517-322-6630 or  
[clarkj25@michigan.gov](mailto:clarkj25@michigan.gov)



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## Prompt Pay

### Prompt Pay Supplemental Information and Interpretation

**The following information is provided to ensure compliance with federal regulations, including the Code of Federal Regulations – 49 CFR 26.29. This information and interpretation is effective immediately and applies to all federally funded projects let by MDOT and local agencies.**

### Cross Withholding Earnings between Projects

Prime contractors often subcontract with the same subcontractor on more than one contract. Each contract is administered independently of any other contract. If the prime contractor and subcontractor are having monetary or other disputes on a contract, it is strictly forbidden for the prime contractor to withhold earnings of the subcontractor on another contract in an attempt to recover damages from the contract with the disputes. If the engineer becomes aware of this occurring, they shall contact the Construction Field Services Division immediately for direction.

### Less Than Full Payment Based on Issues Other Than Satisfactory Completion

BOHIM 2011-06 discusses possible reasons for a prime contractor to withhold payment from a subcontractor or lower-tier subcontractor or supplier. The withholding of any payments by the prime contractor may only occur upon written approval of the engineer. The following reasons listed in the BOHIM may be acceptable, but only under certain circumstances as described below:

- **A demonstrated failure of the subcontractor or lower tier subcontractor to pay or verify payment to its lower-tier subcontractors or suppliers** – This is a valid reason for the prime contractor to withhold payments, but only to the extent of the alleged prompt pay violation, and only until the alleged violation is resolved.
- **A demonstrated breach of the subcontract by the subcontractor such as abandonment of the work** – This is acceptable only if the subcontractor left the work unfinished such that it did not meet the requirements of "satisfactory completion". If, prior to abandonment, the subcontractor completed an incremental portion of the contract work and the completed work met the requirements of "satisfactory completion", then the work shall be paid for and the prime contractor must pay the subcontractor in accordance with the contract documents. As an example, if the subcontractor installed 1000 lineal feet of guardrail in its entirety and it met the requirements of "satisfactory completion", then payment would be made for 1000 lineal feet of guardrail and the prime contractor would be required to pay the subcontractor for the work even if the subcontractor abandoned the project and left more work unfinished. If the work did not meet the requirements of "satisfactory completion" and the prime contractor was required to perform some of the work in order for it to

meet the requirements of “satisfactory completion”, then the prime contractor may make less than full payment to the subcontractor. As an example, if the subcontractor installed the posts for 1000 lineal feet of guardrail and then abandoned the project, the prime contractor would be required to finish the installation of the 1000 feet of guardrail, or hire someone to complete the work. In this instance, less than full payment by the prime contractor to the subcontractor for the 1000 lineal feet of guardrail would be allowed.

- **Unacceptably tardy progress in the work resulting in delays to the project which may subject or have subjected the prime contractor to liquidated damages** – In order for a prime contractor to withhold payments for this reason, there must be a demonstrated delay by the subcontractor, lower tier subcontractor or supplier that will result in liquidated damages (LD's) on the project. The progress schedule or critical path shall be used to verify the delay. If such a delay is documented and verified, the withholding may not exceed the calculated value of the LD's attributable to the unexcused subcontractor, lower tier subcontractor or supplier delay.
- **Failure or refusal to correct deficient work** – If work is determined to be deficient after payment has been made, and the subcontractor, lower tier subcontractor or supplier that performed the work refuses to correct the work, the prime contractor may withhold payments not to exceed the cost of correcting the deficient work.
- **Failure or refusal to provide required submittals such as materials certifications, certified payrolls, etc.** – Payment should not be made until all required submittals have been received.

#### Form 2124A Reporting Requirements

The engineer is reminded that Form 2124A *Prime Contractor Bi-Weekly Statement of Subcontractor/Supplier Payments* is required to be completed by the prime contractor, submitted through the MERS system, and reviewed for reasonableness by the engineer **prior to release of the second and subsequent payments**. Instructions for the *MDOT 2124A/ARRA Reporting System – User Guide*, which is also used for non-ARRA reporting, can be found at the following link:

[http://www.michigan.gov/documents/mdot/Prompt\\_Payment\\_2124A\\_Instructions\\_MERS\\_366314\\_7.pdf](http://www.michigan.gov/documents/mdot/Prompt_Payment_2124A_Instructions_MERS_366314_7.pdf)

A collection of frequently asked questions on prompt pay can be found at the following link:

<http://www.michigan.gov/mdot/0,4616,7-151-31785---F,00.html>

Construction engineers are requested to share this information with local government and consultant engineers within their jurisdiction.