

7.2.4 Prompt Payment Mechanisms

Requirement
<p>49 CFR §26.29 -- <i>What Prompt Payment Mechanisms Must Recipients Have?</i> -- requires grantees to establish a contract clause which requires prime contractors to pay subcontractors for satisfactory performance of their contracts no later 30 days from receipt of each payment that the grantee makes to the prime contractor. This clause must also require the prompt return of retainage payments from the prime contractor to the subcontractor within 30 days after the subcontractor's work is satisfactorily completed.</p> <p>This part also discusses other aspects of a prompt payment program that grantees may wish to consider, including:</p> <ol style="list-style-type: none">1. Appropriate penalties for failure to comply,2. Prior written consent of grantee for delays in payment of subcontractors,3. Requirement for primes and subcontractors to use alternative dispute resolution mechanisms to resolve payment disputes, and4. Requirement that primes will not be paid for work performed by a subcontractor until the prime ensures that the subcontractor is paid.

Discussion

Prompt payment provisions are an important race-neutral mechanism that can benefit DBEs and all other small businesses. Under part 26, all grantees must include a provision in their DOT-assisted contracts requiring prime contractors to make prompt payments to their subcontractors, DBE and non-DBE alike. DBE contractors are significantly affected by late payments from prime contractors, and lack of prompt payment constitutes a very real barrier to the ability of DBEs to compete in the marketplace. Non-DBE contractors are also affected by late payment problems. A prompt payment requirement applying to all subcontractors is an excellent example of a race-neutral measure that will assist all subcontractors.

The required contract clause would obligate the prime contractor to pay subcontractors no later than 30 days from the receipt of each payment the grantee makes to the prime contractor. Payment is required only for satisfactory completion of the subcontractor's work. Retainage would have to be returned within 30 days from the time the subcontractor's work had been satisfactorily completed, even if the prime contractor's work had not yet been completed. The number of days specified in the prompt payment clause for the payment of subcontractors may be less than 30 days, at the grantee's discretion. Grantees who already operate under prompt payment statutes may use their existing authority in implementing this requirement. It may be necessary, however, to add to existing contract clauses in some cases (e.g., if existing prompt payment requirements do not cover retainage).

Paragraph (e) of § 26.29 lists a series of additional measures that the regulation authorizes, but does not require, grantees to use. In addition to the mechanisms suggested by §26.29, another possible mechanism that grantees should consider would be declaring a prime contractor to be not responsible for future awards where the contractor has exhibited a pattern of withholding or making late payments to subcontractors.

Best Practices

Following are examples of *prompt payment and reporting requirements* (of payments to subcontractors) contract clauses used by the Chicago Transit Authority (CTA). 6 We would note that

the time periods specified in the CTA clause for payment of subcontractors may be too aggressive and may not be feasible for all grantees. In any event, FTA gives grantees discretion in stipulating the payment timelines in their prompt payment contract clauses.

Prompt Payment to Subcontractors

- A. The Contractor is required to pay all Subcontractors for all work that the Subcontractor has satisfactorily completed, no later than five (5) business days after the Contractor has received payment from the Authority. 7
- B. In addition, all Retainage amounts must be paid by the Contractor to the Subcontractor no later than fourteen (14) business days after the Subcontractor has, in the opinion of the VP Construction, satisfactorily completed its portion of the Work. 8
- C. A delay in or postponement of payment to the Subcontractor requires good cause and prior written approval of the General Manager, Purchasing.
- D. The Contractor is required to include, in each subcontract, a clause requiring the use of appropriate arbitration mechanisms to resolve all payment disputes.
- E. The Authority will not pay the Contractor for work performed unless and until the Contractor ensures that the Subcontractors have been promptly paid for the work they have performed under all previous payment requests, as evidenced by the filing with the Authority of lien waivers, canceled checks (if requested), and the Contractor's sworn statement that it has complied with the prompt payment requirements. Prime Contractors must submit a prompt payment affidavit, (form to be provided by the Authority) which identifies each subcontractor (both DBE and non-DBE) and the date and amount of the last payment to such subcontractor, with every payment request filed with the Authority, except for the first payment request, on every contract with the Authority. (See below for *Prompt Payment Affidavit* developed by CTA).
- F. Failure to comply with these prompt payment requirements is a breach of the Contract, which may lead to any remedies permitted under law, including, but not limited to, Contractor debarment. In addition, Contractor's failure to promptly pay its Subcontractors is subject to the provisions of 50 ILCS 505/9.

Reporting Requirements During the Term of the Contract

- A. The bidder shall, within five (5) business days of contract award, or prior to any work being performed, execute formal subcontracts or purchase orders with the DBE firms included in the bid. 9 These written agreements shall be made available to the General Manager, DBE Program, upon request. All contracts between the bidder and its subcontractors must contain a prompt payment clause as set forth in Section VIII herein.
- B. During the term of annual contracts, the bidder shall submit regular "Status Reports of DBE Subcontract Payments" in a form acceptable to the Authority. The frequency with which these reports are to be submitted will be determined by the General Manager, DBE Program, but in no event will reports be required less frequently than quarterly. **In the absence of written notice from the General Manager, DBE Program, the bidder's first "Status Report of DBE Subcontract Payments" will be due ninety (90) days after the date of contract award, with additional reports due quarterly thereafter.**
- C. In the case of a one-time procurement with either a single or multiple deliveries, a "Status Report of DBE Subcontract Payments," in a form acceptable to the Authority, indicating final DBE payments shall be submitted directly to the General Manager, DBE Program. The information must be submitted prior to or at the same time as the bidder's final invoice to the Authority user department identified in the solicitation. (NOTICE: The original invoices must be submitted directly to the Authority's department identified in the contract documents and the Status Report of DBE Subcontract Payments must be submitted directly to the General Manager, DBE Program.) **Failure to follow these directions may delay final payment.**
- D. The address for the General Manager, DBE Program, is: CTA General Manager, Chicago Transit Authority, DBE/EEO Programs/Contract Compliance Department, 567 West Lake Street, Chicago, IL 60661-1498).

Contractor will place a check in the appropriate box below that applies to this payment request.

Re: Payment Request No. _____

I, _____ (Name), the
_____ (Title - e.g., President, Vice President, etc.)
of _____ ("Company"), do state the following with
regard to payments made under Contract No. _____
("Contract"):

1. ____ Subcontractors, at the first tier, both DBE and non-DBE, who completed work and were listed for payment on the prior Payment Request No. _____, were paid no later than five (5) business days after Company received payment from CTA.
2. ____ Copies of invoices and cancelled checks for subcontractors at the first tier who were paid under the prior payment request have been delivered or mailed to the DBE Department. In addition, Company has attached to the current Payment Request all lien waivers for prior subcontractor payments and any other documentation required by CTA. (Failure to attach all required documentation to the Payment Request or forward cancelled checks and invoices to the CTA DBE Department may cause the Payment Request to be rejected by CTA.)
3. ____ All retainage amounts withheld from any subcontractor who satisfactorily completed its portion of the contract work, including punch list items, were paid to the subcontractor(s) no later than fourteen (14) business days after it satisfactorily completed its work, whether or not CTA has paid said retainage amounts to Company. Attach a copy of the cancelled check evidencing payment of each retainage amount.
4. ____ There was no delay in or postponement of any payment owed to a subcontractor, whether periodic payment or retainage amount, except for good cause and after receipt of prior written approval from the CTA Purchasing Agent.

Attach a copy of the written approval from the CTA Purchasing Agent.

Company Name

Signature

Print Name

Date: _____

Subscribed and sworn to before me this _____ day of _____ 20__.

Notary Public