Prompt Payment Requirements for Airport Sponsors

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FEATUREING:
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August 4, 2020
Why are we talking about Prompt Payment?

- Prompt Payment remains a compliance priority
- Prompt Payment complements the purpose and intent of the DBE program and affects all small businesses
- FAST Act re-emphasizes role of Prompt Payment in DBE program
- OIG Audit of FAA’s DBE Program - Year Two
- FAA Reauthorization Act of 2018 & complaint reporting
- Action item from FY2019 Prompt Payment Complaints Analysis
What are we talking about today?

- Prompt Payment & DBE Program
- Prompt Payment Monitoring
- Prompt Payment Complaint Reporting
- FY2019 Prompt Payment Complaints Report Analysis
Prompt Payment – DBE Program Requirements

• Update DBE Program to reflect current rule and guidance
• 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 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 partial payment language from Section 90-06 of FAA Advisory Circular 150/5370-10H
• Identify dispute resolution mechanisms
Prompt Payment Template

• Available Online (published 4/25/2018)

• Contains examples of Monitoring, Dispute Resolution Mechanisms, Enforcement Measures, etc.
Prompt Payment Monitoring

• Monitor prompt payment actively
  – Website, automated system, manual practices all acceptable, but prompt pay must be monitored
  – Includes monitoring release of retainage

• Same authority as monitoring for other program compliance (§ 26.37)

• Do not rely on complaints

• Address concerns about retaliation
When Non-payment is NOT a Prompt Payment Violation

• Prime not yet paid by airport sponsor
  – Airport must pay timely
  – Prime must invoice regularly

• Documented dispute over work quality between prime and subcontractor

• Subcontractor has not invoiced prime for completed work
  – Confirm prime is not manipulating invoice procedures
Prompt Payment on Projects with Alternative Contracting Methods

• Prime might not be paid regularly
  – Contract structure
  – Milestone payments

• RFP should address subcontractor/lower tier payments

• Identify sanctions (e.g., point system) in RFP
Prompt Payment and Alternative Contracting

- Included in FHWA’s DBE/ACM Handbook
- Regulation is the same
- Best practice for Major ACM projects - electronic data collection system
- Make sure system allows for tiering
- Every layer of tiering allows the same time period of payment
- Could be very long time before 4th or 5th tier is paid if 30 days is used
Complaint Reporting

• Section 157 of the 2018 FAA reauthorization (Public Law No. 115-254)

• Airport sponsors must track and report subcontractors’ allegations of non-compliance

• FAA is required to assess and improve airport sponsor compliance based on analysis of reports received
Complaint Reporting (cont’d)

• Report complaints and related data directly to FAA at:
  https://www.surveymonkey.com/r/PromptPaymentComplaints

• Report questions are previewed in the following slides
* 1. Sponsor and DBELO Information:

<table>
<thead>
<tr>
<th><strong>Field</strong></th>
<th><strong>Value</strong></th>
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</thead>
<tbody>
<tr>
<td>Sponsor/Owner Name</td>
<td></td>
</tr>
<tr>
<td>Airport Name</td>
<td></td>
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<tr>
<td>Airport Location ID Code (3 digit)</td>
<td></td>
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<tr>
<td>DBELO Name</td>
<td></td>
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<tr>
<td>DBELO Email Address</td>
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<tr>
<td>DBELO Phone Number</td>
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* 2. Date of Complaint

**Date**

**MM/DD/YYYY**

* 3. How was this complaint submitted?

- [ ] Email
- [ ] Formal Letter
- [ ] Telephone
- [ ] Via website
- [ ] Other (please specify)

**Other (please specify)**

**Please specify**
**4. Complainant Information:**

- Complainant Name
- Company Name
- Certified DBE Firm (Yes/No)
- Address
- City/State
- Zip/Postal Code
- Email Address
- Phone Number

**5. FAA funded project information:**

- Project Name
- Project Number
- AIP Grant Number

**6. Description of complaint (include internal tracking #):**


**7. Resolution for Complaint:**


**8. Did all project contracts include the following provisions (check all that apply):**

- [ ] A. Contract assurances as required by 49 CFR 28.10(b)
- [ ] B. 80-80 Partial Payment clause as required by AC143/8370-10G.
- [ ] D. Prompt Payment enforcement provision as required 49 CFR 20.26(d-e)

If you checked D, please describe how contractual enforcement provisions are included, specify document name and section/clause.
9. Does the Sponsor proactively monitor prompt payment of all subcontractors?
   - YES
   - NO
   - If YES, please describe how.

10. Did the Sponsor implement enforcement actions with this complaint to prevent prompt payment complaints from recurring?
    - YES
    - NO
    - If YES, please describe how.

11. Has the Sponsor's DBE Program been updated to address USDOT prompt payment guidance released in 2016 and 2018?
    - YES
    - NO
    - If YES, has a copy of it been uploaded to FAA Civil Rights Connect?

12. Was FAA involved in the resolution of the complaint?
    - YES
    - NO
    - If YES, please provide staff name.
Complaint Reporting (cont’d)

• Report complete details

• Reporting a complaint is an opportunity to review your own processes

• FAA may request confirmation that covered complaints were reported
FY2019 Prompt Payment Complaints Analysis

• 17 Reported Complaints
  – 11 Covered Complaints, 2 unresolved

• Why anecdotal reports may remain high
  – Sub fears retaliation for reporting complaint
  – Slow payment is not a violation (not a covered complaint)
FY2019 Prompt Payment Complaints Analysis (cont’d)

• Insufficient empirical information to date

• Issues identified:
  – Monitoring of prompt payment
  – Reporting covered complaints
  – Lack of contractual enforcement mechanisms
  – Payment issues not covered by rule
Additional Resources

• FY2019 Annual Prompt Payment Complaint Report
Additional Resources

• Official USDOT DBE Program Q&A:
Additional Resources

• Your Operating Administration’s Civil Rights Contact
  – FAA:  
    https://www.faa.gov/about/office_org/headquarters_offices/acr/bus_ent_program/media/faa_dbe_staff.pdf
  – FHWA: 
    https://www.fhwa.dot.gov/civilrights/overview/crpersons.cfm
  – FTA: Your Regional Civil Rights Officer (RCRO) or Contact Us at 
  – Make sure to select “Civil Rights & Accessibility” as the dropdown Category
Questions & Answers
Federal Aviation Administration
Office of Civil Rights
http://www.faa.gov/about/office_org/headquarters_offices/acr