

MICHIGAN
DEPARTMENT OF TRANSPORTATION

SPECIAL PROVISION
FOR
PROMPT PAYMENT

CSD:JDM

1 of 4

C&T:APPR:JC:DBP:05-09-11
FHWA:APPR:05-19-11

Add the following subsection to Section 109, on page 111, of the Standard Specifications for Construction:

109.10 Prompt Payment.

A. Definitions.

Lower-tier subcontract. An agreement between a subcontractor of any tier and any individual or legal entity to perform a part of the subcontract work.

Lower-tier subcontractor. The individual or legal entity that performs part of the subcontract work through a lower-tier subcontract with a subcontractor.

Supplier. The individual or legal entity that agrees to provide materials or services to the prime Contractor, a subcontractor, or a lower-tier subcontractor for the performance of their contract work.

Sworn Statement. A written verification under oath reflecting all persons or entities, including union fringe benefit funds, who have furnished labor, equipment or materials to a subcontractor or lower tier subcontractor for performance of work on the project and the original contract amount, current amount due, amounts paid to date and balance to finish for each person or entity.

Waiver of Lien. A written release and waiver of any claim or right to payment for payments actually received for labor, equipment or materials furnished for performance of work on the project.

B. Progress Payments. For the first payment, or for a one time payment, the prime Contractor agrees to pay each subcontractor for the work associated with their subcontract 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.

For the second and subsequent payments, the prime Contractor agrees to pay each subcontractor for the work associated with their subcontract no later than 10 calendar days from the date the prime Contractor receives from the subcontractor its current Sworn Statement and Waivers of Lien from the subcontractor and the subcontractors' lower-tier subcontractors and suppliers verifying the prior payment has been received, but no later than 30 days from the prime Contractor's receipt of payment from the Department for said work.

Proof of payment documentation, using the Department's current form, is also required from the

prime Contractor to the Engineer prior to release of the second and subsequent estimates.

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 as defined below.

If the prime Contractor has concerns about the satisfactory completion of subcontractor or lower-tier subcontractor work items, this must be brought to the Engineers attention as soon as the concern is discovered. If the work meets the requirements of satisfactory completion and the prime Contractor has been paid for that work, the Engineer must determine whether the prime Contractor has demonstrated a valid reason for withholding payment from the subcontractor or supplier, or the subcontractor has demonstrated a valid reason for withholding payment from the lower-tier subcontractor or supplier. If the prime Contractor or subcontractor has done so, the Engineer will process a negative estimate pulling back the amount involved in the complaint. If payment has not been made, the Engineer will not include those items of work on an estimate until the issue has been resolved.

The prime Contractor remains responsible to make prompt payments to their subcontractors and suppliers even if the prime Contractor is in violation of other contractual obligations and the Department is withholding payment from the prime Contractor for those violations.

The prime Contractor must include in all subcontracts notice of the Department's prohibiting prime Contractors from holding retainage from subcontractors under 49 CFR 26.29.

This prompt payment provision is a requirement of 49 CFR 26.29 and does not confer third-party beneficiary right or other direct right to a subcontractor against the Department. This provision applies to both DBE and non-DBE subcontractors.

C. Satisfactory Completion. Progress and Partial payments for contract work are made based on this assessment; and satisfactory completion is defined for purposes of this prompt payment provision as:

1. Upon preliminary review, the Engineer finds the work completed in accordance with the contract, plans, and specifications; and
2. Required paperwork, for Progress and Partial payments, including material certifications, payrolls, etc., has been received and reviewed by the Engineer.

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. Any delay or postponement of payment from the time frames specified herein, or partial payment from the prime Contractor to a subcontractor or supplier, or from a subcontractor to a lower-tier subcontractor or supplier, may occur only upon receipt of written approval from the Engineer. There may be circumstances where a prime Contractor or subcontractor has a valid reason to withhold payment from a subcontractor or lower-tier subcontractor or supplier. Examples of such circumstances include but are not limited to: a demonstrated failure of the subcontractor to pay, or verify payment to, its lower tier subcontractors or suppliers; a demonstrated breach of the subcontract by the subcontractor such as abandonment of the work, unacceptably tardy progress in the work resulting in delays to the project which may subject or have subjected the prime Contractor to liquidated damages; failure or refusal to correct defective work, failure or refusal to provide required submittals such

as materials certifications, certified payrolls, etc.

E. Non-Payment Claims. Notifications of failure to meet prompt payment provisions can be referred by the prime Contractor, subcontractor, lower-tier subcontractor or supplier to the alleged offending party and must be made in writing and sent certified mail, with a copy to the Engineer and the prime Contractor. All notifications should be mailed within 30 calendar days of the date the payment was to be received. The alleged offending party must respond in writing to the claimant, with a copy to the Engineer, the prime Contractor and the Engineer of Construction and Technology, within 10 calendar days of receipt of the notification of failure to meet prompt payment provisions. Upon receipt of the written notice and response, the Engineer must verify in writing whether grounds exist for the prompt payment complaint. If the alleged offending party provides written evidence of the circumstances outlined in subsection 109.10.D, the parties to the complaint should employ dispute resolution procedures as provided in subsection 109.10.F to resolve the prompt payment issue. At this point, and pending completion of the dispute resolution procedures, there is no basis for any negative action against the alleged offending party. Failure on the part of the alleged offending party to respond to a notification from a claimant shall be considered by the Department as an admission of the violation and may result in sanctions.

Any non-payment claimant has the option of submitting a lien claim to the MDOT Contract Services Division in order to notify the project Surety of the non-payment issue. It is the responsibility of the Surety to ensure that all legitimately due payments are made.

F. Dispute Resolution. The parties must attempt to agree on whether to mediate or arbitrate the dispute and agree upon a mediator or arbitrator within 10 calendar days after a written complaint has been verified by the Engineer. If, within that 10 day period, the parties agree upon a mediator or arbitrator, the entire dispute resolution process must be completed within 60 days from initiation unless, for good cause verified by the mediator or arbitrator, the proceeding will require more time to complete. The cost of the mediation or arbitration shall be borne by the parties as determined by the mediator or arbitrator. Qualified costs of mediation or arbitration, for certified DBEs, will be paid by the Department based on current procedures. The DBE must contact the Office of Business Development for information on current procedures and to receive reimbursement. Outcomes of the dispute resolution will be provided to the Engineer by the mediator or arbitrator within 10 days of the decision. Upon receipt of the status and results of the dispute resolution procedure, the Engineer shall release the disputed payment being held by the Department as outlined by the mediator or arbitrator. If the parties cannot agree upon mediating or arbitrating the dispute or upon a mediator or arbitrator within the 10 day period specified herein, the complaining party shall initiate whatever dispute resolution procedure is specified in the parties' agreement or as available under Michigan law within 30 days of the complaint being verified by the Engineer. The result of the dispute resolution proceeding or litigation shall be provided to the Engineer promptly upon the conclusion of the proceeding and the Engineer shall release the disputed payment being held by the Department in accordance with the result.

At the Engineer's discretion, copies of documents related to prompt payment claims may be requested for inclusion in the project files.

G. Sanctions. Failure to comply with any of the prompt payment requirements by the prime Contractor, subcontractor, lower-tier subcontractor, or supplier may result in sanctions against the offending party. These sanctions may include, but are not limited to: withholding of estimates on projects where prompt payment violations are confirmed; reduction or removal of

prequalification; and/or suspension of bidding privileges.

All provisions of this prompt payment subsection apply to all subcontracts, lower-tier subcontracts, and supplier agreements and must be included in each subcontract for the contract, including all lower-tier subcontracts and agreements.