

Prompt Payment Compliance

October 26, 2020

Description

NDOT's contract with the Contractor contains a provision requiring that prompt payments be made to all Subcontractors. Paragraph 7 of Section 108.01 of the *Nebraska Standard Specifications for Highway Construction, 2017 Edition* (SSHC) contains specific requirements for inclusion of language that makes up a "Prompt Payment Clause" when subletting work to subcontractors and lower-tier subcontractors.

NDOT reviews the prompt payment clause in subcontracts that we receive as a part of the subcontract approval process to ensure that it meets the requirements of the SSHC. Subcontracts that do not contain complete language, contain inaccurate language, or contain clauses conflicting with the prompt payment clause will not be approved.

Applicability

Prompt payment language is in the SSHC; consequently, it applies to all projects and all contractors and subcontractors, both DBE and non-DBE subcontractors, at any tier.

Federal Requirements

The Federal DBE regulations (49 CFR 26.29) specifically address prompt payment of subcontractors.

https://www.ecfr.gov/cgi-bin/text-idx?SID=745ad80c99184e9a7932586669e70e80&mc=true&node=se49.1.26_129&rgn=div8

The regulation requires that NDOT require prompt payment as a part of the DBE program; in addition, the USDOT has determined that the Prompt Payment requirements apply to non-DBE subcontractors as well as DBE subcontractors.

<https://www.transportation.gov/sites/dot.gov/files/docs/mission/civil-rights/civil-rights-learning-center/307421/guidance-prompt-payment-and-retainage-final.pdf>

Payments

Subcontractors of any tier are entitled to receive payment once the NDOT has issued payment for subcontracted work.

Once the Contractor has been paid by the NDOT, the Contractor must pay for work performed by the Subcontractor within twenty (20) calendar days after receiving progress payments for work completed to date, and a Subcontractor must pay a lower-tier subcontractor for work completed to date within ten (10) calendar days of receiving payment from the Contractor.

Withholding of Payment

Paragraph 7.c. of Section 108.01, SSHC states “The Contractor or Subcontractor, as the case may be, may withhold payment only for just cause and shall not withhold, delay, or postpone payment without first receiving written approval from the Department.”

The Contractor, or Subcontractor, must bring any concerns about the satisfactory completion of subcontractor or lower-tier subcontractor work items, to the NDOT’s attention as soon as the concern is discovered. If the work meets the requirements of satisfactory completion and the Contractor has been paid for that work, the NDOT must determine whether: 1. The Contractor has demonstrated just cause for withholding payment from the Subcontractor, or 2. The Subcontractor has demonstrated just cause for withholding payment from the lower-tier subcontractor. If the NDOT determines there exists just cause to withhold payment, NDOT will make a written determination allowing the Contractor to withhold payment. The Contractor remains responsible to make prompt payments on this project to their subcontractors and suppliers except as noted in the prompt payment determination finding of just cause to withhold, even if the NDOT is withholding payment from the Contractor for violation of other contractual obligations.

If payment is not made for work performed, or if retainage is not released within the required thirty (30) calendar day period, without written authorization to withhold from the NDOT, the Subcontractor may make a complaint to the NDOT detailing the amounts and date due, and the work performed.

Prompt payment is separated into two program areas: the highway construction program and the DBE program. Prompt payment issues associated with a DBE subcontractor are subject to the prompt payment guidance in the NDOT DBE Program Plan. <https://dot.nebraska.gov/media/10735/ndot-dbe-program-plan.pdf>

The following processes are applicable to non-DBE subcontracts.

Process to Request to Withhold Payment and Prompt Payment Determination

1. When requesting to withhold payment from a non-DBE subcontractor, send a letter or email to Assistant State Construction Engineer - Contract Administration (Lorraine.Legg@nebraska.gov)
 - a. The request should be submitted within seven (7) calendar days of receipt of the applicable progress payment.
 - b. The request should contain the project information, the specific cost of damages attributed to the Subcontractor and supporting information that justifies the request to withhold. (The Contractor has the responsibility to make the case for just cause by providing documentation that will show a clear path between the Subcontractor’s performance and specific damages assessed or anticipated to be assessed to the Contractor on the contract.)

2. The NDOT will notify the Subcontractor of the request to withhold, providing a copy of the request received from the Contractor. The NDOT provides the Subcontractor the opportunity to respond to the assertions made by the Contractor in the request to withhold. The Subcontractor is normally provided five (5) business days to respond. The time to provide this response may, upon request written request from the Subcontractor, be extended for cause and at the discretion of the NDOT.
3. When the NDOT is in receipt of both the request to withhold and the Subcontractor's response, a review of District records is performed. A determination is made based on the information received from the Contractor, the Subcontractor, and the District records as to whether or not there is just cause to withhold.
4. A Prompt Payment Determination letter is sent to all parties. The determination solely applies to whether or not there is just cause to withhold, and whether or not it would be breach of the NDOT's contract with the Contractor if payment is withheld from the Subcontractor – it does not make a determination on any other matter.
 - a. Finding of just cause – The Contractor may withhold payment for the amount as specified in the determination and will not be considered in breach of contract for doing so.
 - b. Finding of *no* just cause – The Contractor is not authorized to withhold payment from the Subcontractor and withholding, delaying, or postponing payment will be considered a breach of contract by NDOT.

NOTE: After a request to withhold has been received by NDOT, the Contractor is allowed to withhold the requested amount until a determination is made.

Process to Report a Prompt Payment Violation

1. When reporting that payment has been improperly withheld from a non-DBE subcontractor, the Subcontractor will send a letter or email to Assistant State Construction Engineer - Contract Administration (Lorraine.Legg@nebraska.gov).
 - a. The request should contain the project information, the specific amount of money withheld, the date payment was due, and the work performed for which payment was withheld.
2. NDOT will investigate the complaint, providing the Contractor the opportunity to show that payment was not withheld improperly.
3. If NDOT finds that the assertion of a prompt payment violation is valid, the Contractor will be considered in breach of their contract and subject to administrative actions by NDOT.

Overpayments

The prompt payment clause stipulates in Paragraph 7.b.(3) of Section 108.01, SSHC that the subcontractor has an obligation “to return to the Contractor or Subcontractor, as the case may be, any overpayments which result from adjustments to measured and recorded quantities as part of the preparation of subsequent progress payments or the final records. Overpayments shall be returned to the Contractor or

Subcontractor, as the case may be, within 20 calendar days of receiving notice of the adjusted quantities and the amount of the overpayment.”

Retainage

NDOT requires Contractors to make prompt and full payment of any retainage kept by the Contractor to the Subcontractor within 30 days after the Subcontractor's work is satisfactorily completed.

Breach of Contract - Administrative Actions

In the event the Contractor fails to comply with prompt payment requirements, or a pattern and practice of prompt payment violations is recognized, the agency may invoke administrative actions including, but not limited to, the following:

- The NDOT withholding the amount of payment from the Contractor that should have been paid to the Subcontractor
- Termination of the contract
- Other such remedy as the NDOT deems necessary. The remedy shall be in the sole discretion of the NDOT.
- Reduction of the 'maximum qualification' rating for the Contractor. See SSHC Section 102.02

In the event the Subcontractor fails to comply with prompt payment requirements, or a pattern and practice of prompt payment violations is recognized, the NDOT may withhold subcontract approval for other work proposed by that Subcontractor.