



MARTIN O'MALLEY
Governor

ANTHONY G. BROWN
Lieutenant Governor

LUWANDA W. JENKINS
Special Secretary

MEMORANDUM

DATE: August 1, 2008

TO: Cabinet Secretaries

FROM: Luwanda W. Jenkins
Special Secretary

RE: Late Payment of Subcontractors
Prompt Payment Policy Directive - Implementation Procedures

This Directive supersedes the March 3, 2008 Prompt Payment Policy Directive issued by the Governor's Office of Minority Affairs (GOMA). The implementation procedures for this Prompt Payment Directive are described below and are promulgated pursuant to Sections 11-201, 13-205(a), and Title 14, Subtitle 3 of the State Finance and Procurement Article (SFP), and Code of Maryland Regulations (COMAR) 21.01.01.03 and 21.11.03.01 et seq. This Directive seeks to ensure the prompt payment of all subcontractors on non-construction procurement contracts.

In an ongoing effort to increase public confidence in the procedures followed in public procurement, ensure the fair and equitable treatment of contractors and subcontractors who deal with the procurement system, provide safeguards for the maintenance of a procurement system of quality and integrity, foster effective broad-based competition, promote development of uniform procurement procedures, and further compliance with the State's Minority Business Enterprise (MBE) program, the Governor has instructed me to issue this Prompt Payment Directive to ensure that all subcontractors on state projects, including MBEs, are paid in a timely manner.

The Procurement Law currently contains a prompt payment requirement that applies to State procurement contracts for construction. SFP §15-226. This Prompt Payment Directive applies to all other State procurement contracts in excess of \$25,000 by Executive Branch agencies. GOMA has identified specific remedies for Agencies to include in solicitations and contract documents to address certain circumstances when a subcontractor is not paid undisputed amounts by the State's prime contractor for work performed. This Directive also describes the duties of agencies pursuant to COMAR 21.11.03.13, to ensure that the certified MBEs listed in MBE

participation schedules are receiving compensation. Upon notice and explanation to the GOMA, agencies may modify or omit the following prompt pay provisions in a particular contract, only if doing so would be in the State's best interest. It is the expectation of GOMA that the State's interest will rarely require the omission or modification of this language. Additionally, if the subcontractor is a MBE or Small Business Reserve firm, notice of any prompt payment complaint shall be forwarded to GOMA.

With respect to any non-construction State funded contract, an Agency shall include within the solicitation and contract documents, language in substantially the same form as the following:

1. If a contractor withholds payment of an undisputed amount to its subcontractor, the Agency, at its option and in its sole discretion, may take one or more of the following actions:
 - 1.1. Not process further payments to the contractor until payment to the subcontractor is verified
 - 1.2. Suspend all or some of the contract work without affecting the completion date(s) for the contract work;
 - 1.3. Pay or cause payment of the undisputed amount to the subcontractor from monies otherwise due or that may become due;
 - 1.4. Place a payment for an undisputed amount in an interest-bearing escrow account; or
 - 1.5. Take other or further actions as appropriate to resolve the withheld payment.
2. An "undisputed amount" means an amount owed by a contractor to a subcontractor for which there is no good faith dispute, including any retainage withheld, and includes an amount withheld because of issues arising out of an agreement or occurrence unrelated to the agreement under which the amount is withheld.
3. An act, failure to act, or decision of a procurement officer or a representative of the Agency, concerning a withheld payment between a contractor and subcontractor under this policy directive, may not:
 - 3.1. Affect the rights of the contracting parties under any other provision of law;
 - 3.2. Be used as evidence on the merits of a dispute between the Agency and the contractor in any other proceeding; or
 - 3.3. Result in liability against or prejudice the rights of the Agency.
4. The remedies enumerated above are in addition to those provided under COMAR 21.11.03.13 with respect to subcontractors that have contracted pursuant to the Minority Business Enterprise program.
5. To ensure compliance with certified MBE subcontract participation goals, the Agency may, consistent with COMAR 21.11.03.13, take the following measures:

- 5.1. Verify that the certified MBEs listed in the MBE participation schedule actually are performing work and receiving compensation as set forth in the MBE participation schedule.
- 5.2. This verification may include, as appropriate:
 - 5.2.1. Inspecting any relevant records of the contractor;
 - 5.2.2. Inspecting the jobsite; and
 - 5.2.3. Interviewing subcontractors and workers.
 - 5.2.4. Verification shall include a review of:
 - 5.2.4.1. The contractor's monthly report listing unpaid invoices over 30 days old from certified MBE subcontractors and the reason for nonpayment; and
 - 5.2.4.2. The monthly report of each certified MBE subcontractor, which lists payments received from the contractor in the preceding 30 days and invoices for which the subcontractor has not been paid.
- 5.3. If the Agency determines that a contractor is in noncompliance with certified MBE participation goals, then the Agency will notify the contractor in writing of its findings, and will require the contractor to take appropriate corrective action.
 - 5.3.1. Corrective action may include, but is not limited to, requiring the contractor to compensate the MBE for work performed as set forth in the MBE participation schedule.
- 5.4. If the Agency determines that a contractor is in material noncompliance with MBE contract provisions and refuses or fails to take the corrective action that the Agency requires, then the Agency may:
 - 5.4.1. Terminate the contract;
 - 5.4.2. Refer the matter to the Office of the Attorney General for appropriate action; or
 - 5.4.3. Initiate any other specific remedy identified by the contract, including the contractual remedies required by this Directive regarding the payment of undisputed amounts.
- 5.5. Upon completion of the contract, but before final payment or release of retainage or both, the contractor shall submit a final report, in affidavit form under the penalty of perjury, of all payments made to, or withheld from MBE subcontractors.

The Agency shall monitor compliance with the above-mentioned contractual terms, and shall take appropriate actions to remedy noncompliance. The Agency also shall take the actions required under COMAR 21.11.03.13 to verify that certified MBEs listed in the MBE participation schedule are actually performing work and receiving compensation as set forth in the schedule.

Pursuant to COMAR 21.11.03.13D, the Agency is required to prepare a report, upon completion of a project, that: (a) compares the dollar value of the payments actually received by

MBEs with the dollar value of the amount that MBEs were intended to receive under the MBE participation goal; and (b) explains the discrepancy.

I am confident that the above implementation procedures will clarify the State's role in ensuring that subcontractors on state projects are paid in a timely manner.

Thank you very much. Your continued support and cooperation is greatly appreciated.

cc: The Honorable Martin O'Malley, Governor
Michael Enright, Chief of Staff
Matthew Gallagher, Deputy Chief of Staff
Peggy Watson, Deputy Chief of Staff
Elizabeth F. Harris, Chief Legal Counsel to the Governor
Sheila McDonald, Secretary, Board of Public Works
Tom Hickey, Board of Public Works Liaison
Bruce P. Martin, Assistant Attorney General
Sharon Aldouby, Assistant Attorney General