

**MetroConnect**

OUR COMMITMENT TO  
SMALL BUSINESS SUCCESS



SBE University II  
KNOW YOUR RIGHTS  
September 15, 2020



**Metro**

Meeting Begins 10AM



**MetroConnect**

OUR COMMITMENT TO  
SMALL BUSINESS SUCCESS

## Small Business Enterprise University



Miriam S. Long, Director, Strategic Outreach  
Diversity & Economic Opportunities Department





**MetroConnect**

OUR COMMITMENT TO  
SMALL BUSINESS SUCCESS



Our  
Goal  
For You  
Today 



**Metro**

Strategies For Success



**MetroConnect**

OUR COMMITMENT TO  
SMALL BUSINESS SUCCESS

## DEOD – Who Are We?

### DEOD's Responsibilities

- We are your friends on the inside
- We are advocates for Small Business
- We serve as your system navigators (*in case you get lost*)

We ....

- Administer and oversee Small Business Program Initiatives
- Publicize contract opportunities
- Provide training and resources
- DBE/SBE/DVBE goal setting
- Monitor compliance





**MetroConnect**

OUR COMMITMENT TO  
SMALL BUSINESS SUCCESS

Miguel Cabral, Executive Officer  
Tashai Smith, Deputy Executive Officer  
*Diversity & Economic Opportunity*

Jan Davis, DEOD [davisj4@metro.net](mailto:davisj4@metro.net)

Olga Mireya López, DEOD [lopezo@metro.net](mailto:lopezo@metro.net)

Mimi Long, DEOD [longm@metro.net](mailto:longm@metro.net)







**MetroConnect**

OUR COMMITMENT TO  
SMALL BUSINESS SUCCESS

*Welcome*

Debra Avila, Chief

*Vendor /Contract Management*





**MetroConnect**

OUR COMMITMENT TO  
SMALL BUSINESS SUCCESS

# *Program Overview & Objective*

## Tashai Smith, DEO

*Diversity & Economic Opportunity Department*



An isometric illustration of a city street scene. In the foreground, a white tram with a blue stripe is moving along tracks. To its left, an orange bus is driving on a road. A blue car is also visible. In the background, there are green trees, a sidewalk with people walking, and a bike lane with a person on a bicycle. A purple banner is overlaid on the scene, containing the event title and date. The Metro logo is in the bottom left corner.

# Prompt Payment University Day

September 15, 2020



Metro



# Presentation Objective

- Educate on Prompt Payment requirements
- Identify root causes of prompt payment
- Demystify prompt payment misnomers
- Know your rights

# Why Prompt Payment?

- Federal and State law
- To address the impacts created by delays in payment to subcontractors
- Impact to small business cash flow
- Need to support small businesses

# What is Prompt Payment?

- Prime Contractors are required to pay all Subcontractors:
  - For undisputed amounts within 7 days after receiving payment from Metro; and
  - Release retainage within 7 days after subcontract work is completed

# To which Subcontractors does Prompt Payment apply?

- All subcontractors
  - On and off-site
  - DBEs and non-DBEs (Certified and Non Certified)
  - Contractors and subcontractors at all tier –levels, including:
    - Truckers
    - Suppliers
    - Consulting services



**MetroConnect**

OUR COMMITMENT TO  
SMALL BUSINESS SUCCESS

# *Prompt Payment Topics*

*Ivan Page, Executive Officer, V/CM*

*Bruce Warrensford, Deputy Executive Officer*





# Prompt Payment Topics

- Invoicing
  - Prime Contractor
  - Subcontractor
- Conditional/Unconditional Waivers
- Release of Retention
- Subcontractor Rights
- Dispute Resolution
- Enforcement/Remedies

# Prime Contractors – Undisputed Invoices

- Direct Labor
  - Certified Payrolls, Craft Labor
  - Professional Labor, Supporting payroll documentation
- Waivers and Releases (Conditional/Unconditional)
- Metro Payment certification

# Prime Contractors – Undisputed Invoices

- Properly submitted and undisputed invoices will be paid within 30 days from receipt
- Metro has 7 days from date of receipt to reject
  - If Metro rejects within 7 days the 30 days starts over; however, Metro endeavors to pay for undisputed amounts (short pay) within 30 days

# Subcontractors – Undisputed Invoices

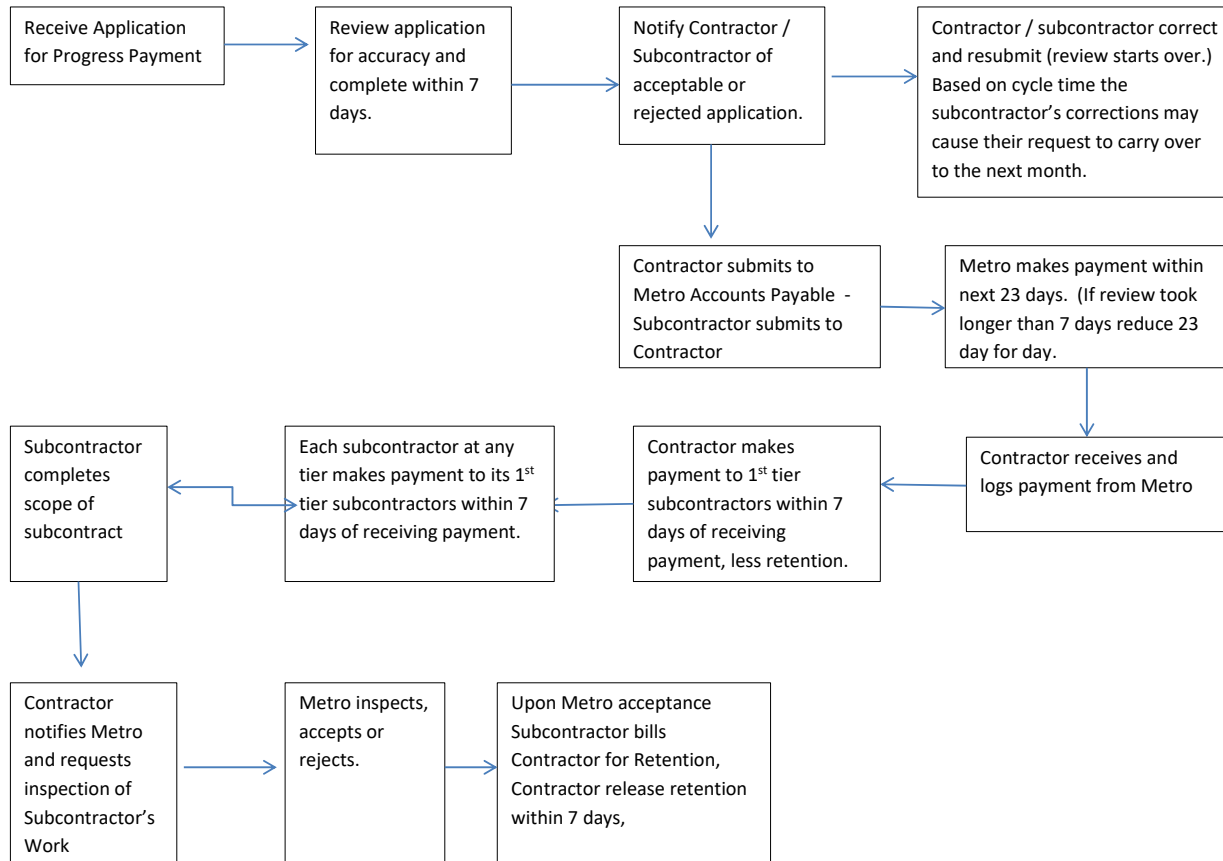
- The prime has 7 days to reject a subcontractor invoice from date of receipt
- Properly submitted and undisputed invoices will be paid within 7 days from receipt of payment from Metro
- As a best practice, the prime shall pay for undisputed amounts (short pay).
- Waivers and Releases
  - (Conditional/Unconditional) are required



Note: This is a flow down requirement and applies to subcontractors at all tiers

# Payment Flowchart

## PROMPT PAYMENT FLOWCHART (TYPICAL)





# Impacts to Subcontractor Tiers

- For each tier of subcontracting, the 7-days for payment applies. See example of 4 tiers of subcontracting:

Assuming Prime is paid in 30 days from date of receipt

- 1<sup>st</sup> Tier, Not to Exceed (NTE) 7 days from when Prime is paid
- 2<sup>nd</sup> Tier, NTE 7 days from when 1<sup>st</sup> tier was paid
- 3<sup>rd</sup> Tier, NTE 7 days from when 2<sup>nd</sup> tier was paid
- 4<sup>th</sup> Tier, NTE 7 days from when 3<sup>rd</sup> tier was paid



**MetroConnect**

OUR COMMITMENT TO  
SMALL BUSINESS SUCCESS

# *Return of Retention*

*Elke Campbell, Director*

*Small Business Programs, DEOD*



An isometric illustration of a city street scene. In the foreground, a white tram with a blue stripe is moving across a crosswalk. To its left, an orange bus is also on the street. A blue car is visible on the right side of the road. Pedestrians are walking on the sidewalks, and a person is riding a bicycle. In the background, there are green trees, a street lamp, and a building. A purple rectangular box is overlaid in the center of the image, containing the text "Release of Retention".

# Release of Retention



Metro

# Retention

- What is Retention?
  - Withholding of a certain percentage of the total contract price until all work is satisfactorily completed
- Why is Retention Held?
  - To help ensure performance and completion of the contract

# Retention

- How is Retention Held?
  - Retention account:

The prime deducts retention from the subcontractor's invoice to be placed in holding account

Note: Subcontractor can look to replace retention with securities
  - Billing:

Prime contractor bills Metro the majority portion earned to-date and bills Metro the final amount due subcontractor upon completion and acceptance of the work



# Release of Retention

In accordance with federal law, the prime withholding a subcontractor's retention until the end of the project is not permitted. Retention must be released upon completion of the DBE and non-DBE subcontractors work.

- Upon completion of subcontractor work, the prime must inspect the work. If accepted, the prime notifies Metro PM for inspection.

# Release of Retention

- When Metro and the prime contractor at any tier, have made an incremental acceptance of a portion of a subcontractor's work, at any tier level, the work of the subcontractor covered by that acceptance is deemed to be satisfactorily completed.
  - After Metro's acceptance, the prime must release retention within 7 days.
  - To assure accepted work and payment, subcontractors must submit acceptable documentation to the prime.



**MetroConnect**

OUR COMMITMENT TO  
SMALL BUSINESS SUCCESS

# *Root Causes & Myth Busters*

*Ivan Page, Executive Officer*

*Bruce Warrensford, Deputy Executive Officer*



An isometric illustration of a city street scene. In the foreground, a white tram with a blue stripe is moving along a track. To its left, an orange bus is driving. Further left, a blue car is visible. On the right side of the street, a person is riding a bicycle. In the background, there are green trees, a sidewalk with people walking, and a building. A purple rectangular box is overlaid in the center of the image, containing the title text. The overall scene is a busy urban environment.

# Root Causes of Prompt Payment Concerns



Metro

# Myth #1

*“Prime Contractor can withhold Subcontractor payment for any reason”*

Truth:

- Prime Contractor may withhold Subcontractor payment when there is a good faith dispute (Business & Professions Code 7108.5)
- Subcontractor must submit proper documentation with their invoice

Best Practice:

Prime Contractor informs Subcontractor of proper documentation required to submit with invoice

# Myth #2

*“Prime Contractor’s billing cycle does not impact Subcontractor”*

**Truth:**

- **Prime Contractor and Subcontractor must coordinate and understand Prime Contractor billing cycle at all tiers**

4 Tiers of subcontracting:

(Prime – Paid in 30 days from date of receipt of invoice)

1<sup>st</sup> Tier, NTE 7 days from when Prime is paid

2<sup>nd</sup> Tier, NTE 7 days from when 1<sup>st</sup> tier was paid

3<sup>rd</sup> Tier, NTE 7 days from when 2<sup>nd</sup> tier was paid

4<sup>th</sup> Tier, NTE 7 days from when 3<sup>rd</sup> tier was paid



Metro

# Myth #3

*“Subcontractor is not required to submit conditional and unconditional waivers/releases to get paid”*

Truth:

- Metro’s Contract requires conditional/unconditional waivers and releases
- Flow down requirement to all subcontractors
- Metro’s prime contractors must submit all subcontractor conditional/unconditional waivers and releases with their Request for Progress Payment to Metro

Conditional is for current request for payment. Unconditional is for last payment received, only for construction contracts.



Metro

## Myth #4

*“Prime Contractor is not obligated to pay subcontractor for change work because they have not received a change from Metro”*

Truth:

- The Contractor is obligated to pay for work performed if it has authorized or directed a subcontractor to proceed with change work.

Best Practice:

Subcontractors should obtain written authorization to perform change work





**MetroConnect**

OUR COMMITMENT TO  
SMALL BUSINESS SUCCESS

# *Subcontractor Rights*

*Richard Chastang, County Counsel*



An isometric illustration of a city street scene. In the foreground, a white tram with a blue stripe is moving along a track. To its left, an orange bus is driving on a road marked 'BIKE'. Further left, a white truck is partially visible. In the middle ground, a blue car is driving on a road. To the right, a person is riding a bicycle. In the background, there are green trees, a sidewalk with people walking, and a building. A purple rectangular box is overlaid in the center of the image, containing the text 'Subcontractor Rights'.

# Subcontractor Rights



Metro

# Stop Payment Notice: What is the Law?

- A Stop Payment Notice is a remedy to get held construction funds due to direct contractor that are still in the hands of the public entity
- Any person or claimant who has supplied labor, services, materials, or equipment to a public works prime contractor and has not been paid may give a Stop Payment Notice.
- Perfecting your rights—Claimant must first file a preliminary 20-day notice.

# Stop Payment Notice - Continued

- A preliminary notice is a written document that includes:
  - a general description of the work to be performed
  - estimate of the total price of the work to be performed
  - total price and description of the work that has been performed
- A preliminary notice must be given to public entity and contractor not later than 20 days after first furnishing work on the public work project
- If claimant does not file a preliminary notice, any Stop Payment Notice it serves is invalid

# Stop Payment Notice - Continued

- What must be in a preliminary notice?
  - Name and address of public entity
  - Description of jobsite
  - Name and address of claimant
  - A general description of work provided
  - Name and address to whom claimant is providing labor, material, services or equipment

Note: Preliminary notice must be served on public entity and direct contractor via personal service, certified mail, registered mail, overnight or express. Need proof of service



# Stop Payment Notice - Continued

- Stop Payment Notice must include:
  - Name and address of entity, direct contractor and relationship of parties to the claimant
  - A general statement of work done by claimant
  - Name of person to whom claimant provided the work
  - Statement of estimate of claimant's demand after deducting offsets and credits
  - Description of project, including street address

# Enforcing the Stop Notice Claim

- If the Stop Notice is not resolved (e.g. the direct contractor fails to pay after filing of the stop notice) you may file a lawsuit in the Los Angeles Superior Court alleging enforcement of stop notice on public works project.
- Stop Payment Notice claims can be filed with the Small Claims Court if \$10,000 or less
- Filing suit in Los Angeles Superior Court to enforce your Stop Payment Notice is \$435
- The filing fee in Small Claims Court is \$75

# Claim Against Payment Bond

- Right to claim against a surety - A payment bond is a surety bond posted by a contractor to guarantee that subcontractors on a project will be paid.
  - Claimant seeking to enforce a payment bond must give 20-day preliminary notice. Civil Code section 9560.
  - Payment Bond claim should contain:
    1. Value of labor or materials provided
    2. Name of party who hired you
    3. Description of work or materials provided
    4. Your name
    5. Description of the site





# Payment of Interest on late payment

- Interest and Attorney's Fees Are Available for Violations of Prompt Payment Obligations
  - Must pay a penalty of 2% of disputed amount per month for every month payment is not made.
  - Delayed progress payments carry an interest at 10% per year.
  - Prevailing party also can collect attorney's fees and litigation costs.

This area of law is complicated.

# Breach of Contract Action

- Subcontract Agreement Between Prime and Sub
- Failure to pay may be grounds to file a lawsuit alleging breach of contract
- Per the Subcontract Agreement, you may be entitled to attorney's fees and costs
- Breach of Contract Cause of Action may be part of a Stop Notice lawsuit
- Seek representation of counsel if you choose to pursue a breach of contract action



**MetroConnect**

OUR COMMITMENT TO  
SMALL BUSINESS SUCCESS

# *Dispute Resolution*

*Ivan Page, Executive Officer*



An isometric illustration of a city street scene. In the foreground, a white tram with a blue stripe is moving across a crosswalk. To its left, an orange bus is also on the road. A blue car is visible on the right side of the street. Pedestrians are walking on the sidewalks, and a person is riding a bicycle. In the background, there are green trees, a street lamp, and a building. The scene is set against a light purple sky. A dark purple rectangular box is overlaid in the center of the image, containing the title text.

# Dispute Resolution Enforcement/Remedies



Metro

# Dispute Resolution

- Disputed work does not fall under the Prompt Payment provisions since it represents work which is not yet accepted
- Contractor must have a dispute resolution process included in your subcontract agreement.
  - It is recommended that dispute resolution process includes a specific timeline to initiate and resolve disputes.
- DEOD is available to facilitate an informal meeting between subcontractor and their prime contractor



**MetroConnect**

OUR COMMITMENT TO  
SMALL BUSINESS SUCCESS

*Enforcement/Contract Remedies*  
*Elke Campbell, Director*  
*Small Business Programs, DEOD*



# Enforcement and Contract Remedies

- Failure to comply
  - May constitute a breach of contract
- Examples of Administrative Remedies:
  - Terminating the contract
  - Debarment
  - Penalty of 2% per month on the improperly withheld amount and attorney's fees and cost if subcontractor prevails



**MetroConnect**

OUR COMMITMENT TO  
SMALL BUSINESS SUCCESS

# *Key Take-Aways*

*Elke Campbell, Director*

*Small Business Programs*

*Diversity & Economic Opportunity Department*





# Key Take-Away's

- Read your contract before signing!
- Make sure prompt payment/release of retainage clause and dispute resolution process is included in contract
- Understand how to submit invoice and releases for payment
- Obtain written authorization to perform change order work

# Key Take-Away's

- Know how to submit notice or a claim against a Payment Bond
- Know when and how to issue a Stop Payment Notice and your obligations thereafter
- Know how to seek payment of interest on late payment
- Notify DEOD via email of any prompt payment issues
- Seek legal advice as appropriate

# Prompt Payment Laws

- General Principles—Civil Code sections 8800-8822; Business & Professions Code sections 7107, 7108.5, 7108.6; Government Code sections 926.19, 927.4; Public Contract Code section 10261.5, 10262.5, 10853, 20104.50, 22300
- Exception of Good Faith Disputes—Public Contract Code section 7107

# Prompt Payment Laws

- Penalties for Failure to Pay within 7 Days after Receipt of Progress Payment—Public Contract Code section 10262.5
- Willful Failure to Pay—Business & Professions Code section 7120
- 49 Code of Federal Regulations Part 26



**MetroConnect**

OUR COMMITMENT TO  
SMALL BUSINESS SUCCESS

*Diversity & Economic Opportunity Department*

Small Business Compliance Inquiry

[SBcomplianceinquiry@metro.net](mailto:SBcomplianceinquiry@metro.net)





**MetroConnect**

OUR COMMITMENT TO  
SMALL BUSINESS SUCCESS

# Q&A

*Olga Mireya Lopez, Sr. Rep*

*Moderator*

*Diversity & Economic Opportunity Department*





**MetroConnect**

OUR COMMITMENT TO  
SMALL BUSINESS SUCCESS

# Jan Davis, Representative

## Diversity & Economic Opportunity Department





**MetroConnect**

OUR COMMITMENT TO  
SMALL BUSINESS SUCCESS

# Metro Connect Upcoming Virtual Events - September

Lunch & Learn With The Primes: CLARK Construction  
September 24, 2020  
11:30 am







**MetroConnect**

OUR COMMITMENT TO  
SMALL BUSINESS SUCCESS

thank  
you



**Metro**