

0072402 LEGAL REQUIREMENTS AND RESPONSIBILITY TO THE PUBLIC
INTERNAL/INDUSTRY REVIEW COMMENTS

Art Berger
OGC

Comments: (3-2-16, Internal)

I recommend against these changes for the following reasons:

Regarding subparagraph 1: Withholding progress payments may harm the subcontractors some of which may be DBE. Many subs need to be timely paid for completed work to remain in business. In general, a Contractor should be paid for properly completed work.

2: "Assessing Sanctions" is vague. The Contractor is not aware of what it is agreeing to when it signs the contract. The sanctions should be defined and pursuant to proper statutory authority.

3. Liquidated damages are for delays, impacts to the traveling public, etc. as defined by Chapter 337. I don't see the connection between imposing liquidated damages as authorized by Chapter 337 and this breach of the contract. How are the liquidated damages going to be calculated re: the number of days?

4. Regarding disqualification from future bidding, I am not sure that this breach is a basis for either a finding of non-responsibility or suspension or revocation of Certificate of Qualification.

Termination of the Contract is already in the Spec and would seem to be adequate incentive to comply.

Response: (Watson response): This change is a requirement from federal regulations. 49 CFR Part 26.13 was recently changed and we are just trying to get the specifications changed to match the new language.

(Berger response to Watson): My original comments regarding this change to the Standard Specifications pointed out that some of the remedies included in the Federal Regulations, such as imposing liquidated damages and sanctions, appear inconsistent with the intent and legislative authorization underlying the Department's construction contracts.

I am now advised that Federal Highway is requiring that this additional wording be included in the Department's construction contracts. Also, it is noted that the new wording required by Federal Highway states:

or such other remedy as the recipient **deems appropriate**,
which **may** include, but is not limited to:

Therefore, I withdraw my objections to this change to the Standard Specifications subject to the Department's understanding that the Department may not be able to employ all of the listed remedies due to the fact that the remedy is not supported by state statute or lacks a means of implementation within the current provisions of the contract. Also, the wording that Federal Highway is seeking to have added does not appear to require that all of the remedies be available for use by the Department.

No changes made.

Dave Sadler
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Comments: (3-2-16, Internal)
I agree with Art.

Response: Please see Art Berger's additional response above.

Tim Lattner
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Comments: (3-2-16, Internal)
I also agree with Art's comments.

Response: Please see Art Berger's additional response above.

Dave Sadler
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Comments: (3-11-16)
Same position as expressed on March 2nd that this shouldn't be included.

Response: Please see Art Berger's additional response above.

Pat McCann
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Comments: (3-29-16)
In regards to the 4 listed remedies; "Assessing Sanctions": This seems too vague to be enforceable. Do we have examples? "Liquidated Damages" I believe Florida Statutes limits when these can be applied. I don't believe the Dept. can use them as a punitive/corrective measure to make a contractor comply with the particular CFRs.

Response: Please see Art Berger's additional response above.

Robert Nieves
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Comments: (4-6-16)

I would suggest to follow the guidelines of the U.S. Federal Government in employment on the basis of: "race, color, religion, sex, national origin, political affiliation, sexual orientation, gender identity, marital status, disability and genetic information, age, membership in an employee organization, or other non-merit factor."

Response: Please see Art Berger's additional response above.

Eddy Scott
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Comments: (4-6-16)

Suggest language be changed to read: "which may result in the termination of this Contract or such other remedy as the recipient deems appropriate, including but not limited to:"

Response: Please see Art Berger's additional response above.

Susana Herrera
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Comments: (4-7-16)

We have concerns regarding the proposed language to be incorporated to Section 7-24.2 Required Contract and Subcontract DBE Assurance Language. Concerns are identified as follows:

1. Who has jurisdiction for the implementation of proposed sanctions? DBE is a federal program, monitored under EEO Office, and technically not applicable under state contracts. We understand that the state expanded the DBE program to non-federal contracts in order to "maximize or bank DBE dollars" on all federal and non-federal contracts. EEO office is not involved on non-federal contracts.

Response: Jurisdiction, evaluation and implementation would continue to be handled by Construction and Legal, as is currently being done.
No changes made.

2. What is the process of evaluation of any allegation prior to the issuance of determination that Contractor has "failed to carry out the requirements of 49 CFR Part 26 related to discrimination"?

Response: Please see response to Herrera comment No. 1.

3. To the extent that the department outlines "sanctions" (as noted on proposed language), there should be quantitative measures related to effective dates and costs such as:

a. Withholding monthly progress payments: Who will initiate? Will it be implemented after determination or upon "allegation"?

Response: Please see response to Herrera comment No. 1.

b. Assessing sanctions: What are the sanctions?

Response: Please see response to Herrera comment No. 1.

c. Liquidated damages: Is there a schedule of liquidated damages?

Response: Please see response to Herrera comment No. 1.

d. Disqualifying the Contractor from future bidding as non-responsible. Again, to be effective immediately, or is there a process for corrective action?

Response: Please see response to Herrera comment No. 1.

We are of the opinion that proposed language is too broad. It lacks clarity as to the entity with jurisdiction, levels of enforcement, and quantitative measures of sanctions.

Response: Please see response to Herrera comment No. 1 and Art Berger's additional response above. The language is taken directly from revised 49CFR26.13.

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ELECTRONIC CODE OF FEDERAL REGULATIONS

e-CFR data is current as of February 29, 2016

Title 49 → Subtitle A → Part 26 → Subpart A → §26.13

Title 49: Transportation
 PART 26—PARTICIPATION BY DISADVANTAGED BUSINESS ENTERPRISES IN DEPARTMENT OF TRANSPORTATION FINANCIAL ASSISTANCE PROGRAMS
 Subpart A—General

§26.13 What assurances must recipients and contractors make?

(a) Each financial assistance agreement you sign with a DOT operating administration (or a primary recipient) must include the following assurance: The recipient shall not discriminate on the basis of race, color, national origin, or sex in the award and performance of any DOT-assisted contract or in the administration of its DBE program or the requirements 49 CFR part 26. The recipient shall take all necessary and reasonable steps under 49 CFR part 26 to ensure nondiscrimination in the award and administration of DOT-assisted contracts. The recipient's DBE program, as required by 49 CFR part 26 and as approved by DOT, is incorporated by reference in this agreement. Implementation of this program is a legal obligation and failure to carry out its terms shall be treated as a violation of this agreement. Upon notification to the recipient of its failure to carry out its approved program, the Department may impose sanctions as provided for under 49 CFR part 26 and may, in appropriate cases, refer the matter for enforcement under 18 U.S.C. 1001 and/or the Program Fraud Civil Remedies Act of 1986 (31 U.S.C. 3801 et seq.).

(b) Each contract you sign with a contractor (and each subcontract the prime contractor signs with a subcontractor) must include the following assurance: The contractor, sub recipient or subcontractor shall not discriminate on the basis of race, color, national origin, or sex in the performance of this contract. The contractor shall carry out applicable requirements of 49 CFR part 26 in the award and administration of DOT-assisted contracts. Failure by the contractor to carry out these requirements is a material breach of this contract, which may result in the termination of this contract or such other remedy as the recipient deems appropriate, **which may include, but is not limited to:**

- (1) Withholding monthly progress payments;**
- (2) Assessing sanctions;**
- (3) Liquidated damages; and/or**
- (4) Disqualifying the contractor from future bidding as non-responsible.**

[79 FR 59593, Oct. 2, 2014]
