

# PREVAILING WAGE COMPLIANCE GUIDE FOR LOCAL CONTRACTING AGENCIES

## PROCESS FOR “WITHHOLDING CONTRACT FUNDS” “REJECTING FUTURE BIDS” AND “DEFAULT AND TERMINATION OF A CONTRACT”

*Mn/DOT Specification 1906, “Partial Payments”*, describes the Commissioner’s authority to withhold funds to protect the interests of the Department. Furthermore, pursuant with *Federal Highway Administration’s (FHWA) “Required Contract Provisions Federal-Aid Construction Contracts Form – 1273, Section IV, Subpart 6*, incorporated into contracts funded in whole or part with federal funds, the Contracting Officer may, after written notice to the Contractor, take such action as may be necessary to cause the suspension of any further payment, advance or guarantee of funds until such violations have ceased.

In addition, *Minnesota Statute 161.32, Subdivision 1(d)*, describes the Commissioner authority to reject the bid of any bidder failing to perform a previous contract with the state and *Mn/DOT Specification 1808, “Default and Termination of Contract”*, describes the Commissioner’s authority to take the prosecution of the work out of the hands of the Contractor.

However, prior to exercising these authorities, the Engineer shall give the Contractor, and it’s Surety due notice. The withholding of contract funds, in accordance with the above-mentioned specifications and/or provisions shall be implemented as soon as a possible prevailing wage violation is recognized; the rejection of future bids and default and termination of a contract shall be implemented as a “last resort” if the Contractor is not willing to comply.

### DEFINITIONS

#### (Mn/DOT Standard Specifications for Construction 2000 Edition, Section 1103)

**Commissioner:** The Commissioner of the Minnesota Department of Transportation, or the chief executive of the department or agency constituted for administration of Contract work within its jurisdiction.

**Contractor:** The individual, firm or corporation Contracting for and undertaking prosecution of the prescribed work; the party of the second part to the Contract, acting directly or through a duly authorized representative.

**Department:** The Department of Transportation or the State of Minnesota, or the political subdivision, governmental body, board, commission, office, department, division, or agency constituted for administration of the Contract work within its jurisdiction.

**Engineer:** The duly authorized engineering representative of the Contracting Authority, acting directly or through the designated representatives who have been delegated responsibility for engineering supervision of the construction, each acting within the delegated scope of duties and authority.

#### (Form 1273 - 29 CFR, Part 5.1, Definitions)

**Contracting Officer:** The individual, a duly appointed successor or authorized representative who is designated and authorized to enter into Contracts on behalf of the Federal Agency.

### IMPORTANT CONSIDERATIONS

1. Upon completion of the work under a contract, the Engineer shall consider issuing the final voucher as soon as possible. Failure to finalize a contract expeditiously could result in subsequent claims that may prevent the Department from finalizing a contract. However, before the issuing the final voucher, the Department shall ensure that the terms of the contract have been met. Failure on the part of the Department to ensure compliance could result in the Mn/DOT State Aid Division retaining funds from the Department in accordance with *Minnesota Rules 8820.3000, Subpart 5*.
2. For each contract, the Department shall consider withholding the final retainage pursuant with the following guidelines: (1) if the total amount of the Contract is \$1,000,000 or more, the Department shall retain funds not exceeding \$50,000, (2) if the total amount of the Contract is less than \$1,000,000, the Department shall retain at a minimum 5% of the total Contract. Retainage shall be withheld until the Department can ensure that the Contractor has met the terms of the contract or until the final voucher has been issued.
3. This guide specifies that the Engineer verbally notify the bonding company early in the process. As a “rule of thumb”, notifying the bonding company is usually the “last resort”. However, the justification for the early notification is related to the language established in *Minnesota Statute 574.31, Subdivision 2*, which summarizes that if an individual or the Department does not submit a claim on the Payment Bond within 120 days after the completion of work under the contract, the claim may be denied.
4. The Department and its legal counsel shall consider executing the steps outlined in this guide. Furthermore, it’s imperative that the Department ensures the “confidentiality” of all claimants and that only one point of contact is maintained between the Department, Contractor and its Surety.

The following are general guidelines that shall be considered prior to implementing the sanctions stated in Steps 8 and 9. *Steps 1 through 4 are the responsibility of the Engineer; steps 5 through 9 are the responsibility of the Department’s Attorney.*

- Step 1: Upon verbal or written notification that a possible prevailing wage violation exists, the Engineer shall provide written notice to the Contractor regarding the nature of the claim, along with the Engineer’s intent to withhold funds until the claim is investigated and determined to be in compliance. Additionally, the Engineer shall inform the Contractor that the bonding company has been verbally notified of the claim.
- Step 2: After conducting a preliminary audit regarding the financial extent of the claim, the Engineer shall consider withholding a “reasonable” portion of one or more partial estimates in accordance with *Mn/DOT Specification 1906*; or for federally funded contracts, in accordance with *FHWA Required Contract Provisions Federal-Aid Construction Contracts Form – 1273, Section IV, Subpart 6*.
- Step 3: If the claim is determined to be invalid, the Engineer shall release any partial estimates that may have been withheld as a result of the claim. However, if the claim is determined to be valid, the Engineer shall schedule a meeting with the Contractor to resolve the matter and continue to withhold the final retainage pursuant with the above-mentioned *Important Considerations, 2*.
- Step 4: If resolution cannot be obtained through a meeting, the Engineer shall inform the Contractor, in writing, to complete its obligations under the contract. The letter shall clearly state the

circumstances under which the Engineer has determined the Contractor has not met the terms of the contract. Furthermore, the Engineer shall include a reasonable deadline for this obligation to be fulfilled. A copy of this letter shall be forwarded to the Surety, District State Aid Engineer (DSAE), Labor Compliance Unit and the Department's Attorney.

- Step 5: In the event that the Contractor does not respond to the Engineer's correspondence, the Department's Attorney shall send a similar letter, demanding that the Contractor respond immediately, in writing, regarding the Contractor's intention to comply or not comply. A copy of this letter shall be forwarded to the Surety, District State Aid Engineer (DSAE) and the Labor Compliance Unit. For federally funded contracts, the FHWA should also be copied.
- Step 6: If the Department's Attorney does not get a proper response from the Contractor, the attorney shall write another letter, addressed to both the Contractor and the Surety, specifying all the facts of the alleged breach, ordering the Contractor, or its Surety, respond satisfactorily within 10 days or the Department may exercise its authority to execute one or more of the following actions:
- A. For federally funded contracts and in accordance with ***FHWA Required Contract Provisions Federal-Aid Construction Contracts Form – 1273, Section IV, Subpart 6***, the Department shall formally request that Mn/DOT withhold one or more partial payments on other federally funded contracts held by the Contractor.
  - B. Pursuant with ***Minnesota Statute 161.32, Subdivision (d)***, the Department shall reject any future bids. Additionally, the Department can formally request that Mn/DOT do the same.
  - C. The Department may consider default and termination of the contract in accordance with ***Mn/DOT Specification 1808***.

It's important to provide sufficient detail so that the Surety understands the situation. This notification shall be sent by certified mail. A copy of the correspondence shall be forwarded to the District State Aid Engineer (DSAE) and the Labor Compliance Unit. For federally funded contracts, the FHWA shall also be copied.

- Step 7: If the Contractor or Surety is non-responsive after 10 days, the Department's Attorney shall proceed with the above-mentioned recommendations listed in ***Step 6, Subparts A-C***. Additionally, the attorney shall send a letter addressed to both the Contractor and its Surety defining the actions that have been taken. This notification shall be sent by certified mail. A copy of this letter shall be forwarded to the District State Aid Engineer (DSAE) and the Labor Compliance Unit. For federally funded contracts, the FHWA should also be copied.
- Step 8: Pursuant with ***Minnesota Statute 161.32, Subdivision 1d***, the Department shall reject any future bids.
- Step 9: As a "last resort" and in accordance with ***Mn/DOT Specification 1808***, the Department and its attorney shall proceed with default and termination of the contract. Upon terminating the Contractor, the Department and its attorney shall work with the Surety to create an agreement between the two parties that describes the responsibilities of each participant to bring resolution to the prevailing wage violation.