

Old Contract Close Out Tips

February 2008

Can you provide me with suggestions and tips with respect to the following scenario:

We've been having continuing issues with contractors not responding to repeated requests/demands to provide intents and affidavits on public works projects. In some cases, we are left holding retainage even after the project's been closed out for a long time because the contractor never sends in the required documents. Some of these are federally funded projects which require as part of grant compliance that funds be released and the project be completely closed out. Those are the most difficult.

We've tried demand letters, holding back retainage to cover estimated unpaid prevailing wages when we don't get the affidavits back from the contractor or L&I, etc. We've thought about debarment, turning the retainage over to the state as unclaimed funds, and in one case we went through the USDOL to locate and distribute unpaid prevailing wages to workers who had not been properly paid.

What has your agency found effective in getting contractors to provide the documentation so you can pay out the full retainage and close out a project in a timely manner?

Terri Coe [tcoe@cityofpoulsbo.com]

Is it just the Intents and Affidavits? Sometimes I just go print it off the L&I website. We usually don't have a problem getting them. We had one once but that was because he had a Lic problem but once he got it fixed and we got the paperwork

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There are a couple contract administration items that jump out at me, especially on Federal Aid jobs:

- 1) They shouldn't pay the contractor initially until they get the Statement of Intents
- 2) They shouldn't close out the contract until they get the Affidavits
- 3) These forms are generally available online nowadays and can be obtained by the agency directly
- 4) Report the contractor to the Dept of Revenue or L & I if not in compliance

John Woodcock [woodcockj@ci.bonney-lake.wa.us]

We have the same problem, we have just use persistence.

Barbara Greenwalt [barbg@ci.north-bend.wa.us]

Progress payments are not made without Affidavits and Intents to match that time period.

Gerry McFaul, PE

City Engineer

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Gerry McFaul [gmcfaul@ci.moses-lake.wa.us]

We've been going through the same thing on a lot of projects. In some cases over a year after all work

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has been accepted, we are still hounding contractors for their Affidavits, holding substantial funds. In addition, the maintenance bond is required for at least 14 months after all of the paperwork is closed out. I don't understand, unless the contractors are having troubles getting the affidavits.

In one case the contractor told us he made so much money one year, he didn't want to receive the retainage until the next year.

I'm actually wondering if the contractors aren't waiting as long as possible to make sure no labor claims are made because they have to certify them as true.

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I'm having the same problem right now with one contractor, so I'd be happy to find out the tips.

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Nothing we've tried has been effective, and now FHWA is going to make it even harder to comply with state law without the local agency assuming the liability for the contractor's failures.

Alcorn, Jessica [jalcorn@portoftacoma.com]

I have to say, we've not had this problem, our contractors are usually on top of receiving their retainage.

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The City of Lynden does not pay the contractor anything until the intent to pay is received. Getting the final after that has not been a problem for us.

C. King Fitch [ckf@fridayharbor.org]

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The Town of Friday Harbor has not had a problem in this area.

Tom Fuchs
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Tom Fuchs [TFuchs@ci.everett.wa.us]

Given the scenario you've presented below it would be most difficult. We don't have experience with this scenario you've presented. We work very hard not to get ourselves into that scenario. I have copied sections of the 2006 WSDOT Standard Specifications and the WSDOT Construction Manual for your review.

The City of Everett references WSDOT Standard Specifications in our contracts, thus WSDOT division I, is what governs.

Essentially as project managers one has to constantly monitor when and if contractors are submitting timely Statement of Intent and Affidavits, (as well as much other subcontractor paperwork such as Request to Sublet Work forms, Certified Payrolls, Monthly Utilization Reports, D/WBE Affidavits and Cert.. on Federally Funded Projects), during the course of the work being done. If they are not, then per WSDOT the project managers have the power to withhold contractor payments. There are very few times that law gives that power to withhold contractor payments. This is one of them.

I've underlined areas that I thought would apply in the documents I've included in the attached pdf. In short what we've found effective to prevent this is timely monitoring of this paperwork, notifying contractors when they haven't sent in whatever is missing. Very seldom do we need to use the big hammer of withholding payments as contractors generally need just to be reminded of their contractual requirements, and the paperwork is generally submitted.

Michael, Pete [pete.michael@co.snohomish.wa.us]

This is a big problem for us too. We are starting to use the unilateral closure provisions of the WSDOT Standard Specifications to close out projects that seem to drag on and on. It is interesting to note that one contractor of ours is claiming that a 3-4 year project closure entitles him to interest on any payments that are due to him that we were finally able to get him to bill us for. I know your question deals more with documentation issues versus billing issues, but they are both related. I am coming to believe that you get the documentation you can, then discuss anything missing with your funding agency. Then ask them if you can close out the project unilaterally. It just doesn't make sense to keep these projects open for so long due to some missing documentation; of course every project is different and some documentation is much more important than others. Good luck in your efforts and please let me know if you discover a satisfactory solution.

Sheri Zimny [szimny@ci.olympia.wa.us]

As far as not receiving intents and affidavits...these should be addressed separately.
If Intents are not received, do not pay anything...no progress estimates, nothing. This should get their attention, and they should submit them.
As far as Affidavits, this can be more complicated. I know there is a process to do unilaterally, but am not sure what it is. If you never receive them, coordinate with Revenue and L&I and see if any back

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payments are required. If yes, write checks to them until all the retainage is gone or the back pay is covered. After that, send the contractor the rest or keep it in escrow until they request it. Yes, this can go on and on...but you hope that they want the funds and are willing to work with you to get it/them closed.

Julie Perez
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On behalf of the Snohomish County Public Works Contract Administration section, I am attaching a documentation-tracking example that we maintain on all of our construction projects. This is updated daily as documentation is received and we send this to the contractor on a monthly basis. It highlights items missing for compliance. We find it a very valuable tool and contractors seem to find it helpful to pass on to any subcontractors for missing items. Of course, phone calls, emails, and letters are also utilized to the contractor for non-responses. In some instances we obtain prior approval from our contractor to make contact with a subcontractor directly to obtain compliance documentation.

DOCUMENTATION TRACKING										
ABC CONSTRUCTION				FED-AID	BROS-2333 (088)	RC1111, RR222, RR333		REVISED:	12/28/07	
CONTRACTOR/SUBCONTRACTOR	CONTRACT AMOUNT	REQUEST TO SUBLET	STMT OF INTENT	CERT FOR FED AID	DBE?	EMPLOYEE INTERVIEWS	DBE RPTS	CERTIFIED PAYROLLS	AFF. OF WAGES PD	IN COMPLIANCE
PRIME:										
ABC CONSTRUCTION	\$14,101,252.50	N/A	YES			1		YES		
SUBS:										
SUPPLIES UNLIMITED	\$125,000.00	YES	YES	YES				2009		
CONWAY MACHINES		YES	YES	YES				YES		
SPEED CONSTRUCTION	\$12,000.00	YES		YES	YES	1	3	YES		
ARNOLD'S CONCRETE	\$33,000.00		YES					6/1/08		
TOM'S CONTRACTING (owner/operator)	T&M	YES	YES	YES				YES		
FRED'S REBAR		YES	YES	YES				YES		
LEFT BANK CONSTRUCTION	\$131,965.21	YES	YES	YES		1		YES		
HAPPY VALLEY TRUCKING	\$3,000.00	YES	YES	YES		1		YES		
INKIND TRUCKING (owner/operator)	T&M	YES	YES	YES						
PANDA FENCING	\$15,000.00	YES	YES					YES		
DBE GOAL 10%. THE FIRST WORKING DAY WAS 12/1/07 AND THE FINAL DAY WAS _____.										
DBE QUARTERLY REPORTS FILED FOR THIS PROJECT: _____										
***see payroll folder for date log of certified payrolls										

Jim Hodges [jhodges@ci.cameras.wa.us]

Sorry for the delay in answering... jeez, what a nightmare of a project. Unfortunately, I can relate.

I don't know who this is from, but they really did a good job of trying to find a remedy. I've got a couple of examples and some comments.

As far as the Intents go, of course some diligence in making sure an agency has them in hand for all of the contractors working on the sight before paying for the work, is good practice, and complies with the law... hindsight.

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Case #1) I inherited a \$5 mil. Library expansion/remodel project that was a huge mess. The prime subbed out almost all of the work, and promptly closed up their local office at the end of the project. So most of the \$250K in retainage rightfully belonged to about 35 subcontractors. The project was almost over when I got it. I constructed a spreadsheet with all of the contractors on it and listed the status of their intents, affidavits, and certified payrolls. In many cases, I dealt directly with the subs to get their paperwork. The Contractor's main office was in San Francisco and no one there knew anything about our project. I documented all of my efforts diligently, knowing that I was not going to be able to collect everything I needed in the end. After two years of effort, the Finance Director and I walked the file over to our attorney, gave him the full story, and he told us to release the retainage. Amazingly, we never received any claims against the retainage from any of the subs., although they called me frequently to find out where "their money was". We got audited of course, and the SAO mercifully, let us off the hook. No finding and no management letter. They said that it was an anomaly. They looked at our efforts, and compared the Library Project with other, more recent projects (which all looked good), and determined that we had fixed whatever problems we had, and acted with diligence and good faith... The project was about 5 years old when it finally got audited. A happy ending, but some sleepless nights in between. The prior P.M. here had some personal problems that kept him chronically absent from work for about a year, so no one was really "minding the store ..."

Case #2) An MBE subcontractor on a Federal Aid job went out of business in the middle of a \$10 mil. Street Project. Also, a WBE got caught by L&I underpaying her workers. L&I put a lien on the retainage along with a couple of other subcontractors and it took about two years for everything to get sorted out. Meanwhile, we had to hold the prime's retainage hostage and he never asked to have it put into an interest bearing account, so he got no interest on his \$500K. He's not happy about that... and is threatening to sue us. Our attorney has assured us that it's the contractor's burden to tell us what he wants us to do with his retainage. That was my take as well on RCW Title 60. Our projects are usually small, so our Finance Dept.'s S.O.P. is to just hold it.

Michael, Pete [pete.michael@co.snohomish.wa.us]

I was just informed by one of our staff that attended the Local Agency Guidelines Training Conference sponsored by WSDOT that one of the instructors or attendees mentioned writing a change order to take a credit for missing documentation from a contractor. Sounds very interesting although I would be interested to know how to assign a value to each missing item. I will advise as I find out more.

Carlson, Brian [Brian.Carlson@ci.vancouver.wa.us]

Sounds like the old age problem is still around and no one has the silver bullet yet. I remember a PWTF loan funded project I had many years back when I was at Clark County where we went round and round with a contractor in an attempt to close things out. It was embarrassing and frustrating after months and months (certainly more than a year maybe it was years) of trying - I can't remember how Terry Dale and I finally managed to close that one out. Maybe we finally got special permission from the PWTF Board to do so.

Cathy Robinson, CPPB

City of Shoreline

Cathy Robinson [crobinso@ci.shoreline.wa.us]

We don't make any payment to a contractors without an intent.

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If we are waiting for a subcontractor's intent, we don't pay the general or we will pay but deduct the subs work. If we need an affidavit for a sub, the general has been known to file on behalf of the sub (going through L&I). If you have a contract bond, contact the surety and let them know you are having difficulty getting the required paperwork from the contractor.

We have contacted L&I when we have had problems getting affidavits. L&I has always assisted.

However, we are still holding retainage from 1998 because the contractor will not send paperwork to the Dept. of Revenue.....

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We recently contacted L & I regarding this issue and they told us that they do not need/want to be involved since no payments have been made or retainage released. Our contact suggested creating an internal policy on how to handle the retainage for non-responsive contractors.

Charlotte Walther, CPPB

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Just attended a workshop today at which Ada Kreckow (425-290-1352), Prevailing Wage Agent, Region 1 (Snohomish, Skagit & Whatcom Counties), Labor & Industries presented.

Methods to Get Prime Contractor to File Their Affidavit of Wages Paid:

During the discussion regarding prevailing wage complaints, I asked if the awarding agency could file a complaint with L&I regarding the prime contractor not filing their Affidavit of Wages Paid and have L&I issue a "Notice of Violation" against the prime. She said, she would work with us to use that as a means, but could not guarantee all Prevailing Wage Agents would do the same. Ada stated that the awarding agency should send the prime contractor a certified letter requesting a certified copy of the Affidavit of Wages Paid. If the prime does not respond by the set deadline in the letter, the agency should send a copy of the letter to the Prevailing Wage Agent for the region in which the contractor is registered. Ada said that, as the Prevailing Wage Agent, she would follow up with the prime contractor and, if they did not respond to her request, she would issue a Notice of Violation. Receiving a Notice of Violation can lead to debarment, so it could be an effective means to get the prime contractor to file. Mike Purdy, University of Washington, who was also presenting, stated that he has used the performance bond as a tool before. He requested the bonding agent file the Affidavit for the prime contractor.

Filing Affidavit of Wages Paid for Subcontractors:

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If a subcontractor hasn't filed their Affidavit of Wages Paid, there are avenues the prime contractor can take through L&I. One being, that the prime can file the Affidavit for the subcontractor. Since the prime has the contract with the subcontractor, it is the prime contractor's responsibility to be sure Affidavits are filed for all of the subcontractors.