

# Revolving Funds (SRF/SWQIF/DWRF)

## Construction Phase Guidance

### Michigan Department of Environmental Quality

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<http://www.michigan.gov/deg>

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*Rev. November 2015*

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## Executed Contract Documents (Competitively-bid contracts only)

Following the loan closing and signing of the construction contract(s), one complete, signed copy of each contract document must be submitted to your DEQ project manager and must include the following items:

- A. Agreement
- B. Addenda
- C. Notice to Proceed (loan condition requires issuance no later than 60 days following loan closing).
- D. Payment Bond
- E. Performance Bond

## Loan Disbursement Procedures

- A. Loan disbursements that include construction costs will not be processed until all executed contract documents have been submitted.
- B. A DEQ Davis-Bacon Act Compliance Certification form must accompany every disbursement request that includes construction costs.
- C. Only one loan disbursement request will be processed in a single calendar month. The exception is for the first month where two requests may be submitted during the month (submittal date may be different within the month).
- D. All disbursement requests must be signed by the authorized representative and may be emailed or hard copies mailed to the DEQ project manager.
- E. Contingency funds may be used to cover the cost of eligible items not initially included in your loan. Approval from the DEQ project manager must be received prior to requesting any contingency amount.
- F. Under-runs on one line item may be used for overruns on another line item, provided the overrun is an eligible expense. However, if the 6-percent contingency is exceeded, there are no loan amendments.
- G. All project costs must be documented, regardless of whether or not they are eligible for loan assistance.
- H. **Documentation (e.g., invoices) to support costs requested for reimbursement must be submitted with each disbursement request.**

## Project Meetings/Site Visits

- A. Please notify your DEQ project manager of the preconstruction meeting and construction progress meetings so they can attend as schedules permit. In addition, copies of the construction progress meeting minutes **must** be submitted to your DEQ project manager. If regular progress meetings are not held, then the construction engineer **must** provide a monthly synopsis of construction progress to the DEQ project manager.
- B. The DEQ project manager and/or district staff will make site visits during construction as needed or upon request. The DEQ project manager should be notified when the loan recipient is ready to initiate operation of the project so a final site visit can be scheduled.

## Compliance with Davis-Bacon and Related Acts (SRF/DWRF only)

The loan recipient must complete and submit a Davis-Bacon Act Compliance Certification form with each disbursement request. Although submitted with the monthly request for loan reimbursement, certification that the project has remained in compliance with the Davis-Bacon Act must be based on a weekly review of contractor payroll records. The form is available at: [http://www.michigan.gov/documents/deq/deq-ess-mfs-formsguidance-Davis-BaconCert\\_332690\\_7.pdf](http://www.michigan.gov/documents/deq/deq-ess-mfs-formsguidance-Davis-BaconCert_332690_7.pdf). Additional information can be found in the Frequently Asked Questions document, available at: [http://www.michigan.gov/documents/deq/deq-ess-mfs-formsguidance-Davis-Bacon-FAQs\\_319434\\_7.pdf](http://www.michigan.gov/documents/deq/deq-ess-mfs-formsguidance-Davis-Bacon-FAQs_319434_7.pdf).

## Project Change Orders

- A. All change orders must be submitted to your DEQ project manager for review. In addition, all changes to the construction contract that could result in a revised Part 41 or Act 399 permit must be approved by the district engineer prior to construction of that portion of the project. All change orders must be submitted even if the loan amount is exceeded or costs are ineligible.
- B. Each change order must include the following information:
  - 1. Project name, project number, contract name or number, change order number, net cost of change order and revised contract amount, any additional days added to the contract and the revised contract completion date, and the signatures of the owner, contractor, and engineer with dates signed.
  - 2. A description of the change(s) and an explanation or reason for the change(s).
  - 3. Contractor/subcontractor quotes/proposals to support prices for new items of work.

4. All applicable drawings and technical information
- C. To be allowable, a change order item must be within the scope of the loan project and conform with loan eligibility guidelines. District staff will review change orders for compliance with the construction permit requirements and technical acceptability.
- D. When change order reviews have been completed, the DEQ project manager will send a change order approval/denial letter to the loan recipient. Change order costs should not be included in a loan disbursement request until the change order has been approved by the DEQ.
- E. The loan recipient may appeal a change order determination. The authorized representative must notify the DEQ project manager in writing that they disagree with the determination and provide supporting documentation to support their position.
  1. The DEQ project manager will review the supporting documentation and will notify the authorized representative whether the determination is changed or remains the same.
  2. If a disagreement with the determination remains, the loan recipient may appeal further in accordance with Rule 13 of the State Revolving Fund administrative rules ([http://www.michigan.gov/documents/deq/deq-ess-mfs-lawsregs-SRFRULES\\_249102\\_7.pdf](http://www.michigan.gov/documents/deq/deq-ess-mfs-lawsregs-SRFRULES_249102_7.pdf))

## **Initiation of Operation (I/O) Notification**

- A. The loan recipient is required to notify the DEQ project manager in writing when the project initiates operation. The loan recipient must notify the DEQ district engineer of the I/O date as well if construction of the project is under a permit or Administrative Consent Order. Initiation of operation is defined as the date when the project becomes capable of operation for the purposes for which it was planned, designed and built (typically equates to substantial completion).
- B. The proposed I/O date indicated in the loan application dictates the loan repayment schedule. The "actual" I/O of the construction project may differ from the target date specified; however, the repayment date of the loan will not change.

## **Administrative Completion**

- A. Administrative completion occurs after the final allowable project costs are verified and the completion of the loan scope is confirmed.
- B. In conjunction with the submittal of the contractor's final pay estimate, the authorized representative must certify that all work has been completed and accepted by the owner, all punch list items have been addressed, and all retainage has been released to the prime contractor(s).

- C. The final disbursement request must tabulate all eligible project costs, including those costs exceeding the loan amount. A disbursement request should not be marked “final” until approved final project costs have been established by the project manager. Your project manager will work with you to facilitate preparation of a final disbursement request that reflects the appropriate DEQ-approved final cost figures.
- D. In most cases, your loan project will be ready for administrative completion as soon as the project manager has verified the final project costs and a final disbursement request that accurately reflects the approved final costs has been processed. If an overpayment has occurred due to ineligible costs being reimbursed, administrative completion must wait until the Michigan Finance Authority (MFA) has received the proper repayment of the amount owed. If the verification of final project costs results in an amount equal to or less than the loan award, an administrative completion letter will be issued. When the final cost is less than the loan commitment, MFA will recalculate the loan repayment schedule to reflect the lesser amount.
- E. Once the administrative completion notification has been sent, the MFA will make any necessary adjustments to the loan, recalculate the loan repayment schedule if the final cost is less than the loan commitment, or use the existing repayment schedule. The MFA will notify the authorized representative in writing of any adjustments.

## **Project Record Keeping Requirements**

Project records should be retained by the loan recipient for a period of three years from the date of the administrative completion letter. Project files are subject to examination by the MFA, the DEQ, or the U.S. Environmental Protection Agency.

## **Attachment A**

### ***Guidance on Retainage***

## Guidance on Retainage

Public Act 524 took effect January 1, 1983, and regulates the retainage of payments on construction contracts with public agencies. This Act states that if the public agency chooses to retain funds, the funds must be deposited in an interest bearing account for the contractor. The Act also states that a public agency **is not** required to deposit retained funds in an interest bearing account **if** the retained funds are to be provided under a **state or federal grant** and the retained funds have **not** been paid to the public agency.

The question has been raised over the years as to whether or not a public agency has the option of **not** depositing retained funds in an interest bearing account if the retained funds are to be provided under a SRF/DWRF loan AND the funds are not requested for disbursement. Under our loan programs, any funds drawn from a loan, including retainage, are subject immediately to our interest rates. Consequently, in order to avoid the earlier interest charges, some communities have opted not to request the retainage in a disbursement request until it actually needs to be paid to the contractor. However, this action also has caused disputes from contractors who believe that their retained monies should have been drawn and deposited into an interest bearing account.

Unfortunately, Act 524 is subject to more than one interpretation. The Act exempts projects using state or federal **grants** from the requirement to deposit retained funds into an interest bearing account. It is silent on the applicability of this option to state or federal **loans** (subsidized by federal grants). Consequently, it is difficult to render an interpretation of this Act that would have sufficient validity to withstand a legal challenge.

While the decision is yours, communities and consultants should consider the impacts of how they may choose to handle retainage. The fostering of a good working relationship with your contractor may outweigh any monetary benefits derived from deferring retainage draws. Whatever option you choose to implement should be discussed with your contractor at the preconstruction meeting.

## **Attachment B**

***Public Act 524***

## **Construction Contracts With Certain Public Agencies Act 524 of 1980**

AN ACT to provide for the terms of certain construction contracts with certain public agencies; to regulate the payment and retainage of payments on construction contracts with certain public agencies; and to provide for the resolution of certain disputes.

*The People of the State of Michigan enact:*

### **125.1561 Definitions.**

As used in this act:

- (a) "Agent" means the person or persons agreed to or selected by the contractor and the public agency pursuant to section 4(2).
- (b) "Architect or professional engineer" means an architect or professional engineer licensed under Act No. 299 of the Public Acts of 1980, being sections 339.101 to 339.2601 of the Michigan Compiled Laws, and designated by a public agency in a construction contract to recommend progress payments.
- (c) "Construction contract" or "contract" means a written agreement between a contractor and a public agency for the construction, alteration, demolition, or repair of a facility, other than a contract having a dollar value of less than \$30,000.00 or a contract that provides for 3 or fewer payments.
- (d) "Contract documents" means the construction contract; instructions to bidders; proposal; conditions of the contract; performance bond; labor and material bond; drawings; specifications; all addenda issued before execution of the construction contract and all modifications issued subsequently.
- (e) "Contractor" means an individual, sole proprietorship, partnership, corporation, or joint venture that is a party to a construction contract with a public agency.
- (f) "Facility" means a building, utility, road, street, boulevard, parkway, bridge, ditch, drain, levee, dike, sewer, park, playground, or other structure or work that is paid for with public funds or a special assessment.
- (g) "Progress payment" means a payment by a public agency to a contractor for work in place under the terms of a construction contract.
- (h) "Public agency" means this state, or a county, city, township, village, assessment district, or other political subdivision, corporation, commission, agency, or authority created by law. However, public agency does not include the state transportation department, a school district, junior or community college, the Michigan state housing development authority created in Act No. 346 of the Public Acts of 1966, as amended, being sections 125.1401 to 125.1496 of the Michigan Compiled Laws, and a municipal electric utility or agency. "Assessment district" means the real property within a distinct area upon which special assessments are levied or imposed for the construction, reconstruction, betterment, replacement, or repair of a facility to be paid for by funds derived from those special assessments imposed or levied on the benefited real property.

(i) "Retainage" or "retained funds" means the amount withheld from a progress payment to a contractor pursuant to section 3.

**125.1562 Construction contract; designation of person to submit written requests for progress payments; designation of person to whom requests for progress payments to be submitted; manner and times of submissions; deferring the processing of progress payments; payment of requested progress payment; failure of public agency to make timely progress payment; interest.**

(1) The construction contract shall designate a person representing the contractor who will submit written requests for progress payments, and a person representing the public agency to whom request for progress payments are to be submitted. The written requests for progress payments shall be submitted to the designated person in a manner and at such times as provided in the construction contract.

(2) The processing of progress payments by the public agency may be deferred by the public agency until work having a prior sequence, as provided in the contract documents, is in place and is approved.

(3) Each progress payment requested, including reasonable interest if requested under subsection (4), shall be paid within 1 of the following time periods, whichever is later:

(a) Thirty days after the architect or professional engineer has certified to the public agency that work is in place in the portion of the facility covered by the applicable request for payment in accordance with the contract documents.

(b) Fifteen days after the public agency has received the funds with which to make the progress payment from a department or agency of the federal or state government, if any funds are to come from either of those sources.

(4) Upon failure of a public agency to make a timely progress payment pursuant to this section, the person designated to submit requests for progress payments may include reasonable interest on amounts past due in the next request for payment.

**125.1563 Retaining portion of each progress payment to assure proper performance of construction contract; retainage; limitations; exceeding pro rata share of public agency's matching requirement; commingling and deposit of retained funds; releasing to contractor retainage and interest earned on retainage; irrevocable letter of credit.**

(1) To assure proper performance of a construction contract by the contractor, a public agency may retain a portion of each progress payment otherwise due as provided in this section.

(2) The retainage shall be limited to the following:

(a) Not more than 10% of the dollar value of all work in place until work is 50% in place.

(b) After the work is 50% in place, additional retainage shall not be withheld unless the public agency determines that the contractor is not making satisfactory progress, or for other specific cause relating to the contractor's performance under the contract. If the public agency

so determines, the public agency may retain not more than 10% of the dollar value of work more than 50% in place.

(3) The retained funds shall not exceed the pro rata share of the public agency's matching requirement under the construction contract and shall not be commingled with other funds of the public agency and shall be deposited in an interest bearing account in a regulated financial institution in this state wherein all such retained funds are kept by the public agency which shall account for both retainage and interest on each construction contract separately. A public agency is not required to deposit retained funds in an interest bearing account if the retained funds are to be provided under a state or federal grant and the retained funds have not been paid to the public agency.

(4) Except as provided in section 4(7) and (8), retainage and interest earned on retainage shall be released to a contractor together with the final progress payment.

(5) At any time after 94% of work under the contract is in place and at the request of the original contractor, the public agency shall release the retainage plus interest to the original contractor only if the original contractor provides to the public agency an irrevocable letter of credit in the amount of the retainage plus interest, issued by a bank authorized to do business in this state, containing terms mutually acceptable to the contractor and the public agency.

**125.1564 Construction contract; agreement to submit matters described in subsection (3) to decision of agent; designation of agent; dispute resolution process; use; agent to receive pertinent information and provide opportunity for informal meeting; decision of agent to be final and binding; vacation of decision by circuit court; dispute resolution resulting in decision; final progress payment to original contractor where public agency contracts with subsequent contractor.**

(1) The construction contract shall contain an agreement to submit those matters described in subsection (3) to the decision of an agent at the option of the public agency.

(2) If a dispute regarding a matter described in subsection (3) arises, the contractor and the public agency shall designate an agent who has background, training, and experience in the construction of facilities similar to that which is the subject of the contract, as follows:

(a) In an agreement reached within 10 days after a dispute arises.

(b) If an agreement cannot be reached within 10 days after a dispute arises, the public agency shall designate an agent who has background, training, and experience in the construction of facilities similar to that which is the subject of the contract and who is not an employee of the agency.

(3) The public agency may request dispute resolution by the agent regarding the following:

(a) At any time during the term of the contract, to determine whether there has been a delay for reasons that were within the control of the contractor, and the period of time that delay has been caused, continued, or aggravated by actions of the contractor.

(b) At any time after 94% of work under the contract is in place, whether there has been an unacceptable delay by the contractor in the performance of the remaining 6% of work under the contract. The agent shall consider the terms of the contract and the procedures normally

followed in the industry and shall determine whether the delay was for failure to follow reasonable and prudent practices in the industry for completion of the project.

(4) This dispute resolution process shall be used only for the purpose of determining the rights of the parties to retained funds and interest earned on retained funds and is not intended to alter, abrogate, or limit any rights with respect to remedies that are available to enforce or compel performance of the terms of the contract by either party.

(5) The agent may request and shall receive all pertinent information from the parties and shall provide an opportunity for an informal meeting to receive comments, documents, and other relevant information in order to resolve the dispute. The agent shall determine the time, place, and procedure for the informal meeting. A written decision and reasons for the decision shall be given to the parties within 14 days after the meeting.

(6) The decision of the agent shall be final and binding upon all parties. Upon application of either party, the decision of the agent may be vacated by order of the circuit court only upon a finding by the court that the decision was procured by fraud, duress, or other illegal means.

(7) If the dispute resolution results in a decision:

(a) That there has been a delay as described in subsection (3)(a), all interest earned on retained funds during the period of delay shall become the property of the public agency.

(b) That there has been unacceptable delay as described in subsection (3)(b), the public agency may contract with a subsequent contractor to complete the remaining 6% of work under the contract, and interest earned on retained funds shall become the property of the public agency. A subsequent contractor under this subdivision shall be paid by the public agency from the following sources until each source is depleted, in the order listed below:

(i) The dollar value of the original contract, less the dollar value of funds already paid to the original contractor and the dollar value of work in place for which the original contractor has not received payment.

(ii) Retainage from the original contractor, or funds made available under a letter of credit provided under section 3(5).

(iii) Interest earned on retainage from the original contractor, or funds made available under a letter of credit provided under section 3(5).

(8) If the public agency contracts with a subsequent contractor as provided in subsection (7)(b), the final progress payment shall be payable to the original contractor within the time period specified in section 2(3). The amount of the final progress payment to the original contractor shall not include interest earned on retained funds. The public agency may deduct from the final progress payment all expenses of contracting with the subsequent contractor. This act shall not impair the right of the public agency to bring an action or to otherwise enforce a performance bond to complete work under a construction contract.

**125.1565 Construction contracts to which act applicable.**

(1) Except as provided in subsection (2), this act shall apply only to a construction contract entered into after the effective date of this act.

(2) For a construction contract entered into before the effective date of this act, the provisions of this act may be implemented by a public agency, through a contract amendment, upon the written request of the contractor, with such consideration as the public agency considers adequate