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 **Division of Local Assistance (DLA)**
 Civil Rights Academy: Module 1
 February 1st, 2nd, 2023
 9:00am - 11:45am

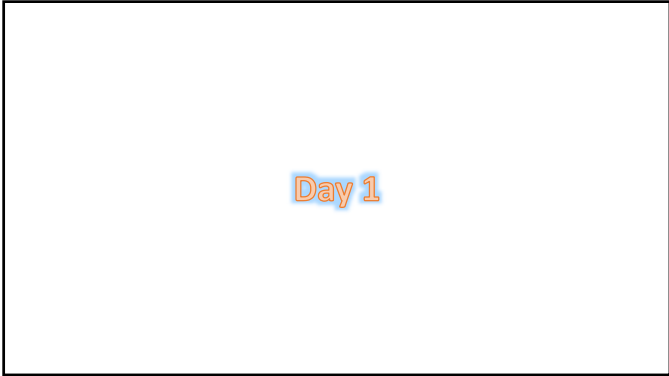
Day 1 - February 1 st		
Time	Topic	Presenter
9:00 AM	Welcome & Introductions	
9:10 AM	DBE procedures	Wenyl Long, Sr DBE Engineer, Division of Local Assistance
10:00 AM	Break (10 minutes)	
10:10 AM	DBE Program: Monitoring and Enforcement	Taylor Stamm, Compliance Branch Manager, Office of Civil Rights
10:35 AM	DBE Forms: Federally Funded Contracts	Cynthia Shipley, D3 Local Grant Manager, Division of Local Assistance
10:50 AM	DLA Reports: SBC and FHWA	Hau Doan, Sr DBE Engineer, Division of Local Assistance
11:05 AM	Break (5 minutes)	
11:10 AM	DBE Program: Construction Contract	Ginmay Beyene, Construction Oversight Program Manager, Division of Local Assistance
11:30 AM	DBE Program: Consultant Contract	Bing Liu, A&E Oversight Program Manager, Division of Local Assistance
11:45 AM	Day 1: Closing	

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 **Division of Local Assistance (DLA)**
 Civil Rights Academy: Module 1
 February 1st, 2nd, 2023
 9:00 am - 11:30 am

Day 2 - February 2 nd		
Time	Topic	Presenter
9:00 AM	Welcome & Introductions	
9:10 AM	Title VI	Daniel Burke, Program Review & Outreach Branch Manager
10:10 AM	Break (10 minutes)	
10:20 AM	ADA	Daniel Burke, Program Review & Outreach Branch Manager
11:30 AM	Day 2: Closing	

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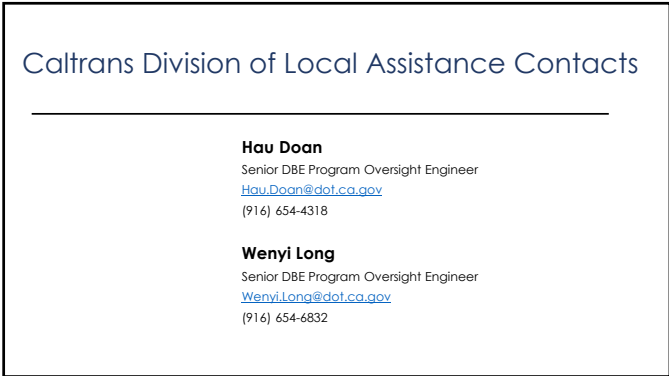
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Content

- DBE Program Objectives
- DLA DBE Procedures:
 1. Pre-award
 2. Post-Award
 3. Non-Compliance and Penalty

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DBE Program Objectives

- Ensure non-discrimination in award & administration of federally funded projects.
- Create a level playing field in which DBE Firms can compete fairly.
- Encourage more DBE firms to participate in federally funded projects

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DLA DBE Procedures

Pre-Award

- 1) Goal Setting
- 2) Good Faith Efforts (GFE)
- 3) Reconsideration Hearing
- 4) Required Contract Language

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Goal Setting

Policy:

All Federal-aid contracts that have subcontracting opportunities must have a DBE goal set. This includes construction, consultant (A&E and non-A&E) contracts, and master on-call consultant contracts.

(Zero goals or no goals require justification)

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Goal Setting

When to set the DBE Goal?

When the cost estimate for the project has been finalized:

- For a consultant contract: the scope of work along with cost estimate for the various professional services is complete.
- For a construction contract: the approximate, lump sum, pay quantities and associated costs for each item of work is complete.

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Goal Setting

A contract DBE goal is set based on the potential subcontract opportunities, location of work, and the availability of ready, willing and able DBE firms.

- 1) Classify work (subcontractor, trucking, material/supply)
- 2) Determine work category codes for subcontractor work items
- 3) Search the California Unified Certification Program database (CUCP) <https://caltrans.dbesystem.com/>
- 4) Apply DBE factors to items of work (100%, 10%, 12%)
- 5) Calculate a soft goal
- 6) Apply 80% factor
- 7) Round to nearest whole percent

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Goal Setting

To calculate the Contract DBE goal:

- Use Exhibit 9-D: DBE Contract Goal Methodology
- In Excel format (No PDF format)

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Goal Setting

Submitting the completed Exhibit 9-D to Caltrans for review:

- For consultant contract \leq \$500,000, or
- For construction contract \leq \$2,000,000
 - Submit the exhibit 9-D in excel format to DLAE, district will review and confirm the DBE goal calculation.
- For consultant contract $>$ \$500,000, or
- For construction contract $>$ \$2,000,000
 - Submit the exhibit 9-D in excel format to DLAE, and the DLAE will forward the 9-D to DBE Inbox: DBEGoal.GFE@dot.ca.gov.
 - OCR will review, approve or adjust the DBE goal for the contract within 15 business days.

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Good Faith Efforts

Policy:

Any contract that has a DBE goal must be awarded to a responsive consultant/bidder that meets the DBE goal or makes GFE to meet the goal.

(LAPM Chapter 9, Section 9.8)

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Good Faith Efforts

- The consultant/bidder took all *necessary and reasonable steps* to achieve a DBE goal that by their *scope, intensity, and appropriateness to the objective* could reasonably be expected to obtain sufficient DBE participation.
- Agencies consider the *quality, quantity, and intensity* of the different kinds of efforts.
- Efforts should be those that one could reasonably expect a bidder to take if the bidder were *actively and aggressively* trying to meet the goal.

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Good Faith Efforts

GFE package:

The local agency must obtain, complete, and review all the following documentation prior to determining a GFE:

For Consultant Contract:

- Exhibit 10-O1: Consultant Proposal DBE Commitment
- Exhibit 15-H: Proposer/Bidder Good Faith Efforts
- Exhibit 9-E: Local Agency Good Faith Efforts Review

For Construction Contract:

- A bid summary such as Exhibit 15-D: Bid Tabulation Summary Sheet
- All bidder's Exhibits 15-G: Construction Contract DBE Commitment
- All bidder's Exhibit 15-H: Proposer/Bidder Good Faith Efforts
- Exhibit 9-E: Local Agency Good Faith Efforts Review

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Good Faith Efforts

When do Bidders/Offerors need to submit those forms?

- Exhibits 15-G
Bidders need to submit the 15-G no later than 4 pm on the 5th day after bid opening.
- Exhibit 10-O1
Submit the 10-O1 with the consultant's proposal package.
- Exhibit 15-H
Submit the 15-H no later than 4 pm on the 5th day after bid opening.

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Good Faith Efforts

Who reviews the GFE Package?

Local Agency is responsible to review the GFE package

- Consultant contract ≤ \$500,000, or
- Construction contract ≤ \$2,000,000

DLAE will submit the GFE package to inbox:
DBEgoal.gfe@dot.ca.gov

- Consultant contract > \$500,000, or
 - Construction contract > \$2,000,000
- OCR review complete within 15 business days

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Good Faith Efforts

What happen if OCR's GFE Review Conclusion differs from the Local Agency's Original Evaluation?

- If Caltrans determines the GFE was inadequate, the local agency will take Caltrans feedback on GFE into consideration and re-evaluate the GFE. After the reevaluation:
- If the local agency still thinks the GFE is adequate, they can award the contract or start the negotiation process.
- If the local agency concludes that the GFE is inadequate, they must invite the low bidder or the most qualified consultant to an Administrative Reconsideration Hearing.

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Administrative Reconsideration Hearing

If local agency determines that the apparent successful bidder has failed to meet the GFEs requirements, the local agency, before awarding the contract, or negotiating, must provide the apparent successful bidder/most qualified consultant, an opportunity for an administrative reconsideration hearing in accordance with 49 CFR 26.53.

Reconsideration Panel:

- (1) Three People (Recommendation, not Regulation)
 - (2) Did not participate in the original GFE evaluation
- (Exhibit 9-H: Sample Procedure for Reconsideration Hearing)

The conclusion of the Reconsideration is final. The conclusion is not appealable to the local agency, Caltrans and FHWA.

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Required Contract Language

1. Contract Assurance

DBE regulations require the following contract assurance statement in every federal-aid contract and subcontract:

- The contractor or subcontractor must not discriminate on the basis of race, color, national origin, or sex in the performance of this contract. The contractor must carry out applicable requirements of 49 CFR 26 in the award and administration of federal-aid 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 recipient deems appropriate.

LAPM Chapter 9:
Exhibit 12-G – For Construction Contract
Exhibit 10-R – For Consultant Contract

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Required Contract Language

2. Prompt Progress Payment to Subcontractor/Subconsultant

Section 7108.5 of the California Business and Professions Code (CBPC) requires a prime contractor or subcontractor to pay any subcontractor not later than **seven (7) days** after receipt of each progress payment, unless otherwise agreed to in writing.

Section 3321 of the California Civil Code (CCC) requires prime design professionals (prime consultants directly in contract with a public agency) to pay any subconsultant not later than **fifteen (15) days** after receipt of each progress payment.

LAPM Chapter 9:
Exhibit 12-G – For Construction Contract
Exhibit 10-R – For Consultant Contract

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Required Contract Language

3. Prompt Payment of Withheld Funds to Subcontractors

Federal Regulation (49 CFR 26.29) requires one of the following three methods be used in federal-aid contracts **to ensure prompt and full payment of any retainage kept** by the prime contractor or subcontractor to a subcontractor:

Method 1:

- The local agency may decline to hold retainage from prime contractors
- Prime contractors and subcontractors are prohibited from holding retainage from subcontractors.

LAPM Chapter 9:
Exhibit 12-G – For Construction Contract
Exhibit 10-R – For Consultant Contract

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Required Contract Language

Prompt Payment of retainage

Method 2:

- The local agency may decline to hold retainage from prime contractors
 - Prime contractor and subcontractors are allowed to hold retainage
- Include language to obligate the prime contractors to make prompt and full payment of any retainage within the following timeframes after the subcontractor's work is satisfactorily completed:
- For construction subcontracts, retainage must be paid not later than **seven (7)** days unless otherwise agreed to in writing
 - For consultant contracts, retainage must be paid not later than **fifteen (15)** days unless otherwise agreed to in writing

LAPM Chapter 9:
Exhibit 12-G – For Construction Contract
Exhibit 10-R – For Consultant Contract

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Required Contract Language

Prompt Payment of retainage

Method 3:

- The local agency may hold retainage from the prime contractor
 - Prime contractor can hold retainage from subcontractor
- Provide for prompt and regular incremental acceptances of portions of the contract, as determined by the agency, pay retainage to the prime contractor based on the acceptances and include a contract clause obligating the prime contractor and subcontractors to pay all retainage owed to all subcontractors within the following timeframes after the subcontractor's work is satisfactorily completed:
- For construction subcontracts, retainage must be paid not later than **seven (7)** days of receipt unless otherwise agreed
 - For consultant contracts, retainage must be paid not later than **fifteen (15)** days after receipt of final retention

LAPM Chapter 9:
Exhibit 12-G – For Construction Contract
Exhibit 10-R – For Consultant Contract

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Required Contract Language

Monitoring and Enforcement Mechanism for Prompt Payment

Per 49 CFR 26.29(d), and LAPM Ch. 9, section 9.6, the Agency is required to stipulate the monitoring and enforcement mechanisms in the contract to ensure that all subcontractors, including DBEs, are promptly paid. These mechanisms may include:

- Appropriate penalties for failure to comply with the terms and conditions of the contract.
- The mechanisms may also provide that any delay or postponement of payment among the parties may take place only for good cause with the Agency's prior written approval.

LAPM Chapter 9:
Exhibit 12-G – For Construction Contract
Exhibit 10-R – For Consultant Contract

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Required Contract Language

4. Termination and Replacement of DBE Subcontractors

- The prime contractor (consultant) shall utilize the original specific DBEs listed to perform the work and supply the materials unless the contractor (consultant) obtains the Agency's written consent.
- The prime contractor (consultant) shall not terminate or replace a listed DBE for convenience and perform the work with their own forces or obtain materials from other sources without prior written authorization from the Agency.
- If a listed DBE is terminated or replaced, the prime contractor must make good faith efforts to find another DBE to replace for the original DBE. The replacing DBE must perform at least the same amount of work as the original DBE under the contract to the extent needed to meet or exceed the DBE commitment.

LAPM Chapter 9:
Exhibit 12-G – For Construction Contract
Exhibit 10-R – For Consultant Contract

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Required Contract Language

Monitoring and Enforcement for DBE Terminations and Replacements

Per 49 CFR 26.53(h), LAPM Ch. 9, section 9.8, the Local Agency shall include administrative remedies in each contract in case the prime contractor or subcontractor terminate or substitute a DBE firm without the Local Agency's written approval. The remedies must include, but are not limited to:

- The contractor/consultant shall not be entitled to any payment for work or material unless it is performed or supplied by the listed DBE on the Exhibit 15-G, or Exhibit 10-O2

LAPM Chapter 9:
Exhibit 12-G – For Construction Contract
Exhibit 10-R – For Consultant Contract

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Required Contract Language

5. Commitment and Utilization

The Local Agency's DBE program must include a monitoring and enforcement mechanism to ensure that DBE commitments match DBE utilization

The Agency shall request the prime contractor to:

- Provide written confirmation from each DBE that the DBE is participating the contract.
 - For construction contract, using LAPM 9-I or equivalent form, and quote
 - For consultant contract, any type of written confirmation
- Notify the RE or Inspector of any changes to its anticipated DBE participation

LAPM Chapter 9:
Exhibit 12-G – For Construction Contract
Exhibit 10-R – For Consultant Contract

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Required Contract Language

The Agency shall request the prime contractor to:

- Provide this notification before starting the affected work
- Maintain records including:
 - Name and business address of each 1st-tier subcontractor
 - Name and business address of each DBE subcontractor, DBE vendor, and DBE trucking company, regardless of tier
 - Date of payment and total amount paid to each business

For more required contract language for the Commitments and Utilization, please see Exhibit 12-G and Exhibit 10-R.

LAPM Chapter 9:
Exhibit 12-G – For Construction Contract
Exhibit 10-R – For Consultant Contract

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Required Contract Language

6. DBE Running Tally of Attainments

After submitting an invoice for reimbursement that includes a payment to a DBE, but no later than the 10th of the following month, the prime contractor/consultant shall complete and email the Exhibit 9-F to business.support.unit@dot.ca.gov with a copy to the Agency

LAPM Chapter 9:
Exhibit 12-G – For Construction Contract
Exhibit 10-R – For Consultant Contract

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Required Contract Language

7. Commercially Useful Function (CUF)

- DBEs must perform a commercially useful function when performing work or supplying materials listed on the DBE commitment form
- The DBE value of work will only count toward the DBE commitment if the DBE performs a CUF
- If a DBE does not perform at least 30% of its contract with its own force, it will be considered that the DBE is not performing the CUF
- For the part of work that CUF is not performed, the LPA may deny the payment

LAPM Chapter 9:
Exhibit 12-G – For Construction Contract
Exhibit 10-R – For Consultant Contract

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DLA DBE Procedures

Post-Award

- 1) Commercially Useful Function
- 2) Termination and Replacement of DBE Firms
- 3) Prompt Payment

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Commercially Useful Function

1. DBEs must perform commercially useful function (CUF) when performing work or supplying materials listed on the DBE commitment form
2. The prime contractor must perform CUF evaluation for each DBE working on federal aid contract, with or without DBE goal
3. The prime contractor must perform a CUF at the beginning of the DBE's work and periodically continue to monitor the performance of CUF for the duration of the project
4. Use the form LAPM 9-J:DBE Commercially Useful Function Evaluation, to perform the CUF evaluation
5. LPAs will verify DBE's CUF by reviewing the 9-J.

(LAPM 9.7)

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Termination and Replacement of DBE Firms

1. A prime contractor cannot terminate or perform any work of a DBE listed on Exhibit 15-G, neither can it substitute any work of a DBE without the written consent of the LPA prior to any replacement taking place
2. If a prime contractor receives written permission from the LPA to terminate a DBE, the prime contractor must then make adequate GFEs for any necessary replacement of a DBE subcontractor to the extent needed to meet the DBE commitment

(LAPM 9.8)

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Termination of a DBE

To terminate a DBE with justifiable reasons, the following procedures must be followed:

1. Contractor must send a written notice to the DBE, simultaneously send a copy of this notice to the LPA. Request the DBE provide any response within 5 business days to both the contractor and LPA
2. If the DBE does not respond within 5 business days, the contractor may move forward with the request as if the DBE had agreed
3. Submit the DBE termination request by written letter to LPA and include reasons, written notice to DBE and DBE's response
4. LPA must respond in writing within 5 days

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Replacement of a DBE

After receiving the LPA's written authorization of DBE termination request, the contractor must obtain the LPA's written agreement for DBE replacement.

The following procedures must be followed to request authorization to replace a DBE firm:

1. Submit a request to replace a DBE with other forces or material sources in writing to LPA
2. If contractor has not identified a DBE replacement firm, submit documentation of GFEs to use DBE replacement firms within 7 days of LPA's authorization to terminate the DBE.

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Prompt Payment

- Progress Payment -- Contractor or subcontractor must pay their subcontractor within 7 days after receipt of each progress payment.
- Withheld Funds to subcontractors – Retainage must be paid within 7 days of receipt
- LPA, as the implementing agency, is responsible to monitor and ensure the Prompt Payment is made by contractors and subcontractors
- If contractor fails to promptly pay DBE firms or other subcontractors within 7 days of receiving a progress payment relating to that subcontractor's work notify LPA and take a performance failure withhold until corrected.

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DLA DBE Procedures

3. Non-Compliance and Penalty

From time to time, the following errors are seen:

- Advertise and award a contract without DBE goal
- Advertise and award a contract without evaluating GFE
- Advertise and award a contract without sending DBE goal calculation or GFE package to HQ for review
 - Those procedural errors could cause a local agency to lose the Federal funds.

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Non-Compliance and Penalty

- Not perform Commercially Useful Function
 - This violation will cause the work performed by DBE firm not be counted towards DBE credit, and the LPA may deny the payment.
- Terminate and Replace a DBE firm without LPA's prior written approval
 - Without the LPA's prior written approval, the work that is committed for original DBE but performed by any other firms will not be entitled for payment.
- Not pay DBE firms promptly
- If contractor fail to promptly pay its sub, the payment to the contractor will be withhold and penalties will accrue until the violation is corrected.

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End of Presentation

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DLA DBE Procedures Quiz



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True or False Question

For a construction contract of \$2 million, if a low bidder does not meet the goal, the GFE package must be sent to DBEgoal.gfe@dot.ca.gov for OCR to review.

- True
- False

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Answer:

For a construction contract of \$2 million, if a low bidder does not meet the goal, the GFE package must be sent to DBEgoal.gfe@dot.ca.gov for OCR to review.

- ✓ False

For construction contracts, the GFE package needs to be sent to DBEgoal.gfe@dot.ca.gov for OCR to review only for contracts that are more than \$2 million.

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Multiple Choice Question

For a construction contract, if a low bidder did not meet the DBE goal and the GFE was not adequate, the local agency:

- A. should award the contract to the next low bidder that met the DBE goal
- B. must invite the low bidder for an administrative reconsideration hearing before considering the next low bidder
- C. should re-advertise the contract and re-bid

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Answer:

For a construction contract, if a low bidder did not meet the DBE goal and the GFE was not adequate, the local agency

- B. Must invite the low bidder for an administrative reconsideration hearing before considering the next low bidder

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Multiple Choice Question

For a construction contract, in what time window does the Local Agency have to request the prime contractor or sub-contractor to promptly pay their sub-contractor after receipt of each progress payment, unless otherwise agreed to in writing:

- A. Not later than 7 days
- B. Not later than 15 days
- C. Not later than 30 days

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Answer:

For a construction contract, the Local Agency has to request the prime contractor or sub-contractor to promptly pay their sub-contractor after receipt of each progress payment not later than 7 days unless otherwise agreed to in writing.

A. Not later than 7 days

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True or False Question

If the Prime Contractor performs work shown on the Exhibit 15-G: Construction Contract DBE Commitment, to be performed by a DBE sub without prior written consent from the Local Agency, the Contractor is entitled to payment as long as the work is completed

- True
- False

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Answer

If the Prime Contractor performs work shown on the Exhibit 15-G: Construction Contract DBE Commitment, to be performed by a DBE sub without prior written consent from the Local Agency, the Contractor is entitled to payment as long as the work is completed

✓ False

The contractor must obtain the Local Agency's written approval to perform the work that is originally committed to a DBE firm

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