

# DIVISION OF LOCAL ASSISTANCE



## CONSTRUCTION OVERSIGHT INFORMATION NOTICE



DLA COIN Issue #10-06

Release Date: August 31, 2010

### **Welcome to the COIN!**

*This is the tenth issue of Caltrans Local Assistance Program Construction Oversight Information Notice, or "COIN" for short. These short, single-topic bulletins are intended to provide outreach information and guidance to local agencies on issues pertaining to the construction of Federal-aid projects. They cover a wide variety of subjects, including discussions of findings resulting from process reviews by Caltrans and/or FHWA, changes in procedures or regulations, reminders of existing procedures or best practices, and other timely information. The goal is to ensure proper and timely delivery of Federal-aid projects.*

### **TOPIC: Prompt Payment Provisions and Enforcement Mechanisms**

Local agencies are reminded that pursuant to Federal Regulation (49 CFR 26.29) all federal-aid projects must contain one of three prompt payment provision methods. These methods may be viewed in Section 9.6, "Local Agency Responsibilities Under Caltrans DBE Program Plan" of the Local Assistance Procedures Manual (LAPM). These prompt payment provisions apply to both DBE and non-DBE subcontractors. Each local agency is required to identify which prompt payment method it will use on an annual basis through the completion of Exhibit 9B, "Local Agency DBE Annual Submittal Form."

Some recent project reviews have shown that the prompt payment specification language had been excluded or failed to align with the local agency's method designated on Exhibit 9B. Local agencies need to ensure their contracts prompt payment provision corresponds to their selected prompt payment method identified on Exhibit 9B.

Another concern that has been noted occurs when the local agency has selected Method 3, which requires the local agency hold retainage from the prime contractor and make prompt and incremental acceptances of portions, as determined by the agency of the contract work and pay retainage to the prime contractor based on these acceptances. The prime contractors and subcontractors must then return all monies held in retention from their subcontractors within 30 days of receipt from the local agency. There have been instances where the local agency has selected this method, but failed to make incremental acceptance of portions of the work and corresponding release of retainage. This practice can negatively impact prime contractors and subcontractors cash flow. Local agencies who select Method 3 need to incrementally accept portions of the work in a timely manner to ensure retainage is distributed to prime contractors and subcontractors.

Federal Regulation 49 CFR 26.29(d) requires the agency have appropriate means to enforce prompt payment. These means may include appropriate penalties for failure to comply with the terms and conditions of the contract. The means may also provide that any delay or postponement of payment among the parties may take place only for good cause with the local agency's prior written approval. Local agencies are required to describe their monitoring and enforcement mechanisms in place to ensure subcontractor are promptly paid. This information is to be included on Exhibit 9B and submitted annually.

In addition, Section 7108.5 of the California Business and Professions Code requires prime contractors or subcontractors pay any subcontractor not later than 10 days of receipt of each progress payment, unless otherwise agreed to in writing. Contract specifications need to include this provision regardless of federal-aid status.