

## **“What to Expect in a Subcontract” Transcript**

### **Slide 1**

Hello and welcome to the “What to Expect in a Subcontract” online training course provided by the Disadvantaged Business Enterprise (DBE) Supportive Services program. DBE Supportive Services is provided in partnership with the Maine Department of Transportation (MaineDOT) and Eastern Maine Development Corporation.

DBE Supportive Services provides certified DBEs in the state of Maine with business assistance and training opportunities. It is a valuable resource that can help support the growth of your business.

### **Slide 2**

In this training course, we will review what certified DBE contractors may expect when entering into a sub-contractual relationship with general contractors for the MaineDOT. We’ll look at what terms and conditions a contractor may expect to see in its subcontract document including project specific and mandatory flow-down clauses from the federal government.

### **Slide 3**

For training purposes, let’s assume that one or more general contractors (or GCs) has solicited a bid from you on a specific MaineDOT project and that you have responded to them with a competitive price. We can also assume that MaineDOT has had its bid opening and a selection has been made. At this point, you have checked the MaineDOT bid site and found that a GC you provided a bid to, was selected and you are now part of that GC’s team. Good for you! While the proposal to award process may take some time between the GC and the MaineDOT, you can signal to the GC that you are ready to work when scheduled. Communications between your company and the prime contractor can take one or more avenues, including emails, phone calls and faxes. Be sure to respond timely to any inquiries from the GC.

Before you start work it is mandatory that you receive a subcontract document from your GC. This is a task the GC must accomplish before MaineDOT awards the contract so it is essential that once you receive it, you need to review it, understand it and return it to the prime in a timely manner. One of the key provisions of this subcontract is form FHWA-1273 from the Federal Transportation Department outlining mandatory clauses your company must comply with. Once you have reviewed the contract, sign the subcontractor acceptance form and return it to the GC before starting work.

### **Slide 4**

As a subcontractor you have several responsibilities to ensure a professional job is executed, failure to perform professionally and at a high standard may result in a future loss of business. Here are some key items for you to consider:

- Do not start without the subcontract in place! That’s very important.

- Be familiar with the federal provisions provided in the subcontract and know how to comply with them.
- High quality professional work done in a timely manner will in many cases result in repeat business from that GC.
- Sometimes things change, site conditions, material prices are just to name a few. Be sure to notify the GC of any changes from what you have bid.
- Know how to comply with accounting and billing processes and submit correct invoices.
- Finally, and it is hoped you considered this when you submitted your bid, you must have the ability to access other points of cash, such as a line of credit to cover interim expenses as it may be a long period of time between execution of work and receiving payment for the work.

### Slide 5

So – what does that subcontract document look like and what might it contain?

### Slide 6

While subcontracts will vary from GC to GC and from project to project, there are several topics that should be in every subcontract.

Project specific terms and conditions address the requirements of a specific effort to be performed, it should include a scope of work, how you will get paid for it, where the work will occur and the period of performance. Next are the state and federal mandatory clauses you must comply with and we'll go into them in more detail shortly.

Change Provisions may also be included in your contract – these clauses allow for the probability that something unexpected may happen and may impact how the work will be performed.

A default clause gives the GC a way to terminate the contractual agreement between you and the GC.

Warranties, the expectation is that your company will warranty your work for a given period of time and if it fails a method for the work to be reperformed at little or no additional cost to the GC.

### Slide 7

Project terms and conditions

Scope of work - Review this against the bid you submitted to ensure you have not missed something or that something hasn't changed. If it has, notify the GC immediately of the differences and, of course, any price impact of the change.

Pricing is obviously very important to your business. Don't assume that the prices in the draft agreement are correct; verify it against your submitted bid. If scope change has occurred and there is an impact, notify the GC of the change and the price impact where appropriate.

### **Slide 8**

Performance site – while this normally shouldn't change, it could, so review this too. For example, let's say you were planning on sowing grass seeds on a highway for 5 miles in an area that was relatively flat and you were planning to use a specific vehicle that cost you less to operate and only required a driver and an operator. Now MaineDOT has changed the 5 miles in one direction and it now incorporates a sloped area. This may or may not change how you plan to do the work, perhaps a different vehicle or now you need two operators. This impacts your cost and the subcontract should be adjusted accordingly.

Period of Performance – perhaps when you originally bid this, the work was to be performed in the spring. Now the schedule has been moved to August, your busiest time of the year. Can you still do the work with the personnel originally scheduled or do you need to hire temps? Review and consider impact on your business. Where possible if you can accommodate changes without business impact, do so, but if there is an impact you need to notify the GC and you have the right to request an adjustment.

### **Slide 9**

Mandatory Flow down Clauses - I will tell you here that I am not a lawyer and my word is not the final authoritative say on clauses. The purpose of this training session is to help you understand at a very high level what may be contained in your contract documents. To ensure compliance and minimize risk you should consult an attorney of your choice to clearly understand what is required of your company.

### **Slide 10**

EEO Pledge Title 49 - This clause states that you will notify the appropriate union or your local Maine job service office where you intend to obtain labor of your pledge to provide EEO without regard of race, color, religion, sex, or national origin. There will be a form you may use to notify these offices.

The EPA National Pollutant Discharge Elimination Systems – you will comply with the requirements of the Storm Water Pollution Prevention Plan for your project. If you haven't seen this from your GC, get a copy and be sure you understand your role under this provision.

### **Slide 11**

Form FHWA-1273 – Federal Highway Administration Required Contract Provisions for Federal-Aid Construction contracts. This document is 9 pages long and covers a variety of activities you must be aware of. In this session we will not cover all topics, but will touch on those with the greatest impact to your business.

NonDiscrimination - Equal Employment Opportunity (EEO) – this requirement applies to subcontracts of \$10,000 or more and covers a variety of activities under the umbrella of Equal Employment Opportunity rights and responsibilities your company must abide by. It also includes the American Disabilities Act of 1990 and affirmative action.

In essence you agree that all applicants and employees will be treated fairly without regard to race, religion, sex, color, national origin, age or disability. Your company should designate someone as an EEO officer and develop an EEO policy as part of your company handbook. The handbook should be read by the employees and signed off every six months. You must also display the required EEO posters in a public area readily accessible to employees.

As head of the company, you must keep records relating to activities undertaken in support of EEO compliance. This includes copies of advertisements, company policy, minority and women hired among other documents and keep such records for a period of two years after contract completion.

For recruiting purposes in any advertisement you must insert the words “An Equal Opportunity Employer” and advertisements should be posted in publications that reach out to women and minority groups.

Personnel Actions, Trainings and Promotions require a company to establish fair wages and investigate any complaints. It also asks that you make full use of any training programs or OJT to hire and improve the skills of current employees and women and minority groups to be hired.

Non-Segregated Facilities – by signing the subcontract agreement your company is certifying under penalty of federal law that you will not maintain or provide separate facilities and will not perform work for companies that do on the basis of race, color, religion, national origin, age or disability because of habit, local custom or otherwise. In addition if you are subcontracting any portion of this work to another company that has a value over \$10,000, you must obtain such a certification from that company too.

### Slide 12

The Payment of Predetermined Minimum Wages is applicable to contracts exceeding \$2,000 unless the work to be performed on roadways is classified as local roads or rural minor collectors.

You must post the Department of Labor Poster WH-1321 or Form FHWA-1495 in a public area accessible to employees, which states the approved minimum wages and also to pay laborers and mechanics at least once per week the full amount due them. This includes any fringe benefits and is based on the approved minimum wage for that position.

The Davis Bacon Act (40 U.S.C 276a) is the guiding document for wage determination based on job classification. This Act also has application to apprentices, trainees and helpers and outlines required payment for overtime work. It is a complex requirement and requires a great attention to detail in accounting and finance.

We encourage you to seek assistance in setting up a program that meets all federal requirements as failure to comply could result in penalties and fines to your company.

**Slide 13**

To continue this discussion of wages and payrolls, we must look to Section V concerning Statements and Payrolls. This requires compliance to the Copeland Regulations at 29 CFR 3 and outlines what records must be kept in terms of payroll and payroll records for a period of 3 years after completion of the work. Proof must be submitted weekly of payroll made and Optional Form WH-347 may be used. When these records are submitted, you must certify that the information provided is correct and complete and that payment has been made in accordance with the Davis Bacon Act. As above, failure to comply may result in severe penalties and fines. There are several companies in Maine that have experience in setting up such programs and if you are just starting to do business with the MaineDOT, you are encouraged to take the time and money necessary to get the program set up initially so your company can remain in compliance at all times.

**Slide 14**

Section VI addresses the requirement for you to record materials, supplies and labor used in executing the subcontracted scope of work. This requirement has several exceptions and is applicable to contracts with a value of over \$1 million, but GCs can still require you to become knowledgeable about approved or acceptable materials. Be sure to keep adequate records of costs and quantities used, a final labor summary and then, if requested, submit these records to the GCs so they may show compliance to the MaineDOT.

**Slide 15**

Section VII of form FHWA-1273 discusses the subcontract and when subletting or assignment of the subcontract may be used. In general GCs may state the bulk of the work or not less than 30% must be performed by your company. If you chose to subcontract work out to a lower-tier company, in many cases, your GC may require pre-approval of lower tier subs before they can be used in any performance of the work.

As a subcontractor you should only use a qualified person to oversee the work and also to direct the companies while on-site. Subletting or assigning the contract may not occur without the written consent of the GC and possibly MaineDOT. This includes financing to receive payment prior to payment by the GC. If subletting or assigning does occur, it must be done in writing and contain all required provisions.

**Slide 16**

Safety and Accident Prevention is important to you as a company and to your employees at anytime work is being performed. Know the regulations; provide all safeguards, safety devices and protective equipment necessary to protect your employees while on the job, the environment and the public. This is not an area that you should cut corners on! Do not let employees work in unsafe, unsanitary, hazardous or dangerous conditions. You may assume that the Occupational Safety & Health Administration (or OSHA) or other

regulatory officials will regularly visit work sites to inspect, investigate and ensure compliance to construction safety and health standards.

**Slide 17**

Section IX, False Statements Concerning Highway Projects, requires people involved in federal highway activities to perform the work as carefully, thoroughly and honestly as possible. Do not falsify documents and if mistakes are made, admit them as soon as they are discovered to mitigate risk and damage. There is a statement that must be posted at the work site and be readily accessible to all persons. Any person making false statements in conjunction with the work being performed may be subject to fines and penalties.

The Clean Air Act and Federal Water Pollution Act are applicable to contracts and subcontracts of \$100,000 or more and requires compliance to the Clean Air Act. I strongly suggest if you are not familiar with this please get a copy of the clause and read it in detail.

**Slide 18**

Upon signing the subcontract document, you will be certifying that you and your business are not debarred, suspended, or otherwise ineligible to perform work under a federal contract. This certification covers 3 years preceding the subcontract. This would apply if you or your business have been convicted or had a civil judgment for the commission of fraud or criminal offense in connection with trying to obtain a federal transaction, or been convicted of antitrust violations, embezzlement, theft, forgery, bribery, falsification or destruction of records, making false statements or receiving stolen property. In addition you may not, during the 3-year period, have had a federal, state or local contract terminated for cause or default. You must also flow-down this certification to your lower tier subcontractors and obtain and maintain their certification as well.

**Slide 19**

Section XII is another certification concerning the use of Contract Funds for Lobbying. Again by signing the subcontract document, you will be certifying that no federal funds were used to influence or attempt to influence federal employees or members of Congress in order to obtain a federal contract, grant or loan. If federal funds were used, you must complete and submit Standard Form LLL, Disclosure Form to Report Lobbying. In addition, you must segregate funds used for lobbying in your accounting records. Failure to comply may result in fines and penalties. In addition, this clause must be flowed down to your lower tier subcontractors if the value exceeds \$100,000.

**Slide 20**

Other mandatory clauses may include statements surrounding the MaineDOT goals for employment of females and minorities. As a DBE, you are helping the GC meet its goals in their prime contracts with MaineDOT. All subcontracts over \$10,000 will have the same goals and they may be adjusted annually. We have already discussed in some detail the Affirmative Action and EEO clauses.

**Slide 21**

You may also see a notice of non-discrimination against Vietnam Era veterans.

**Slide 22**

The clauses, provisions and certifications we've just discussed may be found in the standard subcontract packet that MaineDOT provides. There are two methods to access this packet: by contacting Scott Bickford, the MaineDOT contracts engineer, or via the MaineDOT website.

**Slide 23**

This is your responsibility - if the subcontract document is not provided to you, you need to ask for it to be included in your subcontract. A failure on another's part does not remove liability from your company, it is up to you to be compliant and perform professionally. As always, ask for assistance from either your GC, MaineDOT or legal counsel. All are there to help you succeed.

**Slide 24**

Now, let's turn our attention to other provisions that may be included in your subcontract. Please note not all subcontracts may have these clauses in them but if you have established a good working relationship with your GC, it is not wrong for you to ask that these clauses to be included in your subcontract. After all it not only protects you and your business but them as well.

Change Orders are simply provisions that recognize a scope of work may change for a variety of reasons. They outline a process for notifying the GC that a scope change flowed down to you has an impact. Change provisions recognize that you are entitled to fair compensation for the change, whether it's in additional material or labor costs or both. Under most change provisions, you are not required to perform the changed scope of work without compensation. And in many situations, you are not authorized to perform the changed work until you sign off on the change. And if you do the work without that authorization, you may be liable for all extra expenses incurred. So do the paperwork up front which means notifying the GC that it is a change and then request compensation.

**Slide 25**

Differing Site Conditions refers to unknown conditions that may present itself only after work has started. For example, perhaps you attended a site visit to view the environmental conditions and get the lay of the land. By all, assumptions have been made based on history, knowledge and research. Once under contract and on site, you may find something that did not originally present itself. That is a differing site condition. It is imperative that you notify the site foreman immediately and follow it up with the GC. Keep records of all conversations and documents that substantiate your claim. If extra costs will be incurred, document that and send it to the GC. Come to an acceptable conclusion before starting work.

### **Slide 26**

Default clauses can vary greatly between GCs. Most may use the industry standard default clause, but read the clause provided in your subcontract carefully. Normally a GC will initiate default action based on a subcontractor's inability to complete the job in a timely manner, to an acceptable standard or in case of bankruptcy. Defaulting on a contract is an ugly thing and you should do everything in your power to avoid it. If you are having problems, it is better to talk and work with your GC before the situation gets out of hand. Between the two of you, there may be another alternative to default.

If default actions are started, the GC may withhold any payments due your company, select another company to perform the work and hold you responsible for any additional costs incurred. In many cases, if a performance bond was required, the bonding company will step in and get the job executed. If this happens, you may expect that the company may not bond you in the future or if they do, at an exorbitant cost. Do all that you can to avoid this situation.

### **Slide 27**

Warranties are standard and most of you are probably familiar with a standard warranty offered when you purchase a product or service. GCs may seek a warranty from you that guarantees your work and the material you provided against defects.

### **Slide 28**

Insurance is a necessary evil – as a business you should have a variety of insurances covering your business including liability and automobile insurance as well as Workers' Compensation. You may be required to submit proof of insurance in the required dollar amounts to your GC and be required to have either the GC or MaineDOT named as an additional insured on your policy. Be sure it is to a specific project and not in general.

### **Slide 29**

Retainage is pretty much an acceptable industry norm. It is used by the GC to withhold the final payment on your subcontract until the work has been accepted by MaineDOT and it can be around 5-10% of the subcontract value. You may not see final close out of your subcontract for a period of up to six months or more. So be prepared to close out your costs at your expense as payment may not be received in a timely manner.

### **Slide 30**

Bonds – we've talked about bonds briefly and there are two types of bonds, performance and payment bonds.

Performance bonds guarantees the work will be performed by you and if you don't then the bonding company will get someone else to do it. Premiums are paid by you and can be quite hefty. Make sure you figure in bonding costs when estimating the work.

### **Slide 31**

Payment bonds are used to guarantee payment for materials, supplies and labor. As with performance bonds they may ask for the full value of the subcontract. With either bond,

be sure to use a reputable surety for obtaining the bonds and as previously stated, include the costs of obtaining the bonds in your pricing as a component of overall cost. In both bonds, when the subcontract is closed out, the bonds are also closed out.

### **Slide 32**

In summary, this course offers a high level overview of what many subcontracts may include for terms and conditions. You may find all of these clauses and many more depending on the GC and scope of work. It is your ultimate responsibility to know and understand the terms and conditions and expectations for performance as listed in the subcontract and ask for assistance if necessary. If you see a clause from a GC that is unfamiliar to you and you don't understand it, ask the GC for clarification. All want you to succeed and to do the best work possible.

### **Slide 33**

The websites listed in this presentation contain hyperlinks. Clicking on these links will take you out of this presentation and directly to those sites.

For more information and assistance, here is a list of people that you can call or websites to visit.

- Amy Stewart – Eastern Maine Development Corporation
- The DBE Supportive Services website
- Scott Bickford – MaineDOT Contract Engineer
- MaineDOT DBE website

### **Slide 34**

The MaineDOT doing business website offers a wealth of information if you are interested in doing business with MaineDOT. The Associated General Contractors of America and Maine may have training courses you need and offer services, industry standards and practices to help you succeed in the construction business. The next two organizations, Maine Centers for Women, Work and Community and Women Unlimited, offer programs to women and minorities, job and apprenticeship training in non-traditional skills and may have people you can hire. They also offer training programs. The Maine Procurement Technical Assistance Center located at Eastern Maine Development Corporation in Bangor can assist you in finding other state and federal work as well as in reviewing the solicitations and providing contract management assistance.

### **Slide 35**

Finally, we at the DBE Supportive Services program wish you the best of luck in your pursuit of MaineDOT work and if we can be of service to you, please don't hesitate to contact us.