

**COMMONWEALTH OF VIRGINIA
DEPARTMENT OF TRANSPORTATION
CONSTRUCTION DIRECTIVE
MEMORANDUM**

GENERAL SUBJECT:	<u>NON-PAYMENT CLAIMS AGAINST CONTRACTOR</u>	NUMBER:	<u>CD-2008-10</u>
		DATE:	<u>MARCH 13, 2008</u>
SPECIFIC SUBJECT:	<u>PROCEDURES FOR HANDLING NON-PAYMENT CLAIMS AGAINST CONTRACTORS</u>	SUPERSEDES:	<u>CD-99-12</u>
DATE EFFECTIVE:	<u>IMMEDIATELY</u>	SUNSET/ EXPIRES:	<u>MARCH 13, 2013</u>

Original with signature on file in the office of the
Scheduling & Contract Division

**W. BYRON COBURN, JR., P.E.
STATE CONSTRUCTION ENGINEER**

DIRECTED TO - DISTRICT ADMINISTRATORS

The Contractor is responsible for payment or for making satisfactory arrangements for settling all bills for labor, materials, public utility services, rental of equipment, and all other items entering into or used in prosecution of contract work. To ensure that payments are made, the Department requires the Contractor to furnish a payment bond for contracts (with some limited exceptions). The payment bond covers all just claims for labor and material performed for or supplied to the Contractor or any Subcontractor. The following procedures shall be used in order to ensure that non-payment issues are consistently addressed on both bonded and unbonded contracts.

I. PAYMENT CERTIFICATION

Contracts Without Payment Bond – Certification Requirements

On contracts that do not have a payment bond, there are requirements for the Contractor to submit evidence of or to certify satisfactory payment.

1. The requirements of Section 109.07-Partial Payments (Section 109.08 in the 2007 Specifications), concerning contracts without a payment bond, are to be strictly enforced. If the Contractor does not furnish letters from materials suppliers and/or subcontractors that the Contractor has paid or made satisfactory arrangements for settling all bills for work that was paid on the previous monthly estimate, the dollar value of the pay items is to be withheld from payment on the current monthly estimate. Since it is a contractual requirement, the pay items will not be considered as acceptable for payment on subsequent vouchers until the letter(s) are provided.
2. The Scheduling and Contract Division Quality Control Engineer assigned to work with the particular District is to be notified immediately. A brief description of the situation and items involved should be provided.

3. At the time of final payment, in accordance with Section 109.09-Final Payment, (Section 109.10 in the 2007 Specifications), if the Contractor does not certify that he has paid or made satisfactory arrangements for setting all bills, the final estimate is still to be processed. A letter recommending the suspension of the Contractor from the prequalified bidder's list should accompany the final estimate submission. Payment should not be made for any pay items which the Contractor lacks a letter from a supplier or subcontractor certifying payment to them, otherwise, all other appropriate pay items should be paid in full for the accepted quantities.

Contracts with Payment Bond

On contracts that have a payment bond, the Contractor is not required to provide letters from suppliers and/or subcontractors concerning monthly payments. The Contractor is also not required to provide an overall payment certification as a prerequisite to final payment.

II. NON-PAYMENT CLAIMS

Claims alleging non-payment by the Contractor and/or subcontractor(s) are often directed to the Department by the claimant. The following procedures for handling notifications alleging non-payment are to be used for all non-payment claims (including those against subcontractors):

Contracts Without Payment Bond

1. All notifications are to be furnished to the appropriate Responsible Charge Engineer.
2. The Responsible Charge Engineer acknowledges receipt of the notification and advises the Claimant that the claim is being forwarded to the Prime Contractor for resolution. The Claimant is also advised that in the event the claim is not resolved, the Department will withhold sufficient funds from payment of the final estimate to cover the claim unless the Contractor has provided documentation to support non-payment (See Attachment No. 1)
3. The Responsible Charge Engineer transmits copy of the Claimant's notification and copy of the acknowledgement letter to the Prime Contractor and informs the firm of its responsibility to resolve the claim. The Contractor is further advised that in the event the claim is not resolved, the Department will withhold sufficient funds from payment of the final estimate to cover the claim and may take other actions as provided for in the Specifications unless the firm can provide documentation to support non-payment (See Attachment No. 2)
4. If the claim remains outstanding at the time of payment of the final estimate, sufficient funds to cover the claim are to be withheld from monies due the Contractor.
5. Withheld funds are retained until evidence is received that the claim has been resolved, adjudicated, or until expiration of the period of Statutory Limitation, whichever is the earlier.
6. If the claim for non-payment is from a subcontractor or supplier who has previously given the Contractor a letter of satisfactory payment received or if the Contractor has supplied his certification of payment required in Section 109.09, the Scheduling and Contract Division Quality Control Engineer for the District is to be notified. The non-payment claim will be investigated and the Scheduling and Contract Division Quality Control Engineer, in consultation with the Department Inspector General, will decide what course of action(s) to take.

Contracts With Payment Bond

1. All notifications are to be furnished to the appropriate Responsible Charge Engineer.
2. The Responsible Charge Engineer acknowledges receipt of the notification and advises the Claimant that the claim is being forwarded to the Prime Contractor for resolution. The Claimant is also advised that a payment bond has been furnished for the project and of the name and address of the Surety Company. (See Attachment No. 3)
3. The Responsible Charge Engineer transmits a copy of the Claimant's notification and a copy of the acknowledgement letter to the Prime Contractor requesting that appropriate action be taken to resolve the claim. A copy is to be furnished to the Surety Company. (See Attachment No. 4)
4. Payment of the final estimate is not to be delayed nor funds withheld as a result of claims against the Contractor for non-payment of bills, unless directed in writing by the State Construction Engineer.

DWM

C: Commissioner
Deputy Commissioner
Commissioner's Staff
Division Administrators
District Construction Engineers
District Maintenance Engineers
District Materials Engineers
District Preliminary Engineering Managers
District Location and Design Engineers
District Civil Rights Managers
District Contract Administrators
Regional Operations Directors
Residency Administrators
Area Construction Engineers
Construction Managers
Project Inspectors
Federal Highway Administration
Office of the Attorney General
Virginia Department of Minority Business Enterprise
Virginia Transportation Construction Alliance
Old Dominion Highway Contractors Association
Virginia Asphalt Association
American Concrete Pavement Association
Virginia Ready-Mixed Concrete Association
Precast Concrete Association of Virginia
Division Library

ATTACHMENT NO. 1
Example Acknowledgement Letter To Claimant
Contract without Payment Bond

(DATE)

Route _____ County _____
Project _____

Name and Address
of Claimant

Dear _____:

This is to acknowledge receipt of your letter of (Date) regarding an outstanding account in the amount of \$_____ for (Type of Material or Services) furnished for use on the subject project.

A copy of your letter is being furnished to (Name & Address of Prime Contractor), with the request that they take the necessary action to resolve your claim. In the event your account is not resolved, the Department will withhold sufficient funds to cover the claim from payment of the final estimate unless the Contractor has provided documentation to support the reason for non-payment.

By: Responsible Charge Engineer

C: District Administrator
Scheduling and Contract Quality Control Engineer
Project Inspector
Contractor

ATTACHMENT NO. 2
Example Letter to Contractor
Contract without Payment Bond

(DATE)

Route _____ County _____
Project _____

Name and Address
of Contractor

Gentlemen:

Attached is a copy of a letter from (Name of Claimant) notifying the Department of an outstanding account in the amount of \$_____ for (Type of Material or Services) provided for use on the subject project.

As you are aware, you are responsible for payment or making satisfactory arrangements for settling all bills for materials, labor, equipment, supplies and all other items used on the work. Your particular attention is directed to Sections 102.08 and 109.07 of the Road and Bridge Specifications. (102.08 and 109.08 if the contract is under the 2007 Specifications)

In the event this claim remains outstanding at the time of payment of the final estimate, sufficient funds to cover the claim will be withheld from monies due your firm and other actions as provided for by the Specifications may be taken unless you have provided documentation to support the reason for non-payment.

Your immediate action for settling this account is requested and please keep me informed accordingly.

By: Responsible Charge Engineer

C: District Administrator
Scheduling and Contract Quality Control Engineer
Project Inspector

ATTACHMENT NO. 3
Example Acknowledgement Letter To Claimant
Contract with Payment Bond

(DATE)

Route _____ County _____
Project _____

Name and Address
of Claimant

Dear _____:

This is to acknowledge receipt of your letter of (Date) regarding an outstanding account in the amount of \$ _____ for (Type of Material or Services) furnished for use on the subject project.

A copy of your letter is being furnished to (Name & Address of Prime Contractor), with the request that they take the necessary action to resolve your claim. A payment bond has been provided for this project and a copy of your letter has also been sent to the Company which provided the bond, whose name and address is:

(Name and Address of Surety)

Even though we have referred your claim to the Contractor, it is still your responsibility to initiate any action against the Contractor or bonding company you may deem necessary.

By: Responsible Charge Engineer

C: District Administrator
Scheduling and Contract Quality Control Engineer
Project Inspector
Surety

ATTACHMENT NO. 4
Example Letter To Contractor
Contract with Payment Bond

(DATE)

Route _____ County _____
Project _____

Name and Address
of Contractor

Gentlemen:

Attached is a copy of a letter from (Name of Claimant) notifying the Department of an outstanding account in the amount of \$ _____ for (Type of Material or Services) provided for use on the subject project. Also, a copy of our acknowledgement letter is attached.

Please note that the Claimant has been informed that a payment bond was furnished for this project and also advised of the name and address of the Surety.

Your immediate action for settling this account is requested.

By: Responsible Charge Engineer

C: Surety