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December 16, 2004

Construction Information Memorandum No. 3-2004

TO: All Division Engineers

ATTN: Division Construction Engineers and Division County Transportation Engineers

FROM: Terry McDuffie
Construction Engineer

RE: Unapproved Subcontractors and Contractor Labor Reports (Payrolls)

The requirements for subletting portions of any contract (federal-aid or state only funded) are given in Article 108.01 of the Standard Specifications. These requirements are based on the Code of Federal Regulations (23 CFR 635), and a summary of this CFR is included in every federal-aid contract through *FHWA-1273 Required Contract Provisions Federal-Aid Construction Contracts*. This specification and regulation require that the prime contractor not sublet any of the contract without written approval from the Department before the subcontractor begins work.

Over the past several years, the increased volume of construction work has led to an increase in the number of subcontractors available and working on ALDOT projects. During this time, there have been periodic "streaks" where subcontractors were not approved, yet still worked on projects. In an effort to prevent this practice in the past, several memorandums have been issued by the Department reminding Division Engineers and the contracting industry of the possible consequences of subcontractors working without approval. One such consequence was the Department reserving the right to not pay for the work performed by the unapproved subcontractor. However, these reminders and this reserved right has not deterred contractors from continuing this practice as one of these "streaks" has lasted most of this year.

Therefore, effective with the December 3, 2004 letting, the requirements in Article 108.01 have been amended to include the following statement:

"Work performed without sublet approval will be designated as unauthorized work as noted in Article 105.11."

Article 105.11 has also been amended to include under the designation of unauthorized work the following – "work performed by forces other than the (prime) contractor's forces and performed without sublet approval by the Engineer". By specification, unauthorized work may remain in-place at no pay if the quality is acceptable or, if the quality is unacceptable the unauthorized work shall be removed and replaced.

In the past month, numerous questions have been posed from ALDOT personnel and contractors about what type work constitutes the need for an approved sublet request. In an effort to answer these questions and establish a consistent policy statewide, we have reviewed the matter with the Bureau of Office Engineer and offer the following guidance. Basically, any work performed on-site and within the project limits by forces or firms other than the prime contractor's will require an approved sublet request. This requirement also extends to items of work that are a subsidiary obligation of another pay item. The only exceptions to this requirement

are work by professional engineering firms or professional land surveying firms, hauling by truckers who are owner-operators, rental agreements by subcontractors to lower-tier subcontractors as defined in Subarticle 1:2:H:1.2 of the Construction Manual, and timber companies who cut and harvest trees and then compensate the contractor for the material harvested. While these timber companies are performing a part of the Clearing & Grubbing item, there is no cost to the contractor and no amount to count towards the 70/30 sublet limitation. This type work is normal for a grade and drain project for additional lanes and/or new alignments. Of course, this provision does not extend to a contractor or tree service that cuts trees or does select clearing as part of the contractor's unit bid price. When this type situation is encountered, project personnel should closely monitor the situation, and the contractor needs to be forthright to the project engineer about this working relationship.

If any situation arises where you are unsure a sublet request is required, please direct your questions to the Bureau of Office Engineer **prior** to the subcontractor beginning work. The Bureau of Office Engineer is responsible for reviewing and approving all sublet requests and will determine the requirements for special or unknown situations.

In the past, unapproved subcontractors have caused additional problems on **federal-aid** projects with the submission of Contractor Labor Reports (Payrolls). Since the subcontractors were not approved, it was a general practice of the prime contractors and the unapproved subcontractors to not submit payrolls. Divisions have accepted this practice because of the wording in Article 1:2:I of the Construction Manual. However, Section V (Statements and Payrolls) of FHWA-1273 does not distinguish between the approval status of subcontractors. Simply put, it requires the prime contractor and each subcontractor to maintain and submit **weekly** payrolls for all laborers, mechanics, apprentices, trainees, watchmen, helpers, and guards working at the site of the work. Furthermore, it requires the prime contractor to be responsible for submitting copies of all subcontractors' payrolls. These requirements extend to ensuring that requests for additional classifications are made when required and that they are then complied with. Therefore, prime contractors are required to submit payrolls for any subcontractor working on the site. Failure to comply with any part of the payroll provisions may result in the suspension of further payments (i.e. monthly progress estimates).

The reason for requiring the prime contractor and **all** subcontractors (including unapproved ones) to submit **weekly** payrolls is to ensure that all mechanics and laborers employed or working upon the site or work will be paid in accordance with 29 CFR 3 and the Davis-Bacon Act. In the past, the Department has been unable to determine compliance with contract wage rates because all the weekly payrolls have not been submitted for review. Project personnel, Division Construction Engineers, Division County Transportation Engineers and Division EEO Representatives need to ensure that all weekly payrolls are submitted in a timely manner, are accurate, and comply with the contract provisions before submitting to the Bureau of Office Engineer.

Please be advised that this requirement does not rescind or amend the current policy for labor payrolls for truckers that haul materials or supplies to or from the project site. This policy is addressed in detail by Mr. Dykes Rushing's correspondence dated July 28, 2004. This policy has been also provided to the contracting industry through the Notice to Contractor Inserts provided during recent project lettings.

Hopefully, the policies outlined above clarify past questions and present ALDOT personnel and the contracting industry a clear and consistent interpretation of the requirements for subletting work and submitting contractor labor records (payrolls). If you have any questions concerning this memorandum, please contact this office.

TM/WJP/wjp

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