

## MD 404 No Excuse Bonus Provision Evaluation

Project: MD 404 from US 50 to East of Holly Road Design-Build  
Contract No. AW8965170  
FAP No. AC-NHPP-G-300-1(53)N  
Bid Cost: \$109,997,777.77 (including No Excuse Bonus value)  
Final Payment: \$111,794,667.63 (including payment of No Excuse Bonus)  
Difference: 1.63% increase

The Maryland State Highway Administration (SHA) is submitting this No Excuse Bonus Provision evaluation for the subject project under the provisions of Special Experimental Project No. 14 (SEP-14) for the use of innovative contracting practices.

This project completed the construction of approximately 9 miles of four lane dualization of MD 404. The SHA looked to accelerate the construction of this project as a Design-Build contract to open the entire roadway to the traveling public by the end of 2017.

Three offerors submitted technical proposals, but only two offerors submitted price proposals. The Design-Build contract was awarded to MD 404 Corridor Safety Constructors, which was a joint venture of Wagman, David A. Bramble, and Allan Myers, as a best-value selection. The Notice to Proceed for the Contract was issued on June 7, 2016, with completion achieved on December 31, 2018. Under the No Excuse Bonus provision, the four-lane roadway was opened from an operations and safety perspective for the beneficial use of the traveling public in November 2017 and the Design-Build contractor achieved the No Excuse Bonus.

To evaluate the effectiveness of the No Excuse Bonus provision in the procurement stage, the SHA surveyed all three offerors that submitted technical proposals. Each offeror responded to the following questions:

1. a. Did the concept of the "No Excuse" Bonus provision cause you as a bidder to approach the preparation of your bid differently than for a normal (non-expedited) construction schedule?  
b. If Yes, what difference in approach did you take?
2. a. Did the concept of the "No Excuse" Bonus provision cause you as a bidder to approach the preparation of your bid differently than for other typical accelerated construction schedules with incentives?  
b. If Yes, what difference in approach did you take?
3. Was the incentive amount sufficient to warrant an effort to accelerate the schedule to achieve the "Substantial Completion" date? If No, please explain.
4. Was the disincentive amount sufficient and appropriate to ensure the schedule would be accelerated to achieve the "Substantial Completion" date? If No, please explain.

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5. a. *Were the specifications for the "No Excuse" Bonus incentive sufficiently clear to prepare your bid? If No, please explain.*

b. *How would you rate the clarity of the "No Excuse" Bonus incentive provisions to your experience with other incentive/disincentive provisions?*

<i>Traditional Calendar Day I/D</i>	<i>More Clear</i>	<i>Same</i>	<i>Less Clear</i>
<i>A+B Calendar Day</i>	<i>More Clear</i>	<i>Same</i>	<i>Less Clear</i>
<i>Lane Rental</i>	<i>More Clear</i>	<i>Same</i>	<i>Less Clear</i>

c. *Are there any other thoughts you have on the positive or negative aspects of the "No Excuse" Bonus incentive provision as it relates to the bidding of the subject project?*

All offerors responded that the No Excuse Bonus caused them to approach their bid differently than a normal (non-expedited) construction schedule. Responses generally indicated that more time was spent on risk, schedule acceleration strategies, and contingency to meet the No Excuse Bonus date. The No Excuse Bonus also impacted team formation for joint ventures.

Offerors were mixed if the No Excuse Bonus caused them to approach the preparation of their bid differently than other typical accelerated construction schedules with incentives. One offeror stated that it was viewed the same as A+B bidding. The other two offerors noted that the all or nothing nature and the high disincentive included created a lot of risk that needed to be mitigated to the best extent possible.

All offerors responded that the No Excuse Bonuse amount was sufficient to warrant the effort to accelerate the schedule especially considering the disincentive for not meeting the No Excuse date. It was noted that the project’s risk profile was adjusted accordingly based on certainty of receiving the bonus.

All offerors responded that the disincentive for missing the No Excuse date was sufficient to achieve the No Excuse date. One offeror noted that it created a high-risk profile for the project and required several mitigation strategies to ensure the project would be achieved on time. Another offeror noted the disincentive amount was very punitive for a project that had a late fall completion with weather sensitive items such as asphalt and, if they missed the date, they would be assessed the disincentive all winter.

Two offerors felt the No Excuse Bonuse provision was sufficiently clear to prepare their bid, but one offeror’s opinion was it was not clear. One offeror understood that there was truly no allowable excuse for missing the deadline. Another offeror noted that it was ultimately made clear after questions and responses, but it was confusing initially as to what activities could be achieved after the No Excuse date. The other offeror noted that they had different interpretations among team members and the provision could have been better defined.

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For the clarity of the No Excuse provision to other incentive/disincentive provisions, two offerors found it as clear as a traditional calendar i/d while one found it less clear. All offerors found it as clear as A+B Calendar Day. For Lane Rentals, one offeror found it was clearer and the same whereas the third offeror noted they were uncertain as they had no experience with Lane Rentals.

Thoughts on the No Excuse Bonus as it related to bidding on the project were mixed. One offeror was concerned whether the standards and the specification would be truly followed creating an uneven playing field if another contractor thinks they can get away with late performance. Another offeror noted the all or nothing aspect is a risky endeavor. The other offeror noted the incentive amount offered helped to reduce the risk to proposers as acceleration is a difficult function to estimate and price effectively.

In addition to surveying the offerors, SHA's District 2 Construction Office that administered the construction provided its thoughts on the effectiveness of the provision. Their response indicated it was effective and one of the prime reasons for meeting the opening date in November 2017. The deterrent of the disincentive helped but the interpretation of Substantial Completion came into question due to the use of the words "may include" in the listing of the types of work to be considered substantially complete introduced an uncertainty.

Regardless, the No Excuse Bonus was able to be used as a negotiating tool that allowed the open to traffic date in November 2017 to be achieved through partnering. It was valuable both as intended and as necessitated. However, the fact it allowed the Design-Build contractor to reserve claims reduced efficiency in negotiations.

The SHA finds that this can be a valuable provision on projects with critical open to traffic or completion dates. We believe that it should be used only on the right projects to meet critical dates. Additionally, use of a disincentive with a No Excuse Bonus provision should be rarely used. The contractors should be positively incentivized for superior performance in exceeding expectations. A disincentive should only be used in rare circumstances where a date is absolute and inflexible. Finally, the reservation of claims provision should not be included in future usage of this provision. The reservation of claims reduces the effectiveness of this provision as it can allow the contractor to seek payment of the No Excuse Bonus while continuing to pursue claims that may be related to schedule performance. The contractor should choose to receive No Excuse Bonus or pursue claims but not have the option for both.

Attachment – Final No Excuse Bonus Provision

**NOTICE TO CONTRACTOR**

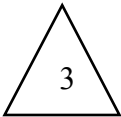
**“NO EXCUSE BONUS”**

The Administration desires to expedite construction on this Contract to minimize the inconvenience to and improve safety for the traveling public and to reduce the time of construction. In order to achieve this, a “No Excuse Bonus” provision is established for the milestone described below. The Administration will pay the Design-Builder a “No Excuse Bonus” in the amount of **\$5,000,000** if the work is completed as described below on or before **November 21, 2017**, which is the “Bonus Completion Date”.

**Substantial Completion** – Substantial Completion is defined as the calendar date when the public has full and unrestricted use and benefit of the 4 lane divided highway both from the operational and safety standpoint. To meet this definition, all work between the outside edge of pavement of the eastbound roadway and the outside edge of pavement of the westbound roadway, including all work in the median, must be complete. This may include, but is not limited to, final paving, final marking, signing, intersection lighting, and traffic barrier required for the safe flow of traffic. For the 4 lane divided highway to be considered substantially complete, no additional work requiring permanent lane or shoulder closures will still need to be completed. Temporary lane or shoulder closures will still be allowable after Substantial Completion.

The “No Excuse Bonus” will be paid only if “Substantial Completion” is achieved as set forth above on or before the “Bonus Completion Date” and subject to the conditions precedent set forth below. For the purposes of the calculation and determination of entitlement to the “No Excuse Bonus” stated above, the “Bonus Completion Date” will not be adjusted for any reason, cause or circumstances whatsoever, regardless of fault.

The parties anticipate that delays may be caused by or arise from any a number of events during the course of the Contract, including, but not limited to, work performed, work deleted, change orders, supplemental agreements, delays, disruptions, differing site conditions, utility conflicts, design changes or defects, time extensions, extra work, right of way issues, permitting issues, actions of suppliers, subcontractors or other contractors, actions by third parties, approval process delays, expansion of physical limits of project to make it functional, weather, weekends, holidays, suspensions of the Design-Builder’s operations, or other such events, forces or factors sometimes experienced in highway construction work. Such delays and events and their potential impact on performance by the Design-Builder are specifically contemplated and acknowledged by the parties entering into this Contract, and shall not extend the “Bonus Completion Date” set forth above. Further, any and all costs or impacts whatsoever incurred by the Design-Builder in accelerating its work to overcome or absorb such delays or events in an effort to complete the work prior to the “Bonus Completion Date”, regardless of whether the Design-Builder successfully does so or not, shall be the sole responsibility of the Design-Builder in every instance.



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Should the Design-Builder fail to achieve the “Substantial Completion” milestone on or before the “Bonus Completion Date”, the Administration shall deduct \$22,200 for each calendar day after the “Bonus Completion Date” for which the conditions of “Substantial Completion” have not been achieved, from monies otherwise due to Design-Builder. This deduction shall be the disincentive for the Design-Builder’s failing to timely provide the public the full and unrestricted use and benefit of the 4 lane divided highway both from the operational and safety standpoint.

In the event that there is a catastrophic event where there is a declared state of emergency directly and substantially affecting the Design-Builder’s operations on the Contract, the Design-Builder and the Administration shall agree as to the number of calendar days to extend the “Substantial Completion” milestone solely for the purposes of the calculation of the disincentive. For no reason, cause or circumstances whatsoever will this calculation for the disincentive adjust the “Bonus Completion Date” of November 21, 2017 or affect the Design-Builder’s entitlement to the “No Excuse Bonus”. In the event the Design-Builder and the Administration are unable to agree to the number of calendar days to extend the “Substantial Completion” milestone for the purposes of the calculation of the disincentive, the Administration will unilaterally determine the number of calendar days to extend the “Substantial Completion” milestone reasonable necessary and due solely to such catastrophic event. The Design-Builder shall have no right whatsoever to contest such determination, save and except the Design-Builder establishes that the number of calendar days determined by the Administration were arbitrary or without any reasonable basis.

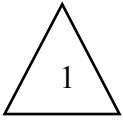
No later than 60 days after final acceptance by the Administration, the Design Builder must either (a) elect to be paid the “No Excuse Bonus” pursuant to the next paragraph or (b) notify the Administration in writing that the Design-Builder is electing to be paid the “No Excuse Bonus” and is reserving one or more outstanding GP-5.14 claims for final determination.

The Design-Builder shall notify the Administration in writing, within 60 days of the final acceptance of the work in the Contract by the Administration, that the Design-Builder elects to be paid the "No Excuse Bonus" which the Design-Builder is eligible to be paid based on the actual acceptance of the “Substantial Completion” date, and such written notice shall constitute a full and complete waiver, release and acknowledgment of satisfaction by the Design-Builder of any and all claims, causes of action, issues, demands, disputes, matters or controversies, of any nature or kind whatsoever, known or unknown, against the Administration, its employees, officers, agents, representatives, consultants, and their respective employees, officers and representatives, the Design-Builder has or may have as to work performed, work deleted, change orders, supplemental agreements, delays, disruptions, differing site conditions, utility relocations and conflicts, design changes or defects, time extensions, extra work, right of way issues, permitting issues, actions of suppliers or subcontractors or other Contractors, actions by third parties, shop drawing approval process delays, expansion of the physical limits of the project to make it functional, weather, weekends, holidays, suspensions of Design-Builder's operations, extended or unabsorbed home office or job site overhead, lump sum maintenance of traffic adjustments, lost profits, prime mark-up on subcontractor work, acceleration costs, any and all direct and indirect costs, any other adverse impacts, events, conditions, circumstances or potential damages, on or pertaining to, or as to or arising out of the Contract. This waiver, release

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and acknowledgment of satisfaction shall be all-inclusive and absolute, save and except any routine Administration final estimating quantity adjustments.



For the purposes of this provision, a temporary lane or shoulder closure is one that is implemented while work is ongoing and is removed when work is not occurring. A permanent lane or shoulder closure would be one that remains in effect while work is not ongoing and would restrict the usage of the lane or shoulder for traffic.

