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DEPARTMENT OF TRANSPORTATION

Federal Highway Administration

AGENCY: Federal Highway Administration (FHWA), DOT.

23 CFR Part 630

Agreement Provisions Regarding Overruns in Contract Time

52 FR 31388

August 20, 1987

ACTION: Final rule.

SUMMARY: This final rule revises the existing regulation contained in 23 CFR Part 630 concerning the assessment of liquidated damages on projects where a contractor overruns the contract time. The revised regulation requires each State highway agency (SHA) to keep liquidated damages provisions current so that the amounts recovered through contractor assessments would at a minimum cover the SHA's average daily construction engineering (CE) cost attributable to the contract time overrun. In addition, the FHWA rate table presently in the regulation is removed, and the provisions for the FHWA recovery of costs have been modified. A definition of "incentive/disincentive for early completion" has also been added to this part.

EFFECTIVE DATE: October 5, 1987. The provisions contained in this final rule apply to all Federal-aid contracts advertised for bid on or after October 5, 1987.

FOR FURTHER INFORMATION CONTACT: Mr. William A. Weseman, Chief, Construction and Maintenance Division, Telephone: (202) 366-0392, or Mrs. Ruth R. Anders, Office of Chief Counsel, Telephone: (202) 366-0780. Office hours are from 7:45 a.m. to 4:15 p.m., ET, Monday through Friday.

TEXT: SUPPLEMENTARY INFORMATION: The term "liquidated damages" means the daily amount set forth in the contract to be deducted from the contract price to cover additional costs incurred by an SHA because of the contractor's failure to complete the contract work within the number of calendar days or workdays specified. The term may also mean the total of all daily amounts deducted under the terms of a particular contract.

Regulation 23 CFR 630.305 prescribes agreement provisions regarding overruns in contract time and provides guidance on the amount of these assessments. This guidance has remained unchanged since December 1975. At that time, the rate table included in the regulation was identical to the table found in the 1972 edition of the American Association of State Highway and Transportation Officials (AASHTO) Guide Specifications for Highway Construction. <sup>n1</sup> The amounts included in these 1972 tables represented an estimate of the nationwide average CE costs to the SHA. Since that time, CE costs have risen significantly; however, the FHWA rate table has not been updated to take account of the increases. The AASHTO subsequently revised its Guide Specifications in 1979, and increased the rates by an inflationary factor of 1.5. No change was made in the 1984 edition; however, further changes are being considered for future editions.

<sup>n1</sup> The Guide Specifications for Highway Construction, 1984, is published by and available for purchase from the American Association of State Highway and Transportation Officials, Suite 225, 444 North Capitol Street NW., Washington, DC 20001.

During audit reviews in several regions of the county, the Department of Transportation Office of Inspector General (OIG) found that liquidated damages

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provisions in use by several of the SHAs were not allowing for the full recovery of CE costs due to contractor caused time overruns. Many of the provisions were based on either the FHWA or the AASHTO rates.

The FHWA agrees that the current rate table found in the regulations is outdated and may not allow for full recovery of extra CE costs associated with contract time overruns. While the regulation allows the SHAs to set higher rates based upon CE costs in their States, there has been some reluctance to increase the rates significantly from the FHWA or AASHTO amounts. The FHWA is also aware that nationwide rate table does not provide adequate guidance to the SHAs concerning liquidated damages assessments for their States. For these reasons, and because it is difficult to maintain an ever changing table in a regulatory format, the table is being deleted from the regulation and, instead, each SHA will be required to maintain its own rate schedule(s). The revised regulation also requires the rates to be reviewed periodically and updated, as appropriate.

In addition, the revised regulation addresses the use of liquidated damages to cover anticipated delay-related costs above and beyond those attributed to CE. Such costs to the SHA are those that could be reasonably anticipated if a delay were to occur in project completion, such as costs resulting from winter shutdown, retaining detours for an extended time, or additional demurrage. The amounts, however, are to be specified separately when the SHA submits claims for reimbursement. This permits an accounting of net CE costs to the project for Federal participation purposes.

The portion of the regulation dealing with the FHWA recovery of the pro rata share of the assessed liquidated damages has been modified slightly to address cases where assessments include more than CE expense factors. There is also a change concerning how the liquidated damages are credited to the project when the FHWA did not participate in the cost of CE. Whereas the current regulation indicates the amount of liquidated damages is to be credited to the federally participating cost of contract construction before calculating the Federal share, the revised rule allows the recovery of the SHA's CE costs first. This revision corrects this inequity of the existing regulation.

The revised regulation requires the SHA's liquidated damages provisions to be approved by the FHWA. By law, all specifications and special provisions has to be approved by the FHWA before use on a Federal -aid project. The only additional "burden" on the SHA will be the periodic review of its CE cost data to determine that the liquidated damages figures are adequate. The FHWA feels this is an SHA responsibility and should be a routine management task.

A notice of proposed rulemaking (NPRM) was published in the Federal Register on March 18, 1986, at 51 FR 9217 in which the FHWA requested comments on the proposed regulation revisions. Comments were to be received by May 2, 1986. Seventeen written comments were received in the docket. Of the 17 comments, 15 were from SHAs, 1 was from a local highway agency, and 1 was from an industry association. Most of the comments favored the regulation revisions and recommended minor procedural or editorial changes. Two commenters opposed the revisions. One believed it would cause an unreasonable administrative burden while the other suggested the rule should not be finalized until AASHTO completed its work on the liquidated damages provisions for its Guide Specifications.

The FHWA is aware that some SHAs may prefer to use liquidated damages rates established in the AASHTO table. The SHAs may choose to adopt the AASHTO table/schedule of liquidated damages provided it meets the requirements of this rule. This does not relieve the SHA of the requirement to periodically submit for FHWA approval, supporting verification that the rate table/schedule closely approximates the average daily CE costs associated with the type and size of projects in the State.

Another commenter suggested that local highway agencies be permitted to

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establish their own liquidated damages rates so as not to be tied to State rates. The FHWA believes that local highway agencies (subrecipients) may use liquidated damages rates established by the SHAs in accordance with @ 630.305(b) of this regulation or establish their own liquidated damages rates. However, if local highway agencies choose to establish their own liquidated damages rates, those rates should be established in accordance with this regulation and submitted through the SHA to the FHWA for approval.

Several commenters suggested using costs other than the average daily CE costs associated with the type of work encountered on the project as the basis for liquidated damages rates. Another commenter objected to the inclusion of CE costs as liquidated damages.

The FHWA believes the average daily CE costs associated with the type of work on a project provides an equitable and reasonable method to estimate liquidated damages regardless of the phase of project construction in which the time overrun occurs. Furthermore, the FHWA believes there is sufficient legal justification to support the inclusion of CE costs as liquidated damages. Therefore, no changes in the provisions were made in the final rule from those proposed in the NPRM regarding this matter.

A few commenters expressed concern regarding the requirement to review and update liquidated damages rates on a 2-year frequency. The FHWA believes that the economic parameters that impact CE and other related costs change at a rate to warrant the review frequency proposed. The 2-year review frequency is retained in this final rule.

One commenter took exception to the requirement that other project delay related costs, which may be included as liquidated damages, be shown separately from CE costs in the contract documents to permit an accounting of net CE cost for Federal participation purposes. This commenter believed such a separate showing would jeopardize the enforceability of the liquidated damages provision.

Although the FHWA does not agree that a separate showing of anticipated CE costs from other liquidated damages amounts would jeopardize the enforceability of liquidated damages provisions, the requirement has been deleted. Thus the SHAs now have the option of showing CE costs and other project delay related costs separately or combined in the contract documents. However, because of Federal participation accounting purposes, it remains necessary that these amounts be specified separately when the SHA submits claims for reimbursement.

In addition to the regulatory changes, a definition of "incentive/disincentive for early completion" (I/D) is added to @ 630.302. Procedures regarding the use of such provisions have been added to this part of the regulation.

The inclusion of I/D provisions in this regulation caused concern for one SHA. That SHA traditionally defines liquidated damages as being damages to the public for inconveniences or road user costs. It does not consider anticipated CE costs to be liquidated damages. As noted by that SHA, the only reference to road user cost in the NPRM is contained in the I/D provisions. Therefore, the SHA concluded that in order to continue assessing liquidated damages, in accordance with its definition, an I/D provision would be necessary in every contract.

The FHWA does not believe this final rule conflicts with State law or administrative procedures for assessing liquidated damages. Furthermore, this final rule does not require the inclusion of an I/D provision in any contract for assessing liquidated damages. The I/D provision is intended for use on those critical projects where it is imperative that traffic inconvenience and delays be held to a minimum. The FHWA recognizes liquidated damages to include not only CE costs but other project delay related costs that the State may choose to include with FHWA concurrence. Under @ 630.305(c), the SHA may assess costs for

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public inconveniences without the inclusion of an I/D provision. Although road user costs were not mentioned specifically in the NPRM, the types of costs included under @ 630.305(c) were not intended to be all inclusive. To clarify this point the FHWA has revised @ 630.305(c) to specifically address such costs. The slight differences in the State and Federal interpretations of liquidated damages will have no impact on the State's assessment of CE costs and costs for public inconveniences.

Other comments to the docket on the NPRM were editorial in nature and suggested that some provisions be clarified. Those comments have been adopted in this final rule where deemed appropriate.

The FHWA has determined that this document does not contain a major rule under Executive Order 12291 or a significant regulation under the regulatory policies and procedures of the Department of Transportation. The proposed revisions will improve the current undesirable situation that has developed and will provide for increased awareness by the SHA of the project related CE costs. Since there is no substantive change in the FHWA approach or procedures concerning liquidated damages assessments, it is anticipated that this action will not have a significant economic impact. Accordingly, for the foregoing reasons and under the criteria of the Regulatory Flexibility Act, it is certified that this action will not have a significant impact on a substantial number of small entities and that the preparation of a full regulatory evaluation is not required.

In accordance with the Paperwork Reduction Act of 1980 (44 U.S.C. 3501 et seq., Pub. L. 96-511), the reporting or recordkeeping requirements that are included in this regulation are being submitted for approval to the Office of Management and Budget (OMB).

In consideration of the foregoing, the FHWA is amending Part 630, Subpart C of Chapter I of Title 23, Code of Federal Regulations, as set forth below.

(Catalog of Federal Domestic Assistant Program Number 20.205, Highway Research, Planning, and Construction. The regulations implementing Executive Order 12372 regarding intergovernmental consultation on Federal programs and activities apply to this program.)

List of Subjects in 23 CFR Part 630

Government contracts, Grant programs -- Transportation, Highways and roads, Project agreement provisions.

Issued on: August 14, 1987.

R. A. Barnhart,

Federal Highway Administrator.

The Federal Highway Administration (FHWA) is amending Part 630, Subpart C of Chapter I of Title 23, Code of Federal Regulations, as follows:

PART 630 -- PRECONSTRUCTION PROCEDURES

Subpart C -- Project Agreements -- [Amended]

1. The authority citation for Part 630 continues to read as follows:

Authority: 23 U.S.C. 101(a), 104, 109, 110, 113, 115, 120(f), 121(c), 125, 315, and 320; 23 CFR 1.32; 49 CFR 1.48(b), unless otherwise noted.

2. Section 630.302 is amended by redesignating paragraphs (h), (i), and (j) to read as (i), (j), and (k), respectively, and by adding a new definition

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"incentive/dis incentive for early completion" as paragraph (h) as follows:

@ 630.302 Definitions.

\* \* \* \* \*

(h) The term "incentive/dis incentive for early completion," as used in this subpart, describes a contract provision which compensates the contractor a certain amount of money for each day identified critical work is completed ahead of schedule and assesses a deduction for each day the contractor overruns the incentive/dis incentive time. Its use is primarily intended for those critical projects where traffic inconvenience and delays are to be held to a minimum. The amounts are based upon estimates of such items as traffic safety, traffic maintenance, and road user delay costs.

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3. Section 630.305 is revised to read as follows:

@ 630.305 Agreement provisions regarding overruns in contract time.

(a) Each State highway agency (SHA) shall establish specific liquidated damages rates applicable to projects in that State. The rates may be project-specific or may be in the form of a table or schedule developed for a range of project costs and/or project types. These rates shall, as a minimum, be established to cover the estimated average daily construction engineering (CE) costs associated with the type of work encountered on the project. The amounts shall be assessed by means of deductions, for each calendar day or workday overrun in contract time, from payments otherwise due to the contractor for performance in accordance with the contract terms.

(b) The rates established shall be subject to FHWA approval either on a project-by-project basis, in the case of project-specific rates, or on a periodic basis after initial approval where a rate table or schedule is used. In the latter case, the SHA shall periodically review its cost data to ascertain if the rate table/schedule closely approximates, at a minimum, the actual average daily CE costs associated with the type and size of the projects in the State. Where rate schedules or other means are already included in the SHA specifications or standard special provisions, verification by the SHA that the amounts are adequate shall be submitted to the FHWA for review and approval. After initial approval by the FHWA of the rates, the SHA shall review the rates at least every 2 years and provide updated rates, when necessary, for FHWA approval. If updated rates are not warranted, justification of this fact is to be sent to the FHWA for review and acceptance.

(c) The SHA may, with FHWA concurrence, include additional amounts as liquidated damages in each contract to cover other anticipated costs of project related delays or inconveniences to the SHA or the public. Costs resulting from winter shutdowns, retaining detours for an extended time, additional demurrage, or similar costs as well as road user delay costs may be included.

(d) In addition to the liquidated damages provisions, the SHA may also include incentive/dis incentive for early completion provisions in the contract. The incentive/dis incentive amounts shall be shown separately from the liquidated damages amounts.

(e) When there has been an overrun in contract time, the following principles shall apply in determining the cost of a project that is eligible for Federal -aid reimbursement:

(1) A proportional share, as used in this section, is the ratio of the final contract construction costs eligible for Federal participation to the final total contract construction costs of the project.

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(2) Where CE costs are claimed as a participating item based upon actual expenses incurred or where CE costs are not claimed as a participating item, and where the liquidated damages rates cover only CE expenses, the total CE costs for the project shall be reduced by the assessed liquidated damages amounts prior to figuring any Federal pro rata share payable. If the amount of liquidated damages assessed is more than the actual CE totals for the project, a proportional share of the excess shall be deducted from the federally participating contract construction cost before determining the final Federal share.

(3) Where the SHA is being reimbursed for CE costs on the basis of an approved percentage of the participating construction cost, the total contract construction amount that would be eligible for Federal participation shall be reduced by a proportional share of the total liquidated damages amounts assessed on the project.

(4) Where liquidated damages include extra anticipated non-CE costs due to contractor caused delays, the amount assessed shall be used to pay for the actual non-CE expenses incurred by the SHA, and, if a Federal participating item(s) is involved, to reduce the Federal share payable for that item(s). If the amount assessed is more than the actual expenses incurred by the SHA, a proportional share of the excess shall be deducted from the federally participating contract construction cost of the project before the Federal share is figured.

(f) When provisions for incentive/disincentive for early completion are used in the contract, a proportion of the increased project costs due to any incentive payments to the contractor shall be added to the federally participating contract construction cost before calculating the Federal share. When the disincentive provision is applicable, a proportion of the amount assessed the contractor shall be deducted from the federally participating contract construction cost before the Federal share calculation. Proportions are to be calculated in the same manner as set forth in paragraph (e)(1) of this section.

[FR Doc. 87-19073 Filed 8-19-87; 8:45 am]

BILLING CODE 4910-22-M