



U.S. Department  
of Transportation  
**Federal Highway  
Administration**

→ GY

# Memorandum

Washington, D.C. 20590

Subject: Use of Incentive/Disincentive (I/D)  
Provisions in Alabama

Date: NOV 29 1990

From: Director, Office of Engineering

Reply to  
Attn. of: HNG-22

To: Regional Federal Highway Administrators  
Federal Lands Highway Program Administrator

We have received a number of inquiries concerning the use of incentive/disincentive (I/D) provisions since the ENGINEERING NEWS RECORD, of September 27, 1990, indicated that the Alabama Supreme Court struck down the disincentive assessments in two Federal-aid contracts.

Based on our review of the court documents and other material related to these projects as provided by the division office, it is our opinion that the use of I/D provisions should be continued. The guidance provided in the Federal Highway Administration (FHWA) Technical Advisory 5080.10, Incentive/Disincentive (I/D) For Early Completion needs to be followed when developing I/D provisions.

As indicated in this FHWA Technical Advisory, the application of I/D provisions is to be reserved for critical projects or phases of projects where it is desirable that traffic inconveniences and delays be minimized. The procedures used for determining the I/D amount and contract time must be documented and retained in the project records. The I/D amount and time determination with supporting data should be submitted by the State and concurred in by the FHWA Division Administrator prior to the State's request for approval of the plans, specifications, and estimate and authorization to advertise.

The daily I/D amount can not be arbitrary but rather it needs to be calculated on a project-by-project basis using established construction engineering inspection costs, State related traffic control and maintenance costs, detour costs, and road user costs. It will be necessary to ensure that factors used to calculate the I/D amount are not duplicated in the liquidated damages clause in the contract. ] ←

The Alabama Supreme Court overturned the disincentive assessment, concluding that as applied it was a penalty. The State did not adequately demonstrate how the contract time was established nor how the daily disincentive rate was related to road user costs. However, we continue to believe that the use of

I/D provisions is beneficial and will be upheld by other courts if our methodology for establishing the contract time and dollar amount for the I/D is reasonable and fully documented.

  
Thomas O. Willett