



Purpose

The bulletin is to provide guidance for setting liquidated damages (LDs) in accordance with 23 CFR §635.127 – “Agreement provisions regarding overruns in contract time”. This bulletin does not provide guidance for liquidated damages not connected to contract working days.

Background

When a contract overruns contract time, the Local Agency (LA) is entitled to recover their estimated construction engineering costs (CE) incurred to administer the contract beyond the contract time set forth in the contract document. In accordance with §635.127(a), these rates shall, at a minimum, be established to cover the estimated average daily 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.

The Local Agency Guidelines defines liquidated damages as– Amounts of money to be assessed against a contractor for late completion. These amounts must be related to the actual damages suffered by the owner because of the late completion.

In 2021, the Standard Specifications for Road, Bridge, and Municipal Construction removed the formula for liquidated damages, which was based on contract cost and time. This method of calculating liquidated damages does not comply with §635.127 and may not be used.

Guidance

There are two methods available to LAs to establish LDs: 1) The LA may establish LDs on a project-by-project basis or 2) The LA may establish a rate table or schedule to be used which is required to be evaluated periodically.

Method 1 - Project-by-Project Basis:

1. Provide Liquidated Damages Calculation Spreadsheet which includes estimated:
 - a. Hourly wages for employees directly billing to a project;
 - b. Fringe benefits for employees directly billing to project;
 - c. Overhead rate established for LA to cover standard inspection vehicles, management oversight, support not directly charging to the project.
 - d. Consultant expenses may be used in liquidated damages calculations when the LA has established a Local Agency funded agreement with the Consultant.
2. Provide back up for wage rates and fringe benefits.
3. Provide back up for local agency overhead. When the local agency does not have an FHWA approved overhead rate, the de minimis rate of 15% may be used (see 2 CFR



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200.414(f)). This should not be confused with the Safe Harbor Rate which applies to consultant overhead.

4. Provide back up for consultant rates and overhead. Consultant overhead rates may be estimated using the Safe Harbor rate of 120%; however, if an agreement is in place for construction management services, the Agency should use the approved overhead rate for that agreement. (either the approved ICR rate or Safe Harbor Rate)

Method 2 - Local Agency Rate Tables:

One or more rate table(s) may be established to closely approximate the actual average daily CE cost for the type and size of projects.

1. Local Agency will submit a table.
 - a. Table will include cost range where LDs would apply (for example, Under 500K, 500K to 2million, 2mil to 20million, 20million to 100mil)
 - b. Table to include type of work for the specific table (for example, overlay projects, painting projects, deck repair, sidewalk, trail ADA ramps, widening,)
2. Local Programs will review and may comment prior to submittal to FHWA.

Local Programs will periodically review its cost data to ascertain if the rate table closely approximates, at a minimum, the actual average daily CE costs associated with the type and size of the projects in the State and any FHWA approved overhead rate. After initial approval by the FHWA of the rates, Local Programs will 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.

Resources

On [Local Agency GSP Webpage](#):

- Liquidated Damages Excel Template (see Local Agency forms and document)
- APWA GSP 1-08.9 Option A, dated March 3, 2021 (see Current Local Agency GSPs)

[23 CFR §635.127](#) – Agreement provisions regarding overruns in contract time

Implementation Plan

LAG Chapter 44 will be updated.

Guidance is active.

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