

# Regulation of Incentive/Disincentive Highway Contracting

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## Federal Regulation – 1989 FHWA Technical Advisory



- I/D provisions appropriate in limited context (post-1989)
  - significant savings/positive benefits to public
- Rates determined case-by-case
  - Recommended cap – 5% of total contract price
- Liquidated damages separate
- High detail for schedules
  - calendar days or completion date (no workdays or 7-day weeks)
  - Extensions for extraordinary circumstances

## Alabama



- Caps incentives at 5% of total contract price (no disincentive cap)
- I/D amounts set by engineering, maintenance, detour, and road user costs
- ***Milton Constr. Co. v. State Highway Dep't.***, 568 So. 2d 784, 1990 Ala. LEXIS 667 (1990) (*rev'd on other grounds*)
  - Disincentives invalid if operate as a penalty
  - Court examined:
    - Difficulty in accurately estimating injury
    - Parties' intent to provide for damages or penalty
    - Reasonableness of disincentive amount in relation to actual damages
  - Damages/disincentives must reasonably compensate for delay to the state/public

## State Trends



- Administrative Codes/DOT guidance documents
- Project selection criteria: “substantial benefit to public”
  - threshold contract amounts
  - no weather sensitive projects
- No cap or 5% of contract price
- Road User Cost model for I/D amount
  - cost to general public resulting from travel delays