8-13.1 Incentive - Disincentive.
(REV 7-27-04) (FA 7-28-04) (FY 2027-28)

The Department desires to expedite construction on this Contract to minimize the inconvenience to the traveling public and to reduce the time of construction. In order to achieve this, an incentive - disincentive provision is established for the Contract. The total "incentive payment" or disincentive deduction shall not exceed $_____.

The Department will pay the Contractor an "incentive payment" in the amount of $_____, for each calendar day the actual completion date precedes the Original Contract Time and subject to the conditions precedent set forth below. The term "Original Contract Time" as used in this Article will mean the number of calendar days established for completion of the work in the Contract on the date the Contract was executed. The term "calendar day" as used in this Article will mean every day shown on the calendar. Calendar days will be consecutively counted from commencement of Contract Time regardless of weather, weekends, holidays, suspensions of Contractor's operations, delays or other events as described herein. For purposes of the calculation and the determination of entitlement to the "incentive payment" stated above, the Original Contract Time will not be adjusted for any reason, cause or circumstance whatsoever, regardless of fault, save and except in the instance of a catastrophic event (i.e., hurricane or a declared state of emergency).

The parties anticipate that delays may be caused by or arise from any 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, shop drawing approval process delays, expansion of the physical limits of the project to make it functional, weather, weekends, holidays, suspensions of Contractor's operations, or other such events, forces or factors sometimes experienced in highway construction work. Such delays or events and their potential impacts on performance by the Contractor are specifically contemplated and acknowledged by the parties in entering into this Contract, and shall not extend the Original Contract Time for purposes of calculation of the "incentive payment" set forth above. Further, any and all costs or impacts whatsoever incurred by the Contractor in accelerating the Contractor's work to overcome or absorb such delays or events in an effort to complete the Contract prior to expiration of the Original Contract Time, regardless of whether the Contractor successfully does so or not, shall be the sole responsibility of the Contractor in every instance.

In the event of a catastrophic event (i.e., hurricane or a declared state of emergency) directly and substantially affecting the Contractor's operations on the Contract, the Contractor and the Department shall agree as to the number of calendar days to extend the Original Contract Time so that such extended Original Contract Time will be used in calculation of the "incentive payment". In the event the Contractor and Department are unable to agree to the number of Calendar Days to extend the Original Contract Time, the Department will unilaterally determine the number of calendar days to extend the Original Contract Time reasonably necessary and due solely to such catastrophic event and the Contractor shall have no right whatsoever to contest such determination, save and except that the Contractor establishes that the number of calendar days determined by the Department were arbitrary or without any reasonable basis.

However, notwithstanding anything above to the contrary, upon the Contractor's written request being made directly to the Chief Engineer, with copies provided to both the Resident Construction Engineer and the District Construction Engineer, the Department reserves unto the Chief Engineer, in their sole and absolute discretion, according to the parameters set forth below, the authority to make a determination to either fully enforce the above provisions with no modification, modify the "Original Contract Time" by moving it, or both modify the "Original Contract Time" by moving it and also modify the "incentive amount" by reducing it.

No modification of this "Incentive-Disincentive" provision will be considered by the Chief Engineer for any impacts, whatsoever, beyond the reasonable control of the Contractor, for which the effect results in a time extension of less that 15% of the time remaining in the period from the first day of occurrence of such impact to the expiration of the "Original Contract Time". Furthermore, as to any such impact, for which the effect results in a time extension of 15% or more of the time remaining in the period from the first day of occurrence of such impact to the expiration of the "Original Contract Time," no modification of this "Incentive-Disincentive" provision will be considered by the Chief Engineer unless the Contractor clearly establishes that it has continuously from the beginning of the project aggressively, efficiently and effectively pursued the achievement of the "incentive payment". This would include the utilization of any and all reasonably available means and methods to overcome all impacts and accelerate the work so as to still achieve the "incentive payment", and that, but for this impact, the Contractor would have otherwise earned the "incentive payment" provided in the original Contract. Also, to the extent the request is not submitted in writing to the Chief Engineer within not less than twenty (20) calendar days prior to the expiration of the "Original Contract Time," the Contractor must also continue to aggressively, efficiently, and effectively pursue the completion of the "Incentive-Disincentive" work. This would include the utilization of any and all reasonably available means and methods to overcome all impacts and accelerate the work, until a determination is made by the Chief Engineer or twenty (20) calendar days has expired since such written request was received by the Chief Engineer. There shall be no right of any kind on behalf of the Contractor to challenge or otherwise seek review or appeal in any forum, of any determination made by the Chief Engineer under this provision.

The Contractor shall have no rights under the Contract to make any claim arising out of this incentive payment provision except as is expressly set forth in this Article.

As conditions precedent to the Contractor's entitlement to any "incentive payment" the Contractor must:

(1) Deliver in-hand to the Department any and all claims, in full accordance with 5-12.3 and subject to the limitations therein, no later than 60 calendar days after completion of the work on which such claim is based and tentatively schedule a Disputes Review Board hearing while awaiting Department review and response to any such claim. Furthermore, as to any such 5-12.3 claims for which the Disputes Review Board has determined entitlement, but both parties have not reached an agreement on monetary compensation prior to final acceptance, and also as to those 5-12.3 claims pending at final acceptance, tentatively schedule a Disputes Review Board hearing within 60 calendar days after the final acceptance date while awaiting Department review and response to any such claim. The sole forum for final determination as to both entitlement and amount of monetary compensation, if not otherwise mutually resolved or otherwise agreed, shall be the Disputes Review Board.

(2) Actually complete the Contract and obtain final acceptance by the Department prior to expiration of the Original Contract Time.

(3) No later than 60 days after final acceptance by the Department, the Contractor must either (a) elect to be paid the "incentive payment" pursuant to (4) below, or (b) notify the Department in writing that the Contractor is electing to be paid the "incentive payment" and is reserving one or more outstanding 5-12.3 claims for final and fully binding determination by the Disputes Review Board. The determinations of the Disputes Review Board as to any such 5-12.3 claims will be fully binding on both the Department and the Contractor, with no right of any kind of challenge, review or appeal, in any forum, by either party. Further, under (b) herein, any previous Disputes Review Board determinations on any such 5-12.3 claims issues shall then be fully binding and not subject to reconsideration by the Disputes Review Board, regardless of whether either party has previously rejected or otherwise not accepted one or more such recommendations at the time such were rendered.

(4) The Contractor shall notify the Department in writing, within 60 days after final acceptance of the Contract by the Department, that the Contractor elects to be paid the "incentive payment" which the Contractor is eligible to be paid based on the actual final acceptance date, and such written notice shall constitute a full and complete waiver, release and acknowledgment of satisfaction by the Contractor 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 Department, its employees, officers, agents, representatives, consultants, and their respective employees, officers and representatives, the Contractor has or may have, 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 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 the Contractor'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 and acknowledgment of satisfaction shall be all-inclusive and absolute, save and except any routine Department final estimating quantity adjustments.

Should the Contractor fail to actually complete the Contract and obtain final acceptance by the Department prior to expiration of the Original Contract Time, or should the Contractor, having timely completed the Contract and obtained final acceptance by the Department prior to expiration of the Original Contract Time but having failed to timely request the "incentive payment" for any reason, and including but not limited to the Contractor choosing not to either reserve one or more outstanding 5-12.3 claims for final and fully binding determination by the Disputes Review Board as set forth in (3)(b) above, or to fully waive, release and acknowledge satisfaction as set forth in (4) above, the Contractor shall have no right to any payment whatsoever under this Article. Notwithstanding the Contractor's election or non-election of the "incentive payment" under this provision, the disincentive provision applies to all circumstances where the work in the Contract is not finally accepted by the Allowable Contract Time.

Completion and acceptance of the Contract for purposes of this Article shall be in accordance with 5-11.

Should the Contractor fail to complete the Contract on or before expiration of the Allowable Contract Time, as adjusted in accordance with the provisions of 8-7.3, the Department shall deduct $_____ for each calendar day completion exceeds the Allowable Contract Time, from the monies otherwise due the Contractor. The term "Allowable Contract Time" as used in this Article shall mean the Original Contract Time plus adjustments pursuant to 8-7.3. This deduction shall be the disincentive for the Contractor's failing to timely complete the Contract. Article 8-10 relating to liquidated damages remains in effect and is applicable.

In the event the Contractor elects to exercise this "incentive payment" provision, should this provision conflict with any other provision of the Contract, the Contract shall be interpreted in accordance with this provision.