



Local Programs Procedures

LPP 04-09 Manual Update
Subject: Liquidated Damages

Reference: *Local Assistance Procedures Manual* (LAPM) Chapter 12 “Plans, Specifications and Estimate”

Effective Date: September 30, 2004

Approved: _____
Original Signed By
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Division of Local Assistance

WHAT IS AN LPP

LPPs are Local Programs Procedures. These documents are used for the rapid deployment of new procedures and policies between updates of Local Assistance manuals, guidelines and programs. They are numbered according to calendar year and order in which released. This is the 9th LPP issued in 2004; hence, it is LPP 04-09.

PURPOSE

The purpose of this LPP is to update the formula and table to accurately estimate the current costs of liquidated damages in Chapter 12 “Plans, Specifications, & Estimates” of the *Local Assistance Procedures Manual* (LAPM). Also updated is the “Notice to Contractors Special Provisions” of the Sample Boiler Plate Contract Documents posted on the Division of Local Assistance Home Page website. Other minor administrative changes have also been made.

BACKGROUND

The existing formula and table for the calculation of liquidated damages is out of date and does not reflect the current cost of liquidated damages for construction contracts.



USER-FRIENDLY FEATURES

- These new procedures are incorporated in the electronic version of the *Local Assistance Procedures Manual* (LAPM) that are available at the Division of Local Assistance Home page on the Internet at: <http://www.dot.ca.gov/hq/LocalPrograms/>. Once there, click on “Publications” and then click on File/Link: lapm.htm. for “*Local Assistance Procedures Manual*.” You may also purchase a Compact Disc (CD), which acts as a one-stop shop for useful publications, and promotes flexible access to helpful information for local project delivery.
- This LPP releases only certain pages that have been revised. The affected pages of the LAPM, Chapter 12 “Plans, Specifications & Estimate” are included in this LPP and can be easily inserted into existing hard copies of the LAPM.
- The boiler plate on the “Notice to Contractors Special Provisions” of the Sample Boiler Plate Contract Documents is posted on the Division Local Assistance Home Page website at: http://www.dot.ca.gov/hq/LocalPrograms/sam_boil/sam_boil.htm
- To receive an electronic notification when new information is posted on the DLA web site, please subscribe to the DLA list server at:
<http://www.dot.ca.gov/hq/LocalPrograms/sub.htm>
- Comments and suggestions for improvement to the manual or the processes and procedures are welcome. They may be submitted to:

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Division of Local Assistance, MS 1
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SUMMARY OF CHANGES

Item	Change
Section 12.9 (Required Federal Contract Provisions) page 12-20, 21	<p>The Liquidated Damages formula has been revised to include the expense of the Resident Engineer's Office.</p> <p>The Liquidated Damages Table has been updated to reflect accurately the estimate for liquidated damages.</p>
Boiler Plate	Change
Notice to Contractors & Special Provisions (Boiler Plate) pages 15, 22	<p>Section 4 "<i>Beginning of Work, Time of Completion and Liquidated Damages</i>" of the "Notice to Contractors & Special Provisions" boiler plate has been updated on the Local Assistance website to reflect the new Liquidated Formula and updated Liquidated Damages Table.</p> <p>Section 5. 1 "<i>Prompt Payment of Funds withheld to Subcontractors,</i>" added in the first paragraph ...<i>modify or...</i>....</p>

AUTHORITIES AND REFERENCES

- Department (Office Engineer) Memorandum, Subject: Liquidated Damages, dated November 29, 2001

clean air and water standards

- A criminal conviction by a State or local court based on noncompliance of the clean air or water standards
- Violation of an administrative order issued under Sections 113(a),(d), 167, or 303 of the Clean Air Act or Section 309(b) of the Clean Water Act due to noncompliance
- An enforcement action filed by the EPA in federal court under Sections 113(b), 167, 205, or 211 of the Clean Air Act or Section 309(b) of the Clean Water Act due to noncompliance with standards

XI. DEBARMENT, SUSPENSION AND INELIGIBILITY CERTIFICATION

On all federal-aid construction contracts and all related subcontracts of \$25,000 or more, the contractor and lower tier participants must certify they are in compliance with this provision. This includes subcontractors, material suppliers and vendors.

Each participant in the contract must certify “that it is not presently debarred, suspended, proposed for debarment, declared ineligible, or voluntarily excluded from covered transactions by any federal agency and they have not been convicted or had civil judgment rendered within the past 3 years for certain types of offenses” (see Attachment E in Exhibit 12-E). It is the administering agency’s responsibility to assure that the contractor is not suspended or debarred from federal contracts. A publication titled, “A Listing of Parties Excluded from Federal Procurement and Non-procurement Programs” is available electronically via the internet at <http://epls.arnet.gov>

XII. LOBBYING CERTIFICATION

On all federal-aid construction contracts and to all related subcontracts of \$100,000 or more, federal funds may not be used to provide financial gain to a member of congress or a federal agency. Awarding a federal-aid contract to a constituent would be an example of financial gain. This applies to contractors as well as subcontractors. A certification that the contractor has not and will not use federal funds to make any payments for lobbying must be included in the contract proposal (see Exhibit 12-E, Attachment F).

Payments of nonfederal funds to any lobbyist must be disclosed on Standard Form LLL “Disclosure of Lobbying Activities” (see Exhibit 12-E, Attachment G), and if there are disclosures, included in the contract proposal.

CONTRACT TIME

Contract time is defined as the maximum time allowed in the contract for completion of all work contained in the contract documents. This time can be established in the specifications by either a specific completion date or a fixed number of calendar days. Contract time often becomes an issue when the traveling public is inconvenienced without any apparent reason. While there may be several reasons for a project to appear dormant, frequently the cause can be traced to excessive contract time or poor contractor scheduling.

For projects on the NHS, the contract time shall be specified in the bidding documents and shall be monitored by the administering agency. Specification of contract time is optional for projects off the NHS.

Insufficient contract time can result in higher bid prices, increased time overruns and claims, inefficiencies, and safety problems. On the other hand, excess contract time can result in increased inefficiencies, equating to costs, to both the local agency and contractor. In addition, delays and inconvenience to the public may be unnecessarily extended.

Caltrans will periodically perform a process review of local agency procedures for determining contract time to assess if the resulting contract times are appropriate. There are several different techniques used to determine contract time. The *FHWA Technical Advisory 5080.15, Construction Contract Time Determination Procedures*, describes time determination techniques in detail, and is available in the appendix of the *FHWA Contract Administration Core Curriculum*.

The local agency should strive for the shortest practical duration of traffic interruptions during highway construction. Innovative contracting methods including incentive/disincentive (I/D), lane rental, A+B contracts or other contract provisions for early completion are available to minimize traffic inconvenience and delay. These provisions are available from Caltrans. The *FHWA Technical Advisory 5080.10, Incentive/Disincentive for Early Completion*, describes this technique in detail, and is available in the appendix of *FHWA Contract Administration Core Curriculum*.

LIQUIDATED DAMAGES

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 a local agency because of the contractor's failure to complete the contract work within the number of calendar days or workdays specified.

Federal law requires the provision for liquidated damages on all federal-aid projects on the NHS. For projects off the NHS, this provision is optional. Liquidated damages are based on the estimated cost of field construction engineering. In special cases, liquidated damages greater than the estimated field construction engineering cost may be specified provided that detailed reasons, such as project related costs for delays and public inconvenience, are given to support the greater amount. In all cases, calculations should support the recommended rate. If project completion time is critical, then Incentive/Disincentive (I/D) provisions should be considered to motivate the contractor to complete the work sooner, and the I/D amount and time documented in the project file.

Local agencies should use the following formula to avoid excessive, or unreasonable, liquidated damages:

$$\frac{L\% \text{ (See Table Below)} \times \text{Engrs Estimate} + \text{RE Ofc Expense}^*}{\text{Working Days}^{**}} = \text{Liq Dam/calendar day}$$

* Resident Engineer office expenses for the life of the contract should be added unless the cost is already included in the Engineer's Estimate.

** Working days used to calculate liquidated damages should not include water pollution establishment or plant establishment days.

LIQUIDATED DAMAGES TABLE (L%)

Project Estimate	Project Type					
	Resurfacing* /Rehab	New Highway	Realignment/ Widening	Landscaping	Soundwall	Others
Over \$30 million	10%	10%	13%	15%	15%	15%
\$10 million to \$30 million	10%	12%	15%	15%	15%	15%
\$5 million to \$10 million	10%	15%	15%	15%	15%	15%
\$750k to \$5 million	15%	15%	15%	18%	18%	15%
Less Than \$750k	15%	20%	20%	18%	20%	15%

* Resurfacing projects include asphalt concrete (AC) surfacing, seal coats, slurry seals, etc.

The calculated liquidated damages should be rounded up in \$100 increments to determine the amount to be specified.

If the local agency uses an alternate method to determine liquidated damages for locally funded projects, this method may be used on federal-aid projects as long as it avoids excessive charges. The local agency should have a liquidated damage calculation in the project files.

BUY AMERICA

On all federal-aid construction projects, current regulations require that steel and iron used be made in the United States. All foreign steel and iron materials are covered by the “Buy America” provision regardless of the percentage of steel in the manufactured product. All manufacturing processes involved in steel or iron products must occur within the United States. These processes include rolling, extruding, machining, bending, grinding, drilling, coating, welding and smelting. Domestically produced steel billets or iron ingots shipped overseas for any process and returned to the United States do not conform to this requirement.

Buy America provisions do not apply to:

- Minimal use of all foreign material in which the total delivery cost to the project site is less than \$2500 or 0.1 percent of the contract amount, whichever is greater;
- Raw materials; scrap temporary steel items such as sheet pilings, bridges, steel scaffolding and falsework
- Materials that remain in place at the contractor's convenience such as sheet pilings and forms
- Pig iron manufactured outside the United States

A local agency shall not list an ineligible iron or steel product as "nonparticipating" in order to circumvent the Buy America requirements.

A waiver of the Buy America requirements by the FHWA Division Administrator is permitted for specific projects, specific products, specific geographical areas, or combinations if:

- Buy America is inconsistent with the public interest or
- There is not a sufficient supply of domestic materials of satisfactory quality

Approval authority for waiver of Buy America requirements has not been delegated from the FHWA to Caltrans and therefore is not delegated to the local agencies.

DISADVANTAGED BUSINESS ENTERPRISE

In accordance with Title VI of the 1964 Civil Rights Act, all federal-aid projects are subject to the legislative and regulatory Disadvantaged Business Enterprise (DBE) requirements. The main objective is to ensure that DBE firms have an opportunity to participate in federally funded projects. Additional information regarding DBE contract goals can be found in Chapter 9, "Civil Rights and Disadvantaged Business Enterprises" and Chapter 15, "Advertise and Award Project" of this manual.

Required DBE specifications and contract provisions are the following for projects with goals:

- DBE Program Policy
- Definitions
- DBE Contract Goal
- Eligibility Criteria
- Good Faith Effort Provisions
- DBE Obligations
- Sanctions on Failure to Comply with DBE Requirements
- Determination Procedures on Counting DBE Participation toward the DBE Goal
- Award Documentation and Procedures
- Post Award Compliance Provisions