1. No Excuse Incentives

Also known as No Excuse Bonus, Locked Date Incentive

What is it?

No Excuse Incentives (NEI) is a monetary incentive for early completion, where the contractor receives the bonus by completing the work on or before a “drop-dead date” that cannot be adjusted for any reason *(1, 2)*.

Why use it?

According to the Federal Highway Administration (FHWA) report *Work Zone Road User Costs: Concepts and Applications* *(3)*, NEI provisions:

* Shorten project/phase completion time,
* Encourage contractor efficiency and productivity, and
* Reduce construction engineering inspection and traffic control costs.

Additionally, as stated in the Minnesota Department of Transportation *Innovative Contracting Guidelines (4)*,NEI provisions offer the possibility for better coordination between the owner, contractor, and subcontractors and the development of more realistic bids.

What does it do?

A NEI provision states a completion due date for a project or portion of a project. In order to win the bonus, the contractor must finish work on or before such date. Furthermore, A NEI provision establishes that the due date cannot be modified for any reason including: permitting, utilities, weather delays, change orders, or any other cause short of a natural catastrophe *(1)*. By providing such clause, the NEI provision allows agencies to meet critical dates (e.g. major sporting events or the beginning of winter season) *(5)*. In case the contractor does not meet the required milestone date, no disincentives are applied and the delay costs are recovered assessing regular liquidated damages to the contractor *(2, 6)*.

How to use it?

The process used to apply NEI provisions is similar to the one used for incentives/disincentives provisions (I/D). Some of the most important aspects are:

* Developing clear project goals and objectives *(7)*,
* Accurately calculating the incentive amount, generally obtained using Road User Costs (RUC) *(1)*, and
* Setting up aggressive but realistic project schedule requirements *(8)*.

The California Department of Transportation *Alternative Procurement Guide (1)* establishes the following additional contracting considerations for the use of NEI provisions:

* Plans and specifications must be complete, accurate, and conflict-free to facilitate a contractor’s understanding of the project. They should indicate any unusual conditions or restrictions under which the contractor may be required to work.
* The NEI provision must clearly state the incentive amount, all the relevant work items, a substantial completion definition, the unit of time used, and the “no excuse” completion date.
* During construction, job-site progress meetings should be held to review and update the project schedule, assess project progress, and adjust the work sequence and resources.
* Cooperation and coordination between the contractor and the agency are extremely important. The agency should quickly respond to any decision-making questions or requests for approval. Both parties should have well defined time limits for submittals, reviews, and any other administrative issues within the contract and the project schedule.

In addition, it is important to consider that this payment provision remains as a non-traditional contracting technique under the FHWA’s *Special Experimental Projects No 14 (SEP-14)* program and requires FHWA approval before being used *(2)*.

When to use it?

NEI provisions are useful for projects where time plays a key role and/or where there are significant road user costs that impact the community and local businesses *(5)*. The California Department of Transportation *Alternative Procurement Guide (1)* provides the following list of appropriate projects:

* **Projects with a fixed date or sequential contracts.** These are projects where finishing early would provide some benefit but finishing late would cause severe damages. (e.g. projects with an arrangement of multiple construction contracts where finishing late would cause collateral impacts to subsequent contractors, or a road opening to accommodate major traffic events)
* **Projects with high user impacts.** These are projects that require traffic restrictions, lane closures, or detours that if delayed would result in increasing road user costs and impacts.
* **Projects with impacts to local community.** Projects where there are severe impacts to the residential or business community.
* **Projects with public or political interests.** Projects where public or political interests may require completion by a certain date to minimize user impacts.

Limitations?

Using this payment provision has the following disadvantages, as identified in the FHWA report *Work Zone Road User Costs: Concepts and Applications (3)*:

* Requires additional agency resources
* Increases construction costs
* Makes contract changes negotiations difficult
* Requires more planning than usual provisions

Who uses it?

A survey performed by the American Association of State Highway and Transportation Officials (AASHTO) Subcommittee on Construction in 2010 showed that 14 STAs (Alabama, Florida, Georgia, Iowa, Massachusetts, Minnesota, Missouri, North Carolina, Pennsylvania, South Carolina, Virginia, Wisconsin, and Wyoming) use NEI provisions *(9)*. The Florida DOT developed this provision, also called “No Excuse Bonus” and has used it to a greater extent than other DOTs *(6)*.

Examples

Example 1) Minnesota Department of Transportation

The Minnesota Department of Transportation executed several projects testing the NEI provisions *(10)*. One of these was the construction of two five-lane bridges (northbound and southbound) over the Mississippi River as part of I-35W in 2008. The previous bridge, collapsed on 2007, was a vital transportation link between Minneapolis and the University of Minnesota which forced MnDOT to reestablish the link with a design-build fast tracked project with an approximate bid price of $230 Million.

MnDOT identified several potential risks with the project that could delay the project from fall 2008 to spring or summer 2009, these were:

* Contaminated Materials – Soils and groundwater;
* Utilities – High pressure gas lines, fiber optic lines, sanitary sewer, water-main, and telecommunication lines;
* Geotechnical Conditions – Limited geotechnical investigation
* Collapsed Bridge – Removal of collapsed bridge performed by third party which could have been delayed and impacted project
* Weather – Harsh winter conditions
* RFP – Large comprehensive complex document written in three weeks which probably had potential for claims due to ambiguities.

The NEI excuse was used in order to ensure that the project was finished in the fall 2008 and to reduce the potential for claims. The NEI consisted of a lump sum of $7 million if the contractor met the completion date and waived all the claims. This incentive was combined with an early completion incentive of $2 million for every 10 days the bridge was open to traffic earlier. The contractor completed the project 90 days before the due date and waived all the claims earning a total $25 million incentive.

The MnDOT uses the following specifications for NEI or locked incentive date (LID) provisions:

A “Locked Incentive Date (LID)” Payment is made available to the Contractor under the following conditions:

1. Subject to the conditions set forth below, the Department shall pay the Contractor a lump sum incentive of $XX if the work specified above in this Section is completed on or before , 20 (hereinafter the “Locked Incentive Date or “LID”)
2. The LID shall not be adjusted for any reason, cause or circumstance whatsoever, regardless of the cause of the delay, and even though it may have been caused by Mn/DOT, Contractor acknowledges and agrees that delays may be caused by or arise from any number of events during the course of the Contract. Such delays or events and their potential impacts on the performance by the Contractor are specifically contemplated and acknowledged by the parties in entering into this Contract and shall not result in an extension of the LID set forth above. Any and all costs or impacts incurred by the Contractor in accelerating the Contractor's work to overcome or absorb such delays in an effort to complete the work by the LID, regardless of whether the Contractor successfully meets the LID or not, shall be the sole responsibility of the Contractor in every instance.
3. If the Contractor fails to complete the work by the LID, the Contractor reserves the right to submit claims for additional compensation in accordance with Mn/DOT 1517, or for time extensions in accordance with Mn/DOT 1806, for work performed prior to the LID. The Contractor shall not, however, make a claim for any acceleration costs associated with attempting to meet the LID date.
4. The Contractor shall provide proper notification of all claims in accordance with MN/DOT 1517 to allow Mn/DOT the option of mitigating or documenting the extra costs, excluding acceleration costs.
5. If the Contractor completes the work by the LID, the following shall apply:
	1. The Contractor must promptly request written verification from the Engineer that the required work was completed on or before the LID. The Contractor shall request this verification from the Engineer in writing on or before the LID.
	2. The Contractor shall elect to either:
		1. Accept payment of the LID incentive; or
		2. Reject payment of the LID incentive and instead reserve the right to submit claims for additional compensation or time extensions (in which the Contractor shall not have the right to make a claim for any acceleration costs associated with attempting to complete Work on or before the Locked Incentive Date).
	3. The Contractor must provide written notice to the Engineer of its election to either accept or decline the LID incentive payment within 30 days of receiving the Engineer's verification that work was completed by the LID. If the Contractor does not notify the Engineer of its election within 30 days, the Contractor shall be deemed to have waived its right to accept the incentive, and shall retain the right to submit claims as specified above.
6. If the Contractor elects to accept the LID incentive payment, the following shall apply:
	1. The Contractor agrees that the incentive payment shall constitute full and final settlement of all claims for additional compensation or time extensions that the Contractor has submitted, could have submitted, or might otherwise hereafter submit, on behalf of itself or any subcontractor or supplier, for work performed up to and including the Locked Incentive Date. This includes all claims that may already be pending with the Department, or in any alternative dispute resolution process such as mediation or arbitration, or before a Dispute Review Board.
	2. The Contractor releases and covenants not to sue the State based upon any claims, demands, charges or causes of action, accruing to the Contractor (including its subcontractors and suppliers) up to and including the Locked Incentive Date. This waiver of claims covers all known or unknown damages, losses, charges, expenses, delays or compensation of whatever nature or kind based upon or in any way arising out of any work performed or materials provided by the Contractor (including its subcontractors and suppliers) for this Project.
	3. Payment of the incentive shall be made on the first partial estimate voucher processed after the Engineer receives the Contractors written request to accept the incentive.
7. Payment of the LID incentive is intended to insure to the Department and the public the benefits of early completion of the specified work and to eliminate claims disputes. Should this provision conflict with any other provision of the Contract, this provision shall prevail and the Contract shall be interpreted in accordance with it.

Example 2) Virginia Department of Transportation

The Virginia Department of Transportation (VDOT) used the NEI provision on the Springfield Interchange Project also called "The Mixing Bowl." VDOT and FHWA offered a No Excuses Incentive for phases two and three of the eight-year project in September 1998. The project consisted of redesigning a complicated and historically congested interchange in the vicinity of Springfield, Virginia, involving I-495, I-95, and I-395. The interchange handles approximately 430,000 vehicles per day.

The incentive amounted to $10 million if the work was completed on or before August 18, 2001, with the amount dropping to $5 million if completed on or before November 17, 2001, and with the contract fixed date for completing these project phases being June 1, 2002. The project planners chose to use a NEI provision because they wanted to begin construction even though certain preparations typically made prior to construction had not been completed. 55 right-of-way parcels still needed to be procured by the bid date, September 1998, and much of the utility relocation work had yet to be completed. The contractors bidding on the project would need to work around the utilities and un-procured lots.

The incentive worked even though the contractor did not have full access to the construction site until right of entry had been obtained for the final ROW parcel in March 1999, and many utilities had to be relocated during construction. The project phases were completed on schedule and the contractor received the full $10 million incentive.

References

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