

period of time. Claims arising on exempt non-NHS projects should be processed in accordance with the State's approved Stewardship Plan.

(c) When requesting Federal participation, the STD shall set forth in writing the legal and contractual basis for the claim, together with the cost data and other facts supporting the award or settlement. Federal-aid participation in such instances shall be supported by a STD audit of the actual costs incurred by the contractor unless waived by the FHWA as unwarranted. Where difficult, complex, or novel legal issues appear in the claim, such that evaluation of legal controversies is critical to consideration of the award or settlement, the STD shall include in its submission a legal opinion from its counsel setting forth the basis for determining the extent of the liability under local law, with a level of detail commensurate with the magnitude and complexity of the issues involved.

(d) In those cases where the STD receives an adverse decision in an amount more than the STD was able to support prior to the decision or settles a claim in an amount more than the STD can support, the FHWA will participate up to the appropriate Federal matching share, to the extent that it involves a Federal-aid participating portion of the contract, provided that:

- (1) The FHWA was consulted and concurred in the proposed course of action;
- (2) All appropriate courses of action had been considered; and
- (3) The STD pursued the case diligently and in a professional manner.

(e) Federal funds will not participate:

- (1) If it has been determined that STD employees, officers, or agents acted with gross negligence, or participated in intentional acts or omissions, fraud, or other acts not consistent with usual State practices in project design, plan preparation, contract administration, or other activities which gave rise to the claim;
- (2) In such cost items as consequential or punitive damages, anticipated profit, or any award or payment of attorney's fees paid by a State to an opposing party in litigation; and
- (3) In tort, inverse condemnation, or other claims erroneously styled as claims "under a contract."

(f) Payment of interest associated with a claim will be eligible for participation provided that the payment to the contractor for interest is allowable by State statute or specification and the costs are not a result of delays caused by dilatory action of the State or the contractor. The interest rates must not exceed the rate provided for by the State statute or specification.

(g) In cases where STD's affirmatively recover compensatory damages through contract claims, cross-claims, or counter claims from contractors, subcontractors, or their agents on projects on which there was Federal-aid participation, the Federal share of such recovery shall be equivalent to the Federal share of the project or projects involved. Such recovery shall be credited to the project or projects from which the claim or claims arose.

[56 FR 37004, Aug. 2, 1991, as amended at 62 FR 6873, Feb. 14, 1997; 69 FR 7118, Feb. 13, 2004]

#### § 635.125 Termination of contract.

(a) All contracts exceeding \$10,000 shall contain suitable provisions for termination by the State, including the manner by which the termination will be effected and the basis for settlement. In addition, such contracts shall describe conditions under which the contract may be terminated for default as well as conditions where the contract may be terminated because of circumstances beyond the control of the contractor.

(b) The STD prior to termination of a Federal-aid contract shall consult with and receive the concurrence of the Division Administrator. The extent of Federal-aid participation in contract termination costs, including final settlement, will depend upon the merits of the individual case. However, under no circumstances shall Federal funds participate in anticipated profit on work not performed.

(c) Except as provided for in paragraph (e) of this section, normal Federal-aid plans, specifications, and estimates, advertising, and award procedures are to be followed when a STD awards the contract for completion of a terminated Federal-aid contract.

(d) When a STD awards the contract for completion of a Federal-aid contract previously terminated for default, the construction amount eligible for Federal participation on the project should not exceed whichever amount is the lesser, either:

(1) The amount representing the payments made under the original contract plus payments made under the new contract; or

(2) The amount representing what the cost would have been if the construction had been completed as contemplated by the plans and specifications under the original contract.

(e) If the surety awards a contract for completion of a defaulted Federal-aid contract or completes it by some other acceptable means, the FHWA will consider the terms of the original contract to be in effect and that the work will be completed in accordance with the approved plans and specifications included therein. No further FHWA approval or concurrence action will therefore be needed in connection with any defaulted Federal-aid contract awarded by a surety. Under this procedure, the construction amount eligible for Federal participation on the project should not exceed the amount representing what the cost would have been if the construction had been completed as contemplated by the plans and specifications under the original contract.

#### § 635.126 [Reserved]

#### § 635.127 Agreement provisions regarding overruns in contract time.

(a) Each State transportation department (STD) shall establish specific liquidated damages rates applicable to projects in that State. The rates may be project-specific or may be in the form of a table or schedule developed for a range of project costs and/or project types. These rates shall, as a minimum, be established to cover the estimated average daily construction engineering (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.

(b) The rates established shall be subject to FHWA approval either on a project-by-project basis, in the case of project-specific rates, or on a periodic basis after initial approval where a rate table or schedule is used. In the latter case, the STD shall periodically review its cost data to ascertain if the rate table/schedule closely approximates, at a minimum, the actual average daily CE costs associated with the type and size of the projects in the State. Where rate schedules or other means are already included in the STD specifications or standard special provisions, verification by the STD that the amounts are adequate shall be submitted to the FHWA for review and approval. After initial approval by the FHWA of the rates, the STD shall 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.

(c) The STD may, with FHWA concurrence, include additional amounts as liquidated damages in each contract to cover other anticipated costs of project related delays or inconveniences to the STD or the public. Costs resulting from winter shutdowns, retaining detours for an extended time, additional demurrage, or similar costs as well as road user delay costs may be included.

(d) In addition to the liquidated damages provisions, the STD may also include incentive/disincentive for early completion provisions in the contract. The incentive/disincentive amounts shall be shown separately from the liquidated damages amounts.

(e) Where there has been an overrun in contract time, the following principles shall apply in determining the cost of a project that is eligible for Federal-aid reimbursement:

(1) A proportional share, as used in this section, is the ratio of the final contract construction costs eligible for Federal participation to the final total contract construction costs of the project.

(2) Where CE costs are claimed as a participating item based upon actual