

FACILITIES DIVISION Standard Operating Procedures

DATE: June 1, 2009
SUBJECT: Liquidated Damages
NUMBER: FD SOP 09-001
EFFECTIVE DATE: Immediately until revised, replaced or cancelled

1. Purpose

This document provides guidance on the use of liquidated damages in construction contracts issued by Facilities Division (FD).

2. References

FAR 11.5, Liquidated Damages
FAR 36.206, Liquidated Damages

3. Background

Liquidated damages are costs used to compensate the Government for expenses it incurs as a result of a delay caused by the contractor in completing a contract after the time specified in the contract. These costs are usually specified daily charges for each day the contractor fails to meet the contract completion date or a specified milestone(s). This timeframe is usually counted as the number of calendar days between the specified date of contract completion in the original contract, or in subsequent contract modifications, and the date the facility is ultimately determined to be substantially complete. In order for a LD clause to be enforceable, the amount of the damages must reasonably relate to the anticipated or actual loss that would be incurred. Liquidated damages must be reasonably quantifiable; they are not to be arbitrary, punitive, or negative performance incentives.

Actual damages, on the other hand, are those that can be easily and readily determined at the time the contractor breaches the contract (when they fail to meet the established completion date). These damages are the direct and proximate result of a contractor's unexcusable delay. When a clause for LDs is not included in the contract, the Government is still entitled to recover the actual damages it incurs. However, actual damages cannot be assessed in addition to LDs if the actual costs are included as an element(s) of the LDs.

FAR 36.206, Liquidated Damages, states that the Contracting Officer (CO) must evaluate the need for liquidated damages in construction contracts in accordance with FAR 11.502 and Agency regulations. (USDA currently has no supplemental regulations on LDs.) FAR 11.501 states that the Contracting Officer must consider the potential impact on pricing, competition and contract administration before using a LD clause. It goes on to say that a LD clause should be used only when timely performance is so important that the Government may reasonably expect to suffer damage if the performance is delinquent and the extent or amount of such damage would be difficult or impossible to estimate accurately or prove. In the event of a termination for default, the CO must take all reasonable steps and prompt action to mitigate LDs in order to prevent excessive loss to the defaulting contractor and to protect the Government's interest.

4. Policy

Unless there are compelling reasons that preclude the use of LDs, they are to be included in all major construction contracts that exceed \$1 million or where the current and/or projected Government occupants are renting space until the construction project is complete. They should also be used in building renovation projects when the occupants must be moved while work is in progress or where research will be disrupted for an extended period of time. The CO and Engineering Project Manager (EPM) should coordinate with each other (and the Area Office Engineer (AOE), as necessary) to determine the need for LDs on projects between \$500,000 and \$1 million.

Liquidated damages are not to be used as a substitute for appropriate contract administration, as a penalty for failure to perform on time, or as a negative incentive to perform. Contracts under \$500,000 should not contain LDs since it is very likely that such an assessment would inhibit reasonable prices and competition.

Courts will typically not uphold a LD clause(s) if the damages are disproportionate to the injury, or if the amount of the liquidated damages appears to be intended as punitive, as opposed to fair compensation for the injury. Therefore, the determination of LDs should be based on a good-faith effort to estimate the anticipated damages should the contractor fail to meet the completion date.

The amount of LDs to be assessed should include: (1) the estimated cost of inspection and/or superintendence by the A-E firm performing the inspections, including their overhead and profit; (2) cost of substitute facilities, such as temporary laboratory space; (3) estimated cost of building or equipment rental; (4) estimated storage costs of equipment; etc. The amount of LDs should be significant enough to prevent a contractor from simply paying the daily rate in order to buy additional time to complete the project.

When the amount of LDs that is intended exceeds \$1,500 per calendar day, the CO will schedule a Contract Review Board (CRB) to discuss the proposed amount prior to issuing the solicitation.

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LIQUIDATED DAMAGES ESTIMATE AND DETERMINATION

Project Number	Project Description	Date
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PART I – TO BE COMPLETED BY ENGINEERING PROJECT MANAGER (EPM) AND FEB BRANCH CHIEF

LIQUIDATED DAMAGES COST ESTIMATE

Line Item No.	Description	Basis of Calculation	Amount Per Day

TOTAL: \$

Recommendation:

- Liquidated Damages are recommended because:
 - Delay in completion will cause damage to the building and/or its contents
 - Delay in completion will cause actual loss of research
 - Delay in completion will cause accrual of rental costs for temporary laboratory space
 - Delay in completion will cause other damages: (Explain)

- Other:

- Liquidated Damages are not recommended because:
 - Government will not be damaged by contractor's failure to complete on schedule (Explain)

- Other:

Name of EPM	Signature	Date
Concur: Chief, Facilities Engineering Branch	Signature	Date

PART II – TO BE COMPLETED BY CONTRACTING OFFICE

DETERMINATION AND CONCURRENCE OF CONTRACTING OFFICER AND FCB BRANCH CHIEF

- Liquidated damages will be included for the reasons noted above at the rate of \$_____ per day.
- Liquidated Damages will not be included for the reasons noted above.

Name of CO	Signature	Date
Concur: Chief, Facilities Contracts Branch	Signature	Date