

# APD ALERT



## LIQUIDATED DAMAGES

### PURPOSE

This document replaces Facilities Division Standard Operating Procedure 09-01 to provide guidance on the use of liquidated damages in construction contracts.

### REFERENCES

FAR 11.5, Liquidated Damages  
FAR 36.206, Liquidated Damages

### BACKGROUND

Liquidated damages (LDs) 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 the 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. LDs must be reasonably quantifiable; they are not 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.

Federal Acquisition Regulation (FAR) 36.206, Liquidated Damages, states that the Contracting Officer (CO) must evaluate the need for LDs 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 CO 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.

## 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 the Engineering Project Manager (EPM) should coordinate with each other (and other location personnel, as necessary) to determine the need for LDs on projects between \$500,000 and \$1 million.

LDs 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 LD 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 the LDs to be assessed should include:

1. the estimated cost of inspection and/or superintendence by the Architect-Engineer (A-E) firm performing the inspections, including their overhead and profit;
2. cost of substitute facilities, such as temporary laboratory or office space;
3. estimated cost of building or equipment rental; and,
4. estimated storage costs of equipment, etc.

The amount of the LD 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 the LDs amount exceeds \$1,500 per calendar day, the CO shall submit the Liquidated Damages Estimate and Determination to the Contract Review Board (CRB) prior to issuing the solicitation. Based upon the initial review, additional information may be requested.

## PROCEDURES

The CO and EPM will review the project's Action Plan/Fact Sheet and discuss the proposed amount, if any, of the LDs with the Location/Program personnel, as appropriate. Based on these discussions, the EPM will calculate and recommend the estimated daily rate for LDs to the CO.

The attached form, Liquidated Damages Estimate and Determination, is to be used to document the calculation and rationale for all projects subject to LDs. If LDs are not to be included in a contract, the rationale must be fully documented on this form as well.

The EPM will complete Part I with his/her recommendations, sign and date, and submit it to the applicable Business Service Center Facilities, Asset Management, and Safety Branch Chief for concurrence. The CO will review the EPM's recommendation and complete Part II, which they will sign and date, then forward to the BSC Acquisition and Property Branch Chief for concurrence.

The fully executed form shall be maintained in the CO's pre-award file.

### **APD POINT OF CONTACT**

Acquisition Programs and Oversight Branch, E-mail at [APOB@ars.usda.gov](mailto:APOB@ars.usda.gov) or phone at 301-504-1725.

Attachment

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