

Guidelines for Liquidated Damages in Construction Contracts

1. Background

At the January 18, 2007, meeting, the Regents approved the rescission of Policy No. 6038: Liquidated Damages For Construction Contracts. Since May 18, 1973, this policy required a liquidated damages clause to be inserted in every construction contract over \$10,000. The following guidelines replace this policy.

2. Guidelines

A. WHEN TO USE LIQUIDATED DAMAGES CLAUSES IN CONTRACTS:

Liquidated damages clauses are a useful tool that should be included in construction contracts when the delay of the project completion is critical for the program or will cost the University unforeseen expense, as, for example, when a delay will impact a research program or the timely completion of a residence hall renovation. Inadequate liquidated damages may, in the event of a contractor-caused delay, prevent the University from fully recovering costs incurred as a consequence of the delay. Minimal liquidated damages amounts are usually less than the administrative costs incurred by the University. Conversely, excessive liquidated damages may be intimidating to small businesses and may not be supportable in legal proceedings.

The following parameters should be considered for use of liquidated damages clauses in contracts. These are guidelines only. Campuses retain the flexibility to decide whether or not to include liquidated damages clauses in any contract.

1. Project size - over \$50,000
2. Project complexity - three or more trades
3. Project duration - over three months
4. For projects involving multiple prime contracts:
5. Impact to critical path - Is the contract on the critical path for the project, and will contract delays set back the entire project or any subsequent contract efforts such as phased projects?
6. Will such delays have an adverse impact on the University's mission?
7. Physical proximity - Is contract work taking place in a location that may impact timely completion of the project?

8. Estimated cost of delay - Will a delay to the project cause loss of revenues, additional rental cost, or other types of costs such as are enumerated in paragraph B. below?

B. HOW TO DETERMINE THE AMOUNT OF ANTICIPATED ACTUAL DAMAGES IN ORDER TO ESTABLISH AN APPROPRIATE AMOUNT FOR LIQUIDATED DAMAGES:

The following list of criteria should be considered when determining anticipated damages that may be caused by a delay in the completion of a project. Some of these are hard costs; others are based upon nonquantifiable factors. Review delay impact costs with your campus Building Committee.

1. Loss of revenue
2. Interest (on borrowed funds) during unexcused delays in completion or periods of non-use
3. Added administrative overhead
4. Rental/moving or other expenses for alternate space
5. Additional consultant costs
6. Inefficient use of University resources
7. Loss of grants or gifts
8. Loss of administrative services
9. Loss of instruction, care, or research facilities
10. Loss of personnel or personnel time
11. Cancellation of classes
12. Loss of outside revenue (e.g., performances, exhibitions)
13. Costs for insurance, utilities, or equipment

C. HOW TO DOCUMENT THE MEANS BY WHICH LIQUIDATED DAMAGES ARE ESTABLISHED:

1. Determine your anticipated actual per diem damages using criteria such as those listed in B. above.
2. Determine the appropriateness of the figure arrived at in Step 1. The anticipated figure may be used, or a percentage of that figure may be determined to be more appropriate for liquidated damages.
3. Create a typewritten document of the criteria, calculations, and judgments used above.
4. Place the documentation in the project file for future reference. It is essential to keep all of the records used to determine the per diem liquidated damages amount.

This documentation is important to resolve possible future claims, for audit purposes, and for reference in developing future liquidated damages clauses.

*Construction Contract size amended to \$50,000.00

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