

LIQUIDATED DAMAGES



What you need to know

Liquidated damages (sometimes called delay damages) is money paid by the contractor to the employer (or by a sub-contractor to a contractor) if the contractor goes past the completion date. They are useful to keep a project on time. They must represent a reasonable estimate of the loss you are likely to suffer if the completion date is not met.



Practical tips for employers/developers

Make sure the contractor is subject to liquidated damages. Standard form contracts (e.g. JCT, NEC, RIBA, etc) usually have a space to insert them.

Make sure the amount of the liquidated damages is a reasonable estimate of what your loss could be if the completion date is not met.

Set the liquidated damages at the higher end of any estimate range and negotiate as much as you can from the contractor.

Most liquidated damages provisions are enforceable unless they are extortionate.

When enforcing liquidated damages, do not be swayed by a contractor's attempt to argue that the loss is not as much as the amount of liquidated damages. So long as a reasonable estimate was made, they should be recoverable.



What you need to know

The test for whether liquidated damages are enforceable is whether the amount claimed is a genuine estimate of loss at the time of contracting. That test can be used to challenge the amount.



Practical tips for contractors

Avoid liquidated damages if you can. For smaller jobs, informal work and most small residential work, they are not common. For commercial and development work, you will have to accept that liquidated damages may be payable.

Negotiate as low a sum for liquidated damages as you can.

You can try to persuade the employer/developer that the liquidated damages will not be enforceable and therefore should be lower if they are too high because they are not a genuine pre-estimate of loss.

If you cannot negotiate the amount of the liquidated damages, try to push the completion date back as far as you can.

When pricing up for work and tendering, take into account the risk of not meeting the completion date and having to pay liquidated damages.

NEGOTIATING AWAY FORTHCOMING LIQUIDATED DAMAGES



What you need to know

If enforcing liquidated damages just means that the contractor will become insolvent and not pay, or if you need something else from the contractor, it can be worth negotiating over how much the contractor has to pay.



Practical tips for employers/developers

Try to get as much as you can from the contractor. Remember that the liquidated damages clause is probably going to be enforceable.

Liquidated damages can usually be deducted from money otherwise due to the contractor, including the retention. That is unless the Construction Act 1996 payment mechanism has been followed (in which case, take advice).

If you need to grant an extension of time, it should be expressed to be an extension of the original completion date, not a new completion date.

If you need to grant an extension of time, the new completion date should just be the date that needs to be achieved, expressed in absolute terms. Avoid language like “best endeavours” or “fullest endeavours”.



What you need to know

Even if enforceable, a liquidated damages clause is just a contractual obligation like any other. It can be the subject of subsequent negotiation.

Sometimes parties negotiate an extension of time in exchange for increased liquidated damages, for example, if it looks like the completion date might not be met.



Practical tips for contractors

If you think the completion date will not be met, speak to the employer or the contract administrator as soon as possible.

If you cannot get an extension of time, try to negotiate over the amount of liquidated damages to be paid.

If you can persuade an employer/developer to agree a new completion date, to be met using “fullest endeavours”, or words to that effect, you may be able to avoid liquidated damages that are otherwise going to later be payable. You may wish to seek legal advice if attempting to go down this route. More sophisticated employers/developers and/or their consultants are unlikely to fall for this trick.

CONCURRENT DELAY



What you need to know

Concurrent delay is when both the employer and the contractor (or the contractor and a sub-contractor) are responsible for the same period of delay.



Practical tips for employers/developers

Concurrent delay is actually fairly rare. If the contractor is in breach, it cannot get out of paying liquidated damages just by pointing to some minor delay caused by the employer/developer.

The employer usually has the upper hand in negotiations over liquidated damages after the event and in most cases the liquidated damages would just be payable in full even if concurrent delay is arguable (but the employer still disagrees). This is usually because there is some other payment due to the contractor (e.g. for goods and services) which can just be reduced by setting it off against the liquidated damages.



What you need to know

Concurrent delay is when both the employer and the contractor (or the contractor and a sub-contractor) are responsible for the same period of delay.



Practical tips for contractors

If it is arguable that concurrent delay has happened, rely on that when trying to negotiate liquidated damages after a delaying event has happened.

It is sometimes more hassle and cost for an employer to argue about whether concurrent delay has happened than to reach an agreement. Rely on that and try to get a reduction of liquidated damages that might otherwise be payable.

TERMINATING ON THE BASIS OF DELAY



What you need to know

If there is an obligation to act with diligence (e.g. regularly and diligently), you must work to an efficient programme. If time is “of the essence”, it means you can terminate the contract if the contractor goes past the completion date, and you can claim damages from the contractor.



What you need to know

If there is an obligation to act with diligence (e.g. regularly and diligently), the contractor must work to an efficient programme. If time is “of the essence”, it means the employer can terminate the contract if you go past the completion date, and can claim damages from you.



Practical tips for employers/developers

Definitely get all contractors to agree to proceed “regularly and diligently”. That is an obligation in JCT contracts.

Insist on the contractor producing a construction programme early on, and monitor it as the project proceeds to make sure it is met.

If you can get the contractor to agree to time being “of the essence”, do so. It means that you can terminate the contract if the contractor goes past the relevant date and can claim damages.



Practical tips for contractors

If you can get a contract without an obligation to act with diligence, you may only be obliged to meet the completion date.

If you are obliged to act with diligence, you must have a robust written construction programme and comply with it. It should therefore be realistic.

Keep an eye out for any obligation to meet a deadline if time is expressed to be “of the essence” and comply with the obligation. Avoid such a contract if you can.