



OCA Position on Liquidated Damages

Summary – Liquidated damages clauses in contracts by its very nature causes an adversarial relationship to exist on a construction project. The Ottawa Construction Association recommends against their incorporation into construction contracts. If an Owner feels compelled it must resort to a liquidated damages clause, the OCA recommends that the liquidated damages be matched by equivalent incentive payments to the Contractor for earlier completion. OCA further recommends that the clause be drafted carefully since potential changed work and unavoidable delays will make it difficult to administer the liquidated damages impartially. Compensation should be reasonable, realistic, itemized and accountable; the dollar amount should be itemized as liquidated damages in the bid documents and calculated at a per diem rate based on the evaluation of the probable cost to the Owner.

Liquidated Damages Clauses are used in contracts to assign financial responsibility to the contractor for damages that are likely to have occurred by the owner failing to meet the specified schedule. A Liquidated Damages Clause, in order to be sustainable, must provide for payments to bear relationship to actual damages incurred and be a genuine attempt to make a pre-estimate of the cost of the damages which are likely to occur. If the amount of the penalty is not excessive and has some relationship to the loss likely to result from the delay, the Clause will generally be upheld as being a genuine pre-estimate of the damages likely to be incurred.

In order to entitle the owner to such liquidated damages, the delay must be one for which the contractor was responsible. In other words, the contractor must be guilty of a breach of contract in respect of which the owner is entitled to damages.

The causes for unrealistic or condensed schedules usually lie in the early stages of the project, either in obtaining the necessary government approval or budget approvals, or in the design phase, etc.

The Liquidated Damages Clause is then often used to impose a financial penalty on the last person in the construction chain to make up for time he/she is not usually responsible for losing. Experience has shown that Liquidated Damages Clauses have usually been used where the schedule may be difficult or impossible to achieve.

Hence a prudent bidder has to make a choice:

1. Refuse to bid the project.
2. Qualify the bid to exclude the Liquidated Damages Clause.
3. Make allowance in the tender for the specified damages.

None of these choices best serves the Owner of the project. Should a Liquidated Damages Clause be used, its very nature causes an adversarial relationship to exist between all parties to the construction project, which permeates to all levels, Owner, Consultant, Sub-contractor, Suppliers. These are the very people who should be working together to make the schedule work; instead, they are using valuable time and energy to justify extensions and convey blame to other parties.

It is in the best interest of all parties in a normal construction project to complete the project in the shortest allowable time. Job overhead costs increase for every hour and/or day the completion of the project is delayed.

It is agreed that Liquidated Damages Clauses are usually counter-productive to the successful and harmonious completion of a construction project and that it is in the best interest of all parties that unnecessary Liquidated Damages Clauses be excluded from construction contracts.