

Dealing With Liquidated Damages

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I. An Introduction To Liquidated Damages

Liquidated damages are the sum that parties to a contract agree shall be paid when one of the parties fails to satisfy some specified portion of their agreement. In construction contracts, liquidated damages are typically a daily specified amount backcharged to the contractor for every unexcused day it takes to substantially complete the project after the contractually defined substantial completion date. Although the daily assessment varies from contract to contract, \$2,000 per day or more is common. The following is a typical liquidated damages provision:

[i]f the Contractor shall fail to achieve Substantial Completion within the Contract Time, it shall be liable to pay the Owner the daily amount specified in the Agreement, not as a penalty, but as fixed and agreed upon damages for breach of contract.

Liquidated damages provisions are common in both private and public construction project contracts. Both AIA A201-2007 General Conditions and ConsensusDOCS 200 provide that the waiver of consequential damages as specified in those documents does not preclude recovery of liquidated damages.¹ Accordingly, it is important to understand what a liquidated damages provision is, how to assess its validity, and the defenses that can be raised to enforcement even if the

¹ Section 15.1.6 of AIA A201 provides that it does not preclude the recovery of liquidated damages as provided for elsewhere in accordance with the Contract Documents. Section 3 of AIA A101-2007 allows for the insertion of a provision “for liquidated damages relating to failure to achieve Substantial Completion on time.” Paragraph 6.6 of ConsensusDOCS 200 similarly provides that it does not preclude the recovery of liquidated damages. ConsensusDOCS 200 does contain a liquidated damages provision at Paragraph 6.5.

provision is valid on its face. There are numerous questions that arise when a liquidated damages claim is threatened or asserted. For instance,

- can an owner recover liquidated damages when there are no actual damages?
- can the owner recover liquidated damages where it was a cause of the delay?
- can liquidated damages be assessed as a penalty?
- can an owner recover liquidated and actual damages?

This article provides a framework for better understanding and addressing these issues. To access the article, please use the following link:

[Liquidated Damages Article.doc](#)