

LIQUIDATED DAMAGES

DO YOU KNOW WHAT THE GOVERNMENT CAN AND CANNOT DO?

Any Contractor performing work for the Government is aware of Liquidated Damages, which is provided by FAR Clause 52.211-12 “Liquidated Damages – Construction” that essentially provides that the Government can assess Liquidated Damages and require a Contractor to pay them in the event that a Contractor “...fails to complete the work within the time specified in the contract,”.

The question is, however, are Contractors aware of how and when Liquidated Damages can be assessed? Are Contractors aware of what makes Liquidated Damages unenforceable? If the answer is “No”, there is some very important information contained in this Excell report that will provide Contractors with some very valuable insight.

Although a Liquidated Damages clause is present in almost every Government construction contract, there are regulations that govern when, how, and the dollar amount per calendar day that the Government can assess in Liquidated Damages in the event that the Contractor fails to complete its work by the Contractual Completion Date. In fact, the dollar amount per day is based solely on what the Government estimates it will need in the event a Contractor does not complete performance as contractually required and then either completes the work late or in some cases must be replaced by another Contractor to complete the work, whereby the Government terminates the contract and asserts and perfects a damages position.

The Government’s ability to terminate a Contract for Default **and/or** assess Liquidated Damages is constrained by very important prerequisites, including, but not limited to:

- If the Government issues a Termination for Default, FAR provision 49.401 requires that if the Contractor fails to perform its contractual obligations within the time specified, or fails to make progress which endangers performance of the contract, Liquidated Damages can be assessed;
- Additionally, the Government then must issue a written notice of default and state its intention to terminate the contract, in whole or in part;
- If written notice is not issued **then** the Government has waived the Contract completion date by not issuing a Modification to extend the Contract Completion Date (CCD);
- Also, if the Government otherwise requires the Contractor to perform additional work beyond the CCD and fails to follow the proper procedure for establishing a new CCD, then the Government may have waived the CCD;
- Should the Government establish a new Contract Completion Date by a bilateral agreement with the Contractor or by unilateral action so long “as the date is reasonable and specifically states that

failure to perform by the new date will result in a Default Termination”; then a new CCD is considered set;

- In any case the Government is not authorized to terminate a delayed Contract for default where the causes for delay are without the fault or negligence of the Contractor and/or are beyond the Contractor’s control. (i.e. acts of God or the public enemy, acts of the Government and/or unusually severe weather, etc.)

A perfect example of such information is in *Sun Cal, Inc. v. United States*, 21 Cl. Ct. 31 (1990) the Claims Court struck down the Government’s Termination for Default because the Contracting Officer had waived the Contract completion date and had not followed the proper procedure for reestablishing a new completion date.

Significantly, the Claims Court in this default situation held that the burden of proof for justification for a default termination always rests on the Government, even when the issue arises in a suit brought by the Contractor, challenging the termination. Simply stated a default termination is a forfeiture and considered a “drastic sanction” which means that a Default Termination should only be upheld if supported on good grounds with solid evidence.

Within the last six (6) months, at least three of Excell’s contractors/clients have been “subjected” to the Government’s proposed assessment of Liquidated Damages allegedly based on a Contractor’s failure to meet a “floating” Contract Completion Date. However, the Government was culpable for the delays experienced by Excell’s clients (in at least two instances), and since the Liquidated Damages are now being used in a “punitive” manner, then the assessment and/or proposed assessment makes **THEM UNENFORCEABLE.**

Across the board is another novel idea presently being advanced in the contractual arena, which pertains to the use of Liquidated Damages as an offset to the costs of extra out of scope work. Various Government agencies are beginning to attempt to “horse trade” and offer Contractors the opportunity to “buy back” Liquidated Damages when the contractor submits pricing for its “changed scope of work.” This tactic is in effect providing the Government with a newly designed “Coffer” to pay for the extra work performed by the Contractor that the Government cannot pay for and the Contractor is being led to believe that the Government is doing it a favor (i.e. Performance Evaluation threats or lesser Liquidated Damages assessment). Contractually, there are several problems with this approach:

1. The Contract Completion Date by this attempted action is compromised (i.e. not set and may be found unenforceable);
2. The Contractor is now being coerced with “Coffered” Liquidated damages which may now be found to be unenforceable;
3. The Contractor is giving up its right to prove the delay, when the delay was caused by factors beyond its control;
4. Since a new Contract completion date has not been established and agreed to through the Government’s action, Liquidated Damages may be deemed unenforceable.

In support of the above, the *Sun Cal* case (copy attached), the Government argued that the parties had both agreed to a new completion date because the Contractor had submitted a Construction Schedule in response to the Government's request. The Claims Court held that the Contractor did not ever accept the new completion date, and that the prerequisites of an unambiguous "offer and an acceptance" – were not met.

The Claims Court goes on to state that there was no "meeting of the minds" on a new Contract completion date and there was no written documentation affirmatively stating that the new Contract Completion Date must be met on penalty of default.

Finally, the Government's "good intentions" in reconsidering its right to terminate had the legal effect of creating new obligations that the Government had to satisfy before it would have the authority to terminate the Contract for default based on the Contractor's delay in completing the project. Because the obligations were not satisfied, the Government lacked the authority to Terminate for Default and/or assess Liquidated Damages.

SUMMATION

The realities associated with Government Contractors involve the need to identify and allocate responsibility for the events of delay on a construction project. Contractors should be educated regarding these types of situations involving Liquidated Damages assessment to better protect themselves. Contractors can also save a significant amount of money and time by ensuring they know what the Government can and cannot do.

Excell has extensive experience essential to review the Contract documents which contain risk-shifting clauses and to evaluate the factors in play in order to establish the best path to avoid liability for the Contractor and to place responsibility upon the Owner or Contracting Officer's staff. By now, an experienced Contractor is well aware that written notice is required to support a claim for delays and extra costs. The information set forth in such written notices is critical to justifications downstream concerning the completion date(s) and which party is responsible for delay(s).

Excell can help a contractor to gain a better understanding of the intricacies of Liquidated Damages assessment. When you partner with Excell Consulting, our consultants will conduct a specialized review of your particular situation and develop recommendations to guide you in making a business judgment. Please feel free to fill out the form below and one of our consultants will contact you right away to discuss your particular situation.

In the end, you will be glad you made the call; by the way, it's a FREE CALL.

Excell CONSULTING: "Here Today for Your Tomorrow."

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