**WHETHER TO INCLUDE LIQUIDATED DAMAGES**

 **AND, IF SO, HOW TO ESTIMATE THE AMOUNT.**

**What are Liquidated damages?**

Liquidated damages is an estimate at the beginning of a project of the amount of actual damages that the University would expect to incur if the construction is delayed and the facility is unavailable for use as and when intended. They are generally permitted only where the amount of damages would be impossible or difficult to ascertain with reasonable certainty. The more difficult it is for the parties to estimate their damages, the more likely the amount stipulated as liquidated damages will be enforced by a court. Where actual damages are easily susceptible to calculation, courts will find the use of liquidated damages to be unnecessary. Under the proper circumstances, however, courts have held that damages resulting from the late completion of a construction project may often be difficult to ascertain in advance, especially with public contracting where loss of profits is not typically the most important element of delay damages. Therefore, liquidated damages will often be a useful means for the University to encourage timely completion of its construction projects.

**Why use liquidated damages?**

Liquidated damages are appropriate for some University projects, and they are inappropriate for other projects. If appropriate, they can encourage the parties to maintain the construction schedule and, if the University incurs damages because the contractor fails to maintain the schedule, a liquidated damages provision in the contract will help the University recover its damages from a contractor’s delay. If the amount of damages that would be incurred from a contractor’s delay is easy to calculate, liquidated damages are not helpful and should not be used. If the amount of liquidated damages in a contract is disproportionate to a reasonable estimate of actual damages, courts might decide they are an unlawful penalty and decide to not enforce the provision. Therefore, it is important that the University estimate, with reasonable accuracy, the amount of actual damages it would expect to incur in the event of a delay. Answering the questions in this worksheet will help to determine whether a liquidated damages provision is suitable for a specific project and, if so, provide a basis for estimating the amount of liquidated damages. It will also demonstrate to a court that the University has exercised good faith in attempting to arrive at a reasonable liquidated damages amount.

# Whether to Use Liquidated Damages

**Project Name(s) and Address**:

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| --- |
| *(Project #) Project Name**Project Address* |

**Anticipated Purposes of Project:**

|  |
| --- |
| *Example: Heating system renovation* |

**When must Project be complete (“Anticipated Completion Date”):**

|  |
| --- |
| *Required Substantial Completion date* |

**Generally, why must this Project by complete then?**

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| *Example: To avoid inconvenience to students and housing staff by preventing the need to relocate student accommodations at the start of the school year.* |

**What types of Damages might be incurred by the University if the Project is not completed on time?**

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| *Example: The University would incur additional expenses to house displaced students, extended PSC contracts, and ongoing maintenance. Additional architectural, engineering, and project management fees due to delayed timelines.* |

**Is the University able to estimate the amount of money it would lose if the Project is not completed on time? If so, how would such damages from delay be calculated?**

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| --- |
| *Yes* |

**What non-monetary damages would the University incur if the project were not completed on time (e.g., reputation, harm to students, neighbors, loss of giving)?**

|  |
| --- |
| *Example: Delays may harm the University’s reputation with students, parents, and stakeholders.**Extended delays could disrupt other housing arrangements.* |

**Are there specific elements of the work that are more likely to be delayed than other elements and, if so why?**

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| --- |
| *Example: Heating Fan coil units have a long lead time.*  |

Would the damages from delay occur at one point in time or would they increase over time? Please explain.

|  |
| --- |
| *Example: Costs would increase over time, as relocation and extended contractor expenses accumulate.* |

# Itemized Estimate of Anticipated Delay Damages

Based on a review of the Project, some or all of the following should be considered when determining a liquidated damage amount that must be based on anticipated damages resulting from a failure to achieve the Anticipated Completion Date. Consider how these factors would damage the University, and in what amounts? Some of these are hard costs; others are based upon nonquantifiable factors. Exact estimates will usually not be possible, so instead, please provide a range of estimates of damages with reasonable accuracy. Attach calculations or supporting documentation to this worksheet. Maintain this worksheet for your files.

1. Loss of Earnings - Loss of income resulting from delay beyond the Anticipated Completion Date. *N/A*
2. Additional Interest – Interest that would be paid on money borrowed to finance the work. *N/A*
3. Loss of Rental Income - The loss of net rental income resulting from delay beyond the Anticipated Completion Date. Consider the reduction in rental income less expenses directly attributable to earning rent. *N/A*
4. Loss of Use of Facilities - Will delay result in the inefficient use of other University resources, a loss of administrative services, loss of instruction, care, or research facilities, loss of personnel or personnel time, cancellation of classes, or loss of outside revenue (e.g., performances, exhibitions). ***$ 3,000/day (example)***
5. Loss of Authority - Will the Statutory or other authority or authorized funds be hampered or negatively impacted by the Delay? *N/A*
6. Loss of Gift or Grant Revenue – Will donations or Grants be lost, reduced, or potentially withdrawn, by the project’s failure to meet the Anticipated Completion Date? *N/A*
7. Additional Marketing, Advertising, or Promotional Expenses – Will additional advertising, marketing, or promotional expenses become necessary as a result of a delay in the completion of the project? *N/A*
8. Leasing Expenses – Will the University be required to lease alternative facilities or lose revenue from an inability to lease the work due to a failure to meet the Anticipated Completion Date? *N/A*
9. Architectural and Engineering Fees - Will the University incur additional architectural, engineering fees or added construction costs if the project is not completed on time? *N/A*
10. Legal and Professional Fees – Will the University incur additional accounting work to renew or restructure the financing, other professional fees as a result of additional costs and expenses of the project, and additional legal work incurred in renegotiating and preparing revised contracts and other documents? *N/A*
11. Debt Service Payments – Will the University incur interest or principal payments on bonds or loans that become due and must be paid whether the project is operational or not? *N/A*
12. Added Construction Costs - Additional costs incurred in the event it becomes necessary to refinance the project as a result of the delay in completion. *N/A*
13. Additional Internal Expenses - General overhead and administration expenses incurred, including but not limited to additional clerical personnel, consultants’ fees, temporary office space, additional security, and similar expenses, including outside contractors and University personnel. *N/A*
14. Insurance Premiums - Additional premiums charged under insurance policies for renewing or extending policies to continue coverage during the period of delay. *N/A*
15. Refund of Fees and Deposits - Refund of deposits and other pre-paid expenses from third parties due to delay. *N/A*
16. Damages from Breach of Other Contracts – If the University has made contractual commitments to other parties based on the project being complete on a certain date, might the University be liable for breaching those contracts if it fails to achieve the Anticipated Completion Date? *N/A*
17. Owner Extended Construction Expenses – Additional expenses of the University from an extended schedule, such as temporary heating and cooling, electricity, storage, rental, staff wages, **project manager time**, security, and other construction expenses. *N/A*

**ITEMIZED JUSTIFICATIONS:**

1. **Loss of Use of Facilities** - Will delay result in the inefficient use of other University resources, a loss of administrative services, loss of instruction, care, or research facilities, loss of personnel or personnel time, cancellation of classes or loss of outside revenue (e.g., performances, exhibitions).

*Example: $3,000/day represents loss of 20% of the 150 rooms at $100/day each.*

*30 x $100/day = $3,000/day*

1. **Rule of thumb**: Liquidated damages ratio calculations based on F.A.C.

*Example: Project F.A.C. of $15,482,000*

* 1. *$25/ $100,000 = $3870.50/Day*
	2. *$45/ $100,000 = $6966.90/Day*

**Totals from Above:**

|  |  |  |  |
| --- | --- | --- | --- |
| 1. **Loss of Use of Facilities**
 | = | $3,000 | /day |
| **TOTAL** | = | $3,000 | /day |
| ***Round up to*** | = | **$3,000** | ***/day*** |
|  |  |  |  |
| 1. **Rule of Thumb (4000+7000) / 2**
 |  | $5500 | /day |
|  |  |  |  |
| **LD Recommendation** | = | **$3,000** | **/day** |
| ***Per internal discussions, we recommend $3,000/ day as a floor for LD’s.*** |

**Overall Justification for Upside Contract**

*Example: This project impacts essential housing needs for University of Illinois students beginning in Fall of 2025. It is important to consider that in Fall of 2024 Housing experienced a shortage of available Housing due to a high demand to meet enrollment. Therefore, for construction in summer 2025, site shall be clear and Contractor(s) completely demobilized by August 15, 2025 at 4:30 P.M. and students move-in date to start on August 16, 2025.*