

STRATEGIC PLANNING & PLACE BUILDING CONTRACT DIRECTIVE

DATE: July 2016

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LIQUIDATED DAMAGES – METHODS OF ASSESSMENT

REFERENCE

The amounts for liquidated damages included in contracts for the Council's building works are to be determined as follows:

1. Where a specific loss can be assessed on a particular contract the liquidated and ascertained damages provided for in the contract should reflect that loss and be assessed by Strategic Planning & Place in consultation with the Section 151 Officer having due regard to its effect on tender prices. Check the position with the client department and consult the Strategic Planning & Place representative if necessary.
2. Where no specific loss can be determined at tender stage the liquidated and ascertained damages provided for in the contract should be assessed on the basis of the elements set out below as appropriate; the percentages being set by Strategic Planning & Place in consultation with the Section 151 Officer to ensure that they reflect the arrangements for the particular contract and provide for a reasonable and justifiable level of damages, again with due regard to the effect on tender prices.
 - (A) Loss of interest on capital – assessed by means of a percentage of the contract sum plus professional costs per week for the time between contractual and actual completion dates.
 - (B) Additional professional costs incurred – based upon an assessment of the average professional costs per week of the contract during the post contract period.
 - (C) Further applicable costs.
 - (D) Fluctuations in the cost of labour and materials where applicable.

For the majority of schemes the assessment would be based on the first two of the above elements, the third element being in respect to special circumstances relating to the particular contract which would be the subject of an ad hoc assessment as and when required (costs of a temporary nature such as temporary housing, mobile libraries, etc, are examples). Fluctuations in the context of liquidated damages are only applicable where the printed text of the Liquidated Damages Clauses are amended. This is not normal practice on West Sussex County Council schemes but this will need to be checked with the tender documents.

For the calculation of the amounts for the foregoing elements use form D340 "Assessment of Liquidated Damages on Building Contracts". See Appendix 'A' for a worked example of an assessment.

The percentages for interest on capital, for use in the Assessments on typical schemes, will be the Bank of England base rate plus one per cent (see note c on

**SBC 11 Cl.
2.32**

IC 11 Cl.2.23

DB 11 Cl.2.29

MW 11 Cl 2.8

[Form D340b](#)

NOTE:

THIS DIRECTIVE IS APPLICABLE TO THE MAJORITY OF SCHEMES BUT IT WILL NOT NECESSARILY BE APPROPRIATE TO ALL WORKS AND THEREFORE ON EACH SCHEME IT WILL BE NECESSARY TO CHECK THE SPECIFIC REQUIREMENTS.

form D340). The percentage is a loss factor calculated upon the assumption that 80% of payments due under the contract will have been paid to the contractor on the date when the building should have been completed. It will however be necessary when considering the levels of damage for schemes of an unusual nature or with special circumstances to consult Strategic Planning & Place before making the assessment.

3. Where the loss would be in the form of a lump sum unrelated to the number of weeks delay the Council will arrange appropriate insurance cover. An example of this type of loss would occur where as a result of the new accommodation not being available for say one week, the Authority would be obliged to renew an existing lease for a minimum three month period. Check the position with the client department and consult the Strategic Planning & Place representative if necessary.

The cost of the premium for the insurance cover is to be incorporated into the tender amounts by means of a provisional sum included in the bills of quantities, specification, schedules of work or employer's requirements.

4. It is important that a signed and dated copy of Form D340b setting out the method of calculation of liquidated damages for any particular contract be securely retained on file for future reference if required.

Note: See Directive No. BCD.4 for insertions to be incorporated into contract appendices.

CONCLUSION
(Appendix A follows)

**WEST SUSSEX COUNTY COUNCIL
ECONOMY PLANNING & PLACE
ASSESSMENT OF LIQUIDATED DAMAGES ON BUILDING CONTRACTS**

Appendix A



PROJECT NO:													
PROJECT:													
BASIC INFORMATION:			£	ITEM A	See Note (a)								
Estimated tender sum													
Fees:	£					Post Contract Fees £	(b)						
Architect													
Quantity Surveyor													
Building Surveyor													
Structural Engineer													
M & E Engineer		Estimated											
Clerk of Works													
Other Consultants		PM Principal Designer											
Total Fees				B	E								
Total of Works & Fees				C									
Contract Period in Weeks			=	D									
ASSESSMENT:			£										
1. Interest on Capital: of total 'C'		<table border="1" style="display:inline-table; border-collapse: collapse;"> <tr> <td style="width:20px; height:20px;"></td> <td style="width:20px; height:20px;"></td> <td style="width:20px; height:20px;"></td> <td style="width:20px; height:20px;"></td> <td style="width:20px; height:20px;"></td> <td style="width:20px; height:20px;"></td> <td style="width:20px; height:20px;"></td> <td style="width:20px; height:20px;"></td> </tr> </table>									%		(c)
2. Professional Costs ..		$\frac{E}{D} =$											
3. Further applicable costs		=			(d)								
4. Fluctuations (if applicable)		=			(e)								
Total liquidated damages per week					% of estimated tender sum								
For notes see overleaf													
Signed:													
Date:													
					D340b(06/16) Assessment of Liquidated Damages								

ASSESSMENT OF LIQUIDATED DAMAGES

NOTES ON CALCULATIONS

Note ref:

- (a) **Estimated tender sum** – The amount should be the full anticipated tender sum inclusive of capital, revenue and all other elements but excluding VAT. For consistency, wherever possible the estimated tender sum should reflect the amount of the latest cost check or the latest capital estimates provision (plus any non-capital elements) as appropriate.

- (b) **Fees** – For consistency, wherever possible the fees should reflect the amounts related to the latest cost check or capital estimates provision (plus any non-capital elements) as appropriate, and be based upon the latest updated assessment of fees calculated for the scheme.

- (c) **Interest on capital** – Liquidated Damages should be applied to the interest on the capital invested in the project for the period during which the Employer has been deprived of the benefit. For this Authority the interest rate will be the Bank of England Base Rate plus one percent, to be calculated at the time. The Bank of England Base Rate can be obtained from the Treasury Management Team on 03302 223378 or at treasury.management@westsussex.gov.uk It will, however, be necessary when considering levels of damages for schemes of an unusual nature or with special circumstances to consult senior management before making the assessments.

- (d) **Further applicable costs** – This element is in respect of special circumstances relating to a particular contract which would be subject to an “ad hoc” assessment. The cost of renting alternative accommodation and/or providing temporary mobile accommodation are examples of these costs.

- (e) **Fluctuations** – This element is not usually applicable to West Sussex County Council Schemes, which normally retain the printed text of Liquidated Damages Clauses un-amended. This limits the fluctuations recoverable by contractors who are at fault in meeting their completion dates. However, it will be necessary to check the tender documents on this point.

THE DEDUCTION OF LIQUIDATED DAMAGES

See BCD 44

1. NOTIFICATION TO THE CONTRACTOR

Under JCT SBC/Q: SBC/XQ: IC:ICD contracts, before liquidated damages are deducted from payments to a contractor it is first necessary for the Architect/Contract Administrator/Employers Agent to issue a Non-Completion Certificate stating that the contractor has failed to complete the works by the completion date last fixed. Secondly, it is necessary for the contractor to be given written notification by the employer that liquidated damages are to be deducted. "Employer's Notification to Contractor: Damages for Non-Completion" E358 is used for this purpose.

[Form E358](#)

Before a certificate of non-completion is issued it is necessary for the Architect/Contract Administrator/Employers Agent to have given fair and reasonable consideration to extensions of time in respect of any notices of delay given by the contractor. On contracts where the division of work into sections apply a separate certificate of non-completion and employer's notification will need to be issued in respect of each section of the works identified in the contract particulars and for which separate liquidated damages apply.

In circumstances where a certificate of non-completion has been issued following the failure of the contractor to achieve completion by a particular date, and subsequently the date is further extended and again not achieved by the contractor, it is necessary for a further certificate of non-completion to be issued in respect of the later date, together with a revised employer's notification.

Whenever there is justification for certifying that the contractor has failed to achieve practical completion by a specific date, officers have a duty to the County Council to ensure that the appropriate notifications are given and liquidated damages are deducted. It is the responsibility of the Architect/Contract Administrator/Employers Agent to keep the Strategic Planning & Place Representative informed in such circumstances.

On JCT DB contract the procedure outlined above is similar except that the Non-Completion Certificate is called a Non-Completion Notice and should be issued by the Employer.

JCT MW:MWD contracts. The issue of a certificate of non-completion and employer's notification to the contractor is not a specific requirement prior to the deduction of liquidated damages, but it is nevertheless good practice for these procedures to be followed. The contract states that if the Employer intends to deduct LADs then he should notify the Contractor not later than the date of issue of the final certificate

2. DEDUCTION OF LIQUIDATED DAMAGES

Following the issue of the employer's notification to the contract, E358 confirming that liquidated damages are being deducted, it is necessary to arrange for the appropriate deduction to be made from the balance of monies subsequently certified for payment. It is important to remember that in accordance with contract provisions the deduction is being made by the County Council as the Employer, and not by the Architect/Contract Administrator/Employers Agent. The contractor should be informed of the amount of LADs to be deducted and the deduction should be taken from the amount due on the contractor's next invoice.

[Form E163](#)

It is the duty of the Architect/Contract Administrator/ Employers Agent to advise the County Council of the amount of liquidated damages that may be deducted when it becomes apparent.

CONCLUSION