



# Damages for delay to completion

UK

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RICS practice information, UK

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# Acknowledgements

## Original lead author

Graham Seage FRICS (Mace Limited)

## Original expert working group

Andrew Smith FRICS (Laing O'Rourke)

Alpesh Patel FRICS (APC Coach Ltd)

Christopher Green FRICS (Capita Symonds Ltd)

David Cohen FRICS (Amicus Development Solutions)

Duncan Cartlidge FRICS (Duncan Cartlidge Associates)

Jim Molloy FRICS (Department of Health, Social Services and Public Safety NI)

John G Campbell FRICS (BAM Construction Limited)

Kevin Whitehead FRICS (McBains Cooper Consulting Limited)

Michael T O'Connor FRICS (Carillion Construction Limited)

Michelle Murray MRICS (Turner & Townsend plc)

Roy Morledge FRICS (Nottingham Trent University)

Stuart Earl FRICS (Gleeds Cost Management Limited)

## 2nd edition authors

Roland Finch FRICS

Steven Thompson FRICS (RICS)

# RICS standards framework

RICS' standards setting is governed and overseen by the Standards and Regulation Board (SRB). The SRB's aims are to operate in the public interest, and to develop the technical and ethical competence of the profession and its ability to deliver ethical practice to high standards globally.

The RICS Rules of Conduct set high-level professional requirements for the global chartered surveying profession. These are supported by more detailed standards and information relating to professional conduct and technical competency.

The SRB focuses on the conduct and competence of RICS members, to set standards that are proportionate, in the public interest and based on risk. Its approach is to foster a supportive atmosphere that encourages a strong, diverse, inclusive, effective and sustainable surveying profession.

As well as developing its own standards, RICS works collaboratively with other bodies at a national and international level to develop documents relevant to professional practice, such as cross-sector guidance, codes and standards. The application of these collaborative documents by RICS members will be defined either within the document itself or in associated RICS-published documents.

## Document definitions

Document type	Definition
RICS professional standards	<p>Set requirements or expectations for RICS members and regulated firms about how they provide services or the outcomes of their actions.</p> <p>RICS professional standards are principles-based and focused on outcomes and good practice. Any requirements included set a baseline expectation for competent delivery or ethical behaviour.</p> <p>They include practices and behaviours intended to protect clients and other stakeholders, as well as ensuring their reasonable expectations of ethics, integrity, technical competence and diligence are met. Members must comply with an RICS professional standard. They may include:</p> <ul style="list-style-type: none"> <li>• mandatory requirements, which use the word 'must' and must be complied with, and/or</li> <li>• recommended best practice, which uses the word 'should'. It is recognised that there may be acceptable alternatives to best practice that achieve the same or a better outcome.</li> </ul> <p>In regulatory or disciplinary proceedings, RICS will take into account relevant professional standards when deciding whether an RICS member or regulated firm acted appropriately and with reasonable competence. It is also likely that during any legal proceedings a judge, adjudicator or equivalent will take RICS professional standards into account.</p>
RICS practice information	<p>Information to support the practice, knowledge and performance of RICS members and regulated firms, and the demand for professional services.</p> <p>Practice information includes definitions, processes, toolkits, checklists, insights, research and technical information or advice. It also includes documents that aim to provide common benchmarks or approaches across a sector to help build efficient and consistent practice.</p> <p>This information is not mandatory and does not set requirements for RICS members or make explicit recommendations.</p>

# 1 Introduction

This practice information introduces the subject of damages for delay to completion by looking at the general principles, including areas such as:

- law
- reasons for introduction within a contract
- amounts of damages, and
- how sums are deducted, certified or released.

The practice information then focuses on how the standard forms of contract deal with damages. For liquidated damages this includes how amounts are inserted in the contract and how this is to be deducted or certified.

Guidance is given for each of the main groups of contracts and the forms in regular use in those groups, under the following headings:

- General principles (Level 1 – Knowing)
- Practical application (Level 2 – Doing)
- Practical considerations (Level 3 – Advising).

## 2 General principles (Level 1 – Knowing)

If a contractor is late completing work or part of work that is the subject of a contract, they may need to pay damages for breach of contract. The general principle of damages is to return the non-defaulting party to the position they would have been in had the contract been performed without breach.

Damages generally take two forms: liquidated or unliquidated.

It is not necessary to agree the level of damages at the outset and no value for them need be entered in the contract. They are therefore based on the actual loss by the employer and are known as unliquidated damages. To be successfully recovered, the actual loss will need to be proven..

According to the principles of the law of contract, to succeed in a claim the claimant would need to demonstrate:

- 1 the breach of contract caused losses in the amount claimed
- 2 the loss was not too remote at the time of formation of the contract and
- 3 they took reasonable steps to mitigate the loss.

It is generally the standard practice to calculate and enter a sum for daily or weekly delay into the contract prior to sending out the tender documents. A value is stated in the contract and referred to as liquidated damages. Sometimes these are also described as 'ascertained', referring to the calculation (ascertainment) of the sum, or more simply as 'delay damages'.

Liquidated damages are a predefined sum to be payable, usually by the contractor to the employer (or by a subcontractor to a contractor), in the event of delay that is attributable to them, beyond the specified completion date for the work or a section of the work. They are therefore recoverable without proof of loss.

Most contracts contain clauses for the deduction of liquidated damages. They allow a contractor (or subcontractor) to agree and understand their potential liability if they are late and therefore to budget for the risk of delay and adjust their tender accordingly. They also confirm the remedy available to the employer. Therefore, liquidated damages may be preferred by both contractors and employers. Where unliquidated damages are applicable, they may be subject to lengthy calculation and agreement, and will have considerably less certainties for contractors and employers.

Liquidated damages are a stated sum in the contract and are normally deducted irrespective of the actual employer loss as a result of the delay. They should be a genuine pre-estimate of the loss at the time of entering the sum within the contract documents, rather than a

penalty. However, following the UK Supreme Court decision in the case of [ParkingEye Limited v Beavis \[2015\] UKSC 67](#), there may be limited circumstances where a different figure may be commercially justified.

Most contracts have start and completion dates. A contractor will be liable for damages if they fail to complete within the timescale stated in the contract, for reasons attributable to them. However, the contract may also contain provisions under which the timescale may be amended (e.g. Extension of Time/Revision to Completion Date).

Many contracts contain a mechanism for sectional completion, in order that parts of the work ('sections') can be handed over to the employer as they are finished rather than waiting until completion of all of the works. Generally, contracts containing sectional completion will also have provision for liquidated damages applicable to each section. However the liability on each section will cease once the relevant sectional completion is certified.

Where no time period is specified (this approach is not recommended) a contractor can complete within a reasonable time. If no completion date is set by the contract, time is 'at large' and damages cannot be deducted. Therefore, care should be taken when entering the possession and completion information into contracts, whether by specific dates or by general durations. A contractor will not be liable for damages for the period where an extension of time is granted.

Some contracts may require the issue of Non-Completion Certificates. These may be a condition precedent for the deduction of damages. Please refer to [section 3.1](#) for more detail.

If completion is certified with outstanding works, a contractor is not liable for delay damages while they undertake the outstanding works. Later discovery of defects will not change the status of the Completion Certificate.

It should also be noted that some contracts contain an early completion bonus. This may not be of use to the employer as they may not wish to have the project early. For example, if the construction project is a new office building, the employer may tie in practical completion a few months prior to the expiry of a lease on an existing building. Early delivery may therefore burden them with additional cost. As an example, the NEC Engineering and Construction Contract contains an early completion bonus optional clause that may be activated in the contract data.

If the delay is considerable, the employer may have the right within the contract to terminate the contractor's employment. It is advisable to review the contract-specific provisions relating to the reasons for, and the process of, termination and to seek expert advice. Also, the effect on the ability to recover delay damages upon termination should be reviewed, as the employer may only be able to recover the additional costs of completing the works. In the case of [Triple Point Technology, Inc v PTT Public Company Ltd \[2021\] UKSC 29](#), the Supreme Court confirmed that the right to liquidated damages for non-completion continues until the termination of the contract, and afterwards general damages may be sought.

## 2.1 Method of calculation

Liquidated damages should be a genuine pre-estimate of loss and not a penalty. Stipulated sums that are construed as a penalty will be unenforceable and therefore the employer will be left to claim unliquidated damages. The courts may deem the damages a penalty if they appear to be a deterrent rather than a method of compensating the non-defaulting party for the breach.

It is recommended that calculations for liquidated damages are thoroughly considered by the employer and the quantity surveyor/project manager, and a detailed record of the final value retained in case they are challenged at a later date. Care should also be taken when calculating the damages applicable to each section, where appropriate.

### 2.1.1 Calculation examples

Damages can be calculated in a number of ways.

For the construction of a hotel, damages could be calculated on loss of revenue from rooms and other facilities in the hotel. The person calculating damages is advised to consider issues such as:

- occupancy levels
- likely room charge rates
- income from restaurants
- leisure facilities, etc. and
- costs that may be saved as a result of delay, e.g. utility consumption costs.

This list is by no means exhaustive. The calculation cannot be based purely on notional lost revenue.

For the construction of an office block, liquidated damages may be calculated on the cost of leasing alternative accommodation if the construction is for the owner occupier. Where the office building itself is likely to be leased, the damages would be calculated on likely lease incomes similar to the example for the hotel above.

Other items for consideration are continuing construction supervision costs and fees, accommodation costs, finance costs, etc. Again, this list is not exhaustive.

It is, however, more difficult to calculate damages for civil engineering projects such as roads and sewage treatment facilities. It may be difficult to put a financial value on the loss incurred from not having a road upgrade available; it is more likely to be a matter of bad publicity for the road owner.

It may also be more difficult for a contractor to calculate the level of damages to apply within a subcontract. The contractor will need to consider if the subcontractor being late will have an impact on other trades and/or an impact on the overall completion of the project. The damages may then become disproportionate to the value of the works covered by the

subcontract. Contractors may, therefore, choose to enter into subcontracts with unliquidated damages.

### 2.1.2 How they are deducted

Different contracts deal with the deduction of damages in different ways once late completion has occurred, see section 3.1. In some instances, this is included within the certificate issued by the contract administrator or project manager to the employer and contractor. However, other contracts deal with this by issuing a withholding notice from the employer, after the aforementioned certificate has been issued.

When considering the provisions of any contract, it is recommended that notice is given to the contractor in accordance with the contract and the [Housing Grants, Construction and Regeneration Act 1996](#) (and any subsequent amendment). Attention is also drawn to section 2 of the Act, in that it may be a condition precedent, that prior to deducting damages from monies due other notices are issued, such as a Non-Completion Certificate.

Some contracts will also limit the contractor's liability for damages, and this should also be taken into consideration when administering the procedures for recovery of damages.

### 2.1.3 Treatment following extension of time

If an extension of time is awarded late in a contract, i.e. after the late completion of the works or a section by the contractor, the level of damages deducted must be reassessed at the next interim payment assessment/certificate. Interest may become due on payments 'incorrectly taken' but this will depend on the provisions contained within the contract, if any.

# 3 Practical application (Level 2 - Doing)

## 3.1 Contract-specific clauses

The following sections contain the detail of the damages for delay to completion provisions in each of the contracts, but for ease of reference this has also been summarised in Table 1. It is recommended that the precise wording of the contract is reviewed, especially where older or later versions of the contract are being used or where the employer has amended the standard terms and conditions.

Contract	Terminology	Entry into contract	Sectional completion damages	Cap on liability	How are they deducted	Other comments
JCT Standard Building Contract, Intermediate Building Contract, Prime Cost Building Contract	Liquidated damages	Contract particulars	Yes	No specific cap for delay damages	May request payment or deduct from sums due to the contractor	Non-Completion Certificate must be issued as must appropriate payment notices.  See notes on schedules to the contract in section 3.2.
JCT Minor Works	Liquidated damages	Contract particulars	No	No specific cap for delay damages	May request payment or deduct from sums due to the contractor	No provision for sectional completion or partial possession and Non-Completion Certificate is not required.
JCT Design and Build Contract	Liquidated damages	Contract particulars	Yes	Total liability does not apply to, or is not affected by, LD provisions	May request payment or deduct from sums due to the contractor	Non-Completion Certificate must be issued as must appropriate payment notices.

Contract	Terminology	Entry into contract	Sectional completion damages	Cap on liability	How are they deducted	Other comments
JCT Management Building Contract	Liquidated damages	Contract particulars	Yes	No specific cap for delay damages	May request payment or deduct from sums due to the contractor	Non-Completion Certificate must be issued as must appropriate payment notices.  Has additional clauses for dealing with liquidated damages in the works contracts.
JCT Management Works Contract	Damages are unliquidated	N/A	No	N/A	May request payment or deduct from sums due to the contractor.	No provision for partial possession.

Contract	Terminology	Entry into contract	Sectional completion damages	Cap on liability	How are they deducted	Other comments
NEC ECC Options A to F	Delay damages	Contract data and secondary option	Yes	No specific cap for delay damages. The NEC guidance note implies that the standard contract data can be amended to include this.	Included in project manager's certificate to the contractor and the employer.	Interest applicable if damages deducted and subsequently the completion date is revised.  If the delay damages optional clause is not selected then damages will be unliquidated.

Contract	Terminology	Entry into contract	Sectional completion damages	Cap on liability	How are they deducted	Other comments
FIDIC Red Book	Delay damages	Appendix to Tender	Yes	Yes – inserted into Appendix to Tender as a percentage of the final contract price.	Contractor should include in application and engineer should include within interim certificate.	Refer to the contract where there are multiple currencies within the contract.
FIDIC Orange Book	Liquidated damages for delay/ liquidated damages for the works	Appendix to Tender	Yes	Yes – inserted into Appendix to Tender as a percentage of the final contract price.	Employer may deduct the amount from monies due.	If late, the contractor may be given notice to complete within a specified reasonable time for completion.

Table 1: Damages for delay to completion provisions in each contract

## 3.2 JCT contracts

It is important to check particular wording in a contract, especially when older or amended versions of the contract are being used.

### 3.2.1 Standard Building Contract

The contract refers to damages for delay to completion as liquidated damages.

The date for completion of the works is stated in the contract particulars, as are any sections of the works should sectional completion be required. The contract particulars will also include dates for possession of the site or sections of the site.

The rate of liquidated damages is also stated in the contract particulars. The employer can choose the period to which they are applicable, e.g. per hour, day, week, etc. The same is undertaken for the sections of the works.

There are also provisions in the contract to adjust the completion date.

The architect/contract administrator will issue a Practical Completion Certificate or Sectional Completion Certificate as necessary. If the contractor fails to achieve the works or a section by the relevant completion date, a Non-Completion Certificate is issued. This is automatically cancelled if the completion date is subsequently revised. A further Non-Completion Certificate will be required if Practical Completion or Section Completion has not been achieved by the revised completion date.

The employer may deduct liquidated damages if a Non-Completion Certificate has been issued and the employer has given the appropriate notice before the Final Certificate. The notice will state that for the period of delay, the employer wishes the contractor to pay damages at the rate in the contract particulars. An employer can, at their own discretion, deduct a lesser amount but they cannot increase the rate. Alternatively, the employer will deduct this from sums due to the contractor.

The contractor may challenge the recovery of liquidated damages if the notice requirements in the contract are not complied with. It is therefore essential that the specifics of the contract are reviewed, understood and administered correctly.

If the completion date is later amended, the damages are be recalculated and repaid to the contractor accordingly.

The employer may take early use of the site or works and this will have an impact on damages that may be deducted. Once this has happened, the architect/contract administrator gives notice to the contractor stating the relevant part and the relevant date. The damages that can be deducted for a section or the works are reduced by the proportion that the relevant part relates to that section or the whole of the works.

The value of the section is entered in the contract particulars to assist the calculation for this element of the contract.

### 3.2.2 Minor Works

The Minor Works Building Contract has similar principles to the Standard Building Contract. The significant variances are:

- there is no sectional completion provision within the contract
- a Non-Completion Certificate is not required and
- there is no provision for partial possession by the employer.

The contract refers to damages for delay to completion as liquidated damages.

The date for completion of the works is stated in the contract particulars, as is the rate of liquidated damages. The employer can choose the period to which these are applicable, e.g. per hour, day, week, etc.

There are provisions in the contract to adjust the date for completion but these are not covered in further detail in this practice information.

The architect/contract administrator will issue a Practical Completion Certificate as necessary. If the works are not completed by the date for completion, the employer may recover damages at the rate stated in the contract particulars. This is either deducted from monies due to the contractor or recovered from the contractor as a debt. If deducted by the employer, they must inform the contractor in writing prior to the date of the issue of the final certificate.

If the completion date is later amended, the damages would be recalculated and repaid to the contractor accordingly.

### 3.2.3 Intermediate Building Contract

The provisions for delay damages are as per the Standard Building Contract. However, in Named Sub-Contractors provisions, there are additional provisions in respect of liquidated damages in the event of termination of the employment of a named subcontractor.

### 3.2.4 Design and Build Contract

The provisions for delay damages are as per the Standard Building Contract with the following exceptions.

There is an additional clause to the Standard Building Contract that the total liability of the contractor does not apply to, or is not affected by, the liquidated damages provisions in the contract.

Third Party Rights for Purchasers and Tenants Schedule also notes that the contractor shall not be liable to the funder for liquidated damages where these have been recovered by the employer.

### 3.2.5 Prime Cost Building Contract

The provisions for delay damages are as per the Standard Building Contract with the following exceptions.

Third Party Rights for Purchasers and Tenants Schedule also notes that the contractor shall not be liable to the funder for liquidated damages where these have been recovered by the employer.

### 3.2.6 Management Building Contract

The provisions for delay damages are as per the Standard Building Contract with the following exceptions.

Works Contracts Section has provisions for where the works contractors are liable for liquidated damages and how this is recovered from the management contractor.

### 3.2.7 Management Works Contract

This contract is different from the other JCT contracts reviewed in this practice information. The damages are unliquidated and such damages include any damages that the management contractor is liable to pay to the employer under the main contract.

Details of the Management Building Contract are contained in the Schedule of Information and a works contractor should ensure they are aware of the main contract damages prior to submitting their tender.

Any such sums due to the management contractor are treated as a deduction from the works contractor's gross valuation or recovered as a debt.

There are provisions in the contract to adjust the date for completion, but these are not covered in further detail in this practice information.

There is also provision for sectional completion in the contract. There is no provision for partial possession by the management contractor.

## 3.3 NEC Engineering and Construction Contract (ECC)

The NEC suite of contracts contains a set of guidance notes and while individual NEC options are reviewed, a summary of the guidance notes is included as an introduction to the principles.

First the contract data must also state that the relevant secondary option will apply to the contract. The level of damages is stated in the contract data.

If the secondary option is not selected, a sum should not be stated in the contract data.

### 3.3.1 NEC ECC guidance notes

The completion date is entered in the contract data rather than a period for completion of the works.

The project manager certifies actual completion within one week of achieving this. The completion date may be changed by compensation events.

Sectional completion can be included in the contract by selecting the relevant secondary option in the contract data.

An optional clause (bonus for early completion) can be selected and entered in the contract data to incentivise the contractor to complete their works earlier than the completion date.

A further secondary option is selected to include delay damages within the contract. The NEC guidance recommends that this is included in most contracts.

Unliquidated damages will be applicable if the appropriate selections are not made in the contract data. As noted in section 2.1 the damages stated should be a genuine pre-estimate of loss.

There is also an option to include low performance damages in the contract by selecting the appropriate optional clause.

The NEC guidance recommends that the employer keeps a record of how the damages are calculated in case they are challenged later in the life of the project.

If the relevant secondary option for delay damages is selected, and nothing is entered in the appropriate section of the contract data, it may be deemed that the level of damages is nil.

Damages, if deducted, are included in the project manager's assessment under the payment provisions contained in the contract. Unlike the JCT, the NEC does not stipulate conditions precedent to the deduction of liquidated damages. To avoid potential dispute it is recommended that written notice confirming intent to deduct damages is given by the project manager.

Where the secondary option for sectional completion is selected, delay damages will be included in the contract data for sections as well as for the whole of the works.

If the levels of damages are required to be capped, this should be entered in the contract data, although this requires alteration to the standard contract data form and caution is advised.

If an employer uses part of the works prior to completion, they are treated as having taken over that part of the works (there are exceptions to this), and the damages are reduced proportionately to reflect this. The same principle would apply to sections of the work. Please refer to the conditions for more details.

### 3.3.2 Main Option A

The general payment clause in the contract notes that the amount due includes amounts to be retained from the contractor, and this should be included in the contractor's application, if any, and in the project manager's certificate. This allows delay damages to be withheld from the contractor.

The option clause for delay damages states that the contractor pays damages from the completion date (i.e. the date completion is required as stated in the contract), until the earlier of either completion (i.e. the date the project manager deems the works complete) or take-over of the works by the employer.

If damages are deducted/paid and the completion date is then revised in accordance with the compensation event clauses in the contract, the employer repays any excess damages deducted. However, such payment is subject to interest for the period for which the incorrect damages are deducted.

If part of the works is taken over prior to completion, the delay damages are reduced for the element of the works taken over. The project manager assesses the proportion of works taken over in relation to the benefit to the employer, rather than any physical area or section of work.

The damages are then reduced by the assessed proportion.

### 3.3.3 Main Options B – F

There is no change to Option A and the general NEC notes above.

## 3.4 FIDIC Red Book and Orange Book

### 3.4.1 Red Book (Conditions of Contract for Construction – For building and engineering works designed by the employer)

The commencement date will be notified to the contractor in accordance with the provisions of the contract. The contractor will then complete the works within the time for completion. The time for completion is stated in the Appendix to Tender as a period of days. This will be affected by any extensions of time granted in accordance with other provisions of the contract.

If the contractor fails to complete the works within time, they are required to pay delay damages to the employer for their default. These are also stated in the Appendix to Tender, as is any maximum cap on damages. Damages are paid on a daily basis for the period between the time for completion and the date stated on the Taking-Over Certificate. The contract clarifies that these are the only damages due from the contractor and the levying of damages does not relieve them of this obligation to complete the works.

It is advisable to note that there are provisions to insert other damages in the contract regarding failing to pass tests on completion.

If a Taking-Over Certificate is issued for part of the works, the delay damages are reduced for the remaining works, assuming they are not delivered within the time for completion. Note that partial take-over is not to be confused with taking over of a section, where a specific rate of delay damages may be entered in the Appendix to Tender for each section. The proportion of reduction is calculated based on a pro-rata of the value of the works certified. This will not have any effect in reducing the maximum liability for damages stated in the Appendix to Tender.

### **Guidance for the preparation of particular conditions**

The contract contains guidance notes as above and there is guidance on delay damages in the Appendix to Tender.

This reinforces the point that damages must be a genuine pre-estimate of loss. If there are mixed currencies in the contract, the delay damages should be clear in the Appendix to Tender as to the level of damages taken in each currency.

### **Appendix to Tender**

The delay damages for the works and also for the section will be stated here. There is also provision to allow for the percentage adjustments where the contract is in multiple currencies. Also, the maximum level of damages is to be inserted.

## **3.4.2 Orange Book (Conditions of Contract for Design – Build and Turnkey)**

It should be noted that the definitions are sorted into areas of contract, although there is no definition of liquidated damages for delay to completion.

The employer's representative will issue a notice to commence within the period defined in the Appendix to Tender after the effective date. This is defined as 'the date on which the contract entered into legal force and effect'. Once issued, the contractor shall commence design and construction 'as soon as is reasonably possible'.

The contractor will then complete the works and any sections of the works, including the passing of tests on completion within the time for completion. The time for completion is stated in the Appendix to Tender as a period of days. This will be affected by any extensions of time granted in accordance with other provisions of the contract.

If the contractor fails to complete the works or any section of the works within the time then the employer may deduct damages from any monies due at the rate per day or part thereof. These are also stated in the Appendix to Tender, as is any maximum cap on damages. Damages are paid on a daily basis for the period between the time for completion and the date stated on the Taking-Over Certificate.

If the contractor is late in completing the works and therefore damages may be deducted, the employer's representative may give the contractor notice to complete within a specified reasonable time. Please also refer to the clause on 'Default of Contractor'.

If the tests on completion do not pass a repeated test, one option for the employer is to issue a Taking-Over Certificate and the contract price will be reduced accordingly.

If a Taking-Over Certificate is issued for part of the works, the delay damages are reduced for the remaining works, assuming they are not delivered within the time for completion. Note that partial take-over is not to be confused with taking over of a section, where a specific rate of delay damages may be entered in the Appendix to Tender for each section. The proportion of reduction is calculated based on a pro-rata of the value of the works certified. This will not have any effect in reducing the maximum liability for damages stated in the Appendix to Tender.

#### **Guidance for the preparation of particular conditions**

The contract contains guidance notes as above and there is guidance on delay damages in the Appendix to Tender.

This reinforces the point that damages must be a genuine pre-estimate of loss. If there are mixed currencies in the contract, the delay damages should be clear in the Appendix to Tender as to the level of damages taken in each currency.

There is also guidance on wording for the insertion of a bonus for early completion.

#### **Appendix to Tender**

The delay damages for the works and also for the sections will be stated here. This is expressed as a percentage of the contract price per day. There is also provision here to allow for the percentage adjustments where the contract is in multiple currencies. Also, the maximum level of damages is to be inserted.

### **3.5 Contracts not reviewed**

In general the contracts use similar principles:

- all have provision for deduction of damages (liquidated), although terminology differs
- the level of damages is entered for a set time period in the relevant section of the contract
- delay damages can also be used for sections as well as the whole of the works
- sometimes there is a cap on the amount of damages that can be taken
- the method of payment of damages varies, although in general this is deducted from sums due to the contractor

- some contracts rely on certain certificates or notices to be given, and notices may be required to comply with relevant legislation, dependent on the type of project or duration, etc. of the contract, and
- interest may become payable if damages are deducted and an extension of time subsequently given.

Please refer to individual contracts if they have not been reviewed in this practice information as they may vary from the general principles set out above. In particular the contract provisions that might be present in bespoke or amended contracts should be considered carefully.

# 4 Practical considerations (Level 3 – Advising)

## 4.1 Common issues

### 4.1.1 Challenge of sum levied

Contractors and subcontractors may try to challenge the amount of damages to be levied closer to the time they are deducted rather than when signing the contract. The employer (or in the case of a subcontract, the contractor) would need to prove that the damages included in the contract were a genuine pre-estimate of the loss at the time the damages were calculated.

The contractor's challenge will not be successful if the employer can demonstrate a genuine pre-estimate and the actual cost of damages incurred by the employer is irrelevant. Likewise, the employer cannot revisit and increase the level of damages deducted if the actual loss suffered is in fact greater, therefore liquidated damages would be an exclusive remedy. Refer to [section 2.1](#) of this practice information for further detail.

If the contractor does not consider the level of damages to be reasonable, it can be challenged during tender negotiations rather than after the contract has been signed.

Challenges may also arise where there is early possession or take-over of a part of the work by the employer. Contracts generally allow for this proportion of the value of works to be considered so that full damages are not deducted. For example, if the employer took over a part of the works which was considered to be 40% in value of the whole project, the damages would be reduced by the same percentage in the event the contractor completed late.

### 4.1.2 Delay in certification of completion

At the end of a project the date of completion or practical completion is often subject to some debate. In practice, the date of achieving practical completion is sometimes agreed and formalised some time after the actual event occurred. There may also be a situation where the completion date has not been fixed, as extension of time entitlements may still be in discussion. This may result in damages being deducted, which will be recalculated and deducted, or refunded, as appropriate at the next certificate, once completion and/or the extension of time is agreed. This may entitle the contractor to a claim for interest in accordance with the particular contract conditions.

### 4.1.3 Other issues

If the relevant section of the contract is left blank, unliquidated damages will apply. Therefore, it will be for the employer and their representatives to collate records and prove actual loss. The contractor will also not have prior visibility of the costs they will be charged in the event of delay.

If 'nil' is inserted in the relevant section of the contract, the employer will not be entitled to either liquidated or unliquidated damages. This should be advised against as it significantly reduces the contractor's incentive to complete the works by the completion date and prevents the employer from recovering losses.

Under JCT contracts generally, recovery of liquidated damages is separate from the interim payment procedures, and therefore would normally be dealt with by the issue of a 'pay-less notice' by the employer, rather than being included in an interim valuation. However, not all contracts adopt this approach, so it is important to check the wording carefully.

Where there is no mechanism in the contract to award an extension to the completion date, the employer cannot benefit if they are responsible for the delay through items such as delayed possession or changes to the scope of work, for example. The remedy for liquidated damages will only survive if there is a mechanism in the contract for amending the completion date in the event of an employer delay.

At the end of a project, the level of damages to be deducted may exceed payments outstanding to the contractor. In this instance, the contractor would have to make a payment to the employer. The relevant provisions in the contract should be reviewed in this instance, as they may well cover contractor payment to the employer. However, should the contractor fail to make payment, the employer or their representatives would need to pursue the dispute resolution mechanisms in the contract or pursue the outstanding sums as a debt.

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General enquiries  
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