



# CONSTRUCTION PRACTICE GROUP

Legal Information for the Construction Industry

May 2015



The Soto Law Group, P.A.

## TOP TEN CONSTRUCTION CLAUSES PART 3-LIQUIDATED DAMAGES PROVISIONS

This article is the third of a ten-part series analyzing ten critical construction clauses. In this installment, we analyze the “Liquidated Damages Provision.” The first two articles, which addressed the indemnification clause and the mutual waiver of consequential damages clause, can be found at: <http://sotolawgroup.blogspot.com/2015/04/top-ten-construction-clauses-part-2.html>

### I. OVERVIEW

A liquidated damages provision determines in advance the measure of damages if a party breaches the agreement. The provision is most frequently utilized when a contractor fails to achieve substantial completion of the construction project by the date set forth in the contract. Two common reasons for using a liquidated damages Provision are: (1) to avoid the difficulty and expense of proving an owner’s actual damages attributable to a contractor’s failure to achieve substantial completion on time; and (2) to incentivize the contractor to stay on the project schedule.

The American Institute of Architects’ Agreement between the Owner and Contractor (AIA Document A101-2007) provides a space in Article 3 for insertion of a Liquidated Damages Provision. The AIA’s model Liquidated Damages Provision is set forth in its Guide for Supplementary Conditions (AIA Document A503-2007) and provides as follows:

The Contractor and the Contractor’s surety, if any, shall be liable for and shall pay the Owner the sums hereinafter stipulated as liquidated damages, and not as a penalty, for each calendar day of delay after the date established for Substantial Completion in the Contract Documents until the Work is substantially complete: \_\_\_\_\_ Dollars (\$\_\_\_\_\_).

### II. ENFORCEABILITY IN FLORIDA

Before including a Liquidated Provision in a construction contract, one must carefully ensure that their liquidated damages provision is legally enforceable. In Florida, the court will not enforce a liquidated damages provision that it determines to be in the nature of a penalty. Where it is doubtful whether a contract provision constitutes a penalty or liquidated damages the tendency of the courts is to construe a provision for payment of an arbitrary sum a penalty rather than one for liquidated damages. *T.A.S. Heavy Equip. v. Delint, Inc.*, 532 So. 2d 23, 25 (Fla. 4th DCA 1988) (citing *Hyman v. Cohen*, 73 So.2d 393 (Fla. 1954)). In making this determination, the courts will usually consider:

1. The reasonableness of the provision;
2. The certainty of establishing actual damages; and
3. The intent of the parties.

*See id.* (citing *Refram v. Porter*, 343 So. 2d 1343 (Fla. 2d DCA 1977)). In the final analysis the test is whether the damages flowing from the breach are readily ascertainable at the time the contract is executed. *See id.* (citing *South Florida Regional Planning Council v. Board of County Commissioners of Palm Beach County*, 372 So. 2d 1142 (Fla. 4th DCA 1979)).

The most difficult element to establish, and therefore most important element, is the first—the reasonableness of the provision. This test refers to the concept that the liquidated damages must bear some relationship to the actual damages suffered. To satisfy this objective, an owner wishing to include a liquidated damages provision should carefully evaluate all aspects of damages it may suffer in the event of delay such as lost profits and additional or increased financing charges/interest. The number ultimately included in the liquidated damages provision must be a product of this analysis, not an arbitrary or punitive amount of money intended to penalize a contractor.

Second, a liquidated damages provision will be unenforceable in the event that the actual damages resulting from a contractor's breach of contract were readily ascertainable at the execution of the contract. Third, the intent of the parties must indicate that the provision is not intended to be a penalty. This can be achieved by including language within the Liquidated Damages Provision that the amount of liquidated damages is not intended as a penalty and that such amount has been agreed upon due to the difficulty in determining the actual damages that will be suffered by the Owner in the event of a failure to complete the work on time.

### III. ADDITIONAL CONSIDERATIONS

A contractor concerned with the risk of accepting a Liquidated Damages Provision has a few options to limit or offset such exposure. For example, a contractor may insist on the inclusion of an early completion bonus as compensation for the additional risk involved in a liquidated damages provision. In addition, a contractor should include liquidated damages provisions in its contracts with subcontractors so that it can properly pass through liquidated damages to the responsible parties.

Finally, owners should consider whether the benefits of including a liquidated damages provision in its contracts outweigh the risks. For example, including such a provision may encourage a hostile working relationship with the contractor, who may feel the need to notify the owner in writing each time it believes the owner has contributed to a delay on the project. In addition, a contractor who is aware that a liquidated damages provision will be included in the contract may be encouraged to submit a project schedule that is longer than the contractor actually anticipates so that it can begin the Project with a built-in cushion.

Consult with an attorney knowledgeable in construction so that together you can decide whether it is advisable to include a liquidated damages provision in your contracts.

**BY: DALE A. EVANS JR., ESQ.**  
**The Soto Law Group, P.A.**  
2400 E. Commercial Blvd., Suite 400  
Fort Lauderdale, FL 33308  
[www.sotolawgroup.com](http://www.sotolawgroup.com)  
[dale@sotolawgroup.com](mailto:dale@sotolawgroup.com)  
TEL: 954-567-1776  
FAX: 954-567-1778



**The hiring of a lawyer is an important decision that should not be based solely upon advertisements. Before you decide, ask us to send you free written information about our qualifications and experience. Additionally, the information above is not intended to be legal advice. Please consult with an experienced lawyer if you have a specific issue or dispute.**

**Office Locations: 2400 E. Commercial Boulevard, Suite 400, Fort Lauderdale, FL 33308  
2901 Q. Street, NW Suite 2, Washington, D.C. 20007**