

A Fixed Cost for Delays

by Quenda Behler Story

Construction delays cost money, but you may not be able to get that money back from the person who caused the delay. That's because not every delay is also a breach of contract.

For example, suppose the drywall sub finishes hanging and taping the rock a week late. Because of the delay, you had to pay to store some cabinets that you otherwise would have stored on site. This extra cost does not necessarily mean, however, that the sub has breached his contract. If the contract simply called for drywall installation with no specific time frame, the drywall sub has fulfilled his part of the bargain. Even if the delay was a breach of that contract, however, in court you would still have to prove exactly how much the delay cost you. And that's not as easy as it sounds.

A **liquidated damages clause** is designed to avoid a lot of this trouble by setting a dollar value on a delay *before* it happens. The clause stipulates that the parties to a contract agree in advance that a person who causes a delay will have to pay for that delay, and they also

agree how much that person will pay.

A liquidated damages clause typically has advantages for both parties. Suppose, for instance, that you have lined up five different subs for a project, and that each sub has to wait to start its work until the sub in front is finished. In this case, the subs would benefit from a liquidated damages clause for delay in their contract with you, because if they can't start another job on time due to a delay in your job, they will lose money.

As the GC, you also benefit from a liquidated damages clause. If you have to pay any damages to one or more of these five subs because of a delay, the clause makes it easier for you to get reimbursed by the sub who caused the delay.

Cost savings. A liquidated damages clause may not keep you out of court, but it can still help avoid some of the cost of litigation. Going back to the first example, if you were to sue, the drywall sub might defend with two arguments; one claiming that the delay was really caused by the framing crew, and a second claiming that your demand for \$1,000 is

not accurate because you stored the cabinets in your own garage. In court you'll still have to prove that the drywall sub caused the delay, but because a liquidated damages clause stipulates a dollar amount for the delay, you won't have to spend expensive courtroom time proving how much that delay cost you.

Reasonable Damages

A liquidated damages clause that contains an excessive dollar amount is usually not enforceable, because the courts consider it a kind of penalty clause that might actually provide one party with an incentive to delay. To be enforceable, the liquidated damages clause should reflect an honest effort to estimate what the damages will actually be. That doesn't mean that the dollar amount has to be exactly what the delay cost — that would be too difficult to predict. But the amount must represent a good-faith effort to estimate damages.

Anticipated problems. The courts also will not enforce a liquidated damages clause unless both parties knew at the time the contract was being negotiated that there was a possibility of a delay that could occur. The parties don't have to know *exactly* what might happen, but the cause of the delay must be something that reasonable people would have recognized as possible — if they had thought about it while they were negotiating the contract.

For example, suppose that pouring the concrete for a foundation took longer than anticipated because of a concealed underground spring on the site. If, while negotiating the contract, the parties had been asked about the possibility of uncovering hidden water sources, they probably would have agreed that it could happen even

Liquidated Damages Clauses

Version 1:

For each and every day that the work contemplated in this agreement remains uncompleted beyond the time set for its completion, _____ shall pay to _____ the sum of \$_____ as liquidated damages and not as a penalty.

The sum stated in the immediately preceding paragraph may be deducted from money due or to become due to _____ as compensation under this agreement.

Version 2:

_____ hereby agrees that liquidated damages in the amount of \$_____ shall be deducted from such party's compensation for each and every day that the work contemplated by this agreement continues uncompleted beyond the contract period of _____ days.

though they didn't think it would.

But suppose the problem is that an ancient Indian burial mound was excavated and a local judge issued a stop order. This is a delay, but it is not a delay that the parties to the contract would have anticipated — or “contemplated,” to use the legal term.

Use an attorney. The sample language included here (see “Liquidated Damages Clauses,” previous page) may not work for every situation, so be sure

to consult with your attorney before including a liquidated damages clause in your contract. Also, be aware that there are a few states that simply will not enforce a liquidated damages clause because the law considers the awarding of damages to be the business of the courts, not the parties.

In fact, since circumstances change throughout the course of a project, you may want to consider changing the language and amounts for different sub-

contractors. For example, a painter who is late by a week may delay owner occupancy for just one week. But an excavator who fails to complete a septic system connection before freezing weather may cause much more trouble. Not only will the cost of the delayed work increase because of the cold weather, owner occupancy may be delayed till spring, which could be months after the scheduled completion date.

