

MARYLAND STADIUM AUTHORITY
POLICY ON LIQUIDATED DAMAGES

I. Authority & Application

This policy (this “Policy”) on liquidated damages is adopted by the Maryland Stadium Authority (the “Authority”) pursuant to the requirement of § 15-113(c)(1) of the State Finance and Procurement Article, Annotated Code of Maryland, to “adopt a written policy concerning the inclusion and use of liquidated damages provisions in procurement contracts by the unit that is substantially similar to the model policy” published by the Board of Public Works pursuant to St. Fin. & Proc. § 15-113(b).

St. Fin. & Proc. § 15-113 is applicable to the Authority under St. Fin. & Proc. § 11-203(c).

In this Policy, the term “liquidated damages” means “damages in an amount designated by the parties to a contract that the injured party is eligible to collect as compensation for a specific breach of the contract” (per St. Fin. & Proc. § 15-113(a)).

II. When to Include Liquidated Damages Provisions in Procurement Contracts

A. When Required by Law

The following types of contracts are required to include liquidated damages provisions:

1. All contracts with Certified Minority Business Enterprise Goals (St. Fin. & Proc. § 14-303(b)(6) and COMAR 21.11.03.10E)
2. All contracts subject to a prevailing wage requirement (St. Fin. & Proc. §§ 17-220 & 222)
3. All contracts subject to a living wage requirement (St. Fin. & Proc. § 18-108)

B. Other Appropriate Conditions

It is appropriate to include a liquidated damages clause when it would “provide a reasonable measure of compensation in the event of a breach where, at the time the provision is agreed to the damages are indeterminable or will be otherwise difficult to prove” (*see CAS Severn, Inc. v Awalt*, 213 Md. App. 683, 694 (2013) (citations omitted)).

C. Construction Contracts – Liquidated Damages for Delay in Completion

In the Authority’s experience, actual damages for completion delay are foreseeable, determinable, calculable, and can be proven. A liquidated damages provision would prevent the Authority from pursuing recompense for its actual damages. Therefore, a provision for liquidated damages for delayed completion is usually not in the Authority’s best interest.

III. Drafting Liquidated Damages Provisions

A. Generally

Liquidated damages provisions must meet three criteria: (1) provide in clear and unambiguous terms for a certain sum, (2) reasonably compensate for the damages anticipated by the breach (that it *not* be a penalty), and (3) may not be altered to correspond with actual damages after the fact. *See CAS Severn, Inc. v Awalt*, 213 Md. App. 683, 694 (2013) (citations omitted).

In line with their purpose, such provisions should state under what conditions they would apply, and how they would apply to such conditions. The amount to be assessed should be reasonably related to the nature of the type of breach that is anticipated and harm to the State should the breach occur. A common example is a set daily rate named in the condition (and itself often based on published economic models) that is then assessed for each day a project or service is delayed.

Further, such provisions should include a statement that no payment by the State, either partial or final, shall be construed to waive the State's right to seek liquidated damages. Nor should any provision cap (or otherwise limit) the amount of liquidated damages to an amount less than the total amount of liquidated damages that may be assessed pursuant to the terms of the contract.

B. Specific Provisions Required

1. Contracts Containing Certified MBE Participation Goals

The Governor's Office of Small, Minority & Women Business Affairs has published "Guidelines for Liquidated Damages Provision for Contracts Containing Certified Minority Business Enterprise (MBE) Participation Goals" on its website (as of 11/7/2024, this is available at <https://gomdsmallbiz.maryland.gov/Pages/Reporting-Tool-MBE.aspx>).

These guidelines contain specific language to use for an MBE related liquidated damages clause, as well as instructions on how to calculate and implement that language.

2. Contracts Requiring Contractor to Pay Prevailing Wage Rates

Contracts requiring the contractor to pay prevailing wage rates shall provide that:

- a) If the contractor is late in submitting copies of required payroll records, the Authority may postpone the processing of partial payment estimates pending receipt thereof; and the contractor shall be liable to the Authority for liquidated damages in the amount specified in St. Fin. & Proc. § 17-220 (as of the date of the contract) for each calendar day the records are late;
- b) If a laborer is paid less than the prevailing wage rate of a mechanic while performing a task required to be performed by a mechanic or

mechanic's apprentice or an employee is paid less than the applicable prevailing wage rate, the contractor shall be liable to the Authority for liquidated damages in the amount specified in St. Fin. & Proc. § 17-222(a)(1) (as of the date of the contract) for each day the laborer or employee is underpaid; and

- c) If a laborer is paid less than the prevailing wage rate of a mechanic while performing a task required to be performed by a mechanic or mechanic's apprentice or an employee is paid less than the applicable prevailing wage rate and the contractor knew or reasonably should have known of the contractor's obligation to pay the prevailing wage rate and deliberately failed or refused to pay the prevailing wage rate, the contractor shall be liable to the Authority for liquidated damages in the amount specified in St. Fin. & Proc. § 17-222(a)(2) (as of the date of the contract) for each day the laborer or employee is underpaid.

The specific wording of the liquidated damages provision may be adapted from the form of liquidated damages provision recommended by the Governor's Office of Small, Minority & Women Business Affairs in its "Guidelines Liquidated Damages Provision for Contracts Containing Certified Minority Business Enterprise (MBE) Participation Goals."

3. Contracts Requiring Contractor to Pay Living Wage Rates

Contracts requiring the contractor to pay living wage rates shall provide that:

- a) If the contractor is late submitting copies of required payroll records, the Authority may postpone the processing of partial payment estimates pending receipt thereof; and the contractor shall be liable to the Authority for liquidated damages in an amount calculated with the same methodology as recommended by the Governor's Office of Small, Minority & Women Business Affairs in its "Guidelines Liquidated Damages Provision for Contracts Containing Certified Minority Business Enterprise (MBE) Participation Goals" as referenced above.
- b) If an employee is paid less than the required living wage rate per hour, the contractor shall be liable to the Authority for liquidated damages in the amount specified in St. Fin. & Proc. § 18-108(2) (as of the date of the contract) for each day the employee is underpaid.

The specific wording of the liquidated damages provision may be adapted from the form of liquidated damages provision recommended by the Governor's Office of Small, Minority & Women Business Affairs in its "Guidelines Liquidated Damages Provision for Contracts Containing Certified Minority Business Enterprise (MBE) Participation Goals."

C. Example Language

Language implementing specific liquidated damages provisions is included in both the Statewide Request for Proposals (RFP) and Statewide Invitation for Bids (IFB) templates, and their support documents, as maintained by the Department of General Services' Office of State Procurement. These may be followed in the specific instances where they are directly applicable and used as models in other circumstances where they do not directly apply.

If the procurement officer determines that a liquidated damages provision is appropriate and in the best interest of the State with respect to any delay in completion of a construction contract, the contract shall include a liquidated damages provision in the form provided in COMAR 21.07.02.08B or such other form as determined appropriate by the procurement officer after consultation with the Office of the Attorney General.

Additionally, if the procurement officer determines that a liquidated damages provision is appropriate and in the best interest of the State with respect to any delay in the delivery of any supplies or services, the following may be used as a model:

Liquidated Damages – Supplies or Services

- (a) If the Contractor fails to deliver the supplies or perform the services within the time specified in this contract, the Contractor shall, in place of actual damages, pay to the State liquidated damages of \$ per calendar1 day of delay.
- (b) If the State terminates this contract in whole or in part under the termination for default clause, the Contractor is liable for liquidated damages accruing until the State reasonably obtains delivery or performance of similar supplies or services. These liquidated damages are in addition to excess costs of re-procurement under the Termination clause.
- (c) The Contractor will not be charged with liquidated damages when the delay in delivery or performance is beyond the control and without the fault or negligence of the Contractor, or its subcontractors, as defined in the Delays and Extensions of time clause in this contract.
- (d) The amount of liquidated damages shall not be capped (or otherwise limited) to an amount less than the total amount of liquidated damages that may be assessed pursuant to the terms of the contract.
- (e) No payment by the State, either partial or final, shall be construed to waive the State's right to seek liquidated damages

IV. Plan for Responding to Deficient Performance

- A. The basic plan set forth below should be adapted and expanded for the requirements of the specific provision being enforced.
- B. Basic Plan for Responding to Deficient Performance
 1. The Authority shall actively monitor the contract and the contractor's performance for signs of breaching the contract requirements.
 2. Upon identification of a potential or actual issue with performance that may trigger a liquidated damages provision, the contract manager shall:
 - a) Document the observed indication of deficient performance;
 - b) Obtain more information regarding that performance, which may include contacting the end-user of the contract and/or the contractor; and
 - c) Consult with appropriate colleagues (such as, if different, the originating procurement officer, the contract manager's supervisor, the Authority's MBE liaison, contact at the Commissioner of Labor and Industry, the Authority's counsel from the Attorney General's office, and/or the Authority's Executive Director). (*Note:* whom to consult, in what order, and whether to do so before or after obtaining more information (especially directly from the contractor), will vary under the particular circumstances involved. A key factor is if the breach has already occurred or is one that has not yet occurred but seems more likely than previously.
 3. If after the above steps the Authority determines that there is no actual or potential breach of the contract, the particular investigation is complete.
 4. If the Authority determines that there is either an actual or potential breach of the contract, then the Authority shall:
 - a) Communicate with the contractor regarding the deficient performance, the need to comply with the contract requirements, and that the State preserves the right to protect its interests under the contract (including through the imposition of liquidated damages (*Note:* the exact wording of this will vary with the facts, and the particular provision involved; the Authority's counsel should be consulted in drafting this communication); and
 - b) Pursue potential avenues to address the actual harms to the State from an actual or potential breach of the contract (*Note:* again, this will vary based on the particular facts of the involved breach; this may involve obtaining alternative (or temporary performance) from elsewhere or working with the existing contractor to cure their performance).

5. If an actual breach of the contract has occurred, then the Authority is to consider imposing the liquidated damages authorized by the contract. Factors to consider include:
 - a) If the breach occurred for reasons beyond the control and without the fault or negligence of the contractor (such as defined in the State's standard Delays and Extensions of Time clause);
 - b) The duration or magnitude of the breach; and
 - c) The effort and success of the contractor to mitigate or cure the breach.
6. For procurements valued at \$5,000,000 or more: when a specified breach associated with a liquidated damages provision has occurred and the Authority's staff concludes in Step 5 that the Authority should *not* impose the liquidated damages authorized by the contract, the Authority's staff must provide to the Authority's board written documentation of the recommendation, including the reasons for not pursuing the damages, and have that recommendation approved by the Authority's board.