



SOCIETY OF
**CHARTERED
SURVEYORS**
IRELAND

Damages for delay to completion

1st edition

Guidance note



RICS

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Damages for delay to completion

1st edition

Guidance note

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SCSI / RICS guidance note

This is a guidance note. Where recommendations are made for specific professional tasks, these are intended to represent 'best practice', i.e. recommendations that in the opinion of SCSI meet a high standard of professional competence. Although members are not required to follow the recommendations contained in the note, they should take into account the following points.

When an allegation of professional negligence is made against a surveyor, a court or tribunal may take account of the contents of any relevant guidance notes published by SCSI in deciding whether or not the member had acted with reasonable competence.

In the opinion of SCSI, a member conforming to the practices recommended in this note should have at least a partial defence to an allegation of negligence if they have followed those practices. However, members have the responsibility of deciding when it is inappropriate to follow the guidance.

It is for each surveyor to decide on the appropriate procedure to follow in any professional task. However, where members do not comply with the practice recommended in this note, they should do so only for a good reason. In the event of a legal dispute, a court or tribunal may require them to explain why they decided not to adopt the recommended practice. Also, if members have not followed this guidance, and their actions are questioned in an SCSI disciplinary case, they will be asked to explain the actions they did take. This may be taken into account by the panel.

In addition, guidance notes are relevant to professional competence in that each member should be up to date and have knowledge of guidance notes within a reasonable time of their coming into effect.

Foreword and Acknowledgements

It is with great pleasure that I introduce to you the *Damages for delay to completion Guidance Note*. Produced by the SCSl Quantity Surveying Professional Group Committee, this guidance 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.

This guidance note has been adapted from the Royal Institution of Chartered Surveyors (RICS) *Damages for delay to completion Guidance Note* for use in Ireland.

The SCSl would like to acknowledge the efforts of the following SCSl members for their assistance in producing this Guidance;

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1. Introduction

This guidance note 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 guidance note then focuses on how the standard forms of contract deal with damages. A list of the contracts reviewed is included within the table of contents. For liquidated damages this includes how amounts are inserted in the contract and how this is to be deducted or certified.

The guidance note concludes with a review of common issues and commonly occurring problems. Guidance is given for each of the main groups of contracts and the forms in most regular use within those groups, under the following headings which conform to the Assessment of Professional Competence (APC):

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

2. General principles (Level 1 - Knowing)

If a contractor is late completing a contract then it may need to pay damages for breach of contract. The general principle of damages is to return the non-defaulting party to the position it 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 of the employer and are known as unliquidated damages. They will need to be proven at the time of the loss. According to the principles of the law of contract, to succeed in a claim the claimant would need to demonstrate:

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

It is generally the standard practice to 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 or liquidated and ascertained damages (LAD).

Sectional completion is often contained within contracts in order that sections of the work can be handed over to the employer rather than waiting until completion of all of the works. Generally, contracts containing sectional completion will also have liquidated damages applicable to each section, however the liability on each section will cease once the relevant sectional completion is certified.

Liquidated damages are a predefined sum to be payable in the event of delay beyond the completion date and are thus recoverable without proof of loss. Most contracts contain clauses for the deduction of liquidated damages. They allow a contractor to know its liability if it is late and therefore to budget for the risk of delay and adjust its tender accordingly, and 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 the opposite certainties for contractors and employers than those noted for liquidated damages.

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, but must be a genuine pre-estimate of the loss at the time of entering the sum within the contract documents, rather than a penalty.

Most contracts have start and completion dates. A contractor will be liable for damages if it fails to complete within the time-scale stated within the contract, which may be amended (Extension of Time/Extension to Completion Date). Where no time period is specified (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 or set off against amounts due to the Contractor. 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 whilst 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 (such as the NEC contracts) contain an early completion bonus. This may or may not be of use to the employer as they may not wish to have the project early. For example, if the construction project was 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, in the NEC Engineering and Construction Contract, the employer may state the early completion bonus optional clause in the contract data.

If the delay is so great, the employer may have the right within the contract to terminate. It is advisable to review the contract specific provisions relating to the reasons for, and the process of, termination and to seek expert advice on this matter. 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.

2.1 Method of calculation

It is a key factor of liquidated damages that they must be a genuine pre-estimate of loss and they cannot be a penalty. Stipulated sums, which 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 therefore 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 within 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 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 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 deemed to be 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 have 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

Please refer to section 3.1, as different contracts deal with the deduction of damages in different ways once late completion has occurred. 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, the prompt payment legislation and the Construction Contracts Act. It may be a condition precedent 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. Prompt payment legislation may also require the payment of interest on LADs subsequently found to be incorrectly deducted from payments to the contractor.

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 within each of the contracts, but for ease of reference, this has also been summarised in the following table. 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 |
|--|------------------------------------|----------------------|------------------------------|------------------------------------|--|--|
| RIAI Building Contract (Blue, Yellow and Pink forms) | Liquidated and ascertained damages | Appendix | No | No specific cap for delay damages. | Employer may deduct from sums due to the contractor, or the Contractor pays or allows to the Employer | Architect's certificate that Works ought reasonably to have been completed when due is required |
| RIAI Building Contract (White Plain English form) | Liquidated damages | Contract information | No | No specific cap for delay damages. | Employer may offset damages against any sum due under the Contract. | If the Architect is satisfied that the Works should have been completed by the due date, he/she informs the Employer that he/she is entitled to liquidated damages |
| GCCC | Liquidated damages | Schedule | Yes | No specific cap for delay damages. | Employer may deduct from sums due to the contractor, or the Contractor pays the Employer. ER deducts from payment certificates | No non-completion certificate is needed. Practical completion is called Substantial Completion |

3.1.1 RIAI Contract

The RIAI Contract has been reviewed in detail. The relevant provisions are the same in the blue, yellow and pink forms but the white plain English form is different. It is important to check particular wording in a contract, especially when older versions of the contract are being used.

The contract refers to damages for delay to completion as liquidated and ascertained damages (LADS) except for the white plain English form which refers to liquidated damages.

The dates for possession of the site and completion of the works are stated in the Appendix or Contract Information. Sectional completion is optional by agreement between Employer and Contractor. If it is needed to make sectional completion a mandatory requirement, modifications to the contract are required, which are beyond the scope of this Guidance Note.

The rate of LADs is also stated in the Appendix or Contract Information. The employer can choose the period to which they are applicable, e.g. per hour, day, week, etc. but they must be a genuine pre-estimate of the loss at the time of entering the sum within the contract documents, rather than a penalty. LADs apply to the Works as a whole and there are no LADs for a section.

If sections of the works are handed over by agreement, the LADs for the whole job are reduced in proportion to the value of the sections.

There are also provisions within the contract to extend, but not bring forward the completion date. The architect will issue a Practical Completion Certificate or a Possession Certificate and a Practical Completion Certificate for a section, as necessary. If the contractor fails to achieve the works by the relevant completion date, then LADs can become payable.

The employer may deduct liquidated damages or the contractor may pay them to the employer if the architect has certified that the Works ought reasonably to have been completed by the due date. The contractor may challenge the recovery of LADs if the extension of time provisions and notice requirements within 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 would be recalculated and repaid to the contractor accordingly.

3.1.2 GCCC Contracts

There are a number of GCCC forms for use in different circumstances but the provisions for liquidated damages are similar in them all.

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

The contract refers to damages for delay to completion as liquidated damages (LDs).

The date, or period, for completion of the Works or a Section is inserted in the Schedule, either by the employer or the contractor. Where a period is inserted it starts on the Contract Date.

The amount of LDs is inserted by the Employer in the Schedule for the Works and any Section of it. The employer can choose the period to which they are applicable, e.g. per hour, day, week, etc. but must be a genuine pre-estimate of the loss at the time of entering the sum within the contract documents, rather than a penalty. There are also provisions within the contract to extend or bring forward the completion date.

The ER will issue a Substantial Completion Certificate for the Works or a Section, as necessary. If the contractor fails to achieve the Works or a Section by the relevant completion date, then LDs can become payable. Each section can have its own Date for Substantial Completion and its own rate of liquidated damages for delayed completion identified in the Schedule.

If a Section and the Works are both late, it is the liquidated damages for the works that apply. Clause 9.8.2. of PW-CF1 to PW-CF5 deals with the situation where a Section is not complete by the Date for Substantial Completion for the Section and the Liquidated Damages for the Section is applied. There is no provision for sectional completion in PW-CF6, PW-CF7 and PW-CF8.

No certificate is required to trigger the employer's entitlement to LDs. They can be deducted by the employer and they are also shown as a deduction in the ER's certificates for interim payments. The contractor may challenge the recovery of LDs if the extension/reduction of time provisions within the contract is not complied with. It is therefore essential that the specifics of the contract are reviewed, understood and administered correctly.

3.1.3 NEC3 Engineering and Construction Contract

The NEC suite of contracts contains a set of guidance notes and whilst 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 optional clause will apply to the contract. The level of damages is stated in part 1 of the contract data. If the optional clause is not selected, a sum should not be stated in the contract data.

NEC3ECC 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 within the contract by selecting optional clause X5 within the contract data.

Optional clause X6 (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.

Optional clause X7 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 of this guidance note, the damages stated should be a genuine pre-estimate of loss.

There is also an option to include low performance damages within the contract by selecting the appropriate optional clause. The 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 X7 is selected as an optional clause, and nothing is entered in the appropriate section of the contract data, then it may be deemed that the level of damages is nil. Damages, if deducted, are included within the project manager's assessment under the payment provisions contained within the contract. Unlike the JCT, the NEC does not stipulate conditions precedent to the deduction of liquidated damages; notwithstanding, to avoid potential dispute it is recommended that written notice confirming intent to deduct damages is given by the project manager.

Where X5 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 then this should be entered in the contract data, although this requires alteration to the standard contract data form and caution is advised.

Option A

The general payment clause within 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 within the project manager's certificate; thus allowing 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 within 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.

Options B - F

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

3.1.4 FIDIC Red Book and Orange Book

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 then 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 then 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 sections will be stated here. It will be noted that 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.

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 then 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.

3.1.5 Contracts not reviewed

It can be seen from the three sets of contracts reviewed, that 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 within the relevant section of the contract
- delay damages can also be used for sections in some contracts 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 within this guidance note as they may vary from the general principles set out above.

4. Practical considerations (Level 3 - Doing/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 within 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 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 per cent 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

Often, at the end of a project, the date of completion or practical completion is subject to some debate. In practice, the date of achieving practical completion is sometimes agreed and formalised sometime 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 or prompt payment legislation.

4.1.3 Other issues

If the relevant section of the Appendix/contract is left blank then unliquidated damages might 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 Appendix/contract then the employer will not be entitled to either liquidated or unliquidated damages. This should be advised against as this significantly reduces the contractor's incentive to complete the works by the completion date and prevents the employer from recovering losses.

Where there is no mechanism within 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 within 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 within 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 mechanisms within the contract or pursue the outstanding sums as a debt.

Dating back to 1895, the Society of Chartered Surveyors www.scsi.ie Ireland is the independent professional body for Chartered Surveyors working and practicing in Ireland.

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