Purpose
This policy prescribes regulations for incorporating liquidated damages in University solicitations. The policy is designed to comply with State regulations.

Definition
a. “Liquidated Damages” is defined as an amount of money stipulated in the contract to be paid by the contractor for failure to perform in accordance with the contract. The damage figure must be a reasonable estimate of the probable loss to the University, and not calculated simply to impose a penalty on the contractor.

Authority, Responsibility, and Duties
da. The University Purchasing Director shall administer the University’s procurement program by recommending policy, and developing, publishing and enforcing appropriate procedures; delegating procurement authority to departments as appropriate; comparing requisitions for purchase with reasonable standards; reviewing the procurement delegation and activity/records of departments for legality and compliance with this policy.

b. The Purchasing Director and/or Capital Outlay Director may establish reasonable liquidated damages on a case-by-case basis.

Policy Statements
a. Liquidated damages shall be assessed when both (1) the time of delivery or performance is such an important factor in the award of the contract that the University may reasonably expect to suffer damage if the delivery or performance is delinquent, and (2) the extent or amount of such damage would be difficult or impossible to ascertain or prove.

b. When a liquidated damages clause is used for construction, the rate of liquidated damages to be assessed against the contractor should be for each day of delay and the rate should, at a minimum, cover the estimated cost of inspection and superintendence for each day of delay in completion. If the University will suffer other specific losses due to the failure of the contractor to complete the work on time, the rate should also include an amount for these items. Examples of specific losses are:

   (1) The cost of substitute facilities;
   (2) The rental of buildings and/or equipment.
c. The Purchasing Director and/or Capital Outlay Director shall place a written justification in the contract file documenting how the proposed amount per day was determined (liquidated damage clause for Capital Outlay projects may require submittal to the Director, Division of Engineering & Buildings, Department of General Services for approval).

d. When a liquidated damages clause is to be used in a contract, the applicable clause and appropriate rate of liquidated damages shall be included in the solicitation.

**Appropriate Language**

a. For the purchase of goods and non-professional services, insert the following liquidated damages clause in the solicitation:

“Delivery is required not later than ________________. It is understood and agreed by the bidder/offer or that time is of the essence in the delivery of supplies, services, materials, or equipment of the character and quality specified in the bid/proposal document. In the event these specified supplies, services, materials, or equipment are not delivered by the date specified, there will be deducted, not as a penalty but as liquidated damages, the sum of $_____________ per day for each and every calendar day of delay beyond the time specified; except that if the delivery be delayed by any act, negligence, or default on the part of the University, public enemy, war, embargo, fire, or explosion not caused by the negligence or intentional act of the contractor or his supplier(s), or by riot, sabotage, or labor trouble that results from a cause or causes entirely beyond the control or fault of the contractor or his supplier(s), a reasonable extension of time as the University deems appropriate may be granted. Upon receipt of a written request and justification for any extension from the contractor, the Purchasing Office may extend the time for performance of the contract or delivery of goods herein specified, at the Purchasing Office’s sole discretion, for good cause shown.”

b. For construction, repair/renovation work, insert the following clause in the solicitation:

“Work shall begin within ____ calendar days after receipt of purchase order or contract and all work shall be completed in ____ calendar days. It is hereby understood and agreed by the bidder that time is of the essence in the delivery of supplies, services, materials, or equipment of the character and quality specified in the bid document. In the event these specified supplies, services, materials, or equipment are not delivered by the date specified, there will be deducted, not as a penalty but as liquidated damages, the sum of $_____________ per day for each and every calendar day of delay beyond the time specified; except that if the delivery be delayed by any act, negligence, or default on the part of the University, public enemy, war, embargo, fire, or explosion not caused by the negligence or intentional act of the contractor or his supplier (s), or by riot, sabotage, or labor trouble that results from a cause or causes entirely beyond the control or fault of the contractor or his supplier(s), a reasonable extension of time as the University deems appropriate may be granted. Upon receipt of a written request and justification for an extension from the contractor, the Purchasing Office may extend the time for performance of the contract or delivery of goods herein specified at the Purchasing Office’s sole discretion for good cause shown.”
Assessment Procedures

a. If a liquidated damages clause is included in a contract and the contractor is late or behind schedule and the delay is not an excusable one, the Purchasing Contract Officer shall (1) issue a Notice of Contract Deficiency or “Cure Letter” to the contractor; and (2) if there is a performance bond, send a copy of the Cure Letter to the bonding company. If the contractor does not comply with the Cure Letter, the Contract Officer shall notify the bonding company that they are responsible to complete the contract and at the same time, terminate the contract for default.

b. If there is no performance bond with the contract, the Contract Officer shall send a cure letter to the contractor. If the contractor does not correct the problem, the Contract Officer shall issue a termination for default letter and re-bid the requirement. The University shall assess liquidated damages against the contractor from the date the project was to be completed, as stated in the liquidated damages clause, to the date of the termination of default letter. In addition, any excess costs encountered in the re-purchase action may also be held against the defaulted contractor.

References


Approved by: Eddie N. Moore, Jr., President
Date: September 29, 2006