 Liquidated damages, sometimes referred to as ‘liquidated and ascertained damages’, ‘LADs’ or ‘delay damages’ are a specific pre-calculated sum of money payable in the event that a party fails to perform a particular obligation.

- Liquidated damages are most commonly seen in construction contracts in the context that they are payable by a contractor when it has failed to complete works by a specified date.
- Contractors are used to seeing liquidated damages provisions and when tendering for work, contractors are often required to disclose whether liquidated damages have been levied against them on other projects.
- The levying of liquidated damages may impact the success of the contractor’s bid. Therefore, contractors are very likely to resist the application of liquidated damages on any project.
- Sometimes your Clients will seek to include liquidated damages provisions within your contract for services. Liquidated damages provisions connected to completion of the works are not appropriate in consultants’ appointments and are not acceptable to you since you have no control over the completion of the works.
- Where Clients seek to impose other types of liquidated damages, such as for failure to provide documentation etc., you should try to avoid such provisions as, generally, you will be reliant on others to enable completion of the task.
- You should instead seek to limit your overall liability for the provision of services.

You do not produce liquidated damages calculations on behalf of Clients.

What problems could you face associated with liquidated damages?

- Contractors will make the following types of complaints:
  - Liquidated damages have been waived by the actions/inactions of Clients and the Project Manager/Contract Manager (for example by making statements/agreements which suggest that liquidated damages will not be applied);
  - The contract machinery has broken down as you have not been operating the extension of time provisions properly, or at all, thereby putting time at large (so that the contractor only has to complete within a reasonable time); and
  - Liquidated damages are void because they are a penalty and are therefore unenforceable.

- In addition, you and your Clients may be reluctant to levy liquidated damages for fear that the contractor will take its ‘foot off the gas’, be distracted from delivery or become adversarial. You and your Clients may also fear that the application of liquidated damages will inevitably result in a wider dispute, where the contractor will seek to prove its entitlement to all manner of extensions and delay and disruption costs in an effort to prevent the application of liquidated damages.

- Clients are often reluctant to give instructions to you to levy liquidated damages and instead expect you to make the decision about whether to apply liquidated damages or not. This can cause you real problems.

Why might these problems be an issue for you?

- Clients often blame the Project Manager/Contract Manager for the problems associated with liquidated damages, usually because they have been involved throughout the project, including at key procurement
stages when liquidated damages are discussed and agreed. The Client might suggest that you have calculated the liquidated damages incorrectly, or failed to warn the Client of the importance of the calculation, its basis and/or validity.

- Where the Client’s entitlement to liquidated damages has been challenged by the contractor, for example because it is alleged that they are a penalty, or because liquidated damages have been waived by your actions or you have failed to give extensions of time when they were due, the Client might look to you for recovery of liquidated damages which it cannot charge, or the application of which is challenged by the contractor.

All of these matters potentially increase your exposure to risk and potential claims.

In addition, on those occasions where you have liquidated damages in your contract with the Client, any application of those damages may need to be disclosed on future tenders.

You must keep the Client informed in writing of all these events.

Steps to minimise risk

When you are at the procurement stage:

- In order to avoid an argument that the liquidated damages are a penalty, ensure that:
  - You make it clear to the Client in writing that liquidated damages must not impose a detriment out of all proportion to any legitimate interest of the Client under the contract – the liquidated damages clause should protect a legitimate business interest and should not be extravagant or exorbitant.
  - You do not prepare the calculation of liquidated damages which must be undertaken by the Client.
  - Any figures included in contracts are based on the Client’s calculation.
  - You can give guidance on the types of losses included in the calculation but the matter is ultimately one for lawyers and accountants to advise upon.
  - The Client is aware that, when it is considering the level of liquidated damages for inclusion in the contract, the estimate must have a legitimate reason.
  - The calculation for the liquidated damages and how that calculation was arrived at, including any underlying assumptions, such as interface risks, is recorded. Make it clear to the Client that you have not audited the figures and are relying on the Client’s data.
  - A note is kept of the categories of loss that the Client thinks he will suffer if the contractor is late.
  - Any savings or benefits that would reduce the loss are taken into account in the calculation and recorded.
  - The final agreed rate does not exceed the amount calculated.
  - A record is kept of any negotiations with the contractor about the rate of damages that will apply.
  - The contract is properly completed in relation to liquidated damages (whether it is the particulars of the contract, or contract data). Be careful if using standard form contracts to specify whether liquidated damages are intended to apply and, if not, clearly state that “general damages apply” instead of using short-cuts such as “nil” or “N/A” where it has been decided that liquidated damages are not to apply.

- You must keep the Client informed in writing of all these events.
When you are at the delivery stage:

- Make sure that the extension of time provisions are operated in accordance with their terms. Comply with time-provisions for assessing contractor claims. Do not allow the contractor to put in late delay and disruption claims or global claims.

- Make sure that the Client is kept fully informed of circumstances when liquidated damages might be levied and that the Client makes a timely decision as to whether to levy liquidated damages or not.

- Record in writing any instructions from the Client as to the application of the liquidated damages. If the Client suggests that it would not be in the interest of the project to levy liquidated damages, that statement must be recorded in a letter to the Client.

- If the Client has given instructions not to levy liquidated damages for now, make it clear in writing to the contractor that the Client is not levying liquidated damages in this payment certificate but fully reserves the right to apply damages in future certificates without notice etc.

- Avoid discussions with contractors about liquidated damages, or any suggestion that, if the contractor achieves a certain level of completion, liquidated damages will not be applied. Contractors will often argue that the works are substantially complete and that, therefore, liquidated damages cannot apply.

- Ensure that the application of liquidated damages is maintained as a real tool; it should be referred to in correspondence regularly, so that the contractor is fully aware that there is a possibility of application. The contractor is more likely to react badly if liquidated damages are levied very suddenly or if it has been led to believe that they will not be applied. Early notification of the application of liquidated damages may result in mitigation efforts that are more likely to be successful.

- If the contractor is suggesting that liquidated damages are waived, are a penalty or that they do not apply, refer the matter to your Line Manager for guidance.

- Where you yourself are at risk of application of delay damages under your consultancy agreement, you must keep a contemporaneous and detailed note of all matters outside of your control which have prevented compliance with the obligation thereby resulting in the potential of levying liquidated damages.