Subpart 11.5 - Liquidated Damages

Parent topic: Part 11 - Describing Agency Needs

11.500 Scope.

(a) This subpart prescribes policies and procedures for using liquidated damages clauses in *solicitations* and contracts for *supplies*, services, research and development, and *construction*.

(b) This subpart does not apply to liquidated damages-

(1) For subcontracting plans (see 19.705-7);

(2) Related to the Contract Work Hours and Safety Standards statute (see subpart 22.3); or

(3) Related to paid sick leave for Federal contractors (see subpart 22.21).

11.501 Policy.

(a) The *contracting officer must* consider the potential impact on *pricing*, competition, and contract administration before using a liquidated damages clause. Use liquidated damages clauses only when-

(1) The time of delivery or timely performance is so important that the Government *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 estimate accurately or prove.

(b) Liquidated damages are not punitive and are not negative performance incentives (see 16.402-2). Liquidated damages are used to compensate the Government for probable damages. Therefore, the liquidated damages rate *must* be a reasonable forecast of just compensation for the harm that is caused by late delivery or untimely performance of the particular contract. Use a maximum amount or a maximum period for assessing liquidated damages if these limits reflect the maximum probable damage to the Government. Also, the *contracting officer may* use more than one liquidated damages rate when the *contracting officer* expects the probable damage to the Government to change over the contract period of performance.

(c) The *contracting officer must* take all reasonable steps to mitigate liquidated damages. If the contract contains a liquidated damages clause and the *contracting officer* is considering terminating the contract for default, the *contracting officer should* seek expeditiously to obtain performance by the contractor or terminate the contract and repurchase (see subpart 49.4). Prompt *contracting officer* action will prevent excessive loss to defaulting contractors and protect the interests of the Government.

(d) The *head of the agency may* reduce or waive the amount of liquidated damages assessed under a contract, if the Commissioner, Financial Management Service, or designee approves (see Treasury Order 145-10).

11.502 Procedures.

(a) Include the applicable liquidated damages clause and liquidated damages rates in *solicitations* when the contract will contain liquidated damages provisions.

(b) *Construction* contracts with liquidated damages provisions *must* describe the rate(s) of liquidated damages assessed per *day* of delay. The rate(s) *should* include the estimated daily cost of Government *inspection* and superintendence. The rate(s) *should* also include an amount for other expected expenses associated with delayed completion such as-

(1) Renting substitute property; or

(2) Paying additional allowance for living quarters.

11.503 Contract clauses.

(a) Use the clause at 52.211-11, Liquidated Damages-*Supplies*, Services, or Research and Development, in fixed-price *solicitations* and contracts for *supplies*, services, or research and development when the *contracting officer* determines that liquidated damages are appropriate (see 11.501(a)).

(b) Use the clause at 52.211-12, Liquidated Damages-*Construction*, in *solicitations* and contracts for *construction*, other than cost-plus-fixed-fee, when the *contracting officer* determines that liquidated damages are appropriate (see 11.501(a)). If the contract specifies more than one completion date for separate parts or stages of the work, revise paragraph (a) of the clause to state the amount of liquidated damages for delay of each separate part or stage of the work.

(c) Use the clause at 52.211-13, Time Extensions, in *solicitations* and contracts for *construction* that use the clause at 52.211-12, Liquidated Damages-*Construction*, when that clause has been revised as provided in paragraph (b) of this section.