A Precise Formula for Liquidated Damages in Oakville

Saheer Fazilat is Manager of New Construction for the Town of Oakville, Ontario. On a recent $45-million construction project, which depended on municipal, provincial and federal infrastructure funding that was available only until the fiscal year end (March 31), Oakville had to ensure that any potential funding losses because of delays would be offset by the contractor. To answer provincial concerns about completion, Manager of Purchasing Kim Dooling developed a precise formula for calculating liquidated damages (i.e., owner’s losses associated with delay or non-performance). The following is the contract language and dollar formula that Oakville included in its “Instructions to Bidders” on the project. (The date for use of the funding was extended by the Province, so Oakville went back to the contractor and amended the clause by extending it for the additional period.)

The date of completion is a material part of this Contract and should the Bidder fail to complete the work within the time specified or any enlargement thereof by the project Engineer/Coordinator, the Bidder shall pay the Corporation Sixty seven cents ($0.67) for every dollar of uncompleted works which represents the portion of the project funded by Provincial Infrastructure funds and, in addition, $1281.70 per day for project staff and consultants for each and every day that the work remains incomplete and not ready for final acceptance by the Corporation after the time specified for the completion thereof or any enlargement thereof by the Project Engineer/Coordinator, whether the Contract has been forfeited or abandoned by the Bidder or not, and it is mutually agreed between the Owner and the Bidder that the amounts stated above shall be considered as predetermined and ascertained liquidated damages. The formula for calculating the daily rate for consultants and project staff is as follows:

- **Project Manager (10 hours/week):** 2 hrs x $158/hr = $316/day
- **Certifying Architect (2.5 hours/week):** 1/2 hrs x $153/hr = $76.5/day
- **Contract Administration Coordinator (16 hours/week):** 3.2 hrs x $126/hr = $403.2/day
- **Contract Administration Document Controller (10 hours/week):** 2 hrs x $90/hr = $180/day
- **Mech, Elec, Civil, Struct engineer (each discipline 2.5 hours/week):** 4 x 1/2 hrs x $153/hr = $306/day

The Certificate of the Project Engineer/Coordinator as to the number of days that the project is overdue beyond the completion date shall be final between the parties.
The Owner may deduct any amount due under this section as provided in item 14.00 herein. The liquidated damages payable under this paragraph are in addition to and without prejudice to any other remedy, action or other alternative that may be available to the Corporation.

The Bidder shall not have to pay liquidated damages for any delay caused by Acts of God, or of the Public Enemy, or of any Foreign State, Fire, Flood, Epidemics, Quarantine Restrictions, Embargoes or delays of Sub-Contractors due to such causes.

Sahe Fazilat can be reached at (905) 845-6601 x 3620 or sfazilat@oakville.ca. Kim Dooling can be reached at x 3087 or kdooling@oakville.ca.

What’s working for you? If you have put a good idea into practice or embraced an innovation that’s made a difference, we invite you to share it with our readers. Please send us a brief email to: editor@neci-legalledge.com.

Reprinted from The Legal Edge Issue 95, July - September 2011

Readers are cautioned not to rely upon this article as legal advice nor as an exhaustive discussion of the topic or case. For any particular legal problem, seek advice directly from your lawyer or in-house counsel. All dates, contact information and website addresses were current at the time of original publication.