

TITLE: CIB 89-23 Liquidated Damages

AGENCY FOR INTERNATIONAL DEVELOPMENT
WASHINGTON. D.C. 20323

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MEMORANDUM FOR ALL CONTRACTING OFFICERS AND NEGOTIATORS

TO: Distribution List D-14(LL)
FROM: M/AAA/SER, John F. Owens, Procurement Executive
SUBJECT: Liquidated Damages

CONTRACT INFORMATION BULLETIN 89-23

The office of the General Counsel recommends that a Contracting Officer who uses a liquidated damages clause in a contract take certain steps to help ensure that the clause is enforceable, including the following:

1. Include a liquidated damages clause only where application of the clause would not constitute a penalty. i.e. where actual damages which would result from a breach of the contract would be difficult to ascertain, and limit the liquidated damages figure to a good-faith, reasonable estimate of the actual damages believed at the time of contracting to be likely to result from a breach.
2. Refer to the content of the clause as "liquidated damages for non-performance" and avoid the term "penalty".
3. State in the contract that both parties agree that time is of the essence in performing the contract. Record in the memorandum of negotiation the mutual understanding of the parties on this point and note any discussions regarding the amount and application of the liquidated damages.

Avoid taking any action. such as waiver of performance or delivery dates, or any inaction, which might be deemed a disavowal that time is of the essence.

4. Whenever possible, include a total ceiling figure as well as per day, per unit or other figures.