



Contract Modernization

Limiting and Quantifying Damages: Consequential Losses and Loss of Use

Alberta Infrastructure has listened to its industry partners. Our new, modernized contracts have added clarity and better align with industry standards, specifically related to Liquidated Damages. The following information applies to construction contracts only.

Disclaimer: This document is for information and context only. It is not legal advice and must not be used as a substitute for reviewing the applicable contract, legislation, or seeking professional legal counsel. Where interpretation is required, the executed contract and governing law prevail.

Background

Within the Contract there is a mutual waiver of Consequential Losses. Consequential Losses and their exclusions are precisely defined in the Contract. In general terms, Consequential Losses includes loss of profits or anticipated profits, loss of business opportunities, loss of revenue, or loss of goodwill or reputation suffered by either Party, or anyone for whom the Parties are responsible. Excluded from that waiver of Consequential Losses are damages related to loss of use of the work or component, delays, and any third-party claims.

This provision establishes clear contractual conditions for indirect or secondary losses resulting from a breach, delay, or failure in contract performance. It is designed to limit exposure to excessive claims and ensure that liability remains proportionate to the risks each party assumes.

In instances when a property or facility cannot be used for its intended purpose due to delays, damage, or other issues caused by the contractor or related parties, also known as 'loss of use' and 'delay', the Province is able to recoup those costs through a predetermined formula set out in the Contract, called Liquidated Damages. The Liquidated Damages are typically calculated as a fixed daily rate based on a reasonable pre-estimate of actual damages (for example, cost of temporary facilities, administrative overhead, and potential use impact).

Liquidated Damages and whether they are limited to a maximum value (i.e. capped) are determined on a case-by-case basis by the Province prior to the RFP process and outlined in specific Contractual terms for each project.

Other Liability – including Third-Party

The Province cannot narrow liability for third-party losses; if the contractor harms a third party, the contractor, not the Province, must bear the full risk. Third-party damages are specifically excluded from Consequential Losses, as required by the Province's risk management and insurance policies.

What We Heard

Consequential Losses and Loss of Use are unlimited and place significant risk on Industry.

Our initial modernized contracts did not quantify how the damages associated with loss of use would be determined making it difficult for Industry to determine their risk level and appropriately price the risk into their bids.

What We Did

Waived Consequential Losses with clearly defined inclusions and exclusions from that waiver. Adopted Liquidated Damages to quantify and limit the claims the Province has for the specified loss of use and delay claims. For clarity, other contractual remedies continue to apply to damages outside of loss of use and delay.

Why We Made the Change

By pricing the risk in advance, Liquidated Damages give both parties certainty about payable losses if breaches occur and reduce disputes and litigation. It also assists the contractor in the preparation of their bid as the risk is explicitly quantified, reducing costs for Albertans. Lastly, it establishes the consequences for failing to meet the specific contractual obligations.

The changes better balance the risk and allows Industry to more appropriately assess the risk and price it into their bids.