



State of Louisiana
Louisiana Department of Health
Bureau of Legal Services

CONFIDENTIAL LEGAL MEMORANDUM

TO: Deputy Secretary, Undersecretary, Assistant Secretaries, Surgeon General, Medicaid Director, Emergency Preparedness, Health Standards Section, and Contracts Section

FROM: Michael Harrington
LDH Secretary

BY: Nicholas Gachassin, III
LDH Executive Counsel 

RE: LDH Contracts – Liquidated Damages Provisions

DATE: September 4, 2024

In order to protect LDH from any loss and for the purpose of deterring substandard service resulting from the action or inaction of a contractor, it may be necessary or appropriate to specify predetermined monetary penalties that the contractor must pay to LDH for failure to meet particular contractual requirements. In all contractual matters meeting the below listed thresholds, liquidated damages provisions may be included in LDH contracts and contract amendments by means of an attachment/rider to the contract or amendment in accordance with this Memorandum.

This memorandum shall serve as written notice of the policy and procedure for inclusion of liquidated damages provisions in new LDH contracts and amendments to existing contracts. Effective immediately, the LDH Secretary has directed that the LDH policy and procedure for liquidated damages provisions in LDH contracts or amendments be as follows:

I. Applicability:

A. Mandatory Inclusion of Liquidated Damages Provisions:

Liquidated damages provisions shall be included in any contract or amendment for which the Executive Management Team (EMT) directs that they be included.

B. Consideration of Liquidated Damages Provisions:

Any contract or amendment falling into one or more of the detailed categories (1-7) listed below shall be reviewed and evaluated by the Assistant Secretary/Medicaid Director, or equivalent or higher position, who shall complete **Attachment A**, the "Liquidated Damages Consideration Form", in making a final determination as to whether the inclusion of liquidated damages in the contract is appropriate:

1. Contracts awarded through an RFP (Request for Proposals) process;
2. Emergency/catastrophic preparedness contracts;
3. Contracts involving private entities in which the annual contract amount is equal to or greater than Three Hundred Thousand Dollars (\$300,000.00);
4. Sole source contracts;
5. Emergency contracts (*i.e.*, ordinary emergency situations, as when there is insufficient time to implement a contract requiring an RFP), except for contracts with public entities;
6. In any new contract involving a contractor that, in a prior contract with LDH, had failed to timely complete deliverables or was assessed liquidated damages. The program office should discuss this option with the appropriate Assistant Secretary/Medicaid Director or other Appropriate Authority; and
7. In any amendment to or relative to an existing contract in which a contractor previously has failed to timely complete deliverables or has been assessed liquidated damages. The program office should discuss this option with the appropriate Assistant Secretary/Medicaid Director or other Appropriate Authority.

For any other contract or amendment, liquidated damages provisions are not required and do not require Attachment A consideration; however, the program office may discuss liquidated damages provisions with the appropriate Assistant Secretary/Medicaid Director/other Authority for inclusion in the contract or amendment.

II. Responsibilities:

When liquidated damages provisions are to be included in an LDH contract or amendment pursuant to Part I above, contract staff responsible for creating the contract shall follow these steps to implement a liquidated damages addendum to be attached to the contract or amendment:

- **STEP 1:** The program office that originates the contract or amendment shall prepare a liquidated damages addendum with a table of deliverables,

performance dates and cost assessment that is reviewed and approved by the Bureau of Legal Services (BLS). (Please note that the liquidated damages provisions should be tailored to the deliverables defined in the Statement of Work and the performance milestones missed, and should make clear how the amount of damages to be assessed is related to the contract deliverables and the missed performance);

- **STEP 2:** If the contractor objects to any of the provisions of the addendum, have the attorneys for the contractor negotiate with BLS;
- **STEP 3:** If the contractor continues to object, have the program office prepare a Submission Memo (template prepared by BLS) to the Assistant Secretary/Medicaid Director/other Authority, who shall evaluate and offer a resolution for the parties, after consultation with the appropriate EMT member;
- **STEP 4:**
 - A. If the contractor agrees with the Assistant Secretary/Medicaid Director/other Authority's resolution, the contract may proceed toward completion;
 - B. If the contractor does not agree with the Assistant Secretary/Medicaid Director/other Authority's resolution, then the Submission Memo is updated and sent to the BLS Contracts Section for legal recommendations to be inserted into the Submission Memo; and
- **STEP 5:** Once the Submission Memo is in final form and includes legal recommendations, the Memo is sent to the Executive Counsel, with copies to the General Counsel and the Assistant Secretary/Medicaid Director/other Authority. The Executive Counsel shall present it to EMT for final resolution/decision on the liquidated damages provisions. The Executive Counsel (or designee) shall notify the General Counsel and the Assistant Secretary/Medicaid Director/other Authority of the final resolution.

III. Terms/Definitions:

For purposes of this Memorandum, the following terms shall apply:

Emergency/Catastrophic Preparedness Contract:

A contract that is part of LDH's response to an emergency condition that affects a great number of people and multiple agencies over a wide area and poses a threat to public health, welfare, safety, or public property. Examples of such conditions include hurricanes, floods, epidemics, riots, equipment failures, or such other emergencies as may be declared or proclaimed by the Governor of Louisiana and/or the Chief Procurement Office

Ordinary Emergency:

"Usual" emergencies that may occur during daily operation of a single agency, such as insufficient time to implement a contract requiring an RFP, a broken water line or freezer, or a tree falling on a building.

Program Office:

Includes the Office of the Surgeon General ("OSG"), Office of Public Health ("OPH"), Office of Behavioral Health ("OBH"), Office for Citizens with Developmental Disabilities ("OCDD"), Office of Aging and Adult Services ("OAAS"), Office of Woman's Health and Community Health ("OWHCH"), Office of Management and Finance ("OMF"), and Bureau of Health Services Financing ("BHSF" or "Medicaid"). For purposes of this memo, this term also includes Office of the Secretary ("OS").

cc: Legal
Budget
Fiscal
HR

Attachment A

Liquidated Damages Consideration Form

A. CONSIDERATION FACTORS FOR INCLUSION OF LIQUIDATED DAMAGES: Pursuant to the LDH MEMO on "Use of Liquidated Damages in Contracts", the program office that originates the contract or amendment should determine, through its Assistant Secretary/Medicaid Director/other Authority, whether a "liquidated damages" provision is necessary. The below referenced factors may be considered when evaluating liquidated damages. The factors provided are not the only factors that may be considered by an Assistant Secretary/Medicaid Director/other Authority. Factors to consider include:

1. A reasonable estimate of the actual damage that LDH is likely to incur as a result of the contractor's breach; and/or
2. When there are concerns about the possibility of losses to LDH caused by error or misjudgments by the contractor; and/or
3. When actual damages, though real, will be difficult or impossible to prove; and/or
4. When there is no other avenue for LDH to recover expenses if a delay in service occurs; and/or
5. When a provider has a history of deficiencies on a current or past contract; and/or
6. When there are deliverable milestones that must be met by specific deadlines to avoid detrimental delays to service.

B. EVALUATION

1. Provide a PO for contract/amendment: _____
2. Annual value of contract/amendment by FY years: _____
3. Title of contract/amendment: _____
4. Program Office of contract/amendment: _____
5. Term of contract/amendment: _____
6. Check all boxes that apply to this contract/amendment:
 - Contract was awarded through an RFP process
 - Emergency/catastrophic preparedness contract
 - Contractor is a private entity and annual contract amount is equal to or greater than \$300,000
 - Sole source contract
 - Emergency contract ("ordinary" emergency) not with a public entity

- Contractor has previously failed to timely complete deliverables or been assessed liquidated damages in this contract or a previous contract

7. Fill in box for summary of deliverables/services:

8. Management, operational or service risk(s) to LDH and recipients if a service deficiency occurs:

9. Monetary risks to LDH if a service deficiency occurs:

10. Other considerations in determining whether a liquidated damages addendum should be added to the contract/amendment, and resulting conclusion:

CONCLUSION/DETERMINATION:

Signature of Assistant Secretary/Medicaid Director/Authority

Date

Printed Name: _____