

The 3 Must Haves for Deducting Liquidated Damages (LAD's)

If a building contractor fails to complete building work before an agreed completion date, then the employer may be entitled to LADs under the terms of the building contract. LAD clauses allow the employer to deduct sums from payments due to the contractor, and are calculated depending on the length of the delay. LADs help to avert tricky legal situations in which the employer would have to prove actual losses as a result of the delay before recovering any compensation. They also benefit the contractor, as they will know in advance the maximum level of their potential exposure for failing to meet a completion deadline.

Employers must ensure that certain procedures are followed should they wish to claim LADs, which will have been defined in the building contract applicable to the project in question. Following is an example of what must be done before claiming LADs:

An employer engaged a contractor under the JCT standard form building contract 2011, under which, LADs are payable in the event the works are not completed by 1 June 2012. There are major delays and the contractor failed to complete by this date. On 1 August 2012 the contract administrator issued the latest interim certificate for payment. The Employer wanted to deduct LADs from the amount stated to be due in this certificate. However, the JCT contract sets out three conditions that must be satisfied before the employer can deduct LADs:

1. The Contract Administrator must issue a 'Non-Completion Certificate'.
2. The Employer must then give a general written notice that he might deduct LADs.
3. The Employer must issue a valid pay-less notice – specifically against the particular interim certificate - stating the amount of LADs he intends to deduct from the sum due under that certificate. This notice must be given not later than 5 days before the 'final date' for payment of the amount payable under the interim certificate, which is 14 days from the date of issue of the interim certificate. In this case, then, the final date for payment is 15 August 2012. So the last date the employer could issue his notice is **10 August 2012**.

To summarise, preconditions defined in the building contract must be met before LADs can be claimed. Under JCT contracts, these conditions are:

- A certificate of non-completion must have been issued.
- The employer must have notified the contractor that he may claim LADs.
- The employer must have served a 'pay less' notice not later than 5 days before the final date for payment.

The two notices by the employer do not need to be served separately; they may be set out in one notice. But the timing of that notice will be crucial.