

Consequential and liquidated damages: What is the difference between them?

February 6, 2018 - NYREJ

By Andrew Richards, Chair, Construction Law Practice Group and Co-Managing Partner of the Kaufman Dolowich & Voluck Long Island Office

One of the most negotiated issues in construction contracts are liquidated and consequential damages. What I have found interesting over the last several months is that contractors, surety brokers and even surety underwriters really do not know the difference between liquidated and consequential damages. And when you throw in the term direct damages, the conversation gets even more complicated.

There are really two types of damages for a breach of a construction contract. This is true whether there is a dispute between an owner and a general contractor or a dispute between a general contractor and a subcontractor. For the purposes of this article, I will use an owner and contractor. Direct damages are the most understandable. Direct damages are those that flow naturally and necessarily from the breach and compensate for loss that is presumed to have been foreseen or contemplated by the parties because of the breach. Examples of direct damages include unpaid contract amounts due the contractor, costs incurred by an owner to repair defective work or complete the work of the contractor, and reduced project value due to nonconforming work. The contractor who does not finish its work gets a credit for the balance remaining under the contract but is liable to the owner for any costs over and above the contract price. The next set of damages is consequential damages, which are recoverable in New York State unless the contract precludes the award of consequential damages.