

**QUESTIONNAIRE: THE EXTENT OF ENFORCEMENT OF THE PENALTY CLAUSE BY PUBLIC SECTOR CLIENTS**

**NB:** 1 Please answer the questions by marking the appropriate box with a cross (X)  
 2 Only construction contracts valued in excess of R650 000 should be considered when completing this questionnaire

RESPONDENT NUMBER

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**SECTION 1: GENERAL PARTICULARS**

1.1 In which of the following construction industry institutions/organisations do you currently fall?

- 1 Client/Employer (e.g. Dept. of Public Works, Municipality, Eskom, etc.)
- 2 Consultant (e.g Architect, Engineer, Quantity Surveyor, Project Manager, etc.)
- 3 Main Contractor/Builder
- 4 Other


Please specify .....

Q0

Q1.1

1.2 Which of the following **BEST** describes your profession?

- 1 Civil Engineering
- 2 Quantity Surveying
- 3 Architecture
- 4 Project Management
- 5 Legal
- 6 Other


(please specify) .....

Q1.2

1.3 How many years have you been practising in the above profession? .....

Q1.3

1.4 What standard conditions of contract do you **MOSTLY** use in your contracts (please choose only one)?

- 1 JBCC
- 2 GCC
- 3 FIDIC
- 4 NEC
- 5 Other


(please specify): .....

Q1.4

1.5 *The answers I will provide in this questionnaire relate to*

- 1 civil engineering works
- 2 building works
- 3 other


(please specify): .....

Q1.5

**SECTION 2: GENERAL ASPECTS OF PENALTIES/LIQUIDATED & ASCERTAINED DAMAGES (LAD'S)**

2.1 *Are you familiar with the Conventional Penalties Act (Act 15 of 1962)?*

- 1 Very familiar
- 2 Familiar
- 3 Unfamiliar


Q2.1

2.2 *There is a difference between penalties and LAD's*

- 1 Yes
- 2 No
- 3 Don't know


Q2.2

2.3 *My understanding of the penalty/LAD clause in construction/building contracts is that it is **(choose only one)***

- 1 A penalty for non-performance by the contractor/builder
- 2 A provision for payment to the client for inexcusable late completion
- 3 A provision for payment to the client for late completion


Q2.3

**SECTION 3: RELEVANCE OF PENALTY/LAD PROVISIONS IN PUBLIC SECTOR CONSTRUCTION CONTRACTS**

	1 Strongly disagree	2 Disagree	3 Neutral	4 Agree	5 Strongly agree
3.1 Penalties/LAD's are still relevant in public sector construction contracts and therefore justified					
3.2 Damages suffered by clients due to late completion of contracts are difficult to prove					
3.3 Penalties/LAD's effectively serve their intended purpose and therefore protect the interests of clients					
3.4 Penalties/LAD's are a useful tool to dissuade the contractor from completing the contract after the agreed contract period					
3.5 Unreasonably high penalty/LAD amounts in tender documents discourage prospective tenderers from tendering for public sector contracts					
3.6 There is a need for alternatives to penalties/LAD's in public sector construction contracts					

Q3.1

Q3.2

Q3.3

Q3.4

Q3.5

Q3.6

**SECTION 4: ASSESSMENT OF PENALTY/LAD AMOUNTS IN CONSTRUCTION/BUILDING CONTRACTS**

4.1 In my contracts, the responsibility of determining the penalty/LAD amount included in contract documents rests with the **(choose one)**

- 1 Client
- 2 Consultant
- 3 Client and Consultant


Q4.1

	1 Strongly disagree	2 Disagree	3 Neutral	4 Agree	5 Strongly agree
4.2 There should be a relationship between the penalty/LAD amount and the likely damage/prejudice to be suffered by the client due to late completion of contract					

Q4.2

4.3 Please rate the following factors in order of their significance in the determination of the penalty/LAD amount  
 (NB: Please tick in the appropriate box, 1 represents the most significant and 5 the least significant factor - you may only have one tick in a column)

		most significant			least significant	
		1	2	3	4	5
4.3.1	potential loss of use of facility					
4.3.2	professional fees					
4.3.3	interest rate on capital invested					
4.3.4	a factor of the envisaged contract value					
4.3.5	construction supervision costs					

Q4.3.1  
 Q4.3.2  
 Q4.3.3  
 Q4.3.4  
 Q4.3.5


4.4 The following method/s should be used to assess the penalty/LAD amount

		1 Strongly disagree	2 Disagree	3 Neutral	4 Agree	5 Strongly agree
4.4.1	penalties/LAD's from previous contracts					
4.4.2	rule of thumb/guess from experience					
4.4.3	% of construction contract amount					
4.4.4	average monthly supervision cost					

Q4.4.1  
 Q4.4.2  
 Q4.4.3  
 Q4.4.4


4.5 *There is a need for the development of a universal/sensible method for the determination of the penalty/LAD amount for the construction/building industry*

		1 Strongly disagree	2 Disagree	3 Neutral	4 Agree	5 Strongly agree

Q4.5

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**SECTION 5: ENFORCEMENT OF THE PENALTY/LAD CLAUSE**

5.1 Estimate the percentage of your contracts that have been completed after the approved (or revised, where applicable) completion date, without any contractually acceptable excuse.

Q5.1

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1	none	
2	less than 10%	
3	>10% to 30%	
4	>30% to 50%	
5	> 50%	

		1 Strongly disagree	2 Disagree	3 Neutral	4 Agree	5 Strongly agree
5.2	<i>There have never been any impediments preventing the enforcement of penalty/LAD clauses in my contracts</i>					
5.3	<i>The timeous completion of construction/building contracts has a positive contribution to the client's social/public infrastructure investment</i>					
5.4	<i>Construction/building contracts in the public sector* are generally completed late (*national/provincial/local government or public/state entity)</i>					
5.5	<i>The type of the works, i.e. building or civil engineering works, affects the enforcement/non-enforcement of the penalty/LAD clause</i>					

Q5.2

Q5.3

Q5.4

Q5.5

Questions 5.6 to 5.10 should be answered by Clients or Consultants only. Contractors/Builders should jump over to Question 5.11

		1 Strongly disagree	2 Disagree	3 Neutral	4 Agree	5 Strongly agree
5.6	<i>I have had to enforce the penalty/LAD clause in my contracts before</i>					
5.7	<i>I <u>always</u> enforce the penalty/LAD clause when required</i>					

Q5.6

Q5.7

5.8 *I sometimes do not enforce the penalty/LAD clause even when enforceable because of these reasons (please answer all questions)*

		1 Strongly disagree	2 Disagree	3 Neutral	4 Agree	5 Strongly agree
5.8.1	<i>prior late payment of contractor by the client</i>					
5.8.2	<i>client not enforcing penalty/LAD clause because of sympathy with the contractor</i>					
5.8.3	<i>consultant neglected to enforce penalty/LAD clause</i>					
5.8.4	<i>contractor successfully challenged enforcement of penalty clause in court/arbitration/mediation</i>					
5.8.5	<i>insufficient or no extension of time granted during construction</i>					
5.8.6	<i>late handover of site to contractor</i>					
5.8.7	<i>fear of retribution</i>					

Q5.8.1

Q5.8.2

Q5.8.3

Q5.8.4

Q5.8.5

Q5.8.6

Q5.8.7

		1 Strongly disagree	2 Disagree	3 Neutral	4 Agree	5 Strongly agree
5.9	A contractor has at some stage legally challenged (incl. arbitration) the penalty/LAD clause in a contract I managed/administered					
5.10	A contractor has at some stage succeeded in legally challenging (incl. arbitration) the enforcement of penalty/LAD clause in a contract I administered/managed					

Q5.9

Q5.10

Questions 5.11 to 5.13 should be answered by Contractors/Builders only. Clients and Consultants should jump over to Question 5.14

		1 Strongly disagree	2 Disagree	3 Neutral	4 Agree	5 Strongly agree
5.11	The penalty/LAD clause has at some stage been enforced by a client/consultant in my contract					
5.12	I have at some stage successfully legally challenged (incl. arbitration) the penalty/LAD clause in my contracts in court/arbitration					

Q5.11

Q5.12

5.13 I successfully challenged the enforcement of penalty/LAD clause on the following grounds

		1 Strongly disagree	2 Disagree	3 Neutral	4 Agree	5 Strongly agree
5.13.1	prior late payment of contractor by the client					
5.13.2	insufficient or no extension of time granted during construction					
5.13.3	late handover of site to contractor					

Q5.13.1

Q5.13.2

Q5.13.3

5.14 Consequences of non-enforcement of penalty/LAD clauses

		1 Strongly disagree	2 Disagree	3 Neutral	4 Agree	5 Strongly agree
5.14.1	The enforcement of penalty/LAD increases the rate of production on site					

Q5.14.1

**SECTION 6: RELEVANT LEGISLATIVE PROVISIONS IN THE PUBLIC SECTOR**

	1 Strongly disagree	2 Disagree	3 Neutral	4 Agree	5 Strongly agree
6.1 <i>I am familiar with the financial responsibilities of accounting officers contained in the Public Finance Management Act (PFMA) or Municipal Finance Management Act (MFMA)</i>					
6.2 <i>Public sector clients make every effort to recover penalties/LAD's due to them</i>					
6.3 <i>Knowingly failing to recover penalties/LAD's by a public entity is a violation of sections 62(1)(d) of the MFMA or 38(1)(c)(ii) of the PFMA</i>					

Q6.1

Q6.2

Q6.3


**SECTION 7: ALTERNATIVES TO PENALTY/LAD CLAUSES**

7.1 *Please propose other alternatives that can be used in place of penalties/LAD in construction/building contracts*

- a) .....
- b) .....
- c) .....

Q7.1a

Q7.1b

Q7.1c


**You have now reached the end of the Questionnaire. Thank you very much for taking the time to complete the Questionnaire.**

**Would you like to get feedback on this research (e.g. a summary of the findings)?**

Yes	
No	

**If your answer to the above question is "Yes", please provide your email address**

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