



**THE ATTORNEY GENERAL
OF TEXAS**

AUSTIN 11, TEXAS

**JOHN BEN SHEPPERD
ATTORNEY GENERAL**

November 16, 1954

Mr. Milburn Lathan
Executive Assistant
Texas Southern University
3201 Wheeler Avenue
Houston, Texas

Opinion No. S-145

Re: Payment of liquidated damages
for default on completion
date of student dormitory and
a student union building at
Texas Southern University.

Dear Mr. Lathan:

On October 15, 1952, a Texas corporation contracted to build a dormitory group for Texas Southern University. The contract emphasized the importance of the time element in completing the work. In Paragraph 3 of the General Conditions in the contract we find the statement:

"All time limits stated in these documents are of the essence of the contract."

Again, in Paragraph 27 of the General Conditions is found the statement:

"All contract work shall be completed on or before the date set out in contract.

"Contractors must recognize the necessity for completing the work on time, and they shall take all necessary steps to assure this end. Contracts between Contractor and Sub-Contractors, special contractors, and material dealers shall provide properly scheduled work and deliveries to assure the completion within the agreed time limit.

"Contractors shall guarantee the completion of the work upon the agreed date and shall agree to the payment to Owner liquidated damages in the sum of \$50.00 per day, for each and every calendar day's delay beyond the date fixed for the completion of the work and the same shall constitute a charge to be paid by Contractor to Owner, prior to final settlement on the Contract.

"Should Contractor be delayed in the prosecution or completion of the work by act, neglect or default of Owner, of Architect, or of any other

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Contractor employed by Owner upon the work, or by any damage caused by fire, weather conditions or other casualty for which Contractor is not responsible or by general strikes or lockouts caused by the acts of employees, then the time fixed for completion of the work shall be extended for a period equivalent to the time lost by reason of any of the causes aforesaid, which extended period shall be determined and fixed by Architect; but no such allowance shall be made unless a claim therefore is presented in writing to Architect within forty-eight hours of the occurrence of such delay."

Again, in Paragraph 28 of the General Conditions is the statement:

"... The damages set for the benefit of Owner shall apply at the time for final settlement as a charge against Contractor. Time being a consideration in awarding of the contract Owner accepts the above stipulated damages as the measure of its damage in the event that the work is not substantially completed and ready for occupancy on the Contract Completion Date. The said sums are agreed upon as the measure of liquidated damages and shall not be considered in any sense as penalties."

Paragraph 3 of Addendum #1 to this contract again emphasized the time element:

"Owner desires to be able to provide housing for students for the Fall Semester of 1953-54, opening on or about September 1, 1953. Bidders should note that both low cost and time for occupancy are of vital concern to Owner and that cost should not be penalized adversely to save time and similarly that time should not be penalized to save cost. Time of completion, however may be a factor in awarding a contract as between two bids reasonably close together. At least partial occupancy of Men's and Women's Dormitory Buildings by September 1, 1953 is desirable, with completion of the remainder of the work thereafter as is feasible."

The Contractor's bid of 427 calendar days was accepted by the Board of Directors of Texas Southern University. Completion Date according to the bid submitted

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by Contractor was December 16, 1953. Under the provisions of Paragraph 27, supra, the Contractor requested and the Architect granted extensions of 60 days because of weather conditions and of 70 days because of general strikes. This total 130 days extended the Contract Completion Date to April 25, 1954. However, Contractor did not complete the dormitory group contract until August 1, 1954, when the Union Building was substantially ready for use. The two dormitories were substantially ready for use on or about June 1, 1954.

You ask three questions in regard to the foregoing statements:

1. Is the provision in the contract specifying a fixed sum as liquidated damages for default in completion date an enforceable obligation under the facts presented?
2. Is the collection of the sum specified as liquidated damages discretionary or mandatory with Texas Southern University?
3. Does the completion date of the last completed building determine the completion date or can a partial completion be recognized for the purpose of determining liquidated damages on a pro rata basis?

The leading case on the subject of liquidated damages is Sun Printing and Publishing Association v. Moore, 183 U.S. 642, 22 S.Ct. 240, 46 L.Ed. 366 (1902). Beginning at page 673 the Court quotes from an early New York case the applicable rule:

"When the parties to a contract, in which the damages to be ascertained, growing out of a breach, are uncertain in amount, mutually agree that a certain sum shall be the damages, in case of failure to perform, and in language plainly expressive of such agreement, I know of no sound principle or rule applicable to the construction of contracts, that will enable a court of law to say that they intended something else. Where the sum fixed is greatly disproportionate to the presumed actual damages, probably a court of equity may relieve; but a court of law has no right to erroneously construe the intention of the parties, when clearly expressed, in the endeavor

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to make better contracts for them than they have made for themselves. . ."

In the instant situation it is clearly apparent that the University has suffered substantial actual damage caused by the delay. The construction of the buildings was financed with the proceeds from an issue of revenue bonds. The bonds are to be paid from the revenues earned from the operation of the buildings. It has been determined that a revenue in excess of \$3,000 per month may reasonably be expected from each of the dormitories, and a revenue in excess of \$50,000 per month may reasonably be expected from the operation of the Union Building. The liquidated damages provided in the contract have a reasonable relation to the actual damages, are not punitive, and therefore are valid charges against the Contractor. Stewart v. Basey, 150 Tex. 666, 245 S.W.2d 484 (1952).

The provision for liquidated damages need not be apportioned because some of the buildings were completed at an earlier time than the completion date for the last building. The contract was a single contract for three buildings, and until the last building was completed it cannot be contended that there was compliance with the contract. The case of Wise v. United States, 249 U.S. 361, 39 S.Ct. 303, 63 L.Ed. 647 (1919) involved a contract to build two buildings for the Department of Agriculture in Washington, D.C. The Supreme Court expressly rejected the argument that an apportionment of liquidated damages should be accorded for the completion of one building prior to final completion of the other building and of the contract. In concluding the Court made a statement which controls your situation:

"There is nothing in the contract or in the record to indicate that the parties did not take into consideration, when estimating the amount of damage which would be caused by delay, the prospect of one building being delayed and the other not, and the amount of the damages stipulated, having regard to the circumstances of the case, may well have been adopted with reference to the probability of such a result."

Since the charge for liquidated damages has accrued against the Contractor, it is now mandatory that the Board of Directors of Texas Southern University collect this liquidated sum. Sections 53 and 55 of Article III of the Constitution of Texas prohibit the release of any indebtedness, liability or obligation of any corporation or

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individual to this State. The Board of Directors of Texas Southern University operate under powers delegated to them by the Legislature. Certainly the Legislature has not, and could not grant to them powers which the Legislature has not itself.

SUMMARY

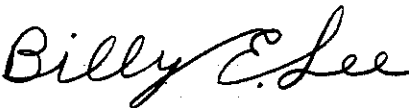
The Provision in the dormitory group contract specifying liquidated damages is an enforceable obligation.

The completion date on the last building determines the completion date of the contract. No apportionment of liquidated damages is provided.

It is mandatory that the Board of Directors of Texas Southern University collect the sum specified as liquidated damages.

Yours very truly,

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Attorney General

By 
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