

SPECIAL CONDITIONS

Penalty Clause

Basis for Invoking the Penalty Clause

Any failure to meet any of the terms of the contract will cause the penalty clause to be invoked. The terms of the contract includes all the 'Minimum Requirements' specified in the Technical Evaluation Table of the RFP and any of the 'Desirable Features' (noted in the same table) that a company declares it will provide in its bidding documents.

In addition, SOPs will be defined by individual UN Agencies and any guard failing to follow any significant aspect of such SOPs will cause the penalty clause to be invoked. 'Significant aspects' of SOPs will include (but are not limited to) guards staying awake whilst on duty and guards not shouting at, harassing or being abusive towards client staff. A decision as to whether other aspects of an SOP should be considered to be significant (and so invoke the penalty clause) will be made by the CSA of UNDSS when necessary.

Furthermore, the company must not punish guards for exposing failures of the company; doing so will cause the penalty clause to be invoked.

Examples of Applying the Penalty Clause

Note 1: The examples provide below only refer to how the penalty clause would be applied, they do not limit the response of the UN to only applying the penalty clause. For example, in example one, the UN would also consider immediately cancelling the contract as it had been awarded under false pretenses.

Note 2: The method by which the penalty clause will be applied for incidents that are not described in the examples below will be decided by the CSA of UNDSS, who will be guided in his decision by the closest type of incident described in the examples below.

Example 1: The company makes an accidental mistake in their bidding documents, e.g. stating that they have been operating in Indonesia for three years, when in actual fact they have only been operating in Indonesia for one year. As this mistake affects the ability of all management to fulfill their obligations under the terms of the contract the penalty clause would be invoked, one time for every non-guard staff they employ under the contract (e.g. management staff, admin staff, etc.) (up to a maximum of ten times) each month, until the contract has been rebid. The first time this penalty is applied it will also be applied retroactively to all the preceding months since contract award and the total deduction applied to the current month's invoice. Hence, assuming the accidental mistake in the company's bidding documents was uncovered six months after contract award and the company employed more than ten managers, the first time the penalty clause was invoked for this issue it would be for 6% of that month's total invoice, and for each proceeding month 1% of that month's total invoice would be deducted until the contract has been rebid.

Example 2: The client claims that the company has failed to meet one of the terms of the contract, the company disagrees and an investigation is conducted which not only concludes that the client is correct but that the company either intentionally submitted false data or failed to fully and transparently cooperate with the investigation. The penalty clause would be invoked and its magnitude doubled, once for the initial failure to meet one of the terms of the contract and doubled due to the company either intentionally submitting false data or failing to fully and transparently cooperate with the investigation. Applying this to example one, if the incorrect bidding document information was uncovered by the client, and the company could not provide substantial evidence as to why it was an accident, it will be determined that the company intentionally submitted false data and the magnitude of the penalty clause will be doubled. However, if the incorrect information was uncovered and declared by the company, before the UN had initiated any related investigation, the penalty clause magnitude would not be doubled.

Example 3: Background check documentation is unavailable within a reasonable period (such as two weeks after a written request and with two reminder emails) or is shown to be at variance with the terms of the contract. The penalty clause will be invoked for each guard (up to a maximum of ten persons) for which the necessary documentation cannot be provided. The penalty clause will be similarly re-invoked every month for each affected guard (up to a maximum of ten persons) until the necessary documentation is provided.

Example 4: A guard is found sleeping at the residence of an international staff member. The penalty clause will be invoked against both the sleeping guard and their immediate supervisor.

Example 5: QRF fails to respond in 15-mins during a test. The penalty clause will be invoked against each member of the QRF and a manager of the provincial company office.

Example 6: Several guards expose the fact that they have not been receiving the training required under the contract and the company subsequently dismisses those guards against the request of the client. In addition to the penalty clause being invoked for failure to provide the required training, the penalty clause will also be invoked for each dismissed guard (up to a maximum of ten persons), each month, until they are reinstated.

Magnitude of Penalty Clause

Each time the penalty clause is invoked the total monthly invoice for all guard services for the whole country will be reduced by 0.1%.

The maximum number of times the penalty cause can be applied for a single type of incident in a single month is ten. The exception to this is if it is determined that the company has submitted false information to the client or failed to fully and transparently cooperate with an investigation, in which case the number of times the penalty clause will be invoked is doubled and the maximum number of times the penalty cause can be applied for a single type of incident in a single month is twenty.

If it is determined that a company has been failing to meet its contractual obligations for a period of several months, the first time the penalty clause is invoked it will be done retroactively for all the preceding months during which the failure has been determined to have been occurring, and the total penalty applied to the current month's invoice.

Mechanism for Verifying the Basis to Invoke the Penalty Clause

Note 1: The client is at liberty to draw on any available resources in order to verify the company's compliance with the terms of the contract. This includes but is not limited to, information from the guards, host government authorities, client staff members and members of the general public.

Note 2: The company is obliged to immediately advise the client of any issue that it believes may be grounds for invoking the penalty clause.

Note 3: The company is obliged to fully cooperate with any reasonable request for supporting documentation and failure to do so is sufficient grounds for invoking the penalty clause. The CSA of UNDSS will determine what constitutes a reasonable request for information.

When both the client and the company agree that the basis for invoking the penalty clause has been met, an investigation is not needed and the matter can be documented by an exchange of emails between any international UN security advisor and the company's appointed representative.

When the client and the company disagree regarding whether the basis for invoking the penalty clause has been met, the company representative will be invited to attend a meeting at the UN office where the client is making the complaint. If no agreement can be reached the client and the company will provide their a written accounts of the event in question to the CSA of UNDSS, who will make the final decision as to whether to invoke the penalty clause.