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Federal Infrastructure Contracting 2023 – Common Claim Issues in Construction Contracting Part 2 – Differing Site Conditions and Delays/Disruption/Suspension

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Agenda

- Type I and Type II Differing Site Conditions under the FAR Differing Site Conditions Clause
- Differing Site Conditions v. Defective Specifications
- Notice Requirements
- Inspection Requirements
- Delays v. Disruption/Inefficiency v. Suspensions
- Critical Path
- Compensable v. Excusable v. Concurrent Delay

Recognizing Issues - "Changes"

- The Changes Clause Governs All Changes
  - Most Federal contracts will explicitly include the Changes Clause (limited exceptions: OTAs, etc.)
    - … and even if they don't, the changes clause is generally read into every Federal government contract (due to Christian Doctrine)

Recognizing Issues - "Changes"

The Federal Acquisition Regulation ("FAR") includes several versions of the Changes Clause

- 52.243-1 Changes - Fixed-Price.
- 52.243-2 Changes - Cost-Reimbursement.
- 52.243-3 Changes - Time-and-Materials or Labor-Hours.
- 52.243-4 Changes.
- 52.243-5 Changes and Changed Conditions.
- 52.243-6 Change Order Accounting.
- 43.205 Contract clauses

What is a "Change?"

A "Change" occurs any time the contracting officer requires a contractor to perform work beyond the contract requirements

- Two kinds of "Changes"
  - An express change is one requested by the Contracting Officer, often through a Request For Proposal ("RFP")

But also…

  - (Depending on version of Changes Clause) A constructive change occurs when the Contracting Officer impliedly orders a change to the contract, whether by direction or by interpretation of the contract terms

Type I and Type II Differing Site Conditions under the FAR Differing Site Conditions Clause

Differing Site Conditions

Purpose of the Clause

- "The purposes served by the differing site conditions clause in a construction contract, which permits a contractor to seek an equitable adjustment in the contract price for a changed condition, is to prevent bidders from increasing their bid prices to protect against misfortunes resulting from unforeseen developments, and thus avoid turning a construction contract into a gambling transaction."
  - *Shank-Artukovich v. United States*, 13 Cl. Ct. 346, 355 (1987), aff'd, 848 F.2d 1245 (Fed. Cir. 1988)
- The purpose of the Differing Site Conditions clause is to allow contractors to submit more accurate bids by eliminating the need for contractors to inflate their bids to account for contingencies that may not occur.
  - *H.B. Mac, Inc. v. United States*, 153 F.3d 1338, 1343 (Fed. Cir. 1998)

Differing Site Conditions

FAR § 36.502 Differing site conditions.

The contracting officer shall insert the clause at 52.236-2, Differing Site Conditions, in solicitations and contracts when a fixed-price construction contract or a fixed-price dismantling, demolition, or removal of improvements contract is contemplated and the contract amount is expected to exceed the simplified acquisition threshold. The contracting officer may insert the clause in solicitations and contracts when a fixed-price construction or a fixed-price contract for dismantling, demolition, or removal of improvements is contemplated and the contract amount is expected to be at or below the simplified acquisition threshold.

Differing Site Conditions

There are **two types** of differing site conditions under FAR § 52.236-2.

- Type 1 occur where there are "subsurface or latent physical conditions at the site which differ materially from those indicated in this contract."
- Type 2 occur where there are "unknown physical conditions at the site, of an unusual nature, which differ materially from those ordinarily encountered and generally recognized as inhering in work of the character provided for in the contract."

Differing Site Conditions – Type I

In order to be eligible to recover for a Type I differing site condition, a contractor must first prove, as a threshold matter, that the **contract contained some identification of the conditions** to be encountered at the site. The contractor must then prove by a preponderance of the evidence that the conditions encountered during the contract performance **differed materially** from the conditions indicated in the contract. To carry this burden, the contractor must demonstrate that the conditions encountered **were not reasonably foreseeable** in light of all information available to the contractor when bidding, that the contractor **reasonably relied** upon its original interpretation of the contract, and that the contractor suffered damages as a result of the material variation between the conditions expected and those encountered.

- *Renda Marine, Inc. v. United States*, 509 F.3d 1372, 1376 (Fed. Cir. 2007)

Differing Site Conditions – Type I

Elements:

(1) A reasonable contractor reading the contract documents as a whole would interpret them as making a representation as to the site conditions

(2) The actual site conditions were not reasonably foreseeable to the contractor, with the information available to the particular contractor outside the contract documents (i.e., reasonable foreseeability)

(3) The particular contractor in fact relied on the contract representation

(4) The conditions differed materially from those represented and …

(5) The contractor suffered damages as a result.

Differing Site Conditions – Type I Contract Indications

What are examples of contract "indications" you can rely on?

- Boring logs
- Plans of existing utilities
- Geotechnical reports
- Test reports
- Anything included in the contract documents that provides specific information regarding the conditions to be expected in the parts of the project site that are not visible or accessible during a non-invasive inspection.

Differing Site Conditions – Type I Reasonably Forseeable

How Do You Show that the Conditions Were Not Reasonably Forseeable?

- Review the Contract carefully!
- "The alleged unknown and unusual physical condition must be one that was not foreseeable by a reasonable contractor after a review of the contract documents, a site investigation and the contractor's general experience. If information regarding the condition is contained in the contract documents, failure to review them will preclude recovery."
  - *Fru-Con Const. Corp. v. United States*, 44 Fed. Cl. 298, 312 (1999)

Differing Site Conditions – Type I Reasonable Reliance

How can you show that you reasonably relied on the contract documents?

- State in your bid/proposal when you estimate job costs based on uncertain contract indications.
- When the solicitation states that certain information is available upon request – request that information, even if you don't think you need it!
- Take into account publicly available information and your experience as a general contractor. Don't make unreasonable assumptions:
  - We are at a loss to comprehend how appellant, with its experience working in and around Mount Rainier National Park, could have reasonably believed it would not encounter boulders on this project. We find Tucci's assumption that it would be able to dig the utility trenches without encountering any boulders or bedrock to be unreasonable.
    - *Tucci & Sons, Inc., Appellant*, 17-1 B.C.A. (CCH) ¶ 36599 (Dec. 20, 2016)

Differing Site Conditions – Type I "Materially Different" Conditions

When is a condition "materially different from the conditions indicated in the contract documents?

- When more work, more expensive equipment and/or more time is necessary as a result of the unforeseen condition:
  - "Indeed, in the judgment of the Board, the amount of extra work involved should be of primary consideration in determining the materiality of the changed condition."
    - *Appeal of Dunbar & Sullivan Dredging Co.,* ENGBCA No. 3165, 73-2 B.C.A. (CCH) ¶ 10285 (Sept. 7, 1973)
  - "The use of heavier and more expensive equipment and a more time consuming operation further supports the conclusion that appellant encountered materially and substantially different material in the trench excavation than could be expected from contract documents."
    - *Appeal of Maitland Bros. Co.,* ASBCA No. 24032, 85-2 B.C.A. (CCH) ¶ 18041 (Apr. 8, 1985)

Differing Site Conditions – Type I Example

Contract includes three reports regarding inspections for asbestos in the building indicating that pipe sealant is non-detect for asbestos.

During performance, pipe sealant is discovered to contain significant amount of asbestos, necessitating far more mitigation than anticipated in the bid.

Government argues that because the building was renovated in the 1960s asbestos in the pipe sealant was reasonably foreseeable.

Differing Site Conditions – Type I Example

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Contractor prevails because specific contract indications outweighed general knowledge that buildings renovated in the 1960s often contain asbestos.

Differing Site Conditions – Type II

Federal Circuit used to sometimes use a different three-element test for a Type II differing site conditions claim:

- A Type II differing site condition depends on the existence of three elements — (1) the condition must be unknown to the contractor; (2) unusual; and (3) materially different from comparable work.
  - *Kiewit Constr. Co. v. United States*, 56 Fed. Cl. 414, 417, 2003 U.S. Claims LEXIS 92, *8

More recently chose to employ the *Randa/Madison* standard:

- "unknown physical conditions at the site, of an unusual nature, which differ materially from those ordinarily encountered and generally recognized as inhering in work of the character provided for in the contract."
  - *Randa/Madison Joint Venture III v. Dahlberg*, 239 F.3d 1264, 1276, 2001 U.S. App. LEXIS 1736, *32

Differing Site Conditions – Type II

To prevail on a Type II DSC, the contractor must demonstrate the physical condition was unknown, unusual, and differed materially from conditions ordinarily encountered and generally recognized as inhering in the type of work provided for in the contract. [The contractor] must show that prior knowledge of the alleged DSC could not reasonably have been anticipated by its study of the contract documents, its inspection of the site, and its general experience as a contractor in the area.

- *In Re Luhr Bros., Inc.,* ASBCA No. 52887, 01-2 B.C.A. (CCH) ¶ 31443 (May 31, 2001)

Differing Site Conditions – Type II Unusual Condition

"Unusual conditions are judged by the normal conditions for the area. The condition must significantly deviate from the norm for the area and the type of work."

- *Servidone Const. Corp. v. United States*, 19 Cl. Ct. 346, 367 (1990), aff'd, 931 F.2d 860 (Fed. Cir. 1991)

Must show that the unusual conditions were **NOT** indicated in the Contract documents.

Differing Site Conditions – Type II Unusual Condition

These are rare!

- An example of an actual Type II Differing Site Condition occurred in *Skanska USA Bldg., Inc. v. United States*, No. 07-143 C, 2013 WL 1179528, at *21 (Fed. Cl. Mar. 21, 2013) where the excavated soils turned out to be contaminated with lead. The Court found that:
  - Plaintiff has presented evidence that (1) the contract documents did not disclose the lead contamination; (2) the site inspection did not reveal the lead contamination; and (3) an estimator with seventeen years of experience in the Fort Lewis region who was working for a construction firm doing business in the region for more than forty-one years found lead contamination to be an unusual condition

Differing Site Conditions Examples – Type I or Type II?

- Contract for flood channel construction and relocation of a sewer line. Boring logs indicate hard, unyielding soil. Contractor, once on site, finds soils to be soft, soupy, and contaminated with sewage.
- Contract for maintenance dredging of a US river. Boring logs and other contract clauses indicated dredged materials would be mostly sediment. In reality, project involves virgin dredging. Contractor pulls up large boulders and in situ rock.
- Contract for recoating of spillway radial gates at a dam. During performance, contractor discovers that (1) existing rubber seals were far harder and more rigid than the average rubber seal, which was extremely unusual for rubber seals of the type present at the project and (2) there was an excessive amount of rust on the side seal retainer bar, which differed from conditions ordinarily encountered.

Differing Site Conditions

A Note About Modifications

- Closing Statement Release Language
- Release, Waiver, Accord & Satisfaction
- Beware Release Language!
- Rebuttals to Release/Waiver/Accord & Satisfaction Defenses?

Differing Site Conditions v. Defective Specifications

Differing Site Conditions v Defective Spec

What is the difference between a differing site condition and a defective specification?

- A differing site condition occurs when the physical conditions on the project site are different from what was indicated in the plans and specs.
- A defective specification occurs when the plans and specs direct the contractor to perform the work in a way that will not render a satisfactory result, often as a result of failure to take into account the existing conditions on the ground.

Differing Site Conditions v Defective Spec

What is the difference between a differing site condition and a defective specification?

- So a set of plans that indicates a particular route for utility lines which is blocked by other, unknown, utility lines will result in a differing site condition claim.
- But a set of plans that tells the contractor to install the wrong size pipe for the depth of the line is a defective specification claim.

Differing Site Conditions v Defective Spec

- A Differing Site Condition might also be a Defective Specification
- But not all Defective Specifications are DSC

Notice Requirements

Differing Site Conditions - Notice

Notice to the Government is required before the work is performed

- FAR §52.236-2(a) states:
  - The Contractor shall promptly, and before the conditions are disturbed, give a written notice to the Contracting Officer . . .
- FAR §52.236-2(c) states:
  - No request by the Contractor for an equitable adjustment to the contract under this clause shall be allowed, unless the Contractor has given the written notice required; provided, that the time prescribed in (a) above for giving written notice may be extended by the Contracting Officer.
- Failure to provide written notice before performing the work may be prejudicial to the Government.

Differing Site Conditions Example – Notice Failure

Contract for maintenance dredging of a US river. Boring logs and other contract clauses indicated dredged materials would be mostly sediment. In reality, project involves virgin dredging. Contractor pulls up large boulders and in situ rock.

Government argues that Contractor failed to provide notice in serial letters that they were dredging a larger quantity of rock than anticipated, or that they were encountering what they believed to be DSC.

Differing Site Conditions Example – Notice Failure

…BUT Contractor argued actual and constructive notice.

- Still not ideal. Provide the Required Notice!

Inspection Requirements

Differing Site Conditions – Investigation

Do a site investigation! It's not only prudent, it's required under the FAR!

FAR § 52.236-3 Site Investigation and Conditions Affecting the Work:

- The Contractor acknowledges that it has taken steps reasonably necessary to ascertain the nature and location of the work, and that it has investigated and satisfied itself as to the general and local conditions which can affect the work or its cost, including but not limited to (1) conditions bearing upon transportation, disposal, handling, and storage of materials; (2) the availability of labor, water, electric power, and roads; (3) uncertainties of weather, river stages, tides, or similar physical conditions at the site; (4) the conformation and conditions of the ground; and (5) the character of equipment and facilities needed preliminary to and during work performance. The Contractor also acknowledges that it has satisfied itself as to the character, quality, and quantity of surface and subsurface materials or obstacles to be encountered insofar as this information is reasonably ascertainable from an inspection of the site, including all exploratory work done by the Government, as well as from the drawings and specifications made a part of this contract. Any failure of the Contractor to take the actions described and acknowledged in this paragraph will not relieve the Contractor from responsibility for estimating properly the difficulty and cost of successfully performing the work, or for proceeding to successfully perform the work without additional expense to the Government.

Differing Site Conditions – Investigation (cont'd)

Notify the Government if you believes that there may be unexpected conditions that the site investigation has not revealed, and state that the costs associated with such conditions are not included in your bid.

Both Connor and Phenix were experienced government contractors and while this court will not venture to opine that Phenix's prior construction work at the Hospital should have put it on notice with respect to the above-ceiling conditions, at the very least, experienced government contractors should have been aware of their obligation to conduct a site investigation where the bid documents so require and of their duty to inquire in the event that circumstances precluded the site inspection. A reasonable site inspection would have revealed the above-ceiling conditions. Furthermore, to the extent that those portions of the workspace above the ceiling available for viewing could not be inspected because of the presence of a maze of pipes and ducts obscuring the view, that fact alone should have alerted a reasonable, experienced contractor both of the need to inquire with the government as well as the likelihood that there might well be a space problem with the void area above the ceiling.

- *Conner Bros. Const. Co. v. United States,* 65 Fed. Cl. 657, 682 (2005)

Differing Site Conditions - Rules

Always notify the Government in writing pre-bid if your inspection cannot reach suspect conditions.

Always provide notice as soon as the differing site condition is encountered.

Do not perform any work to mitigate a differing site condition until directed to do so by the contracting officer.

Do not refuse to perform work to mitigate a differing site condition when directed to do so until you are paid for that work.

Delays v. Disruption/Inefficiency v. Suspensions

Key FAR Clauses Relating to Delay

Changes – FAR 52.243-1 – 52.243-4

Differing Site Conditions – FAR 52.236-2

Government Delay of Work – FAR 52.242-17

Suspension of Work – FAR 52.242-14

Excusable Delays – FAR 52.249-14

- Contract Terms and Conditions-Commercial Items - FAR 52.212-4

Termination for Default – FAR 52.242-10

Delays Under the Changes Clause – FAR 52.243-4

Contracting Officer has a Right to Make Changes to the Contract

- (d) If any change under this clause causes an increase or decrease in the Contractor's cost of, **or the time required for,** the performance of any part of the work under this contract, whether or not changed by any such order, the Contracting Officer **shall make an equitable adjustment** and modify the contract in writing . . .

Delays Under the Changes Clause – FAR 52.243-4

(d) . . . However, except for an adjustment based on defective specifications, no adjustment for any change under paragraph (b) of this clause shall be made for any costs incurred more than 20 days before the Contractor gives **written notice** as required. . .

(e) The Contractor must assert its right to an adjustment under this clause within 30 days after (1) receipt of a written change order under paragraph (a) of this clause or (2) the furnishing of a written notice under paragraph (b) of this clause. . .

Delays Under the Changes Clause – FAR 52.243-4 – Example

Final Tests and Inspection clause required that the ACO be present during certain testing.

Another contract clause required weighing of the crane, but did not require that the ACO must be present.

Contractor weighed the crane without the ACO present.

The ACO directed reweighing based on the Final Tests and Inspections clause, causing a 15 day delay to the project critical path.

Eventually the ACO acknowledged this as a change, and extended the contract duration by 15 compensable days.

Delays Under the Differing Site Conditions Clause – FAR 52.236-2

(b) …If the conditions do materially so differ and cause **an increase or decrease in the Contractor's cost of, or the time required for, performing any part of the work under this contract . . . an equitable adjustment shall be made** under this clause and the contract modified in writing accordingly.

Delays Under the Differing Site Conditions Clause – FAR 52.236-2

(a) The Contractor shall promptly, and before the conditions are disturbed, **give a written notice** to the Contracting Officer . . .

(b) The Contracting Officer shall investigate the site conditions promptly after receiving the notice. If the conditions do materially so differ. . .

(c) No request by the Contractor for an equitable adjustment to the contract under this clause shall be allowed, unless the Contractor has **given the written notice required**; *provided*, that the time prescribed in paragraph (a) of this clause for giving written notice may be extended by the Contracting Officer.

Delays Under Government Delay of Work Clause – FAR 52.242-17

(a) If the performance of all or any part of the work of this contract is delayed or interrupted

- (1) by an act of the Contracting Officer in the administration of this contract that is not expressly or impliedly authorized by this contract, or
- (2)by a failure of the Contracting Officer to act within the time specified in this contract, or within a reasonable time if not specified, **an adjustment (excluding profit) shall be made for any increase in the cost of performance of this contract caused by the delay or interruption and the contract shall be modified in writing accordingly.**

Adjustment shall also be made in the delivery or performance dates and any other contractual term or condition affected by the delay or interruption.

Delays Under Government Delay of Work Clause – FAR 52.242-17

(b) A claim under this clause shall not be allowed-

- (1) For any costs incurred more than 20 days before the Contractor shall have **notified** the Contracting Officer in writing of the act or failure to act involved;
- (2) Unless the claim, in an amount stated, is asserted in writing as soon as practicable after the termination of the delay or interruption, but not later than the day of final payment under the contract.

Delays Under the Suspension Clause – FAR 52.242-14

(a) The Contracting Officer may order the Contractor, in writing, to suspend, delay, or interrupt all or any part of the work of this contract for the period of time that the Contracting Officer determines appropriate for the convenience of the Government.

(b) If the performance of all or any part of the work is, for an **unreasonable** period of time, suspended, delayed, or interrupted (1) by an act of the Contracting Officer in the administration of this contract, or (2) by the Contracting Officer's failure to act within the time specified in this contract (or within a reasonable time if not specified), **an adjustment shall be made for any increase in the cost of performance of this contract (excluding profit)** necessarily caused by the unreasonable suspension, delay, or interruption, and the contract modified in writing accordingly. However, no adjustment shall be made under this clause for any suspension, delay, or interruption to the extent that performance would have been so suspended, delayed, or interrupted by any other cause, including the fault or negligence of the Contractor, or for which an equitable adjustment is provided for or excluded under any other term or condition of this contract.

Constructive Suspensions

A constructive suspension results when performance is *effectively* suspended or delayed, but the contracting officer has failed or declined to issue a stop-work order. In such case, the law considers that done which ought to have been done and deems such delay to constitute a constructive or *de facto* suspension. Primarily, the function of the Suspension of Work clause is to provide a contractual basis for compensating the contractor for *government-caused* delays of an unreasonable duration. An additional reason for the clause is that it clearly supports the policy that the contractor is entitled to other remedies besides a time extension for such government-caused delays . . . Thus, under the application of the constructive suspension clause, an *express* order to suspend the work is not a necessary imperative to entitle the contractor to receive an adjustment for a constructive suspension. In short, the court may treat the contractor's claim as one brought under the Suspension of Work clause **where the acts of the contracting officer unreasonably delay the contractor's progress in performance and cause the contractor to incur additional expense.**

- *Beauchamp Const. Co. v. United States*, 14 Cl. Ct. 430, 436–37 (1988)

Notice is Required to Recover for a Constructive Suspension

FAR 52.242-14 Suspension of Work:

(c) A claim under this clause shall not be allowed (1) for any costs incurred more than 20 days before the Contractor shall have notified the Contracting Officer in writing of the act or failure to act involved (but this requirement shall not apply as to a claim resulting from a suspension order), and (2) unless the claim, in an amount stated, is asserted in writing as soon as practicable after the termination of the suspension, delay, or interruption, but not later than the date of final payment under the contract.

Delays Under the Suspension Clause – FAR 52.242-14 – Example

The contractor submitted its product and material submittals as required by the contract.

The VA had no personnel available to review the submissions, but refused to suspend performance of the work.

The contractor was unable to proceed with the work for 427 days while it awaited approval of its submittals.

Delays Under the Excusable Delay Clause – FAR 52.242-14

(a) Except for defaults of subcontractors at any tier, the Contractor shall not be in default because of any failure to perform this contract under its terms if the failure arises from causes beyond the control and without the fault or negligence of the Contractor. Examples of these causes are (1) acts of God or of the public enemy, (2) acts of the Government in either its sovereign or contractual capacity, (3) fires, (4) floods, (5) epidemics, (6) quarantine restrictions, (7) strikes, (8) freight embargoes, and (9) unusually severe weather. In each instance, the failure to perform must be beyond the control and without the fault or negligence of the Contractor. Default includes failure to make progress in the work so as to endanger performance.

. . .

(c) Upon request of the Contractor, the Contracting Officer shall ascertain the facts and extent of the failure. If the Contracting Officer determines that any failure to perform results from one or more of the causes above, the delivery schedule **shall** be revised, subject to the rights of the Government under the termination clause of this contract.

Delays Under the Termination for Default Clause – FAR 52.242-10

(b) The Contractor's right to proceed shall not be terminated nor the Contractor charged with damages under this clause, if—

(1) The delay in completing the work arises from unforeseeable causes beyond the control and without the fault or negligence of the Contractor. Examples of such causes include (i) acts of God or of the public enemy, (ii) acts of the Government in either its sovereign or contractual capacity, (iii) acts of another Contractor in the performance of a contract with the Government, (iv) fires, (v) floods, (vi) epidemics, (vii) quarantine restrictions, (viii) strikes, (ix) freight embargoes, (x) unusually severe weather, or (xi) delays of subcontractors or suppliers at any tier arising from unforeseeable causes beyond the control and without the fault or negligence of both the Contractor and the subcontractors or suppliers; and

(2) The Contractor, within 10 days from the beginning of any delay (unless extended by the Contracting Officer), notifies the Contracting Officer in writing of the causes of delay. The Contracting Officer shall ascertain the facts and the extent of delay. If, in the judgment of the Contracting Officer, the findings of fact warrant such action, **the time for completing the work shall be extended.** The findings of the Contracting Officer shall be final and conclusive on the parties, but subject to appeal under the Disputes clause.

Distinguishing Delay from Disruption/Inefficiency

There is a distinction in the law between: (1) a "delay" claim; and (2) a "disruption" or "cumulative impact" claim. Although the two claim types often arise together in the same project, a "delay" claim captures the time and cost of *not* being able to work, while a "disruption" claim captures the cost of working less efficiently than planned.

- *Bell BCI Co. v. United States*, 72 Fed. Cl. 164, 168 (2006)

Distinguishing Delay from Acceleration

- A claim of constructive acceleration ordinarily arises when the government requires the contractor to adhere to the original performance deadline set forth in the contract even though the contract provides the contractor with periods of excusable delay that entitle the contractor to a longer performance period . . . (1) that the contractor encountered a delay that is excusable under the contract; (2) that the contractor made a timely and sufficient request for an extension of the contract schedule; (3) that the government denied the contractor's request for an extension or failed to act on it within a reasonable time; (4) that the government insisted on completion of the contract within a period shorter than the period to which the contractor would be entitled by taking into account the period of excusable delay, after which the contractor notified the government that it regarded the alleged order to accelerate as a constructive change in the contract; and (5) that the contractor was required to expend extra resources to compensate for the lost time and remain on schedule.
  - *Fraser Const. Co. v. United States*, 384 F.3d 1354, 1361 (Fed. Cir. 2004)

Critical Path

Only Delays on the Critical Path Entitle the Contractor to an Equitable Adjustment

"A "critical path" is a way of grouping interrelated activities in a construction project. A delay to an activity that is on the "critical path" usually results in a corresponding delay to the completion of the project. The reason that the determination of the critical path is crucial to the calculation of delay damages is that only construction work on the critical path had an impact upon the time in which the project was completed."

- *Wilner v. United States*, 24 F.3d 1397, 1399 (Fed. Cir. 1994)

Only Delays on the Critical Path Entitle the Contractor to an Equitable Adjustment

Theoretically, if an activity on the critical path is delayed by one day, and no compensating change is made by rescheduling or some form of acceleration, the entire project will be delayed by one day. Running parallel to the construction events on the critical path, there will probably be other activities, which should easily keep pace with the critical construction events. Because these events have more time available to them on the schedule than is actually necessary to complete these events, they are said to have "float time," i.e., an amount of time in excess of the minimum reasonable amount of time required to complete that item of work. While every construction event can eventually become "critical," by having its cushion or float time used up, this is not anticipated in the initial scheduling. If, for example, the construction of a house is delayed in foundation construction, we know that that is a critical event; arguably, a two-day delay in that construction will cause a two-day delay to project completion. At the same time, a two-day delay to the electrician which merely deprives the electrical work of two days of "float time" will not, by definition, directly cause any delay to the project as a whole.

- *Sterling Millwrights, Inc. v. United States*, 26 Cl. Ct. 49, 75-76, 1992 U.S. Cl. Ct. LEXIS 193, *85-86, 38 Cont. Cas. Fed. (CCH) P76,316

Only Delays on the Critical Path Entitle the Contractor to an Equitable Adjustment

In order to prevail on its claims for the additional costs incurred because of the late completion of a fixed-price government construction contract, the contractor must show that the government's actions affected activities on the critical path of the contractor's performance of the contract. The reason that the determination of the critical path is crucial to the calculation of delay damages is that only construction work on the critical path had an impact upon the time in which the project was completed. One established way to document delay is through the use of Critical Path Method (CPM) schedules and an analysis of the effects, if any, of government-caused events upon the critical path of the project.

- *George Sollitt Constr. Co. v. United States*, 64 Fed. Cl. 229, 240 (2005)

Only Delays on the Critical Path Entitle the Contractor to an Equitable Adjustment

The contractor asserting entitlement to an equitable adjustment for a delay fails in its burden of proof if it does not provide a CPM analysis.

See e.g.. Appeal of BES Constr., LLC, 2019-1 B.C.A. (CCH) P37,455, 2019 ASBCA LEXIS 294 (A.S.B.C.A. October 23, 2019)

Only Delays on the Critical Path Entitle the Contractor to an Equitable Adjustment

There is a limited exception to the requirement to show that the delay would have delayed the completion of the project—when the contractor can prove that it would have finished early but for government caused delays.

See e.g. Weaver-Bailey Contractors, Inc. v. United States, 19 Cl. Ct. 474, 1990 U.S. Cl. Ct. LEXIS 36, 36 Cont. Cas. Fed. (CCH) P75,801

Compensable v. Excusable v. Concurrent Delay

Types of Delay

Compensable – Delay that is the fault of the Government alone. The contractor is entitled to an equitable adjustment for time and money.

Excusable – Delay that is caused by something beyond either parties' control (i.e. third-party actions, weather, acts of God). The contractor is entitled to an equitable adjustment for time, but no money.

Contractor Caused – Delay that is caused by the contractor or its subcontractors. The contractor is not entitled to time or money.

Concurrent – Government caused delay which occurs at the same time as contractor caused delay. These are treated as excusable delays and the contractor is entitled to an equitable adjustment for time, but no money.

Excusable Delays

To establish entitlement to an extension based on excusable delay, [the contractor] must show that the delay resulted from unforeseeable causes beyond the control and without the fault or negligence of the Contractor. [The contractor] must further prove that it took reasonable action to perform the contract notwithstanding the occurrence of such excuse. In addition, the unforeseeable cause must delay the overall contract completion; *i.e.*, it must affect the critical path of performance.

As a general rule, a party asserting that liquidated damages were improperly assessed bears the burden of showing the extent of the excusable delay to which it is entitled.

- *Sauer Inc. v. Danzig*, 224 F.3d 1340, 1345 (Fed. Cir. 2000)

Excusable Delays

A contractor who is terminated for default, pursuant to FAR § 52.249-10, is entitled to a conversion of its default termination into one for the convenience of the government if the contractor can establish excusable delay. In the context of a construction contract, as here, the contractor must demonstrate that the excusable event caused a delay to the overall completion of the contract, i.e., that the delay affected activities on the critical path.

- *Aptus Co. v. United States*, 61 Fed. Cl. 638, 659 (2004)

Excusable Delays

Can an excusable delay ever become a compensable delay?

Yes, but only when the sole reason that the contractor encountered the excusable delay was because of earlier, government-caused delays.

"Weather delays are compensable to the extent that construction activities that were scheduled for periods of favorable weather are pushed into periods of unfavorable weather due to government-caused delay."

- *J.D. Hedin Constr. Co. v. United States*, 171 Ct.Cl. 70, 347 F.2d 235, 256 (1965)

Beware of Release Language in Modifications!

Contractor encountered a year long delay that it believed was caused by the government.

The contracting officer disagreed, but offered to extend the contract completion date to avoid liquidated damages.

The contractor agreed and signed a bilateral modification.

The contractor was barred from recovering any money for the delay, even though it was the government's fault, because of the release language in the modification.

Concurrent Delays

Where both parties contribute to the delay neither can recover damage, unless there is in the proof a clear apportionment of the delay and the expense attributable to each party.

- *Blinderman Constr. Co. v. United States*, 695 F.2d 552, 559 (Fed. Cir. 1982)

Where a contractor is responsible for some project delays, regardless of government caused delay, it must present delay analysis that segregates concurrent or other contractor delays and shows how particular events delayed project completion. Without such an analysis and clear apportionment of delay and expense to each party, the contractor cannot recover monetary compensation for delay damages.

- *Appeals of Tromel Construction Corp.,* 13 BCA P 35346, PSBCA No. 6303, 2013 WL 3227344 (PSBCA June 27, 2013).

Concurrent Delays – Example

The government caused a 60 day delay on a design-build project by failing to timely review and approve the design of certain steel structures.

15 days into this government caused delay, the contractor had a dispute with its steel supplier, causing a separate delay to the steel delivery that lasted for 45 days.

The government was held liable for compensation for the first 15 days of the delay that it caused, but not for the subsequent 45 days, as these were concurrent with the delay caused by the dispute with the steel supplier.

Concurrent Delays – Example

As a result of a defect in the specifications there was a delay in the delivery of a generator.

On the schedule, pouring the foundation to support this generator was listed as a predecessor activity to installation of the generator.

The contractor did not pour the foundation until the generator arrived.

The government argued that the delay to the foundation work was concurrent with the delay to the generator installation, and therefore the contractor should receive time but no money.

The contractor argued that the delay to the foundation was a "pacing" delay—meaning that it had paced the foundation work to match the delay to the generator delivery.

The contractor ultimately prevailed.

Compensable Delay + Excusable Delay = Concurrent Delay

For the government to be found to have caused compensable delay, the general rule is that the government must have been the *sole* proximate cause of the contractor's additional loss, and the contractor would not have been delayed for *any other reason* during that period . . . Thus, even if the government has caused an unreasonable delay to contract work, that delay will not be compensable **if the contractor, or some other factor not chargeable to the government**, has caused a delay concurrent with the government-caused delay.

- *George Sollitt Constr. Co. v. United States*, 64 Fed. Cl. 229, 238 (2005)

Questions?

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