The Professor's Forum

Delays

Virtual Class June 15, 2023, 12:00pm – 1:30 pm (ET)

In determining the allocation of risk for delays during performance of fixed price contracts, the contract clauses used by the government deal with two categories – *excusable delays* and *compensable delays*. In general, the government agrees to a time extension for excusable delays and a price adjustment for compensable delays. However, there are some nuances to this general proposition which will be discussed below.

If we break down the causes of delay to three categories, this allocation of risk yields the following results:

Cause	Result
Government	Time + Money
Third Party	Time
Contractor	Nothing

Over the many years of this allocation of risk, it has been seen as fair to contractors. However, contractors entering into long term contracts should analyze the possibility of significant third party causes of delay, such as pandemics, hurricanes, floods and material price increases, where the only contractual relief is a time extension. If these cannot be covered by insurance, there may be a need to negotiate special contract provisions in addition to the standard clauses.

I. Excusable Delays

With the exception of cost-reimbursement contracts, the excusable delays provisions are in the Default clauses of government contracts. A typical clause is the Default (Fixed Price Supply and Service clause in FAR 52.249-8 which contains the following language:

> (c) Except for defaults of subcontractors at any tier, the Contractor shall not be liable for any excess costs if the failure to perform the contract arises from causes beyond the control and without the fault or negligence of the Contractor. Examples of such causes include (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.
>
> (d) If the failure to perform is caused by the default of a subcontractor at any tier, and if the cause of the default is beyond the control of both the Contractor and subcontractor, and without the fault or negligence of either, the Contractor shall not be liable for any excess costs for failure to perform, unless the subcontracted supplies or services were obtainable from other sources in sufficient time for the Contractor to meet the required delivery schedule.

Paragraph (c) of this clause contains generic language "*causes beyond the control and without the fault or negligence of the Contractor*" plus the enumeration of nine specific causes of delay. There are two fundamental rules that determine when an excusable delay has occurred.

Rule 1 - The generic language overrides the specific enumerated causes. Thus, a contractor cannot claim an excusable delay if it sets fire to its own facility or if it causes a strike by an unfair labor practice.

Rule 2 – The enumerated causes of delay provide guidance on which delays are beyond the control of the contractor. In *Carnegie Steel Co. v. United States*, 240 U.S. 156 (1916), the Supreme Court enunciated the rule that the excusable delays provisions did not extend to delays due to "nonextraneous causes." In this case, the contractor claimed an excusable delay because it had encountered unforeseen technical problems in using a new manufacturing process. The Court held that such a problem was not the type of cause for delay covered by the excusable delays clause because the enumerated causes were all due to events over which the contractor had no control. Thus, a contractor cannot claim an excusable delay if the delay is caused by an aspect of performance which it is required to bring to the job. These aspects are:

a. **Financing** – The general rule is that the contractor assumes the risk of providing sufficient funds to perform the contract, *Southeastern Airways Corp. v. United States*, 673 F.2d 368 (Ct. Cl. 1982); *C-Shore Int'l, Inc. v. Dep't of Agriculture*, CBCA 1696, 10-1 BCA ¶ 34,379 (contractor's financial difficulties are normally not a legitimate excuse for failure to perform). Thus, neither undercapitalization, *Willems Indus., Inc. v. United States*, 155 Ct. Cl. 360, 295 F.2d 822 (Ct. Cl. 1961), cert. denied, 370 U.S. 903 (1962), nor insolvency, *Medical Fabrics Co.*, ASBCA 11458, 66-2 BCA ¶ 5887, excuses a failure to perform.

In contrast to the general rule denying relief for delays due to lack of financing, the contractor will be granted relief when the lack of financing is caused by wrongful government action. See *Brooklyn & Queens Screen Mfg. Co. v. United States*, 97 Ct. Cl. 532 (1942) (wrongful denial of progress payments); *Southland Mfg. Corp*., ASBCA 10519, 69-1 BCA ¶ 7714, *recons. denied*, 69-2 BCA ¶ 7968 (wrongful cancellation of loan by Small Business Administration); *Freedom NY, Inc*., ASBCA 43965, 01-2 BCA ¶ 31,585, *recons. denied*, 02-1 BCA ¶ 31,676, *aff'd in part and rev'd in part on other grounds*, 329 F.3d 1320 (Fed. Cir. 2003),

Rreh'g en banc denied, 346 F.3d 1359 (Fed. Cir. 2003), *cert. denied*, 54124 U.S. Ct. 9872016 (2004) (government provided inaccurate information to the contractor's prospective sources of funding).The failure to make progress payments is the most often cited basis for excuse due to financial inability. *George T. Johnson & Harvey Case v. United States*, 618 F.2d 751 (Ct. Cl. 1980).

b. **Facilities and equipment** – A contractor assumes the risk of obtaining and maintaining the facilities and equipment necessary for performance, *Krauss v. Greenbarg*, 137 F.2d 569 (3d Cir.), *cert. denied*, 320 U.S. 791 (1943). See *Wescor Forest Products, Co.*, AGBCA 96-154-1, 97-2 BCA ¶ 29,242, where delay resulting from the contractor's election to use its equipment on other contracts was not excusable.

c. **Materials** – A contractor assumes the risk of obtaining the materials necessary for performance, *Aargus Poly Bag*, GSBCA 4314, 76-2 BCA ¶ 11,927; *Environmental Devices, Inc*., ASBCA 37430, 93-3 BCA ¶ 26,138.

d. **Know-how** – The rule of *Carnegie* is strongly followed in denying contractors' claims for delays due to lack of know-how or inability to perform. See *Canfield Machine. & Tool Co.*, ASBCA 10390, 65-2 BCA ¶ 5018, where the board stated that "the usage of materials and tools, as well as production methods and their coordination are all within a contractor's basic performance responsibility as aspects of know-how."

e. **Labor** – In the absence of a strike or other enumerated cause of delay, a contractor is generally not excused for labor difficulties. These difficulties usually involve either the loss of key personnel or an unexpected labor shortage. The boards have strictly adhered to the rule that the contractor assumes the risk of hiring and retaining a competent work force, *Telecommunications Lab., Inc*., ASBCA 25240, 85-1 BCA ¶ 17,786. See *Electro-Magnetics, Inc*., ASBCA 19830, 75-2 BCA ¶ 11,503, where the board held that the fact that the contractor's president suffered a heart attack did not excuse the contractor's failure to complete its contract.. See also *Centennial Leasing v. General Servs. Admin*., GSBCA 12037, 94-1 BCA ¶ 26,398, where death of a subcontractor's chief operating officer was not an excusable cause of nonperformance. Neither do accidents to key personnel constitute excusable delays, *Yumang, O'Connell & Assocs*., AGBCA 83-171-1, 84-2 BCA ¶ 17,313 (contractor's field supervisor fell on the job and sustained a concussion); and *M&T Constr. Co.*, ASBCA 42750, 93-1 BCA ¶ 25,223 (heart attack suffered by one of subcontractor's personnel).

II. Compensable Delays

The clauses granting compensation for delays differ between construction contracts and supply and service contracts. For construction contracts the government uses a single clause, Suspension of Work in FAR 52.242-14 which covers both orders suspensions and constructive suspensions as follows:

(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.

In contrast, supply and service contracts contain separate clauses dealing with ordered suspensions and constructive suspensions. The first dealing with ordered suspensions states:

STOP-WORK ORDER (AUG 1989)

(a) The Contracting Officer may, at any time, by written order to the Contractor, require the Contractor to stop all, or any part, of the work called for by this contract for a period of 90 days after the order is delivered to the Contractor, and for any further period to which the parties may agree. The order shall be specifically identified as a stop-work order issued under this clause. Upon receipt of the order, the Contractor shall immediately comply with its terms and take all reasonable steps to minimize the incurrence of costs allocable to the work covered by the order during the period of work stoppage. Within a period of 90 days after a stop-work order is delivered to the Contractor, or within any extension of that period to which the parties shall have agreed, the Contracting Officer shall either --

(1) Cancel the stop-work order; or
(2) Terminate the work covered by the order as provided in the Default, or the Termination for Convenience of the Government, clause of this contract.

(b) If a stop-work order issued under this clause is canceled or the period of the order or any extension thereof expires, the Contractor shall resume work. The Contracting Officer shall make an equitable adjustment in the delivery schedule or contract price, or both, and the contract shall be modified, in writing, accordingly .

. .

The second supply and service contract clause dealing with constructive suspensions states:

GOVERNMENT DELAY OF WORK (APR 1984)

(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. However, no adjustment shall be made under this clause for any delay or interruption to the extent that performance would have been delayed or interrupted by any other cause, including the fault or negligence of the Contractor, or for which an adjustment is provided or excluded under any other term or condition of this contract.

a. **Ordered suspensions** – Both the Suspension of Work clause and the Stop Work Order clause give the contracting officer broad authority to order the contractor to stop work. However, the compensation for such an order is significantly different. The Stop Work Order clause provides for an *equitable adjustment* (which includes all provable costs plus profit) while the Suspension of Work clause provides for "any increase in the cost of performance of this contract (*excluding profit*) necessarily caused by the *unreasonable* suspension, delay, or interruption. Contractors cannot recover if the contracting officer is justified in suspending the work because of contractor fault, *Eris Painting & Gen. Corp*., ASBCA 27803, 84-1 BCA ¶ 17,148, *aff'd*, 765 F.2d 160 (Fed. Cir. 1985) (no recovery for suspension ordered because contractor could not perform work required by specifications); *Munck Sys., Inc*., ASBCA 25600, 83-1 BCA ¶ 16,210, *aff'd*, 727 F.2d 1118 (Fed. Cir. 1983) ("do not ship" order fully justified because the contractor did not furnish detailed drawings as required so that government could check compliance with specifications); and *Mudsharks Co-op, Inc*., AGBCA 81-238-3, 82-2 BCA ¶ 16,117 (suspension justified following noncooperation and verbal abuse of government representative by contractor)..

b. **Constructive suspensions** – Both the Suspension of Work clause and Government Delay of Work clause provide for compensation for constructive suspensions but they both limit the compensation to the unreasonable costs excluding profit. The Court of Claims gave a broad reading to the scope of constructive suspensions finding that the Suspension of Work clause applied when the suspension occurred for the "convenience" of the government. The original cases stating the "government convenience" rule were *John A. Johnson & Sons, Inc. v. United States*, 180 Ct. Cl. 969 (1967), where there was a delay of "almost a year" because the

government gave priority to another contractor in accordance with a contract clause permitting such government action, and *Merritt-Chapman & Scott Corp. v. United States*, 429 F.2d 431 (Ct. Cl. 1970), where there was a delay of 14 months to enable the government to determine how to cope with materially different subsurface conditions. In these instances, the court found that, despite lack of fault in the actions of the government, under the circumstances the contractor "cannot reasonably be expected to bear the risks and costs of the delay." Subsequently, the court followed this reasoning in *C.H. Leavell & Co. v. United States*, 530 F.2d 878 (Ct. Cl. 1976), where there was a delay of five months awaiting a government appropriation to provide additional funding, and in *Fruehauf Corp. v. United States*, 456, 587 F.2d 486 (Ct. Cl. 1978), where there was a 15-month delay caused by a prior contractor at the work site who performed very poorly.

c. **Notice requirements** – The Stop Work Order clause requires that the contractor give notice of its right to an adjustment within 30 days of the end of the stop work order. This is the same notice requirement that is in standard Changes clauses which has been enforced very infrequently. In contrast, the Suspension of Work and the Government Delay of Work clauses provide:

> (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.

This "20 day cutoff" rule was given a practical interpretation of this requirement in *Hoel-Steffen Constr. Co. v. United States*, 456 F.2d 760 (Ct. Cl. 1972), which held that it should not be construed technically but that the requirement should be found to be met if the contractor conveyed actual knowledge of the event causing the delay to the government. However, the requirement has been enforced when there was no government knowledge that the contractor was claiming compensation, *F.G. Haggerty Plumbing Co.*, VABCA 4482, 95-2 BCA ¶ 27,671, or when the lack of notice prevents the agency from resolving a problem, *Dawson Constr. Co.*, VABCA 3306, 93-3 BCA ¶ 26,177, *aff'd*, 34 F.3d 1080 (Fed. Cir. 1994).

d. **Reasonableness of delays** – The Suspension of Work and the Government Delay of Work clauses provide compensation for only the unreasonable period of the delay. If government fault is found, the courts and boards generally hold that the entire period of the delay is unreasonable, whereas in the case of delay due to exercise of a contractual right, the contractor is compensated for only the unreasonable portion of the delay. Delays where the total delay period has been found unreasonable because of government fault include delays because of the inclusion of the wrong labor standards clause in the contract, *Davho Co.*, VACAB 1005, 72-2 BCA ¶ 9683; delay in obtaining a subdivision plan from a city government that could be obtained only by the federal agency, *Leonard Pevar Co.*, PSBCA 219, 77-2 BCA ¶ 12,690; delay

in issuing notice to proceed beyond the date needed by the contractor to perform work efficiently, *L.O. Brayton & Co.*, IBCA 641-5-67, 70-2 BCA ¶ 8510; delays because of conflicting specifications, *Stamell Constr. Co*., DOTCAB 68-27J, 75-1 BCA ¶ 11,334; and delays because of defective government specifications, *Chaney & James Constr. Co. v. United States*, 421 F.2d 728 (Ct. Cl. 1970); *Minmar Bldrs., Inc*., GSBCA 3430, 72-2 BCA ¶ 9599; *Sergent Mech. Sys., Inc. v. United States*, 34 Fed. Cl. 505, 526 (1995).

Delays that have been found to be reasonable include delays in the award of the contract, *De Matteo Constr. Co. v. United States*, 600 F.2d 1384 (Ct. Cl. 1979) (failure of government to award contract for the period required by the GAO regulations to process a bid protest was a reasonable delay because the prospective contractor was on notice of regulations); delays in issuing the notice to proceed, *Commercial Contractors, Inc. v. United States*, 29 Fed. Cl. 654 (1993) (40 days reasonable); delays in granting approvals, *R.J. Crowley, Inc*., ASBCA 35679, 88-3 BCA ¶ 21,151 (one month reasonable to approve relatively complex shop drawings); and delays in issuing changes, *Chaney & James Constr. Co. v. United States*, 421 F.2d 728 (Ct. Cl. 1970) (55 days reasonable; remaining 55 days unreasonable). The amount of time that is reasonable is highly dependent on the specific circumstances in each situation.

e. **Measuring the length of the delay**.– The delay is measured from the date that the contractor reasonably could have completed the work not from the contractual date of completion, *Metropolitan Paving Co. v. United States*, 325 F.2d 241 (Ct. Cl. 1963).The contractor is entitled to compensation for all days of delay beyond that date unless there is a concurrent contractor-caused delay. Concurrent delays are two delays that both extend the prospective date of completion (both on the "critical path"). *See Commerce Int'l Co. v. United States*, 338 F.2d 81 (Ct. Cl. 1964) (no recovery when government delay in furnishing parts mixed with subcontractor delays and other delays for which the contractor was liable)*; John McShain, Inc. v. United States*, 412 F.2d 1281 (Ct. Cl. 1969) (no recovery when defective drawings were encountered during same period government issued almost 700 change orders, which it had a right to do with some delay). Another way of stating the rule is to preclude recovery when both parties contributed to the delay, *Vogt Bros. Mfg. Co. v. United States*, 160 Ct. Cl. 687 (1963) (court refused to apportion responsibility when the contractor delayed in replying to the government's counterproposal). See also, *F Versar, Inc*., ASBCA 56857, 12-1 BCA ¶ 35,025, *recons. denied*, 12-2 BCA ¶ 35,126, stating there could be no recovery without clear apportionment of delay and expense attributable to each party.