



CONSTRUCTION E-BRIEF

The Weather Outside is Frightful: Understanding Your Contract's Weather Provisions

Winter—for some it is the most wonderful time of the year. For contractors, however, inclement weather can lead to delays and lost profits. Thus, it is essential for contractors to understand how to allocate and manage the risk of weather-related delay. In this e-brief we will discuss how construction contracts allocate the risk of weather-related delay, along with steps contractors can take to manage such risk.

Frequently, contracts will allow an extension of time (but not compensation) for “unusually severe weather.” Under such an agreement, no extension of time or compensation is allowed for normal or “foreseeable” weather. Oftentimes what constitutes “unusually severe weather” will be a dispute among the parties, especially if the contract does not define the term. Some contracts, however, do provide guidance on this issue. Certain federal public contracts, for example, look at the average weather (e.g., temperatures, levels of precipitation, etc.) for the past ten years. Under this system, weather on the project must have been more severe than the ten year historical average in order to be considered “unusually severe.” As a practical matter, a prudent contractor should consider historical averages as representing the *minimum* level of weather-severity that the contractor will encounter on the project.

Even if the project suffers unusually severe weather, a contractor will usually only be entitled to an extension of time

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if it can show that the weather *caused* the delay. In other words, if contractor-caused delay just happens to coincide with unusually severe weather, such a delay will not warrant a time extension. Yet contractors can maximize their chances of proving that weather caused their delay by keeping a contemporaneous record of the project's weather. Thus, contractors should diligently document weather conditions on the job site along with any effects such conditions have on productivity. This should be done in as detailed a manner as possible. While it may not be feasible for a contractor to collect specific weather data at the project site, such data can be obtained from several sources, including the National Oceanic and Atmospheric Administration (NOAA).

In some circumstances, delays caused by unusually severe weather may entitle a contractor to compensation if coupled with another delay event. For example, if the project owner causes delay which pushes the contractor's work into the winter months thereby leading to inefficiency and further delay, the contractor may be entitled to compensation. In this circumstance, the contractor should make sure to update its project schedules so that the schedule reflects how the owner-caused delay impacted the contractor's work.

Rules Before You Sign

This issue's Rule—Understand How to Manage Weather-Related Risk

Follow our "Rules" before signing the contract to reduce your contract issues and problems.

Inclement weather has the potential to devastate a contractor's bottom line. Thus, it is essential that a contractor understand its contractual rights when it suffers weather-related delay. Such delay will usually not merit compensation and will often not merit a time extension. In addition, even if weather is severe enough to warrant a time extension, the contractor will still have to prove that the weather caused the delay. Accordingly, contractors should document weather conditions on a daily basis. Finally,

contractors should understand that not every delay which is partially caused by weather is non-compensable. Indeed, delay which results primarily from non-weather causes, but is exacerbated by weather, may be compensable.

Experienced legal counsel can help a contractor evaluate its liability for delay in addition to its ability to recover additional payment in such situations.

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