

MONEY DAMAGES FOR ADVERSE WEATHER DELAYS?

Time and Money Damages under Suspension of Work Clause

INTRODUCTION

Every contractor will at some point have a project impacted by adverse weather. When a weather-related delay happens, additional costs are virtually inevitable. The general rule of recovery for unusually severe weather conditions in government contracting is additional “time, but no money.” However, if an adverse weather delay is the result of a wrongful Government delay, the contractor may be entitled to **both time and money damages**. While recovery will depend on the facts surrounding the claim, proper positioning and certain proactive measures can optimize a contractor’s chances for recovery.

MONEY DAMAGES POSSIBLE

The issue of recovery of money damages on an adverse weather delay claim was most recently addressed by the Armed Services Board of Contract Appeals (ASBCA) in [Appeal of DTC Engineers & Constructors, LLC](#), ASBCA No. 57614, 12-1 B.C.A. (CCH) ¶ 34967 (Mar. 9, 2012).

In *DTC*, the contractor (“DTC”) entered into a fixed-price contract with the Corps of Engineers (“Corps”) to design and build an Armed Forces Reserve Center. The contract included the standard [FAR](#) and [DFARS](#) clauses, including Differing Site Conditions, Suspension of Work, Changes, and Default (for Fixed-Price Construction). **The contract also included a Time Extension for Unusually Severe Weather clause (Weather clause), which allowed for additional time, but not money, for delays caused by severe weather.**

The contract notably required that all design submissions be approved by the Corps before construction would be authorized to begin. Ultimately, the Corps’ delays in approving certain submittals resulted in DTC’s inability to begin site work until 8 months after the original projected start date. **This delay** pushed the project into the winter months, during which record rainfall altered the means and methods of construction, and ultimately delayed the project.

DTC then submitted several REAs based on the number of days the project was delayed due to rain and mud on the worksite. The Corps responded by awarding **time, but not money**, under the Default Clause and Weather clause in response to the REAs.

Meanwhile, DTC submitted another REA requesting time and money, claiming that the Corp’s delay in issuing the Notice to Proceed pushed the project into unforeseen winter conditions, which delayed the project and caused DTC to incur additional costs. The Corps once again denied the request, concluding that DTC’s only remedy was time, not money.

APPEAL NECESSARY

On appeal to the ASBCA, **the Corps moved for summary judgment**, arguing that DTC's claim was based on severe weather delays, for which the proper remedy under the Weather clause was extended time, but not money.

The ASBCA denied the Corps' motion, finding that the claim was based not on unusually severe weather, but seasonal differences in the weather, resulting from Government delays. *DTC*, No. 57614 BCA ¶ 34967 at 35,116.

Consequently, the ASBCA found that the **adverse weather claim was "not grounded" in the Weather clause or Differing Site Conditions clause**, but instead was based on a constructive suspension of work by the Government under the Suspension of Work clause. *Id.*

Finally, the ASBCA held open the possibility of money damages, stating that: "[w]rongful government delays that are not reasonably anticipated and push a contractor's performance into periods of adverse weather can be a cause of **ADDITIONAL DELAY FOR WHICH A CONTRACTOR MAY BE COMPENSATED.**" *Id.* (quoting *Charles G. Williams Construction*, 92-1 BCA ¶24,635 at 122,930)(emphasis added).

IMPORTANT POINTS TO CONSIDER

The idea to base a claim for time and money on the Suspension of Work clause was advanced in the *Charles G. Williams Construction* case (cited above) (note: Excell's V.P. and General Counsel, Judith Ward Mattox, Esq., successfully argued this case).

In that case, Government-caused design errors resulted in a suspension of work that shifted excavation and concrete work from the mild, relatively dry months into colder, wetter winter months. When adverse weather caused further delays in construction, the contractor entered negotiations with the CO, requesting additional time and money related to the delays.

Not being content with the Government's assessment that the contractor was only entitled to a time extension for the delays, Ms. Mattox argued the theory that the weather-related delays were directly caused by the Government's "suspension of work;" that is to say that, had the Government not suspended work on the project, the weather delays would not have occurred. Thus, instead of using a traditional analysis for weather-related delays, Ms. Mattox brought the claim (on behalf of the contractor) under the Suspension of Work clause, which allows for money damages.

The ASBCA agreed with that analysis, finding that the suspension of work was the direct cause of the additional weather-related delays, and therefore granted money damages to the contractor.

Other examples where suspension of work was the direct cause of additional, weather-related delays include: A Government failure to correct inaccurate drawings caused the contractor to incur additional costs associated with

erosion and clearing weed growth when work was delayed until after the rainy season;¹ A contractor was entitled to

¹ *Reliance Enterprises*, ASBCA No. 27638, 27639, 85-2 BCA par. 18,045.

an equitable adjustment for weather delay where a Government delay caused the contractor's installation of roads to be shifted into wet winter months;² and a contractor was entitled to compensation for additional costs where erroneous contract specifications prevented completion of excavation before the onset of winter.³

CONCLUSION

Although the typical contractually stated remedy for adverse weather delays is time only, a contractor **may** also be entitled to money damages if the adverse weather delay was the direct result of the Government's actual or constructive suspension of work. If contractors have a weather-related delay following a suspension of work, they should explore the possibility of recovering money damages through a claim or REA based on the Suspension of Work clause.

Additionally, the cases mentioned in this article highlight the important principle that certain remedies, while not available based on the apparently applicable clause, may nevertheless be available through a creative approach based on another clause.

For adverse weather claims, contractors should consider carefully FAR and DFARS clauses *in addition to* the Default clause and adverse weather provisions. It is also important to meticulously track time and money costs resulting from weather delays, as the contractor will need to provide documentation of the cost incurred, and the causal connection between the delay and associated costs.

Consulting an expert in these situations can be vital to the success of your claims. In analyzing claims, the professionals at Excell Consulting combine their expert knowledge of government contracting claims with the type of innovative thinking that won the *Williams Construction* claim. Please give us a call to discuss any issues your project is facing.

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² *Robert L. Rich d/b/a/ Unitraco*, DOT 1026, 82-2 BCA par. 15,900.

³ *Weaver-Bailey Contractors, Inc. v. United States*, 19 Cl. Ct. 474, reconsidered, denied 20 Cl. Ct. 158 (1990).