

REFRESHER ON CONSTRUCTION DELAYS

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Government's Implied Duty Not to Hinder Contract Performance

General Rule

There is in every contract an implied duty on the part of both parties to cooperate and not to interfere negligently or willfully with the performance of the other party. *C. Sanchez & Son, Inc. v. United States*, 6 F.3d 1539, 1542 (Fed. Cir.1993)

Examples of Government breach of duty not to hinder performance:

- Government conducts an over zealous inspection. *H.G. Reynolds Co., ASBCA 42351, 93-2 BCA ¶ 25,797.*
- Government fails to help a contractor who runs into a problem during performance, such as differing site conditions, changes, and defective specifications. *Hardrives, Inc., IBCA 2319, 94-1 BCA ¶ 26,267.*
- Government failure to coordinate work of other contractors working at the site so as not to interfere with each other. *Toombs & Co., ASBCA 34590, 91-1 BCA ¶23,403 (failure of other contractor to meet contract schedule)*

Delays due to Defective Specifications

- The Government implicitly warrants that the plans and specifications are suitable for their intended purpose. *U.S. v. Spearin, 248 U.S. 132 (1918)*
- A cause of action for defective plans/specifications arises when the Government negligently prepares the specifications or plans.
- In such a case, the contractor is entitled to additional compensation (time and money) if the defects delayed or changed his method of performance. *Appeals of W.G. Yates & Sons Construction, 01-2 BCA ¶31,428, ASBCA No. 49,399 (May 18, 2001)*

Government Delay in Approvals

- When the Government is required to render approvals during contract performance, any unreasonable delays in doing so will result in a compensable suspension of work. *M.S.I. Corporation, VACAB 503, 65-2 BCA ¶ 5203; Sydney Construction Company, ASBCA 21377, 77-2 BCA ¶ 12,719.*
- Contractor must show the period it could have reasonably anticipated Government approval given the status of the project and particular work involved.
- Contractor not entitled to relief for delays if it was responsible for the delay in approval. *Joseph Penner, GSBCA 4647, 80-2 BCA ¶ 14,604* [contractor at fault because its submittal did not include all of the required information]
- Contractor not entitled to relief, however, if the delay in approval did not actually impede performance.

Government Delay in Inspections

- Unreasonable delay in inspection has been held to be a breach of the Government's implied duty of cooperation.
- Typically, the contract will specify the time in which the Government must conduct the inspection.
- If no period is noted in contract, then the Government is entitled to a "reasonable time period" in which to inspect. *Southern Roofing & Petroleum, ASBCA 12841, 69-1 BCA ¶ 7599* (eight day delay in inspection reasonable even though no defects were found)

Government Delay in Issuance of Changes

- Government delays preceding issuance of a modification are generally excusable.
- Contractor justified in not proceeding with changed work until Government issues mod to contract. *George A. Fuller Co., ASBCA 8524, 1962 BCA ¶ 4582* (it would have been “irresponsible” for contractor to proceed without contract modification)
- If there is a dispute over whether a change exists, the contractor must continue with the work under protest. *Plandel, Inc., HUDBCA 92-7171, 93-3 BCA ¶ 26,103.*

Subcontractor and Supplier Delays

- A delay encountered by a subcontractor is not excusable unless it can be shown to be beyond the fault and fault of the subcontractor as well.
- The delay will not be excusable if it can be shown that the delay could have been averted by procuring supplies from other sources. *Cryer & Parker Elecs., Inc., ASBCA 15150, 71-2, BCA ¶ 8943.*
- Thus, there is no excusable delay where the prime contractor could have procured supplies elsewhere, but did not want to pay the higher price. *Northern Va. Elec. Co. v. United States, 230 Ct. Cl. 722 (1982)*
- Dispute between contractor and subcontractor, which results in delays, is not excusable delay. *Fairfield Scientific Corp., ASBCA 21152, 78-1 BCA ¶ 12,869.*

Failure to Lock-in Suppliers

A surprising number of small business Government Contractors get into trouble because they fail to control subcontract and supply delivery schedules. It is difficult to extend the prime contract based on late suppliers.

- Excusable Delay – for delay to be excusable, it must be beyond the reasonable control of the contractor and without its “fault or negligence.” The prime contractor is generally responsible for the deficiencies of its suppliers and subcontractors.
- Long Lead Time Items – identify work inputs that require advance ordering and scheduling -- anything not “off the self” should be scheduled in advance.
- Be Professional -- Schedule Subcontractors and suppliers; include the schedule in the subcontracts; Include long lead time procurement activities in the schedule.
- Get time-frame commitments for delivery before award based on projected time elapsed and then include specific dates in the subcontracts and supply agreements.
- Confirm the delivery dates up front and then reconfirm periodically during performance. These steps will help insure timely delivery and it will provide a paper trail to demonstrate entitlement to a time extension if the supplier fails to deliver and an extension is required.

Government Delay/Suspension of Work Clause

- Under the Suspension of Work Clause and Government Delay in Work Clause, a contractor is entitled to relief (monetary and schedule) if the period of delays is considered unreasonable.
- What is unreasonable is highly dependent of the facts of each case. The following three (3) part test has been used to determine if a delay is unreasonable:
 - Whether the delay is due to Government fault;
 - Whether the overall completion of the project was delayed; and
 - Whether the delay is not concurrent with delays within the contractor’s control.
- A suspension caused by defective specifications is *per se* unreasonable. *Chaney & James Constr. Co. v. United States*, 190 Ct. Cl. 699, 421 F. 2d 728 (1970)

Contractor's Duty to Proceed in Face of Dispute

- Disputes Clause (FAR 52.233-1) requires contractor to proceed with performance in accordance with directions from the contracting officer.
- When faced with a disagreement over whether a change exists, the contractor should continue performance and file a claim for an equitable adjustment with the contracting officer.
- The contractor should keep good records of the additional work (labor and material), as well as the time to perform this additional work.

There are three exceptions to the Duty to Proceed recognized by the boards and courts:

1. The specifications are so defective that performance cannot continue without assured failure;
2. The contractor cannot proceed until it receives a response to a clarification request; and
3. The Government materially breached the contract, i.e. cardinal change.

Available Monetary Relief for Delays

- Additional Time
- Extended Field Office Overhead
- Extended Home Office Overhead, i.e. Eichleay Damages
- Material and Labor Price Escalations
- Labor Inefficiencies

Understanding Remedy Granting Clauses

Don't guess your rights based on fairness. Your rights in a dispute probably depend on the remedies in contract clauses. Some clauses limit remedies to time extensions, recovery of costs incurred, or even no-cost termination. This will affect how you frame your claim. Read the clauses before you communicate your position. Here are the most common remedy granting clauses:

- **Changes Clauses (FAR 52.243-4)** - entitles contractor to an equitable adjustment for increased costs caused by the change –(if the contractor has provided proper notice). Equitable adjustment normally includes overhead and profit, but the VA Construction Changes Clause (§ 852.236-88) limits percentage markups according to a precise formula.
- **Differing Site Conditions (FAR 52.236-2)** – if the contractor has provided timely written notice, DSC clause provides an equitable adjustment for additional costs incurred on account of (1) subsurface or latent physical conditions at the site which differ materially from those indicated in this contract, or (2) 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.
- **Suspension of Work Clause (FAR 52.242-14)** -- gives the contractor an adjustment for increase in costs, excluding profit, caused by “unreasonable” suspension, delay, or interruption caused by (1) by an act of the CO or (2) by the CO's failure to act within the contract-specified time or within a reasonable time.

Understanding Remedy Granting Clauses (cont'd)

- **Default Clause, FAR 52.249-10, (Fixed-Price Construction)** -- provides two important sets of remedies, one for the Government and one for the Contractor:
 - if the Contractor fails to prosecute the work with the diligence to insure its completion, or fails to complete the work on time, the Government may terminate. The Government may take over the work and complete the work and use any materials, appliances, and plant on the work site necessary for completing the work. The clause makes the Contractor and its sureties liable for any damages, including the cost to complete.
 - If, after termination, it is determined that the Contractor was not in default, or the delay was excusable, the termination is converted to a “Termination for Convenience.”
- **Termination for Convenience Clauses** -- include precise formulations for a contractor’s recovery, depending on the type of contract and the clause included. Generally, a contractor terminated for convenience is entitled to the contract price, or to the costs incurred for the work performed, plus profit and overhead, minus a loss adjustment.
- **Disputes clause, FAR 52.233-1** – specifies detailed process by which, upon submission of timely Claim, CO must issue a final decision subject to appeal. The Contractor must proceed diligently with performance of this contract pending final resolution of any request for relief, claim, appeal, or action arising under or relating to the contract, and comply with any decision of the Contracting Officer.

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