



CONSTRUCTION DELAYS CAUSED BY WEATHER

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The last two months have been among the wettest in years. In May, **rainfall was recorded on 19 of 31 days**. Harrisburg Airport measured seven inches of rain for the month – nearly 2.5 inches above average of 4.6 inches. June is shaping up to be just as wet as or wetter than May. All this rain has resulted in **many lost days on construction sites**. And, on days that it was not actually raining, productivity was **significantly reduced by extremely wet conditions**.

As most members undoubtedly know, time is **critical in the construction industry**. A delayed project can result in extended performance costs and lost opportunities. Unfortunately, many owners are unwilling to recognize requests for additional performance time and withhold funds on the basis of liquidated or other alleged damages. Thus, on a project delayed by weather, you may be stuck with the double-edged sword of increased costs from the extended performance combined with the improper withholding of contract funds. So, what are your rights relating to delays caused by adverse weather?

Liability for construction delays is one of the most litigated issues in construction law. Usually, the party required to pay for the construction delay is the one that was in the best position to control the events which caused the delay. With weather delays, however, the **law recognizes that neither party can control weather, so they are handled differently**. Usually, weather delays are considered excusable but not compensable. This means that you are entitled to a time extension, but not additional monetary compensation. This risk allocation mandated by **most contracts requires a contractor to include a factor in its bid to account for weather**. Most contractors do not include this factor in their bid and the bleeding starts as soon as the delays begin.

This is the result mandated by the **AIA contracts (including the very popular A201 General Conditions)**, which specifically address adverse weather and require that claims for additional time on account of bad weather “be documented by data that conditions were abnormal and could not have been anticipated.” They also require the claimant to demonstrate that the weather had an adverse effect on the schedule. This language **leaves room for disagreement about whether the weather was truly abnormal and unexpected**.

To eliminate the room for argument, I recommend that the parties **include a specific number of days expected to be lost or affected due to adverse weather and that once exceeded**, the contract time will be extended day for day. This clause can be as simple as reciting in the contract the number of weather days to be expected each month (e.g. 5 days in May, 7 days in June, etc.) and that an extension will be granted for bad weather days over and above that amount. Also, while weather delays are not compensable under most standard contracts, **parties can override this result with a clause** providing that compensation will be paid for excusable weather-related delays.

A more complex problem is where the actions of the owner push work into a season in which it is affected by inclement weather when, had the delay not occurred, the work would have been performed at a time when it would not have been affected by weather. In this situation, the general rule that weather delays are not compensable may not apply, and the contractor may be entitled to additional compensation. Also, if the contract contains a no damage for delay clause, it may not apply either. These claims are not delay claims on account of weather, but are **actually inefficiency/diminished productivity and/or acceleration claims**. Unlike pure weather delay claims, the cause of the adverse impact on the work can be attributed to one of the parties. A simple example is where **unforeseen conditions result in long delays to the excavation and site work**, which pushes concrete work into winter, making it more difficult and time consuming to install.

In many cases, the characterization of the claim is critical as different types of claims are often treated differently under the contract. This makes it particularly important to understand what your contract says about weather-related delays, claims in general and the periods and requirements for giving notice of your claims. Many contracts contain very short notice periods and **failing to adhere may result in waiver of the claim**.

Weather-related delay claims, as well as inefficiency or impact claims, must be supported by accurate records. Weather data from the National Weather Service should be obtained to prove the conditions. Schedules should be used to prove the impact on the work. **Good daily logs should be kept** to show the severity of the weather and its actual effect on the work in the field. Most judges, juries, arbitrators and lawyers don't know construction, so you will enhance your chances of succeeding on a claim if your documentation is clear.