

Construction Claims in the COVID Era: Lessons Learned and Best Practices

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As we move into the second year of a global pandemic, construction contractors are not only taking stock of project delays and disruption experienced to date, but also preparing for more of the same. What better time than now for contractors to take affirmative steps to protect themselves from default actions and to preserve their right to a time extension and/or contract adjustment.

Delay and Disruption in a Pandemic

As construction contractors well know, delay to agreed-upon construction schedules can result from a host of circumstances. The COVID-19 pandemic presents numerous challenges that may result in such delays, including, for example, project site closures or restrictions; labor impacts due to employee illness, exposure, and/or quarantine; new health and safety protocols such as on-site screenings; supply chain issues; subcontractor impacts; and delays to Government activities such as permitting and issuing approvals. Of course, the type of delay and the extent to which a contractor may be entitled to additional time or compensation depend on the circumstances.

A threshold question is whether a delay to the project schedule is excusable in the first instance—i.e., whether the contractor will or should be excused from being found in default by virtue of the delay. The Excusable Delay clause at FAR 52.249-14 provides some guidance. This clause excuses contractors from default for failure to perform—including failure to make progress in a manner that endangers performance—if the failure “arises from causes beyond the control and without the fault or negligence of the contractor.” Of potential relevance to COVID-related delays, the clause identifies

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specific causes deemed beyond contractors' control. These include epidemics, acts of God or the public enemy, and quarantine restrictions, among others.

A second question is whether a contractor delayed by such causes is due any relief. To establish entitlement to an extension of time, the contractor must show that the cause of the delay was unforeseeable, beyond the contractor's control and without the fault or negligence of the contractor, and that any Government caused delays were not concurrent with delays caused by the contractor. To establish entitlement not only to time, but also to additional compensation, the contractor must show that the Government was the "sole proximate cause" of the delay such that "the contractor would not have been delayed for any other reason during that period."

Is COVID-Related Delay Excusable? And Could It Be Compensable?

While it is still early for contract Boards and courts to have directly addressed COVID-related delays, contractors may be able to glean some guidance as to what paths may be open for recovery from decisions related to epidemics and hostile security environments.

As an initial matter, precedent from the boards of contract appeals confirms that documentation is key. In *Ace Electrical Associates, Inc.*, a contractor requested that its termination for default be converted into one of convenience because a flu epidemic resulted in a 30-40% absentee rate over several weeks, causing a delay. ASBCA No. 11781, 67-2 BCA ¶ 6,456. Although the Armed Services Board of Contract Appeals seemed willing to accept that a flu epidemic could create excusable delay, the Board also found that the contractor did not present sufficient evidence to support its claim. In particular, the Board noted that the contractor could not show when exactly the flu epidemic occurred, what personnel were absent for the flu, whether the absentee rate caused the delay, and what efforts were made to mitigate the delay. Without such documentation, the Board determined that the contractor could not recover under its flu theory.

The contractor's ability to prove that the pandemic was the sole cause of delay will also likely be critical. Indeed, on several occasions, the Board has rejected contractors' attempts to invoke excusable delay during a flu epidemic because the contractor could not show that the epidemic was the sole cause of delay. In *Crawford Development and Manufacturing Co.*, for example, the contractor documented the flu's effect on performance, but the record also showed that the epidemic occurred at the same time as other reasons for delay. ASBCA No. 17565, 74-2 BCA ¶ 10,660. Similarly, in *Asa L. Shipman's Sons*, the Board concluded that the contractor was not able to show that the principal cause of failure to perform was the flu, emphasizing that the "essence of the 'Ace Electronics' test is the requirement that a defaulted contractor prove that an epidemic was the sole cause, not merely a contributing cause, of the performance delay." GPOBCA No. 06-95, 1995 WL 818784 (Aug. 29, 1995). In other words, contractors must be able to show the causal link between the COVID pandemic and the delay.

More recently, in *Pernix Serka JV v. Department of State*, a case decided in 2020, a contractor struggled to meet deadlines on a construction contract in Sierra Leone due to an Ebola outbreak. CBCA No. 5683, 20-1 BCA ¶ 37,589. The contractor requested guidance from the contracting agency, but the agency declined to

provide any; according to the agency, how the contractor elected to manage the outbreak was a business decision. The agency did give the contractor an extension of time, but the contractor sought an equitable adjustment on the ground that it had incurred additional costs to protect the safety of its workers. According to the contractor, the Ebola outbreak constituted a cardinal change, constructive change, and constructive suspension of work. The Civilian Board of Contract Appeals disagreed, noting that “[d]espite the difficulties encountered during the Ebola outbreak, the Government never changed the description of work it expected from the contractor.” Even though the outbreak was unusual and unexpected, it was not a Government-made problem, and the agency did not instruct the contractor to take any specific action. Similarly, without any change in the work or instructions from an agency, a contractor may find it difficult to recover under the Changes clause for additional procedures brought on by COVID.

Cases examining security environments may also provide insight into how contractors can recover for additional work under COVID—particularly with regard to the requirement that the cause of delay be unforeseeable. For example, in *ECC International, LLC*, a contractor sought costs resulting from the Government’s closure of a gate needed to access the construction site. ASBCA No. 60484, 18-1 BCA ¶ 37,203. While the Government had closed the gate for security concerns, the contractor argued that use of the gate constituted part of its approved security plan. Given that the contractor was on notice that it was providing services in “a wartime contingency environment,” the ASBCA determined the Government’s action were foreseeable and thus, not a constructive change. In *Terraseis Trading Limited*, the contractor was terminated for cause for not meeting its data collection delivery date. ASBCA Nos. 58731, 58732, 15-1 BCA ¶ 36,176. The contractor argued that it could not have foreseen that the Afghan government would be unable to provide needed security because it had provided adequate security on two previous projects. Again, the Board disagreed and found that the contractor affirmatively opted into a project with complex security issues. The foreseeability of a dynamic security working environment was relevant to the Board; this same reasoning might also be extended to working in a COVID environment.

Top Takeaways for Construction Contractors

It might seem given that delays experienced while attempting to perform in a pandemic, with all the challenges posed by health screenings, travel restrictions, and shuttering businesses, are caused solely by COVID-19. But the epidemic and security cases described above serve as reminders that the path to establishing excusable delay, and especially compensable delay, can be rocky and will be rooted in details.

For that reason, we cannot overstate the importance of documentation, both to establish any delay in the first instance, and to bolster the assertion that the pandemic was in fact the only cause of a particular delay. As construction contractors review potential grounds for seeking schedule and monetary adjustments related to performance in 2020 and prepare for a second year of performance in a pandemic, contractors should make sure to document challenges, decisions, and costs with as much specificity as possible, and to integrate lessons learned from 2020 into future projects. In particular, contractors should document changed or more difficult conditions; specific impacts COVID-19 precautions and illnesses have on performance methods and scheduling; delays to activities on the critical path; additional costs; and any and all instructions from the Government—particularly those resulting in new requirements or restrictions, and/or revisions to the schedule.

The key to any compensable delay may be a showing that the Government somehow changed the method and manner of performance while the company remained prepared to perform pursuant to the contract requirements.

It is also important that contractors facing delay continue to perform and mitigate any delay as much as possible. In order to deflect any Government claims of concurrent delay, it will likely be critical going forward to carefully manage the project's material supply chain and labor requirements in order to react to any unplanned COVID-related shortages. Last, as always, contractors must take care to comply with the applicable notice requirements, as they may differ by applicable FAR clause (e.g., changes, suspension of work, schedule acceleration).

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