

Construction Newsletter

[Presented by the Law Offices of Ashley A. Baron]

Legal News for Construction Industry

Adverse Weather in Extension of Time Claims

Most construction contracts contain some form of clause that allows for Extension of Time (EOT) to be claimed by contractors in certain instances. Many times the contract defines (or should) what weather delays constitute grounds for a delay. In the case of rainfall the contract should contain a clause that defines how much rain qualifies and usually is determined by reference to average rainfall for the particular month as determined by the National Weather Service for the area in which the construction takes place. Often times the definition does not entitle the contractor to an EOT claim unless the delay exceeds a certain period (for example: the rainfall must be continuous and exceed one 24 hour period before the delay can be claimed).

Other contract provisions make it a condition that the adverse weather must affect the critical path and not occur concurrently with other causes of delay for which a claim cannot be made (for example: where a contractor has failed to obtain critical materials to proceed with the work of improvement).

The clearer the definitions in the contract the easier it will be for all parties to recognize a proper EOT claim. From an owners perspective the definitions should only allow EOT when the weather is beyond statistical norms for the region i.e. the weather

must be found to be “unusually severe” as opposed to merely “adverse”. By defining how many days of rain are normal for the months of construction in the contract and allowing the EOT claim only after that number of days have been exceeded the owner can pin down when the EOT claim can legitimately be made.

The number of days can be determined from the weather condition averages for the specific area over a ten year average.

Such construction contract specificity allow the contractor to base his schedule on the predictable affects of weather and if the weather exceeds the prediction allow the contractor EOT time to make up for the unanticipated delay.

The contract might also provide that the “unusually severe weather” must actually be the cause of the delay. The contractor would be required to show that the project was on schedule prior to the “unusually severe weather” delay or that if not on schedule that the “unusually severe weather” was the cause of a further delay.

The contract should also recite that the delay must be beyond the control and without the fault or negligence of the contractor. For example, if the contract provides that the contractor shall be responsible for de-watering or for damage to installed work then delays for “unusually severe weather” which are brought for such conditions should be excluded under the contract.

Likewise, the contract should contain provisions that exclude work that is performed indoors from the

EOT for “unusually severe weather” because the contractor should be capable of performing that work even though the outside work is affected by the weather.

Most construction contracts do not provide extra compensation for weather delays, only an extension of time for completion. However, acceleration claims often result from rain delays when the contract is silent as to whether additional costs incurred by a contractor to overcome excusable delays within the time limits originally established in the contract to meet the inflexible completion dates set by the owner. Such claims include the cost of multiple shift operations, adding additional subcontractors or equipment and other increased operating expenses related to the on time completion of the work on an accelerated schedule.

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The two types of acceleration claims are actual and constructive. Actual claims are ones where the contractor is directed by the owner to add manpower, work weekends, work evenings or rent more equipment to complete the project on time. The second, constructive, results from the owners refusal to acknowledge a rightfully entitled time extension. This results from a denial of the time extension request by the contractor or the owner stating it will consider the claim for extension at the end of the project.

Obviously, the later situation leaves the contractor dangling in the wind, not knowing whether it will have extra time or not and therefore forced to push for on time completion with the attended extra costs.

The contractor in either case should notify the owner of the acceleration claim and the additional costs anticipated and seek the owners approval thereof. If the owner is informed it can decide to either accept the acceleration charges, negotiate the charges, reject the charges or fail to take any action. The contractor can at the end of the project at least document its notice to the owner and that it gave the owner the opportunity to stop the acceleration by advising the contractor that it would accept a later completion date.

The contractor should obtain the climatological data report prepared by the National Atmospheric and Oceanic Administration as proof of the claim for delay. The contractor should also document in the daily job logs that the weather conditions prevented work and identify what trades were impacted by the weather.

Likewise, even when the weather delay is accepted and no demand to complete on the scheduled completion date is made there may be damages to the contractor. The contractor may incur additional costs in the performance of said work from the costs of maintaining an idle workforce, have equipment sitting idle on the project,

unabsorbed office overhead, loss of efficiencies and general conditions.

The contract should be clear on what delays are compensable and which are non-compensable and what is included in a compensable delay. By delineating the compensable delays and amounts the risk of such delays is assigned and the contract price can take that risk into account. If a contractor is willing to accept the risk then he should demand more compensation in the contract for the assumption of the risk as he is acting as an insurer. Conversely, if the owner is willing to assume the risk he should obtain a lower contract price because he is the insurer of the delay.

Proper drafting or modification of the construction contract is a must in assigning risk and taking it into account in negotiating the contract price.

California Budget Crisis Will Impact California Courts

The recent California budget just cut \$650 million from the California Court system. Governor Jerry Brown and the California Legislature have agreed to a budget that cuts \$200 million in the Judicial Branch, \$300 million in statewide court construction funds and additional \$150 million in the court system's operating budget. California Chief Justice Tani Cantil-Sakauye stated: "I am completely dismayed and gravely concerned about how the proposed budget cuts will affect the judicial branch and the public we serve."

These plus the previous cuts to the courts budgets will have the affect of court closures, fewer services to court users, and the specter of more furlough days and layoffs for employees. It will affect everyone and anyone connected to the courts in civil, criminal, family , probate and small claims court.

The Chief Justice went on to say that "These cuts are unsustainable and incompatible with equal justice for all.

This is a sad day of justice in California."

What this all means to contractors and owners is that they will either have to opt to pay for private arbitration or private judges at \$350 to \$500 per hour to resolve their disputes or have the wherewithal to sustain a two to three year battle in a congested court system that must place criminal trials on the priority list, because of the right to a speedy trial under the Constitution, over civil matters.

Ironically, the Trial Court delay Reduction Act of 1986 (Gov. Code § 68600 was enacted because of the incredible backlog of cases in the California Court system and under Cal. Court Rule 3.714 set a goal for trial courts to get 75% of all unlimited civil cases filed disposed of within 12 months and 85% within 18 months and 100% within 24 months.

In the months and years ahead the time delays may require the courts to extend the 5 year statute Code of Civil Pro. § 583.310. These lengthy delays will increase attorneys fees because attorneys will be required to prepare their cases for trial more than once as they will never be sure when the trial will actually start.

We now have both Orange County and Park City Offices. Ashley Baron, a U.S.C. undergraduate and law school graduate, has been a lawyer for the past 29 years. Ms Baron has tried over 100 cases. The firm performs construction, business, arbitration, labor law and litigation support for developers, general contractors, material suppliers, subcontractors, banks, title companies and other businesses in Orange, Riverside, San Bernardino, Los Angeles and San Diego Counties. For further information contact us at (714) 974- 1400 or e-mail us at ashleybaronesq@yahoo.com. Please take a look at our all new web site at: www.ashleybaron.com where you can learn more about our firm, can read and review our past newsletters and our blog of current information.