

A Refresher on Delays in Federal Government Contracting

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Overarching Government Duties: Implied Duty Not to Hinder Contract Performance

- 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)
- The Government does not breach the duty to not hinder contractor performance if it acts REASONABLY under the circumstances. Ben C. Gerwick, Inc. v. United States, 152 Ct. Cl. 69, 285 F.2d 432 (1961) [Government not liable for delays of other contractor if Government was not at fault]

Overarching Government Duties (cont.): Duty of Good Faith and Fair Dealing

- The implied duty of good faith and fair dealing has been used where the Government engages in improper contract administration.
- Examples of breach of the duty of good faith and fair dealing:
 - Even if there is no specific provision requiring the Government to provide certain information, the implied duty to cooperate still requires the Government to timely supply essential information necessary for the contractor to address problems that arise under the contract. [Spectrum Leasing Corp., GSBCA Nos. 7,347, 7,379](#), 7,425-27, 90-3 BCA ¶22,984.
 - The Government breaches the duty to cooperate if it fails to timely respond to RFIs. [Hardie-Tynes Mfg. Co.](#), ASBCA No. 20,582, 76-2 BCA ¶11,972.
 - Government does not act promptly on claims for constructive changes. [Nash Janitorial Serv., Inc.](#), GSBCA 6390, 84-1 BCA ¶ 17,135.
 - Government enforces a contract provision that “produces an egregious, unfair, or unreasonable result.” [Forest Env'tl. Servs. Co. v. United States](#), 5 Cl. Ct. 774, 777 (1984)

Excusable Delays – Contract Provisions

- **Excusable delays in fixed price supply and service contracts are governed by paragraphs (c) and (d) of the default clause in FAR 52.249-8, as follows:**
- (c) Except for defaults of subcontractors at any tier, ***the Contractor shall not be liable for any excess costs if the failure to perform the contract arises from causes beyond the control and without the fault or negligence of the Contractor.*** Examples of such causes include (1) acts of God or of the public enemy, (2) acts of Government in either its sovereign or contractual capacity, (3) fires, (4) floods, (5) epidemics, (6) quarantine restrictions, (7) strikes, (8) freight embargoes, and (9) unusually severe weather. In each instance, the failure to perform must be beyond the control and without the fault or negligence of the Contractor.
- (d) **If the failure to perform is caused by the default of a subcontractor at any tier, and if the cause of the default is beyond the control of both the Contractor and subcontractor, and without the fault or negligence of either,** the Contractor shall not be liable for any excess costs for failure to perform, unless the subcontracted supplies or services were obtainable from other sources in sufficient time for the Contractor to meet the required delivery schedule.

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.
- However, 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)
- However, even if there is another supplier, a contractor can claim excusable delay if that other source is unable to timely provide the materials. Wiggins Elec. Co., ASBCA 14790, 72-1 BCA ¶ 9190 (ordering from another supplier would have increased rather than decreased the delivery time).
- Dispute between contractor and subcontractor, which results in delays, is not excusable delay. Fairfield Scientific Corp., ASBCA 21152, 78-1 BCA ¶ 12,869.

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 and Inspections

- 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. E.W. Eldridge, Inc., ENGBCA 5269, 89-3 BCA ¶ 21.899.

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 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.

Contract Provisions Providing For Relief for Excusable Delays

- Changes Clause (FAR 52.243-4)
- Suspension of Work Clause/construction contracts (FAR 52.242-14)
- Government Delay of Work Clause/supply contracts (FAR 52.242-17)
- Differing Site Condition Clause (FAR 52.236-2)
- Time Extension Clause (FAR 52.211-13)

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)

Available Relief for Delays

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