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WEBINAR 12/2/2022
GOVERNMENT DELAYS IN FEDERAL CONTRACTING

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Discussion Outline

Examples of Delay – Compensable/Non-Compensable

Legal Grounds to Recover Time and Money

CPM Analysis – Legal Perspective

Available Monetary Relief for Delays

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)

This duty has also been characterized as the duty not to “destroy the reasonable expectations of the other party regarding the fruits of the contract.”

This duty must be “must be 'keyed to the obligations and opportunities established in the contract so as to not fundamentally alter the parties' intended allocation of burdens and benefits associated with the contract.”

Appeal of Ace Elecs. Def. Sys., 2022 ASBCA LEXIS 159, *12 (A.S.B.C.A. October 5, 2022)

Government's Implied Duty Not to Hinder Contract Performance

Examples of Government breach of duty not to hinder performance:

- Government conducts overzealous or piecemeal inspections. *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)*

Government's 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-TynesMfg. 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 Emtl. Servs. Co. v. United States, 5 Cl. Ct. 774, 777 (1984)*

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.*

Sole Source Subcontractor and Supplier Delays

- If the Government requires a prime contractor to use a particular supplier or subcontractor, it only warrants that this supplier or subcontractor is capable of performing the work.
- The Government does not guarantee that the subcontractor or supplier will complete its work on time, however.
- The prime contractor should have recourse against the supplier or subcontractor if it delayed the project, not the Government.

Appeal of Metro Machine dba General Dynamics NASSCO-Norfolk, ASBCA 62221 (March 29, 2022)

COVID RELATED DELAYS

Excerpt from DOD Memorandum dated July 2, 2020

Unlike contractors performing under cost-type contracts, contractors under fixed-price contracts generally must bear the risk of cost increases, including those due to COVID-19 (e.g., costs associated with PPE, social distancing, and supplier delays and inefficiencies). However, Contracting Officers are granted discretion, subject to the availability of funds, to modify contracts (e.g., under FAR 52.243-1, Changes Fixed Price, and its applicable alternatives) to reflect changes to the Government's needs as a result of COVID-19. Any resulting changes in contract price must be substantiated by the contractor and determined by the contracting officer to be required to perform the contract as modified, and must be driven exclusively by the change(s) directed by the Government.

COVID RELATED DELAYS

Appeal of Ace Electronic Defense Systems, ASBCA 63224 (October 5, 2022)

Board Finds that DOD Memo Dated July 2, 2020 Does Not Entitle Contractor to COVID Related Delays:

We agree with the government that the memorandum is not a part of the contract or delivery order and nothing in it governs the parties' rights under those instruments. Moreover, after noting the challenges that the pandemic posed to the government's interests and the health of the defense industry, the memo observes that contractors performing fixed price contracts generally must bear the risk of cost increases due to the pandemic. It grants discretion to contracting officers to modify contracts to reflect changes to the government's needs resulting from the pandemic. (Compl. P 12) Ace has not alleged that this contract was modified by the contracting officer to reflect any changes to the government's needs. Ace's suggestion that the memo imposes a contractual obligation upon the government to grant a price adjustment because Ace experienced higher costs due to the pandemic is not correct.

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. *Appeal of W.G. Yates & Sons Construction, 01-2 BCA ¶31,428, ASBCA No. 49,399 (May 18, 2001)*

Defective Period of Performance

A contract's period of performance can be itself defective if the designer of record failed to calculate the projected schedule. **Appeal of ECC International, LLC, ASBCA 58993, (Feb. 24, 2022)**

In Kora, the designer of record failed to take into account construction phasing and sequencing detail. The Board found that the contract's original period of performance was not feasible and constituted a design defect.

Board found that Government breached the duty of good faith and fair dealing by requiring contractor to complete the work on time, but without giving it the ability to do so through acceleration:

USACE's failure to cooperate in achieving the schedule by implementing the current austere design standards, or by facilitating ECCI's access to the work site, deprived ECCI of the contemplated value of the contract. USACE's refusal to grant reasonable time extensions during performance, and its interim unsatisfactory performance ratings, withholding of funds, and assessment of liquidated damages had the punitive effect of forcing ECCI to try to accelerate to meet an unreasonable completion date. ECCI is entitled to recover its damages flowing from this breach.

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

- *FAR 52.246-12(e)*, Inspection of Construction, mandates that the Gov't complete inspections in a manner that will not unnecessarily delay the work.
- 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* (8-day delay in inspection reasonable even though no defects were found)

RIGHT TO FINISH EARLY

When a contractor plans to complete the project early, it may receive compensation for delays if the Government prevented that. Even if the contractor completed the contract by the official contract completion date.

The burden of proof is high. The contractor must prove that *“from the outset it intended to complete the contract early, had the capability to do so, and actually would have completed early but for the Government's actions.”*

**SOUTHWEST CONSTRUCTION CORPORATION, ENG BCA
No. 5286 (August 24, 1994)**

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)*

Suspension of Work Clause - STANDBY

In *M.E.S., Inc. v. Department of Army* (Fed. Cir. 2013), the Court of Appeals for the Federal Circuit required a showing that the government required the contractor to remain idle or contractor could not take on other work during the suspension to mitigate the delay damages:

- *The "standby" element requires a contractor to show more than just that delays rendered it idle; it must also show that the government required it to remain idle, or that circumstances otherwise rendered mitigation "impractical." See Daly Constr., Inc. v. Garrett, 5 F.3d 520, 522 (Fed. Cir. 1993); see also Cmty. Heating, 987 F.2d at 1582 (requiring the contractor to "demonstrate that it could not have taken on any other jobs during the contract period")*

CPM ANALYSIS

- The purpose is to identify the contract's progress and critical path.
- There can only be one critical path at any given time.
- Critical path is determined by the activity that has the most negative float.
- There is no leeway for critical path delays.

CPM ANALYSIS

- To prove days of delay, the Boards and Courts expect the contractor to provide an expert CPM Analysis.
- This CPM Analysis should make use of the CPM Updates provided during contract performance whenever possible.
- Most construction contracts require a monthly CPM Update. The Government can review and approve or reject changes to the baseline schedule and subsequent updates.

CPM ANALYSIS (Cont.)

- Oftentimes, the Government and the Contractor cannot agree on what the CPM Update should be. To make matter worse, the Government may withhold payment until the contractor provides a CPM Update it likes.
- This poses a dilemma. The contractor needs to get paid but does not agree with the Government's request to revise the CPM Update.
- One answer is to provide two versions of the update. One that accounts for the Government changes and one that the contractor believes is realistic.

CPM ANALYSIS (Cont.)

- The CPM Updates are not looked at in a vacuum.
- The contractor should keep records to corroborate activity start and end dates.
- Correspondence, daily logs, photos, etc.
- Logic ties between activities must be reasonable.
- Durations must be reasonable.

CPM ANALYSIS (Cont.)

- CPM Analysis should make use of the CPM Updates provided during contract performance whenever possible.
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- Oftentimes, the Government and the Contractor cannot agree on what the CPM Update should be. To make matter worse, the Government may withhold payment until the contractor provides a CPM Update it likes.
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CPM ANALYSIS (CONCURRENT DELAY)

- What is concurrent delay?
- Contractor caused delay during the same time the Government did.
- Therefore, time but no money.

CPM Analysis (Cont.)

- What happens if contractor did not provide CPM Updates every month?
- Boards have allowed contractor to forensically create CPM Updates – but there is a heightened scrutiny.

Available Monetary Relief for Delays

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

GENERAL CONDITIONS

General Conditions/Field Costs – trailer, fencing, rental equipment, scaffolding, etc.

FAR31.105(d)(3) gives contractors the option of treating costs incurred at a job site, also known as field office costs, as either direct costs or indirect costs, but it makes clear that the contractor must maintain consistency in whichever accounting practice it chooses:

Costs incurred at the job site incident to performing the work, such as the cost of superintendence, timekeeping and clerical work, engineering, utility costs, supplies, material handling, restoration and cleanup, etc., are allowable as direct or indirect costs, provided the accounting practice used is in accordance with the contractor's established and consistently followed cost accounting practices for all work.

*Active Constr., Inc. v. DOT, 2022 CIVBCA LEXIS 59, *10-11 (B.C.A. March 9, 2022).*

EXTENDED GENERAL CONDITIONS

- How to calculate?
- Total General Conditions for Entire Job / Total Days of Performance = Average General Conditions Daily Rate.
- Extended General Conditions = (Average General Conditions Daily Rate) x (Days of delay)

Amec Foster Wheeler, CBCA 5168 (November 13, 2019)

Material and Labor Price Escalations

- Must prove that but for the delay, contractor incurred increase in labor and/or material costs.
- Purchase orders before and after delay.
- Bid Worksheets

Labor Inefficiencies

- Labor Inefficiencies – contractor could not perform the work in the as-planned orderly sequence of work.
- Stop and go.
- Labor inefficiencies are calculated base on percentage loss of labor, i.e. 25% of labor was nonproductive due to disruptions on the project.

Unabsorbed Overhead/Eichleay Damages

A. First Calculate:

$$\frac{(\text{Contract Billings})}{(\text{Total Billings for Contract Period})} \times (\text{Total Overhead for Contract Period}) = \text{Overhead Allocable to Contract}$$

Second Calculate:

$$\frac{\text{Allocable Contract Overhead}}{\text{Actual Days of Contract Performance}} = \text{Daily Contract Overhead}$$

Third Calculate:

$$(\text{Daily Contract Overhead}) \times (\text{Number of Days of Delay}) = \text{Amount Recoverable}$$

Unabsorbed Overhead/Eichleay Damages

To use the *Eichleay* formula, the contractor must meet three prerequisites.

1. First there must have been a government-caused delay of uncertain duration. [*Interstate Gen. Gov't Contractors, Inc. v. West*](#), 12 F.3d 1053, 1056 (Fed. Cir. 1993).
2. Second, the contractor must also show that the delay extended the original time for performance or the date planned by the contractor if the contractor planned to finish early. [*P.J. Dick, Inc. v. Principi*](#), 324 F.3d 1364, 1370 (Fed. Cir. 2003).
3. Third, the contractor must have been on standby and unable to take on other work during the delay period. [*Interstate Gen.*](#), 12 F.3d at 1056–57. Reduction in planned income stream during standby.

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