

What Should Parties Do With Unusually Severe Weather on a Construction Project?

Rain. Snow. Sleet. Ice. The winter elements this year have been unusually severe throughout the country. While weather affects our everyday lives, it can be especially crippling to the delivery of materials, the schedule of activities, and the construction project as a whole.

In *Daewoo Eng'g & Constr. Co. v. U.S.*, 557 F.3d 1332 (Fed. Cir. 2009), the contractor involved in building a 53-mile road around the island of Babeldaob submitted to the Corps a claim for delays and additional costs incurred because of high humidity, rainy weather and moist soils encountered on the project. The contractor sought \$13 million in additional costs incurred and more than \$50 million for future costs not yet incurred. The government filed a counter-claim alleging fraud and other violations.

Although the appellate decision focuses on the government's claims, the lessons learned about delays stem from the trial court's opinion. The trial court criticized the contractor's witnesses for lacking credibility. The court concluded that the \$50 million portion of the contractor's claim addressing future costs was no more than "a claim to gain leverage against the United States [and] violates the principles on which Congress enacted the Contract Disputes Act." The contractor was seeking a substantial modification of compaction requirements for embankment that would have greatly reduced problems for the contractor. In the court's view, the \$50 million in future costs was an inflated figure inserted into the claim as a ploy to expedite the Corps' decision on whether to modify the compaction requirements.

The most notable lesson from *Daewoo* is that contractors should seek the guidance of experts to assist in calculating damages and to perform a schedule analysis for their claims. Here are some tips when dealing with weather delays:

- **The contractor is usually entitled to additional contract time, but not additional compensation for weather delays.** Here, the contract terms and specifications are key to understanding what relief is available.
- **Delays must be attributable to "unusually severe" weather or weather "not reasonably anticipated."** Of course, by its very nature, such a claim will be factually driven. The contractor should be prepared to establish this by reasonable documentation, such as weather data from the National Oceanic and Atmospheric Administration.
- **Weather analysis should be geographically limited.** What may be characterized as "unusually severe weather" on a Nashville transportation project may be different than a site in another part of the country.
- **The delays must actually impact the schedule.** While you may think that down-time due to weather should automatically entitle the contractor to a time extension, it will depend largely on the contract provision addressing weather delays. You will have to determine whether the inclement weather affected material delivery, access to the site, safety measures, etc.

FINALLY, GET GUIDANCE FROM YOUR EXPERTS AS SOON AS POSSIBLE.

What most likely doomed the *Daewoo* contractor was the difference in methodologies in assessing the claim. Although the claim was originally prepared using in-house personnel, the outside experts hired for trial abandoned altogether the methodologies the contractor utilized in the claim. The trial court concluded that “the experts’ method resulted in an entirely different claim to the Government . . . [and] . . . the claim that was certified by the plaintiff’s project manager became an orphan during trial, supported by no one and barely acknowledged by plaintiff’s attorneys.”

Even on the smallest claims involving the calculation of damages, contractors should—at a minimum—seek the guidance of an expert on the most desirable methodology and should permit the expert to review the results prior to inclusion of them in the claim submitted to the public entity.

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