

RAIN DELAY: WHO PAYS?

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Whether involved in public or private construction projects, most would agree that delays caused by rain fall in to that excusable but non-compensable bucket known as the force majeure clause. In today's construction market, it's rare to find a construction contract without one. Simply put, force majeure means:

An event or effect that can be neither anticipated nor controlled. The term includes both acts of nature (e.g., floods and hurricanes) and acts of people (e.g., riots, strikes, and wars). Also termed force majeure; vis major; superior force. Cf. ACT OF GOD; VIS MAJOR.¹

Owners will often include additional verbiage in force majeure clauses that limit the contractor's ability to obtain a time extension unless delays were caused by unusually severe weather. Of course, this restriction leads to a discussion on what constitutes unusually severe weather. Without clear and definitive language in the contract, the burden of proof will remain with the contractor to establish that the actual weather pattern was more severe than what could have been

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reasonably anticipated under the contract. Acceptable proof will include historical weather patterns over a number of years that compares, say, the average number of rain days in a given month to the actual number that occurred during the same month. Many times, the number of years required to establish the average weather pattern will be identified in the force majeure or time extension clause of the contract. With the burden of proof met, the contractor will be entitled to an excusable time extension for the number of days in excess of what could have been reasonably anticipated.

Owners that routinely build within the same geographical region can remove any uncertainty with regards to unusually severe weather by including a table that defines the number of days of delay that should be anticipated during the

construction period. An owner looking to include such information should always clarify how the anticipated weather days are defined. For example, most contracts define a working day as occurring between Monday and Friday, excluding weekends and listed holidays. The number of days of anticipated inclement weather should be limited to those historically falling on or affecting a working day as it is defined by the contract. Such a table could look like the following:

MONTH	INCLEMENT WEATHER DAYS
January	5
February	4
March	3
April	1
May	0
June	0
July	0
August	0
September	0
October	1
November	3
December	4

With this information, the bidding contractor can adjust its means and methods of construction to account for the anticipated days of inclement weather while meeting the time of completion of the contract. Consider the following timeline with a Notice to Proceed on May 1, 2005:

NTP: May 1, 2005

Orig. Completion: Sept. 30, 2006

Original Duration: 17 Months

The above bidding condition represents a 17-month project for which the contractor should anticipate 21 days of inclement weather. For the sake of this example, we'll assume that the contractor submitted a baseline schedule that showed a completion date of September 30, 2006 and included a rain bank of 21 days. Under this

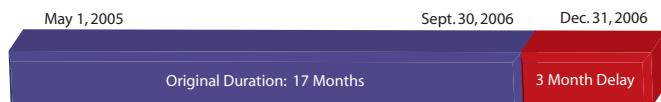
¹Black's Law Dictionary

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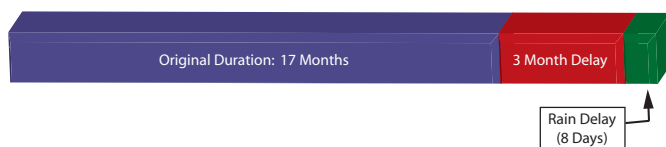
bidding scenario, a prudent contractor would include the appropriate amount of overhead to account for the full 17-month duration. Consequently, the contractor accepts both the risk and reward of completing the project within the original completion date, which includes general conditions for 21 days of inclement weather that may or may not occur.

Under the terms of a contract with provisions as previously described, the contractor would be entitled to a non-compensable time extension under the force majeure clause when the actual number of days of inclement weather exceeded the number shown in the table. Since neither party caused the unusually severe weather, under the theory of force majeure, and from the contract clause itself, the contractor is relieved from the threat of liquidated damages but cannot recover the cost of extended overhead. Thus far, these assumed facts are common occurrences in today's construction projects. Consider, now, the following additional circumstances.

Given the high probably of extra work and scope changes on most construction projects, consider the effect of the following critical path delay caused by the owner:



Based on the table of anticipated weather days, it should be clear that the 3 months of delay moved the adjusted contract completion date into a period where the likelihood of encountering inclement weather increased significantly since a total of 8 days are shown in the months of October, November and December. If, in this circumstance, the owner compensated the contractor for the actual cost of the delay for the entire 3 months and the contractor then encountered 8 additional days of inclement weather, how do time extension and force majeure clauses address this situation?



This situation is best described by the following scenarios involving inclement weather:

1. Anticipated weather days during the original duration of the project.

2. Unusually severe weather days during the original duration of the project.
3. Anticipated weather days during the delayed portion of the project.
4. Unusually severe weather days during the delayed portion of the project.

Absent confusing language to the contrary, most contracts transfer the risk of Item No. 1 to the contractor and no time extension is warranted for the number of days of inclement

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weather that is either reasonably foreseeable or precisely identified within the contract provisions. Given the level of sophistication in contracts today, most would agree that the subject matter of Items 2 & 4 is addressed in the force majeure clause. The contractual remedy is an excusable (non-compensable) time extension.

At the time of contract formation, the contractor bears the economic risk of completing the project within the original 17-month duration along with the overhead costs associated with the anticipated number of weather days. If the owner caused a 3 month delay that ultimately resulted in an additional 8 days of weather delay, or a total of 38 days of delay, did the original bargain transfer the cost of this extra weather delay to the contractor? It is clear from the force majeure clause that delays caused by unusually severe weather are considered excusable and non-compensable. However, these 8 days of delay do not fall into the category of unusually severe weather nor are they part of the original 21 days of anticipated weather delays. This condition (Item No. 3) may be left open and raised at a later date by the contractor when faced with more weather delays as the project moves into the extended period.

Ultimately, the question is whether the owner transferred the risk associated with the number of anticipated weather days in the extended period when compensating the contractor for the 3 months of owner-caused delay. On

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its face, it would seem inequitable for a contractor to have the opportunity to incorporate the cost of anticipated inclement weather in its original proposal but have to accept the risk of future weather delays with no opportunity to price them when the reason for facing that risk is due to an owner-caused delay. Thus, owners may wish to re-visit their contract general conditions to determine if this situation is addressed and develop some rationale on how to deal with these conditions.

Several options exist for owners when dealing with this situation. One would be to include clear language that all inclement weather delays, regardless of when they are encountered, are considered non-compensable. Another would be to entertain the possibility of buying the risk when settling compensable time extensions, rendering them non-compensable if and when they occur. Finally, owners may wish to provide compensation for general conditions for anticipated weather days during an extended period but withhold compensation until proof a critical path delay occurred due to such weather delays in the extended period. Whatever the remedy, owners are well advised to begin addressing this subject as this author is seeing more claims for extended general conditions for inclement weather in owner-caused delay periods.

About the Author

Bryan Forbes is the Associate Vice President of Construction Claims Services based out of PinnacleOne's Los Angeles office. He has more than 26 years of experience in the construction industry. As a construction industry expert, Mr. Forbes provides expert testimony on matters before courts and boards and frequently assists owners and contractors in the dispute resolution process. With extensive heavy civil works construction experience working for a contractor, public works owner, developer and construction manager Mr. Forbes brings a multi-faceted viewpoint to the subject of loss prevention on construction projects that will assist both owners and contractors.