

# Seeking Time & Money for Weather Impacts

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The issue of whether the owner or the contractor should bear the risk of unforeseen weather conditions can be a contentious issue, not just in negotiating construction contracts but in pursuing time extensions and extra costs arising from weather conditions. In the highway industry in Pennsylvania, the record-setting rainfalls experienced during the 2018 construction season presented many challenges to both contractors and public owners as they administered their respective projects. The impact of the weather delays experienced in 2018 has resulted in ongoing discussions between APC and PennDOT with regard to what changes, if any, will be made to the Form 408 Specifications to address weather-related issues. Regardless of what specification changes may ultimately

contracts, the parties make an attempt to equitably account for the risk of weather delays. Indeed, it is not uncommon on private-sector projects for the parties to build into a contract a certain number of expected weather delays for which the contractor bears the risk, and after which the owner will be responsible. With respect to highway projects in Pennsylvania, the current version of PennDOT's Form 408 Specifications purports to shift most of the risk for weather delays to the contractor. Section 108.06(a) sets forth a list of "events or occurrences that do not qualify for an extension of required completion date," and that itemized list includes weather delays. However, this section also provides that a weather-related event "warranting an emergency declaration" may qualify for an extension of time if the contractor has taken precautions to protect the project from damage and if controlling operations were affected. Notably, the extension of time that is contemplated under Section 108.06(a) for a weather delay due to an "emergency declaration" would likely be non-compensable. The extent of the delay for which PennDOT is responsible once an emergency declaration is issued is not spelled out in Section 108.06.

111 and 108 both allow a contractor time and compensation for the "negligent acts and omissions" of the department. While PennDOT would likely argue that weather events could never be considered a "negligent act or omission" to utilize these sections to support a claim for weather-related delays, it would be incumbent on the contractor to prove, for example, that the department was somehow negligent in failing to plan for appropriate weather considerations when developing specifications for a project.

Some surrounding states take a more lenient approach in their specifications regarding weather delays. West Virginia's Standard Highway Specifications list several grounds for excusable/non-compensable delays, including delays due to adverse weather. Under West Virginia's Specifications, a contractor is entitled to a non-compensable time extension due to weather delays where inclement weather prevents the involvement of a contractor's normal working forces in performing critical or controlling items for at least 60% of the total scheduled daily hours and/or if the weather conditions prevent the contractor from beginning at the regular time and the crew is dismissed regardless of whether or not the conditions improve for the rest of



when a contractor can justifiably argue for both time and compensation for weather events, even though it appears that weather conditions contributed to the adverse impact to the contractor. The first situation when a contractor can recover for a weather delay is if a prior delay of the owner pushes work into bad weather, thus further exacerbating the impact of the initial delay. On highway projects, this is a fairly common occurrence. If, for example, a three-month utility delay over the summer pushes paving work past the contract paving deadlines, and paving cannot take place until the following spring, the owner should be responsible for the entire delay, not just the three-month utility delay.

Second, an owner can also be deemed to have financial responsibility for extra costs if a time

extension for a weather delay should have been granted under the contract provisions but an extension was not timely provided, and thus the contractor accelerated to meet a deadline. One potential scenario when this could occur under PennDOT's Form 408 Specifications is if the governor had declared a State of Emergency (which would entitle a contractor to a time extension), but the owner fails to timely grant a requested extension and the contractor accelerated as a result. Those actions could turn a non-compensable delay into a compensable acceleration claim.

Third, a contractor can typically recover both time and money when the project's design does not adequately account for site conditions, which are ultimately impacted by weather. This is particularly prevalent when erosion

sediment control measures and/or stream diversion measures are under-designed. If, for example, the contract specifies a certain height cofferdam, and also specifies a certain type of stream diversion device be used, the owner is warranting that if the as-designed devices are installed per plan they will be effective. When they are not, the owner should be held liable. Thus, when storm events cause as-designed cofferdams to overtop, the owner should bear that risk (although it is likely the owner will take a different position).

Fourth, even if weather adversely impacted a project, if there is an overlapping owner delay that is critical, the contractor should be entitled to at least time, and likely compensation, for the overlapping owner-caused delay, irrespective of any concurrent weather delay.



Finally, there may also be situations for which an owner is liable when weather conditions exacerbate existing site conditions. This could occur if material at the site was originally deemed suitable for fill, but adverse weather ultimately made that material unsuitable and/or prevented the contractor from adequately drying the material. Thus, while some events may initially look like “weather caused” impacts, there are several scenarios in which

exculpatory language should not bar claims against the owner.

#### Are There Other Legal Theories that Could Support a Weather Delay Claim?

When weather delays hit, one of the contractor’s primary concerns is the possible imposition of liquidated damages by the owner. Thus, obtaining a time extension is often as valuable, or more valuable, than being

compensated for the weather delays. There are two separate but comparable legal doctrines that may work to assist the contractor in arguing for time extensions: (1) impossibility of performance, and (2) commercial impracticability. Essentially, these two legal theories recognize that a party to a contract should not be required to do something that is impossible. In the context of a highway construction project, there are contract deadlines that restrict certain activities, including bituminous paving, the application of certain line striping, etc. If a contractor experiences such a significant amount of adverse weather during a construction season that ultimately makes it impossible for the contractor to meet the required construction deadlines, the contractor would have a good argument that its timely performance was rendered impossible, and thus its timely performance would be “excused.” This would result in a time extension, albeit with no compensation.

A related doctrine is the Doctrine of Commercial Impracticability. This theory relies on the same legal principles as the Doctrine of Impossibility, but applies in very limited circumstances when one can show that attempting to complete the contract by its terms would be “commercially impracticable.” This is a fairly high standard to meet under the law, but it is one more argument a contractor could raise to support a time extension request, as a contractor could argue that it should not be expected to spend extraordinary amounts to meet a certain deadline.

In summary, regardless of the risk-shifting provisions in a contract, when a contractor



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