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WHAT YOU NEED TO KNOW ABOUT CONSTRUCTION WEATHER DELAY CLAIMS

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Inclement weather particularly tropical storms and hurricanes can have a devastating economic impact on a construction project. There may be labor cost overruns, material cost overruns, equipment rental overruns and disruption of cash flow due to time extensions and interest payments, just to name a few. Planning for and understanding weather delays claims will help construction businesses avoid disputes.

Typically, delay claims are the responsibility of the party in the best position to control the event that caused the delay. Weather delays are considered excusable and generally non-compensable. This means a contractor may be entitled to a time extension, but not monetary damages. Let's look at two standard contract forms to see how they address weather delays.

AIA General Conditions

One of the most widely used contract forms is from the American Institute of Architects (the "AIA"). The available forms cover a broad range of contracting parties (owners, general contractors, subcontractors, and design professionals). The A201 General Conditions of the Contract for Construction, modified in 2017, are incorporated into a broad spectrum of the AIA form contracts, contain several provisions regarding weather delays. For example, A201 provides:

8.3.1 If the Contractor is delayed at any time in the commencement or progress of the Work by (1) an act or neglect of the Owner or Architect, of an employee of either, or of a Separate Contractor; (2) by changes ordered in the Work; (3) by labor disputes, fire, unusual delay in deliveries, unavoidable casualties, adverse weather conditions documented in accordance with Section 15.1.6.2, or other causes beyond the Contractor's control; (4) by delay authorized by the Owner pending mediation and binding dispute resolution; or (5) by other causes that the Contractor asserts, and the Architect determines, justify delay, then the Contract Time shall be extended for such reasonable time as the Architect may determine.

15.1.6.2 If adverse weather conditions are the basis for a Claim for additional time, such Claim shall be documented by data substantiating that weather conditions were abnormal for the period of time, could not have been reasonably anticipated, and had an adverse effect on the scheduled construction.

(Emphasis in underscore added).

ConsensusDocs

Another popular contract form is similar to the AIA, ConsensusDocs. ConsensusDocs' form contracts were produced by a diverse coalition of 40 leading associations with members from all stakeholders in the design and construction industry, such as the Associated General Contractors of America and the American Subcontractors Association. According to Section 6.3.1:

> 6.3.1 If the Contractor is delayed at any time in the commencement or progress of the Work by any cause beyond the control of the Contractor, the Contractor shall be entitled to an equitable extension of the Contract Time. Examples of the causes beyond the control of the Contractor include…adverse

weather conditions not reasonably anticipated; encountering Hazardous Materials…

Both the AIA and ConsensusDocs clauses leave open the question of what is considered "normal" or could have been "reasonably anticipated."

What is Considered "Normal"?

The first thing that should be established is what is "normal" for the time and place where the job site is located. There are sources, such as data available from the National Oceanic and Atmospheric Administration (NOAA), that provide historical weather data for nearly any specific region of the United States.

Another weather data source may come from historical project data accumulated by the contractor or owner that can be used to support its calculation. Although using past project history to establish the "norm" may be more accurate than using the data provided by NOAA, few owners or contractors have this historical information.

What Was "Reasonably Anticipated"?

Establishing what is "normal" through weather data is just part of the analysis. You also have to show that the delay could not have been "reasonably anticipated." It is best to approach a potential weather event with an established baseline schedule and progress schedules constantly updated. Weekly and daily site reports should be kept, noting progress of critical and sub-critical activities on each report. When the weather event occurs, the daily report should specifically note which activities do not progress and why. The contractor should notify the owner when they think a delay might be occurring, and the project schedule should be updated for progress to see if changes have been made to either the critical path or the end date. It is the contractor's obligation to then establish that the weather during the delay period was abnormal. A contractor who makes a weather delay claim should record what is happening on the construction site before, during, and after the weather event, including making reports and taking photographs and videos. Once this is done, the contractor will be in an optimal position to request additional days.

Are There Alternatives to Time Extensions?

The primary relief a contractor can obtain from a weather delay is more time. However, there may be other factors involved for the delay to be inexcusable, and therefore compensable. For a weather-related delay to be compensable, it must be directly or indirectly caused by the owner. There are several legal theories under which adverse weather may form a basis of a contractor's claim for compensable damages, such as prior owner caused delays which caused the contractor to encounter adverse weather, excusable weather delays which caused accelerated performance to stay on schedule, and weather interacting with physical site characteristics which caused differing site conditions.

Conclusion

Most construction projects will be affected by inclement weather, especially in South Florida. By understanding the effects of weather delays and planning for expected weather disruptions in project schedules, you should be able to weather the storm.

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