# Weather or Not You Have a Delay

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If a raindrop falls at a nearby airport but not on the project site, does the contractor get a weather delay extension? This seemingly easy question is not so easy when it comes to most construction contracts. Typical contracts and specifications will go into excruciating detail on the requirements for various systems within a building but are generally very vague or silent as it relates to weather. Simple questions such as *What is weather? What is abnormal weather? What is a weather impact? How do you measure precipitation? Do you evaluate the impact of weather monthly or cumulatively?* are frequently not addressed in many construction contracts and specifications.

## COMMON LANGUAGE – THE GOOD, THE BAD, AND THE UGLY

Let's start with the ugly. Ugly is being completely silent on weather and keeping the answers to the questions above a mystery. Does the contractor receive a time extension for every day of bad weather or does the contractor receive no extension for any type of weather? This situation is why there are construction lawyers – go find a good one.

The bad. An example of "bad" weather impact language would be along the lines of, *"No consideration of weather impacts will be allowed except when conditions exceed the five-year NOAA average."* This is a start, but leaves many unanswered questions:

- The five-year average of what? Rain days? Temperatures? Rain days with over 0.1" of precipitation? Rain total for the month? Rain for each calendar day? Wind?
- How does the contractor "plan" for the average?

So how do we get to good weather contract language? Start with answering these questions:

- *What is weather?* It is important to define what constitutes weather. Are snow, wind, rain, fog, temperature, etc. included?
- *What is abnormal weather?* You first must define normal. A simple way to do this is to identify a table with the number of weather-impact workdays to anticipate each month. If "normal" is defined by a reference to an external data source, that source and the specific criteria should be specified. For example, *"utilize the 10-year average workdays per month with precipitation in excess of 0.10" for the closest monitoring station."* Other potential weather impacts such as wind and temperature should be similarly defined.

- *What is a weather impact?* The specifications need to clearly define these parameters, including: Does the weather have to occur at the project site? Some specifications require the contractor to report precipitation from the closest airport. Does jobsite production have to be impacted the entire day? What if it rains 0.25" at 3:00 pm? What if it rains on one day or overnight but impacts production the next day?
- *How do you measure precipitation?* Measurement of the alleged weather impact is crucial for properly assessing any weather impacts. This language should be specific on the location and frequency of measurement for each of the defined weather components. In addition, the measurement of any "wet days" or similar affects should be defined. It is also important to note that most contracts also place a requirement on the contractor to mitigate weather impacts. Weather impacts resulting from the contractor's failure to adequately protect the work may result in rejection of claimed weather impacts stemming from the contractor's actions/inactions. The contract language should be reviewed to ensure it is compatible.
- *Do you evaluate the impact of weather monthly or cumulatively?* Abnormal weather impacts can occur during an individual month. The specification needs to define if this is justification for any extension or if weather impacts are evaluated cumulatively throughout the project, which typically dampens the effect of any single abnormal month.
- Other considerations:
  - The weather impact language should also be reviewed with the force majeure clause language to ensure they are compatible.
  - On building projects, many times the contract language will limit the assessment of weather impacts upon achieving building "dry-in." This approach necessitates the definition of "dry-in" and reinforces the importance of the contractor demonstrating the critical path impact resulting from the alleged abnormal weather.
  - If a specification requires the contractor to anticipate "average" weather impacts, how is this documented? One clean method is to assign weather-sensitive activities in the project CPM schedule to a calendar in which the "average" number of adverse weather days are incorporated as non-workdays. Contractors frequently indicate that "weekends" will be used as make-up days or that the anticipated weather impacts are incorporated into the planned durations. Both of these methods need more documentation as to the assumptions used to incorporate the "average" anticipated adverse weather.

## SO HOW DO YOU FIGURE OUT IF YOU DO HAVE A WEATHER DELAY?

Like most things in life, it depends. If you have "good" contract language, the determination of any excusable time extension for a weather impact is simply an exercise of the process that is clearly defined in the contract. In the cases of "bad" or "ugly" contract language, getting the contractor and the owner/design team on the same page *prior* to experiencing adverse weather is key.

The first step is to establish the baseline assumptions. How much adverse weather should have been anticipated? Are weather-related activities placed on a weather calendar that has a historic average number of days as non-workdays? Is weather assumed to be in the planned duration of an activity? Do all parties agree to a definition of dry-in for a building? MBP recommends having this discussion at the preconstruction meeting and all parties agree to the method of analysis upfront.

Once you understand any contract definitions and baseline assumptions, the next step is to quantify the impact. What source of data collection was used, NOAA, local weather station, or rain gauge on-site? Do you need to add in muck-out days following a rain event? Did the contractor make all reasonable accommodations to avoid such hindrances? This step will go beyond a straight mathematical comparison of planned versus actual precipitation days per month to evaluate impacts on the critical path of the project.

## LET'S "MUDDY" THE WATERS FOR A MINUTE

There are other weather impacts to consider depending on the stage of construction and project location such as high winds, temperature extremes, and humidity. The use of a crane, placing concrete, and paint activities can be affected by weather beyond precipitation. While these items would be addressed in "good" contract language, in other cases, MBP again recommends early discussion regarding these possible impacts and how any alleged impacts will be assessed.

## RECOMMENDATIONS

So, how do you avoid all this confusion? MBP offers the following recommendations regarding adverse weather impacts:

- Provide clear contract language defining all aspects of potential adverse weather impacts – what constitutes adverse weather and how is impact determined.
- Early project discussions – do not wait until the contractor submits a time extension request. In the preconstruction meeting, or a special meeting focused solely on this topic, discuss, gain consent from all parties, and document for future reference.
- Each project is unique – make sure the definitions and applications are tailored to the requirements of a specific project; remember non-precipitation impacts.

Learn about MBP's program and construction management services or contact us to see how we can help you avoid issues regarding weather delays.

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