

Extension of Time For Material Shortages

When a Supply Problem Arises, Make Your Claim for Extension Promptly

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Generally, the American Institute of Architects (AIA) standard contract clauses and government contracts seem to permit an excusable delay and allow for extension of time when a subcontractor cannot obtain materials because of short supply.

Article 8.3.1 of the AIA's General Conditions of the Contract for Construction (April 1970 edition) provides:

If the Contractor is delayed at any time in the progress of the Work . . . by labor disputes, fire, unusual delay in transportation or any causes beyond the Contractor's control . . . or by any cause which the Architect determines may justify the delay, then the Contract Time shall be extended by Change Order for such reasonable time as the Architect may determine.

The AIA's General Conditions are incorporated by reference into

the AIA's standard subcontract so that Article 8.3.1 would apply to the subcontractor as well. The clause is broadly enough stated that material shortages could be an excusable delay.

There is some doubt about whether the failure of a manufacturer to produce goods on time is an excusable delay since the subcontractor could be held to the duty of having found reliable suppliers before entering into a contract with the general contractor.

The Board of Directors of the American Institute of Architects has declared as policy to its members that material and equipment delays should be considered as a basis of excusable delay and passed the following resolution on May 17, 1974:

Completion dates should be established based on delivery time of major items needed in the construction process. If liquidated damages are a contract consideration, bona fide delays in manufacturing schedules or shipment should be considered as warranting an extension of time.

Article 8.3.2 of the AIA's General Conditions establishes the procedure for making a claim for extension of the contract time and provides:

All claims for extension of time shall be made in writing to the Architect no more than twenty days after the occurrence of the delay; otherwise they shall be waived. In the case of a continuing cause of delay only one claim is necessary.

So, it would be wise for the subcontractor to make a claim for extending the contract within the twenty day period and preferably as soon as possible after the supply problem arises.

The general rule in government contracts is that a contractor is not in default where his failure to perform his obligations is due to causes beyond his control or without his fault or negligence.

The standard "Default" clause excuses failure to perform on time for a whole catalogue of reasons. Severe material shortages caused by a foreign government's oil embargo, a world-wide shortage, and government manipulation of the economy may fit within the spirit of excuses.

If you are faced with a material shortage on a federal government job which prevents you from completing your work, you should request and obtain an extension of time for the period of the delay from the Contracting Officer. This is based upon Standard Form 23-A; General Provisions, Article 5(d) which provides:

The Contractor's right to proceed shall not be so terminated nor the Contractor charged with resulting damage if:

(1) the delay in the completion of work arises from unforeseeable causes beyond the control and without the fault or negligence of the Contractor, including but not restricted to . . . the delays of subcontractors or suppliers arising from unforeseeable causes beyond the control and without the fault or negligence of both the

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Contractor and subcontractors or suppliers...

The Contracting Officer shall ascertain the facts and the extent of the delay and extend the time for completing the work when, in his judgment, the findings of fact justify such an extension . . .

A notice of delay is required to be filed with the Contracting Officer within ten (10) days of the commencement of the delay, but even if you are outside this time limit,

file a notice since there are certain exceptions to this requirement.

Substantial compliance with the requirement of timely written notice, such as by informal communication of some information pertaining to the delay and the reasons for it, has been held by courts to be sufficient so long as there was some written communication.

Also, since the notice is for the benefit of the General Contractor or Owner, if they have actual knowledge of the delay, the failure to give notice may be excused or waived. The same may be true if the General Contractor or Owner is found not to have been prejudiced by failure to give timely notice.

However, a subcontractor should be cautioned that the "default" clauses in the government's standard construction contracts specifically provide also that a general contractor's failure to perform due to the default of a subcontractor is only excusable if both the general contractor and subcontractor are free from fault. Applying this concept to the subcontractor-supplier level, a subcontractor would be held liable for a default due to supply problems unless both the subcontractor and supplier were free from fault.

Board of Contract Appeal's decisions would also indicate that the subcontractor may still be liable even if the supplier was not negligent in his delay or failure to manufacture if the materials or equipment could have been obtained from another source.

In a legal proceeding on a government contract, the burden of proof would be on the subcontractor to demonstrate that neither he nor his supplier is at fault in the material unavailability and that the materials could not be obtained from another source.

Extensions of time for material shortages or failure of a manufacturer to produce on time will have to be negotiated for under existing contracts, but additional protective language should be written into future contracts to save the subcontractor the added expense of liquidated or delay damages if he is delayed in his performance due to material or equipment shortages.