When Material Availability is a Major Problem,
Contractual Relief Does Exists

In Time For Material Shortages

Generally, the American Institute of Architects standard contract clauses and government contracts seem to permit an excusable delay and allow for extension of time when a contractor cannot obtain materials because of short supply. Article 8.3.1 of the AIA’s General Conditions of the Contract for Construction Document A201 (1976 ed.) provides:

*If the Contractor is delayed at any time in the progress of the Work . . . by labor disputes, fire, unusual delay in transportation, adverse weather conditions not reasonably anticipatable, unavoidable casualties, or any causes beyond the Contractor’s control . . . or by any other 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.* (Italics added).

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 sub contractor as well.

The preceding excusable delay clause is stated broadly enough so that material shortages could be considered an excusable delay. There is some doubt about whether the failure of a manufacturer to produce goods on time is an excusable delay because the contractor could be held to the duty of having found reliable suppliers before entering into a contract.

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

*Any claim for extension of time shall be made in writing to the Architect not more than twenty days after the commencement of the delay; otherwise it shall be waived. In the case of a continuing delay only one claim is necessary. The Contractor shall provide an estimate of the probable effect of such delay on the progress of the Work.*

So, it would be wise for the contractor to make a claim for extending the contract within the 20-day period and preferably as soon as possible after the supply problem arises.

In government contracts the general rule 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 catalog of reasons. Severe material shortages caused by a foreign government’s oil embargo, a worldwide shortage, and government manipulation of the economy may fit within the spirit of the clause.

If a contractor is faced with a material shortage on a federal government job which prevents him from completing his work, he 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 S(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 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 an extension

A notice of delay is required to be filed with the contracting officer within 10 days of the commencement of the delay; but even if the contractor is outside this time limit, he should file a notice because there are certain exceptions to this requirement of timely written notice, such as informal communication of some information pertaining to the delay and the reasons for it, which have 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 that a general contractor’s failure to perform due to the default of a subcontractor is excusable only if both the general contractor and subcontractor are free from fault. Applying this concept to the subcon-
tractor-supplier level, a subcontractor may 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 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.

Right To Substitute Materials

The right to substitute materials can be used to alleviate the possible price instability on materials or equipment originally specified. If a contractor cannot substitute materials or equipment in order to complete the job on time, he may be stuck with added expense and delays. Therefore, contractors should include provisions giving themselves a right to substitute materials and to be reimbursed for any additional expenses such substitution involves.

If the standard forms of the American Institute of Architects are being used, the contractor should be sure that the Supplementary Conditions of the Contract for Construction include Article 16.1 of the A201 Supplementary Conditions (August 1972 ed.) or equivalent language which provides for substitution of materials and equipment:

16.1.1 Whenever a material, article or piece of equipment is identified on the Drawings or in the Specifications by reference to manufacturers’ or vendors’ names, trade names, catalog numbers, or the like, it is so identified for the purpose of establishing a standard and any material, article, or piece of equipment of other manufacturers or vendors which will perform adequately the duties imposed by the general design will be considered equally acceptable provided the material, article, or piece of equipment so proposed is, in the opinion of the Architect, of equal substance, appearance and function. It shall not be purchased or installed by the Contractor without the Architect’s written approval.

(Editor’s Notes: Not only is product pricing a serious problem, but simply getting materials in quantity and on time plagues contractor planning. Here are some of the legal aspects of the problem.)