Foreseeable Delays

by Quenda Behler Story

Schedules are tight, but the end is near. Your project looks like it will be completed at the end of the month. Being on schedule makes you happy because there is a penalty of $200 a day if you miss the completion date. But, all of a sudden, 20 inches of snow falls on the job site, and shuts the job down for the rest of the month.

You are now up against what is known as a liquidated damages clause. You can't finish on time because of the snow. Are you obligated to pay that $200 a day?

Exceptions to the Rule

The basic legal rule is that when you made your bid and signed your contract, you accepted the risk that things might not go according to your plan. So, yes, you are stuck with the penalty as outlined in the liquidated damages clause. That is, unless the delay was caused by exceptions to that rule.

There are several exceptions you might use to escape paying the penalty, including an owner-caused delay, but the one I'm writing about in this column involves the exception made for things that are beyond anybody's control, which aren't anybody's fault, and are things you couldn't have foreseen when you were negotiating your contract — things like fires, floods, tornadoes, or maybe that 20 inches of snow.

The legal theory behind this is that when you agreed to a certain completion date, you also agreed to assume responsibility for delays that were foreseeable at the time the contract was signed. You did not agree to assume risks for things you couldn't have anticipated at that time. Bad weather is a legitimate exception when it is extremely bad and extremely unforeseeable.

Reasonably Foreseeable

I don't mean that you should have consulted a crystal ball before signing and tried to guess at what the heavens held in store for you. What I do mean is that if you, as a reasonable person, had asked yourself in advance if snow could interrupt your February schedule, you should have answered yes. Here in Michigan a snowstorm in February that dumps 20 inches on you is not an unusual event. It doesn't happen every day, but it does happen, and would therefore be foreseeable.

But suppose, instead of coming in February, that 20 inches came in the last week of June. How foreseeable is that?

Court decision. I recently read a lawsuit over delays caused by heavy rains that lasted nonstop for two weeks and all but washed the job site away. Is that kind of rain foreseeable? My first answer would have been no, but in that particular lawsuit, the answer turned out to be yes. The property owner's lawyer brought in weather records for the previous ten years, and proved that the area had this kind of weather before, albeit once ten years before. Close enough, ruled the court; the contractor should have seen it coming.

Realistic Amounts

So there you are with your completion date buried in the snow. The property owner now has a counterclaim against your contract amounts in the form of liquidated damages, which he intends to deduct from what he owes you.

Liquidated damage clauses are enforceable as long as the dollar amount represents an honest effort to guess in advance what the delay will actually cost the property owner. If it's not realistic in assessing the true damages any delay would cause, then the law considers it a penalty clause, and penalty clauses are not enforceable in most states.

No clause. Let's suppose there wasn't a liquidated damages clause in the contract, or that it wasn't enforceable for some reason. Maybe the court said it was really a penalty clause instead of a liquidated damages clause and wasn't enforceable. You just have a completion date that you can't meet because of that February snowfall you should have anticipated. What sort of liability does the contractor face then?

In this example, the contractor would be responsible for the costs of catching up, such as paying for additional personnel and more overtime. The contractor would also be responsible for the actual damages the delay caused the property owner. However, in a situation like this, if there were no actual damages to the owner, there would be no additional liability for the contractor — a no-harm, no-foul kind of rule.

But had that snowfall occurred in June, it would be considered extreme weather and therefore unforeseeable. If the weather event meets this standard, the contractor should be off the hook for those kinds of damages. This also means that the contractor should, in most cases, be able to pass along the costs of the delay. Think of it as a weather-induced change order.

It Works Both Ways

The no-harm, no-foul rule works in the opposite direction, too. If you were able to overcome the weather disaster without suffering any actual damages due to the delay, you are not entitled to recover anything yourself. Think of it working the way fire insurance policies work. If you put the fire out before it caused any damage, don't hold your breath waiting for a check from the insurance company.

The legal excuse of extreme and unforeseeable weather also entitles you to a time extension, if you need it. The amount of time extension depends on what's reasonably necessary to bring the job up to date. Don't forget that you can get catastrophic insurance to protect you from these disasters. Also remember that these are broad rules, and your particular situation may not fit exactly, or you may be in a state with slightly different interpretations. So when the big snowstorm hits, clarify your situation with your local attorney. 

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