



Technical

The Cold War : JCT and Adverse Weather Conditions

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1. Ramskill Martin's previous article "*The Cold War: NEC and Adverse Weather Conditions*" explained the NEC's strict contractual rules for assessing when adverse weather is a Compensation Event. The article explained the 2 stage process:
 - Calculating if there is a Compensation Event.
 - Assessing the Compensation Event.
2. This article will explain the equivalent steps in JCT contracts and describes how an assessment under the JCT contracts is much more subjective.

For ease of reference when referring to Contractor, the principles equally apply to a Sub-contractor.

Is it a Relevant Event?

3. Under JCT contracts additional time is only allowed for Relevant Events. In the Standard Building Contract 2011 the Relevant Events are listed at clause 2.29. Included in this list is the Relevant Event for "*Exceptionally adverse weather conditions*" (clause 2.29.9).
4. The meaning of "*exceptionally adverse*" is not defined in the Contract, there is no explanation in the guidance notes and there is little

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judicial interpretation or authority. Often, reference is made to standard text books.

5. It is only the “*exceptionally adverse weather*” description that is included as a Relevant Event. The Contractor may wish to make allowance in its Contract sum and programme for “*normal*” adverse weather. There will be no entitlement to additional time for weather that is not exceptional.
6. Commentators have made various suggestions about the meaning of “*exceptionally adverse*”. It seems widely accepted that the weather encountered must be exceptional for that time of year or location. Some advocate using the same average 1 in 10 year event criteria that can be found in NEC contracts.
7. Whatever the meaning, clause 2.28.1 describes the Architect’s/Contract Administrator’s obligation to assess and award an extension of time as he “*estimates to be fair and reasonable*”. This means that it will be for the Contractor to convince or persuade the Architect/Contract Administrator that the weather encountered is “*exceptionally adverse*”.

Is it a Relevant Matter?

8. No.
9. Loss and Expense is only paid for Relevant Matters that materially affect the progress of the works. The list of Relevant Matters (clause 4.24) does not include “*exceptionally adverse weather*” or any other weather conditions. This means that the Contractor is not entitled to any additional payments for the prolongation caused by exceptionally adverse weather. The principle is that “*the costs lie where they fall*”.
10. The risk for adverse weather is shared between the Contractor and the Employer. The Contractor is at risk for the increased costs associated with being on site for an increased period of time. The Employer, however, is not entitled to deduct liquidated damages to compensate it for the late completion of the project. This is why adverse weather is sometimes referred to as a “*Neutral Event*”.

Notices and Demonstrating the Effect of the Relevant Event

11. The Contractor should notify the Architect/Contract Administrator when the progress of the Works is being or is likely to be delayed. The notice should give the material circumstances and identify each event which is a cause of delay (clause 2.27.1).

12. The Contractor should also notify the Architect/Contract Administrator of the likely effect of the delay to the completion date (clause 2.27.2).
13. The Contractor should remember to give notice of any updates and/or any changes and provide information reasonably required (clause 2.27.3).

What Happens in Practice?

14. Frequently, in the past anyway, Contractors were able to submit requests for extensions of time because of exceptionally adverse weather with little evidence to support their claim. Architects/Contract Administrators would give generous extensions of time under the guise of “*exceptionally adverse weather*” and in the process “*wrap up*” the delays that had been caused by the Client or more likely the Architect/Contract Administrator themselves, for example, variations that substantially increased the amount of work required and the late provision of design information. As a result, the Clients may have avoided paying any, or substantially reduced, the amount of loss and expense that it would have to pay to the Contractor. This has provided a convenient and commercially effective way for Architects/Contract Administrators to resolve and horse-trade without resorting to more sophisticated analysis or to more formal methods of ADR (alternative dispute resolution) such as Adjudication or Mediation.
15. In the present market, it is most likely that the Contractor will need to present its position more robustly and must provide evidence that the weather was exceptionally adverse and that it has caused delays, evidenced with impacted programme submissions.

How to Demonstrate that it was Exceptionally Adverse and Therefore a Relevant Event

16. It may be necessary for the Contractor to demonstrate, for example with historical weather records, that the weather encountered was exceptional.
17. How far back these records should go is debated; many commentators suggest that looking back over the past 10 years is sufficient, others say that a longer period should be used.
18. Ramskill Martin recently prepared a notification of delays and a request for an extension of time on behalf of a Client for a project where delays had been caused mostly by strong winds. Several different types of

crane were involved on the project including tower, mobile and crawler cranes each of which could operate at different wind speeds.

19. A detailed analysis was undertaken to establish the Sub-contractor's entitlement for additional time.

How to demonstrate the effect

20. It will be necessary to demonstrate that the adverse weather has caused a delay. This will almost invariably involve using programmes or schedules and some form of delay analysis. The type of analysis undertaken will depend on the availability of information and records. It is important for good records to be kept, otherwise it will be more difficult to demonstrate the effect of the adverse weather.
21. In the example of the crane downtime, which is described in the section above, the effect of the crane downtime was demonstrated graphically using programmes supported by a narrative and by contemporaneous records.

Conclusions

22. The Contractor may wish to make allowance in its Contract sum and programme for “*normal*” adverse weather. Contractors should take care with how the allowance for “*normal*” adverse weather is presented on its programmes. Too often, especially after delays are experienced on the site, the Contractor will issue a programme that actually weakens its own position because of the way it is presented.
23. **Here are some practical tips when dealing with Adverse Weather Conditions under the JCT Form of Contracts.**
 - Present your programme in a way that does not weaken your position.
 - Prepare notifications of delay and requests for an extension of time in accordance with the Contract and in as much detail as possible and provide updates on a regular basis.
 - Provide revised programmes that illustrate the impact of the delays being notified.
 - Maximise the entitlement of your extension of time claim by properly demonstrating the causative link.

- Keep good records for evidential purposes to enable you to demonstrate all that you are entitled to under the Contract Terms and Conditions.
24. If you require assistance with any of the above issues, contact Ramskill Martin at any of our offices detailed below.

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