



Technical

The Cold War: Winter Working

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What is Winter Working?

1. Winter working is often used to describe the effects when delays cause a project to be pushed from summer months into winter months.
2. If the winter weather encountered is worse and the working conditions are more difficult than those in the summer months, when the project was planned to be carried out, then it is likely that the knock-on effect will be to extend the overall period of delay.
3. In other words, the earlier delays cause the project to be pushed into a period of more difficult conditions where further delay occurs.
4. In these circumstances the Contractor or Sub-Contractor will probably have incurred additional expense and be exposed to liquidated damages.
5. If the project is under a JCT Design & Build 2016 Contract the Employer's Agent is likely to point at the Contract and say that the weather encountered is not exceptionally adverse, meaning there is no entitlement to additional time or money. Perhaps, if the weather is very bad, they may award an extension of time but not loss and expense.
6. If it is an NEC3/4 Contract the Project Manager may say that the weather is not worse than the average 1 in 10 year values in the Contract Data so there is no Compensation Event.

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7. Under a GC Works contract, where the Contractor takes all of the risk for bad weather, then the Architect/Contract Administrator is likely to take an even stauncher position.
8. So, who is right. Is there any entitlement to additional time or money?

Does Winter Working Give Rise to any Entitlement?

9. Over the years some of the disputes relating to the shift of the project into winter working have progressed to the courts where Judges have decided the issue.
10. One very old case is *Bush v Whitehaven Trustees (1883)* in which work was shifted from summer to winter because of delays caused by the Employer. In the winter months the working conditions were more difficult, and wages were higher. The Contractor was awarded payment on a quantum meruit basis, the Contractor being paid a reasonable amount for the work done. This was a favourable result for the Contractor.
11. In the aptly named *Fairweather & Co Ltd v London Borough of Wandsworth* the Employer again caused delays that shifted the project into winter and bad weather was encountered. The Contractor was found to be entitled to an extension of time and to loss and expense.
12. If the Employer has caused a delay, then the Contractor could well be entitled to additional time and money. This, however, always depends on the terms of the contract and the specific facts.
13. When the Contractor entered into the contract with the Employer (for example under a JCT Design & Build 2016 form of contract) it accepted the risk for all weather that was “normal” adverse weather; that is anything which is not exceptional. Arguably, the Contractor only accepted the risk of this “normal” adverse weather for the period when the work was planned to be carried out. If the Employer causes a delay that extends the period when the work is actually carried out, then the Contractor’s exposure to the risk of “normal” adverse weather is increased. The Contractor could be entitled to additional time and money for delays caused by “normal adverse weather” that occurs during any extended period of the works.
14. Of course, it could be the Contractor that has caused delays which have shifted the project into winter working.
15. In *Balfour Beatty v Chestermount* the Judge said in relation to a Relevant Event like a storm/flood causing delay, and if an initial delay giving rise to this Relevant Event was caused by the Contractor, then in

that case it was hard to see that it would be fair and reasonable to award an extension of time for that Relevant Event.

16. In practice, establishing causation is rarely straightforward. Especially when there is a series of delays, some of which have been caused by the Contractor and some by the Employer. Establishing which of these delays actually caused the shift into winter working and assessing the “*knock on effect*” of each individual delay, if this is required, can be further complicated by issues of concurrency.

The Difficulties of Claiming for Winter Working

17. In 2010 Costain tried to argue in the courts that it was entitled to additional time because of a shift into winter working (*Costain Ltd v Charles Haswell & Partners*). Costain said that delays caused by the Employer meant that external pipework, which was planned to be installed in the summer, could not be installed until October and November and that this shift into winter working resulted in the works taking 1.33 times longer to carry out because it was carried out during the winter.
18. The Judge rejected all of Costain’s claim for additional time for winter working because the claim was not supported by hard facts and figures.
19. The Judge said:

“There can be no presumption that it will be generally worse in October and November than in any other month.”

20. A proper assessment of the cause and effect of a claim is needed.

Likely Costs of Winter Working and Mitigation

21. If the shift into winter working further extends the overall period and time spent on site, then the Contractor/Sub-Contractor will incur the usual prolongation costs.
22. There will usually be an obligation on the Contractor/Sub-Contractor to mitigate the delay and there will be costs associated with this mitigation which could include:
 - • Protective measures such as weather proofing.
 - • Heaters to dry out the building.

- • Additives so that concrete and mortars can be used at lower temperatures.
 - • Additional site lighting because of the reduced hours of daylight.
 - • Equipment and labour for clearing snow and ice.
23. Some forms of Contract exclude entitlement for the costs associated with any acceleration of the works. The wording of each Contract will need to be reviewed.

Conclusions

24. From a practical point of view, it is important for Contractors and Sub Contractors to properly assess and present any claim for winter working and demonstrate the causal link between cause and effect.
25. **Here are some practical tips when dealing with claims for winter working:**
- Demonstrate that the winter weather was/is expected to be worse than would otherwise have been encountered.
 - Check whether the Contract allows you to claim for the cost of taking mitigating action.
 - 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.
26. If you require assistance with any of the above issues, contact Ramskill Martin at any of our offices detailed below.

Note: This article is based on the author's own experience.

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