

Alternative Delay-Based Entitlement Theories to the Government Delay of Work Clause

By W. BARRON A. AVERY



Contractors are frequently delayed by government action or inaction, and contractors frequently turn to the Government Delay of Work clause, Federal Acquisition Regulation (FAR) 52.242-17, as a means of recovering the costs incurred from government-caused delay. The Government

Delay of Work clause, however, is an arguably inflexible contract provision that can hinder contractors' ability to recover delay-related costs. Notice requirements, the exclusion of profit from any recovery, and the otherwise narrow application of the clause can prevent contractors from recouping all their costs from government delay. Therefore, an alternative basis of recovery to the Government Delay of Work clause can provide substantial value to contractors.

This article analyzes two alternative breach of contract theories that contractors can pursue: Recovery under a "cardinal delay" theory and recovery under a "partial remedy" theory. These theories are particularly attractive, as they provide an exception to the general rule against breach of contract actions when a remedy-granting clause provides an avenue of relief, such as that provided by the Government Delay of Work clause. Set forth below is an analysis of these two alternative theories, preceded by a short analysis of the general rule regarding breach of contract actions and their relation to remedy-granting clauses.

The General Rule

The general, well-established rule is that a contractor cannot maintain a breach of contract claim for government-caused delay when contractual relief is otherwise available.¹ This rule emanates from the principle that a contractor must exhaust its administrative contractual remedies if a contract provides relief for a particular dispute.² Accordingly, for those contracts that contain the Government Delay of Work clause,³ breach claims for government delay are arguably precluded, as the clause provides the mechanism for contractual relief arising from a government-caused delay of contract performance.⁴

The government's ability to bar a breach claim is no small matter, as a breach of contract can result in the recovery of profit, while the Government Delay of Work

clause specifically denies such recovery.⁵ Moreover, the government's ability to bar breach claims is particularly troublesome in those situations in which breach is a more attractive theory of entitlement than one under the Government Delay of Work clause.⁶ Notwithstanding this general rule against breach claims for government delay, however, the boards of contract appeals have developed two exceptions that allow recovery under a breach theory when the government delays a contractor's performance.⁷

Cardinal Delay

One method contractors can use to overcome the Government Delay of Work clause is through the concept of "cardinal delay," in which the government's delay was so "profound" that it should be deemed outside the scope of the contract and, therefore, not remediable under the contract's clauses.⁸ In other words, the contractor can argue that the delay was so significant that the contract (including the contract's Government Delay of Work clause) no longer applies. This breach-based approach was first acknowledged by the Armed Services Board of Contract Appeals in *Godwin Equipment, Inc.*,⁹ and then tentatively embraced in *Selpa Construction & Rental Corp.*¹⁰ by the Postal Service Board of Contract Appeals.

In *Godwin Equipment, Inc.*, the board embraced the concept of cardinal delay, explaining that "in some unusual cases, the breach has been so profound that it was deemed to be outside the scope of the contract and, therefore, not remediable under the contract clauses."¹¹ The board then noted that while this principle generally applied to cardinal changes, "the same logic would seem to dictate that government delays of like magnitude should be treated in the same fashion."¹² Thus, *Goodwin Equipment, Inc.*, clearly embraced the concept of cardinal delay; however, the board failed to establish what magnitude of delay is necessary to invoke the cardinal delay concept.¹³

More recently, and in the only decision since *Goodwin Equipment, Inc.*, in which a court or board has applied the cardinal delay theory, the board in *Selpa Construction & Rental Corp.* analyzed whether a particular delay was of a sufficient magnitude to invoke the cardinal delay concept. In *Selpa Construction & Rental Corp.*, a contractor appealed the termination for default of a contract to make improvements to a building to be used as a post office.¹⁴ Extensive delays caused by defective plans, differing site conditions, and other changes led to a bilateral modification of the contract, including the extension of deadlines.¹⁵ At the end of these extensions, the government terminated the contract because work remained unfinished.¹⁶ The contractor argued that cardinal delay should excuse its performance

W. Barron A. Avery is an associate in the Government Contracts Practice Group at Wiley Rein, LLP.

and prevent termination of the contract for default. “Assuming, without deciding, the viability of [the cardinal delay theory],” the board found that a delay of 138 days did not constitute cardinal delay.¹⁸ Therefore, although the board failed to establish a clear standard, the board at least indicated that a delay of 138 days under the circumstances was insufficient to invoke the cardinal delay concept.

Following the precedent provided in *Godwin Equipment, Inc.*, and *Selpa Construction & Rental Corp.*, contractors pursuing delay-based claims can arguably proceed under a breach theory rather than under a contract’s Government Delay of Work clause. Although the standard by which a cardinal delay can be judged is far from developed—at least as compared to the more developed case law under the cardinal change doctrine—contractors nevertheless have a viable option to pursue a breach claim. Put simply, delays that are so profound as to be of a magnitude of a cardinal change lend themselves to cardinal delay, meaning that a breach claim can proceed even in the face of the Government Delay of Work clause.

Partial Remedy

Yet another means for contractors to attempt to overcome the Government Delay of Work clause and maintain a breach claim for government-caused delay is through the partial remedy line of authority, in which boards allow recovery under a breach theory when a contract clause could provide only a “partial remedy.”¹⁹ This line of authority recognizes that, although a remedy-granting clause may provide some relief to a contractor, such clauses cannot always fully satisfy a contractor’s injury.²⁰ Therefore, if a contractor

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can establish that the Government Delay of Work clause cannot provide full relief, the contractor can maintain a breach claim for certain costs.²¹

This partial remedy concept is most clearly illustrated in *Marine Hydraulics, Inc.*, in which the board stated that a contractor could recover indirect “cross-contractual costs”²² from government-caused delay that were unrecoverable under the Government Delay of Work clause.²³ Recovery under the Government Delay of Work clause was arguably unallowable in that case, as the clause only allowed for an equitable adjustment stemming from an increase in performance of the contract in which the government delayed performance,²⁴ and the increased costs sought by the contractor arose in a separate, otherwise unrelated contract.²⁵ Because these costs could not be recovered under the contract’s terms, and because the Government Delay of Work clause did not specifically prohibit the

type of cross-contractual costs sought, the board allowed the contractor’s breach of contract claim to continue.²⁶

As demonstrated in *Marine Hydraulics, Inc.*, however, the circumstances in which a contractor can pursue this partial remedy theory are quite limited, as the costs sought must fall outside of what can be recovered under the Government Delay of Work clause.²⁷ Although the boards’ decisions are unclear, contractors may also have to establish that at least some delay-related costs are recoverable under the Government Delay of Work clause.²⁸ This unique set of circumstances means that the partial remedy theory is unlikely to be of use to most contractors in most situations; however, contractors should still be aware of the potential entitlement theory. In certain situations, the partial remedy theory will provide a welcomed avenue of relief from the strict requirements of the Government Delay of Work clause.

Conclusion

Contractors seeking to recover delay-related costs are not entirely limited to recovery under the Government Delay of Work clause. Cardinal delay offers the contractor an alternative entitlement theory, so long as the contractor can show that the government’s delay was so profound that it rendered the contract inoperable. The partial remedy line of authority provides yet another alternative to the Government Delay of Work clause; however, the circumstances in which a contractor seeks costs that cannot be recovered under the clause means that the theory is probably of limited use. Indeed, the limited circumstances in which a contractor can show a cardinal delay means that the cardinal delay theory is also of limited use. Nevertheless, unique situations will almost certainly arise where these theories will provide useful tools for contractors seeking to recover costs arising from the government’s delay of performance. PL

Endnotes

1. See, e.g., *Freedom NY, Inc.*, ASBCA No. 43965, 01-2 BCA ¶ 31,585 (“A contractor cannot maintain a breach claim for Government delay when relief is available under the contract.”), *aff’d in part, rev’d in part and remanded*, 329 F.3d 1320 (Fed. Cir. 2003); see also *Mega Constr. Co. v. United States*, 29 Fed. Cl. 396, 415 (1993) (“Plaintiff cannot give life to breach of contract claim by merely relabeling claims for which relief is available under the contract.”); *Cleereman Forest Prods.*, AGBCA No. 2000-101-1, 02-1 BCA ¶ 31,664 (Houry, J. concurring in part, dissenting in part) (“[R]elief on the basis of breach of contract is not available where a remedy granting clause exists.”); *Triax Pac.*, ASBCA No. 36353, 91-2 BCA ¶ 23,724 (holding that a delay in the issuance of a notice to proceed was not a breach because damages were remediable under the contract’s “Suspension of Work” clause), *aff’d*, 958 F.2d 351 (Fed. Cir. 1992).

2. See, e.g., *Paragon Energy Corp. v. United States*, 229 Ct. Cl. 524, 1981 WL 22045, at *1 (1981) (“It has long been settled that if a Government contract provides relief for a particular dispute, the standard disputes clause requires the contractor to present the claim administratively before suit can be brought.”).

3. For purposes of analysis, this article assumes that the clause is included in contracts in which delay-related costs are sought. Indeed, the Government Delay of Work clause is contained in many fixed-price contracts. The clause is mandatory in fixed-price contracts for supplies other than commercial or modified-commercial items. FAR 42.1305. The clause is optional for fixed-price contracts for services or

for supplies that are commercial or modified-commercial items. *Id.*

4. See, e.g., *Freedom NY, Inc.*, 01-2 BCA ¶ 31585.

5. See *Anchor Savings Bank v. United States*, 597 F.3d 1356 (Fed. Cl. 2010); FAR 52.242-17(a) (“[A]n adjustment (excluding profit) shall be made for any increase in the cost of performance of this contract caused by the delay or interruption.” (emphasis added)).

6. The Government Delay of Work clause may be a disfavored theory of entitlement given the arguably inflexible requirements of the clause. For example, the clause bars recovery when the contractor fails to provide adequate notice of an alleged government delay. See FAR 52.242-17(b) (“A claim under this clause shall not be allowed . . . for any costs incurred more than 20 days before the Contractor shall have notified the Contracting Officer in writing of the act or failure to act involved . . .”). Although such notice requirements can often be overcome, it is possible that a lack of notice may be so significant that a contractor is led to disfavor the Government Delay of Work clause as a viable theory of entitlement. See *Walsh/Davis Joint Venture v. General Services Administration*, CBCA No. 1460, 10-2 BCA ¶ 34,479 (noting that a constructive change claim can continue in the absence of notice so long as the government was not prejudiced by the lack of notice). As yet another example of the clause’s inflexibility, the Government Delay of Work clause only allows recovery for increased costs of performance of the contract in which the government causes the delay, meaning that the contractor cannot recover increased costs of performance incurred in unrelated contracts. See FAR 52.242-17(a) (“[A]n adjustment (excluding profit) shall be made for any increase in the cost of performance of this contract caused by the delay or interruption.” (emphasis added)); *Marine Hydraulics Int’l, Inc.*, ASBCA No. 46116, 94-3 BCA ¶¶ 27,057 (noting that the contractor could not recover under FAR 52.242-17 costs incurred due to government delay arising under a separate, unrelated contract). These “cross-contractual” costs are addressed below in the “Partial Remedy” section of this article.

7. See, e.g., *Selpa Constr. & Rental Corp.*, PSBCA No. 5039, 11-1 BCA ¶ 34,635 (addressing cardinal delay); *Marine Hydraulics, Inc.*, 94-3 BCA ¶ 27,057 (addressing the partial remedy line of authority).

8. See *Godwin Equip., Inc.*, ASBCA No. 51939, 01-1 BCA ¶ 31,221 (“[I]n some unusual cases, the breach has been so profound that it was deemed to be outside the scope of the contract, and, therefore, not remediable under the contract clauses.”); *Cleereman Forest Prods.*, 02-1 BCA ¶ 31,664 (Westbrook, J., concurring) (“The Government’s failure to commence performance at all . . . resulted in a claim far broader than one for improper delays in performing contract obligations.”); see also Ralph C. Nash & John Cibinic, *Cardinal Delays: Are There Such Things?*, 15 NASH & CIBINIC REP. ¶ 29 (June 2001) (analyzing cardinal delay as addressed in *Godwin Equipment, Inc.*, 01-1 BCA ¶ 31,221); ASBCA Adopts “Cardinal Delay” Rule, *Avoids Limitation on Delay Damages*, 43 GOV’T CONTRACTOR ¶ 15 (Jan. 10, 2001) (analyzing potential for cardinal delay claim).

9. *Godwin Equip., Inc.*, 01-1 BCA ¶ 31,221.

10. *Selpa Constr. & Rental Corp.*, 11-1 BCA ¶ 34,635.

11. See *Godwin Equip., Inc.*, 01-1 BCA ¶ 31,221.

12. See *id.* (emphasis added). The cardinal changes of “magnitude” noted in *Godwin Equipment, Inc.* related to “1,000 changes to a manufacturing contract,” a “100 percent increase in amount of earth moved,” and “reconstruction costing \$3.7 million.” See *id.* (citing *Air-A-Plane Corp. v. United States*, 408 F.2d 1030 (Ct. Cl. 1969), *Saddler v. United States*, 287 F.2d 411 (Ct. Cl. 1961), and *Edward R. Marden Corp.*, 442 F.2d 634 (Ct. Cl. 1971)). These and other decisions on cardinal change certainly provide some indication of what magnitude of delay would qualify as a cardinal delay. However, even though such examples are instructive, the facts presented in these cases apply more directly to changes and not to delay, limiting the precedential value of the examples for a cardinal delay argument.

13. See *Godwin Equip., Inc.*, 01-1 BCA ¶ 31,221. See *id.* (“[I]n some unusual cases, the breach has been so profound that it was deemed to be outside the scope of the contract, and, therefore, not remediable under the contract clauses.”); *Cleereman Forest Prods.*, 02-1

BCA ¶ 31,664 (Westbrook, J., concurring) (“The Government’s failure to commence performance at all . . . resulted in a claim far broader than one for improper delays in performing contract obligations.”); see also Ralph C. Nash & John Cibinic, *Cardinal Delays: Are There Such Things?*, 15 NASH & CIBINIC REP. ¶ 29 (June 2001) (analyzing cardinal delay as addressed in *Godwin Equipment, Inc.*, 01-1 BCA ¶ 31,221); ASBCA Adopts “Cardinal Delay” Rule, *Avoids Limitation on Delay Damages*, 43 GOV’T CONTRACTOR ¶ 15 (Jan. 10, 2001) (analyzing potential for cardinal delay claim).

14. See *Selpa Constr. & Rental Corp.*, 11-1 BCA ¶ 34,635.

15. See *id.*

16. See *id.*

17. See *id.*

18. *Selpa Constr. & Rental Corp.*, 11-1 BCA ¶ 34,635; see *id.* (stating in dicta that a delay of 138 days was not so “extensive or so unusual as to be unremediable under the contract and to implicate the theory of cardinal delay”).

19. See, e.g., *Cleereman Forest Prods.*, 02-1 BCA ¶ 31,664 (Westbrook, J., concurring) (“Where there is a remedy granting clause providing only a partial remedy, there is authority under various circumstances for a party to recover costs not payable under the contract, as a breach of the contract.”); see also PAE Int’l, ASBCA No. 45314, 98-1 BCA ¶ 29,347 (“[W]hen only partial relief is available under the contract . . . the remedies under the contract are not exclusive and the contractor may secure damages in breach of contract . . .”); *Maine Yankee Atomic Power Co. v. United States*, 225 F.3d 1336, 1342 (Fed. Cir. 2000) (“Our discussion of the limited relief available under the excusable delays provision also leads to the conclusion that ‘complete relief’ would not be available for [plaintiff] under that provision, so that [plaintiff] is not precluded from seeking judicial relief by its failure to invoke the contract’s disputes clause.”).

20. See *id.*

21. See *id.* As indicated below, not all costs are recoverable under such a theory. Because the Government Delay of Work clause precludes the recovery of profit, boards have also precluded the recovery of profit under the partial remedy theory. See *Marine Hydraulics Int’l, Inc.*, 94-3 BCA ¶ 27,057.

22. The “cross-contractual costs” sought in *Marine Hydraulics, Inc.* were costs that arose from the government’s delay on the contractor’s other, unrelated contracts. See *id.*

23. See *id.* Direct costs from the government-caused delay were presumably recoverable under the Government Delay of Work clause, although the board never addressed a claim for these direct costs. See *id.* The board only addressed the “cross-contractual-costs” claim, which was before the board on summary judgment. See *id.*

24. See *id.*; see also FAR 52-242-17(a) (“[A]n adjustment (excluding profit) shall be made for any increase in the cost of performance of this contract caused by the delay or interruption . . . shall be modified in writing accordingly.” (emphasis added)).

25. See *Marine Hydraulics Int’l, Inc.*, 94-3 BCA ¶ 27,057.

26. See *id.*

27. See *id.*

28. In the decisions in which the partial remedy concept is embraced, the boards do not expressly state that the contractor met the requirements of the Government Delay of Work clause and could have at least partially recovered its costs under that clause. The boards’ decisions appear to either take for granted entitlement under the Government Delay of Work clause or the parties do not dispute such entitlement. See *Marine Hydraulics Int’l, Inc.*, 94-3 BCA ¶ 27,057 (suggesting that analysis of the appellant’s entitlement for costs under the Government Delay of Work clause is necessary); see also *Cleereman Forest Prods.*, 02-1 BCA ¶ 31,664 (failing to address whether the appellant could make a partial recovery under the remedy-granting clause); PAE Int’l, 45314, 98-1 BCA ¶ 29,347 (failing to state whether the contractor could have recovered under a remedy-granting clause).