

## Steps For Government Contractors To Take After Hurricanes

By Jay DeVecchio and Lauren Horneffer

October 5, 2017, 12:04 PM EDT

The aftermath of a hurricane is a difficult time for many in the affected areas, and government contractors are no exception. Hurricanes Harvey and Irma caused terrible damage in Texas and Florida, claiming lives and extensively damaging property. The costs of these hurricanes are staggering. Recovery will be slow. For government contractors, the hurricanes resulted in, and will continue to cause, performance delays, increases in costs for materials and services, and material shortages and damage. The good news is that, in most cases, contractors will be entitled to contract schedule relief. The bad news is that contractors may not be entitled to additional compensation. Here is what you need to know.



Jay DeVecchio

### Time

Rebuilding and getting back into business are obviously the top priorities. But an essential part of getting back into business is taking the time now to figure out what the likely schedule impact of the hurricane or flooding will be going forward. This is because your schedule clocks are ticking; and no matter how sympathetic a contracting officer may be, the sooner a CO knows what the effect will be on deliveries, the sooner the CO can consider and accommodate a schedule extension.



Lauren Horneffer

To be sure, a hurricane almost certainly will be an “excusable delay.” As a practical matter, however, no delay is meaningfully “excusable” until your contract is modified to reflect a schedule extension. Nor is a particular amount of delay automatic; the time to which you might be entitled will depend on your circumstances and your CO’s discretion. If an extension is not granted, the burden is on the contractor to establish excusable delay to overcome a default termination or liquidated damages. These things do not get better with time.

Excusable delays are addressed in the Federal Acquisition Regulation’s Fixed-Price Default clause, 52.249-8(c), as well as in FAR 52.249-14 “Excusable Delays” for cost-type contracts. Both address the same circumstances that typically comprise causes “beyond the control and without the fault or negligence of the Contractor.” FAR 52.249-14(a), for example, provides:

- (a) Except for defaults of subcontractors at any tier, the Contractor shall not be in default because of any failure to perform this contract under its terms if the failure arises from causes beyond the control and without the fault or negligence of the Contractor. Examples of these causes are

(1) acts of God or of the public enemy; (2) acts of the government in either its sovereign or contractual capacity; (3) fires; (4) floods; (5) epidemics; (6) quarantine restrictions; (7) strikes; (8) freight embargoes; and (9) unusually severe weather. [Emphasis added.]

Category 4 and 5 hurricanes surely fit somewhere within this clause.

Occasionally, the government will assert successfully that bad weather does not qualify as unusually severe because the weather's severity was typical for an area. See, e.g., *Diversified Marine Tech Inc., DOTBCA 2455, 93-2 BCA ¶ 25,720 (1993)* (frequent rain and high humidity were foreseeable in the location, and therefore the contractor was not entitled to additional time); *Cape Ann Granite Co. v. United States, 100 Ct. Cl. 53, cert. denied, 321 U.S. 790 (1943)* (contractor was on notice of the harsh weather conditions, and although the weather was severe, it was not unusual). Although regrettable, one might encounter this position because both Florida and the Texas Gulf have a "hurricane season" during which hurricanes are foreseeable.

Hurricanes, however, are generally considered acts of God instead of unusually severe weather. *Trataros Construction Inc. v. General Services Administration, GSBGA No. 15081, 01-1 BCA ¶ 31310* (Hurricane Georges was an "act of God"); *Johnson Controls World Services Inc., ASBCA No. 49011, 96-1 BCA ¶ 28163* (Hurricane Hugo was an act of God). Therefore, a contractor does not need to prove the unusually severe quality of the hurricane. This seems an obvious point, although obvious things occasionally have to be proved to agencies. Nonetheless, one should expect the agencies to see reason. See *Hvac Const. Co. Inc. v. United States, 28 Fed. Cl. 690, 691 (1993)* (government granted a one month extension to the contractor as a result of Hurricane Hugo, which caused damage to the contractor's office and great personal loss to subcontractor employees). Contractors must still examine their contracts for counterintuitive provisions. Some contracts contain special clauses that shift the risk of almost all adverse weather to the contractor or that disallow an extension of time for adverse weather delays (or costs) unless the adverse days exceed a specified, anticipated quantity. See *Con-Seal Inc., ASBCA No. 41544, 97-1 BCA ¶ 28819 (1997)* (denying costs for hurricane preparation because the "storm protection" clause required the contractor to take precautions to minimize damage from gale force winds).

Being "excusable," however, is not the same as being "compensable." Contractors also have to make a clear connection between the hurricane's damage and the particular delay being claimed. That is, to make a case for excusable delay after a hurricane, the contractor should identify key work that affects the completion of the contract and show this "controlling work" was delayed by the weather. *Fraya S.E., ASBCA No. 52222, 02-2 BCA ¶ 31975 (2002)* (the contractor failed to show with precision how Hurricane Georges had excused the lack of progress on its contract, even though the hurricane blew off the roof of the contractor's offices and left them without power for two weeks, because even accounting for these delays the contractor was months behind in work). A failure to order supplies on time will preclude a finding of excusable delay, even if the delivery is delayed by the hurricane. *Dyno Group Inc., ASBCA No. 59074, 14-1 BCA ¶ 35575 (2014)* ("Had Dyno timely performed, it would have ordered the materials and received them before Hurricane Sandy occurred. Accordingly, Dyno has failed to show that its supplier's Hurricane Sandy delays constitute an excusable delay.").

Because the contractor must prove how the hurricane affected its productivity, contractors should — sooner rather than later — develop documentation establishing exactly what work cannot be accomplished timely because the roof is gone, the power is out, or the building is flooded.

## **Money**

Although contractors should receive extra time to complete a contract due to hurricanes, they may not be entitled to cost and price adjustments. Parties generally allocate the risk of loss during contract performance. For example, the government may assume the risk of loss or damage to government property, but this does not include the cost of retrieving the property following a hurricane. *Braswell Shipyards Inc.*, ASBCA No. 40610, 90-3 BCA ¶ 23167 (1990) (the cost of retrieving boats moved one mile by the hurricane was not assumed by the government in the “liability and insurance” clause and the contract did not otherwise assign to the government the risk of increased costs of performance caused by unusually severe weather). Therefore, contractors should examine their contracts to see what, if any, costs they may be entitled to recover following a hurricane. The cost risk of damage from hurricanes often is placed contractually on the contractor and not the government. The courts have addressed these claims in different contexts.

### ***Repairs***

A contractor that must redo work or repair damage sustained by a hurricane might not be reimbursed by the government if the contract does not expressly provide a remedy. *Richards & Assocs. v. United States*, 177 Ct. Cl. 1037, 1051 (1966) (contractor was not entitled to recover extra dredging expenses and other expenses incurred in connection with Hurricane Carla because the government’s payment obligations did not extend beyond those prescribed in the contract, regardless of the extraordinary difficulties faced by the contractor when completing the work); *DeRalco Inc.*, ASBCA No. 41063, 91-1 BCA ¶ 23576 (1990) (denying contractor’s claim for the cost of rebuilding a wall Hurricane Hugo damaged because the work had not yet been accepted by the government).

Construction contracts usually contain the “permits and responsibilities” clause, which states that a contractor shall be “responsible for all materials delivered and work performed until completion and acceptance of the entire work.” FAR 52.236-7. The Armed Services Board of Contract Appeals has interpreted this to mean that if the “work in process is damaged, the contractor’s responsibility is to restore it without compensation.” *Joseph Becks & Associates Inc.*, ASBCA No. 31126, 88-1 BCA ¶ 20428 *aff’d* 864 F.2d 150 (Fed. Cir. 1988) (damage from an electrical fire to the materials delivered and the work performed was the responsibility of the contractor).

### ***Changes***

Although contractors may struggle to receive price adjustments solely due to losses from a hurricane, they may be entitled to compensation based on the government’s actions in response to the hurricane. For example, contracting officers may direct contractors to perform additional or different work, entitling the contractor to an adjustment under the various “changes” clauses. See e.g., FAR 52.243-1. Contractors have to be careful, however, because in the upheaval following a hurricane, they may be given direction from government officials who lack the ability to bind the government. Only the contracting officer holds a warrant, and under the terms of the “changes” clauses, only the contracting officer is authorized to direct changes. This means contractors should be diligent and ensure the authority of the individual issuing a change order; and in all events — without exception — confirm with the CO in writing (email will do) any and all direction received from any government representative. You might be surprised by the CO’s disavowing those directions, something you want to learn sooner rather than later. Although emergency situations occasionally permit unauthorized government officials to bind the government, it is best to have the CO on record. Compare *Halvorson v. United States*, 126 F. Supp. 898 (E.D. Wash. 1954) (holding the government responsible when federal officials directed the contractor to remove snow from the interior of buildings under construction) with *Gardiner v. Virgin*

Islands Water & Power Authority, 145 F.3d 1440 (3d Cir. 1998) (refusing to find an emergency entitling the contractor to an implied-in-fact contract because the contractor delivered water for ten weeks and the emergency of the hurricane lasted only a few days).

Therefore, following a hurricane, contractors should be diligent in documenting any direction received from the government, assuring the CO's involvement, and tracking the impact on contract performance as well as the associated costs. The burden of proof is always on the contractor to prove entitlement to and the quantum of what it claims.

### ***Differing Site Conditions***

There is another, more attenuated, circumstance that warrants mentioning: Contractors who encounter poor site conditions following a hurricane likely will not be entitled to an equitable adjustment for a differing site condition. Kilgallon Construction Co., ASBCA No. 51601, 01-2 BCA ¶ 31,621 (2001) (acts of God, standing alone, do not constitute a differing site condition). The contractor must prove that the interaction of the severe weather or act of God with the pre-existing and unknown site condition produced unforeseeable consequences. Kilgallon, citing D.H. Dave and Gerben Contracting Co., ASBCA No. 6257, 1962 BCA ¶ 13493 (1962) (unknown, inadequately designed drainage system); Paccon Inc., ASBCA No. 7643, 1962 BCA ¶ 3546 (1962) (expected clay soils behaved erratically with an unexpected tendency to slide). In other words, if the site floods, a contractor will be entitled to time to wait for the water to recede, but it may not be entitled to an adjustment for differing site conditions unless it can prove the flooding exposed other unknown issues on the site.

### **Conclusion**

While getting back on their feet, contractors affected by Hurricanes Harvey and Irma cannot lose sight of the important tasks associated with preserving and pursuing their contractual rights. First and foremost, contractors should promptly identify, track, and document the particular effects of the hurricane on a contract's schedule and costs, while carefully reviewing their contracts for troublesome provisions like the "storm protection" clause. These storm-related schedule and cost effects should be raised promptly with the CO. Similarly, if a government representative directs or even asks for additional or changed work, this direction or suggestion by the government must be confirmed in writing with the CO. Then the costs associated with this directed change will be compensable because they are carefully tracked.

This sort of contract administration can be tedious, and is often a low priority amid the daunting tasks of recovery. But they are essential, and in the long run may prove as important as replacing that missing roof.

---

*W. Jay DeVecchio is a partner in the Washington, D.C., office of Morrison & Foerster LLP. Lauren J. Horneffer is an associate in the firm's Northern Virginia office.*

*The opinions expressed are those of the author(s) and do not necessarily reflect the views of the firm, its clients, or Portfolio Media Inc., or any of its or their respective affiliates. This article is for general information purposes and is not intended to be and should not be taken as legal advice.*