



W E D O T H E D E A L S

Contracts Unlimited

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## Excusable Delays

Welcome to our quarterly newsletter!! We hope the current information will help you successfully navigate the world of government contracts. Don't hesitate to call on us if you have any questions or need help with your individual contracts. That's what we do best!

When a company enters into a contract with the government, it is required to comply strictly with the terms and conditions of the contract. As with every rule, there is an exception called an excusable delay. An excusable delay is generally equivalent to an event of "Force Majeure" in commercial contracts. An authorized excusable delay serves to shield the contractor from adverse actions such as liquidated damages, default, and other damages.

A contractor is not empowered to define an excusable delay. The reasons for an excusable delay are found in the contract clauses (1). Such a delay must be beyond the (foreseeable) control of the contractor, or could not be prevented or overcome. In addition, it must have occurred without the contractor's fault or negligence. There are several enumerated causes of delay in the contract clause, and some rare, non-enumerated causes of delay such as impossibility of performance unknown to the contractor at the time of contract formation, or financial distress caused by the government.

The limitation or restraint on the use of excusable delay is intended to stress that the contractor is required to perform the contract that resulted from their proposal in strict compliance with those contract terms and conditions.

The issue of excusable delay was discussed in the opinion from the United States Civilian Board of Contract Appeals (the "CBCA" or the "Board") in the appeal of Silver Spring Citrus, Inc. ("SSCI") v. Department of Agriculture ("USDA") CBCA 1659, August 4, 2010.

In 2008, SSCI received seven separate contracts for canned fruit juice. The contracts contained a clause for liquidated damages generally for \$.15 per hundred weight per calendar day not to exceed 45 days of delay unless the delay was excusable under the excusable delay clause in the contract.

Subsequently, SSCI experienced sporadic problems with various equipment requiring extensive repairs and resulting in downtime. For these reasons, SSCI claimed excusable delay for their inability to make timely deliveries. The Contracting Officer rejected the SSCI excuses and assessed liquidated damages.

The Board had no sympathy for SSCI observing that "an excusable failure to deliver timely occurs when the failure is caused by an occurrence beyond the reasonable control of the contractor and without its fault or negligence." The CBCA then stated that "SSCI's delays were ascribed to equipment and mechanical malfunctions. Neither an equipment malfunction nor a mechanical malfunction is a valid excuse for a delay." The Board went on to explain that "the inability to make [timely deliveries] because of equipment and mechanical malfunction is not extraneous to the contract, and it is therefore not an excusable delay."

The moral of the story is a contractor must strictly comply with the terms and conditions of a contract.

In a given situation, an excusable delay may be possible if and only if the delay conforms to the acquisition regulation contract clauses. Contractor developed excuses will never be accepted by the government.

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1. FAR 52.249.14

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The foregoing is not a legal opinion or legal advice. Consult your attorney for legal assistance.

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