

DEEP DIVING INTO LA NINA: EVERYTHING YOU NEED TO KNOW

La Nina Mitigation Strategies

Introduction

As we enter another La Nina weather pattern over the upcoming festive period, contractors will be exposed to an increased risk of being unable to meet deadlines on projects.

Extension of Time ('EOT') clauses can provide a level of contractual protection for contractors, builders and their subcontractors against the time and cost risk associated with the impacts of severe weather patterns projected to batter the east coast of Australia.

To find out more about minimising the risk and the impacts of La Nina weather events, contact the team at Construction Legal.

Industry Climate

In 2022, the construction industry experienced significant disruption due to extreme weather. From January to March, inclement weather patterns caused chaos for businesses and consumers due to the NSW and Queensland flooding events. In addition, the turbulence brought on by the pandemic further threatened the economic viability of various industries as firms battled rising costs of materials, labour shortages, and prolonged delays to projects.

As the festive season approaches, we are reminded that the extreme weather events may return. It is projected that a third La Nina event, which is forecasted to remain until early 2023, will inflict a repeat of the wild weather experienced earlier this year.

Contact

Jessica Rippon, Principal Solicitor | ✉ jripton@constructionlegal.com.au
☎ +61 1300 543 910 | 🌐 www.constructionlegal.com.au

Tips for Contractors

Contract Drafting Stage

In order to safeguard against the risk of inclement weather, a contractor should implement clauses into contracts that prescribe:

- an “extreme weather event” or “inclement weather” as an Event of Delay;
- the “effects of any extreme weather” in the definitions; and
- a clear and descriptive definition of “extreme” i.e. wind speeds or rainfall exceeding a certain value, thunderstorms or flooding or a number of consecutive wet weather days.

If included, the clauses above may help contractors avoid disputes with the principal by setting out objective criteria to assess whether a weather event is ‘extreme’ or ‘inclement’.

These clauses should set out whether time and / or costs can be recovered because of the inclement weather.

Tender and Planning Stage

A contractor may take precautionary measures to adequately plan for unexpected inclement weather during the program development phase, including:

- the use of climatological data forecasting rainfall to be factored into the contingency plan as part of the program;
- the knowledge of extreme weather events to reduce risk and increase foreseeability in contracts and to provide certainty of projected cash flow, EOT claims, and project duration; and
- the preparation of daily job logs that document weather conditions to be used as evidence to lodge an EOT claim.

In this phase, it is encouraged that contractors be commercial and flexible in relation to the use of climatological data to ensure program construction timelines are forecasted realistically. A contractor should appreciate the unpredictability of weather patterns and ensure that unnecessary risks are vitiated while the remaining risks are fairly allocated between the parties. In addition, contractors should consider mitigation strategies prior to the commencement of a project in response to the latest weather advice.

Processing an EOT Claim

If inclement weather delays the progress of a project, ensure you follow the steps outlined in the contract to lodge a claim. A typical set of contractual requirements would require a contractor to:

- submit a notice of delay within a specified period;
- submit a written EOT claim within a specified period; and
- continue to submit an EOT claim for every specified period that the delay persists.

Contact

Jessica Rippon, Principal Solicitor | ✉ jripton@constructionlegal.com.au
☎ +61 1300 543 910 | 🌐 www.constructionlegal.com.au

A contractor may expose themselves to liquidated damages at the agreed rate in the contract if the delay is incorrectly lodged. In *Gaymark Investments Pty Ltd & Anor v Walter Construction Group Ltd* (1999) 16 BCL 449, it was held that an application lodged by Walter Construction (the contractor) after the specified time period was invalid and that Gaymark was entitled to claim liquidated damages against the contractor.

In addition, there are limited grounds for a contractor to justify an EOT claim being lodged after the specified time period. In *Turner Corp Pty Ltd (Receiver and Manager Appointed) v Austotel Pty Ltd* (1997) 13 BCL 378, it was held that a contractor's failure to lodge an EOT claim within the prescribed period did not mean the contractor could later argue the prevention principle. In other words, where a contractor has an option to claim an EOT but fails to do so, it was not "prevented" from obtaining the EOT.

As a more recent example, it was held in *CMA Assets Pty Ltd v John Holland Pty Ltd* (No 6) (2015) WASC 217 that despite the delay was caused by John Holland, CMA was not entitled to an EOT as it failed to comply with the notice provision, which required notices to be submitted within seven days.

Mitigation Strategies

A contract may require contractors to mitigate delays. In a practical sense, this may include protecting the worksite from the impacts of inclement weather. Adequate mitigation measurements can minimise weather damage and allow works to recommence as soon as possible. As a contractor, one of the key measurements is to protect construction materials from moisture damage. In order to prevent delays associated with potential defect disputes and replacing damaged materials, contractors should:

- review carefully the higher and lower areas of a site to assess the most appropriate storage areas for construction materials away from potential pooling or water flow;
- cover stockpiles of earth and other materials with waterproof membranes;
- ensure temporary and permanent drainage lines are built and maintained;
- provide, where possible, all weather access roads to critical areas of the site;
- secure items that can be blown by high winds; and
- cut back trees and branches.

If a contractor fails to mitigate the delay, the entitlement to an EOT may be wholly or partially revoked. It must also be noted that damage caused by inclement weather, notwithstanding whether or not mitigation strategies were implemented, should always be documented and photographed as evidence for an EOT claim.

Conclusion

A construction contract should seek to allocate risks of adverse weather patterns fairly between a contractor and principal. A contract that prescribes clear definitions and instructions ensures that that contract can be used as a point of reference, rather than for the purposes of a dispute. The parties to the contract should act in good faith, including having clear communication, being commercial and flexible, and abiding by their contractual obligations.

Contact

Jessica Rippon, Principal Solicitor | ✉ jripton@constructionlegal.com.au
☎ +61 1300 543 910 | 🌐 www.constructionlegal.com.au