

Contract Disputes Act claims: Delay damages for an early finish?

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One of the most common concerns for federal contractors is delay.

Projects can fall behind schedule for a variety of reasons that are outside of the contractor's control (government-directed changes, differing site conditions, and government interference — just to name a few). Contractors need to take proactive steps to provide proper notice and secure entitlement to additional time and costs based on the delay.¹

In most instances, we think of delays as causing projects to finish **late** (i.e., after the originally established contract completion date). But can a contractor still recover compensable delay damages when a project finishes **early**?

A recent Armed Services Board of Contract Appeals (ASBCA) decision says **yes**.

The ASBCA denied the contractor's claim — but not because of the early finish.

In the case, the contractor sought to recover delay damages for 17 days during which no work was performed. The contractor argued that the government was responsible for the delay because it failed to provide access to certain work areas. However — despite the alleged government-caused delay — the contractor still finished 45 days earlier than contemplated by the contract.

The ASBCA denied the contractor's claim — but not because of the early finish. It was the contractor's failure to meet the key element of intent that really mattered.

The intent requirement

The ASBCA enforces a three-part test that contractors must meet in order to establish entitlement to delay damages in the case of an early finish.

Specifically, the contractor must demonstrate:

- It intended to complete the contract early from the outset,
- It had the capability to accomplish the early finish, and
- It would have completed even earlier, but for the government-caused delay.

*This ASBCA decision solidifies that contractors **can recover** delay damages on projects that finish early.*

The Board found that the contractor failed under the first factor. That is, the contractor did not express (or at least did not **properly document**) the intent to complete the project earlier than the date established in the contract.

Key takeaways

This ASBCA decision solidifies that contractors **can recover** delay damages on projects that finish early. But like so many other times in government contracting, the contractor's deliberate action and documentation are essential to recovery.

Contractors must make the intent to finish early explicit — and then continue to track that progress during performance. That way, if a government-caused delay occurs, the plan and ability to perform are already established.

Notes

¹ Side Note: For a complete run down on best practices for contractor claims — check out my recent blog series starting here: <https://bit.ly/3rxKylf>.

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