

[Construction Delay Damages Can Be Tough to Show](#)



Recently, there have been a few cases in construction that have grabbed the headlines (or at least those at this and some other blogs). The biggest stir seems to be from the Jacobs Engineering case discussed so ably by Matt Bouchard in [last Friday's Guest Post](#). However, while the "headlines" were grabbed by the U. S. Supreme Court's decision not to review that case, the Virginia Court of Appeals handed down an instructive case regarding delay damages and actual costs.

In [Commonwealth v. AMEC Civil LLC](#), the Court considered the above questions. The basic facts of the case involve a VDOT project that was delayed causing financial hardship to AMEC. Without going into the procedural history of the case (it is well laid out in the opinion and in the Virginia Lawyer's Weekly summary of it), the case went to the Virginia Supreme Court and back and was appealed again after remand to the trial court.

The VA Court of Appeals considered a couple of questions, one which was procedural (what evidence could be considered on the first remand) and the second considered the expert testimony at trial relating to the delay damages and the "actual costs" incurred by AMEC due to the various delays. While the first is an interesting legal question, I'll leave that one for your independent consideration.

The second question is the more pertinent to the subject matter of Musings. In short, the question is what constitutes "actual costs" in a construction contract. The appellate court determined that "actual costs" do not include office overhead and other indirect costs (including those from the inability to work at all during bad weather). After deciding what constituted actual costs, the Court then went on to decide what the proper number of delay days were available to AMEC. This resulted in a partial win for VDOT because the Court cut the number of days and tasked the trial court with parsing a 5000 page cost record for the proper prorated (not averaged) costs and the appropriate credits.

In short (I know, too late), this case still isn't completely resolved after a trial, an appeal, a remand, another hearing, and another appeal and the issue is not even if AMEC is entitled to some damages regarding the delays. The lesson? Make sure you have good experts and a good [Virginia construction attorney](#) to help you navigate the difficult waters of delay claims. You'll be glad you did.

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