

ELEMENTS OF AN ACCELERATION CLAIM

EDWARD L. WRIGHT

FORCON INTERNATIONAL CORPORATION
ITASCA, ILLINOIS

Presented to the Southern Surety & Fidelity Claims Conference
April 18, 1991



ELEMENTS OF AN ACCELERATION CLAIM

Acceleration has been defined as the process by which the ordinary and expected progress of events in a construction contract is quickened or compressed in order to achieve a reduction in the total project duration. Acceleration occurs when the Contractor performs his work at a faster rate in order to complete his required performance, either in advance of his scheduled time as specified in the contract or an attached schedule, or in advance of the time-extended completion date that circumstances may justify, or by the contract completion date even though progress has otherwise been delayed. The techniques used by a Contractor to accomplish or attempt acceleration include, but are not limited to:

- Resequencing Work Activities
- Increasing the Labor Force by Increasing Over-Time, and Adding New Shifts
- Adding Extra Equipment
- Expediting Material and Equipment Deliveries

There are three general causes of acceleration. The first, and least frequently encountered cause of acceleration, is **Voluntary Acceleration**. Voluntary Acceleration occurs when the Contractor performs ahead of schedule for his own purposes or motives and not on the directives of another party. In this situation, the Contractor does not have a claim for damages against the Owner as the Contractor incurred the additional cost

relative to acceleration pursuant to his own directives and cannot establish that any other party is liable for these costs or damages.

The Second cause of acceleration is **Directed Acceleration** which occurs when the Contractor is ordered by the Owner to complete his performance in advance of the scheduled completion date in the contract. Owner-Directed Acceleration is a counter-part of Owner-caused delays and constitutes the subject of many construction claims. Contrary to how delays occur, acceleration is typically well thought out by the Owner before the Contractor is ordered to implement it.

An Owner who directly accelerates a Contractor may be liable to the Contractor for his acceleration cost. The Contractor, in bidding the contract, bargained for a certain amount of time to complete the project. By depriving the Contractor of part of his bargained time, the Owner is in effect "buying back" some time from the Contractor. The price of the Owner's purchase is the Contractor's acceleration cost less any cost associated with bringing the project back "on-schedule" due to Contractor-caused delays which occurred before the newly ordered acceleration.

The third cause of acceleration is **Constructive Acceleration**. Constructive Acceleration occurs when an Owner refuses to adjust the completion date to take into account justified time

extensions and instead requires the Contractor to complete performance by the original contract completion date.

Seven elements must be present for a Contractor to prove Constructive Acceleration:

1. The Contractor has encountered one or more excusable delays which would entitle him to an extension of time.
2. Timely notice by the Contractor to the Owner of said delay or delays.
3. The Contractor timely requests a time
4. The Owner fails or refuses to grant a time
5. The Owner requires the Contractor to complete his contract performance within the original contract period either expressly or impliedly by the Owners refusal to grant a time extension.
6. The Contractor reasonably attempts to accelerate his rate of performance, and
7. The Contractor incurs additional costs as a result of said acceleration.

Excusable Delays can be defined as those that entitle the Contractor to a time extension because they are beyond the control of the Contractor. The most recognized Excusable Delays

are found in the American Institute of Architects' (AIA) General Conditions and include:

1. Labor Disputes
2. Fire
3. Unusual Delays in Deliveries
4. Unavoidable Casualties
5. Compensable Delays
6. Unforeseen Delays in Transportation
7. Unavoidable Calamities Such as Fire or Flood, and
8. "Other Causes Beyond the Contractor's Control"

Although the contract clause dealing with time extensions will enumerate the factors entitling the Contractor to an extension of time, the rationale for all of the extenuating factors is captured in the phrase "any cause beyond the Contractor's control and without the fault or negligence of the Contractor."

Excusable Delays include a specific category of delays called **Compensable Delays**. Compensable Delays are delays caused by

the negligence or fault of the Owner. Common examples of Compensable Delays include:

1. The Owner's failure to coordinate multiple prime contracts.
2. The Owner's failure to provide adequate access to the project.
3. The Owner's failure to provide the right-of-way.
4. Suspension of the Contractor's performance.
5. Change orders issued by the Owner.
6. Any interference by the Owner with the Contractor's performance, and
7. Delays caused by a third party under the control of the Owner.

As a subset of Excusable Delays, Compensable Delays can be the basis of a Constructive Acceleration claim. Whether the Contractor can recover money damages may depend on whether the contract has a "no damage for delay" clause. However, such a clause does not effect the Contractor's right to a time extension, nor should it preclude recovery for disruption damages such as productivity losses.

The causes enumerated in the time extension clause of the construction contract provide for Excusable Delays. Therefore, any delay which does not fit into the clause is a **Non-Excusable Delay**. Non-Excusable Delays are delays for which the Contractor is liable.

As indicated above, the Owner must refuse to grant a proper extension of time for an Excusable Delay in order for the Contractor to recover for a Constructive Acceleration. Thus, it is clear that it is to the Contractor's advantage to notify the Owner in writing that he has experienced an Excusable Delay and to request an extension of time. If none is forthcoming, another written notice should be sent, informing the Owner that his refusal to grant an extension of time is considered a Constructive Acceleration, and that he will expect compensation therefore.

. Such notices serve three purposes:

1. They inform the Owner of the delay and of the claim, thereby satisfying the notification requirements of a constructive acceleration claim.
2. They may bring the parties together, actually resulting in a settlement, thereby avoiding a time consuming and expensive dispute.
3. They create a record of the Contractor's protest, thereby avoiding a time consuming and expensive dispute.

Some cases have held that the notification requirements are waived when the Owner has expressly ordered the Contractor to accelerate his performance. However, in the absence of such circumstances, a failure to comply with contractual provisions requiring notice and request will probably preclude the Contractor from recovering on his acceleration claim.

True Constructive Acceleration occurs when the Owner fails to grant any time extensions to the Contractor. The more difficult case to resolve is when the Owner grants a time extension that the Contractor feels is insufficient to cover the Excusable Delay. This is known as **Disputed Constructive Acceleration**. In this case, in order for the Contractor to recover on his acceleration claim, he must first prove that he was entitled to a time extension. Then, he must show that the extension granted by the Owner was less than the extension to which the Contractor was entitled.

Because a change order is simply a contract modification, a Contractor who accepts or executes a change order may be found to have assented to being accelerated. Likewise, if a change order contains a specified time extension and the Contractor does not object to its length, the Contractor probably will be contractually precluded from later asserting that he was entitled to a lengthier time extension.

If the Contractor feels that he is being accelerated because he has been granted an inadequate time extension, the Contractor should give the Owner written notice that he considers the extension inadequate and that he will expect additional compensation for his acceleration effort. It is also essential that the Contractor utilize a "reservation of rights" clause

similar to the following in any contract modifications which are executed:

"The compensation and completion time allowed by the Contract Modification do not include any amounts for changes in the sequence of work, delays, disruption, rescheduling, extended overhead, acceleration and/or impact cost, and the right is expressly reserved to make claim for any and all of these and related items of cost prior to any final settlement of this contract."

As stated above, the Contractor must also establish that the Owner ordered the Contractor to accelerate his performance. In situations other than Directed Acceleration, this can be shown by the absence of any time extensions. If time extensions have been granted, they must be proved inadequate in order for the acceleration claim to be successful.

After a Contractor proves he was ordered to accelerate, he must then prove that he reasonably attempted to accelerate. The Contractor, however, does not have to prove that he completed construction by the Owner's accelerated date in order for his acceleration claim to stand. The Contractor only needs to show that he incurred additional cost in a reasonable effort to accelerate.

The most accurate method used to identify acceleration in a construction project is to analyze the Critical Path Method (CPM) Schedules. These schedules will provide a framework for

analyzing both the total project and the interrelationships between the work activities within the project. A **Work Activity** of a construction project is defined simply as a time-consuming task with a recognizable beginning and end.

A comparative analysis of the planned project versus the actual project should be carried out. Five major scheduling documents are prepared in this analysis.

The **As-Planned Schedule** reflects the Contractor's planned approach to pursue the work. This schedule is prepared in accordance with the contract documents and approval by the Owner or his representative may have been required.

The **As-Built Schedule** presents the actual sequence of events that occurred during the life of the construction project. This schedule will contain all of the delays, disruptions and accelerations that took place during the project. It can be developed from a detailed examination of the project records and inspection reports supplemented by photographs, meeting minutes and correspondence.

A series of **Adjusted Schedules** may be prepared to explain the sequence of events that transform the As-Planned Schedule into the As-Built Schedule. A comparison of the As-Planned Schedule to the first Adjusted Schedule that incorporates the first delay

quantifies the impact of schedule damages on the project. The first Adjusted Schedule is then used as the benchmark for measuring the subsequent schedule variance with the second Adjusted Schedule, which incorporates the second delay in the life of the project. This process is continued for each successive delay until all variances have been analyzed and accounted for. A series of such Adjusted Schedules will lead to the As-Built Schedule.

A schedule that contains the as-built data for the completed part of the project and the proposed changes in the remaining portion is called an **As-Projected Schedule**. This schedule will show the expected project completion date if changes are implemented in the remaining portion. If the project has been completed at the time of this analysis, an **Impact Schedule** may be developed by extending the As-Planned Schedule by taking into account all Compensable and Excusable Delays.

Typically, a comparison between the As-Planned and As-Built Schedules will reveal a variance that is the basis of the claim. This difference has to be apportioned between the parties. The responsibility for each delay is assigned by using the contract documents, the chronological delay information collected during the course of the project, and accepted industry practices. Based on this information, an **Owner Accountable Schedule** is prepared which identifies the project delay caused by the Owner.

The proper analysis for Constructive Acceleration effort depends on the nature of the Excusable Delay. If the Contractor experiences an Excusable Delay that effects the total project, like a labor strike, then the Contractor should proceed as if under Directed Acceleration. The Contractor should compare the As-Planned and the As-Built Schedules with the Impacted Schedule to show the impact of the project-wide Excusable Delay upon the Critical Path and the time of performance. This enables the Contractor to establish that he performed ahead of the impacted completion date.

The analysis is more difficult when the Contractor claims that there was a delay to an individual work activity. In this case, the Contractor needs to prove a causal connection between the Excusable Delay and the Contractor's acceleration effort. To establish such a connection, the Contractor has to show that the delay to the individual work activity impacted or extended the baseline critical path.

Because all individual critical activities are dependent on one or more other critical activities, any delay to a critical activity extends the critical path. Therefore, when a Contractor can show a delay to an individual critical activity, and the activity was still completed earlier than the Impacted Schedule completion date, establishing the Contractor's acceleration effort is relatively easy.

An even more complex analysis is required when the Contractor has experienced a delay to an individual non-critical activity. Non-critical activities have float, which is the amount of time a non-critical activity can be started or completed late without impacting the Critical Path or total project completion date. Most courts hold that an excusable delay to a non-critical activity that is not long enough to cause the activity to become critical cannot be the basis of a claim of Constructive Acceleration. If, however, the non-critical delay exceeds the non-critical activity's float, then the non-critical activity in effect becomes a critical activity, and the delay to it becomes a critical delay. The duration of the critical delay, not including the period during which the delay was a non-critical delay, will be reflected on the Impacted or As-Projected Schedules.

A discussion of the current arguments over float ownership and how it effects delays to the Critical Path is beyond the scope of this paper.

The final element of an acceleration claim is the additional cost incurred by the Contractor. Costs that are commonly

incurred as a result of acceleration include, but are not limited to:

1. Additional Labor Cost
2. Stacking of Trades Cost
3. Loss of Labor Efficiency Cost
4. Additional Equipment Cost
5. Additional Supervision Cost
6. Increased Material Delivery Cost
7. Increased Overhead Cost

A Contractor cannot recover all of his cost. Only those costs that exceed the cost that he would have incurred had his work not been accelerated. Thus, the Contractor must be able to show the difference between his cost before and after acceleration.

The Contractor can prove the cost difference by several different methods including the total cost approach, modified total cost approach, or discrete cost approach. Regardless of the cost method used, the Contractor must document his claim of increased cost.

Documenting the cost associated with an acceleration claim is extremely important as recovery of any or all of the damages suffered by a Contractor on an accelerated project may depend on

the Contractor's ability to document the cost. Several categories of documentation which may prove helpful in developing the case include:

1. Notes and Meeting Minutes
2. Correspondence Between Parties
3. Detailed Job Cost Information
4. Budgets and Estimates
5. Change Orders
6. Daily Log Books
7. Job Schedules

As a general rule, the Contractor is entitled to recover damages that fairly and reasonably flow from a delay and the resulting acceleration. Use of the above-listed job cost information sources and a well-designed and maintained system of cost codes can greatly aid this effort.

Once the seven required elements of a Constructive Acceleration claim have been reviewed, they must be assembled in such a way as to get the desired message across in a simple and understandable way. A variety of graphic exhibits can be used to demonstrate acceleration and the resulting damages. These exhibits should be developed so that they are the most effective for the specific circumstances at-hand and illustrate simply the points in the claim. The presentation of the claim, as the final step in the claim development, is extremely important and should be done in a persuasive and well-thought-out manner.

REFERENCES

Michael F. Albers, Mark J. Hosfield, Robert L. Meyers III,
Acceleration Claims in Proving and Pricing Construction Claims
John Wiley & Sons, 1990

Donald G. Gavin, Fredric R. Miller, Daniel E. Toomey,
Robert J. Smith, Disruption Claims in Proving & Pricing
Construction Claims, John Wiley & Sons, 1990

Roy S. Mitchell, Delay and Acceleration: Concepts of Time,
in Construction Claims and Disputes, Engineers News
Record, 1979

David Arditi, Bhupendra K. Patel, Impact Analysis of Owner
Directed Acceleration, Journal of Construction Engineering
and Management, ASCE, 1989

