

# Constructive Acceleration

“Hurry and finish, but don’t say I said so.”

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### Introduction

Construction projects require precise movement of material and labor. When one component of the project is delayed, it may affect work that follows. Delays to the planned project completion date may be the unavoidable result. In an effort to mitigate project delay, contractors often accelerate their work. Contractors add labor, equipment and/or re-sequence work to make up lost time.

If the underlying reason for the delay is clear and the owner takes responsibility for the cause of that delay, the owner may direct the contractor to accelerate to make up the lost time. With “directed acceleration,” the parties sit down and plan their efforts and the cost of this directed acceleration ahead of time. If the underlying cause of the delay is the contractor’s responsibility, the contractor has two options, either accelerate on its own or face the prospect of having to pay for the owner’s delay costs, be they liquidated damages or actual damages.

Constructive acceleration typically occurs when a contractor makes a claim for additional time, based on an excusable delay, and the owner denies the time extension and directs the contractor to finish project according to the pre-delay schedule. This requires the contractor to accelerate to make up the lost time incurred from the excusable delay. An excusable delay is a delay that under the contract entitles the contractor to extra time to complete the project. Typical excusable delays under many construction contracts include delays due to unusual weather; labor disputes, owner caused delays and delays caused by factors beyond the contractor’s control.

The term “constructive” used to describe this concept comes from the line of cases that discuss “constructive changes.” In such situations, the owner wants an item of work a certain way but does not acknowledge that the work constitutes a compensable change under the contract. In constructive acceleration scenarios, similar elements are present regarding the schedule

aspects of the project. The owner wants the contractor to accelerate, but does not acknowledge that the owner is responsible to pay for the acceleration.

### Legal Elements of a Successful Claim

There are five basic legal elements to a claim for constructive acceleration. The elements are as follows: 1) the contractor experienced an excusable delay; 2) the contractor properly and timely requested a time extension; 3) the project owner failed or refused to grant the requested extension; 4) the project owner demanded that the project be completed by the original date despite the excusable delay; and 5) the contractor actually accelerated the work to complete the project by the original date.

Under the first element, the contractor must experience an excusable delay. As discussed earlier, such delays depend on the precise language in the contract and typically include: unusual weather; labor unrest and acts of God. The excusable delay may also be the fault of the owner. The key issue under this element is that the cause of the delay must be outside the control of the contractor.

Under the second element, the contractor must properly and timely request an extension of time due to the delay. Most important here is the “proper” request for the time extension. This is crucial as the contractor must give notice pursuant to the contract claim notice provisions. Furthermore, many contracts require that a contractor’s notice of delay include notice for all delays that the contractor believes it is entitled to as part of its claim for additional time.

Under the third element, to have a constructive acceleration claim, the project owner must have refused to grant the contractor’s request for an extension of time to complete the required work. Critical to this element is the timing of owner’s response to the contractor’s request. If the owner is to grant additional time, the owner must do so in a prompt manner so that the contractor can take advantage of the extension by efficiently ordering and sequencing the work that needs to be performed. A belated extension is meaningless, other than constituting admission that the delay was excusable.

The fourth element, that the project owner demand that the project be completed by the original date, is, perhaps, the most subject to dispute. The cases do not provide a clear test on what

conduct by the owner will suffice. The circumstances of the project may be such that it is very clear that the owner wants the project to be completed by the original completion date. In many cases, however, the owner writes a strong letter threatening liquidated damages, but stops one word short of directing the contractor to accelerate. Is this an order to accelerate? The United States Court of Claims concluded in *Norair Engineering Corps v. United States*<sup>1</sup> that “a request to accelerate or even an expression of concern about lagging progress, may have the same effect as an order.” To determine whether there is clear direction by the owner to accelerate, the contractor could try writing a letter to the owner and ask the question: Are you directing me to accelerate? If the answer back is anything but a clear “no,” courts would likely find that owner did indeed order the contractor to accelerate.

Under the fifth and final element, the contractor must actually accelerate its work to complete the project by the original completion date. Success of timely completion, however, is not a requisite for a contractor’s claim, as long as there is a legitimate effort to accelerate. The contractor could recover for constructive acceleration even if the efforts undertaken by the contractor do not result in a timely finish.

## Example

The case of *Fraser Construction Co. v. United States*<sup>2</sup> from the United States Court of Appeals for the Federal Circuit provides a good example. The case arose from a contract with the United States Army Corps of Engineers to excavate a lakebed for flood control purposes. “During the excavation, the water level of the lake [was to] be lowered by 8 ft, resulting in a small stream that would wind its way through a mud flat.” In order to work completely in the dry, the contractor diverted the local river that feeds the lake around the perimeter of the lake and dewatered the lakebed.

“The excavation did not proceed smoothly, however. The contractor contended that in the summer of 1993, a greater volume of water flowed through the river than in any other year on record, and that the flows did not recede to normal levels at any time during June, July and August.”

The contractor submitted a certified claim to the contracting officer for additional money claiming that the Army Corps’ denial of a time extensions due to the high water flow in the river constituted a constructive acceleration. The contracting officer denied the contractor’s claim. The contractor filed an action in the Court of Federal Claims seeking to overturn the contracting officer’s decision. The Court denied the contractor’s request for relief and upheld the contracting officer’s decision. The contractor then appealed the Court’s decision.

The appellate court started by noting the five elements for a constructive acceleration claim discussed above.

The appellate court first addressed the issue of whether the contractor had experienced an excusable delay, the first element of constructive acceleration claim. The appellate court noted that the lower court had decided that the high water flow conditions the contractor experienced, in and of itself, would not be an excusable delay. The contract stated that delays are excusable if such delays are due to “unforeseeable causes,” including “floods” or “unusually severe weather.” According to the lower court, the high water flow conditions the contractor experienced “can give

rise to an excusable delay only when they are relatable to unusually severe weather . . . or else associated with a flood.” According to the lower court, because technically there was no flood and no severe weather to explain the high water level, the lower court found no excusable delay.

The appellate court disagreed with the lower court. The appellate court found that contract “provides generally that delay is excusable if it arises from ‘unforeseen causes beyond the control and without the fault or negligence of the Contractor.’ Floods and unusually severe weather are provided as ‘examples’ of causes that may give rise to excusable delay, but the contract language makes clear that those are not the only conditions that can have that effect.” Because the high water level was beyond the contractor’s control, it can constitute an excusable delay.

The Army Corps further argued that the contractor never formally requested additional time in the first place, the second element of a constructive acceleration claim. Although there were no documents evidencing a formal request for a time extension, the contractor submitted an affidavit to the court by its project manager. The affidavit stated that the project manager orally requested time extensions for several periods of high water in June 1993 and was told by an Army Corps representative that the contractor would receive no time extension for flooding. While the lower court dismissed the affidavit as insufficient, the appellate court found that the affidavit sufficed to raise an issue of fact as to whether the contractor did indeed make a request for a time extension that the Army Corps denied.

This case highlights how two different courts can come to two different conclusions on the same set of facts. The higher court ultimately found in favor of the contractor. The case shows that the contractor has to clearly make its case for an excusable delay. It shows that the contractor should follow the technical process for making a time-related claim to avoid potential adverse outcomes later.

## Conclusion

Typically, when a contractor gets behind schedule, whether due to unusual weather delays, faulty designs, or other reasons, it is not an easy task to right the ship. There is a tendency among owners to neglect contractors’ claims for extra time and leave such claims unresolved until the very end of the project. Failure to promptly address time-impact claims can be shortsighted, as it often results in higher costs to perform the work and expensive litigation later. By dealing with schedule impacts early, the owner and contractor get the benefit of working together to achieve better results mitigating the delay’s impact. The best practice for owners and contractors is to deal with the issues they face on a real time basis in order to avoid a cascade of deeper scheduling problems from arising later.

<sup>1</sup>229 Ct. Cl. 160, 666 F. 2d 546 (1981).

<sup>2</sup>1999 U.S. App. LEXIS 15787.

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