

Problems with Acceleration Claims

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BACKGROUND TO ACCELERATION

Perhaps one of the most difficult issues to resolve when a Construction Contract over runs or threatens to is, what do you do about it?

Most Contracts traditionally say a Party should notify the other Party (be that the Employer, Main Contractor or Sub-Contractor) and then wait to see if an Extension of Time is granted. The award of an Extension of Time provides protection from the deduction of liquidated damages and may give rise to claims for additional expense but, in most circumstances, this still leaves a Party somewhere in the chain disappointed, frustrated and often out of pocket.

Ordinarily (although there are exceptions to this) the Employer/End User want the building they are paying for at the time they originally prescribed in their Contract.

In these circumstances the question that is often asked of the Contractor is; can you build quicker? This "speeding up" of the construction process is generally referred to as "Acceleration".

It should be noted that it is also possible for Acceleration to be requested, in effect, to bring forward the date for completion to a date earlier than that stated in the Contract. If this is the case then the points below equally apply, but further consideration needs to be given to the original Contract Completion Dates.

The answer to a request to Accelerate is often; "yes it can be done, but at a cost". After all, as anyone involved in construction knows, time is money.

TYPES OF ACCELERATION

The decision to Accelerate will often only be taken once a multitude of factors have been considered and often a complex cost/benefit analysis has been carried out.

In a scenario such as this the Acceleration is referred to as "Directed" or "Instructed" Acceleration. Both Parties attempt to agree the accelerative measures to be taken and the cost of the measures and outcome.

If, however, the Acceleration is caused by the Contractor feeling pressured into Accelerating (usually by the refusal to grant an Extension of Time and an insistence on completing by the original date for completion) this is often referred to as "Constructive Acceleration".

Whilst both claims will be based on the same principles of loss calculation and consider the same factors; how and when they are presented is dramatically different.

Directed or Instructed Acceleration is either dealt with in accordance with the Contract Terms and Conditions or in a separate agreement which is drafted and agreed between the Parties.

Constructive Acceleration is a claim to be submitted either during or at the end of the project, and is outside the mechanisms of the Contract. It should be noted that there is little legal authority for such claims although there are arguments which can be presented to bolster them. There is, however, common consensus amongst numerous commentators that, to have any possibility of success, there must be continual and sustained refusal to award Extensions of Time on behalf of the Employer and substantial and sufficient notice, of

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both the intention to accelerate and to make a claim for the additional costs associated with the acceleration, issued to the Employer before embarking on the acceleration.

ACCELERATION UNDER THE JCT STANDARD FORM OF BUILDING CONTRACT

Acceleration under the JCT Standard Form of Building Contract 2011

Acceleration is dealt with in clause 2 of Schedule 2 of the JCT 2011 Standard Form of Building Contract. No mention is made of "acceleration" in the main body of the Contract, except at clause 1.1, where the term "Acceleration Quotation" is defined.

2.1 of Schedule 2 states that:

"If the Employer wishes to investigate the possibility of achieving practical completion before the Completion Date ... the Architect/Contract Administrator shall invite proposals from the Contractor in that regard."

The "Acceleration Quotation" must identify the amount of time that can be saved and the amount of the adjustment to the "Contract Sum" that the contractor requires also the quotation must include direct costs, consequential loss and expense and an allowance for the cost of preparing the quotation.

The contract is very prescriptive of the timescales associated with the acceleration quotation and its acceptance.

The time periods for the production and acceptance of a quotation may be varied by agreement.

ACCELERATION UNDER THE NEC FORM OF CONTRACT

Acceleration is referred to in Core Clause 36 of the latest edition of the NEC3 Standard Form of Building Contract.

Under clause 36.1 the Project Manager may instruct the Contractor to submit an acceleration quotation. As with the JCT form, the stated aim of acceleration is to achieve completion before "the Completion Date".

Under NEC it is the Project Manager who informs the Contractor of the revised date, or dates, that it is required to achieve.

Following receipt of an instruction the contractor must provide a quotation and a revised programme showing how it can achieve the early completion date(s). The Contractor may decline to quote but, if it does, it must state why (clause 36.2).

ACCELERATION AGREEMENTS OUTSIDE OF THE CONTRACT

If there is no mention of Acceleration in the Contract it does not mean the Employer cannot request that the Contractor accelerates, the Parties are free to reach other agreements outside the original Construction Contract.

It should be remembered that an Acceleration Agreement of this type would be a separate Contract and, as such, could not be incorporated into Adjudication under the original Construction Contract.

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POTENTIAL DIFFICULTIES WITH ACCELERATION AGREEMENTS

For an Acceleration Agreement to be operable the Parties must consider all the possible outcomes and events, and agree who carries the risk for each possibility. This can be extremely time consuming and the risk is that the opportunity to accelerate may be lost.

Poorly considered and drafted Acceleration Agreements can result in one, or both, of the Parties suffering unrecoverable additional costs or simply not getting what it expected from the Acceleration/Agreement. This applies to agreements under the original Contract or in parallel to them.

A major stumbling block with Acceleration Agreements is; what happens if the Contractor does all that it commits to do, but the anticipated improvement on the Completion Date is not achieved.

The Standard Forms of Building Contract referred above do not appear to address this question. This is why the drafting of the Agreement is key; a guarantee that the Contractor will complete by the revised accelerated date will attract a premium as the Contractor is in effect taking the substantial part of the risk associated with the Agreement.

If an Employer does not want to pay this premium it can accept that the Contractor will not bear the risk of failure to achieve acceleration. For such less prescriptive agreements to succeed, the Contractor must clearly define exactly what it proposes to do so the Employer can satisfy itself that the Contractor has complied with the bargain.

A further issue which must be considered and incorporated into such an agreement is; What happens if further change or instruction arises during the accelerated period? An Acceleration Agreement should also consider what happens if either party (for whatever reason) wishes to call the acceleration measures to a halt prior to them coming to fruition and exactly what constitutes completion should be established (possibly by reference to the main head Contract).

TYPICAL ACCELERATION COST HEADS

As the old adage goes "*Time is Money*" and accelerating a construction project costs money. In addition to the direct cost of the work, acceleration also may result in an overall loss of labour productivity amongst other considerations which must all be incorporated into a fully formed and properly considered Acceleration claim/Agreement.

The typical heads of claim in an Acceleration claim/Agreement are:

1. Additional Labour or Sub-Contractor Costs.
2. Stacking of Labour/Sub-Contractor Costs.
3. Overtime Costs.
4. Productivity Losses.
5. Additional Plant and Equipment Costs.
6. Additional Supervision Costs.
7. Increased Material Delivery Costs.
8. Increased Overhead Costs.

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The principles for each head are:

Additional Labour or Sub-Contractor Costs

It may be possible to improve the rates of production by increasing labour. This head of claim is sustainable if such additional labour is more costly than that originally anticipated to be employed. The claimable sum is the extra over the original anticipated cost. It is not simply additional labour costs as the cost to carry out the original work is included in the original rates for the work so, as stated, it is the extra over the original allowance only.

Stacking of Labour/Sub-Contractor Costs

Increasing the number of resources or increasing the number of work faces available to numerous trades can improve production but, conversely, it can also reduce levels of production in relative terms. More trades working in the same area will have an impact on production as numerous trades compete for space and work faces which will reduce effectiveness. The acceleration will still achieve its goal as long as the relative loss in production of each trade is less than the increased effectiveness created by increasing resource numbers. This is often the most difficult consideration when ascertaining the effectiveness of proposed acceleration. The reduction in productivity can be calculated using some broad assumptions and the potential loss ascertained.

Overtime Costs

This is fairly obvious. A possible way to accelerate is to simply extend the working day and thus achieve more per day (ignoring the impact overtime has on productivity). This attracts a premium which again can be ascertained and included into any Acceleration claim. As with labour costs above the claim must incorporate only the extra over element, for example, if the premium time rate was "time-and-a-half" (rate x 1.5) it would only be the 0.5 which would be allowed in the claim as the original 1 is included in the original Contract allowances.

Productivity Losses

Most of the above possibilities available to accelerate have an impact on achieved levels of production. Reducing working space, increasing new resources and working overtime have all been established in a number of studies to have an impact on productivity. The problem is often establishing what the original level of production was in the Contract and then establishing what the actual impact on production is (or is likely to be). This calculation is often a major point for discussion between the Parties trying to agree the cost of acceleration. The principle is straightforward; to appreciate the calculation of what it is is far more subjective, especially when the original allowances for labour production are difficult to demonstrate.

Additional Plant and Equipment Costs

Also this head is fairly straightforward; more labour needs more plant and equipment to operate effectively. Again, this head of claim should only be for the additional extra over cost (if any).

Additional Supervision Costs

Also this head is fairly straightforward; more labour needs more supervision to manage it and operate effectively. Again, this head of claim should only be for the additional extra over cost (if any).

Increased Material Delivery Costs

During accelerated periods more deliveries of materials may be necessary and possibly these deliveries are only possible at a premium (often due to reduced loads and the like).

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Increased Overhead Costs

The acceleration may attract additional overhead costs (for example, off-site management or accommodation) which should be claimed. Again, only the extra over additional cost can be claimed.

For further direction on this matter we would suggest that the RICS guidance note titled "Acceleration" published in 2011 is an excellent reference document.

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