

PROVING CONSTRUCTIVE ACCELERATION IN CONSTRUCTION DISPUTES

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Constructive acceleration arises when a contractor is compelled to complete the works within the original contract period, despite the presence of excusable delays that would justify the granting of an Extension of Time (EOT). This typically occurs when the employer either delays the approval of the EOT or disputes its entitlement, leaving the contractor with no choice but to mitigate the risk of delay damages by accelerating the works at their own expense.

A common cause of constructive acceleration is the employer's "Wait and See" approach to EOT claims. Instead of awarding an EOT prospectively based on the predicted effects of a delay event, the employer delays its decision until the actual delay materializes. This deferral of the EOT decision forces the contractor to implement acceleration measures to meet the original completion date, effectively creating an implied instruction to accelerate the works.

In such situations, contractors are exposed to significant financial risks and incur additional costs to accelerate the works, such as employing extra labor, deploying additional equipment, or adjusting construction methods. If an EOT is eventually awarded retrospectively, it often leads to ambiguity concerning compensation for these acceleration costs. Contractors must prove that the acceleration measures were necessary to mitigate delays caused by factors outside their control and that such measures benefited the project as a whole.

Employers may challenge claims for constructive acceleration, arguing that no EOT was warranted or that the contractor's obligation was to mitigate the delay rather than accelerate. Employers may also contend that any acceleration measures taken were voluntary, rather than necessitated by the absence of timely EOT approval.

To successfully prove constructive acceleration in arbitration, a contractor must establish a clear and structured case, supported by detailed and compelling evidence. The first step is to demonstrate entitlement to an EOT by proving that an excusable delay occurred due to events outside the contractor's control. The contractor must then show that the employer either unjustifiably refused to grant the EOT or delayed the decision unreasonably, adopting a "Wait and See" approach. This can be substantiated through correspondence, meeting records, or evidence of rejected EOT claims.

Next, the contractor must prove that they were pressured to complete the works within the original contract period, despite the excusable delays. While this pressure may not always be explicitly stated, it can be inferred from the employer's insistence on adhering to project milestones, threats of liquidated damages, or failure to acknowledge the delay's impact. Once the pressure to complete is established, the contractor must provide evidence of the acceleration measures undertaken, such as increased labor, overtime, additional resources, or revised work schedules. It is essential to link these acceleration efforts directly to the employer's failure to grant the EOT, showing that the measures were not voluntary but rather a necessary response to avoid delay damages.

A "Wait and See" approach not only exposes contractors to financial risks but also fosters disputes over compensation for acceleration costs. The SCL Delay and Disruption Protocol helps mitigate the need for constructive acceleration by promoting early and clear assessments of Extensions of Time (EOT). It encourages timely decision-making regarding delays, preventing the "Wait and See" approach that forces contractors to accelerate work at their own cost.