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8th Biennial Conference on Construction Projects from Conception to Completion

Constructive Acceleration

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Agenda

- Types of Acceleration and their Definitions
- Entitlement Proof
- Challenges in Cost Recovery
- Recommendations for Successful Recovery of Costs
- Q&A

Definition of Acceleration

- *The process of expending additional resources and/or costs to expedite contract performance. Typical examples of acceleration include adding crews, adding equipment, increasing work hours, increasing workdays, increasing resources, and expediting material delivery times.-ASCE Standard 67-17 Schedule Delay Analysis, p 5.*
- *All or a portion of the contracted scope of work must be completed by the contractor earlier than currently scheduled-AACEI 29R-03 FSA, p123*



3 Types of Acceleration

- Voluntary Acceleration:
 - take advantage of the elements (e.g. weather)
 - right to finish early
 - recover from one's own caused delay
 - contractor generally not entitled to cost recovery
- Directed Acceleration:
 - owner requirement
 - typically agree on compensation and “revised completion date” ahead of implementation
- Constructive Acceleration:
 - disagreement between owner and contractor on the root cause
 - owner requires the contractor to accelerate but refuses to pay
 - contractor claims a time extension (EOT) and the owner denies it
 - contractor pressured to maintain original completion date with “threats” of LD's
 - determined at a future date that the contractor was entitled to the EOT

Constructive Acceleration Definition

- *Acceleration following failure by the CA to recognise that the Contractor has encountered Employer Delay for which it is entitled to an EOT and which failure required the Contractor to accelerate its progress in order to complete the works by the prevailing contract completion date. This situation may be brought about by the Employer's denial of a valid request for an EOT or by the CA's late granting of an EOT.*
- **This is rarely recognised under English law.**

Source: SCL Delay and Disruption Protocol 2nd Edition 2017

Question #1 to Audience

How many of you have been involved in a voluntary acceleration?

How many of you have been involved in a directed acceleration?



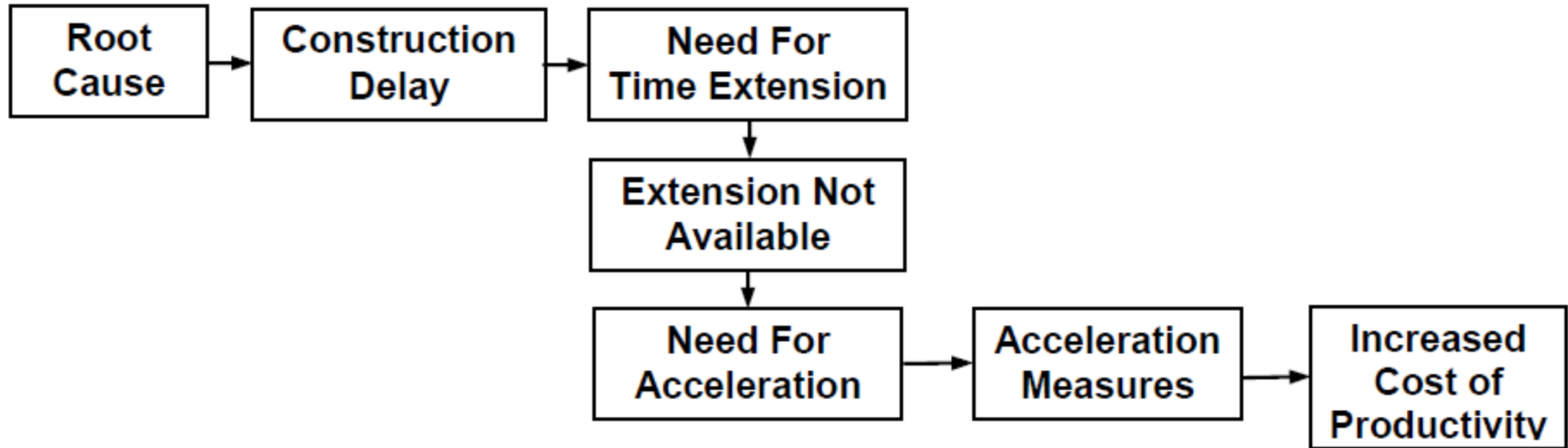


Figure 16 – Constructive Acceleration Flow Chart

-AAEI 29R-03, p125

5 Elements Necessary for Constructive Acceleration Recovery

1. The contractor is entitled to an excusable delay;
2. The contractor requests and establishes entitlement to a time extension;
3. The owner fails to grant a timely time extension;
4. The owner or its agent (“CA”) specifically orders or clearly implies completion within a shorter time period than is associated with the requested time extension; and
5. The contractor provides notice to the owner that it considers this action an acceleration order.

Source: AACEI 29R-03 FSA, pp 124-125



Question to Panel

What are the legal criteria to establish a constructive acceleration claim?

General Requirements in the United States to Establish Entitlement to Constructive Acceleration

The Legal Doctrine Is Firmly Established in US, But Often Very Difficult to Prove

1. Contractor established an excusable delay for which a time extension is due under the Contract;
2. Contractor provided appropriate notice of the delay and submitted appropriate time extension requests;
3. Owner issued no time extension (or less than should have been allowed);
4. Owner or its Agent acted by coercion, direction, or in some other manner that can reasonably be construed as an order to complete the work within the unextended time;
5. Contractor provided notice to the owner that it considered Owner's actions to be a directive to accelerate; and,
6. Contractor accelerated and properly can document the costs incurred to the constructive acceleration.

Cibinic, Nash & Nagle, *Administration of Government Contracts*, 4th Edition, pp. 445 – 458, George Washington University, Washington, D.C., 2006
See also Fraser Constr. Co. v. United States, 384 F.3d 1354, 1361 (Fed. Cir. 2004); *Norair Eng'g Corp. v. United States*, 666 F.2d 546, 548 (Ct. Cl. 1981); *Ace Constructors, Inc. v. United States*, 70 Fed. Cl. 253, 280 (2006), *aff'd*, 499 F.3d 1357 (Fed. Cir. 2007).



Korean Court Case Precedents

1. *Seoul High Court, 2015Na2047837 (Judgment 2016.10.11. Not Appealed)*

- Delayed due to Employer's causes (delay of preceding excavation works, delay in supply of tower cranes, etc.)
- Employer rejected Contractor's claim for extension of time.
- Contractor performed additional holiday/night works to recover the delay, and claimed the costs.
- Court recognized that Employer had not directly instructed acceleration, but awarded Contractor's costs for holiday/night works to accelerate.

2. *Suwon High Court, 2021Na12946 (Judgment 2021.09.16. Not Appealed)*

- Public-sector LNG power plant project.
 - Delay would have caused power shortage for new residential development.
 - Employer could not change the completion date without approval from Ministry of Trade, Industry and Energy.
- Court ruled that extension of time was either impossible or not seriously considered by Employer.
- During weekly/monthly meetings, weekend and holiday works were continually discussed.

English Law and other common law jurisdictions

- Usually said that English law does not generally recognise Constructive Acceleration
 - See, for example, *Ascon Contracting Ltd v Alfred McAlpine Construction Isle of Man Ltd*
- Glossary to SCL protocol provides:

Constructive acceleration Acceleration following failure by the CA to recognise that the Contractor has encountered Employer Delay for which it is entitled to an EOT and which failure required the Contractor to accelerate its progress in order to complete the works by the prevailing contract completion date. This situation may be brought about by the Employer's denial of a valid request for an EOT or by the CA's late granting of an EOT. This is rarely recognised under English law.

- But claims based on this, or analogous, doctrines are very occasionally recognised under English Law and (more frequently) in other common law jurisdictions:
 - *Morrison-Knudsen v British Columbia Hydro & Power Authority*
 - *Motherwell Bridge v Micafil*
 - *V601 v Probuild*
- Special circumstances – e.g. a deliberate failure to grant an EOT – may assist.

Question #2 to Audience

Have you ever submitted or prosecuted a constructive acceleration claim?

Were you successful?

(i.e. recovered at least 80% of claim value?)

Challenges in Cost Recovery of CA Claims

- Notice requirements not met: a) request for EOT and b) for acceleration
- Contract is “Silent” on the issue
- Lack of proper causation documentation
- Lack of proper delay analysis
- Cause of delay mingled: excusable and non-excusable delays
- Acceleration may not be on critical path
- Inability to tie cause to effect (improper nexus)
- Lack of proper man-hour and cost documentation for acceleration efforts
- Lack of proper disruption analysis

Question(s) to Panel

What is the relationship between a delay claim and constructive acceleration?

How is concurrent delay treated in regard to cost recovery on a constructive acceleration claim?

Should a contractor be able to recover: partial costs, 100% of the costs, nothing?

What is the relationship between a disruption claim and a constructive acceleration claim?

Question #3 to Audience

What other challenges did you face in cost recovery of CA claims?



Recommendations for Successful Cost Recovery

- Viable baseline schedule and schedule updates with valid critical path
- Adherence to notice provisions
- Narrative explaining the acceleration efforts being employed and time periods
- Coding of indirect and direct man-hours/costs to specific acceleration cost codes
- Issue database to reinforce solid causation documentation for delay and need for acceleration/acceleration efforts

Question #4 to Audience

What 1 recommendation would you give to bolster the chances of favorable recovery of a CA claim?

Q&A and Further Discussion





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