

Acceleration Costs Claims: claiming and managing.

Construction Contract Claims Article Series.

This article on acceleration costs claims is the second article in our series of construction claims articles delivered alongside Seán McNally of Anvelo. In our previous article, we discussed change and variation claims. Our following articles will explore different delay, disruption and prolongation as well as site conditions claims, progress claims, and damage claims.

In construction, time is money. Delays can mean significant financial repercussions for both the principal and contractor. Within the construction industry, the term acceleration refers to the actions taken by both the principal and contractor to expedite the completion of a project or part of a project, usually in response to delays. Whilst acceleration may be deemed necessary to meet deadlines or mitigate potential penalties, directing acceleration often means the incurrence of additional costs, which typically leads to an acceleration costs claim. Understanding the nuances of acceleration and how to manage and respond to acceleration costs claims is vital for both principal and contractors.

What is acceleration?

With any construction project, delays are not uncommon, and in most cases, end up resulting in significant costs, especially when the project is bound by fixed timelines. The term acceleration, in construction, generally refers to increasing the originally planned or current rate of progress of the work so as to complete the project (or a section of the project) earlier than would otherwise be the case (RICS Practice Information on Acceleration, 2024). Employing such methods to expedite the scope of works can give rise to increased costs, typically to be borne by the contractor in the absence of an agreement.

What is an acceleration costs claim?

The term acceleration costs claim refers to the formal request by a contractor for additional payment for costs incurred because of the contractor accelerating the works. These costs may include:

- Additional labour costs (including overtime and additional hires)
- Extra equipment mobilisation costs
- Increased project management costs
- Costs associated with rescheduling or re-sequencing the works

Typically, to claim acceleration costs there must be a direction from the principal or an agreement between the parties.

Types of Acceleration

There are three types of Acceleration which can occur on a project, including:

Principal Directed Acceleration

Typically, acceleration is associated with a formal instruction from the principal to accelerate the works under a contractual provision, and the basis for the contractor to be paid costs associated with the acceleration is usually identified in that provision. This is referred to as a principal directed Acceleration. The usual process for a principal directed acceleration is as follows:

1. The principal will request a quote from the contractor for the costs of accelerating
2. The principal will then issue a formal direction to accelerate the program
3. The contractor will accelerate the progress of the works and claim the costs as per their quote

It is important that any direction to accelerate or request for quote for acceleration is properly documented and recorded by both principal and contractor to ensure both parties are protected and to avoid a dispute. It is important for both the principal and contractor to discuss and work through how further delay in a period of acceleration is to be addressed.

Voluntary Acceleration

Voluntary acceleration occurs when the contractor voluntarily chooses to speed up the works without a formal directive or otherwise from the principal. There are several reasons why a contractor may choose to do this, namely, to meet completion timeframes to avoid liquidated damages, to achieve early completion for bonus incentives, improve cashflow or to gain goodwill.

It is typical that voluntary acceleration will not entitle the contractor to any claim for additional costs, with the costs associated being entirely worn by the contractor. In some cases, the contract may include a clause which allows for compensation where a contractor accelerates of their own accord, but this is rare. It is far more likely for a contract to not include such a clause. Further, it is rare in both adjudication and formal litigation that a claim for voluntary acceleration succeeds unless an argument for estoppel or an implied agreement can be proved.

Constructive Acceleration

The term Constructive Acceleration is used to describe the circumstance where a contractor claims an extension of time (EOT) under a contract, the principal wrongfully rejects the claim for the EOT, and the consequence is that the contractor decides to accelerate the works in order to meet the unadjusted date for completion.

It is a common misconception that a contractor who constructively accelerates work is automatically entitled to recover acceleration costs from the principal. While this principle is relatively well-established under United States law, Australian courts have not recognised a general entitlement to such costs merely due to a failure to grant a reasonable extension of time (EOT).

Instead, in *V601 Developments Pty Ltd v Probuild Construction (Aust) Pty Ltd* [2021] VSC 849, the Court awarded acceleration costs in circumstances where the principal and superintendent were found to have colluded to unreasonably deny EOTs, thereby breaching the terms of the contract.

Key considerations for acceleration

When considering whether to accelerate, whether you are a principal or a contractor, it is vital to carefully evaluate key factors to ensure effective decision making and risk management. Generally, the key considerations include the legal effect/s of an acceleration, the feasibility of the acceleration, and whether the impact can be accurately forecasted. From a legal standpoint, it is important to consider the potential interaction of acceleration with contractual obligations of the party – particularly in relation to variations, payment clauses and clauses as to timing under the Contract. Further, acceleration may create new obligations and entitlements under the Contract, so it is vital that these are documented to avoid later disputes.

Feasibility is another fundamental aspect to consider; requiring the party to undertake a realistic assessment of whether acceleration is actually achievable and at what cost. The assessment requires a holistic look at the project including the current stages, availability of labour, subcontractors, suppliers, materials and the costs associated with accelerating a program against the likely consequences of not accelerating. If feasibility is not addressed it could lead to a case where a party attempts to accelerate but leads to significant cost overruns, or acceleration cannot be achieved. These concerns are similar as to whether the impact of acceleration can be accurately forecasted. The accuracy of forecasting is essential, not only to determine whether the revised completion date is attainable, but to understand the costs and program impacts across the project. Without accurate forecasting, acceleration may result in significant inefficiency and costs. Ultimately, a balanced evaluation of legal, practical and commercial factors is essential to making an informed decision about whether to accelerate.

Conclusion

Acceleration can be a valuable tool for managing the completion of construction projects, but often comes at a cost. It is vital that a party considering acceleration carefully considers whether acceleration is appropriate in the individual circumstances of that project, weighing the likely costs against the likely benefits. In any event, if acceleration is pursued it is vital that the parties properly document any acceleration decision and the impacts of that acceleration and ensure that there has been clear communication with stakeholders on the project.

Accordingly, it is recommended that both principal and contractor alike comprehensively consider whether acceleration is appropriate in the particular circumstances before proceeding. In the next article of this series, we will explore different site conditions claims.

About Anvelo

This article is delivered in conjunction with Seán McNally of Anvelo. Mr McNally is a Chartered Quantity Surveyor, Accredited Quantum Expert, International Arbitrator, and adjudicator for Adjudicate Today, with over a decade of experience in construction and dispute resolution. He holds a BSc (Hons) in Quantity Surveying and Commercial Management and is a Fellow of both the Chartered Institute of Arbitrators (FCI Arb) and the Australian Centre for International Commercial Arbitration (FACICA). As Director of Anvelo Pty Ltd, Seán co-leads the Expert Services Division, specialising in forensic quantum analysis, contractual claims, and dispute resolution.

If you have any questions in relation to this article or construction contract claims generally, please do not hesitate to contact us or Mr Seán McNally.



Paul Muscat

Director

+61 408 234 289

paul.muscat@muscattanzer.com.au



Kayla Webb

Lawyer

+61 473 586 473

kayla.webb@muscattanzer.com.au



Seán McNally

Anvelo

Director – Quantum Expert

+61 468 617 475

sean@anvelo.com.au



Paul Muscat
Director
+61 408 234 289
paul.muscat@muscattanzer.com.au



Joel Taylor
Consultant
+61 407 641 338
joel.taylor@muscattanzer.com.au



BJ Doyle
Senior Associate
+61 419 104 996
bj.doyle@muscattanzer.com.au



Sian Phelps
Associate & BD Manager
+61 409 688 169
sian.phelps@muscattanzer.com.au



Kayla Webb
Lawyer
+61 473 586 473
kayla.webb@muscattanzer.com.au



Thomas Hendry
Law Clerk
thomas.hendry@muscattanzer.com.au



Gillian Want
Legal Assistant
+61 411 469 480
gillian.want@muscattanzer.com.au



Angelica Rusovan
Legal Assistant
+61 417 153 965
angelica.rusovan@muscattanzer.com.au



Craig Tanzer
Director
+61 403 408 200
craig.tanzer@muscattanzer.com.au



Joseph Sammut
Senior Associate
+61 428 834 096
joseph.sammut@muscattanzer.com.au



India Bennett
Associate
+61 459 684 170
india.bennett@muscattanzer.com.au



Hugo Sherlock
Lawyer
+61 466 662 121
hugo.sherlock@muscattanzer.com.au



Layla Montefiore
Law Clerk
layla.montefiore@muscattanzer.com.au



Isabel Rusovan
Office Manager
+61 473 749 259
isabel.rusovan@muscattanzer.com.au



Jackie White
Accounts & Compliance Manager
+61 409 972 735
jackie.white@muscattanzer.com.au