

Acceleration

Construction Law Terms: A to Z

By Huw Wilkins

A is for Acceleration

What is acceleration?

In the case of *Ascon Contracting Limited -v- Alfred McAlpine Construction*¹, Judge Hicks said the word “‘acceleration’ tends to be bandied about as if it had a precise technical meaning, but I have found nothing to persuade me that this is the case.” Notwithstanding that assessment, “acceleration” remains a term commonly used by contractors to claim additional time and cost.

The issue of acceleration may arise in circumstances where:

- (i) the employer expressly instructs a contractor to accelerate; or
- (ii) although there is no express instruction by the employer to accelerate, the contractor nevertheless feels pressured to do so.

“Instructed” acceleration

One example of “instructed” acceleration is where the completion date is 1 February 2022 but the employer instructs the contractor to accelerate the works so that they are completed earlier than that - for example, by 11 January 2022. Another example is where the contractor has been awarded an extension of time so that the completion date is changed from 1 February 2022 to 28 February 2022, but the employer nevertheless instructs the contractor to accelerate the works to meet the original completion date of 1 February 2022. In both these scenarios, where an instruction is given by the employer to the contractor, the parties should seek to agree at the outset (i) the measures to be taken to accelerate the works, and (ii) the cost of those measures. By doing so, the parties will reduce the prospect of subsequent disputes.

Because a need (or desire) to accelerate works is foreseeable in the context of construction projects, the contract will often include provisions to deal with acceleration. For example, Core Clause 36 of NEC4 deals provides that:

- the contractor or the project manager may propose to accelerate completion. If both parties agree to consider acceleration, then the project manager instructs the contractor to provide an acceleration quotation; the project manager’s instruction identifies the revised date(s) that the accelerated measures must achieve;

1. (66 CLR 119)

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- the contractor's acceleration quotation must include a revised programme and set out the changes to its prices; and
- if the quotation is accepted, then the project manager changes the key dates and prices, and accepts the revised programme.

Other standard forms also have express provisions dealing with acceleration:

- JCT 2016 deals with Acceleration in Schedule 2 (*"Variation and Acceleration Quotation Procedures"*); and
- Clause 8.7 of the FIDIC Red Book provides that, where any acceleration is required due to an event that is the responsibility of the employer, then the variation provisions shall apply.

Where the contract sets out a procedure for express acceleration, it should be followed and formally documented so as to avoid any confusion or disagreement in the future.

If the parties' contract does not set out a procedure for dealing with acceleration, then the parties may enter into a separate "acceleration agreement" (although, if there is no express provision in the contract to provide additional time and cost due to acceleration, then an employer may be reluctant to enter into an acceleration agreement). Such an agreement should set out clearly:

- the background (i.e. why the need to accelerate has arisen);
- the acceleration measures that are to be implemented;
- the revised completion date(s) (it is also preferable to include a revised programme); and
- how payment is to be assessed. (e.g. lump sum, cost reimbursable). If payment is to be on a cost reimbursable basis, the agreement should identify what records the contractor will need to provide to evidence its resources and rates.

From the contractor's perspective, it will also be important to ensure that the agreement re-fixes the completion date, but does not affect the contractor's entitlement to an extension of time for any future events.

"Implied" or "Constructive" acceleration

The more common scenario that tends to arise in construction projects is that the contractor is delayed, but feels pressured by the employer into accelerating its work – for example, because no extension of time has been granted. In such circumstances, rather than risk incurring delay damages, the contractor may choose to incur costs accelerating its works and then seek to recover them from the employer, arguing that the employer's insistence on the contractor meeting the completion date amounts to an instruction to accelerate. This is often referred to as "implied" or "constructive" acceleration.

Such claims are challenging because the laws of England and Wales generally do not recognise "implied" or "constructive" acceleration. However, each case will need to be assessed on its own facts. Furthermore, even if the employer's conduct does not amount to an instruction to the contractor to accelerate the works, the Contractor may be able to recover its costs in other ways – for example, as part of a variation claim.

In an "implied" or "constructive" acceleration scenario, before the contractor takes any acceleration measures, it should, at the very least, notify the employer that it is undertaking acceleration measures, including (i) why it considers these to be necessary; (ii) what these measures include; and (iii) that it will claim the costs of acceleration from the employer.

Conclusions

If a contractor is asked to accelerate its works, it will be preferable to agree with the employer what measures it will put in place, and the consequences of implementing those measures.

The contractor should check the contract to see if there is an express entitlement to the additional cost of putting in place acceleration measures. If no such express entitlement exists, then the contractor can try to enter into an acceleration agreement with the employer. It is important that any agreement is formalised in writing - either by following the contractual mechanism or, if there isn't one, in a separate binding agreement.

In the absence of an agreement, the contractor will need to consider whether to implement acceleration measures or not and the strength of any claim for "implied" or "constructive" acceleration. This will require the contractor to consider the implications of implementing acceleration measures (or not) and the contract terms. If it decides to implement acceleration measures, it should, at the very least, notify the employer and maintain good records in order to prove its entitlement.

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