

## Preserving Your Claim for Constructive Acceleration by Sean Hanlon and Tim Gordon



There are many different forces or events that can delay a construction project. When the project is delayed and the critical path is affected, the owner and general contractor may have differing opinions on whether the schedule impacts constitute excusable delay under the governing contract documents. For instance, does an unusually severe weather impact rise to the level of a force majeure event entitling the contractor to schedule relief?

When the owner denies a contractor's formal request for additional time, the dates for performance of the construction are not adjusted by an executed change order. Consequently, the contractor's exposure to liquidated damages is similarly unaffected. The owner's decision to deny schedule relief effectively serves as the owner's order to the contractor that it will be liable for liquidated damages if it does not meet the substantial completion or other deadline. Such an order results in a "constructive" order directing the contractor to accelerate its work to recapture the days lost due to the event that impacted the schedule.

When faced with this dilemma, the contractor can: (1) accelerate its work to maintain the original schedule, or (2) proceed with the work without accelerating and challenge the owner's imposition of delay damages (and risk a possible default termination for not maintaining the project schedule). Additionally, and if the contractor chooses the former route, the owner may argue that the contractor voluntarily accelerated and acquiesced to the owner's position, and thereby waived any claim for the costs associated with accelerating. To best preserve the position of constructive acceleration, a prudent contractor will document its position in writing during the project as impacts are occurring.

What does the law tell us about constructive acceleration and a contractor's entitlement to recover its acceleration and impact costs? Acceleration and impact costs are allowable only for efforts to overcome excusable delays. *Walace Process Piping Co. v. Martin-Marietta Corp.*, 251 F. Supp. 411, 418 (D.C. Va. 1965).

To establish a claim for constructive acceleration, the contractor must prove five elements:

1. There must be an excusable delay.
2. The owner must have knowledge of the delay.
3. The owner must act in a manner which reasonably can be construed as an order to accelerate.
4. The contractor must give notice to the owner that the "order" amounts to a constructive change.
5. The contractor must actually accelerate and thereby incur added costs.

*Fru-Con Const. Corp. v. U.S.*, 43 Fed. Cl. 306, 328 (1999).

Generally, a delay on the critical path is a prerequisite to an excusable delay. "Only delays to activities on the critical path--activities with no leeway in the schedule--may give rise to excusable delay." *Morrison-Knudsen Corp. v. Fireman's Fund Ins. Co.*, 175 F.3d 1221, 1233 (10th Cir. 1999); see also *CJP Contractors, Inc. v. U.S.*, 45 Fed. Cl. 343, 372 (1999); *Wilner v. U.S.*, 24 F.3d 1397, 1401 (Fed. Cir. 1994); *Mega Constr. Co.*, 29 Fed. Cl. 396, 424-25 (1993); *Commercial Contractors, Inc. v. U.S.*, 29 Fed. Cl. 654, 662 (1993).

Be mindful of instances where both the contractor and the owner caused delay to the project. In order to recover delay damages when there are concurrent delays, the contractor will have to clearly apportion the delays and the expense attributable to each party in order to recover.

Where the delay is concurrent, the contractor can attempt to prove the portion of the delay attributable to the [owner], that was separate and apart from the contractor's delay. In particular, "[w]here both parties contribute to the delay neither can recover damages, unless there is in the proof a clear apportionment of the delay and the expense attributable to each party." (Citations omitted). "Courts will deny recovery where the delays are concurrent and the contractor has not established its delay apart from that attributable to the [owner]." (Citations omitted).

*CJP Contractors, Inc.*, 45 Fed. Cl. at 372.

In sum, when events cause a delay to the critical path, the contractor often finds itself stuck between a rock and a hard place when the owner does not agree that the event constitutes an excusable delay. Should the contractor accelerate to maintain schedule? Or, does the contractor decide to risk exposure to liquidated or other delay damages, and challenge the owner's position at the end of the project? If the decision is made to accelerate, the contractor must take the steps necessary to preserve its claim for constructive acceleration.

Photos from Urban Perspectives column page 57.  
Renderings courtesy of OZ Architecture / The Foundry in Loveland.



Photos / Blue Dot Place (below). Darsey Nicklasson, president of DHN Development (photo bottom right - 4th from left). She's a planner who lives nearby and took this on as a rookie project, which was nominated for a ULI Impact Award last year.



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Contact: Kevin Bridston  
303.295.8104 kbridston@hollandhart.com  
555 17th Street, Suite 3200  
Denver, CO 80202

www.hollandhart.com