

US APPROACH

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[US law *does* readily recognize this type of claim]

Constructive Acceleration occurs when an employer orders a contractor to complete the work by the contract completion date despite the existence of excusable delay or the addition of extra work that entitles the contractor to an extension of time. When an employer fails to recognize that the contractor is entitled to an extension of time, it forces the contractor to perform the work in a shorter period of time than would have been available had an extension been given.

Requisite Elements

U.S. courts recognize the following five requisite elements of a constructive acceleration claim:

1. The contractor encountered excusable delay or was ordered to perform extra work affecting the critical path.

2. The employer had knowledge of the excusable delay or extra work and that it affected the critical path.

3. The employer failed or refused to grant the contractor's request for an extension of time.

4. There was some act or statement by the employer that could be construed as an acceleration order, such as reference to liquidated damages or termination.

4(a). In some U.S. jurisdictions there is the additional requirement that the contractor must have notified the employer that the contractor deemed the employer's act or statement to be a constructive order to accelerate; that the contractor will accelerate; and that the contractor will claim additional compensation for any cost incurred.

5. That the contractor did, in fact, accelerate performance and incurred additional cost as a result.

An employer can order acceleration directly or indirectly. A direct order is usually obvious. What is not so obvious is whether an employer intends the contractor to accelerate a job when it asks the contractor to adhere to the original schedule despite extra work or excusable delay, stresses the urgency of the project, or threatens the contractor with termination or liquidated damages. Therefore, an employer has to choose its words very carefully when it uses such language, lest it be deemed a constructive acceleration directive.

Acceleration Damages

Acceleration damages (whether ordered or constructive) can include the following: increased labor costs due to increased numbers of craftspersons working on the job, or the same craftspersons working more hours per day or more days per week at overtime wage rates; loss of craft labor productivity resulting from more laborers than can efficiently work together being required to work in a limited area so the job can be completed sooner, or from fatigue working more hours per day or more days per week than usual for a prolonged period of time, or from working in climatic conditions under which they would not otherwise have worked; increased procurement costs because a contractor had to pay extra for early delivery of materials, or had to procure materials locally on short notice, rather than from usual sources with normal lead time; and extra supervision costs incurred because of the need for more foremen to supervise the extra laborers.

Case Examples

The following two case examples illustrate how U.S. courts deal with constructive acceleration claims, one case granting the relief claimed and the other denying relief.

1. Decision Granting Constructive Acceleration Claim

SNC-Savalin America, Inc. (“SNC”) v. *Alliant Techsystems, Inc.* (“ATK”), 858 F.Supp. 620 (U.S.D.C., Va. 2012), involved a contract for the design and construction of a new nitric acid and sulfuric acid concentration plant at the Radford, Virginia arsenal owned by the United States Army and operated by ATK. ATK and SNC entered into a multi-million dollar design-build contract pursuant to which SNC agreed to provide engineering, procurement, and construction services. Unfortunately, the path to completion was fraught with delays, disputes, and plan alterations. In the end, SNC did not meet the deadline set forth in the contract. Not surprisingly, the parties disputed where to place the blame for the delays. SNC contended that delays resulted from unusually severe winter weather. SNC asserted a constructive acceleration claim arising from ATK’s denial of its weather-related time extension request. The parties’ contract expressly permitted time extensions for “unusually severe weather,” and it was undisputed that the winter during which the construction took place was the sixth coldest and second snowiest on record. It was also undisputed that SNC notified ATK that severe winter weather was impacting its performance; that SNC formally requested

a 30 day time extension, which was promptly denied by ATK ; that ATK threatened to impose liquidated damages if the work was not completed by the date established in the contract; and that SNC actually accelerated its performance, incurring documented additional costs.

ATK's principal defense to SNC's constructive acceleration claim was that SNC failed to provide "post-denial" notice that it deemed ATK's actions as ordering acceleration for which ATK intended to assert a claim. The court, in rejecting ATK's defense, noted that while many construction contracts do, in fact, mandate such notice be given as a prerequisite to claims' assertion, the contract between the parties to this project did not impose such a requirement.

Therefore, the court concluded that the time extension denial was wrongful and that SNC was entitled to recover additional compensation for its constructive acceleration claim.

2. Decision Denying Constructive Acceleration Claim

Fraser Construction Company v. United States, 384 F.3d 1354 (Fed. Cir. 2004), involved the claim of an excavation contractor on a U.S. government flood-control project on the South Fork Zumbro River in Rochester, Minnesota, alleging that it had been constructively accelerated by the Army Corps of Engineers' refusal to grant sufficient time extensions for high water flows, requiring it to perform work throughout the summer months of continued high water flows, whereas if the time extensions had been granted, it would have shut down its operations until the waters receded to levels that were more nearly normal.

The contract work entailed excavating material from the bottom of Silver Lake, a shallow reservoir located along the Zumbro River. Before the project began, the water level in the lake was to be lowered by approximately eight feet to facilitate excavation of the lake bottom. At that water elevation, most of the lake would normally be dry, except for a small stream running through the lakebed. The contractor, Fraser, submitted to the Corps a proposed plan of operations to divert the stream into a trench along the edge of the dry lakebed and to construct an earthen dike to confine the water to the trench. The dike was originally designed to withstand a water flow rate of 800 c.f.s. Government records, however, showed that water flow in excess of the flow the dike was designed to handle could destroy the dike and flood the lakebed. The records also showed that water flow of significantly more than 800 c.f.s. could be expected to occur, on average, approximately 2.4 times per year during the summer months. In comments accompanying the Corps' acceptance of Fraser's plan of operations, the Corps pointed out that the diversion system Fraser had selected "will be susceptible to damage by flow amounts which are anticipated to occur during the May to August time frame. *Delays due to such flows are not justification for weather-related extension of the contract completion date.*" (emphasis added).

The Corps' concerns turned out to be well founded. Because of wet weather in the region, Silver Lake began to experience high water flows shortly after the project

started, damaging the dike, flooding the work site, and delaying the work. The Corps denied Fraser's time extension requests and sent Fraser a letter demanding that the company improve its progress and threatening to terminate the contract due to delays in the project. Fraser continued work without notifying the Corps that it deemed the Corps' action a constructive acceleration order for which it would claim additional compensation. After completion of the project, Fraser asserted numerous claims against the Corps, including a claim for constructive acceleration, which the Corps denied.

The Court upheld the Corps' denial of the constructive acceleration claim on the grounds that Fraser was not entitled to the time extension it sought, and, in any event, that Fraser failed to provide the Corps the requisite post-denial notice.

Summary

U.S. law recognizes constructive acceleration claims, provided that the prerequisites for such claims have been satisfied.

References

Bruner & O'Connor on Construction Law, §§ 15:94 -15:100 (Thomson/Reuters/West)

Rubin, Biser, Brown, *New York Construction Law Manual*, §7:46 (Thomson/Reuters/West)