Job Acceleration: What Does It Really Cost You?

Suing for damages caused by acceleration is not as common as suing for damages caused by delays. But that tide is turning, and you need to know how to document them.

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Construction contractors are a special breed of businessmen who thrive on the risk inherent in the construction industry. Success is not only dependent on ability to construct but, also, on important variables that are out of the contractor’s control. Common occurrences such as change orders, weather-related delays, delays in materials delivery, impossible working conditions, and differing site conditions can greatly increase the costs of a job and lead to a dismal performance. Often, in addition to the costs associated with delay, the contractor incurs heavy costs from the acceleration resulting from the delay. At other times, acceleration is requested by the owner when there was no original delay involved. In either case, you, the contractor, need to be able to determine the true costs of accelerating a job.

Sometimes when a job is accelerated, the contractor and the owner agree ahead of time to the new schedule and to a method for reimbursing additional costs. But, what happens when acceleration is necessary, the job is completed on time, and the owner refuses to pay for the increased costs?

Often the contractor is forced into litigation to recover damages, and substantiating the actual costs of the acceleration is generally a requirement for recovery. What is the best way to substantiate increased costs for the courts or arbitration?

Job acceleration can occur in two ways—affirmative action by the owner or constructive inference that the acceleration is to occur. Affirmative action by the owner is simple and clearcut. When the owner specifically orders the contractor to speed up construction, the acceleration is required by affirmative action. Obviously, such a request for acceleration should entitle the contractor to recover any additional costs incurred during the acceleration period. Affirmative acceleration can occur when the owner refuses to allow an excusable delay and forces
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the job to be completed on schedule, or when the owner orders the contractor to perform within a shorter period of time than originally planned.

Constructive acceleration is more difficult to define. Most of the time constructive acceleration occurs when there is a delay in the job. The owner may infer that the job is to be completed on schedule, requiring acceleration even though he gives no direct order to that effect. For example, a wall and ceiling contractor working as a prime notifies the owner that there is a big problem with the CPM developed by the owner’s engineer. The owner replies that it will be taken care of. Three weeks later the problem is finally fixed; but, in the meantime, the wall and ceiling contractor has been unable to perform on schedule. The owner never directly says, “I’ll give you an extension.” Instead, he continues to focus on the original completion date. The wall and ceiling contractor is forced to accelerate in order to meet the schedule.

In point of fact, the wall and ceiling contractor was faced with an unavoidable and excusable delay. The owner ignored the delay and acted as if the job should be completed according to the original schedule. The owner constructively forced the contractor to accelerate to make up for the time lost waiting for the CPM to be corrected, and the contractor should be entitled to damages to recover additional costs incurred.

Seeking Damages . . .

When the contractor is forced to accelerate in order to recover from delays and the owner refuses to pay the additional costs, the contractor may be forced to seek damages to recover losses. But, before damages can be claimed, there are several elements that must support the contractor’s right to damages:

1. There must have been an excusable delay which would have entitled
the contractor to an extension. Some examples of excusable delays for which the owner might fail to make an extension are:

- Owner fails to make the job site available at appropriate time;
- Work is delayed by strike;
- Contractor discovered a problem that rendered performance impossible, e.g., the CPM problem described above;
- Owner-furnished materials were delivered late;
- Active interference by the owner;
- Unusually severe weather problems;
- Change orders causing delay in the base construction contract.

In other words, any contractor-caused delay will not entitle the contractor to a valid claim for damages. If the contractor falls behind and accelerates in order to get back on schedule, he will not be able to recover any increased costs caused by acceleration.

2. The contractor must have requested an extension. Sometimes the owner’s actions make the granting of a request for extension impossible. For example, the owner states that there will be an acceleration and no delays will be considered. If that happens, make the request for extension anyway, as documentation for future recovery.

3. The owner must have refused to grant the extension or failed to respond to the extension request. The owner has the responsibility to respond to a request for extension within a reasonable period of time. If the response does not come within a reasonable period of time, the contractor may feel forced to accelerate to prevent a breach of contract for late completion. In that case, the contractor would probably be entitled to damages for the increased cost of the acceleration.

4. Finally, the contractor was required to complete the contract without an extension, did complete the job on time, and did incur additional costs by doing so.

Preventing A Case for Seeking Damages . . .

When you seek damages for increased costs caused by acceleration, you should be able to prepare a case that would, in effect, put you in the same financial position you would have attained on the job had the acceleration not occurred. Of course, you should expect to recover all out-of-pocket costs associated with the acceleration. We’re going to discuss each type of cost that should be considered in preparing a case for claiming damages. The courts have emphasized the use of accurate cost records to determine damages, and you should be able to substantiate any costs that you claim in a way that is acceptable to the courts.

Labor Costs . . .

Labor costs are the most noticeable additional costs incurred in an acceleration period. Labor costs increase for three reasons: overtime pay, additional manpower requirements, and a combination of those two. Both overtime pay and increased crew sizes are complex issues with regard to establishing allowable and required costs for acceleration. Overtime affects productivity so that the amount of overtime worked becomes an issue—how much overtime was really required as compared to the amount of overtime actually worked. Increasing crew size also affects productivity, and the issue becomes how many men were required as compared to the number of men actually worked.

Effects of Overtime. The Construction Industry Cost Effectiveness Task Force Report, November 1980, had this to say about the true costs of overtime.

- “Placing field construction operations on a project on a scheduled overtime basis disrupts the economy of the affected areas, magnifies any apparent labor shortage, reduces labor productivity, and creates excessive inflation of construction labor costs without material benefit to the completion schedule.”
- “Where a work schedule of 60 or more hours per week is continued longer than two months, the cumulative effect of decreased productivity will cause a delay in the completion date beyond that which could have been realized with the same crew size on a 40-hour week.”

In other words, excessive overtime may cause more harm than it does good because of the associated losses in productivity. After an extended period of overtime, the reduction in productivity caused by fatigue factors begins to approach or even to exceed the number of overtime hours worked. At that point, the inflation in labor costs becomes unreasonable. As you may have guessed, there is no way to precisely evaluate this point of diminishing returns in an overtime schedule. The availability of local labor management skill, and the location of the job are all factors that vary from situation to situation that will affect the productive outcome of overtime operations. Determination of productivity losses associated with overtime must be made on an individual basis.

Effects of Increasing Crew Size.

There is an optimum crew size for any job. The optimum crew size may vary from job to job or from company to company. But, any additions to crew size beyond the optimum tend to cause corresponding decreases in total productivity. A recent productivity survey by Contractor Consultants Corporation supports this fact. Specifically, the study said:

“For crew sizes in excess of the planned or optimum size ranging to 10% above the planned level, the contractor can expect to experience productivity losses in the amount of 4.4 percent. When the crew sizes are 25 percent larger than planned, the loss in productivity increases to 15.1 percent. When crew sizes are 50 percent larger than planned, the loss of productivity is 29.1 percent; and when crew sizes are 100 percent larger than planned, there is a 48.8 percent reduction in productivity.”

As mentioned earlier, qualifying costs represents the best method for substantiating claims for damages. You may, however, be well prepared to document the increased costs, and then find the presence of dollar amounts isn’t the issue. Rather, the owner may argue “Yes, we agree that additional labor costs were incurred; however, we feel that the amount of overtime in hours was completely unjustified.” Or the owner may verify the amounts paid, but claim that the contractor didn’t need to use so many men to complete the job—that the job could
have been done as well with fewer people.

Sometimes contractors rely on anticipated labor savings. Granted, anticipated labor savings is a grey area, but the court may be willing to consider it. If you can analyze a random group of comparable jobs and prove that, on the average, you beat your labor estimate, why not seek this savings from the accelerated job? Perhaps, for example, you anticipated savings because you were going to work a certain superintendent on the job. With acceleration, that was no longer possible; you actually suffered financial losses because of the revised timetable. Documentation is the key.

**Other Cost Increases . . .**

Normally, during the course of a construction job, a contractor can save money with aggressive material purchasing. Often, a substantial savings in material costs is realized if the contractor has time to “shop” for the best prices available. When the job is accelerated, the ability to “shop” is greatly limited. As soon as the supplier knows that delivery has to be tomorrow, he can easily demand a higher price. And, the contractor, who is being forced to accelerate for whatever reason, is in no position to argue.

Proving the amount of money lost because of differences in material prices is not as easy as it seems. Simply comparing what the material actually cost to the original estimate may not satisfy the court; your original estimate may not have been realistic. One way of approaching this problem is to take a random sampling of past jobs and compare estimated material costs to actual costs for the entire sample. If your estimating has been fairly accurate, the court will be more likely to consider your actual-versus-estimate presentation of damages to be valid.

If you typically are able to save money over and above your estimated materials costs by your buy-out procedures, you may be entitled to seek damages for lost savings as well as increased costs. Contractors often find that they can buy out materials and subcontracts cheaper than estimated, and those savings are a planned part of their profits.

**Opportunity Costs . . .**

It seems reasonable that overhead costs will increase with acceleration, that there may be some lost-opportunity costs, that you will incur additional interest costs, etc. All these costs are valid considerations and should be presented with substantiating documentation just like direct costs increases. Even though most construction overhead is a function of direct costs rather than time, it is difficult to prove overhead increases due to acceleration because much overhead is categorized as fixed expense. However, expenses that vary directly with direct costs may well increase when the direct costs increase—small tool, truck, and driver expense for example. Once again, the best way to prove any such loss may be to take overhead expenses on past jobs as a percentage of direct costs and compare, that to the relationship existing on the job in question.

Whether you borrow funds to finance your operation or whether you finance your operations with in-house cash flow, there is a cost of financing—either the cost of debt or the firm’s cost of capital funds. Understanding the concept of additional interest on borrowed funds will be easier for the court to understand than the concept of the firm’s cost of capital. If you had to borrow more money than you normally would have to keep accelerated operations moving along, you should be entitled to recoup those costs. You should also seek recovery for any costs incurred in obtaining the additional funds, such as points assessed for restructuring an existing loan.

States differ in the amount of interest that can be applied in different situations. Basically, the courts say any damages that result from increased interest rates are not direct damages—interest rate escalations are not caused by delays in construction. In a delay situation, that may be true. However, during an acceleration, there is a real cost of borrowing additional funds which should not be reduced to a “legal rate of interest.” In fact, you even may be able to collect on your true costs of funds tied up for a period of time that payment is delayed after the job is finished—the time involved in arbitration or court proceedings.

Your firm’s money also has costs associated with its use. If the money were not tied up in the accelerated job, you would be able to use it profitably elsewhere. If you must invest more of your available cash in an accelerated project than you had anticipated on a normal schedule, you should be entitled to a return on that money that would equal the lost opportunity.

You are entitled to a reasonable profit on the increased costs of the acceleration. You must calculate the profit margin in the same way it was calculated in the original estimate—either a percentage of sales or a percentage of direct costs. What do you do if the original markup included both overhead and profit in a single percentage? The best way to break out profit would be to look at the prior year’s financial statements and determine overhead as a percentage of direct costs. By subtracting the overhead portion from the total markup, you will have a representative profit margin. You should seek recovery for similar profit that you would ordinarily have made on a change order or additional work where costs equaled the costs of the acceleration.

In the past, the courts have allowed contractors to seek damages using the total cost approach. This simply means you subtract the original estimated costs from the actual project costs to determine the damage amount. This would seem to be a reasonable method; unfortunately, the courts do not look upon these relatively unsubstantiated claims with favor.

Using this approach will not enhance your chances for recovery.

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And, neither will it account for all the costs you absorbed in most cases. When using the total cost approach to substantiating damages, you must meet four criteria:

1. The contractor’s original bid must have been realistic;
2. The contractor’s actual costs were reasonable;
3. The contractor was not responsible for the additional costs;
4. The nature of the losses makes it impractical to individually determine them with a reasonable degree of accuracy.

The best means of recovering damages is to identify each component of the costs in question, the specific cost of each component, the time frame involved, and any other specifics that relate to the additional costs. This approach requires the complete records and documentation we have been discussing throughout this article. Obviously, the most difficult additional costs to document are those associated with labor because the relationship between increased effort and productivity is so complex. There are specific but complex procedures available to help contractors document the labor costs associated with accelerating the construction schedule.

Contractors have long been suing for damages caused by delays. Suing for damages caused by acceleration does not have the long history and the precedents in the courts. However, damages caused by forced acceleration are real and should be considered when payment for accelerated completion is agreed upon. If there is a disagreement, the contractor has a right to relief in the courts or through arbitration which he should take advantage of. Documented, qualifiable information as to the amount of the damages will help contractors present cases that prove to the court’s satisfaction that the contractor is entitled to recovery.