

More haste, less speed

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Kevin Joyce looks at the concept of 'acceleration'

What is 'acceleration' and is it recognised under English law?

Acceleration relates to a situation where a contractor aims to achieve an earlier completion date. It intensifies the level of work being undertaken, and should not be confused with mitigation, which is the reallocation of resources to minimise cost and delay.

If the contractor has accelerated they aim to recover costs incurred by measures such as increased working hours, or using extra equipment or resources.

Express instruction

Under circumstances where employers have instructed a contractor to accelerate, and where the acceleration does not arise from the contractor's delay, the recovery of the costs of acceleration is often straightforward.

If the contract does not, however, provide for instructed acceleration, the employer must reach agreement with the contractor on how the work is to proceed.

The contract terms

Contractual authority to instruct acceleration forms no part of the JCT11 standard form. Therefore, the project manager's power to request a quotation from the contractor revising the programme to achieve earlier completion under NEC3 is limited.

Where a contract grants no such power, but the employer instructs the contractor to accelerate anyway, the contractor can recover their acceleration costs on the basis of an implied promise to pay.

Constructive acceleration

The more difficult and common situations are those where there are no clear instructions to accelerate. This arises where a contractor believes that they have a valid claim for an extension of time, but the employer refuses to certify an extension and the contractor, rather than risk having to pay liquidated damages, accelerates to make up the delay. This is known as 'constructive acceleration'.

The UK courts do not accept the principle of constructive acceleration. Convention dictates that the parties have included contractual provisions for time extensions, and if the employer fails to certify an appropriate extension the dispute resolution provisions are used to correct failures.

The UK courts do not accept the principle of constructive acceleration

In reality there will be significant commercial pressure on contractors who continue at a normal rate of progress. By doing so, they become liable for liquidated damages while the employer decides on the contractor's entitlements, and/or the parties follow the dispute resolution procedures in the contract. In *Ascon Contracting Ltd v Alfred McAlpine Construction Isle of Man Ltd* [1999] and *Motherwell Bridge v Micalfil Vacuum Technik* [2002] the courts suggested that there may be limited circumstances whereby a contractor could recover acceleration costs, even where there has been no express instruction. However, the position remains unclear.

Best practice ? the contractor's perspective

The best advice for the contractor is to resolve extension of time claims promptly, and/or obtain a written instruction to accelerate before undertaking such works.

Where that is not possible, but in instances where the contractor decides to take accelerative measures, the contractor must set out the basis of the steps they intend to take in advance. They must also explain why the conduct of the employer leads them to believe that they are being instructed to accelerate.

If it is established that the causes of delay are the responsibility of the employer, then there is every likelihood that the contractor may be able to recover costs ? either as loss and expense ? damages for breach, or on grounds of unjust enrichment.

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Once the principle of recovery of acceleration costs is established, the contractor needs to be able to prove what these costs are. The contractor can only recover only the additional costs they have incurred in taking the accelerative measures. As a result, the contractor must accordingly be able to produce evidence that the costs are additional to those which would have occurred in any event.

Best practice ? the employer's perspective

From the employer's point of view the contractor's entitlements to a time extension should be addressed promptly, and agreement sought in relation to the value of acceleration.

If the employer does not intend to instruct acceleration care needs to be taken with written and oral communication, because an inadvertent reference to 'acceleration' could result in arguments from the contractor that they have been so instructed. Once again, the employer must ensure that good records are maintained.

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