SCHEDULE-RELATED CLAIMS

By Lonnie D. Johnson*

As the adage goes, time is money, and when a project strays from the critical path, delays and attempts to regain schedule slippage alter time and foil cost estimates, causing companies to incur losses. Delay claims are filed by contractors to recover the additional expenses of performing on the job site longer than estimated due to the fault of the owner, architect or another contractor. At the other end of the spectrum, changes in the scope and timing of the project may compel contractors to perform at a quicker pace than anticipated. So called "acceleration claims" allow a contractor to recover the costs associated with performing at a more rapid pace than estimated; there are two types of acceleration claims: actual and constructive.

A. Contractor Delay Claims

A delay claim is the most common action asserted by contractors to recover additional costs incurred on a project. A contractor may bring a traditional delay claim against another contractor or owner whose acts or omissions caused the contractor's work to be delayed. *Indiana & Michigan Elec. Co. v. Terre Haute Indus., Inc.*, 507 N.E.2d 588, 602 (Ind. Ct. App. 1987). Proof that the defendant caused the delay is the crucial element of a delay claim. *Id.*; *see also Amp-Rite Elec. Co. v. Wheaton Sanitary Dist.*, 580 N.E.2d 622, 673 (Ill. App. Ct. 1991). If the plaintiff can carry the burden of proving its performance was wrongfully delayed by the defendant, then plaintiff can recover the

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accumulated additional cost of performance occurring as of the date that the delay commenced. *Indiana & Michigan Electric Co.*, 507 N.E.2d at 602.

A contractor is entitled to recover any damages for any delay caused by the owner. *Id.* at 588. In pursuing a delay claim, a contractor generally can recover overhead costs attributable to the operation of a field office during the period of delay. *Guy James Constr. Co. vs. Trinity Indus., Inc.*, 644 F.2d 525 (5th Cir. 1981). In certain circumstances, home office overhead can be recovered when properly attributable to a specific construction project. *Complete Gen. Constr. Co. vs. Ohio Dep't of Transp.*, 760 N.E.2d 364 (Ohio 2002). There are various methods utilized by courts to calculate and allocate overhead expenses, with the so-called *Eichleay* formula being the general rule. *Aetna Cas. & Surety Co. vs. Doleac Elect. Co.*, 471 S.2d. 325 (Miss. 1985). Contractors have been able to recover, as a consequential damage, loss of ability to obtain performance bonds, stemming from a breach of contract. *U.S. Fidelity & Guar. Co. v. Peterson*, 540 P.2d 1070, 1072 (Nev. 1975). However, as with any breach of contract action, the contractor has a duty to mitigate damages and must take other work, if able, to minimize the potential damages caused by a construction delay. *Complete Gen.*, 760 N.E.2d at 370.

B. Acceleration Claims

Inducement is the cornerstone of a claim for acceleration, and absent inducement, a mere acceleration does not entitle a party to recover damages. *Dep't of Transp. v. Anjo Constr. Co.*, 666 A.2d 753, 757 (Pa. Commw. Ct. 1995). Acceleration claims arise when an owner or contractor acts in such a manner as to induce a contractor to complete the project ahead of the scheduled completion date. *Id. Stelko Elec., Inc. v. Taylor Cmty.*

Schs. Bldg. Corp., 826 N.E.2d 152, 159 (Ind. Ct. App. 2005). The mere existence of acceleration in performance is insufficient to establish that the other party acted to induce the acceleration, and absent evidence to the contrary, the acceleration is presumed to be a voluntary action. *Stelko Elec., Inc.*, 826 N.E.2d at 158.

With actual acceleration claims, the period for performance relied upon in cost estimating is compressed because either the original target date for completion is advanced, the start date is delayed with the completion date remaining fixed, or the scope of the work to be performed within the fixed period is expanded. An order to accelerate may be explicitly stated in the form of a command to complete the project at a time ahead of that provided by the contract, or may be a constructive order. *Anjo Constr. Co.*, 666 A.2d at 757. A constructive order occurs when an owner or contractor behaves in such a way as to convey the message of acceleration to a contractor without the use of a direct command. *Norair Eng'g Co. v. United States*, 666 F.2d 546. The determination of whether a contractor's actions constitute a constructive order is a question of law. *Id.*; s*ee also Pennsylvania Liquor Control Bd. v. City of Philadelphia*, 333 A.2d 497 (Pa. Cmmw. Ct. 1975). For example, in *Tombigbee Constructors v. United States*, a government "request" to perform a task in a manner different from that agreed on in the terms of the contract was deemed to be equivalent to an order that the scope of the project be altered. 420 F.2d 1037, 1046 (Ct. Cl. 1970).

Every actual legal theory or claim has its "constructive" counterpart. Constructive acceleration claims provide relief for contractors where both the initial time-frame and the scope of work to be performed have remained the same but circumstances beyond the contractor's control support a finding that performance was constructively

accelerated. A constructive acceleration claim differs from constructive acceleration orders discussed above, which may be imposed to trigger an actual claim. While inducement is the cornerstone of an actual acceleration claim, the wrongful refusal of a rightful request for an extension for time to complete work is the hallmark of a constructive acceleration claim.

Typical construction contracts allow a contractor faced with unavoidable delays an extension of the contract performance date. *Sherman R. Smoot Co. v. Ohio Dep't. of Adm. Serv.*, 736 N.E.2d 69, 78 (Ohio Ct. App. 2000). The failure of the owner or prime contractor to grant a justified extension, instead holding to the original timeline of the project, gives rise to a constructive acceleration claim. *Id*; *Murdock & Sons Const., Inc. v. Goheen Gen'l Const., Inc.*, 461 F.3d 837 (7th Cir. 2006). The five elements for a successful constructive acceleration claim are:

(1) the contractor experienced an excusable delay entitling it to a time extension;
(2) the contractor properly requested the extension;
(3) the project owner failed or refused to grant the requested extension;
(4) the project owner demanded that the project be completed by the original completion date despite the excusable delay, and;
(5) the contractor actually accelerated the work in order to complete the project by the original completion date and incurred costs as a result.

Id.; *Envirotech Corp. v. Tenn. Valley Auth.*, 715 F.Supp. 190, 192 (W.D. Ky. 1988).

Excusable Delay Entitling a Contracting Party to a Time Extension

Excusable delays in the context of a constructive acceleration claim are creations of *force majeure* contract clauses which allow a contracting party to avoid contract damages where unavoidable circumstances necessitate the project taking longer to complete than initially estimated. *Tombigbee Constructors*, 420 F.2d at 1046. The most obvious and common subject of these clauses is the so-called "act of God" delay, which a contracting

party has no ability to control, avoid, or foresee. The existence of an unavoidable delay is a question of law. *Norfolk So. Corp. v. Main Fin. Assocs. L.L.C.*, No. L01-93, 2001 WL 34038611, *3 (Va. Cir. Ct. June 7, 2001). The burden of proving the existence of such a delay is on the party alleging its existence. *In re Bushnell*, 273 B.R. 359, 364 (Bankr. D.Vt. 2001).

It is important to emphasize that excusable delay clauses do not shift the burden of the losses incurred by such a delay to the other party. *McNamara Contr. of Manitoba, Ltd. v. United States*, 509 F.2d 1166, 1170 (Ct. Cl. 1975). Instead, such clauses only allow the delayed party an extension of the completion date in an effort to avoid potential breach of contract liability for failure to complete the job on the original contract schedule. *Tombigbee Constructors*, 420 F.2d at 1037. Such clauses do not include delays that, while unavoidable, are foreseeable. It is anticipated that a prudent contractor will construct estimates with these foreseeable delays in mind. If a contractor bears the risk of loss over a subject in the contract, that subject cannot be the basis for an unavoidable delay by that party. *Mt. Olivet Baptist Church, Inc. v. Mid-State Builders, Inc.*, No. 84AP-363, 1985 WL 10493, *7 (Ohio Ct. App. October 31, 1985). Thus, for example, lower than estimated productivity in and of itself is not considered an unavoidable delay, as a contractor is deemed to have control over its own employees and construction methods such that it bears the risk of low productivity. *Id.* at *5; *Goheen*, 461 F.3d at 843.

Proper Request for an Extension

A party experiencing an excusable delay has the burden to affirmatively seek an extension from the other contracting party. In the event that a contractor accelerates

performance on the project to meet the initial start date despite an excusable delay without requesting relief, the acceleration is deemed voluntary and the costs of the acceleration are not recoverable. *See generally, Nello L. Teer Co. v. Washington Metro. Area Transit Auth.*, 695 F. Supp. 583 (D.C. 1988); *see also Envirotech Corp.* 715 F. Supp. at 190; 5 Phillip L. Bruner & Patrick J. O'Connor, Jr., *BRUNER AND O'CONNOR ON CONSTRUCTION LAW* § 15:94 (2004). Moreover, construction contracts usually require a written request for an extension. If this request is unambiguously expressed in the contract, then the failure of a delayed party to submit a written request bars a constructive acceleration claim. *Johnson Controls, Inc. v. Nat'l Valve & Mfg. Co.*, 569 F. Supp. 758 (E.D. Okla. 1983) (granting summary judgment against subcontractor on acceleration claim because of failure to comply with requirement of written request, even where general contractor caused subcontractor's delays); *A. Beecher Greenman Constr. Corp. v. Incorporated Vill. of Northrop*, 619 N.Y.S.2d 293 (N.Y. App. Div. 1994) (finding liquidated damages could be assessed against contractor for later completion where contractor had not satisfied contractual requirement of written request for extension of time).

Wrongful Refusal of a Proper Request

A wrongful refusal can only stem from a proper request for an extension with the sufficiency of the request measured at the time of request, not at the time of trial. *e.g., Nello L. Teer Co.*, 695 F.Supp. at 590-91. If an extension is not requested or is requested in a manner inconsistent with the terms of the contract, a refusal of the extension, is not wrongful. *Id.*

Lastly, it must be emphasized that it is a well-settled legal principle that efforts to induce performance of the contract by the original target date do not give rise to an acceleration claim when the cause of the delay is solely the actions of the performing party. *Siefford v. Hous. Auth. of the City of Humboldt*, 223 N.W.2d 816, 819 (Neb. 1974).

Acceleration Damages

Damages for acceleration claims are limited to the additional costs incurred to complete the project pursuant to the shortened schedule beginning on the date the acceleration order was issued or when a proper request for an extension was denied. *Anjo Constr. Co*., 666 A.2d at 757. These costs may include such amounts as the hiring costs and salaries of additional workers, overtime pay increases, additional costs of materials due to the shortened time span, etc. *Id.* at 757-58; *Siefford*, 223 N.W.2d at 819. However, consequential damages are not recoverable in an acceleration claim. *Sherman R. Smoot Co*., 736 N.E.2d at 78; *Anjo Const. Co*., 666 A.2d at 757. Damages may be measured either through a "total cost" measurement, where the award is the difference between the actual costs of the project and the projected costs, or by a measurement of the precise amount of new costs incurred as a result of the acceleration. *John F. Harkins Co., Inc. v. Sch. Dist. of Philadelphia*, 460 A.2d 260, 265 (Pa. Super. 1983). "Total cost" damages can only be awarded if the party requesting the damages can show that its initial estimates of costs were accurate. *Id.; see also Wunderlich Contracting Co. v. United States*, 351 F.2d 956, (Ct. Cl. 1965); *Exton Drive-In, Inc. v. Home Indem. Co.*, 436 Pa. 480, 261 A.2d 319, 324 (1970).