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CONSTRUCTIVE ACCELERATION: THE SILENT LITIGATION THREAT FACING CONSTRUCTION PROJECTS

Wynne C. S. Reece
Megan L. Tilton
Bassford Remele, P.A.

Deadlines drive the construction industry, but what happens when unexpected delays make those deadlines impossible to meet? Owners have become increasingly insistent on “staying on schedule”—forcing contractors to work faster and harder, often at a steep cost. This scenario, known as “constructive acceleration,” is becoming a leading source of costly legal disputes. Understanding how these claims arise and how to manage them is essential for owners, general contractors, and in-house counsel who want to avoid unexpected liability and protect the bottom line.

A Crash Course in Constructive Acceleration: The Courts’ Perspective

Constructive acceleration is a doctrine grounded not in explicit contractual mandates but in the practical realities of project management and the conduct of owners and contractors: when a contractor faces what would ordinarily constitute an excusable delay, submits a timely and substantiated request for an extension, and is either denied or met with silence, the owner's insistence—whether explicit or implied—that the original completion date be met can result in legal liability.¹

The foundational elements of a constructive acceleration claim have been consistently recognized by courts and boards of contract appeals. Generally, a contractor must demonstrate: (1) the occurrence of an excusable delay; (2) a timely request for a contractually justified time extension; (3) the owner's denial of that request or failure to act; (4) an implicit or explicit demand for timely completion according to the original schedule; and (5) the incurrence of additional costs due to the acceleration efforts.² However, these requirements are not stringent, and various courts have made clear that so long as the “essential elements” of excusable delay, an acceleration order, and

¹ See *L3Harris Mar. Servs., Inc. v. BAE Sys. Norfolk Ship Repair Inc.*, No. 2:23cv259, 2023 WL 7095096, at *4 (E.D. Va. Oct. 30, 2024) (citing *Nova Grp./Tutor-Saliba v. United States*, 159 Fed. C. 1, 51 (2022)) (“Constructive acceleration occurs when the [owner] requires compliance with an original deadline, despite excusable delay being present.”).

² See *Framaco Int'l, Inc. v. United States*, 68 Fed. Cl. 722 (2005); *CEMS, Inc. v. United States*, 59 Fed. Cl. 168 (2003); Bruner & O'Connor on Construction Law § 15:118.

acceleration with associated costs are met, a contractor may still have a viable constructive acceleration claim.³

In *Framaco*, the Court of Federal Claims held that even informal communications emphasizing the necessity of maintaining an original project schedule may be sufficient to establish the demand prong.⁴ In doing so, the court underscored that an absence of a formal directive does not necessarily preclude a finding of constructive acceleration if the owner’s conduct and communications effectively require adherence to the initial schedule.⁵

Further, in *L3Harris*, the District Court for the Eastern District of Virginia refused to dismiss a constructive acceleration claim brought by a subcontractor that allegedly incurred significant increased costs that resulted from delays caused by the COVID-19 pandemic.⁶ In doing so, the Court noted that the law makes clear that an order to accelerate need not be specific or explicit to become actionable.⁷ Instead, any direction that implies an expectation that a contractor continue performing through an excusable delay may amount to an acceleration order.⁸

What Changed, and Why Does it Matter?

Several modern developments have heightened the prevalence and risk of constructive acceleration claims. For example, persistent labor shortages have constrained project staffing and flexibility, forcing contractors to stretch limited resources across multiple projects. Meanwhile, global supply chain disruptions, compounded by recent tariffs on steel, aluminum and other critical building materials, have introduced significant uncertainty into material procurement timelines. Owners, under increasing financial pressures and faced with compressed project schedules, have grown even more reluctant to grant time extensions, even when delays are clearly excusable. The lingering effects of the COVID-19 pandemic continue to reverberate, having upended traditional risk allocations and disrupted longstanding scheduling norms across the construction industry.

Typical scenarios giving rise to constructive acceleration claims include the unreasonable denial or delayed response to extension requests, informal owner communications that stress the need to “stay on schedule”—e.g. handshake deals or text messages—milestone-based payment structures that financially incentivize on-time completion irrespective of project realities, and the failure to adjust project schedules following significant change orders.

³ See *Fraser Constr. Co. v. United States*, 384 F.3d 1354, 1361 (Fed. Cir. 2004).

⁴ *Id.*

⁵ *Id.*

⁶ *L3Harris*, No. 2:23cv259, 2023 WL 7095096, at *1–2 .

⁷ *Id.* at 5.

⁸ *Id.*

The financial ramifications of constructive acceleration claims are substantial. Contractors often seek compensation for premium labor costs, including overtime and weekend work, expedited material shipping, additional equipment rentals, and subcontractor acceleration premiums. From a litigation standpoint, these claims are inherently fact-intensive and document-dependent, leading to protracted disputes that strain both financial and relational capital.

Minimizing the Threat

To mitigate the risks associated with constructive acceleration, owners and general counsel alike should adopt a proactive and disciplined approach. First, construction contracts must be drafted with precision, incorporating explicit procedures for requesting and granting time extensions and, where enforceable, “no damages for delay” clauses, with careful attention to jurisdictional nuances. They should also include a clear definition of acceleration and establish compensation mechanisms for any required acceleration efforts.

While there are, of course, industry norms—with some associations even providing base contracts to their members—these documents should be carefully tailored alongside experienced counsel. Engaging counsel who understands not only the construction business but also the unique practices and risk tolerances of the specific owner or general contractor is critical. Such counsel can ensure that the contract reflects the client’s preferred approach to handling timing-related issues and is appropriately attuned to the jurisdictional environment and the particular market dynamics in which the project will be executed.

Second, formalizing all communications related to scheduling is critical. Owners should avoid casual or off-the-record exhortations to “stay on schedule” and should take special care to ensure that responses to extension requests are timely, reasoned, and thoroughly documented. While this sounds tedious, simple email follow-ups on casual communications, documenting what was agreed to or discussed, can mean the difference between getting paid versus not.

Third, project managers and site supervisors should be trained on the legal implications of their communications and actions. A lack of awareness at the management level can inadvertently create the foundation for a constructive acceleration claim.

Fourth, robust scheduling protocols should be employed and regularly updated to accurately reflect project conditions and delays. Proof of such protocols is often pivotal in defending against claims.

Fifth, tight documentation must be maintained throughout the project lifecycle. Detailed records of delays, extension requests, owner responses, and internal discussions regarding schedule adjustments will form the evidentiary backbone of any future dispute.

For in-house legal teams, pre-project contract review is essential to ensure that acceleration and delay provisions are clear and enforceable. Internal training programs should equip teams with the knowledge necessary to manage delays prudently and recognize the potential legal ramifications of their actions and communications. Additionally, establishing escalation pathways for time-sensitive scheduling issues and conducting periodic legal audits of project documentation can serve as early warning systems, enabling intervention before issues escalate into formal claims.

What Happens Next?

Looking forward, the construction industry is unlikely to experience a decline in constructive acceleration claims. Market volatility, evolving regulatory landscapes, and the complexities introduced by large-scale infrastructure initiatives ensure that the risk will persist, if not intensify. Thus, business owners and general counsel who neglect to address this exposure proactively will find themselves increasingly vulnerable to significant financial and operational consequences.

Put simply, no longer is constructive acceleration a mere peripheral concern—it is a central risk in modern construction project management. However, by embedding thoughtful contractual provisions, fostering disciplined communication practices, and maintaining vigilant project oversight, stakeholders can position themselves to effectively mitigate this risk and shield the integrity and profitability of their construction endeavors.

About the Authors



[Wynne Reece](#) is a shareholder with Bassford Remele. Wynne represents law firms, other professional entities, businesses of varying sizes, corporations, creative entrepreneurs, and individuals in commercial matters, including general structure, client relations and disputes, investor growth strategy, buy-sell agreements, mergers, acquisitions, IP, real estate, team structure compliance and mediation. She is licensed in Minnesota and Illinois. wreece@bassford.com, 612-376-1606.



[Megan Tilton](#) an attorney with Bassford Remele who focuses on business and commercial litigation, consumer finance defense, construction, and corporate matters. Prior to joining Bassford Remele, Megan was involved in litigating complex insurance coverage disputes in state and federal courts nationwide. She is licensed in Texas. mtilton@bassford.com, 612-376-1664.

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