

SOCIETY OF CONSTRUCTION LAW NEW ZEALAND

AUCKLAND 5.30 pm MONDAY 3 OCTOBER 2011

WELLINGTON 5.30 pm WEDNESDAY 5 OCTOBER 2011

ACCELERATION

DEREK S FIRTH

Barrister, Arbitrator, Mediator, Adjudicator
Fellow, The Arbitrators' and Mediators' Institute of NZ

Telephone No: (09) 307 9129, Mobile: 021 933 747
Box Number 105392, Auckland City 1143, New Zealand
Email: dsfirth@ihug.co.nz

Website: www.derekfirth.com

ACCELERATION

DISCUSSION POINTS

1. Acceleration to catch up lost time due to Contractor delay:

- Very difficult to require in the absence of a contractual entitlement in favour of the Principal.
- This is because, at common law, a Contractor is entitled to take the risk that it can come up with a magical, last-minute solution. (In practice, this means hoping for an overlapping Principal caused delay!)
- For the same reason, it is important to include a provision in the contract requiring immediate catch-up for contractor delay, as well as expedition generally.
- Catch-up is usually easier and cheaper the sooner it is done.
- A clause which might be suitable is as follows:

Expedition – In any circumstances where there is a critical delay to the Contract Works for which delay an extension of time is not permitted, then the Contractor will take all necessary steps to overcome the delay at its own cost. The Contractor shall ensure the time lost as a result of any and all such delays is overcome at the earliest opportunity. The Contractor shall prepare a revised programme showing the application of all additional resources as are necessary to promptly overcome each delay. If, in any particular case, the Contractor proposes a period longer than one calendar month to catch up the delay, the consent of the Engineer shall be necessary (which consent shall not unreasonably be withheld). In no circumstances shall the provisions of this clause or any revised programme issued under it, or any consent of the Engineer permit or excuse the Contractor from completing the Works by the Due Date for Completion.

2. Acceleration for delay in lieu of all or part of a time extension:

- This should be a discretion as of right in favour of the Principal.
- It is not unfair to the Contractor because acceleration in these circumstances can be priced as a variation.
- A mandatory requirement is essential for enforcement. (GC 10.3.6 of NZS 3910:2003 is a Clayton's acceleration provision of no effect because it requires the agreement of the Contractor.)¹

¹ While on the subject of shortcomings in NZS 3910:2003 (and NZS 3915:2005) another omission (from the perspective of a Principal) is at the end of GC 10.3.1 dealing with extensions of time. There should be an additional ground for time extension being any action by or on behalf of the Principal which wrongly prevents or delays the Contractor. Many other standard forms of contract have an express provision to this effect in the time extension clause: for example, in the FIDIC suite the last ground for extension of time reads "... any delay, impediment or prevention caused by or attributable to the Employer, the Employer's Personnel, or the Employer's other Contractors on the site." The reasons for this essential provision are summarised in a paper (An Arbitrator's Perspective of

- Apart from being highly desirable for all projects, such a provision is the only efficient mechanism for meeting an absolute deadline (such as a hotel opening date, essential site works before the winter season, or meeting other immovable deadlines such as facilities for a major sporting tournament like the Rugby World Cup or the Olympic Games.)
- A clause which might be suitable is as follows:

Acceleration – Whenever the Contractor may be entitled to an extension of time, then in lieu of granting a time extension for all or part of the delay, the Engineer, following consultation with the Contractor, may require the Contractor to, (if practicable in the reasonable opinion of the Engineer), overcome all or part of the delay by applying additional resources, working longer hours or in whatever manner is required, at a cost to be determined as a Variation.

3. Identifying the steps necessary to accelerate (whether at the Contractor's expense or as a variation):

- The acceleration must be carefully planned.
- This will require the cooperation of subcontractors (which is yet another reason why a head contractor should include head contract conditions in a subcontract agreement).

4. Valuing the cost of acceleration (where the cost is to be priced a variation):

- The advantage to the Principal of having a mandatory acceleration provision where the extra work is to be priced as a variation is that the Contractor will be caught with any relevant underbidding. (The point is not to see the Contractor treated unfairly, but to make all of the tenderers price properly to get the job.)
- Treatment of P & G – time related not recoverable, but relevant volume related is recoverable.

Construction Disputes and Their Causes) for which a link is provided at my website www.derekfirth.com. The two New Zealand Standard forms adopt a different approach. The authors have attempted to think of all of the possible kinds of Principal caused delays and identify them throughout the document as Variations. Examples include GC 5.16 which provides that if the Principal is late with the supply of any materials, services or work, that shall be treated as if it was a Variation; GC 6.2.4 provides that if the Contractor suffers delay by reason of the failure or inability of the Engineer to carry out properly his or her duties, that failure shall be treated as if it was a Variation; and in the Guidelines, G 10.3, it is said that an example of the broad washup ground (GC 10.3.1 (f)), "Any circumstances not reasonably foreseeable by an experienced Contractor at the time of tendering and not due to the fault of the Contractor" includes breaches of contract or other acts or omissions of the Principal or of any Person for whose acts or omissions the Principal is responsible. Certainly, the Guidelines are said to "... have contractual status as between the Principal and the Contractor, but only to the extent that they may be referred to as an aid to the interpretation of the substantive clauses." I would have thought this is a very unsafe way to deal with a critical requirement because we have a "Guideline" intended only to be "an aid to the interpretation in the substantive clauses" and where the interpretation of the Guideline is completely contrary to the existing common law interpretation of GC 10.3.1 (f). This uncertainty can be simply avoided by following the more common international practice.

5. Necessary awareness of the benefits of acceleration:

- Consider the dewatering of a large excavation for a tower building where the excavation is accidentally flooded and the Contractor would normally be entitled to two weeks extra time extension, or through Contractor fault (negligently causing the flooding) and no time entitlement.
- That two weeks might be caught up completely during the original time allowed for excavated works, by installing additional pumping capacity.
- Compare the very small cost of that additional pumping capacity with having to accelerate by two weeks at the end of a tower building to meet a hotel opening date where further time extension could cause a financial calamity to the Principal, (or, if through Contractor fault, where the Contractor has delayed catching up in the hope that further down the track the Principal will be late with the supply of drawings, or there will be a delay with a Building Consent for a later part of the work).

6. Some problem areas:

- Wrongful refusal of an extension of time as a result of which the Contractor voluntarily accelerates to mitigate its exposure to liquidated damages – this is a breach of contract by the Principal (even if it arises from the actions of the Engineer), the time for completion is probably set at large and the Principal probably loses all rights to liquidated damages, and the Contractor will recover the acceleration costs as damages for the wrongful refusal of the time extension.
- Where acceleration is extremely difficult or impossible. Obviously, if acceleration is extremely difficult, then the Principal can still require acceleration (if the contract so permits) and the cost of the difficulty will be reflected in the valuation of the variation. If acceleration is impossible then, obviously, it cannot be ordered. If there is a dispute about that then it can go to a very quick adjudication or to the Expert under NZS 3910. In the suggested precedent above in section 2, you will see the inclusion of the words, “following consultation with the Contractor ...” These words are intended to flush out the issue of whether or not acceleration is impossible or to what extent. Those words first found their way into an original version of this clause at the request of Fletcher Construction, about 20 years ago and has sometimes been included and sometimes not.