

Project Acceleration in Construction Contracts: A Contractor's Dilemma to Proceed or to Pause?

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Abstract:

Construction contracts play a vital role in development of the construction sector that in turn develops the overall infrastructure of the country. However, the realities of the ground level of the contractors often go unnoticed and unacknowledged. In order to meet the deadlines, the contractors often have to take steps that are beyond the scope of work assigned to them. The extra cost that they incur, they will either be entitled to claim or will have to forego depending on various circumstances. This paper deals with those circumstances in which a contractor is forced to accelerate its speed with either resources or time to complete the project on time.

Key Words: *Project Acceleration, Construction, Contracts, Extension of Time, Constructive Acceleration, Implied Acceleration*

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Introduction

The socioeconomic landscape of a region is significantly shaped by infrastructure initiatives, and India has historically remained deficit of infrastructure initiatives. However, in recent years, the Indian Government has shifted its focal point on India's infrastructural needs and has developed various schemes and policies in the said regard. The National Infrastructure Pipeline (NIP), introduced in 2019 emphasizes social and infrastructure projects including energy, roads, railways, and urban development projects worth INR 102 lakh crores². Further, in India Budget 2023-24, the Indian government particularly emphasized the need for increased spending in the infrastructure sector and nearly trebled its infrastructure spending to 3.3% of GDP compared to its spending in 2019-20.³ The Budget has exceptionally allocated Rs.75000 crores for 100 projects deemed critical to improving the overall multimodal logistics infrastructure. However, given that construction time has a substantial impact on both construction cost and quality, the time element has grown in importance as a crucial prerequisite for a construction project in recent years.

Effect of Time on Contracts & the Relevant Legal Provisions

More commonly than we think, the Clause pertaining to "Time" is more prevalent in Contracts, be that may in a standard form of Contract or a mutual contract. The importance of this concept is also laid down in our Indian Statutes. Section 55 of the Indian Contract Act, 1872 specifically discusses the voidability of the contract where time is of the essence. A bare perusal of Section 55 of the Indian Contract Act, 1872 provides as follows:

"Effect of failure to perform at fixed time, in contract in which time is essential.

When a party to a contract promises to do a certain thing at or before a specified time, or certain things at or before specified times, and fails to do any such thing at or before the specified time, the contract, or so much of it as has not been performed, becomes voidable at the option of the promisee, if the intention of the parties was that time should be of the essence of the contract."

Where "time is of the essence" in a Contract, it particularly specifies that timely performance of the Contract is crucial and any delay can be considered a material breach to which there are consequences. But, what kind of consequences are we referring to here? There are 2 types of damages that arise out of material breach in contracts. Firstly, damages as specified in accordance to the provisions of the Contract. Secondly, damages that are predetermined amounts of

² Press Release, Ministry of Finance, Finance Minister Smt. Nirmala Sitharaman released Report of the Task Force on National Infrastructure Pipeline for 2019 and 2025 (Dec 31, 2019 04:11 PM) <https://pib.gov.in/PressReleaseDetail.aspx?PRID=1598055>

³ Infrastructure Development in India, Invest India (Sept. 14, 2023, 2:50 PM) [https://www.investindia.gov.in/team-india-blogs/infrastructure-development-india#:~:text=The%20National%20Infrastructure%20Pipeline%20\(NIP,sector%20has%20a%2021%25%20share](https://www.investindia.gov.in/team-india-blogs/infrastructure-development-india#:~:text=The%20National%20Infrastructure%20Pipeline%20(NIP,sector%20has%20a%2021%25%20share)

compensation agreed upon by the Parties to a Contract Agreement to account for potential losses resulting from a breach of Contract. Prominently, Section 74 of the Indian Contract Act, 1872 primarily enunciates the law regarding liquidated damages. A bare perusal of Section 74 of the Indian Contract Act, 1872 provides as under:

“74. Compensation for breach of contract where penalty stipulated for:-

When a contract has been broken, if a sum is named in the contract as the amount to be paid in case of such breach, or if the contract contains any other stipulation by way of penalty, the party complaining of the breach is entitled, whether or not actual damage or loss is proved to have been caused thereby, to receive from the party who has broken the contract reasonable compensation not exceeding the amount so named or, as the case may be, the penalty stipulated for.”⁴

However, the Hon’ble Apex Court in the matter titled *Welspun Specialty Solutions Ltd. vs. Oil and Natural Gas Corporation Ltd*⁵ had observed that whether time is of the essence in a contract, has to be culled out from the reading of the entire contract as well as the surrounding circumstances. Merely having an explicit clause may not be sufficient to make time the essence of the contract.

Concept of Project Acceleration

It is often witnessed that the Employers put pressure on the contractors to complete the work within the scheduled date of completion, notwithstanding the delays that have already occurred due to the fault of either the Employer or the Contractor. The Contractors in order to avoid the risk of liquidated damages as a result of not receiving an Extension of Time for the completion of the Project are induced to adopt measures without prior agreement for accelerating the work on the Project site. These may include, measures to be taken or, more significantly, the means of valuation and payment, resulting in avoidable disputes between the Parties to the Contract. The meaning of the term “Project Acceleration” has evolved over a period of time in Construction industry and even though it is not defined anywhere, however, the Society of Construction Law Delay and Disruption Protocol (2nd Edition February 2017) (‘the Protocol’) provides a helpful explanation on the concept of Acceleration of Projects.

“Acceleration is a subset of mitigation, and typically refers to the situation where additional costs are incurred to seek to overcome all or part of delay or disruption (for example, to ensure that that the contract completion date is achieved). Where the Employer is responsible for that delay or disruption, the Contractor may claim its acceleration costs from the Employer. This situation is distinct from a Contractor’s general duty to mitigate

⁴ The Indian Contract Act, 1972, No. 13, Acts of Parliament, 1872 (India)

⁵ Civil Appeal Nos. 2826-2827 of 2016

its loss when it suffers delay and disruption or incurs additional cost due to an Employer Risk Event.”⁶

The concept of “Project Acceleration” is very significant in order to avoid losses to the Parties to a Contract. The FIDIC Red Book (Second Edition 2017) provides that the Engineer may instruct the contractor to adopt accelerative measures to reduce the effect of delays resulting from causes which would provide entitlement to an extension of time. Further, the New Engineering Contract⁷ at Clause 36 provides specific provisions for the instruction for and submission of a quotation for acceleration. Through all these guidance notes, it is observed that even though the term ‘Project Acceleration’ still remains undefined till date, international societies and groups have started accepting this very concept as real and in the near future, we can expect either a statute or Rules that will govern this concept.

Reasons for Accelerating the Project?

What can be the possible reasons that the contractors double their labour , materials basically causing financial risk to themselves, all for completing the project on time? This may be because of the reasons we pondered upon in the above segment and will delve upon in more detail and new angle herein. The issue of an extremely tight schedule for completion of project milestones is not new in construction contracts which further results in imposition of liquidated damages if the same is not achieved as per schedule. In order to avoid the imposition of liquidated damages, the Parties often agree to accelerate the Project and achieve the milestones as fixed at the time of signing of the Contract Agreement. In other words, when an employer refuses to provide time extension of time to the contractor for the delay attributable to the employer, the contractor may pursue one of two options. The first alternative is to make an acceleration claim and enhance project resources to assure timely completion, avoiding liquidated damages. The second alternative is to file a prolongation cost claim, requesting both a time extension and compensation for additional expenses incurred as a result of the delay.

Acceleration can typically arise in two ways in a construction project:

- a. Express Acceleration:** The employer instructs the contractor to complete the works before the completion date. Typically, this arises where the employer is responsible for the delaying event but requires the works to be completed by the original completion date e.g. due to obligations under an agreement for lease or a potential sale and purchase of the building.
- b. Implied or constructive acceleration:** The contractor has been delayed and is entitled to an extension of time but the extension of time has not been awarded. The contractor

⁶ Society of Construction Law Delay and Disruption Protocol , 2nd Edition February 2017

⁷ New Engineering Contract, Engineering and Construction Contract, published June 2017,

therefore accelerates to avoid paying liquidated damages. In these circumstances, the contractor is trying to complete the works before the date that it should have to complete the works if the extension of time had been properly awarded.⁸

Methods of Project Acceleration

What if there exists no Clause pertaining to Project Acceleration in the Contract Agreement? Can a Party still request the other Party to accelerate the Project in order to achieve the completion date? This is a basic doubt that usually surfaces the mind of the Parties when the Project is behind the schedule completion date. A simple answer to the same is YES, even in the absence of a Clause pertaining to Project Acceleration in the Contract, a Party is not precluded from requesting the other Party to accelerate the Project and achieve the completion date; the Parties in such circumstances are free to reach an additional/ supplementary arrangements outside of the original Construction Contract pertaining to the cost of acceleration and formulation of revised timelines of the Contract. There are various methods to accelerate the project in order to achieve the scheduled date of completion. However, we will be focusing on the most prominent few methods of accelerating the Project.

1. Acceleration by deploying additional equipment and manpower (Resources):

The most typical technique for the Contractors to achieve the scheduled completion date of the Project is to deploy additional resources at the Project Site. The Contractor in order to cover the delay in achieving the Project milestone may deploy additional machinery and manpower or mobilize the resources for a longer duration. However, in this method, while the scope of work remains the same but the work is compressed into a shorter time frame and hence need more resources which is likely to incur more costs and does not assure timely completion.

2. Procuring and storing of raw materials ahead of schedule:

In many projects, there might be some raw materials that are brought from far off distance either via roads or railways. Often due to closure of a certain roads or due to an unexpected halt, the raw materials get delayed hence ultimately delaying the project completion. Procuring the raw materials from nearby resources and storing the materials brought off from a distance ahead of its using schedule can help save time.

3. Over time and overuse of man and machinery:

A laborer who may be employed to work 8 hours a day, may be given incentive (either monetary or extra perks) to finish the work in the time schedule provided. This prevents

⁸ Daniel Cashmore, Back to basics: acceleration of construction projects (April 14, 2022) <https://www.lexology.com/library/detail.aspx?g=6215e615-3a13-4ca7-b2fe-3e8f435f3ac2>

the extra work of hiring new workers and cuts down on training time as the already employed workers are aware of the techniques and the work that is to be done.

Other methods, in brief are as below⁹:

- Adding new suppliers in the already existing supply chains
- Using different construction methods, for eg: off site construction manufacturing
- Changing the sequence or compressing the activities to be performed
- Identify the inefficiencies and the primary causes of causing delay, then solve that inefficiency first.

Contractor's Dilemma: to accelerate or to wait?

Many a times the contractor may be at a crossroads, whether to wait for granting of the extension of time by the employer or impliedly start accelerating the project work. It may also happen that till the time, the extension of time gets approved from the employer, it might be too late and the damage may have already been done. But, what if it doesn't get approved and the contractor has already started accelerating the project? Who will bear the costs then? It is only a situation like this that may give rise to either a court case or an arbitration proceeding depending on the provisions of the Contract.

Generally speaking, the completion period of the construction contracts does get extended when there is a delay which is not attributable to the contractor.¹⁰ If and when the situation arises that the contractor feels the work of the project may not get completed within the scheduled timelines, he sends a notice to the employer mentioning the reasons for the delay and thereby seeking extension of time. The employer after carefully perusing the same either accepts the notice thereby extending the construction period or rejects the notice.

What factors may be considered while allowing or disallow the contractor's extension of time:

- Change of Scope of work: whether approved by employer or not?
- Adverse weather conditions (too much rainfall, snowfall): impact of the same on the work done
- Force Majeure Event: Such as Covid-19 restrictions put a halt on the work of all the sectors if the economy
- Political unrest in the Project site

⁹ John Williams and Frankie Bell, Construction Projects: contractual and non-contractual acceleration (July 15,2022 1:01 PM) <https://www.pinsentmasons.com/out-law/guides/construction-projects-contractual-non-contractual-acceleration>

¹⁰Extension of time (EOT) in construction Contracts (Jan 12, 2023) https://www.designingbuildings.co.uk/wiki/Extension_of_time_EOT_in_construction_contracts

- Delays in receiving approvals/clearances from the authority or the government wherever required

At the end, it is the contractor's decision to start with the project acceleration or wait for the approval keeping in mind the other factors related to the project. This in all likelihood results in disputes between the parties thus paving way for the Claims which are talked about in detail in the below segment of the paper.

What are the Claims that can be sought under Project Acceleration?

As the old age saying goes '*Time is Money*' and any time extra spent requires money to be paid. Similarly, acceleration claims are the claims that contractors can make with regard to the payment of speeding up a project. Completing a project faster in order to ensure that the work is done by the deadline prescribed as per the contract requires the Contractor to impliedly spend more money on resources and manpower, however acceleration claims are a tricky path to navigate as there can be several causes that attribute to the necessity for completing the project faster than the time limit specified within the contract. In some cases, the Contractor himself may need to speed up the project in order to complete it within the timeline provided in the construction contract, hence it is important to ensure that the acceleration claims are viable. Just like in other claims, reviewing of Contracts is very important to understand the claims that can be out up. In the case of direct acceleration, the claims will be limited to the provisions in the Contract. However, in the case of Constructive acceleration, a thorough and deep review of the provisions of the contract along with the root cause of the delay of the Project has to be analysed. In either case, the contractor in case of constructive acceleration is entitled to certain damages or on other words compensation in return for the extra costs incurred by the Contractor to accelerate the work. Construction disputes in itself are very exhaustive, no naturally its claims head the same way too. Some of the common evidences that can be used by the contractor to strengthen its claims include, Correspondences exchanged, minutes of meeting, change of scope in work order and pictures and videos. The Court or Arbitral tribunal while considering the relevant laws, provisions of the Contract, the circumstances, the facts of the case may award appropriate damages or compensation amount which may extend to the following claim heads depending on the extent of measures taken by the contractor.

- Additional labor or subcontractor costs: for every extra laborer or sub-contractor hired by the Contractor to accelerate the project work, he is entitled to be compensated for the same amount incurred by him subject to proofs.
- Overtimes cost: having laborers work overtime ultimately means paying overtime money, which is substantially even higher than what is paid in the normal working hours. This amount paid by the contractor for accelerated completion of the project is liable to returned to the Contractor by the employer.
- Loss of business opportunity: All the resources that the contractor utilized on completing the specific project on time, the same could have been put in another project that could

possibly have been profitable. The employer is liable to give the loss incurred due to the non-application by the contractor in the possible prospective bids.

- Additional supervision costs: any accelerated project doesn't just require additional workers, instead all the employees at senior positions to supervise the workers. This extra cost too is liable to be paid to the contractor in case of constructive acceleration.
- Additional cost incurred due to plant and machinery purchased: in certain situations, it may be possible that the contractor roped in extra plant and machinery than what was originally planned in order to finish off the project acceleration. In such scenario, the employer may be liable to reimburse the cost of the equipment bought upto a certain extent.
- Overhead costs: It is a settled position that while complying with the above mentioned acceleration process, the contractor may have incurred allied expenses including but not limited to the transportation, additional setup that are liable to be paid by the

Conclusion

Completing the project as per the decided timelines works in the benefit of both the employer and the contractor. A few steps are advisable to be taken by the parties in order to avoid the emergence of any dispute. If the situation arises wherein the Contractor is at fault for delaying the project work then accelerating the Project is within his right to do in order to avoid the imposition of liquidated damages by the employer, however, in such a scenario the right to claim compensation/damages on account of delay in the completion of the Project is waived by the Contractor. In a situation wherein the delay is attributable to the employer, it is advised that at the time of accelerating the Project, the parties enter into a Supplementary Agreement providing the terms and conditions pertaining to the acceleration of the Project.