

Issue No : 3
Published : Pre 1991
Article No : 1
Author : Roger Trett
Title : Introduction

The time has come round yet again to put pen to paper for the Trett Digest. Just like Christmas the time between appears to get shorter - or perhaps we are all getting older.

Time seems to impinge upon everything somewhere, and particularly in construction where the time period is often overrun and in an attempt to reduce the overrun acceleration measures are implemented.

In the last few months we have seen a repeat of problems arising with regard to acceleration of contracts and the resultant disputes as to levels of payment.

In numerous cases Contractors and Sub-Contractors have accelerated the Works, without prior agreement as to reimbursement, only to find that the client is not willing to give cognizance to the proper costs of that acceleration. I think that we all know that the costs of extended working hours, provision of additional resources etc. can be quite disproportionate to the physical work achieved when compared to the original tender and plan.

Very few contracts provide any entitlement for the Employer to instruct acceleration measures, yet most of our Contractors and Sub-Contractors seem to believe that they do, otherwise why do they continue to undertake such measures without prior agreement to reimbursement. I accept that on occasions it is done to keep the Employer happy, particularly when he says 'I'll see you alright', but how many times has he *not* seen you alright.

The fact that a contract may provide the entitlement to the Employer to vary, or alter the sequence of the work, does not entitle him to change the completion date at his will. If the contract includes an extension of time clause then the Employer is not entitled to bring forward the completion date arising from an entitlement to the Contractor without the Contractor's agreement.

The Contractor is not in breach of contract if he fails to accelerate without agreement, he is able to rely upon his rights under the contract.

An acceleration agreement implies that the date is being brought forward to a date that is earlier than the contract date or a date arising out of the contract after application of its conditions or even from a date that would arise from 'reasonable time' following breach of contract by the Employer and setting of 'time at large'.

As a consequence the acceleration measures should be agreed and settled by a Supplementary Agreement between the parties.

One word of caution, Contracts do normally allow for the Employer to instruct the Contractor to take measures to achieve the completion date if the delay results from the Contractor's own lack of performance. Be sure that you can distinguish between acceleration of the programme and recovery of the programme!

To take the acceleration theme further Tony Farrow, Associate Director and Manager of the Manchester office has prepared a set of three articles which deal with acceleration. The first one has been included in this Digest.

In addition an article from Roger Reynolds, Associate Director of our Great Yarmouth office 'addresses the question 'What is a Consultant?'.

Issue No : 3
Published : Pre 1991
Article No : 2
Author : Anthony Farrow
Title : Acceleration

A series of three articles has been prepared on the subject of accelerating the construction process. The first article, below, considers some of the dilemmas facing both the Employer and the Contractor when, respectively, contemplating the issuance of an instruction to accelerate and acting upon such an instruction. The second article, to appear in the next TRETT DIGEST, considers the items to be included in such an instruction and the various methods for agreeing a price. The final article deals with matters after acceleration is under way and the resultant effects at completion.

PART 1

The Dilemmas of Acceleration

An acceleration deal can be defined as an agreement to reduce the originally planned periods to carry out various programmed activities, either on or off site, to achieve an overall reduction in the project duration. This reduction is usually brought about by working longer hours, more shifts, increasing numbers of operatives and providing additional plant. As a consequence, the party undertaking the acceleration incurs additional costs which can often be a substantial increase on the originally agreed price for the work. Therefore, it is an unwise Contractor who enters into such a deal with the method of reimbursement and the contractual implications left on the table for future discussion.

Acceleration is brought about for many reasons; the imposition of additional works, design modifications, changed ground conditions resulting in delays to the structure etc. The need for acceleration arises because the Employer is locked into an end date that he cannot afford to miss; such as an office or retail development that is pre-let, with damages for delay. Alternatively, the income to be derived from the facility may be such as to outweigh any contemplated extra-over costs for acceleration.

Most traditional forms of contract do not envisage acceleration being instructed (except where the Contractor is in default and he then usually has the option of taking steps and incurring costs to overcome his own delays or alternatively suffering the imposition of liquidated damages). Construction contracts usually envisage that an event causing a delay provides the Contractor with an entitlement for an extension of time. More recently drafted contracts do provide the Supervising Officer with rights to instruct, by agreement, acceleration measures but must refrain from giving him a unilateral power to instruct whatever measures he deems necessary with the right to likewise determine the extra-over costs. Consequently, when an acceleration deal is made, more often than not the parties enter into some form of collateral agreement that amplifies, modifies or extends the existing contractual arrangements.

The Employers Dilemma

Quite often, the Employer considers himself to be the aggrieved party when acceleration is being considered. He has done everything by the book; appointed Consultants to design and manage the development for him and entered into a contract with an experienced Contractor to construct it and have it completed by a given date. Yet he learns that delays have arisen and progress has fallen behind programme. The Contractor will have sought extensions of time and notwithstanding the provisions of the contract, it will take the design team months to consider the finer implications of this delay and that delay. However, the Employer does not

have the time for such deliberations and consequently he must take the decision to accelerate and hence bear the financial implications, before he has had sufficient time to consider if he is the party responsible for the state of affairs that exist. Of course, he may try to force the Contractor into taking accelerative steps prior to accepting liability for costs, but the Contractor's refusal to act without a deal having been reached will usually force his hand and concede liability for extra costs.

The Employer's decision-making process can be slow and the time taken to obtain approval is so long as to be too late to make acceleration a feasible option. Employers must bear in mind that there appears to be an exponential relationship between time to save an extra-over costs i.e. one week can be saved at a cost of £x, two weeks at £2.5x, three weeks at £5x etc.

Delays frequently occur because of some underlying fault in the management of the project. For example, the Employer may be unable to fix his requirements and repeatedly creates variations. Alternatively, the contract may dictate a 14 day approvals period but because of the imposed administration approvals period approvals may take 28 days or longer. Consequently, accelerating the site processes may reduce construction times but will it reduce the overall project duration? Employers should therefore, review their own project management procedures.

A major dilemma faced by the Employer is the thought that his agreement to paying additional monies may not bring about the time savings he requires. Contractors will usually agree to accelerate provided they feel confident that additional cost will be reimbursed but sometimes are unwilling to give a contractual commitment to a specific end date. The Employer's dilemma being should he expect liquidated damages to be imposed on the end date or, quite the opposite approach, should he offer a financial bonus for hitting the date? A carrot or a stick?

Probably the biggest dilemma the Employer will face is anticipating the likely costs of acceleration and how costs should be established. The most clear cut approach is to agree a fixed price from the outset. However, acceleration can be a rather unknown quantity and some degree of flexibility is warranted. The Contractor's measures will vary depending upon his success at reducing time and the usual position is that time is not made up at the expected rate and so more and more resources are thrown into the project. Consequently, an open ended financial arrangement may arise meaning an open cheque and little cost control for the Employer.

The Contractor's Dilemma

All too often Contractors see acceleration as an opportunity to increase the profit margin on a project and so willingly enter into loose agreements which impose significant additional obligations and liabilities. A simple agreement whereby "the Employer agrees to pay the Contractor £100,000 in consideration of the Contractor completing the works by 22 October" could result in the Contractor getting a substantially lesser sum, or nothing, if he finishes a week late. And what if the Contractor's real costs are in fact £100,000 should he fail to achieve a target date? Or is it more equitable to be paid actually incurred costs, whatever the outcome, and forfeit an incentive bonus should he not achieve the Employer's required date? All too often, Contractors enter into acceleration deals in which additional costs are identified but at the same time agree to gamble the recovery of these costs by the possible imposition of unreasonable damages.

To accelerate, the Contractor requires the support of everyone involved with the project. His own staff and site operatives will need to work extra hours. His Sub-Contractors will have to be consulted and likewise instructed to work to a new programme and revised methods of working. Suppliers will have to be consulted to ensure deliveries can be made to meet the new programme and if not possible, preferential deliveries negotiated or manufacture expedited, at additional cost.

The Contractor not only relies on his own staff, Sub-Contractors and Suppliers but also on the design Consultants and the Employer's site supervision. Site acceleration will demand speedier design information and decisions from the Consultants and so the Contractor must insist that the Employer has the Consultants' commitment to provide extra resources. Quality standards invariably drop during accelerative working and so testing and checking procedures must be reviewed. At the outset of acceleration, the Employer may indicate that there will be a more reasonable attitude towards quality and inspection, but in the field it is unlikely that a Clerk of the Works will pass shoddy workmanship and so resources will have to be reallocated away from productive activities to correcting defects.

If labour is already in short supply, the Contractor must consider where he is going to obtain additional labour, at what cost and what quality. Furthermore, productive labour requires supervision and additional numbers must be sought. The Contractor should also consider the wider implications on his business. The commitment to accelerate one project will tie up important resources and hence limit his ability to undertake other work. Will the acceleration deal adequately compensate him for this?

Acceleration usually means a change of site organisation and the provision of additional levels of management. For example, programming and tightly integrating the various trades and progress reporting become more critical and so extra planning resources are needed. Procurement of materials is important and it is normal to designate someone as Expediter, to chase material orders and deliveries so as to ensure that labour is never left short. There can be a need to split the Project Manager's role in two; one Project Manager to concentrate on the site production, identifying problems and finding solutions; the other can liaise with the Employer and Consultants, ensuring design information is available and engineering and drawing tasks are completed to suit the construction programme.

A pressure the Contractor is likely to face is the Employer's expectation that he should, in good faith, proceed with acceleration before the details of the deal are worked out. However negative this may seem, a Contractor would be well advised to resist this since the Contractor's requirements for accelerating may be considerably different to the Employer's expectations. It is far better to proceed on a fully thought out and agreed basis and the contractual implications understood by both parties.

The Employer may ask that only part of the works be expedited. In these cases, if acceleration can be kept to certain trades, it is usually possible to expedite parts of the works e.g. rebar workers' hours increased. However, it becomes problematic to increase, for example, the electricians' overtime hours in Block A and keep the working hours of the electricians in Block B to a normal week. Whilst the Employer may only be interested in expediting Block A, he may be forced into paying additional costs elsewhere to maintain labour harmony on site.

Finally, whilst the above has identified problems in undertaking acceleration, thought should be given to stopping acceleration if it does not naturally end with the completion of the project. During the acceleration, the project has become a source of high earnings for labour, with plenty of overtime. At completion of acceleration, the Contractor is faced with the task of reducing the number of operatives on site and normalising working hours. Labour therefore, perceives the project as a low earnings site, become disenchanted and the Contractor may lose his best operatives.

In conclusion, when contemplating acceleration the construction parties should identify the likely problems and consider how they will be dealt with. If the Employer decides that he will be financially better off paying for acceleration and the Contractor believes he will improve his profit margin then they can negotiate an agreement. Part II of this series will review items that can be included within such an agreement and consider how additional costs can be identified and agreed.

Issue No : 3
Published : Pre 1991
Article No : 3
Author : Roger Reynolds
Title : What is a Consultant?

What is a Consultant? - in these days of specialisation open any newspaper at the "Appointments" page and you will see advertisements for this Consultant, and that Consultant - but what are they?

At their best Consultants are men and women who through education, training and practical experience have become expert in their particular field of activity, whether that be computer sciences, industrial engineering, management services and so forth, or, as in our own specialisation, Construction Contracts Advice and Contractual Claims.

In each case the Consultant fulfils a need in his or her own industry. In general they assist others from that industry to solve problems; reappraise management systems from an independent view point; or more generally fill a gap which may be thought to exist in that industry. Whatever the industry and whatever the specialisation the Consultant has identified a need , and set out to fulfil that need.

In our own situation Trett Contract Services Limited is a firm of Consultants, working in the Construction Industry. We have a staff of experienced people, who prior to joining us have many years of experience and who have held senior positions in the construction professions and contracting organisations. We are thus well qualified, both by training, and experience, to advise our clients as to the potential that may exist in any situation whereby they may be in delay, financial difficulty or have other problems within a specific project, through reasons beyond their control.

Of course, this is not to say that our clients' themselves are not able to prepare their own solutions. However, they may not at that particular time have the staff available to undertake such work which is often time consuming and expensive! This is not to say that we can either execute the work quicker or cheaper - though because of our more specialised experience, and independent stance, we can often get to the core of the problem quicker than those who perhaps have been more deeply, or are emotionally involved, with the problem situation. Because we generally work for a previously agreed fee, perhaps combined with an additional contingency fee based on results; our clients are aware from the outset of their financial commitment -since the risks involved in the preparation, and hence cost are all ours! As an additional factor, where the claim is of major proportions, and does eventually proceed to either Litigation or Arbitration, a substantial part of our fee may itself become reimbursable unlike the costs of the clients direct staff.

To ensure the requisite quality of service to our clients is maintained, if not improved, the company has this year made very considerable investment in the acquisition of new and improved offices; recruitment of new Consultants and other staff; as well as in the provision of new and improved computer systems and software.

Our Great Yarmouth offices have been consolidated for some months now in Vauxhall House together with our subsidiary company OMS Management Services Limited; whilst both Darlington and in particular London have moved to new premises. Our London operation especially, has been greatly expanded under the leadership of Roger Trett and Peter Hill. A new office has been added in Manchester to aid and develop our services to the North West led by Tony Farrow.

The preparation of claims is by the nature of the Construction Industry often very involved comprising numerous threads interwoven to create complex situations which have to be unravelled before solutions can be worked out. To provide assistance in such circumstances we have a well established Planning Department equipped with up to date computers and CAD equipment under the managership of Steve Briggs (whose articles on Planning appeared in the first two issues of the Digest).

The illustration and demonstration of the cumulative effects of often diverse threads within the overall delay situation frequently forms an integral and effective part of any overall claim solution prepared by our Consultants for the benefit of clients. It is our hope that by the provision of better facilities, an enlarged staff, and improved equipment, we will be able to enhance our services to our present clients and increase our client base.

To return to the original question posed in this article "What is a Consultant?" in terms of Trett Contract Services Limited a consultant is a specialist who can provide an investigative service to potential clients who having identified the source of the clients difficulties, then researches the detailed cause and effect and will prepare a solution, usually in the form of a detailed claim document.

Our objective as specialists in this work is to provide a service which is both prompt and efficient and is achieved without detriment to our client's core activities.