

CONSTRUCTIVE ACCELERATION

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Constructive acceleration occurs when the government demands the contractor's compliance with an original contract deadline even though there is excusable delay. This is precisely what happened in *In IAP Worldwide Svcs*, ASBCA no. 59397 et al, May 17, 2017. A contractor is entitled to compensation for additional costs that result from the constructive acceleration.

In IAP, the Army Corps of Engineers issued three delivery orders to provider power plants at forward military bases in Pakistan. The delivery orders incorporated IAP's proposal which made it clear that IAP would ship the power plants via surface transportation, using what was called the "Pakistan route." Before the shipments were due, in response to U.S. combat operations, Pakistan closed the Port of Karachi and the land routes from that city to Afghanistan to US and NATO military shipment, making it impossible for IAP to complete shipment of the power plants. The generators for the orders became trapped in the Port of Karachi.

IAP requested a delay in the delivery date. The government refused to grant extensions and threatened default. IAP suggested the Corps agree to permit it to use either air freight at an additional cost of \$4.4 million or an alternate delivery route, known as the "Northern Distribution Network ('NDN')"—a route that took more time and went through numerous East Europe and Asian countries— at an additional cost of \$1 million. The contracting officer refused to grant extensions and demanded that IAP comply with the delivery date without agreeing on how to meet it. IAP shipped the goods via the NDN and incurred additional costs.

The Corps initially refused to acknowledge an excusable delay arising from the border closure. After negotiations however, the contracting officer changed her position and decided that the border closure was an excusable delay, was beyond IAP's control, and occurred without its fault. However, the Corps stated that the delay was "not compensable." Notwithstanding this, IAP submitted certified claims for all three delivery orders, which the Corps then denied, giving rise to this appeal.

IAP claimed there was constructive acceleration, and the Board agreed. To establish entitlement to compensation arising from an acceleration, IAP had to prove:

- IAP encountered an excusable delay
 - There was no question that the delay was excusable
- IAP made timely and sufficient requests for an extension of the contract schedule
 - IAP had requested sufficient and timely extensions
- The government denied IAP's requests or failed to act within a reasonable time
 - The Corps denied or did not respond to IAP's requests
- The government insisted on completion of the contract within a shorter period than the excusable delay would have permitted
 - The Corps refused to grant IAP the amount of time the excusable delay warranted
- IAP expended more resources to compensate for lost time and remain on schedule.
 - IAP had to ship a second set of generators at additional cost

In granting the constructive acceleration claim and returning the appeal to the parties for resolution of quantum issues, the Board stated

IAP encountered an excusable delay performing the three task orders as a result of Pakistan closing its border with Afghanistan. The government accelerated performance when it failed to timely grant extensions to fully account for the delay. IAP is entitled to an equitable adjustment reimbursing it for expenses actually and reasonably incurred in complying with the acceleration orders.

The takeaway is simple: If a contractor experiences excusable delay (i.e., a delay that is beyond the contractor's control and occurs without its fault), the contractor must request extensions from the contracting officer and if denied (or ignored), incur the additional resources to meet the original delivery schedule. The contractor is entitled to receive compensation for the additional costs, and should submit an acceleration claim to the contracting officer.