Schedule-Related Construction Claims

By Lonnie D. Johnson*

Timely completion of large construction projects depends upon the correct sequencing and interfacing of the work of numerous contractors and trades. As the adage goes, time is money, and when a project strays from the critical path, delays and attempts to regain schedule slippage alter time and foil cost estimates, causing companies to incur losses. Schedule slippage caused by contractors may give rise to a delay claim by the owner. Conversely, delay claims filed by contractors to recover the additional expenses of performing on the job site longer than estimated, due to the fault of the owner, architect or another contractor, are common. At the other end of the spectrum, changes in the scope and timing of the project, typically caused by unexpected delays on a portion of the project, may compel other contractors to perform at a quicker pace than anticipated. So called "acceleration claims" allow a contractor to recover the costs associated with performing at a more rapid pace than estimated. There are two types of acceleration claims: actual and constructive.

With schedule related construction claims, damages are awarded pursuant to traditional common law principles of contract law. Contract damages are limited by two fundamental principles: foreseeability and reasonableness. The most important black letter rule of contract law originated in the famous English case of *Hadley v. Baxendale*, which holds that the measure of damages for breach of contract are either those damages

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as may fairly and reasonably be considered as arising naturally from the breach or as may reasonably have been within the contemplation of the parties at the time the contract was made. *See Appel v. LePage,* 15 P.3d 1141, 1144-45 (Idaho 2000), *Lassen v. First Bank Eden Prairie*, 514 N.W.2d 831, 838 (Minn. Ct. App. 1994); 5 *Arthur Corbin, Corbin on Contracts* § 1000 (1964), *Hadley v. Baxendale,* 9 Ex. 341, 156 Eng.Rep. 145 (1854). To be reasonable, a damage award must be referenced to some fairly defined standard, such as cost of repair, market value, established experience, rental value, loss of use, loss of profits, or direct inference from known circumstances, so long as it is supported by the evidence. *See Abbey Villas Development Corp. v. Site Contractors, Inc.*, 716 N.E.2d 91, 101 (Ind. Ct. App. 1999). As with any damage award, damages for a construction claims must be supported by probative evidence and cannot be based on mere speculation, conjecture, or surmise. *See 4-D Buildings, Inc. v. Palmore*, 688 N.E.2d 918, 921 (Ind. Ct. App. 1997).

Furthermore, to ensure reasonableness, it is axiomatic that a party injured by a breach of contract may recover the benefit of his bargain, but his recovery is limited to the loss actually suffered so as to prevent plaintiff from recovering an economic windfall. *See Whitaker v. Brunner*, 814 N.E.2d 288, 296 (Ind. Ct. App. 2004) ("When injured by a breach of contract, a party's recovery is limited to the loss actually suffered. Such party may not be placed in a better position than he or she would have enjoyed if the breach had not occurred."); *Abbey Villas Development Corp. v. Site Contractors, Inc.*, 716 N.E.2d 91, 102 (Ind. Ct. App. 1999); *Sheppard v. Smith*, 749 N.E.2d 609 (Ind. Ct. App. 2001). Thus, only a party's actual, not desired, "expectation interest" is protected. *See Goolesby v. Koch Farms*, LLC, ___ So.2d ___, 2006 WL 2925327, *3 (Ala. 2006). The

injured party is not entitled to be put in a better position than he would have enjoyed if the breach had not occurred. *Id.* In appropriate cases, an injured party may recover not only the loss in value of the contract but when foreseeable and reasonable, other losses sometimes referred to as consequential damages so as to be made whole. *See Fairfield Development, Inc. v. Georgetown Woods Sr. Apartments Ltd. Partnership*, 768 N.E.2d 463, 474 (Ind. Ct. App. 2002). The recovery of consequential damages is sanctioned by the second branch of the *Hadley* test which allows any damages that may reasonably have been within the contemplation of the parties at the time the contract was made. *See Ambrogio v. Beaver Rd. Assoc.*, 836 A.2d 1183, 1187 (Conn. 2003); *Hadley v. Baxendale*, 9 Ex. at 354, 156 Eng. Rep. 145. There is no explicit limitation on the type of damages which may be awarded as consequential, but rather all claimed damages must pass the rigorous test of forseeability.

The amount of damages that a party is entitled to recover is a question of fact. *See GSB Contractors, Inc. v. Hess*, 179 S.W.3d 535, 541 (Tenn. Ct. App. 2005). However, the proper measure of damages in a particular case is a question of law.

DELAY CLAIMS

1. Owner Delay Claims

If a contractor is at fault for a delay in construction of the project, the owner may seek redress under several damage theories. If the breach of the contract stems from a delay of the completion time, damages are measured as value of the use of the structure during the time the plaintiff was deprived of it, generally arising as the fair rental value of the structure for the time the injury existed. *Johnson-Johnson, Inc.*, 108 N.E.2d at 639 (Ind. Ct. App. 1952) ("The general rule of law is well settled that the

measure of damages for breach of a construction contract is the reasonable cost of completion, and that in event of long and unreasonable delay damages for loss of use may, under some circumstances, also be awarded."); *Cleveland, C., C. & St. L. Ry. Co. v. Joyce*, 103 N.E. 354, 357 (Ind. Ct. App. 1913); *Jay Clutter Custom Digging v. English*, 393 N.E.2d 230, 233 (Ind. Ct. App. 1979); *Berkey & Gay Furniture Co. v. Hascall*, 24 N.E. 336, 338 (Ind. 1980) (Damages limited to "actual loss", which is the loss of use of a contracted object for the time of the breaching delay); *Singer v. Farnsworth*, 2 Ind. 597, *2 (1851) (Damages limited to use of product for the time delay occurred). Additionally, one may seek damages amounting to those costs arising directly from the delay, such as the rental of alternate premises or equipment. *Chicago College of Osteopathic Medicine v. George A. Fuller Co.*, 776 F.2d 198, 205 (7th Cir. 1985) (Assuming they could show costs with adequate specificity, subcontractor would have been able recover for the rental value of tools and equipment left unused during delay caused by main contractor.); *Cleveland, C., C. & St. L. Ry. Co. v. Joyce*, 103 N.E. at 357. These costs must be, "susceptible of ascertainment in some manner other than by mere conjecture, speculation or surmise. *Jay Clutter*, 393 N.E.2d at 233". Thus, awards for lost profits are looked upon warily by the court, as they are not reasonably certain enough to base an award of damages upon. *Id.* at 233-34. (loss of corn crop and resulting profits not reasonably certain to be caused by delay, and thus not viable as computation of damages.); *Berkey*, 24 N.E. at 338. If the specific contracted item is unusable at the time of the delay, damages for delay of completion are limited to the interest bearing ability of the funds already paid for the completion of the project, as rental or usage values are nil. *Wood v. Joliet Gaslight Co.*, 111 F. 463 (7th Cir. 1901) (When item at issue is only usable during

winter months, in the absence of evidence of special damages, defendant is entitled to recoup, as damages against the unpaid balance of the contract price, a sum at least equal to the legal interest on the monies and property invested in the project for those times when the object would have been unusable).

Delays in completion of construction projects may result in various consequential damages that are not amenable to proof by adequate probative evidence. To avoid the uncertainty and conjecture implicit in proving consequential damages resulting from a delay, construction contracts typically provide a liquidated damages provision that sets forth the amount of damages the owner is entitled to assert against a contractor for each day of delay in completion of a project that is attributable to the contractor. *See, e.g. Hunts Point Multi-Service Ctr., Inc. v. Terra Firma Constr. Mgmt. & Gen. Contracting*, LLC, 5 A.D.3d 183 (NY App. Div., 2004). Contractual liquidated damages provisions avoid the difficulty in proving such damages by providing a stipulated amount of damages for each day of delay. Courts typically enforce liquidated damages provisions, so long as they do not amount to an unreasonable penalty, because they serve a "worthy purpose." *See New Pueblo,* 696 P.2d at 193. In such cases, where delays in completion occur that are attributable to the contractor, the owner is usually entitled to recover an amount of damages equal to the number of days of delay multiplied by the amount of liquidated damages per day provided for in the contract. *See A.G. Cullen Constr., Inc. v. State Sys. of Higher Educ.*, 898 A.2d 1145, 1161-63 (Pa. Commw. Ct. 2006).

2. Contractor Delay Claims

A contractor can recover damages and additional costs incurred on a project by bringing a traditional delay claim against another contractor or owner whose acts or

omissions caused the contractor's work to be delayed. *Indiana & Michigan Elec. Co. v. Terre Haute Indus., Inc.*, 507 N.E.2d 588, 602 (Ind. Ct. App. 1987). Proof that the defendant caused the delay is the crucial element of a delay claim. *See Id.*; *see also Amp-Rite Elec. Co. v. Wheaton Sanitary Dist.*, 580 N.E.2d 622, 673 (Ill. App. Ct. 1991); *S. Leo Harmonay, Inc. v. Binks Mfg. Co.*, 597 F. Supp. 1014, 1026 (S.D. N.Y. 1984); *McNamara Construction of Manitoba, Ltd. v. United States*, 509 F.2d 1166, 1169 (Ct. Cl. 1975). If the plaintiff can carry the burden of proving its performance was wrongfully delayed by the defendant, then plaintiff can recover the accumulated additional cost of performance occurring as of the date that the delay commenced. *See Indiana & Michigan Electric Co.*, 507 N.E.2d at 602; *see also Amp-Rite Elec. Co. v. Wheaton Sanitary Dist.*, 580 N.E.2d at 673; *Peter Scalamandre & Sons, Inc. v. Village Dock, Inc.*, 589 N.Y.S.2d 191, 191 (N.Y. App. Div. 1992) ("A contractor wrongfully delayed by its employer must establish the extent to which its costs were increased by the improper conduct, and its recovery will be limited to damages actually sustained").

Generally, a contractor is entitled to recover any damages for any delay caused by the Owner. *See Indiana & Michigan Electric Company vs. Terre Haute Industries, Inc.*, 507 N.E.2d at 588. In pursuing a delay claim, a contractor generally can recover overhead costs attributable to the operation of a field office during the period of delay. *See Guy James Construction Company vs. Trinity Industries, Inc.*, 644 F.2d 525 (5th Cir. 1981). In certain circumstances, home office overhead can be recovered when properly attributable to a specific construction project. *See Complete General Construction Company vs. Ohio Department of Transportation*, 760 N.E.2d 364 (Ohio 2002). There are various methods utilized by courts to calculate and allocate overhead expenses, with the so-called Eichleay

formula being the general rule. *See Aetna Casualty & Surety Company vs. Doleac Electric Company*, 471 Southern 2d. 325 (Miss. 1985). However, as with any breach of contract action, the contractor has a duty to mitigate damages and must take other work, if able, to minimize the potential damages caused by a construction delay. *Complete General*, 760 N.E.2d at 370.

ACTUAL ACCELERATION CLAIMS

1. Actual Acceleration Claim

Inducement is the cornerstone of a claim for acceleration, and absent inducement, a mere acceleration does not entitle a party to recover damages. *See Dep't of Transp. v. Anjo Constr. Co.*, 666 A.2d 753, 757 (Pa .Commw. Ct. 1995). Acceleration claims arise when a party to a contract acts in such a manner as to induce the other party to complete the project ahead of the scheduled completion date. *Id.* The mere existence of acceleration in performance is insufficient to establish that the other party acted to induce the acceleration, and absent evidence to the contrary, the acceleration is presumed to be a voluntary action and the costs of acceleration are not recoverable. *Stelko Elec., Inc. v. Taylor Community Schools Building Corp.*, 826 N.E.2d 152, 158 (Ind. Ct. App. 2005). *See generally, Nello L. Teer Co. v. Washington Metro. Area Transit Auth.*, 695 F. Supp. 583 (D.D.C. 1988); *see also Envirotech Corp. v. Tennessee Valley Auth.*, 715 F. Supp. 190, 192 (W.D. Ky. 1988) (*Envirotech*); Phillip L. Bruner & Patrick J. O'Connor, Jr., Bruner and O'Connor on Construction Law § 15:94 (2004).

With actual acceleration claims, the period for performance relied upon in cost estimating is compressed because: 1) the original target date for completion is advanced; 2) the start date is delayed with the completion date remaining fixed; or 3) the scope of

the work to be performed within the fixed period is expanded. Thus, as the *Anjo Construction* court noted, "acceleration occurs when a contractor speeds up the pace of its work faster than the rate prescribed in the original contract." *Anjo Constr.*, 666 A.2d 757. A contractor may recover for the increased cost incurred as a result of accelerating performance when: 1) its own delays in performance are excusable; 2) the contractor was ordered to accelerate; and 3) the contractor did so and sustained extra costs. *Id.* An order to accelerate may be explicitly stated in the form of a command to complete the project at a time ahead of that provided by the contract, or may be a constructive order. *Id.* A constructive order occurs when an owner or contractor behaves in such a way as to convey the message of acceleration to a contractor without the use of a direct command. *Norair Engineering Co. v. United States,* 666 F.2d 546, 229 Ct.Cl. 160 (1981). The determination of whether a contractor's actions constitute a constructive order is a question of law. *Id*.; s*ee also Pennsylvania Liquor Control Board v. City of Philadelphia*, 333 A.2d 497 (Pa. Commw. Ct. 1975). For example, in *Anjo Construction*, the contractor accelerated the pace of performance in erecting a bridge to complete construction by the initial target date, despite numerous delays caused by design errors. Although the owner did not expressly order the contractor to accelerate, the court found a constructive order, as a matter of law, where the owner had notice that the contractor was working at an accelerated pace to make the initial date despite the delays and had been hesitant to extend the deadline. *Id.* Likewise, the *Norair* court held that an owner's "expression of concern about lagging progress, may have the same effect as an order," where the owner is aware that the contractor is delayed by causes clearly beyond its control. *Norair,* 666 F.2d 548. In *Tombigbee Constructors*, a government "request" to perform a task in a

manner different from that agreed on in the terms of the contract was deemed to be equivalent to an order that the scope of the project be altered. 420 F.2d 1037, 1046 (Ct. Cl. 1970).

2. Constructive Acceleration Claims

Every actual legal theory or claim has its "constructive" counterpart. Constructive acceleration claims provide relief for contractors where both the initial time frame and the scope of work to be performed have remained the same, but circumstances beyond the contractor's control support a finding that performance was constructively accelerated. A constructive acceleration claim differs from constructive acceleration orders. Constructive acceleration orders are invoked by courts to satisfy the element of an acceleration claim that there be an order to accelerate. A claim for constructive acceleration, on the other hand, is a separate claim that arises when neither the time period for performance is compressed nor the scope of the work altered, but due to circumstances beyond its control, the contractor requires, but is denied, additional time to complete the project. Therefore, while inducement is the cornerstone of an actual acceleration claim, the wrongful refusal of a rightful request for an extension for time to complete work is the hallmark of a constructive acceleration claim.

Typical construction contracts allow a contractor faced with unavoidable delays an extension of the contract performance date. *Sherman R. Smoot Co. v. Ohio Dept. of Adm. Serv.*, 736 N.E.2d 69, 78 (Ohio Ct. App. 2000). The failure of the owner or prime contractor to grant a justified extension, instead holding to the original timeline of the project, gives rise to a constructive acceleration claim. *Id.* The five elements for a successful constructive acceleration claim are:

1) the contractor experienced an excusable delay entitling it to a time extension:
2) the contractor properly requested the extension;
3) the project owner failed or refused to grant the requested extension;
4) the project owner demanded that the project be completed by the original completion date despite the excusable delay; and
5) the contractor actually accelerated the work in order to complete the project by the original completion date and incurred costs as a result.

Id.; *Envirotech Corp.*, 715 F.Supp. at 192; *Fraser Constr. Co. v. United States*, 384 F.3d 1354 (Fed. Cir. 2004).

Excusable Delay Entitling a Contracting Party to a Time Extension

Excusable delays in the context of a constructive acceleration claim are creations of *force majeure* contract clauses, which allow a contracting party to avoid contract damages where unavoidable circumstances necessitate the project taking longer to complete than initially estimated. *Tombigbee Constructors,* 420 F.2d at 1046. In the early common law, a contractual undertaking was not excused merely because something had happened (such as a natural disaster) that prevented the undertaking. *Northern Indiana Public Serv. Co. v. Carbon County Coal Co.,* 799 F.2d 265, 277 (7th Cir. 1986). Thus, it became common practice to write excuses into the contracts. This practice is the origin of *force majeure* clauses. *Id.* However, a *force majeure* clause is not intended to buffer a party against a normal risk of contracting. *Id.* at 275. *Force majeure* causes must

be a force outside the control of either party. The most obvious and common subject of these clauses is the so-called "act of God" delay, which a contracting party has no ability to control, avoid or foresee. For example, *force majeure* clauses often provide for relief from labor strikes on the grounds that, as often recognized by courts, "a labor strike, beyond the control of either party, may be analogized to an act of God." *McNamara*, 509 F.2d at 1170. The existence of an unavoidable delay is a question of law. *Norfolk Southern Corp., Norfolk Southern Tower v. Main Financial Associates, L.L.C.* 2001 WL 34038611, *3 (Va.Cir.Ct. 2001). The burden of proving the existence of such a delay is on the party alleging its existence. *See In re Bushnell*, 273 B.R. 359, *364 (Bkrtcy. D. Vt. 2001).

However, even with a *force majeure* cause analogous to an act of God, there is no basis for shifting the loss to a defendant, but only relief in the form of an extension of time in order to avoid the imposition of liquidated and delay damages. *See id.; see also Tombigbee Constructors*, 420 F.2d 1043; *see also Mcnamara Contr. of Manitoba, Ltd. v. United States*, 509 F.2d 1166, 1170 (Ct.Cl. 1975). As a general rule of contract law, parties are free to assume and assign risk as they see fit, and construction contractors in a fixed-price contract assume the risk of unexpected cost. *Fresh Cut, Inc. v. Fazli*, 650 N.E.2d 1126, 1129–30 (Ind. 1995); *Rolin v. United States*, 160 F. Supp. 264, 268–69 (Ct. Cl. 1958); *see also* 3 Arthur A. Corbin, Corbin on Contracts § 598 (2d ed. 1960). Therefore, with firm fixed-priced contracts, the risk of encountering difficulties falls on the contractor, and the contractor must take this in account when establishing prices. *McNamara*, 509 F.2d at 1170. Instead, such clauses only allow the delayed party an extension of the completion date in an effort to avoid potential breach of contract liability

for failure to complete the job on the original contract schedule. *Tombigbee Constructors,* 420 F.2d at 1037.

Such clauses do not include delays that, while unavoidable, are foreseeable. It is anticipated that a prudent contractor will construct estimates with these foreseeable delays in mind. If a contractor bears the risk of loss over a subject in the contract, that subject cannot be the basis for an unavoidable delay by that party. *See Mt. Olivet Baptist Church, Inc. v. Mid-State Builders, Inc*., 1985 WL 10493 (Ohio Ct. App. 1985). Thus, for example, lower than estimated productivity in and of itself is not considered an unavoidable delay, as a contractor is deemed to have control over workers and construction methods such that it bears the risk of low productivity. *Id.* at *5. The scope of control assumed by contractors is illustrated in *Mt. Olivet*. There, the contractor was delayed by multiple events and did not complete construction by the contractual deadline. Among the major causes of delay were poor performance by the masons and delays in ordering materials. *Mt. Olivet*, 1985 WL 10493, at *1. The contractor argued that these were delays beyond its control. The court disagreed, finding that under the contract, the contractor bears the risk for supervising all work, acts of employees and subcontractors, provision of all materials, and completing the work on time. *Id.* at *5. Delays caused by actions and poor performance of the masonry subcontractor were not beyond the control of the contractor because such risks were assumed by the contractor under the contract. *Id*. Thus, difficulties experienced by the contractor were not so severe as to excuse the contractor's nonperformance or mitigate its risk. *Id*.

Proper Request for an Extension

A party experiencing an excusable delay has the burden to affirmatively seek an extension from the other contracting party. In the event that a contractor accelerates performance on the project to meet the initial start date despite an excusable delay without requesting relief, the acceleration is deemed voluntary and the costs of the acceleration are not recoverable. *See generally, Nello L. Teer Co.*, 695 F. Supp. 583; *see also Envirotech*, 715 F. Supp. at 190; Phillip L. Bruner & Patrick J. O'Connor, Jr., Bruner and O'Connor on Construction Law § 15:94 (2004).

Construction contracts usually require a written request for an extension. If this request is unambiguously expressed in the contract, then the failure of a delayed party to submit a written request bars a constructive acceleration claim. *See Johnson Controls, Inc. v. Nat'l Valve and Mfg. Co.*, 569 F. Supp. 758 (E.D. Okla. 1983) (granting summary judgment against subcontractor on acceleration claim because of failure to comply with requirement of written request, even where general contractor caused subcontractor's delays); *see also, A. Beecher Greenman Constr. Corp. v. Incorporated Village of Northrop*, 619 N.Y.S.2d 293 (N.Y. App. Div. 1994) (finding liquidated damages could be assessed against contractor for later completion where contractor had not satisfied contractual requirement of written request for extension of time). As a matter of law, knowledge of the delay alone does not equate to knowledge of the claim of an excusable delay. It is well established that when a contract requires written notice of a claim, knowledge of difficulties or delays in the project will not suffice; rather the issue is whether defendant had notice that *a claim for delay* was being made. *Assoc.'d Mech. Contractors, Inc. v. Martin K. Eby Constr. Co.*, 271 F.3d 1309, 1316 (11th Cir. 2001)

(*Associated*); *Allgood Elec. Co. v. Martin K. Eby Constr. Co.*, 959 F.Supp. 1573, 1581 (M.D. Georgia, 1997); *Envirotech*, 715 F.Supp. at 192. Accordingly, failure to provide notice will bar a subsequent, untimely claim, and notice of delays and difficulties will not save the claim. *See, e.g. Allgood Elec.*, 959 F.Supp. 1579–81, *Associated*, 271 F.3d 316–37, *Envirotech*, 715 F.Supp. at 192. In *Envirotech*, the court held that the contract required written notice of the claim even when the owner was aware of delays, noting, "[k]nowledge of facts which might give rise to a claim, even if possessed by employees whose knowledge can be deemed to the employer, is not sufficient. [Owner] had to know that [Contractor] was actually making a claim." *Id.* at 192. When no notice was submitted, the owner was entitled to believe no such claim was forthcoming. *Id*. An owner's mere knowledge of a contractor's delay is not tantamount to knowledge that the contractor is incurring monetary damages or that the contractor intends to file a claim. *See Allgood Elec.*, 959 F.Supp. at 1581. If the owner's mere knowledge of a delay is sufficient, the contract provision requiring timely written request for an extension of time would be superfluous. *Id*.

Wrongful Refusal of a Proper Request

A wrongful refusal can only stem from a proper request for an extension, with the sufficiency of the request measured at the time of request, not at the time of trial. *See, e.g., Nello L. Teer*, 695 F.Supp. at 590–91 (owner's refusal of extension request that contained only insufficient data at the time of request deemed not a wrongful refusal, as the information contained in the request did not allow the owner to make a proper determination concerning the extension at that time). If an extension is not requested or is requested in a manner inconsistent with the terms of the contract, a refusal of the

extension is not wrongful. *Id.* Efforts to induce a quicker pace to meet schedules do not give rise to a claim.

Lastly, it must be emphasized, an owner's efforts to induce compliance with contract schedule that merely induce a contractor to "accelerate," as in to increase the pace of construction to complete the contract by the agreed original completion date, do not create a claim for constructive acceleration:

> The term "acceleration" is a very general term and certainly cannot be held to encompass reasonable and legal efforts on the part of the owner to induce his contractor, under a construction contract, to increase the pace of construction in order to complete the contract by the completion date agreed upon and set out in the contract between them. This would seem to be particularly true in the case where a contractor was substantially and continually behind his own established and projected schedule under the contract, and where the delay was not caused by a breach of the contract on the part of the owner, or willful hindrance of the contractor's work by the owner.

Siefford v. Hous. Auth. of the City of Humboldt, 223 N.W.2d 816, 819 (Neb. 1974).

Damages

Damages for acceleration claims are limited to the additional costs incurred to complete the project pursuant to the shortened schedule beginning on the date the acceleration order was issued or when a proper request for an extension was denied. *Anjo Constr.*, 666 A.2d at 757. These costs may include such amounts as the hiring costs and salaries of additional workers, overtime pay increases, additional costs of materials due to

the shortened time span, etc. *Anjo Constr. Co.*, 666 A.2d at 757–58; *Siefford*, 223 N.W.2d at 819. Consequential damages are not recoverable in an acceleration claim. *Sherman R. Smoot*, 736 N.E.2d at 78; *Anjo Constr.*, 666 A.2d at 757. Damages may be measured either through a "total cost" measurement, where the award is the difference between the actual costs of the project and the projected costs, or by a measurement of the precise amount of new costs incurred as a result of the acceleration. *John F. Harkins Co., Inc. v. School Dist. of Philadelphia*, 460 A.2d 260, 265 (Pa. Super. 1983). "Total cost" damages can only be awarded if the party requesting the damages can show that its initial estimates of costs were accurate. *Id.*; *See also Wunderlich Contracting Co. v. United States*, 351 F.2d 956, (Ct. Cl. 1965); (total cost damages are valid, but the reasonableness of the contractor's estimate is a question of fact in each case); *Exton Drive-In, Inc. v. Home Indemnity Co.*, 261 A.2d 319, 324 (1970) (approving of total cost damages even in absence of mathematical certainty, so long as the measurements are reasonable).