

CONSTRUCTION CLAIMS IN TEXAS
September 6, 2002

“CONSTRUCTION CLAIMS AND DAMAGES”

By: David M. Kleiman
Kleiman, Lawrence, Baskind & Fitzgerald, L.L.P.
4849 Greenville Avenue, Suite 1605
Dallas, Texas 75206
david@klbf.com

CONSTRUCTION CLAIMS AND DAMAGES

This paper addresses claims that can be asserted and damages that can be sought in construction lawsuits. Discussing a “claim” separately from damages is difficult because they often are so interrelated. For instance, a delay claim is also a claim for damages. Thus, to a certain degree the “claims” section deals with “damages,” and the “damages” section deals with “claims.”

I. CLAIMS

Claims are broken down into those asserted by the owner, contractor and subcontractor.

A. OWNER CLAIMS

When things go bad on a construction project, the owner has several potential avenues of recovery. Depending upon the circumstances, the owner may have a claim against the general contractor, and possibly an architect or engineer or a subcontractor. If the job is bonded, the owner can pursue a claim against the surety. Claims against a surety are not part of this paper.

1. Owner claims against a general contractor.

Claims by the owner against the general contractor can exist when a contractor abandons performance under a contract, when the contractor’s actions result in its termination, or when the contractor completes performance, but there is defective work.

Many construction contracts will have termination clauses, which state specific times at which an owner is justified in terminating the contractor. Some common clauses that can justify termination by the owner are when: the contractor fails to pay in accordance with contractual obligations; the contractor or one of its subcontractors is so short of labor or materials as to delay

the project; the subcontractor substantially fails to perform or fails to fix incorrect, substandard or defective work; or when the contractor is guilty of a material breach of contract.

Typically, whichever party materially breaches the contract first will lose the termination fight. In other words, if a contractor is wrongfully terminated, the owner may be the breaching party. The key to determining whether termination is justified is whether there is a material breach. Termination without justification is otherwise itself a breach of contract. There are lots of examples where the contractor or subcontractor has made the wrong decision. *See Austin Paving Co. v. Cimarron Construction, Inc.*, 511 S.W.2d 417 (Tex. Civ. App.–Austin 1974, no writ) (Subcontractor was found to have wrongfully terminated a contract when contractor had withheld a portion of its draw alleging a defect in the subcontractor’s work.)

If one party believes that the other party has materially breached the contract, it can either treat the contract as terminated excusing its further performance, or it can continue to perform under the contract and allow the other party to continue working. Under that circumstance, the parties treat the contract as still in effect. However, the party who ignores a material breach and decides to let the contract continue, cannot later rely upon that material breach to claim termination. *Chilton Insurance Co. v. Pate & Pate Enterprises, Inc.*, 930 S.W.2d 877, 887, 888 (Tex. App.–San Antonio 1996, writ denied.) Having chosen to treat the contract as continuing, the non-breaching party does still retain the right to sue for damages caused by the breach.

When a contractor abandons the contract, the owner is typically entitled to take possession of the project and complete the work which remains. Generally, the owner is then entitled to recover excesses in the reasonable cost of completion over and above the unpaid portion of the contract

price. *Bledsoe v. Bowden*, 411 S.W.2d 56, 60 (Tex. Civ. App.–Ft. Worth 1966, no writ). The same would be the case if a contractor breaches, resulting in its termination.

If the contractor completes performance, but fails to follow, or deviates from plans and specifications, or otherwise fails to perform in accordance with the contract, the owner would typically be entitled to recover the reasonable costs necessary to make the work comply with the contract requirements.

If the contractor fails to live up to express contractual warranties, the owner can also pursue claims against the general contractor.

Depending on the terms of the contract between the owner and contractor, the owner may be entitled to recover damages for delay, and other costs associated with the contractor's actions. Such damages could include increased interest, lost profits and anything else caused by the owner's inability to use a structure for its intended purpose. These types of damages are discussed later in this paper.

2. Owner claims against architects or engineers.

Generally, an owner's claim against an architect or engineer will be either breach of contract or negligence. An architect has a duty to perform with the care and skill exercised by members of that profession in a particular locality.

As between the contracting parties themselves, it is well established that each owes a duty to the other to perform contractual obligations with care, skill, reasonable expedience and faithfulness, either personally or through one for whom the obliged party is responsible. A breach of duty in that case gives rise to a cause of action for negligence against the other contracting party.

Bernard Johnson v. Continental Constructors, Inc., 630 S.W.2d 365, 369 (Tex. App.–Austin 1982, writ ref'd n.r.e.) The claim against an architect could exist relative to the failure to design of the

project and the drafting of plans and specifications. Furthermore, if an architect contracts to supervise a project, he must do so with reasonable care and is subject to liability for negligence if he fails to exercise such care. Such failures could also subject an architect to breach of contract. *Hunt v. Ellisor & Tanner*, 739 S.W.2d 933 (Tex. App.–Dallas 1987, writ denied).

An architect could also be subject to liability and a claim from the owner if he fails to properly perform or assume certification of pay applications. Negligent conduct that results in progress payments in excess of the value of the work performed, or the certification of final payment when the work is not complete or properly performed, could subject to architect to liability. This liability may be controlled by the contract between the architect and the owner.

As stated above, the most typical claims against an architect are for a breach of contract or negligence. DTPA claims against an architect or engineer have been somewhat limited by amendments to the DTPA. *See* TEX. BUS. & COM. CODE § 17.49(c). Pursuant to that section, the DTPA does not apply to a claim for damages based on the rendering of a professional service, the essence of which is the providing of advice, judgment, opinion, or similar professional skill. However, the DTPA does still apply to professional services where there is an express misrepresentation of a material fact, not attributable to a professional advice, judgment or opinion, or where there is a failure to disclose information in violation of § 17.46(b)(23), or where there is an unconscionable action or course of action that is not characterized as advice, judgment or opinion.

3. Owner claims against subcontractors.

An owner's opportunity to pursue claims against the subcontractor may be severely limited, because there is no privity or relationship between those entities. A court recently held that a

subcontractor does not owe an implied warranty of good and workmanlike performance to the owner. *Codner v. Arellano*, 03-99-0535-CV, 2001 WL 193746 (Tex. App.–Austin, Feb. 28, 2001). An owner probably has a claim for negligence against the subcontractor, and may have an express warranty claim against the subcontractor.

Typically, the owner would pursue claims directly against the general contractor. However, if there are issues of insolvency or bankruptcy with the general the owner may want to pursue a claim directly against a subcontractor.

B. GENERAL CONTRACTOR CLAIMS

A general contractor could potentially have claims against the owner, subcontractors or suppliers, other contractors, or even a construction manager.

1. Contractor claims against architects.

As a general rule, a contractor cannot assert a claim against an architect with whom he has no contract. *Bernard Johnson v. Continental Constructors, Inc.*, 630 S.W.2d 365, 369 (Tex. Civ. App.–Austin 1982, writ ref'd n.r.e.). However, there is some case law that provides that there is a negligence cause of action a contractor can assert against an architect based upon an implied duty. *Turner, Collie & Braden, Inc. v. Brookhollow*, 624 S.W.2d 203 (Tex. Civ. App.–Houston [1st Dist.] 1981, rev'd on other grounds, 642 S.W.2d 160 (Tex. 1982).

2. Contractor claims against the owner.

As to the owner, a contractor can expect an adequate set of plans and specifications, and that it will be paid for its work, if properly performed. If the owner fails to provide adequate plans or specifications, or fails to timely pay the contractor, the contractor must look to the contract to

determine his rights and remedies. The contract may state that the contractor is not entitled to terminate performance, and that his only damage is to sue for compensation. If there is no such contractual provision, the contractor may need to decide whether to terminate performance and sue for damages, or continue to work and attempt to recover damages.

As a general rule, if an owner's actions prevent a contractor from performing its contractual obligations, the contractor is excused from further performance, and the contractor's failure to perform is not considered a breach of contract. *L.H. Land Painting Co. v. S & P Construction, Inc.*, 516 S.W.2d 14, 16 (Tex. Civ. App.—Ft. Worth 1974, writ dismissed). In order to justify a contractor's right to terminate the contract, it will need to establish a material breach of the owner. If the owner fails to meet a contractual payment obligation, the contractor can be excused from further performance. *Tex. Bank & Trust v. Campbell Bros.*, 569 S.W.2d 35 (Tex. Civ. App.—Dallas 1978, writ dismissed).

Contractual provisions oftentimes determine the damages that are recoverable for termination. Absent such contractual language, a contractor who has properly terminated the contract can collect from the owner the contract price minus the cost to complete. *McCracken Construction Co. v. Urrutia*, 518 S.W.2d 618 (Tex. Civ. App.—El Paso 1974, no writ). That measure of damages is the anticipated profit the contractor would have recovered. Alternatively, the contractor can recover in quantum meruit for the reasonable value of its work done. *Timmons v. Fogel*, 278 S.W.2d 549 (Tex. Civ. App.—Dallas 1955, no writ).

A contractor faces a risk if it terminates performance. If the owner has not committed a material breach, or the contract precludes termination by the contractor, the termination may be a

breach, which would allow the owner to recover damages. The general contractor could find itself responsible for project delays and increased costs such as demobilization.

The Texas Property Code has provided certain circumstances in which a contractor has a right to suspend work. When the amount owed to a contractor, subcontractor or supplier is disputed, only that disputed amount can be withheld, and the party withholding payment can be required to provide a list of specific reasons for nonpayment.

Under a recent amendment to the “Prompt Pay” provisions of the Property Code, § 28.009, and in certain circumstances, a contractor has the statutory right to suspend work. If the contractor, subcontractor or supplier does not timely receive the undisputed amounts owed to it, the Property Code allows them to suspend performance and protects them from liability. Under the prompt pay act, the contractor is to be paid within 35 days after the owner receives the request for payment. If there is a good faith dispute over what amount is owed, the disputed amount can be withheld. However, if the undisputed amount is not paid, the contractor can give written notice of its intention to suspend work. Suspension can occur on the 10th day after notice is provided.

The contractor is not responsible for damages resulting from the suspension of work unless it is notified in writing before the suspension, that payment has been made or that a good faith dispute exists. A notification of a good faith dispute must include a list of the specific reasons for nonpayment.

Of course, the decision to suspend work can impose liability if not done correctly or under the proper circumstances. The property code section should be consulted and evaluated carefully before it is relied upon to justify suspension of work. The statutory right to suspend does not apply to contracts for the construction of residential or public projects.

3. Contractor claims against subcontractors.

In addition to claims against the owner, a contractor may have claims against subcontractors. If a subcontractor is not performing, the contractor must decide whether to terminate the subcontract or get the subcontractor to perform, and sue the subcontractor for any breach. However, if the contractor treats the contract as continuing despite the breach of a subcontractor, it cannot later claim excuse of nonperformance. *Chilton Insurance v. Pate & Pate*, 930 S.W.2d 877 (Tex. App.—San Antonio 1996, no writ).

The type of damages that a general contractor can recover from the subcontractor include the cost to complete and remedy an inadequate or incomplete performance of the subcontractor, the difference in value as built and as it should have been built, delay damages, and liquidated damages, which are discussed later on in this paper.

C. SUBCONTRACTOR CLAIMS

Subcontractors' predominant claims are against the contractor. Many of the same principles discussed above with respect to the general contractor also apply to the subcontractor. For example, the discussions regarding the decision to terminate performance under a contract, or where there has been a material breach that can justify such termination, and the risks of that termination, apply equally to the subcontractor. Similarly, subcontractors' damages depend on whether it terminates performance, or decides to treat the contract in force and continues to perform. Typically, its remedies parallel those of the general contractor.

Typically, a subcontractor would have a breach of contract claim against the contractor if it has not been paid by the contractor. The subcontractor would be entitled to recover the full

contract price, unless it is only substantially completed, in which case it would only be able to recover the contract price minus the cost to complete and correct any defects. A subcontractor, just like the contractor, may also have an action in quantum meruit for the value of the work performed. (See discussion of quantum meruit below.) The subcontractor may also be entitled to recover for extra work or work performed under a change order. The contract between the subcontractor and the prime contractor must be reviewed to determine entitlement to assert such claims.

While in the normal case the subcontractor does not have a claim against the owner, the subcontractor can assert a mechanic's lien on the owner's property.

The subcontractor that expects a profit will recover more money by suing on the contract to recover the value of the work actually performed and anticipated profit. The subcontractor that does not expect a profit would be better off suing under the theory of quantum meruit, which entitles it to a fair and reasonable value of the labor and materials provided. Of course, the contract itself may dictate and provide for the scope and type of damages recoverable.

TYPES OF CLAIMS

While this list is not exhaustive, the following are typical of claims that might be asserted in a construction lawsuit:

- **Breach of contract.** There can be a breach of contract when a specific contractual provision is not met, or when the construction is not in accordance with industry standard building practices or of a sufficient quality.
- **Rescission.** In this type of claim, the contract is “rescinded” and any consideration paid by the owner is returned. A claim for rescission requires that there be fraud or representations that improperly induced the contract. Furthermore, rescission normally requires that damages not be able to adequately compensate for such loss.

- **Negligence.** Negligence is a standard by which the contractor did something that a person of ordinary prudence in similar circumstances would not have done, or failed to do what a person of ordinary prudence would have done under similar circumstances. If the conduct of a contractor falls below the standard, the owner can pursue a claim for negligence.
- **Violation of the Texas Deceptive Trade Practices & Consumer Protection Act (“DTPA”).** Under the DTPA, a contractor could be liable for specific violations defined by this statute. These defined violations, also referred to as the “laundry list,” include allegations that relate to misrepresentations as to the grade, standard or quality of goods and services, misrepresentations as to rights under an agreement, and misrepresentations as to work actually performed. Furthermore, the breach of an express or implied warranty can be the basis of a Deceptive Trade Practices claim.

To qualify to assert a claim under the DTPA, the owner must fit within the definition of a consumer. To be actionable, the consumer must rely upon a misrepresentation, to the consumer’s detriment. If the owner is a business, it cannot assert a claim under the DTPA if it has assets of up to \$25 million or more, or if it is owned or controlled by a corporation or entity with assets of \$25 million or more.

Specific damage recoveries will be discussed below, but it should be noted that under the DTPA, an owner at least has the potential of recovering triple actual damages.

- **Breach of implied warranties.** A contractor is under an implied obligation to perform its work in a good and workmanlike manner. *Humber v. Morton*, 426 S.W.2d 554 (Tex. 1968). There can also be what is called an implied warranty of habitability and for fitness for a particular purpose.

Implied warranty of habitability and workmanship has even been extended to a subsequent purchaser of a home. *Gupta v. Ritter Homes, Inc.*, 646 S.W.2d 168 (Tex. 1983).

An appellate court has recently ruled that an implied warranty of habitability and good and workmanlike construction could not be disclaimed in a contract between a builder and homeowner. *Buecher v. Centex*, 18 S.W.3d 807 (Tex. App.–San Antonio 2000, pet. granted).

- **Breach of express warranty.** Often a general contractor will provide a written warranty that construction defects or other problems with the construction will be remedied during the warranty period. If there is such a written warranty and a contractor fails or refuses to perform its warranty obligations, there can be a claim made on that warranty.

- **Fraud.** The contractor could be subject to a claim for fraud if: it makes a material misrepresentation which it knew to be false, or which was made recklessly without knowledge of the truth; such statements were made with the intent that they would be relied upon by the owner; they were in fact relied upon by the owner, to their detriment. A finding of fraud can entitle the owner to exemplary or punitive damages.
- **Negligent misrepresentation.** A claim for negligent misrepresentation can exist when a representation is made in the course of business or in a transaction in which the party making the representation has a pecuniary interest; if the contractor supplied false information; if the contractor did not exercise reasonable care or competence in obtaining or communicating the information; or if claimant suffered loss by justifiably relying on the representation. *Federal Land Bank Assn of Tyler v. Sloane*, 825 S.W.2d 439, 442 (Tex. 1991).

II. DAMAGES

The concepts of “claims” and “damages” are interrelated and difficult to separate from one another. Damages are to a certain degree discussed in the “claims” portion of this paper.

TYPES OF DAMAGES

Actual Damages. When a contractor is in breach after substantial performance, the owner is entitled to the cost of completing the job or of remedying those defects that are remediable. *Vance v. My Apartment Steakhouse of San Antonio*, 677 S.W.2d 480, 482 (Tex. 1984). Where there has not been substantial performance, the measure of the owner’s damage is the difference between the value of the building as constructed and its value had it been constructed in accordance with the contract. *Turner, Collie & Braden, Inc. v. Brookhollow, Inc.*, 642 S.W.2d 160, 164 (Tex. 1982). Where it is necessary in order to make the building comply with the contract, that the structure, in whole or in material part, must be changed, or there will be damage to parts of the building, or the

expense of such repair will be great, it has been said there is not substantial performance of the contract.

If the owner breaches the contract, and the contractor chooses not to complete performance, the contractor can recover the contractor's lost profits had it been able to finish the project. That is measured by the difference between the total contract amount and what it would cost to finish the contract. Alternatively, a contractor can recover the reasonable value of the services and materials provided at the time of breach. *McCracken Construction Co. v. Urratia*, 518 S.W.2d 618, 621, 622 (Tex. Civ. App.–El Paso 1974, no writ).

Liquidated Damages. There may also be a claim for liquidated damages. Liquidated damages are those damages agreed upon in advance by the parties as compensation for the breach of a contract, where the actual damages caused by the breach are incapable of accurate estimation. *Sisk v. Parker*, 469 S.W.2d 727 (Tex. Civ. App.–Amarillo 1971, writ ref'd n.r.e.) Of course, an owner is only entitled to assess liquidated damages if the contractor's delay is not excusable. Often, a construction contract will include a liquidated damages provision relating to the time of performance. An amount is charged for each day completion extends beyond the agreed upon date. Liquidated damages provisions are enforceable only so long as they are not considered penalty provisions. *Birdwell v. Farrell*, 746 S.W.2d 338 (Tex. App.–Austin 1988, no writ).

A liquidated damages provision is enforceable if the damages for breach of contract are uncertain and the amount stipulated in the liquidated damages provision is a reasonable estimate of the anticipated damages. *Henshaw v. Kroenecke*, 656 S.W.2d 416, 419 (Tex. 1983).

The amount stipulated as liquidated damages must be a reasonable forecast, based on information available to the parties at the time the contract is executed. A liquidated damages

provision is enforceable, but a penalty provision is not. The legal definition of a penalty is a security for the performance of a contract. Liquidated damages are the measure of damages in the event of breach. For a clause to be considered an unreasonable penalty, the certainty of the actual damages or the unreasonableness of the forecast of the stipulated damage, must have existed at the time the contract was executed.

The mere statement within a liquidated damages provision that it is not a penalty will not be the determining factor. The courts will look beyond just the language in the clause to determine whether it is an enforceable liquidated damages provision.

If a liquidated damages provision is determined to be invalid, actual damages caused by delay could still be recoverable, and it is possible that actual damages for delay would exceed the amount of liquidated damages provision.

Delay Damages. Depending upon the contract provisions, a contractor may be entitled to recover damages for losses due to delays. Alternatively, a contractor may only be entitled to an extension of time, but no monetary damages. The terms of the contract will control this issue.

The components of delay damages could include increased overhead, additional manpower and machinery, and increase material expenses. Delays may be caused by disruption or by interference.

Compensable delays are those that are not the fault of the contractor. Some common types of excusable delays that can result in compensable damages include: owner's failure to provide access to the construction site; owner's interference with access to the construction site; excessive change orders; owner's failure to provide specific plans or specifications; and owner's failure to provide materials at the required date.

Determining whether damages are recoverable can often be the subject of significant factual disputes. Who was responsible for the delay? Were there overlapping delays? Did the delay impact the job? If delays are attributable to both the owner and the contractor during the same period, they are known as concurrent delays. If those delays can be apportioned, they can be the basis for delay damages.

Even if the delay would otherwise be compensable, the contract could provide a no damage for delay clause, or another contractual prerequisite that must be satisfied before obtaining delay damages.

A typical no damage for delay clause would be as follows:

No payment or compensation of any kind shall be made to the contractor for damages because of hindrance or delay from any cause in the progress of the work, whether such hindrance or delays be avoidable or unavoidable.

Generally speaking, no damage for delay clauses are enforceable unless the party seeking to enforce it has acted in bad faith, there has been delay so long as to be deemed abandonment, the delay is not contemplated by the parties, or the delay was caused by active interference of a party seeking to enforce the clause. *City of Houston v. R.F. Ball Construction*, 570 S.W.2d 75 (Tex. Civ. App.–Houston [14th Dist.] 1978, writ ref'd n.r.e.).

In addition to a no damage for delay clause, contracts may also require that specific steps be taken before a delay claim can be made. As an example, the contract might require that the contractor give written notice within a certain number of days after the occurrence of a claim, in order to assert such claim.

Types of Delay Damages:

- a. **Increased overhead.** The increased cost of keeping employees in the field longer than anticipated is one element of delay damages. These costs can include personnel, facilities, power and other general office costs. These costs are directly attributable to a particular project. Extended home office overhead can also be sought. The reasoning for recovering home office overhead is that even though they are not directly attributable to a particular project, at least a portion of them would have been absorbed by the project in question. A contractor often expects or budgets jobs to pay a portion of these fixed costs. The time for completion is extended, but the project still requires support from the home office, but they will not be paying for it as the contractor originally calculated. Proof of home office overhead can be very difficult.
- b. **Mobilization.** Start-up and stopping costs can be an element of delay damages. The Prompt Pay Act, Texas Property Code Chapter 28, specifically provides for the reimbursement of reasonable demobilization and remobilization expenses in certain circumstances.
- c. **Equipment Costs.** Equipment that is rendered unproductive as a result of delays can be another element of delay damages. If the equipment is not used, but must stay on the project for a longer period of time because it may need to be used, the increased cost can be an element of delay damages.
- d. **Labor and Materials.** The cost for labor and materials may increase because of the extended time on the project.
- e. **Productivity.** Oftentimes, if a job is delayed, a contractor is required to skip around in the performance of its work, thereby creating inefficiencies. This occurs when work has to be done out of sequence. Delay and interference can also cause an increase or decrease in work crews, which can result in decreased productivity.
- f. **Lost Profits.** A claimant can be entitled to recover lost profits if he can prove that (1) they were foreseeable; (2) caused by the other party's breach; and (3) calculated with reasonable certainty. Lost profits are hard to prove because they are oftentimes too speculative.
- g. **Lost Business.** A contractor might also claim that delay on a project negatively impacted his ability to obtain additional work. The argument is that because the contractor is tied up on the delayed project, it is unable to bid and work on other profitable work.

Typically, to be entitled to recover delay damages, the contractor must prove that his work was delayed or hindered, that he suffered damages because of the delay or hindrance, and that the owner or its agents were responsible for the act or omission that caused the delay or hindrance. *Anderson Development Corp. v. Coastal States Crude Gathering Co.*, 543 S.W.2d 402 (Tex. Civ. App.–Houston [14th Dist.] 1976, writ ref’d n.r.e.); *Board of Regents of the University of Tex. v. S&G Construction Co.*, 529 S.W.2d 90 (Tex. Civ. App.–Austin 1975, writ ref’d n.r.e.). If the delays were caused by someone other than the owner or its agents, or if there is an enforceable no damage for delay clause, a contractor may not be entitled to recover delay damages. The method for proving the amount of delay damages is beyond the scope of this paper.

Extra Work. A contractor may be entitled to recover for extra work. Extra work is work outside of and independent of the contract. It is work not required for the performance of the contract. Oftentimes, there is a dispute about whether the work performed is extra, which may entitle the contractor to additional compensation, or just additional work, necessary to perform the work contracted for. Generally speaking, absent fraudulent concealment of the condition requiring the additional work, the contractor is not entitled to extra compensation for additional work. *Brown-McKee, Inc. v. Western Beef, Inc.*, 538 S.W.2d 840 (Tex. Civ. App.–Amarillo 1976, writ ref’d n.r.e.). A key determination as to whether the work is “additional” (no compensation) and “extra” (additional compensation) is whether additional costs incurred by the contractor added value to the contract. *See Keith A. Nelson Co. v. R.L. Jones, Inc.*, 604 S.W.2d 351 (Tex. Civ. App.–San Antonio 1980, writ ref’d n.r.e.).

If it is determined that a condition was concealed from the contractor, and the owner knew of such condition, there can be recovery for the extra cost of that condition. *North Harris Co. Junior*

College District v. Fleetwood Construction Co., 604 S.W.2d 247 (Tex. Civ. App.–Houston [14th Dist.] 1980, writ ref'd n.r.e.). In that case, the court concluded that the contractor should recover additional costs incurred by doing extra work as a result of the discovery of a concealed condition. The court found that the owner knew of a subsurface water problem which was concealed. The evidence established that the architects knew of the subsurface water but did not inform the contractors in the bidding process.

a. Waiver

Even if the work performed is extra, and thus potentially compensable, contracts typically require that such work be approved in writing before it is performed. While a requirement that extra work be approved in writing is enforceable, it can be avoided. Recovery for such extra work could still be allowed under a theory of quantum meruit, which means that the contractor is entitled to the value of the work performed. Alternatively, it is possible that the owner waived the notice requirement through its course of performance or through promises or representations made to the contractor.

b. Quantum Meruit Recovery

Quantum meruit is based upon a promise implied by law to pay for beneficial services rendered and accepted. The existence of an express contract does not preclude recovery in quantum meruit for the reasonable value of services rendered and accepted which are not covered by the contract. *Black Lake Pipeline Co. v. Union Construction Co.*, 538 S.W.2d 80, 86 (Tex. 1976). The measure of recovery for extra work, in the absence of a contractual provision, is for the reasonable value of the extras. *Black Lake Pipeline* at 80.

Acceleration Damages. A contractor may be entitled to recover for acceleration damages. Actual acceleration occurs when the contractor is directed to speed up performance. Constructive acceleration occurs when a contractor is forced to make up for lost time for which they are not responsible. If a contractor's work is slowed by another contractor, or site conditions or other things outside its control, it may be entitled to an extension of time. If it is not given extra time, the contractor can either accelerate its performance or run the risk of being responsible for delay damage claims.

If a contractor completes performance after the owner's breach, it can recover the reasonable value of the work done over and above the final contract amount. *Anderson Development Corp. v. Coastal States Gathering Co.*, 543 S.W.2d 402 (Tex. App.–Houston [14th Dist.] 1976, writ ref'd n.r.e.).