



J. Kevin Bridston

Partner and General Counsel
303.295.8104
Denver
kbridston@hollandhart.com

Cumulative Impact Claims: Hard to Describe; Even Harder to Prove

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Most folks are familiar with claims for changes and delay claims. Fewer people are familiar with cumulative impact claims. What is a cumulative impact claim? Stated simply, a cumulative impact claim is a claim that consists of the "ripple effect" of multiple changes to a project, the effects of which were not recognized or anticipated at the time the change itself was priced by the contractor. Cumulative impact claims are relatively uncommon and are generally seen only on large and complex projects.

Normally when a change is directed on a project, the contractor determines the cost and time impact of the change and submits a change order request to cover the same. But when there are a multitude of changes, the changes may interact with each other to create costs and impacts beyond those attributable to the individual changes. Often these impacts are only recognized at the conclusion of the project, when costs have exceeded the contractor's budgeted costs and the contractor analyzes the source of those additional costs. Unfortunately for contractors, this after-the-fact analysis is closely akin to the legally disfavored total cost approach in which the projected budget is compared with actual costs to support the claim. In order to successfully prove a claim, more detailed analysis of causation, including analysis and deduction of possibly self-inflicted harm, is required. The critical question that must be answered with evidence and analysis, rather than a mere difference in budgeted as compared with actual costs, is how the impacts caused the increase in costs.¹

Because of the difficulties in proving causation and segregating the possibly self-inflicted harm (due to inefficiencies, imperfect takeoffs, etc.), cumulative impact claims are recognized in theory but rarely granted in practice. In fact, almost every leading case acknowledging the possibility of cumulative impact claim goes on to reject the claim for lack of proof, most typically for lack of causation and failure to segregate compensable impacts from non-compensable impacts. This is much akin to the rationale under which the total cost claims are often rejected. The pattern of rejection is so pervasive that Professor Ralph Nash concluded "there is no independent claim for cumulative impact." *Ralph C. Nash*, 6Nash & Cbinic Rep. ¶27 (May 1992).

Despite Professor Nash's comment, there can be little question that the

concept of a cumulative impact claim is recognized legally. For example in *Pittman Construction Co.* 81-1 BCA ¶14,847 (GSBCA 1980), which is widely recognized as the seminal case on cumulative impact claims, the Board of Contract Appeals noted as a general matter that costs for cumulative impacts are recoverable. The Board went on to address the critical question of whether the claim in that case had been proven, ultimately concluding that it had not. *Pittman* was affirmed on appeal by the claims court in *Pittman Construction Co. v. United States*, 2 Cl. Ct. 211 (1983). There, the Court of Claims equated the cumulative impact claim to a delay claim, noting that "settled law dictates that where both parties contributed to the delay 'neither can recover damage, unless there is in the proof a clear apportionment of the delay and the expense attributable to each party.'" *Id.* at 217.

This is remarkably similar to the approach of the Colorado Court of Appeals to a total cost claim in *City of Westminster v. Centric-Jones Constructors*, 100 P.3d 472, 478 (Colo. App. 2003), *cert denied*. In noting that the total cost theory of damages is disfavored, the *Centric-Jones* court held that damages must be "traceable to and the direct result of the wrong sought to be redressed," and suggested that damages under such an approach will be rejected "unless a 'basis appears for even an educated guess as to the increased costs suffered by plaintiffs due to that particular breach or breaches [by the defendant] as distinguished from those causes from which defendant is contractually exempt from responding in damages.'" *Id.* (citations omitted). In light of *Centric-Jones*, it seems likely that Colorado courts would follow the approach of *Pittman* and its progeny in viewing cumulative impact claims.

The difficulty of proving cumulative impact claims is highlighted in *Southwest Marine, Inc.*, 94-3 BCA ¶27,102 (DOTCAB 1994). In that case, the Board of Contract Appeals described the high burden a party bears in asserting a cumulative impact claim:

Although the specificity otherwise necessary to prove direct or local disruption resulting in the implementation of individual change requests is not required to prove entitlement to cumulative disruption (because it is more difficult to foresee), appellant, nevertheless, shoulders the burden of proving by a preponderance of the evidence that the 202 Change Orders collectively disrupted its work as alleged. And it must show not only that the disruption resulted solely from government actions, but also the extent of that disruption and the harm it caused appellant.... Neither government-caused disruption nor the extent of disruption is adequately shown by evidence merely attesting to the issuance of 202 change requests, since numbers alone will not prove fault or disruption....

Cumulative impact need not be traced to specific causes of increased performance costs, but can rise from changes which, when viewed retrospectively, were so many and had such effect on performance that there is a separately compensable impact claim. ... The sheer number of change orders, however, can not establish the validity of cumulative

impact claim. Impact is not demonstrated by showing the number of changes or clarifications to the contract.... General unsupported statements that a contractor suffered impact are not sufficient proof that it did and the absence of contemporaneous documentary evidence of the disruptive effects of the work may provide reason for rejecting the claim....

Id. The Board further noted that "to prove these allegations appellant must show by a preponderance of the evidence not only that its work was in fact disrupted by the issuance of the 202 Change Orders but also the extent of that disruption and government responsibility therefor." *Id.* Ultimately, that was not shown and the cumulative impact claim was rejected for lack of proof.

The requirement of the causal connection is reinforced in *Triple "A" South*, 94-3 BCA ¶27,194 (ASBCA 1994). In that case, the Board stated,

To recover after-the-fact for "cumulative effects" as an increment to direct disruption, the contractor must still show a causal connection between the accumulated changes giving rise to "contract growth" and their effect on other changed and unchanged work. A given percentage of contract growth is not itself determinative of impact having been caused by a cumulation of change orders. We have found the record before us devoid of credible evidence showing any cumulative or synergistic effects caused by the several hundred directed changes ordered....

The Board further noted that,

for the government to be liable for a separately compensable constructive change, despite the contracting officer's explicitly reserved right to "make changes within the general scope of any job order," the contracting officer must have exceeded the permissible limits of his discretion under the Changes clause and ordered changes that "materially alter the nature of the bargain" originally agreed upon.

Id. The Board concluded there was no evidence showing that the nature of the job was materially altered by the accumulation of Change Orders or otherwise, and thus rejected the claim. The standard announced in the *Triple "A"* case may be a bit of an outlier, as in addition to posing a very difficult causation hurdle, it also required changes that virtually amount to cardinal change, and seemingly rejected the claim on that basis.

While the burden for establishing a cumulative impact claim may seem impossibly high, at least one case has allowed a cumulative impact claim and awarded substantial damages on that basis. In *Bell BCI Co. v. United States*, 81 Fed. Cl. 617 (Ct. Fed. Cl. 2008), the Court of Federal Claims noted that a,

combination of ... conflicting factors created a classic

environment for cumulative impact and labor inefficiency. Multiple change orders on a construction project potentially can be accommodated if the owner acknowledges that additional time and money will be required, and if the parties carefully plan the sequencing of the changed work. However, if the owner as here denies the additional time or money to perform changed work, but nevertheless continues the flow of change orders to the contractor a chaotic project inevitably will result.

Id. at 638. This positive result for the contractor was likely dictated by what the court characterized as an expert schedule analysis that "overwhelmingly shows that the delays encountered by *Bell* were caused by the NIH changes," *id.* at 620, and the fact that the contractor maintained extensive and detailed productivity records that permitted a meaningful analysis of the impacts on the contractor's productivity. *Id.*, *passim*.

The lesson of these cases is that cumulative impact claims do exist, notwithstanding Professor Nash's apparent opinion to the contrary, but they are exceedingly difficult to prove. Such claims are likely to succeed only when there is a detailed set of records, both project based and task based, including defensible productivity records of prior work, combined with thorough expert analysis, tying specific claimed impacts to specific causes. Without good project records, it is difficult to convincingly prove causation. Without causation, the claim fails.

What kind of records should be kept? The answer will vary depending on the project and the contractor, but at a minimum contractors should keep good daily logs that reflect more than the weather and work progress. Meaningful daily logs need to reflect all known impacts and impediments to progressing the work. Such records not only demonstrate owner caused impacts when possible, but of equal importance they also reflect other impacts and allow the kind of cost/impact segregation the courts require to prove a productivity or delay claim. To the extent it is possible to track impact costs separately, that should be done. At times this may require judgment, and at times it may be impossible, but all project timekeepers should be directed to track, to the greatest extent possible, time and costs above the unimpacted time and costs. Separate cost codes should be created and reviewed with project staff regularly. Finally, contractors should keep productivity records for specific job activities from multiple projects. Most contractors track such information for bidding purposes, so this should not be an unduly difficult task.

While no contractor wants to go through the process of pursuing a claim, contractors should prepare before a claim is brought, rather than after the fact. It is far easier, less costly and more persuasive to build the foundation for a claim while the work is ongoing than to reconstruct it after the fact.

¹ Another critical question is whether the contractor has waived a claim for cumulative impact by agreeing to a change order without reserving the right to revisit unknown impacts. Different courts have reached different

results when the contractor signs a change order without any reservation of rights. Some hold that a signed change order without reservation of rights is a final resolution of the issue such that a cumulative impact claim will be barred. See Triple "A" South, 94-3 BCA ¶27,194 (ASBCA 1994). Others reason that unless the release clearly covers unknown impacts, no waiver occurs. Beaty Elec. Co., 90-2 BCA ¶22,829 (EBCA 1990).

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