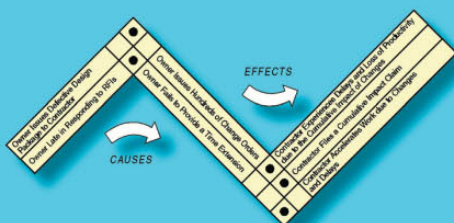


CUMULATIVE IMPACT AND OTHER DISRUPTION CLAIMS IN CONSTRUCTION

RICHARD J. LONG, P.E.

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HAROLD E. BUDDMEYER



LONG INTERNATIONAL

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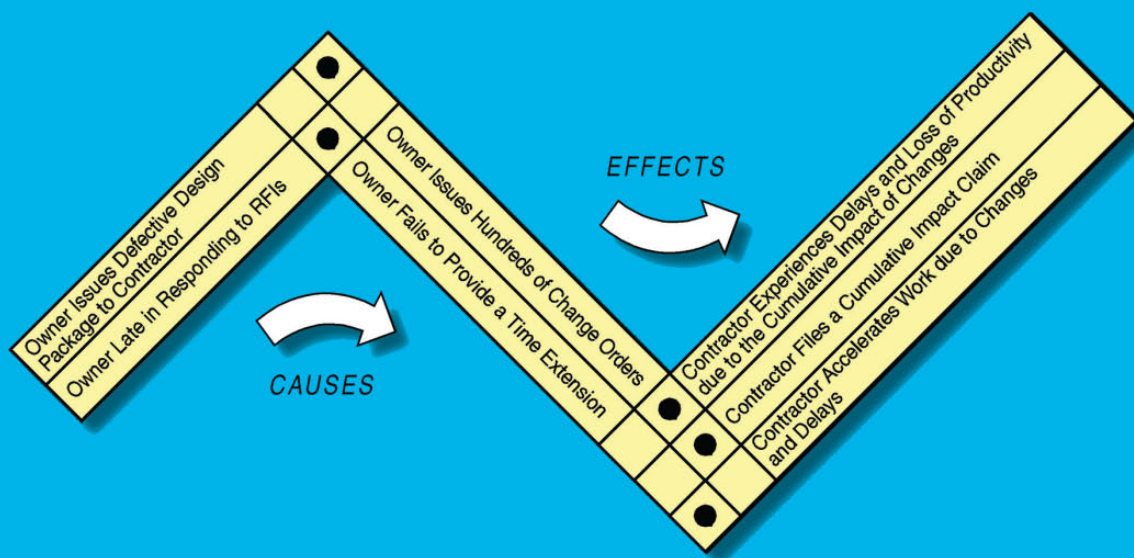
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Preface

Construction contracts usually contain a “Changes” clause by which the owner can bilaterally or unilaterally request changes to the scope of work that is to be performed by the contractor, and these requests are typically converted into change orders. However, the owner’s actions or inactions can also result in constructive changes to the contract. Change orders to adjust the contract price and time for completion result from a wide range of owner responsible events, including but not limited to, owner-directed increases or decreases in the scope of work to be performed by the contractor, owner-directed changes in the means and methods of the contractor’s performance or the materials or equipment to be installed, owner-directed changes in the contractor’s planned sequence in which the work is to be performed, design changes, changes in the performance specifications, differing site conditions, constructability issues, late responses to the contractor’s properly prepared submittals and requests for information, delays in the delivery of owner-supplied materials and equipment, failure to secure permits in a timely manner, owner interference with the contractor’s work, owner delays resulting in changes in the weather season during which the work is to be performed, changes due to actions or inactions of other trades working on the project for which the owner is responsible, and “constructive changes.”

A directed change order or a constructive change typically entitles the contractor to a time extension if the changed work is on the then critical path, and to additional compensation not only for all direct costs, time-related costs, and costs for direct disruption that are caused by the change, but also indirect disruption costs for the unforeseen impact of the change on unchanged work.

The disruptive effect of a change is a function of the size (man-hours and cost) of the change, the nature or scope of the change, the number of changes (although the number of changes may not be a sufficient determining factor in an assessment of cumulative impact), and the impact of the change on the other work. Also critical to the magnitude of the disruptive impact of a change is the time within the engineering and construction cycle when the change is issued. The further into the construction phase of the project, the greater the disruptive impact. If the changes are significant in scope and require significant additional man-hours to perform the changed and/or impacted work, direct and indirect disruption may occur.

The cost of direct disruption that is known and foreseeable should be included in the contractor’s change order requests as they are submitted to the owner for approval. The indirect disruption is often unforeseeable and referred to as the cumulative impact of changes. If requests for additional compensation for these indirect disruption costs are not included as part of the change order process because they are not foreseeable, cumulative impact claims may be submitted by the contractor, usually

Preface

near or shortly after the completion of the project. These cumulative impact claims most often seek recovery of the contractor's additional expenditure of resources, typically labor costs.

By any measure, it is difficult for a contractor to recover claimed costs that allegedly result from the cumulative impact of changes, either during the project, through a request for equitable adjustment and claim negotiations, or through arbitration/litigation. The construction industry, courts, and arbitration panels in the United States generally agree that the theory of cumulative impact is reasonable, and that multiple change orders and other types of delays and disruption can negatively impact the contractor's performance of unchanged work such that a contractor expends additional time, man-hours, and costs in completing its "unchanged" base scope of work. Yet, as will be discussed, the standard of proof set by the courts in proving these cumulative impact claims is burdensome, and their decisions are somewhat subjective. Further, the construction industry has no definitive standard to calculate loss of productivity claims that allegedly result from the cumulative impact of changes. Finally, the concept of cumulative impact claims has not always been accepted in dispute resolution venues outside of the United States.

Cumulative impacts remain largely an ill-defined concept. A more thorough understanding of cumulative impacts as defined by the construction industry and courts and boards will aid the contractor in preparing its damages and proving causation. The information herein provides a blueprint for the contractor seeking to recover costs that result from disruption and the cumulative impact of changes. Conversely, information is also provided that can be used by the owner to identify weaknesses in the contractor's claim submittal, and to better defend against such a claim.

The term "contractor" is used throughout this book to indicate the party claiming damages for disruption and cumulative impact. Subcontractors may also be claimants. The term "owner" is used throughout this paper to indicate the party defending against a disruption and cumulative impact claim. Engineering and construction firms, prime contractors, or construction managers may also be defendants against disruption and cumulative impact claims that are submitted by subcontractors.

Chapter 1 discusses disruption and cumulative impact as defined by the construction industry, as well as by courts and boards. Legal considerations affecting disruption and cumulative impact claims, and the challenges that contractors may encounter to sustain a cumulative impact claim, are discussed in Chapter 2. Methods for estimating loss of productivity man-hours for disruption and cumulative impact claims are presented in Chapter 3, including references to commonly referenced industry studies. Chapter 4 presents examples of productivity loss and cumulative impact calculations using various industry studies and methods. A discussion of quantum/damages quantification methods associated with construction claims is presented in Chapter 5,

Preface

and these quantum/damages calculation methods are discussed in the context of preparing cumulative impact and other disruption claims. Chapter 6 provides information for preparing a cumulative impact or disruption claim during the project. Finally, a discussion of cause-effect analysis is provided in Chapter 7.

Appendix A includes 18 cases in which a court or board awarded a contractor monies pursuant to its disruption claims. In six of these cases, the theory and legal precedent associated with cumulative impact was specifically discussed. Appendix B includes 31 cases in which a court or board denied a contractor's disruption claims, along with a brief description of the reasons for rejecting the claim. In 24 of these cases, the theory and/or legal precedent associated with cumulative impact was specifically discussed. Appendix C provides a list of documentation that is typically preserved on an engineering and construction project.

This book contains information from numerous published sources, and in many cases, the claims made by the various writers of those publications are restated herein. Therefore, the views and conclusions in this book are not necessarily those of the authors.

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