

**EIGHTH ANNUAL
SOUTHERN SURETY AND FIDELITY CLAIMS
CONFERENCE
APRIL 3 - 4, 1997**

“CUMULATIVE IMPACTS AND CARDINAL CHANGES”

PRESENTED BY

**WILLIAM C. GUERRANT, JR.
HILL, WARD & HENDERSON, P.A.**
Suite 3700 • Barnett Plaza
101 East Kennedy Boulevard
Tampa, Florida 33602
(813) 221-2900

CUMULATIVE IMPACTS AND CARDINAL CHANGES

By: William C. Guerrant, Jr.

I. INTRODUCTION

This paper will suggest that a surety should carefully analyze the concept of "cumulative impacts" when considering the availability of a cardinal change defense. I will first discuss the concept of a cumulative impacts claim, will briefly summarize the cardinal change defense, and will conclude with the discussion of the application of cumulative impacts to cardinal changes.

II. SCENARIO

Consider the following scenario. The principal has filed for bankruptcy. The surety has numerous outstanding performance and payment bonds on multiple incomplete projects. The surety meets with the principal, who advises that on a major unfinished project, it intends to pursue a "cumulative impacts claim" against the owner. The principal advises that it expects the claim will exceed \$1 million.

The surety, uncertain of exactly what it is the principal is claiming, hires a consultant to analyze this situation. The consultant reports that the principal's claim is based upon losses arising out of alleged inefficiencies and loss of productivity, resulting from a series of over 100 change orders which had been issued on the project. While no single change order was particularly troublesome, and while the total value of the change orders amounted to only approximately 20% of the contract price, the principal claims that the ripple effect of inefficiencies associated with the changes, including lost productivity, extended overhead, and cumulative disruption in the progress of the work was devastating. Does the surety have a cardinal change defense?

III. CUMULATIVE IMPACT CLAIM

Courts have recognized a contractor's ability to recover for the indirect or "cumulative impact" associated with change orders. Cumulative impact costs have been described as

the inefficiencies and disruptions associated with changes which, when viewed cumulatively, (i.e. retrospectively), were so large in number and or/magnitude as to give rise to a separately compensable impact claim. The term 'ripple effect' has also been used to describe such impact costs.

Pitman Construction Company, Inc. v. United States, 2 Cl. Ct. 211 (1983).

Cumulative impact costs have been defined as the costs associated with impact on work which are not as readily foreseeable or, if foreseeable, are not as readily computable as direct impact costs. The source of such costs is the sheer number and scope of the changes to the contract. The result is an unanticipated loss of efficiency and productivity which increases the contractor's performance costs and usually extends his stay on the job.

Appeal of Haas & Haynie Corporation, 84-2 BCA ¶17,446. Such costs are attributed to "global

disruption," or "cumulative disruptive effect."

Cumulative impact need not be traced to a specific cause of increased performance costs, but can arise from changes which, when viewed retrospectively, were so numerous, and had such an effect on performance, as to be a separately compensable impact claim. Bechtel National, Inc., 90-1 BCA ¶ 22,549. The source of such costs is deemed to be "the sheer number and scope of the changes to the contract." Id. at 113,180.

The nature of the cumulative impact costs claimed will vary with the circumstances. Such claims are akin to delay/acceleration claims and the cost components will be similar. The Corps of Engineers Board of Contract Appeals has noted that the term "impact," "like the blank tile in the word game 'Scrabble,' has come to have whatever definition a party seeks." Appeal of Saudi Tarmac Company, Ltd., 89-3 BCA ¶ 22,132, 1989 WL 98743, p. 20.

Because such cumulative impact claims are viewed retrospectively, the impact costs typically cannot be ascertained until completion of the job. See, Appeal of Dyson and Company, 78-2 BCA ¶ 13,482. Such costs can be contrasted to "direct impact" costs, which are direct consequences of a change, and which a contractor is expected to foresee and recognize in forward pricing a claim. Appeal of Freeman-Darling, 89-2 BCA ¶ 21,882.

Due to the nature of a cumulative impact claim, and the fact that it typically cannot be quantified until the completion of the job, the contractor often fails to reserve the claim when providing releases upon partial payments, providing a defense to the owner. See, "The Cumulative Impact of Multiple Changes," *Construction Claims Monthly*, Volume 18, Number 5, May 1996. In Atlantic Drydock Corporation v. United States, 773 F. Supp. 335 (M.D. Fla. 1991), for example, the contractor sought to pursue a cumulative impact claim where, during the course of construction, there had been approximately 130 modifications to the contract. The contractor alleged that, as a result of the "cumulative impact of the many small changes," it had suffered from cumulative delay and disruption, entitling it to additional compensation. Because the contractor had provided partial releases, however, upon the negotiation of each modification, without reserving the ability to assert a cumulative impact claim at the completion of the project, the court granted a partial summary judgment to the government.

VI. CARDINAL CHANGE DEFENSE

It is well known that a cardinal change in a contract without the surety's consent releases the surety from its bond obligation. In re: Technology for Energy Corporation, 140 B.R. 214 (E.D. Tenn. 1992). Basically, a cardinal change occurs when "the obligee affects an alteration of the work so drastic that it effectively requires the contractor to perform duties materially different from those originally bargained for." See, The Surety's Response to the Obligee's Declaration of Default and Termination: To Perform or Not to Perform That is the Question, *The Construction Lawyer*, p. 11 and notes 95-101 (January 1997).

V. CAN A CUMULATIVE IMPACT CLAIM BE A CARDINAL CHANGE?

The existence of a cardinal change, like the existence of cumulative impact costs, must be determined on a case-by-case basis. It is well known that there is no bright line test for when a change to a contract is considered a cardinal change. See e.g., Air-A-Plane Corporation v. The United States, 408 F. 2d 1030 (Ct. Cl. 1969). Likewise, the determination of when cumulative

impacts are separately compensable cannot be determined based upon any formula or bright line test.

I found no reported decision in which a surety asserted that cumulative impact costs amounted to a cardinal change, resulting in a discharge of its obligation under a bond. On the other hand, I am unaware of any cases which hold that cumulative impact costs may not be used to prove the existence of a cardinal change.

In re: Boston Shipyard Corporation, 886 F. 2d 451 (1st Cir. 1989), is a case which arguably applies the cardinal change doctrine to a cumulative impact claim. Although not designated as a claim for "cumulative impact" costs, in that case, the contractor sought to justify termination of the contract on the grounds that it had been subjected to 86 change orders, on a project which was scheduled to be performed in 100 days. The contractor alleged that these changes resulted in a cardinal change.

The court rejected the contractor's argument holding:

We cannot conclude that these change orders amounted to a cardinal change, putting the government in breach and justifying BSC's abandonment of the contract. Some delay and disruption must be expected in the performance of any contract.

Id. at 457.

Based on the court's rationale, any attempt by the contractor to seek cumulative impact costs in that case would have failed. The court characterized the change orders themselves as "predictable." Further, the court specifically found that the changes were not of a magnitude or extent which would represent a cardinal change. Thus, the case does not squarely address our issue.

In Atlantic Drydock Corporation v. United States, 773 F. Supp. 335 (M.D. Fla. 1991), the contractor had asserted a cumulative impact claim, and had also sued for breach of contract based upon an alleged cardinal change to the contract.¹ The court, as noted above, granted the government summary judgment on the cumulative impact claim, based upon the existence of partial releases. The court denied the government's motion for summary judgment on the cardinal change claim, however, and allowed it to proceed.

Importantly, for our purposes, the court recognized a relationship between a cumulative impact claim and the cardinal change doctrine. Specifically, the court wrote as follows:

The court recognizes that both the cumulative delay and disruption claim and the cardinal change claim are cumulative in nature. That

¹The cardinal change doctrine, in the context of government contract disputes, provides that where a cardinal change occurs, it amounts to a breach of the contract, entitling the contractor to damages. Hancock Electronics Corp. v. WMATA, 81 F. 3d 451, 454 (4th Cir. 1996). See also, Executive Business Media v. U.S. Department of Defense, 3 F. 3d 759, 763 n. 3 (4th Cir. 1993). Cases applying the doctrine in the context of government contracting have, however, been cited as authoritative when applying the doctrine to sureties. Such cases are, therefore, instructive when analyzing issues related to a surety's cardinal change defense.

is, they do not depend upon the effect of any particular modification but rather depend upon the cumulative effect of all the modifications taken together.

Id. at 340, n.1. The court specifically noted the "identity of the grounds" underlying the two claims. Thus, while the court did not need to reach the issue, the Atlantic Drydock case provides at least one example of an assertion that a cumulative impact claim amounted to a cardinal change.

VI. CONCLUSION

There is no conceptual reason why cumulative impact costs, determined retrospectively, could not be deemed to be a cardinal change to the principal's contract, resulting in a discharge of the surety. While there seems to be no case law or literature directly applying the cardinal change doctrine to a cumulative impacts claim, if the cost would constitute a cardinal change had they been "direct impact costs," certainly the argument could be made that they are no less a cardinal change merely because they are "cumulative." Thus, the surety faced with the scenario described earlier should analyze the effect of the cumulative impact on the contract the same way it would analyze the direct cost components of the changes.

When considering the availability of a cardinal change defense, a surety should be careful not to overlook any cumulative impact costs which can be demonstrated. These costs, either alone, or in combination with the direct impact costs, may provide a cardinal change defense to the surety.