

# CUMULATIVE IMPACT CLAIMS: Hard to Describe, Even Harder to Prove

Most 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, however, they are noteworthy.

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, they 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. This after-the-fact analysis is closely akin to the 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, which must be answered with evidence and analysis, is how the impacts caused the increase in costs.

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. For example in *Pittman Construction Co.* 81-1 BCA ¶14,847 (GSBCA 1980), the Board of Contract Appeals noted that costs for cumulative impacts are recoverable, but concluded that they had not been proven. On appeal, 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.’” *Pittman Construction Co. v. United States*, 2 Cl. Ct. 211 (1983).

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 . . . 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. . . .

Ultimately, that was not shown and the cumulative impact claim was rejected for lack of proof. Most other cases have reached similar results.

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 approved over \$6 million of cumulative impact damages. This positive result for the contractor was likely dictated by an expert schedule analysis that “overwhelmingly shows that the delays encountered by *Bell* were caused by the NIH changes,” 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.

The lesson of these cases is that cumulative impact claims do exist, 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.