

RISK ASSESSMENT

Construction Claims

how to calculate the recoverable costs and damages

By Aman Kahlon

When negotiating a complex change order or preparing to litigate a claim, calculating actual recoverable costs incurred can be a difficult exercise. You will want to first review your contract to determine what kinds of costs are compensable. For example, the change order provision of your contract may provide a specific markup that can be included in a change request or limit the recovery of indirect costs and overhead associated with a change. Similarly, a termination for convenience provision may prohibit recovery of profit or provide a defined demobilization fee. Your contract may also include liability caps or waivers of certain types of damages (e.g., consequential damages). Damages waivers may try and limit exposure of both parties to indirect, hard-to-determine costs.

ECONOMIC LOSS DOCTRINE

Beyond the contract terms, recoverable costs will also be limited by the different methodologies or approaches used by various courts. One of the primary limitations on recovery in contract disputes, including those involving construction, is the economic loss

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doctrine. Most states have adopted the economic loss doctrine in some form. While a detailed discussion could fill up several pages, the basic premise of the doctrine is that a party cannot avoid contractual limitations on recovery by alleging a tort (e.g., negligence) for purely economic losses.

ACCOUNTING METHODOLOGIES

Other challenges to calculating recoverable costs relate to the accounting methodologies used by a party in developing a claim. When things go wrong on a construction project, it may be difficult to adequately track

costs or assign costs to particular impacts. Concurrent delays, acceleration directives, interference with the work, and other issues all complicate the cost accounting exercise. Even the most sophisticated contractors, can have a hard time tracking their costs. Courts are not always forgiving of the complexity involved in tracking construction costs, so be careful about trying to submit your claim as a total cost claim (i.e., here's what we bid and here's what it actually cost to build the project; pay us the difference). If you cannot adequately connect your damages to the claimed impacts and demonstrate their reasonableness, many jurisdictions will not permit recovery based on this total cost exercise, although there are exceptions and caveats.

ENSURE CLAIM IS CREDIBLE

Before you submit a claim, you should consult internally or with a lawyer to make sure you are adequately calculating your damages in way that you can later justify to a judge or arbitrator. The size and credibility of your damages claim will likely factor into the risk assessment that your company makes in pursuing a claim in arbitration or litigation.

The industry has a number of experts who address construction delay and accounting matters and can help you work through a difficult or complex claim.

For instance, if a project manager presents a claim that estimates total losses of \$10 million, at first glance, that may appear like a sizable claim that is worth pursuing. However, if on further reflection, you recognize that the project manager failed to account for contractual limitations on recoverable costs or has not done a poor job of tracking and assigning costs to the particular impact giving rise to your claim, the actual amount of the claim you can legitimately support may be much smaller. If your \$10 million claim turns out to really be worth only \$1 million, the expected attorneys' fees and uncertainty of the litigation process may cause you to re-think pursuing the matter aggressively.

Be careful about trying to submit your claim as a total cost claim.

CLOSING THOUGHT

This article touches very briefly on some of the complexities of determining construction damages, but this is not an exhaustive discussion. There are other methodologies and approaches contractors use to calculate their damages (e.g., loss productivity claims) that may be worth exploring depending on the type of claim you are pursuing. Aside from contacting your lawyer, you may also consider reaching out to a construction

consultant. The industry has a number of experts who address construction delay and accounting matters and can help you work through a difficult or complex claim. ■

about the author

Aman Kahlon is a partner in the Construction Practice Group at Bradley Arant Boult Cummings (www.bradley.com) in Birmingham, Alabama. He represents owners, general contractors, and subcontractors in construction and government contracts matters. His litigation experience covers a wide variety of disputes, including substantial experience in power and energy matters. He also advises clients on delay, interference, defective design, and negligence claims. He can be reached at akahlon@bradley.com.

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