

## United States Court of Federal Claims Recognizes General Contractor's Claim for Cumulative Impact Despite Seemingly Broad Release Language in Contract Modifications

*This article first appeared in the Summer 2008 edition of Claims Resource, produced by URS' Claims and Dispute Resolution Group. It is reprinted here with permission.*

In *Bell BCI Company v. United States*, No. 03-1613C, 81 Fed. Cl. 617; 2008 U.S. Claims LEXIS 116, (April 21, 2008), the Federal Court of Claims recognized a claim of cumulative impact despite release language in negotiated and agreed upon contract modifications that purported to preclude further equitable adjustment attributable to the work covered by the modifications. The court awarded Bell more than \$2 million, plus interest, for the cumulative impact of modifications to the work for which Bell had already been granted in excess of \$21 million in contract modifications.

Bell was the general contractor on a new laboratory building at the National Institutes of Health in Bethesda, Maryland. After nine months of construction, the government added a new floor, and issued more than 200 modifications that delayed completion by more than nineteen months and increased the contract price by 34 percent, or \$21.4 million. Although Bell was paid for the changed work, it asserted an impact claim for the cumulative effect of the changes on its overall performance and asserted pass-through impact and inefficiency claims on behalf of five of its subcontractors. The government argued that Bell was paid for the additional work pursuant to the contract

*Although the court's decision in Bell does not represent a sea change in the law regarding cumulative impact claims, it does provide clarity and useful guidance regarding prosecuting and defending such claims.*

modifications, and that release language in the modification effected an accord and satisfaction of all claims for additional compensation stemming from the changes.

The court first discussed the concept of a cumulative impact as a separate and distinct basis for equitable adjustment, over and above the compensation for the additional work. The court observed that not all projects with multiple changes support a cumulative impact award, and suggested that, when changes are properly managed, a cumulative impact claim may not be cognizable. The court clearly did not feel that the government had properly managed the change process on the project at issue, however, and this obviously influenced the outcome:

“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

### also in this issue

- 2 **Peppercast: Pursuing Real Estate Tax Assessment Appeals in a Down Economy**
- 3 **Construction SuperConference**

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. In this case, there were 279 EWOs and 113 contract modifications issued ... while NIH project personnel were maintaining that no further changes would be issued. The project environment was contentious, as NIH representatives bordered on bad faith in denying payment to Bell for extra work performed.”

In fact, the court made no secret of its displeasure with the manner in which the government had acted both during the project and the ensuing claims process. Although not a predicate for its finding of entitlement, the court commented that there was substantial evidence that the government breached its implied duty of good faith and fair dealing in the administration of the project. The court also was highly critical of the government for asserting what it considered to be a frivolous liquidated damages claim for the purpose of gaining leverage against the contractor’s claim for equitable adjustment:

“A contracting officer’s review of certified claims submitted in good faith is not intended to be a negotiating game where the agency may deny meritorious claims to gain leverage over the contractor. The same principle applies where the agency asserts an unfounded liquidated damages claim solely to gain negotiating leverage.”

Having recognized the viability of a cumulative impact claim on top of the individual modifications, the court

turned its attention to the government’s argument that the standard release language included in each modification precluded any further claim for equitable adjustment related to the work covered by the modification. The release language at issue provided:

“The modification agreed to herein is a fair and equitable adjustment for the Contractor’s direct and indirect costs. This modification provides full compensation for the changed work, including both Contract cost and Contract time. The Contractor hereby releases the Government from any and all liability under the Contract for further equitable adjustment attributable to the Modification.”

The court held that this seemingly broad release language did not bar a cumulative impact claim because the release did not contain any language *expressly* releasing claims for the cumulative impact of the changes that were the subject of the individual modifications. The court also found that the general release language did not apply because the government failed to present any evidence that the adjustments to the contract sum included any payment specifically attributed to the cumulative impact of the various changes. In so holding, the court rejected the argument that the broad release language evinced an intention to satisfy any and all claims relating to the additional work, and effectively placed a duty on the government to either expressly exclude additional compensation for cumulative impacts and/or expressly identify a portion of the adjustment as compensation for cumulative impacts.

After dispensing with the government’s accord and satisfaction defense, the court then turned to the issues of proof



## Peppercast: Pursuing Real Estate Tax Assessment Appeals in a Down Economy

With financial markets sinking and costs for gasoline and transportation rising, businesses are eager to trim costs and improve their bottom lines. This podcast, with **Dusty Elias Kirk** and **Sharon F. DiPaolo**, who are partners in Pepper Hamilton’s Pittsburgh office and members of the firm’s Real Estate Practice Group, discusses how businesses are finding ways to reduce costs by reducing their real estate tax.

Listen today by visiting the Real Estate section of [www.pepperpodcasts.com](http://www.pepperpodcasts.com).

of the cumulative impact and the resultant damages. Here, the contractor's cause was greatly aided by its cost reporting and scheduling practices. Bell maintained an updated CPM which allowed it to perform a time impact analysis of the changes. It also performed a windows analysis, by which it compared selected snapshots of activities to the as-planned CPMs as updated during performance. Bell and its subcontractors were able to establish that the multiple changes caused labor inefficiencies because they tracked their progress by appropriate units of weekly production (i.e., units or pounds of materials installed). This allowed the establishment of a "measured mile" and a comparison of actual to as-planned installation efficiency. Bell supplemented this documentation with anecdotal evidence from its subcontractors describing the impact that the numerous changes had on their work. For example, Bell presented testimony from its sheet metal subcontractor (Stromberg) that it:

"[had] to demolish duct work previously completed, and then reinstall new work to a different set of requirements. The ... changes often came after other trades had installed their work in the interstitial spaces. These complications occurred on every level and area of the project. ... Stromberg performed the changed work under tight working conditions. Its crews had to crawl over existing ducts and newly installed mechanical and sprinkler pipes to remove completed ducts. The changed duct work often had to be installed one piece at a time. The crews had to share the elevators with other trades."

The court was clearly impressed with the logic and detail of the contractor's analysis and the specificity of the supporting contemporaneous project records and anecdotal evidence. In contrast, the government presented expert testimony that the project delays were caused by Bell's problems with its subcontractors or understaffing. The court found these "general allegations" to be unpersuasive.

In some respects, this case is proof of the adage that "bad facts make bad law." This is not to say that the court's legal analysis was necessarily flawed, but it was clearly influenced by the perception that the government mismanaged the process and, even worse, asserted a counterclaim to gain leverage which, according to the court, the government knew was without merit. One has to wonder whether the court would have been as willing to recognize the cumulative impacts or to ignore the release language in

## Construction SuperConference

December 10-12, 2008  
San Francisco, California

The Pepper-sponsored Construction SuperConference, now in its 23rd year, is recognized as the preeminent legal construction conference. Pepper partner Bruce W. Ficken is a co-chair of the conference. James Nicholson, presently Senior Counsel, Brownstein Hyatt Farber Schreck and former United States Ambassador and Secretary of Veteran Affairs, will be the keynote speaker for this year's conference.

In addition to the workshops, educational sessions will be offered within the following tracks:

- legal and institutional
- business related issues
- contract and management
- industry specific.

This conference is designed as an educational conference with networking and product/service information opportunities for mid and senior level attorneys, consultants and engineers working within the construction industry.

For more information or to register, visit [www.constructionsuperconference.com](http://www.constructionsuperconference.com).

the contract modifications had the government behaved differently. In fact, prior to *Bell*, many courts had held that similar release language was sufficiently broad to bar a contractor's cumulative impact claim. For example, in *Jackson Construction Co., Inc. v. United States*, 62 Fed.Cl. 84 (Fed. Cl. 2004), the contractor executed 24 modifications, each of which contained a release provision stating "[i]t is further understood and agreed that this adjustment constitutes compensation in full on behalf of the contractor and his subcontractors and suppliers for all costs and markup directly or indirectly, including extended overhead, attributable to the change order, for all delays related

thereto, and for performance of the change within the time frame stated.” The court held that this language was sufficient to constitute an accord and satisfaction of the contractor’s cumulative impact claim. Similarly, in *Atlantic Dry Dock Corp. v. United States*, 773 F.Supp. 335 (M.D. Fla. 1991), the contractor asserted a cumulative impact claim arising out of approximately 130 modifications to its contract with the government. Each modification contained a release provision stating “[t]he change in price and/or delivery date described above, is considered to be fair and reasonable and has been mutually agreed upon in full and final settlement of all claims arising out of this modification including all claims for delays and disruptions resulting from, caused by, or incident to such modifications or change orders.” The court held that this language was intended to resolve all claims for damages and disruption, cumulative or otherwise, and thus, barred the contractor’s cumulative impact claim.

Although the court’s decision in *Bell* does not represent a sea change in the law regarding cumulative impact claims, it does provide clarity and useful guidance regarding prosecuting and defending such claims. First, *Bell* makes clear that an owner cannot establish an accord and satisfaction defense merely through the inclusion of general, broad release language in change orders or contract modifications. According to the *Bell* court, in order to act as a release or accord and satisfaction, a change order or modification must include language *explicitly* releasing any cumulative impact claim. In addition, *Bell* seems to require that, even where the modification or change order contains a clear and unambiguous release of a cumulative impact claim, it

may be advisable for the owner to expressly allocate a portion of the contract adjustment to compensation for any cumulative impact of the subject and all prior changes.

The other lesson to be learned from the court’s opinion is the importance of keeping real-time production records and updated schedules. The court’s decision in *Bell* reflects the preference of courts and boards that a contractor present contemporaneous documentation detailing the type and extent of the cumulative disruption, rather than attempting to prove cumulative impact by comparing the original cost of the work to the cost as changed (i.e., a total cost comparison). The *Bell* court strongly endorsed the use of updated CPM schedule analysis and production tracking as an objective measure of the effect of changes to the work on the project schedule and cost. The court also gave its imprimatur to the use of the “measured mile” analysis to establish labor inefficiency costs, and made clear that a contractor has a better chance of success on a cumulative impact claim if it can present detailed proof of its alleged inefficient performance through comparisons of the productivity achieved on the disrupted work versus its normal productivity achieved on undisrupted work on the same or a similar project. In sum, the contractor’s ability to demonstrate – quantitatively, analytically and anecdotally – that it was impacted beyond the cost of performing the additional work was critical to its ultimate success.

*Author:*

*Thomas J. Madigan*  
412.454.5883  
[madigant@pepperlaw.com](mailto:madigant@pepperlaw.com)

## **Pepper Hamilton LLP** Attorneys at Law

The material in this publication is based on laws, court decisions, administrative rulings and congressional materials, and should not be construed as legal advice or legal opinions on specific facts. The information in this publication is not intended to create, and the transmission and receipt of it does not constitute, a lawyer-client relationship.

Please send address corrections to [phinfo@pepperlaw.com](mailto:phinfo@pepperlaw.com).

[www.pepperlaw.com](http://www.pepperlaw.com)

Berwyn | Boston | Detroit | Harrisburg | New York | Orange County  
Philadelphia | Pittsburgh | Princeton | Washington, D.C. | Wilmington

© 2008 Pepper Hamilton LLP. All Rights Reserved.  
This publication may contain attorney advertising.