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In Bell BCI Co. v. United States, we represented the contractor in prosecuting a disruption and cumulative impact claim that the government rejected based on release language contained in contract modifications. We asserted, among other things, the legal distinction between delay claims and disruption claims, and the fact that the cumulative impact that changes had on base contract work were not expressly released in the contract modifications. The Court rejected the government's accord and satisfaction defense based on the contract modifications and awarded the contractor 100% of its claims.

The Court's decision recognizes the legal distinction between delay claims and claims based on disruption and cumulative impact of changes. Based on this decision, a contract modification or change order, even though containing broad waiver and release language addressing cost and time resulting from changed work, does not release a contractor's right to claim cumulative impacts, labor inefficiencies and/or work disruptions. Additionally, if the modification does not show that the contractor received compensation or other consideration for the cumulative impact, inefficiency or disruption, the lack of such consideration may negate a defense of accord and satisfaction.

### **Background**

Bell BCI Co. v. United States involved the construction of a laboratory building located at the National Institutes of Health ("NIH") campus in Bethesda, Maryland. The initial contract amount for the construction of the laboratory was approximately \$63.6 million. Roughly nine months into construction, NIH decided to add a new floor to the building. The design of the new floor was intended to replicate an existing floor. Based on that fact, the government and Bell entered into a modification to increase the time and cost of performance.

The contractor, Bell BCI Company ("Bell"), asserted a claim for the performance of unpaid changed work, disruption, and the cumulative impact of all the changes which increased the cost of performing its base contract work. Bell also asserted "pass-through" impact claims on behalf of several of its subcontractors. The government asserted a defense of accord and satisfaction based on broad release language contained in contract modifications signed by the parties during construction. That release language stated:

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

this Contract for further equitable adjustment attributable to the Modification

The modifications further stated that the contract adjustment would be a “full and equitable adjustment for all delays resulting from any and all Government changes transmitted to the Contractor.” After arguments regarding the meaning of this release language and its application, the Court ruled that Bell was not precluded from pursuing its disruption and cumulative impact claims and that the government did not act in good faith in resolving the issues surrounding the difficulties Bell experienced in performing the work.

### **The Court’s Analysis & Decision**

The trial, which took place in October 2007, resulted in a decisive ruling in favor of Bell. The Court found that NIH “lost control of the project” and was unable to prevent the eventual occupants of the building from demanding changes to the project during the course of construction. The “addition of a new floor after construction had begun proved to be a disastrous idea” in the opinion of the Court. The mounting delays and changes the government demanded were exacerbated by its quality management firm’s directives to Bell to perform extra work without time extensions and without authorization to accelerate performance.

Bell’s schedule analyses, which involved a contractually required time impact analysis to determine Bell’s entitlement to time extensions, and a windows analysis, were well received by the Court. To determine the cumulative impact of NIH’s changes, Bell analyzed its earned and unearned hours expended each week. The use of Bell’s historical productivity data and project records to measure inefficiency by comparing earned and unearned hours was accepted by the Court.

The Court noted that the factors involved on this project created a “classic environment for cumulative impact and labor inefficiency.” Where an owner denies additional time or money to perform changed work, yet issues a continuous flow of change orders to a contractor, “a chaotic project inevitably will result.”

The government tried to convince the Court that Bell was either paid for the work or the claims it was seeking were released under the modifications. The government argued that Bell’s claims were barred by the waiver and release language, cited above, which was contained in numerous contract modifications. The Court, however, observed that the modifications contained no language by which Bell expressly released its disruption or cumulative impact claims. Further, the Court noted that there was no evidence that the government ever provided any consideration to Bell to settle cumulative impact claims. The Court stated:

On a project where the Government issues many change orders, bilateral modifications will compensate the contractor for the cost of performing the changed work, but the cumulative effect of the changes may add to the contractor’s time and effort in performing the unchanged work as well. Unless provided otherwise, the bilateral modifications will compensate the contractor for

performing the changed work, but not for the impact of multiple change orders on the unchanged work.

In order to retain Bell's contract balance, the government assessed liquidated damages for delay. The Court, however, found no factual basis for the government's liquidated damages claim and admonished the government for attempting to improperly leverage the contractor to forego its legitimate claims.

While the government may appeal the decision, we are confident that the United States Court of Appeals for the Federal Circuit will uphold this ruling in light of the overwhelming evidence in support of the lower court's decision.