



Reservation of Rights to Make a Cumulative Impact Claim

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1. INTRODUCTION

Imprecise wording on change order forms often causes problems relating to what costs are included in the agreed price for the change. Contractors may argue that the change order language, such as compensation for “indirect costs, or time-related costs,” does not include loss of productivity or cumulative impact costs. The contractor argues, in defense of its position, that there is no way that it could have known the actual impact of later owner-caused changes at the time that the earlier change order was priced. Therefore, the contractor waited until the end of the job to quantify and request its impact or loss of productivity claim, and called it a “cumulative impact claim.” The owner, however, often refuses to pay any more than the price earlier agreed for change orders.

Thus, an owner’s primary defense to a disruption and/or cumulative impact claim is often to argue that, in executing the various change orders, the contractor agreed to the price of the changes and thereby waived its rights to seek any further compensation. The argument advanced is that the contractor, by signing the change order, included any possible costs that would be associated with the cumulative impact claim and accepted any risk that the costs would be more than anticipated.

2. RELEASE LANGUAGE IN CHANGE ORDER FORMS

The change order form may contain the following commonly used language:

This change includes all costs associated with the scope of work associated with this change, including all direct, indirect, and impact costs on the unchanged work such as loss of productivity, ripple effect, cumulative impact, and acceleration.

The owner’s argument is simply that the contractor, by signing the change order, has accepted the risk associated with the changed work and has included in the change order price the value of any possible costs that could be associated with disruption and/or cumulative impact.¹

If an impact is foreseeable, it may be reasonable to consider it a direct impact, and any right to claim the costs associated with the disruption is either priced, settled, or waived with the execution of a change order. If an impact is unforeseeable, it may be reasonable to consider it an indirect impact, and the right to recover for an indirect impact should be reserved, or at a

¹ The legal defense is essentially “accord and satisfaction.”



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minimum, the contractor must not waive the right, so that the possibility of recovery exists.² The handling of these issues is highly dependent on the contract and change order form language.

3. MCAA CAUTIONS SIGNING CHANGE ORDERS WITH RELEASE LANGUAGE

The MCAA acknowledges the difficulty that a contractor will face if it signs a change order with what is termed “full accord and satisfaction”³ language on the change order form, as follows:

Often, contract language known as “full accord and satisfaction” language, contained in some change order forms, may require the contractor to attempt to price all categories of productivity loss within the change itself, as estimated values. This is called a forward priced productivity loss and the cost of this estimated loss can be included as a line item in the change order proposal. While it can be highly beneficial to include all estimated impacts within a change order, thus “closing out” the change, many owners refuse to recognize labor productivity impacts caused by scope changes or other factors beyond the control of the contractor. This leaves the contractor in the unwanted position of either not executing change orders due to the risk of waiving its rights or placing a “reservations of rights” statement on each change, which can have the effect of holding open the option of making further requests for equitable adjustment should the contractor suffer productivity losses due to the cumulative impacts of changes in scope on the project.⁴

The MCAA also cautions the contractor about accord and satisfaction, as follows:

While the owner-directed change is easiest to identify, the contractor must consider schedule and productivity impacts in the analysis and pricing of the change. Time and productivity impacts often are not the subject of initial negotiations regarding the scope, but these topics should be incorporated into the negotiation process. Failure to consider these impacts at the time of the change can result in a waiver of a contractor’s ability to recover additional time and money. Contractors should

² See Jones, Reginald M., “Lost Productivity: Claims for the Cumulative Impact of Multiple Change Orders,” Public Contract Law Journal, Volume 31, Number 1, Fall 2001, pp. 23–24, published by the Section of Public Contract Law, The American Bar Association.

³ Accord and satisfaction is a concept attributed to a bilateral contract, and requires (1) proper subject matter, (2) competent parties, (3) a meeting of the minds, and (4) consideration. See *Jackson Construction Co., Inc. v. United States*, 62 Fed.Cl. 84 (Fed. Cl. 2004), Lois Law Federal District Court Opinions, No. 97-31C, at p. 16.

⁴ “Change Orders Productivity Overtime – A Primer for the Construction Industry,” MCAA, 2012, p. 84.



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*consider their need to reserve rights associated with impacts if they are not quantified and included in the change order price at the time of each change order negotiation.*⁵

*Courts and boards have found that such language [accord and satisfaction] may bar the contractor from additional recovery. If there is concern that productivity impacts, cumulative impacts of multiple changes, and delay-related costs cannot be quantified for individual changes, the contractor should consider reserving its right to make a claim for such impacts separate from individual change orders.*⁶

*In some cases, the interpretation of the “full accord and satisfaction” language is so broad that the contractor’s cumulative impact claim is barred in total or in part because such impacts are claimed to arise from the change orders containing such exculpatory language.*⁷

4. CASE LAW DENYING IMPACT CLAIMS IF CONTRACTOR SIGNS CHANGE ORDERS CONTAINING RELEASE LANGUAGE

While the *accord and satisfaction* argument is dependent upon the change order language and the intent and knowledge of the parties at the time of change order signing, courts and boards have denied many claims on this basis.

For example, in the appeal of *Dyson & Co.*, the board acknowledged that the contractor likely suffered cumulative impacts from change orders, but denied recovery, ruling that the modifications “*represent full settlements for the cost consequences flowing from each of the directed changes, and there is no evidence that appellant, which agreed to these modifications without manifesting any reservations, considered them otherwise.*”⁸ The board further relied on the fact that the modifications were executed after the changed work was almost completed and, therefore, the contractor had knowledge of the impacts.⁹

In *Pittman*, the board did not definitively state that the contractor’s cumulative impact claim was barred by executed change orders, but that the board was “*relatively strict in holding that priced out change orders bar recovery of further costs associated with those changes.*”¹⁰ The board also

⁵ *Id.* at p. 5.

⁶ *Id.* at p. 13.

⁷ *Id.* at p. 98.

⁸ *Dyson & Co.*, ASBCA No. 21,673, 78-2 BCA ¶13,482, 1978 WL 2368 at pp. 25–26 (Westlaw print).

⁹ *Id.*

¹⁰ *Pittman Construction Co.*, GSBCA Nos. 4,897, 4,923, 81-1 BCA ¶14,847, 1980 WL 2643 at pp. 20–21.



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examined project correspondence to determine if Pittman had reserved its rights to assert the cumulative impact claim (prior to agreeing to the change order), and commented:

Now Pittman comes back, after the entire matter has been concluded, and says it does not like the result. But it managed to go through 206 change orders and thirteen extensions of time without raising a single objection that sufficed to reserve a claim for further equitable adjustment.¹¹

The board denied Pittman's appeal due to lack of causation.

In *Vanlar Construction, Inc. v. County of Los Angeles*,¹² the owner issued seven supplemental agreements and 81 change orders. The contractor signed each document with general waiver and release language. The court acknowledged that the large number of changes may have had a cumulative impact on the contractor's performance costs, but concluded the right to such a claim had been waived. The court determined that if the contractor contemplated a future claim for impact costs, it should have requested that the change orders contained a reservation clause before it signed the documents.¹³ After the change order is signed, the court ruled that it was too late to make a claim for such costs.

In *Central Mechanical Construction*,¹⁴ the contractor attempted to recover additional costs by way of a cumulative impact claim after agreeing to settle multiple changes. The board determined that the waiver and release language in the settled change orders barred further recovery.

In *Atlantic Dry Dock Corp. v. United States*,¹⁵ the court held that the release provision in each modification clearly addressed delay and disruption, stating that the modifications incorporated a final settlement of all claims arising out of each modification "including all claims for delays and disruptions resulting from, caused by, or incident to such modifications or change orders." The court found that this language was unambiguous and "reasonably susceptible to only one interpretation," which was that the parties intended to resolve all claims for damages caused by delay and disruption whether cumulative or otherwise. Therefore, the provision was unambiguous and the contractor's claim was barred for cumulative impact.

¹¹ *Id.* at p. 45.

¹² See Bramble, Barry B. and Michael T. Callahan, *Construction Delay Claims*, Third Edition, 2000, p. 5-41, citing *Vanlar Construction, Inc. v. County of Los Angeles*, 217 Cal. Rptr. 53 (Cal. App. 1985).

¹³ See Bramble, Barry B. and Michael T. Callahan, *Construction Delay Claims*, Third Edition, 2000, Section 5.06 [C].

¹⁴ See *Central Mechanical Construction*, ASBCA No. 29434, 86-3 BCA (CCH) ¶19,240 (1986).

¹⁵ *Atlantic Dry Dock Corp. v. United States*, 773 F. Supp. 335, 338-39 (M.D. Fla. 1991).



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In *Community Heating & Plumbing Company, Inc.*,¹⁶ a construction contractor's claim for impact costs associated with change work under a contract to replace underground pipes was barred. The government argued that the contractor had negotiated contract modifications associated with the change work without reserving its right to impact costs. The contractor maintained that the release language in the modifications addressed only the costs that were directly associated with the changes, not the impact costs resulting from the change work. The contractor contended that its claim letter contained a reservation of rights for impact costs. However, the language of the contractor's letter and the response of the government's resident officer did not indicate an understanding of a reservation of rights. Also, the contractor's execution of subsequent modifications had the effect of eliminating any alleged reservation. After filing its claim, the contractor executed modifications covering loss of productivity, equipment ownership costs, labor, material, rental equipment, overhead, and profit. There was no express reservation of rights for impact costs in any of these modifications. Having failed to prove that it had expressly reserved its right to impact costs, the board concluded that the contractor had waived its right to further compensation.

More recently, in *Jackson Construction Co., Inc. v. United States*,¹⁷ the contractor executed 24 modifications, each of which contained a release provision stating: "*It 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.*"¹⁸ The court held that this language was sufficient to constitute an accord and satisfaction which barred the contractor's cumulative impact claim.

States have also upheld the provisions of change orders which include language constituting final settlement of all claims arising out of the changed work. In *Uhle v. Tarlton Corp.*,¹⁹ the court ruled that because the subcontractor had not added any language to the change orders that specifically preserved its right to cumulative impact costs, the subcontractor had waived them.

In *Kleinknecht Electric Co. v. Jeffrey M. Brown Associates, Inc.*,²⁰ the subcontractor was barred from pursuing an impact claim by its signing of partial releases during the project. The electrical subcontractor agreed to provide a partial or final release and waiver of liens as the contractor required as a condition for payment. During the project, the subcontractor signed twenty five partial releases wherein it released the contractor from all claims the subcontractor had at the time it signed the release. Although the owner paid the contractor the full amount requested for the

¹⁶ See *Community Heating & Plumbing Company, Inc.*, ASBCA, 92-2 BCA ¶24,870 (Feb. 2, 1992).

¹⁷ See *Jackson Construction Co., Inc. v. United States*, 62 Fed.Cl. 84 (Fed. Cl. 2004).

¹⁸ *Id.* at p. 9 (Westlaw print).

¹⁹ See *Uhle v. Tarlton Corp.*, 938 S.W.2d 594 (Mo. Ct. App. 1997).

²⁰ See *Kleinknecht Electric Co. v. Jeffrey M. Brown Associates, Inc.*, 2006 Phila. Ct. Com. Pl. (Apr.10, 2006).



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subcontractor's work, the subcontractor was not paid in full. The subcontractor demanded payment for the balance of the subcontract as well as change orders including an impact claim.

The contractor contended that the subcontractor was not entitled to payment since it did not sign a final release, waiver of lien, and other closeout documents as required by the subcontract. The subcontractor was justified in not signing the documents, however, because additional claims remained to be decided. The subcontractor was entitled to recover the difference between the adjusted subcontract balance and the amount already paid to the subcontractor, but the subcontractor's impact claim for the change orders was barred by the subcontractor's signing of partial releases. It was found that the subcontractor knew that the alleged disruptions and delays were negatively impacting its performance while the events were occurring. The subcontractor nevertheless executed partial releases without limiting the scope of the release or reserving any right to bring an impact claim. The subcontractor's inability to ascertain the actual cost of impact at the time the events occurred did not preserve its impact claim.

In *Addicks Services v. GGP Bridgeland, L.P.*,²¹ it was decided that a contractor may not recover damages for delay and lost productivity where releases signed as consideration for progress payments expressly waive such recovery. The contractor signed a "Waiver and Release of Lien Upon Progress Payment" each month as consideration for progress payments. Although the releases contained a blank space for the statement of disputed costs, the contractor failed to identify any disputed costs on the documents. The project was late by nearly a year. The contractor claimed that the owner made significant changes in the scope of work after construction began. Weather conditions also caused delays. Alleging that the owner refused to compensate it for its additional expenses, the contractor filed a mechanic's and materialman's lien. The contractor contended that the owner did not allow it to include additional work and delay costs in its monthly pay estimates. The contractor maintained that the releases only covered work performed pursuant to the original contract. According to the contractor, it was supposed to be paid for supplemental work through a separate process. The contractor asserted waiver, estoppel, mutual mistake, and ambiguity as defenses to enforcement of the releases.

The court determined that the owner's conduct did not waive its right to enforce the releases. Although the owner may have paid claims that were previously released, it did so only upon securing another release from the contractor. The owner was not estopped from relying on the releases. The owner's payment of some claims in exchange for another release was not reasonable grounds to assume that the owner would pay all future claims. The contractor did not incur delay costs in reliance on any promise by the owner to reimburse the contractor for its lost productivity. The owner and contractor did not make a mutual mistake as to the meaning of the releases. The owner's payment for some extra work items was not evidence of a mistake as to the releases'

²¹ See *Addicks Services v. GGP Bridgeland, L.P.*, 2008 U.S. Dist. (S.D. Tex. Oct. 27, 2008).



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meaning. The releases were not ambiguous. The releases specifically waived recovery for the sort of claims brought by the contractor, including delay claims. The contractor's claims for damages were barred by the plain language of the releases.

5. CASE LAW UPHOLDING IMPACT CLAIMS EVEN IF CONTRACTOR SIGNS CHANGE ORDERS CONTAINING RELEASE LANGUAGE

Notwithstanding these legal precedents, certain courts have held that, unless cumulative impact claims had been specifically discussed or considered as part of the change order negotiations, a release may not apply to a cumulative impact claim.²² Also, if discussions have occurred during change order negotiations regarding cumulative impact claims, but no settlement was reached, the general waiver and release language may not apply to a subsequently submitted cumulative impact claim.²³ If no release language is included in executed change order documentation, a contractor may be entitled to subsequently claim cumulative impact costs even if it did not expressly reserve its rights to those costs.²⁴

In *Saudi Tarmac Co., Ltd.*,²⁵ there had been considerable discussion of cumulative impact claims, but no agreement had ever been reached. The Board ruled that in the absence of a general meeting of the minds, the general waiver and release language did not apply to cumulative impact costs. In *Beaty Electric*,²⁶ when a contractor signed a change order without a waiver or release, the contractor was entitled to subsequently claim cumulative impact costs even though the contractor did not expressly reserve the right to those costs.

In another case, a contractor prevailed in its argument that the release provision in the change order was the result of a mutual mistake. In *T.L. Roof & Associates Construction Co. v. United States*²⁷ the contractor contracted with the United States Army Corps of Engineers for the construction of a telecommunications facility. During the project, the government issued 48 change orders, which in part delayed project completion by six months. The contractor filed a \$1 million plus claim with the contracting officer seeking costs related to the delay.

Each of the change orders at issue contained the following release language:

²² See *David J. Tierney*, GSBCA No. 7,107, 88-2 BCA (CCH) ¶20,806 (1988).

²³ See *Saudi Tarmac Co., Ltd.*, ENGBCA No. 4841, 89-2 BCA (CCH) ¶121,644 (1989).

²⁴ See *Beaty Electric*, EBCA No. 408-3-88, 90-2 BCA (CCH) ¶22,829 (1990).

²⁵ See *Saudi Tarmac Co., Ltd.*, ENGBCA No. 4841, 89-2 BCA (CCH) ¶121,644 (1989).

²⁶ See *Beaty Electric*, EBCA No. 408-3-88, 90-2 BCA (CCH) ¶22,829 (1990).

²⁷ See *T.L. Roof & Associates Construction Co. v. United States*, 28 Fed. Cl. 572 (1993).



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It is further understood and agreed that this adjustment constitutes compensation in full on behalf of the contractor and its subcontractors and suppliers for all costs and markup directly or indirectly attributable to the change ordered, for all delays related thereto, and for performance of the change within the time frame stated.

The government argued that this language barred the contractor from presenting any claim based on delay in completing the project. The contractor responded that during the negotiations concerning the modifications and during discussions concerning contract completion, the parties specifically discussed delay and impact claims and had agreed to defer consideration of these claims until such time as the contractor could more accurately assess its damages. Accordingly, the contractor argued that its execution of these change orders was based on a mutual mistake.

The elements of proof of mutual mistake that allow for relief are: (1) the parties to the contract were mistaken in their belief regarding an existing fact; (2) that mistaken belief constituted a basic assumption underlying the contract; (3) the mistake had a material effect on the bargain; and (4) the contract did not put the risk of the mistake on the party seeking reformation.²⁸ The underlying basis for such an action is that the parties failed to document an understanding.

The court stated that the evidence presented indicated that: (1) the contractor believed it had an agreement with the government that its delay claim would be preserved for future consideration; (2) the government was aware of the contractor's understanding and that the government had the same understanding; and (3) the contractor may not have signed the change orders if it had believed that the release language would bar its delay and impact claim.²⁹ Accordingly, the court denied the government's motion holding that there was a fact issue concerning whether the release provision in the change order was the result of mistake.

In *Bell BCI Company v. United States*,³⁰ the U.S. Federal Court of Claims awarded the contractor a \$2 million claim for cumulative impact on behalf of its subcontractors despite release language it negotiated and agreed upon contract modifications that were intended to preclude subsequent contract cost adjustments for work associated by the prior modifications, which were in excess of \$21 million. The government issued more than 200 modifications to the contract, which delayed the contract by more than 19 months and increased the contract price by 34 percent.

²⁸ *John T. Jones Constr. Co.*, ASBCA Nos. 48, 303, 48, 593 (Nov. 12, 1997); Black's Law Dictionary 1001 (6th ed. 1990) ("Mutual mistake is where the parties have a common intention, but it is induced by a common or mutual mistake.").

²⁹ *Supra* Note 27, 28 Fed. Cl. 572, 578.

³⁰ See *Bell BCI Co. v. United States*, 570 F.3d 1337, 1339 (Fed. Cir. 2009).



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The court confirmed that:

Until 1967, the Rice doctrine [Rice v. United States 1942] precluded courts from considering the effect of change orders on portions of the work not directly covered by the change To avoid inequitable results, the Government changed the standard Changes clause in late 1967 to add language that covers the effect of changes on unchanged work.³¹

The court found that the government had breached its implied duty of good faith and fair dealing in the administration of the project:

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 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.³²

The court held that the broad release language agreed in the contract modifications did not bar a cumulative impact claim because the release language in the contract modifications did not contain any language expressly releasing claims for the cumulative impact of the changes. The court also found that 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.

If the owner's representative will not execute change orders without a release, the contractor should formally communicate that it may pursue cumulative impact claims in the future. With a formal communication reserving a cumulative impact claim, a court or board may ignore any releases in the change orders, because both parties understood that the contractor had reserved its right to file a cumulative impact claim at a later date as a result of the contractor's indication that it intended to file a cumulative impact claim. Notice should be unequivocal and be made continuously, at every new change order.³³

³¹ *Id.* at p. 29.

³² *Id.* at p. 31.

³³ See *McMillin Bros. Constructors*, EBCA No. 328-10-84, 91-1 BCA (CCH) ¶23,351 (1991).



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Contractors may also argue that the change order release was signed under duress, which is often difficult to demonstrate. The owner's refusal to approve a modification unless the contractor signs an unconditional release does not constitute duress.³⁴ Courts may be reluctant to accept a duress theory when the claimant waits over one year to allege duress³⁵ or when the contracting officer merely insists upon the execution of a release prior to final payment.³⁶

In *Service Eng'g Co.*,³⁷ the contractor demonstrated that the government would not allow the contractor to include delay and impact costs in change order pricing. The change orders also contained release language that explicitly covered delay and disruption costs. When the contractor filed a request for equitable adjustment for delay costs, the government argued that, based upon several other decisions involving similar release language, the contractor should be barred from recovering for delay and impact costs. The Board determined that "the government cannot have it both ways" by deferring recovery of impact costs, using a release, and then denying the contractor the opportunity to assert impact claims.

Also, where modifications or change orders contain such all-encompassing release language, a contractor may still assert inefficiency claims where the contractor can show that the intent of the parties was never to preclude such claims. In *Walsh/Davis Joint Venture v. GSA*,³⁸ the modifications executed by the contractor and GSA contained similar language to that in *Bell BCI*. The court allowed inefficiency claims because the cover letter to the modifications expressly reserved claims for "working out of sequence, disruption, hindrance, interferences, acceleration, compression, [and] loss of efficiency."³⁹ Further, the GSA previously settled disputes with subcontractors on the project regarding labor inefficiency claims, notwithstanding the language in the modifications. Taking these factors together, the court denied the GSA's motion for summary judgment where there were material facts as to whether the parties intended to preclude such inefficiency claims.

6. RECOMMENDATIONS

To avoid an owner's legal challenge of accord and satisfaction to deny any additional costs for cumulative impact, the prudent contractor should reserve its rights to claim for cumulative impacts as soon as the problem becomes apparent. If the owner will not accept such reservations in the change orders, and the contractor believes it must sign the change orders to receive compensation

³⁴ See *Program & Constr. Mgmt. Group, Inc.*, ASBCA No. 47048, 94-3 BCA (CCH) ¶27,127 (1994).

³⁵ See, e.g., *Boston Shipyard Corp.*, 886 F.2d 451 (1st Cir. 1989).

³⁶ See, e.g., *Progressive Bros. Constr. Co. v. United States*, 16 Cl. Ct. 549 (1989).

³⁷ See *Service Eng'g Co.*, ASBCA No. 40274, 93-2 BCA (CCH) ¶25,885 (1993).

³⁸ See *Walsh/Davis Joint Venture v. GSA*, 11-2 BCA (CCH) ¶34,799, 2011 WL 2945846.

³⁹ See *Bell BCI Co. v. United States*, 570 F.3d 1337, 1339 (Fed. Cir. 2009).



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for the work it must perform, the contractor should either attempt to include additional costs for cumulative impact in its change order pricing or send the owner a separate letter reserving its right to claim for cumulative impact costs when the full extent of such impacts are known. However, the effect of sending a separate letter with each new change order is a legal issue and, therefore, may or may not be persuasive to a court or arbitration panel.

To protect against such claims, the owner should include language in a change order or contract modification that specifically states that all costs for the change includes the costs for cumulative impact on the unchanged work and impacts from this change on other changes, and by signing, the contractor explicitly releases any cumulative impact claim. In addition, even where the contract modification or change order contains a clear and unambiguous release of a cumulative impact claim, the owner should expressly allocate a portion of each agreed change to compensation for any cumulative impact.

About the Author



Richard J. Long, P.E., is Founder and CEO of Long International, Inc. Mr. Long has over 40 years of U.S. and international engineering, construction, and management consulting experience involving construction contract disputes analysis and resolution, arbitration and litigation support and expert testimony, project management, engineering and construction management, cost and schedule control, and process engineering. As an internationally recognized expert in the analysis and resolution of complex construction disputes for over 30 years, Mr. Long has served as the lead expert on over 300 projects having claims ranging in size from US \$100,000 to over US \$2 billion. He has presented and published numerous articles on the subjects of claims analysis, entitlement issues, CPM schedule and damages analyses, and claims prevention. Mr. Long earned a B.S. in Chemical Engineering from the University of Pittsburgh in 1970 and an M.S. in Chemical and Petroleum Refining Engineering from the Colorado School of Mines in 1974. Mr. Long is based in Littleton, Colorado and can be contacted at rlong@long-intl.com and (303) 972-2443.



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