

Your Last Choice: The Total Cost Claim Approach

Executive Summary. In a claim situation, when choosing a method of claim recovery, the total cost claim method is usually the weakest choice. A recent court case put another nail in that coffin.

ASCE recently caught my eye. I am a member of ASCE and saw in one of their recent email blasts an article written by Michael Loulakis and Lauren McLaughlin. The QR Code is at right for the article.



ASCE article of 3/1/2023
"Total cost claims are viewed with suspicion"

The article wrote about a recent construction case which involved another Contractor who fared poorly on a total cost claim. Nothing in the article, or the case¹ for that matter, was really new. It just echoed for the construction industry the challenges in using a total cost claim.

What is a total cost claim? It's really quite simple. This is a total cost claim from a Contractor: "I had \$1,000,000 in my budget at bid time. I spent \$1,600,000 on your job because your job was so messed up. You owe me the difference: \$600,000. Pay me."

The problem with this method is it assumes sole fault of the claim to be the Owner. The total cost claim method says that "I, the Contractor" have zero responsibility for this mess. Proving the word solely, as in every dollar of this claim is solely your responsibility, it a very steep uphill climb.

Then, what is the correct approach? Perhaps the easiest pivot is to go to a modified total cost claim. It says "you know what, I did have some ownership in that \$600,000 loss. And I'm going to not charge you for that." So, the modified total cost claim may look like this:

My total loss:	\$600,000
Weather events:	(\$9,000)
Delay in material delivery:	(\$5,000)
Rework:	<u>(\$14,000)</u>
Modified total cost claim ask:	\$572,000

¹ RAND CONSTRUCTION COMPANY v. CARAVAN INGREDIENTS, INC. D/B/A CORBION F/K/A CJ PATTERSON COMPANY; Opinion filed: December 13, 2022, see: <https://www.courts.mo.gov/file.jsp?id=191133>.

My story. I didn't read every line of the Rand case. However, I read enough to know that it failed for a lot of the reasons that are coached in Construction Claims 101 from your local construction attorney:

1. Document, document, document.
2. Provide timely notice, provide timely notice, provide timely notice.
3. Update your schedule contemporaneously and send it to the Client.
4. Try to get rock solid on entitlement and send it to the Client.

Some other helpful advice from your author:

5. The easiest way to save money is to not spend it.
6. No good deed goes unpunished.

I know what you're saying. You're saying "Whatever Scott, you never ran a job and don't know what it's like to maintain a Client. You can't pepper them daily with letters and piss 'em off." That's all untrue. But, yes, you're right, it's much, much harder to do than is written here on the paper. You have to make a survival decision and, believe it or not, the Client may have more respect for you if you do hold them to the rules of the Contract.

I digress. Back to the total cost claim versus modified cost claim. Since I've got your blood pressure up from the preceding paragraphs, you may be right in the Owner being solely at fault. I hear you. I've been there. But the courts don't see it that way. The black and white fact here is that of that \$600,000 loss over your budget, is every single penny the fault of the Owner? I doubt it. But don't forget that the \$600,000 of direct cost loss maybe should be supplemented by the additional management you had to bring in (or pay overtime to). So your modified claim of \$572,000 above should be a modified direct cost claim and then \$50,000 of additional management cost. Now we've complied with the court's common position and increased our claim above our initial \$600,000 ask.



*Appeal opinion by
Judge Thomson.*

In the instant Rand case, 136 of the 187 changes on the job were in the last three months. That job was pure, unadulterated chaos and I'll bet Rand was doing what

they thought was right: “Take care of the Client an he’ll take care of us.” Well, you saw where that got Rand.

Oh, and just to add a wheelbarrow full of salt into the wound. Upon appeal, Judge Thomson reversed the trial court’s judgment on attorney’s fees. Now Rand has to pay a portion of opposing legal fees. Ouch.

Work safe!

