



Construction & Claims: May 2024

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Welcome to *Construction & Claims*, a periodic digest of the headlines, statutory and regulatory changes and court cases involving construction news, claims, bid protests, contract administration and payment-related disputes.

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[AECOM Technical Services, Inc. vs. Flatiron - AECOM, LLC: Lessons Learned From a Recent Jury Trial](#)

In February 2024, a jury rendered a verdict in a case actively watched across the public construction landscape. Plaintiff AECOM Technical Services (“ATS”) was the lead designer on a highway construction project. Defendant joint venture, Flatiron - AECOM, LLC (the “JV”) was the lead design/build contractor. ATS sued JV, in the United States District Court in Colorado, seeking damages for breach of contract claims arising from alleged unpaid invoices (*AECOM Technical Services, Inc. v. Flatiron - AECOM, LLC, Case No. 19-cv-2811*). The JV filed a \$250 million counterclaim alleging that ATS failed to follow basic engineering and project requirements. After an 18-day trial, the jury returned a verdict: (i) awarding ATS \$5 million as damages; and (ii) rejecting the JV’s \$250 million counterclaim against ATS.

This case is notable for at least two reasons. First, the JV filed a motion for judgment as a matter of law notwithstanding the jury’s verdict. Specifically, as pertinent here, the JV argued that ATS had failed to comply with contractual requirements for presenting potential change orders (“PCOs”) as a condition precedent to being paid, i.e., that every PCO must receive written authorization from the Design Change Control Board (“DCCB”). In asserting that ATS’s never obtained DCCB authorization for its PCOs, the JV argued that ATS’s claims for damages failed as a matter of law.

Importantly, the Court rejected the JV’s argument by determining that it had waived the DCCB authorization requirement in multiple respects: (1) the JV had actually stalled and impaired the formation of the DCCB; and (2) that the JV had actually presented one of ATS’s PCOs to the Colorado Department of Transportation (“CDOT”) arguing that the JV was entitled to payment of that PCO – despite never having been authorized

by the DCCB. Therefore, the Court made a determination that the PCO presentation requirements set forth in a contract are waivable depending on the conduct of the parties.

Second, although mooted in light of the jury's verdict, the Court allowed the JV to utilize the Modified Total Cost Approach ("MTC") as an acceptable quantification methodology by which to prove its loss of productivity ("LoP") damages. The MTC approach essentially measures loss of labor productivity by comparing the total labor hours actually expended on a project minus the original estimated (or planned) labor hours, as well as other certain deductions, i.e., approved change order hours, labor hours contained in pending PCOs, time and material labor hours, and labor hours to repair contractor errors in the field.

The MTC methodology is not universally favored. In a 2021 white paper commissioned by MCAA (Mechanical Contractors Association of America (MCAA), National Electrical Contractors Association (NECA) and Sheet Metal and Air Conditioning Contractors' National Association (SMACNA), the MTC approach was acknowledged as "one of the least favored methods."^[1] Indeed, the Association for the Advancement of Cost Engineering international ("AACEi") has deemed the MTC approach to be at the bottom of the preferred methods to quantify LoP, behind such methods as the "Measured Mile" and the MCAA Factors Table.^[2] However, as evidenced by the ATS case, certain courts are allowing the MTC approach to be utilized an accepted form of LoP quantification.

Accordingly, two takeaways from the ATS case are that contractual requirements pertaining to PCOs can be waived based on the conduct of the parties, and that courts may be receptive to the MTC methodology thereby increasing the different manners by which contractors can prove their LoP damages.

[1] *Project-Specific Loss of Productivity Analysis Methodologies*, by Professor William Ibbs, Ph.D., and Paul L. Stynchcomb (January 2021).

[2] *Id.*