

## MODIFIED TOTAL COST METHOD – PRICING OF ADJUSTMENTS

---

### INTRODUCTION

When a contractor is entitled to an adjustment to the cost or time on a contract, the contractor is expected to prove its costs by submitting the best available evidence under the circumstances. **Three methods** are generally used to establish the amount of an adjustment, in order of preference by the courts: (1) Actual Cost Data - the preferred approach, (2) Estimates, and (3) the disfavored Total Cost method. This article discusses the “Modified Total Cost” method, which has gained general acceptance by courts and boards when other methods are impracticable.

### TOTAL COST METHOD

Before discussing the Modified Total Cost method, it is important to first understand the fundamentals of the **Total Cost method**. The Total Cost method of quantifying construction claims has historically been disfavored by the courts and boards of contract appeals, because it is imprecise. In fact, this method will not be used if there is another, more reliable method available for use.

However, **where actions by the owner** clearly cause damages to the contractor, but the amount of those damages is impossible to accurately define, the Total Cost method may be used. The Total Cost method consists of subtracting the costs of the original contract price from the actual costs of performance, or as-built price, and adding profit. For example:

$$\begin{array}{r} \text{As-Built Price} \\ - \text{Original Contract Price} \\ + \text{Profit} \\ \hline \text{Total Cost of Adjustments} \end{array}$$

In the relatively rare cases where the Total Cost method has been accepted, the courts and boards have mandated that four criteria be met:

1. Other methods of showing costs directly are either not available or impracticable
2. The [accepted] bid price is reasonable
3. The actual costs (as-built price) are reasonable, and
4. The contractor is not responsible for the increased costs (i.e., owner responsibility)<sup>1</sup>

This method has been rejected by the courts when some of the contractor’s claims have been denied, when fragmentary data is available, when another method could have been used, or when the contractor simply did not track the costs of additional work (but could have done so).

### MODIFIED TOTAL COST METHOD

---

<sup>1</sup> See *Servidone Const. Corp. v. United States*, 931 F.2d 860 (Fed. Cir. 1991).

Courts and boards more generally accept a variation of the Total Cost method known as the “Modified Total Cost” method. Modified Total Cost is an acceptable method when one of the Total Cost criteria is not met, but **actual costs cannot be accurately determined.**

This modified version of adjustment quantification addresses the shortfalls of the Total Cost method by adjusting the original bid price and the actual cost of performance, as necessary, to reflect a reasonable estimate of each cost, and by segregating any actual costs which were not the responsibility of the owner. This refinement of the original estimate and actual costs should generally separate the work activities that were impacted by the claim from those costs that were unaffected.

Notably, the Total Cost Method cannot be used when the contractor can prove its actual costs directly by segregating them from the costs of other work.<sup>2</sup>

In order to reach a satisfactory level of reasonableness, **adjustments to the contract price** have historically included courts using the higher bid price used by a competing contractor for a certain item of work, an adjustment to the bid price to compensate for the contractor’s overly optimistic productivity rate,<sup>3</sup> or by averaging all bids to establish a reasonable contract price.<sup>4</sup>

An adjustment to the **total costs of performing the impacted work**, typically made by reducing the actual costs by any amounts attributable to the contractor’s own inefficiency or other costs not attributable to owner fault, has been persuasive in convincing the board or court to accept the Modified Total Cost method.<sup>5</sup>

A simplified example of the Modified Total Cost method would formulate costs in the following manner:

As-Built Price  
- Costs of Additional Work, not Attributable to Owner  
- Contract Price (adjusted to reflect a reasonable price)  
+ Profit  
Total Cost of Adjustments

Of course this type of calculation would be adjusted to accurately describe and account for the specific facts surrounding a particular project.

## DEFECTIVE SPECIFICATIONS AND MODIFIED TOTAL COST

A good time to use the Modified Total Cost method is in cases where Defective Specifications result in multiple delays and changes to the contract. One board explained a situation in which the Total Cost method was accepted:

Where so many delays occurred with **concurrent or overlapping** or consecutive time spans, all attributable to the Authority, the right to relief is not defeated merely because it is impossible neatly to separate the intertwined incidents and establish a specific critical

<sup>2</sup> *Propellex Corp. v. Brownlee*, 342 F.3d 1335 (Fed. Cir. 2003)

<sup>3</sup> *Baldi Bros. Constructors v. United States*, 50 Fed. Cl. 74 (2001)

<sup>4</sup> *Bechtel Nat’l, Inc.*, NASABCA 1186-7, 90-1 BCA ¶ 22,549, *recons. denied*, 90-3 BCA ¶ 23,105

<sup>5</sup> *Hardrives, Inc.*, IBCA 2319, 94-1 BCA ¶ 26,267

impact for each.<sup>6</sup>

It is a natural extension of this rationale that, where some of the additional costs are attributable to the contractor and such costs are separated from the total costs claimed as additional costs, the Modified Total Cost method would be acceptable.

## CONCLUSION

Contractors should utilize the Modified Total Cost method to calculate its costs on change work where warranted by the circumstances of their project. Many times when this method of calculation is appropriate, the result is **more costs being recovered** by the contractor. Because this method of cost allocation can be complex, contractors should consult with an experienced professional who can assist in preparing a Request for Equitable Adjustment or Change Order Request that is most likely to be accepted by a contracting officer, board, or court.

**In the end, you will be glad you made the call; by the way, it's a FREE CALL.**

***EXCELL CONSULTING: “HERE TODAY FOR YOUR TOMORROW.”***

*Author's note: The information contained in this article is for general informational purposes only. This information does not constitute legal advice, is not intended to constitute legal advice, nor should it be relied upon as legal advice for your specific factual pattern or situation. – Taylor Benson, Esq., Assistant General Counsel*

---

<sup>6</sup> *Norair Engineering Corp.*, ENG BCA Nos. 3804, et al., 90-1 BCA ¶ 22,327 at 112,209