I. INTRODUCTION

Several years ago, a private owner was sued for breach of contract regarding a large construction/development project. Interestingly, the prime contractor asserted that significant changes had occurred in the original design thereby entitling the prime contractor to recovery on a “total cost basis.” In other words, the contractor argued that, due to the numerous, significant changes in the original design, the contractor did not have to prove exact damage resulting from each and every breach to recover its total damages. As unusual as it seems, the contractor was absolutely correct.¹

In a traditional breach of contract case, a plaintiff would have to prove the breach of contract and the resulting damage.² This involves long, tedious case preparation and extensive trial evidence. The trier of fact is required to verify each breach and the cause and effect relationship of the breach.³ In cases involving large, complex construction projects that experience extensive material changes, the impact of each change may be very difficult or impossible to prove.⁴ In these limited cases, courts have deemed the contract “abandoned” and have allowed the contractor to recover on a total cost basis, not limited by contract

¹ This fact pattern represents a typical scenario in complex construction litigation. E.g. C. Norman Peterson Co. v. Container Corp. of Am., 218 Cal. Rptr. 592, 598 (App. 1st Dist. 1985).
⁴ Aaen, supra n. 2, at 1186.
price. Courts generally do not favor this method of calculating damages because it does not require proof of each item of damage. However, in limited circumstances, courts do allow a total cost damage analysis.

It is important to point out that courts are reluctant to allow a contractor to recover under a “total cost theory” unless four factors are found. In *WRB Corp. v. United States*, the federal Court of Claims required:

(1) the nature of the particular losses make it impossible or highly impracticable to determine them with a reasonable degree of accuracy;
(2) the plaintiff’s bid or estimate was realistic; (3) its actual costs were reasonable; and (4) it was not responsible for the added expenses.

The total cost method is not a substitute for proving causation. California courts, however, have also recognized that abandonment of contract occurs and warrants a total cost recovery when numerous changes to the original contract result in a significant change to the scope of work originally contemplated by the parties and the parties ignore contractual change order procedures. This article will discuss cases that support a contractor’s recovery on private, complex

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5. See id. at 1192-93 (stating that “[c]ases have generated some confusion where courts have found that a rescission or abandonment has taken place and have purported to awarded damages under the ‘total cost method’.”).
6. Id. at 1193.
7. Id. at 1194 (stating that the total cost method is used as a last resort when “no other method of calculating damages is available”).
8. Id. at 1195.
10. Id. at 426.
11. Aaen, supra n. 2, at 1190.
construction projects. Further, in part II, it will discuss recent cases that prevent total cost recovery against public agencies. Finally, the article will advise the contractor on important practical considerations to support this unique damage analysis.