

# MATERIAL SHORTAGES: NUCA'S UPDATE ON THE NATIONAL SUPPLY CRISIS

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# MEET THE PRESENTERS



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# Freedom To Contract - Be Careful What you Sign

## Contract Clauses At Issue:

- Liquidated Damages
- Warranty/Guarantees of Performance
- Force Majeure
- Suspension of Services
- Material Escalation Clause
- Contingency Funds
- Venue and Choice of Law



# SUSPENSION OF SERVICES CLAUSE

## 1. Suspension of Services.

1.1 [Service Provider/Customer/Either Party] (the "**Suspending Party**") shall have to right to suspend the Services without liability and upon written notice to the other Party as the Suspending Party [reasonably] determines to be necessary or appropriate:

- (a) [for the convenience of the Suspending Party;]
- (b) [for the breach of the Agreement by the other Party [without waiving Suspending Party's rights under Section[s] [NUMBER(S)]];]

# SUSPENSION OF SERVICES CLAUSE

(c) [for the health and safety of the Suspending Party's employees or contractors, including without limitation:

(i) to comply with any shelter-in-place, social distancing, travel restrictions, or any other order, instruction, or request of any government, public health, or emergency service organization, or other competent authority; or

(ii) due to shortages or unavailability of personnel or personal protective equipment.]



# SUSPENSION OF SERVICES CLAUSE

- (d) [as a consequence of economic downturn, business interruption, or cash-flow difficulties, including without limitation, adjustments in payments from lenders or investors;] or
- (e) [as a consequence of supply chain disruptions, including without limitation, labor and material shortages].

[Suspending Party shall have the right to suspend the Services pursuant to Sections 1.1(c), (d), or (e) whether or not the events listed therein qualify as a Force Majeure Event under Section [NUMBER]].

# SUSPENSION OF SERVICES CLAUSE

1.2 If the Suspending Party delivers a written notice requiring the suspension of Services pursuant to Section 1.1, both Parties agree to act reasonably and promptly discuss in good faith (a) mitigation measures by both parties, (b) the foreseeable duration of such suspension, and (c) the impact, if any, on timelines and costs relating to the Services. In the event of such a suspension, Service Provider shall be paid in accordance with the payment terms set forth in Section [NUMBER] for all Services [actually] [completed/rendered], [including incurred expenses,] through the date of such suspension.

# SUSPENSION OF SERVICES CLAUSE

- 1.3 If, after such suspension, the Suspending Party does not provide the other Party with written notice to resume the provision of Services within [60/90/[NUMBER]] days after the date of the notice of suspension, the other Party may terminate this Agreement upon written notice to Suspending Party.

# MATERIAL ESCALATION CLAUSE

## Material Escalation Clause in Proposal:

- NOTICE: THIS PROPOSAL IS CONTINGENT ON A LACK OF FUTURE IMPACT BY THE ON GOING ESCALATION OF THE PRICES OF MATERIAL, EQUIPMENT AND/OR ENERGY. Given that the construction industry has been and will continue to face unprecedented escalation in material pricing as the world begins the rebound from COVID-19, and the possibility that the pricing of materials, equipment and energy continues to escalate, [Contractor/Subcontractor] cannot anticipate the impact of the current increases in

# MATERIAL ESCALATION CLAUSE

pricing. As such, [Contractor/Subcontractor] will use its best efforts to purchase the materials, equipment and energy in such a manner as to limit the impact of the escalation. However, [Contractor/Subcontractor] reserves its right to seek an equitable change order if [Contractor/Subcontractor] or its subcontractors and suppliers are unable to supply these products at the same or similar costs as carried in their estimates. To the extent that the project is subject to provable material escalation in pricing, we reserve our right to seek any such additional costs.

# MATERIAL ESCALATION CLAUSE

## Material Escalation Clause in Change Order:

- This Change Order specifically excludes all escalation of prices of material, equipment or energy experienced by [Contractor/Subcontractor] from the date of this change order until the execution of the needed material, equipment or energy associated with this particular increased scope of Work.



# MATERIAL ESCALATION CLAUSE

## Material Escalation Clause in Contract:

- Escalation Clause. In the event of significant delay or price increase of material, equipment, or energy occurring during the performance of the contract through no fault of the Construction Manager, the Contract Sum, time of completion or contract requirements shall be equitably adjusted by Change Order in accordance with the procedures of the Contract Documents. A change in price of an item of material, equipment, or energy will be considered significant when the price of an item increases \_\_\_\_% percent between the date of this Contract and the date of installation.

**What if you already signed a contract without a suspension of services or material escalation clause?**

- Impossibility of performance
- Impracticality of performance
- Frustration of Purpose
- UCC Section 2-615

# QUESTIONS?





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# HOW DID WE GET HERE?

## COVID-19 Pandemic

- Rising consumer demand for goods, falling demand for services
- Manufacturing and supply chain disruptions from pandemic
  - Asian ports experienced multi-week partial-terminal closures
  - Factories closed under lockdown restrictions
  - Orders scaled back due to reduced demand
- Shipping delays (including domino effect from Suez Canal obstruction)
- Shipping container shortages as routes changed to serve shifting demands

## Shortage of truck drivers and other workforce challenges

- US is short at least 80,000 drivers (ATA), 30% increase over 2020 levels
  - “Driver pool not going up as fast as freight is going up”

## Inefficiencies in supply chain system exposed

- Lack of automation, limited operating hours at ports



# THE INFRASTRUCTURE BILL

## Infrastructure Investment and Jobs Act, H.R. 3684

- IIJA would inject \$500B in new spending into our markets
  - \$55B for water infrastructure
  - \$42B for broadband construction
  - \$110B for surface transportation and bridges
  - \$1B for municipal gas replacement
  - Also includes \$16B for upgrading ports

## Materials shortages concerns

- Senate has supported over \$50B to address chip shortage by boosting domestic semiconductor manufacturing; has stalled in the House

# GOVERNMENT ACTIONS SO FAR

## **Facilitated ports operating 24/7**

- Los Angeles, Long Beach
- Longshore and Warehouse Union agreed to work extra shifts
- Private companies (Walmart, UPS, FedEx) along supply chain moving to 24/7 operations

## **Supply Chain Disruptions Task Force established**

## **Shipping container zoning regulations relaxed**

- Two shipping containers stacked → four containers stacked

# WHAT ACTIONS CAN BE TAKEN?

## Temporary tariff relief

- Lumber, steel, aluminum, and other construction components

## Regulatory relief

- “All-out effort” to help ports and freight transportation move goods more quickly
  - Combination of state, local, and federal efforts
    - Ex: further relax restrictions on height of stacked shipping containers
  - Temporary container yard approval, National Guard assistance floated
  - Temporary regulatory relief on trucking industry

## Workforce challenges

- Increasing number of CDL holders; accelerating issuing of CDLs
  - Relaxing state-line limitation for CDL holders under the age of 21
    - S. 659 - DRIVE Safe Act; pilot program also included in IIJA

# WHAT'S NEXT?

**Encourage your lawmakers to visit factories, distribution centers, or job sites** - Tell state/federal government how these issues are affecting your business

## **SHARE YOUR IDEAS WITH YOUR LAWMAKERS**

**NUCA Washington Summit – November 2nd-3rd, 2021**

# QUESTIONS?



# CONTACT INFORMATION



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