



HOW TO PROTECT AGAINST SUPPLY COST INCREASES, DELAYS, AND UNAVAILABILITY

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

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MEET THE PRESENTERS



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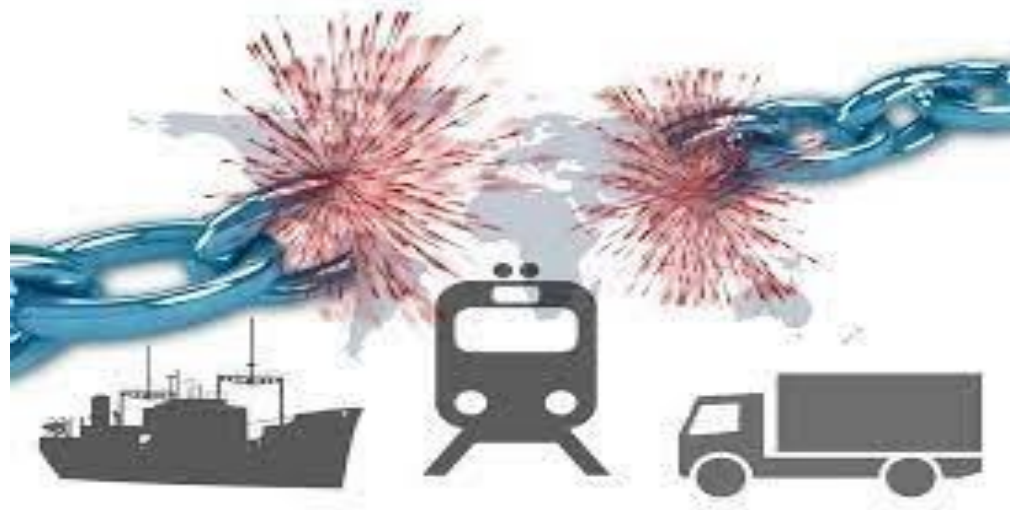
I USED TO SAY THERE WERE THREE THINGS A CONTRACTOR COULD COUNT ON

1. Death
2. Taxes
3. Late Relocation/Unmarked/Mismarked Utilities



WE CAN ALL AGREE THAT WE CAN ADD A FOURTH ITEM TO THIS LIST

- **Supply cost increases, delays, and sometimes unavailability**
- There is no doubt these supply problems will continue through 2022



POLLING INSTRUCTIONS

To join, text the number **22333** with the message
“cohenseglias527”

For each question, text your answer from the multiple choice options
(e.g. A, B, or C). Your answers are anonymous.





Who is on the call with us today?

General/Prime Contractors

Subcontractors

Vendors



Who bears the cost of a material cost increase?

Owner

General/Prime Contractor

Subcontractor

Material Supplier

SUPPLY DISRUPTIONS WERE UP IN THE FIRST HALF OF 2021

- A recent AGC workforce survey found that **88%** of the surveyed construction firms were experiencing **PROJECT** delays with **75%** saying that **longer lead times and material shortages were to blame**



DISRUPTION

The only question is: How can and should general contractors, subcontractors, suppliers, and owners protect against these problems?





As of today's date, how many contractors have approached an owner or prime contractor requesting additional money for material cost or labor cost increases, for COVID-19 or supply chain events, on a lump sum contract?

Yes, we have

No, we have not

A. PRE-BID PHASE

1. Request owner include “material price escalation clause” in contract if one not already included
 - Request that your supplier attend pre-bid to provide details as needed to owner to help substantiate the need for escalation clause
 - Such a clause provides both additional compensation as well as time
 - A good example of such a clause is set forth in the attached Consensusdocs 200.1, Amendment no.1 Entitled “Potentially Time and Price-Impacted Materials.”
 - And, you can explain potential of far greater cost if clause not included-contingency!

A. PRE-BID PHASE

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 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.

A. PRE-BID PHASE

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.

A. PRE-BID PHASE

2. Request owner purchase material
3. Request owner pay for material on 'cost/plus' basis
4. Request owner use alternative pipe material that is more available/less subject to price fluctuations
 - Request owner shorten bid phase/contract award phase to align with shorter supplier quote effective date

B. BID PHASE

1. Qualify Your Bid

- As suppliers are doing now, if you can (which you may be able to do on *private projects*), **limit the time in which your bid remains open**
- On *private projects*, **include your own “escalation clause”**

B. BID PHASE

1. Include 'contingency' in your bid
2. Purchase/stockpile materials for projects awarded but not under contract
3. Purchase/stockpile materials for projects *not yet awarded*

C. PROJECT AWARDED BUT NOT UNDER CONTRACT

1. Request owner use alternative pipe material that is more available/less subject to price fluctuations
2. Request owner delay work performance
3. Compare material cost increase/availability v. Bid bond cost

D. BUILD PHASE

1. Request owner use alternative pipe material that is more available/less subject to price fluctuations
2. Request owner delay work performance
3. Exercise contract remedies
4. Approach owner immediately and seek “fair” resolution
5. Examine “equitable” legal remedies

D. BUILD PHASE

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. These cost shall be included in this Change Order as soon as quantifiable by the Contractor.

E. CONTRACT REMEDIES

- Examine what remedies are included in contract
- The *federal government* has clauses for an “Economic Price Adjustment” for **labor and material** (FAR § 52.216-4) as well as **fuel** (48 CFR § 852.216-75)
- The south dakota dot has such a clause for **fuel** only. It applies to “No. 2 fuel oil (diesel), regular unleaded gasoline, and propane (LPG).”
- The *North Dakota DOT* sometimes includes a similar **fuel** clause by *special provision*.

E. CONTRACT REMEDIES

- Up until 2016, I believe, the *Minnesota DOT* included a clause for fuel as well. The same contract section (1910) now reads: “the department will **not** make adjustments for **cost escalations** unless contract requires otherwise.”
- MNDOT does provide additional **time**. See Section 1806.2.B (delay for “pandemic”); 1806.2.E (“extraordinary delays in material deliveries, to the contractor or its suppliers cannot foresee or avoid resulting from . . . regional material shortage”)

E. CONTRACT REMEDIES

- **Note:** The problem here is that these problems may no longer be “unforeseeable”
- AIA Documents A201, per Section 8.3.1, provides additional *time* for “unusual delay in deliveries . . . or other causes beyond the contractor’s control.”

E. CONTRACT REMEDIES

- **Note:** If the ‘cause’ of the problem is ‘owner-caused delay,’ you may then be able to obtain ‘payment’ as well as a ‘time extension.’
- See, E.G. AIA201, Section 8.3.3 (“This Section 8.3 does not preclude recovery of damages for delay by either party under other provisions of the contract documents.”); NDDOT Section 109.F.6 (“The department will pay the contractor for increased material costs or material shortage costs due to the delay”)

E. CONTRACT REMEDIES

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



What about lump sum contracts? If you have a lump sum contract without a clause that specifically allows for an increase to the price because of COVID or Supply Chain issues, can you obtain a price increase in your contract?

Yes

No

WHAT ARE THE ISSUES?

Specifics:

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

F. EQUITABLE LEGAL REMEDIES

- Doctrines of 'Breach of Covenant of Good Faith and Fair Dealing,' 'Impracticability'/'Impossibility'
- Some courts have held that dramatic increases in material costs will excuse performance by a contractor
- See, E.G., *Moyer v. City of Little Falls*, 134 Misc. 299, 301-02, 510 N.Y.S.2d 813 (Sup. Ct. 1986) (666% Price Increase); *Aluminum Co. of Am. v. Esses Grp., Inc.*, 499 F. Supp. 53, 70 (W.D. Pa. 1980) (**Contractor would have lost \$75 million**).

F. EQUITABLE LEGAL REMEDIES

- **Note:** The Eighth Circuit Court of Appeals (which Covers Minnesota, Iowa, Nebraska, North Dakota and South Dakota) has found that excessive cost increases did not excuse the contractor's performance
- See, E.G., *Iowa Electric Light and Power Company v. Atlas Corporation*, 467 f. Supp. 129, 140 (N.D. Iowa 1978) (**Increase of costs by 52.2%, resulting in loss of approx. \$2,673,125 failed to constitute 'commercial impracticability'**); *Missouri Pub. Serv. Co. v. Peabody Coal Co.*, 583 s.W.2d 721, 726 (MO. CT. APP. 1979) ("**Increased cost alone does not excuse performance unless the rise in cost is due to some unforeseen contingency which alters the essential nature of the performance**").



Should you seek the assistance from material supplier and vendors to get the owner to increase the price?

Yes

No



Are material price increases, because of COVID and Supply Chain issues, treated the same for purposes of holding an owner responsible for extra cost?

Yes

No



Are there any insurance or bonding strategies to mitigate the risk of material cost increases?

Yes

No

CONCLUSION

- Material shortages, delays and cost increases are not going away
- Given how large the financial impact of these problems can be, contractors and owners need to implement fair contractual responses
- Some of the most effective responses are not going to occur unless and until contractors ask for them! As the greatest hockey player wayne gretsky said, “i missed 100% of the shots i never took!”
- If you don’t ask for it, you cannot get it. The owner cannot say ‘yes’ unless you ask. The worse thing the owner will say is ‘no.’



QUESTIONS?



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