

Volatility in the Market Place: Lessons Learned From Price Increases of Past Pandemics

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The National Utility Contractors Association (“NUCA”) has received numerous inquiries concerning how contractors are dealing with shortages of material goods due to the COVID19. In the last year, materials, equipment, parts, and crafts workers have been in scarce supply. The disruption to the supply chain has increased the cost of such goods and labor. Members have experienced delays in delivery of steel joists, insulation, stainless steel, copper, brass, ductile pipe fittings/valves, and PVC piping. Coupled with late delivery, these items are being sold at higher prices. But neither the owner nor contractor expected these additional costs. This situation places the contractor as well as others in the supply chain in the middle of extraordinary circumstances, where all face unexpected cost escalations.

A contractor must remain adaptable, exploring multiple alternatives, to avoid becoming responsible for these cost increases. Your particular contract should be reviewed with a professional to fully understand the obligations imposed. Terms should be reviewed with an understanding of the case law from past pandemics and how the courts previously interpreted these clauses. We recommend getting this subject discussed with your customer sooner rather than later. The contractor should explain that this unique crisis requires a new mentality, one of collaboration and partnership, to the benefit of all parties.

What To Do When Projects Have Not Been Awarded

- Educate owner as to a realistic price for all construction. The Owner should be informed about the fluctuation in material prices and labor supply.
- Explore various forms of contract types, including lump sum; cost of the work; cost of the work plus a fee; guaranteed maximum price contract.
- Include a price adjustment clause within the contract that is fair to all parties.
- Consider purchasing the material earlier and storing it onsite, to lock into prices. In such circumstances, the contract should include terms that allow the contractor to get paid for stored material.

What to Do When Material Prices Increase After the Contract has been Executed

- Comply with all notice provisions in the contract.
- Formally request relief, as required by the contract, and consider if both additional time and money are needed.
- Do not act unilaterally, at a minimum get a “construction change directive” from the owner to address these conditions.

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- Review any “force majeure” type clauses in the contract, it may allow for the suspension of work or the extension of time.

What Steps to Take to Seek Compensation for increases to Material and Labor Shortages

- Notice for time and money should be sent to the owner pursuant to the times set forth in the contract, but best practices would be to send it monthly.
- Make sure you causally connect, in writing, the impacts of COVID19 to the specific cost increases in material goods.
- Track the COVID19 impacts as discretely as possible and demonstrate these are “actual” costs and not an attempt at profiteering.

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