



**DATE:** July 19, 2021  
**TO:** CAWV MEMBERS  
**RE:** PRICE ESCALATION CLAUSE AVAILABLE FOR USE IN STATE PURCHASING CONTRACTS

The West Virginia Purchasing Division has issued a memorandum dated July 15, 2021 to various state agency procurement officers that price escalation clause language is available for use in state agency solicitations where pricing volatility is expected.

The CAWV enlisted the advice and support of Commerce Cabinet Secretary Ed Gaunch, Administration Cabinet Secretary Allan McVey, State Senator and CAWV member Glenn Jeffries, State Purchasing Director Mike Sheets and State Purchasing General Counsel James Meadows in developing a remedy for contractors who are experiencing an unprecedented mix of steeply rising material prices and delays in the supply chain.

State agencies have been good to extend completion dates and address liquidated damage (LD) charges when material has been delayed. Some agencies have been able to work with contractors on a one-to-one basis on existing contracts when the price for a particular product has greatly increased between the award date and actual construction.

Below are the key aspects of the new clause (which is attached).

- The clause will only be for those agencies that use the State Purchasing Division for their construction procurement. The CAWV will be working with agencies that perform their own construction procurement to adopt the Purchasing Division's language. These agencies include, but not limited to, state Division of Natural Resources, Department of Environmental Protection, Division of Highways, Water Development Authority, Infrastructure and Jobs Development Council, and Higher Education.
- The clause addresses significant price increases of material or rental equipment which is defined by increases by 20% or more between the date of bid submission and the date of the contract award. The total amount of all change orders dealing with the escalation clause may not exceed 10% of the total contract price.
- The clause will not be automatically included in future construction contracts. The awarding agency will have to include the clause during the bidding process. It is anticipated a vendor or contractor will notify the agency of potential price increases

during the bid and award process during pre-bid discussions. If the agency agrees there is a need to include the clause, an addendum will be issued prior to the bid date.

- Vendors and contractors should work with an agency's architect or engineer to keep them informed on volatility in prices. An A/E firm knows that bids could be higher than the estimate if bidders have to factor risk into their bids. The agency could get a lower price if they would agree to include the escalation clause in the bid package. The CAWV will be sending this memo to all A/E's in the state so everyone is aware of the Purchasing Division's escalation clause policy.
- Any request for a price increase under this escalation clause must have supporting documentation.

The CAWV appreciates the work of all those mentioned above and thanks them for developing the July 15, 2021 price escalation clause language. If members have questions on the new policy, please contact Pat McDonald at 304-342-1166 or [pmdonald@kawv.org](mailto:pmdonald@kawv.org).

**DATE: July 15, 2021**

**SUBJECT: A Message to Agency Designated Procurement Officers**

**FROM: West Virginia Purchasing Division**

**Price Escalation Clause Language Available for Use in Solicitations Where Pricing Volatility Expected**

The state of West Virginia and the supply chain have faced many challenges during the COVID-19 pandemic, including but not limited to pricing volatility. Even in pre-pandemic times, pricing volatility was common in certain industries at various times. To address this issue in instances where pricing volatility is expected, agencies may utilize the escalation clause language (shared below) in their solicitations. Please note this language must be requested by the agency procurement officer at the time of requisition submission.

Escalation Clause: In the event of a significant price increase of material or rental equipment planned for use on a public improvement project, that occurs during the time between bid submission and contract award, and that is not the fault of the Vendor, the contract sum, or contract requirements, may be equitably adjusted by change order in accordance with the procedures specified in the relevant procurement law or contract documents. A change in price is considered significant if the price of the material or rental equipment increases by 20% or more between the date of bid submission and the date of contract award. The total amount of all change orders issued to account for price increases under this Escalation Clause may not exceed 10% of the total contract price. Any request for a price increase under this clause must be supported by: price quotes included with the Vendor's bid for the materials or rental equipment for which a change is being sought; invoices showing amounts actually paid for the materials or rental equipment; and any other evidence that supports the increase request. The quotes included in the bid must be the quotes that Vendor actually relied on when submitting its bid and both the quote and the amount ultimately paid must have resulted from an arm's length transaction with an unrelated party. The Vendor must also show that the significant price increase would have been incurred if the owner had purchased the material or rental equipment directly from the supplier.