Price Escalations & Supply: Chain Disruptions: Legal and Practical Remedies and Mitigation

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The Problem

• April 2020 through August 2021:
  - Input Costs: +20.8%
  - Bid Prices: +5.0%

• Escalations & Delays = Forefront of risks facing Contractors

• Causes: Covid-19, tariffs, inflation, supply chain disruptions, hoarding, foreign governments, weather, war + other causes

• $ Compensation to the Contractor is usually NOT given for the escalation.
The Solution

How to best protect against the peril of extreme price escalation?

- High contingency – Contractor gets no work
- ConsensusDocs 200.1 Price Escalation Amendment
- Type of contract
- Legal solutions
- Practical solutions

- Downstream protections at the Subcontractor/Supplier level.
Price Escalation Clauses Are the Best Solution

- ConsensusDocs 200.1 Potentially Time Price-Impacted Materials Amendment

- Only industry standard contract document that addresses the issue
Price Escalation Clauses Provide the Best Solution

- Not practical to include in contingency or bids
- Owner should pay or share in extreme price escalation
- ConsensusDocs 200.1 provides:
  - Baseline Price: prices can go UP or DOWN – so fair to owners
  - Based on an objective index agreed upon upfront
  - Overhead and profit are excluded from adjustment
  - Sets a Ceiling and a Floor, but not a threshold
  - Explicitly mentions delays that are not a builder’s fault.
ConsensusDocs 200.1
Price Escalation Clause

- Prices could go up day 1
  - Could be modified to set a period from contract signing

- Written notice and appropriate documentation must be given
  - within 30 days from the basis of adjustment

- Flow provisions to the Subcontractor and Supplier level.
Price Escalation Negotiation Points

- No magic bullet for extreme spikes & supply delays
- Agreeing an objective index = key
- All material inputs or specific materials?
- Include at contract signing
- Make it about WE not ME
  - advocate through industry group
  - this is an industry or even societal need
- Explain how Owners benefit as much or more than the Builders.
How Is a Price Escalation/De-escalation Clause Good for Owners?

- Estimate so must include contingency or escalation clause
- Commercially reasonable bid price if clause included
- If no clause → greater possibility for claims
- Should it apply to all materials or only specific materials
- Exclude overhead and profit
- Consider sharing price increase
- Price could go down ... fast
- Include notice provision to protect owner.
## ConsensusDocs Price Escalation Resource Center

### Contract Documents
- Click here to get a sample of the ConsensusDocs 200.1 price escalation addendum.
- Subscribe to ConsensusDocs
- ConsensusDocs 200.1 Standard Time and Price Impacted Materials Addendum and Schedule A (Including Price Escalation Elements and Clauses)
- Guidebook to ConsensusDocs 200.1

### Examples of Cost Indexes
- ENR https://www.enr.com/economics/historical_indices
- DCD cost charts https://www.dcd.com/cost-index
- Turner Cost Index http://www.turnerconstruction.com/cost-index
- Mortenson https://www.mortenson.com/cost-index
- RS Means City Cost Index https://www.rsmmeans.com/rsmmeans-city-cost-index
- Natural Resources Conservation Service - Price Index with Web Sources

### Webinar & Presentations
- Webinar on Price Escalations & Supply Chain Disruption: Legal and Practical Remedies and Mitigation. Click here to register. Click here to register
- Webinar April 14th, 2021: Soaring Material Prices and Supply Shortages
- Soaring Material Prices and Supply Shortages PowerPoint Presentation

### Articles & Other Information
- De-escalating The Impact of Price Escalation
- Sign-up for the ConsensusDocs Construction Law Newsletter
- Tariffs, Taxes, and Trade Wars: Using Material Price Escalation Clauses to Mitigate Risk in an Uncertain Political Climate
- Negotiating Material Escalation Clauses
- September 2021 Construction Inflation Alert
- Mitigating the Effect of Construction Price Escalations
- Recovery of Material Escalation Costs Arising from Steel and Aluminum Tariffs
- Addressing Material Prices
- The Price Isn’t Right: Don’t Get Escalated Out of Business

### Federal Resources
- Federal Acquisition Regulations. Economic Price Adjustment- Labor and Material
- FAR Economic Price Adjustment- fuel surcharge
- Natural Resources Conservation Service - Price Index with Web Sources

### State-Level Resources
- Arizona DOT: provision for adjustment of the cost of bituminous material and gasoline fuel
- Nevada DOT covering Asphalt, Fuel and Steel prices
- Ohio Department of Transportation Escalation Clauses: Fuel; Steel; Asphalt; and, Cement.
Effect of Type of Contract

- Different contract vehicles give different results
- Cost Plus – Owners bear the risk
- GMP – Owner bears the risk up to GMP
  - Contingency that provides for escalation
  - Share risk and costs increases from escalation
- Fixed Price – Contractor is on the hook.
Other Clauses

- Allowance

- Contingency

- Force Majeure
  - Make sure get a time extension
  - Make Force Majeure compensable

- Change in Law clause
Legal Remedies

- Force Majeure
  - Time extension

- Change in Law Clause
  - See ConsensusDocs 200 3.21.1

- Changes Clause
  - Directive from Owner

- Commercial Impracticability/Cardinal Change

- Suspension of Work Clause
  - No damage for delay clause

- Concealed or Unknown Conditions

- Termination Clause

- Acceleration.
The Case Law

- Very little case law
- Not very positive for contractors
- Appeal of Pernix Serka Joint Venture v. Department of State, CBCA No. 5683 (April 22, 2020)
Practical Solutions

- Non-legal solutions from lawyers – What is that worth?
- Collaborate with the Owner
- Pre-purchase and storage of materials
  - See ConsensusDocs 750.1 Storage Rider
- Accelerate purchases
- Value engineering
- Substitutions
- Deletions
- Revised design
- Look downstream.
Protect Your Downside

- Don’t get stuck in the middle: you can’t give what you don’t get

- Confirm in subcontract that Sub = responsible for escalation, except for pass through claims

- If price increases are capped, → cap downstream

- Pass along fair terms to Subs/Suppliers
  - Otherwise, why should the Owner give fair terms?
QUESTIONS?
Price Escalation & Supply Chain Disruptions Webinar
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