

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

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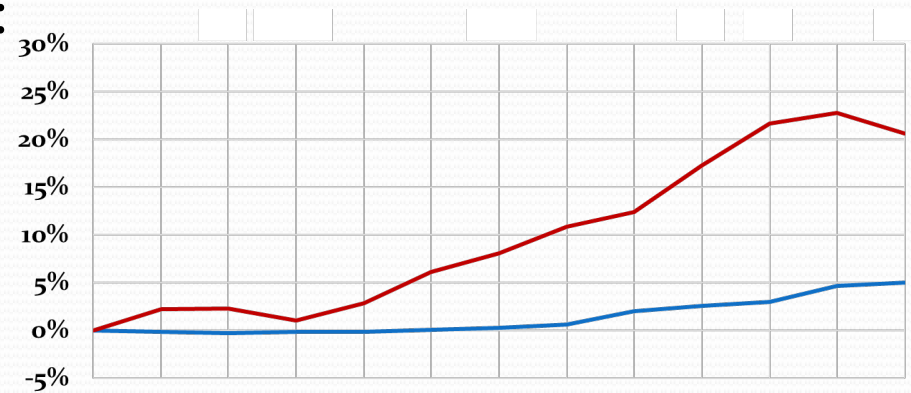
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The Problem

- 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.rsmeans.com/rsmeans-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.](#)
- [Price Escalation Clause – West Virginia Department of Highways Fuel and Liquid Asphalt.](#)

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)
- *M.J. Paquet, Inc. v N.J. Dept. of Transportation*, 335 N.J. Super. 130 (2000)

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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