



Events such as the worldwide Covid-19 pandemic and more recent Russia-Ukraine conflict have created extraordinary and unusual cost volatility impacting the price of many raw materials and supplies used in construction projects. The impact is widespread. In addition to material cost increases, inflationary pressures exist in all aspects of the distribution chain. Additionally, projects are being delayed, adding to the unpredictability. The result is that subcontractors are receiving steady communication from suppliers about price increases, long lead times, and unavailability. And sellers are reluctant to allow subcontractors to lock in prices for future purchases.

In this market, previously atypical price escalation clauses are ubiquitous in construction contracts. Here are some examples:

In the event of significant delay or price increase of material occurring during the performance of the contract through no fault of the contractor, the contract sum, time of performance, 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 shall be considered significant when the price of an item increases 5% between the date of this contract and the date of installation.

If there is an escalation clause the contract may also have certain triggering requirements to get an actual increase. For example, a subcontractor might have to provide adequate documentation showing that there was a true and legitimate in-crease. That is, a response would be that the contractor (and owner) can't just take the subcontractor's word that the price went up. Instead, those upstream will demand rock solid detailed proof. Fulfilling this request means keeping detailed cost data from when the subcontract was signed. And similar pricing information at the time of increase. Suppliers ought to be able to help with this backup.

A second requirement to trigger an escalation clause could be that the subcontractor take reasonable efforts to mitigate the price increase. This could mean showing efforts to find better prices. Or prove what was done to try to buy out or lock in early on prices. A third prerequisite could be that the

subcontractor give, in the beginning, a specific list of materials that could potentially increase. This list unfortunately is seemingly continuing to grow and might cover any supply item needed to perform the scope of work.

A final precondition is that notice of the price increase must be clearly given right when the subcontractor learns that pricing has changed. “Notice” requirements are typical in any contract. They usually say that if not provided in a certain number of days, then the claim for a price increase is waived. The general contractor’s reasoning for this requirement is that they need the request early so they can promptly pass it onto the owner. They also might want a chance to see if they or the owner can make other arrangements to lessen the escalation impact.

What if you are a subcontractor that is facing a price increase escalation and do not have any contractual price escalation clause such as those listed above? On top of that, how about if the subcontract also has a “no damage for delay” clause stating that if there is a delay outside of the contractor’s control the only relief is a time extension and no additional costs? “No damage for delay” clauses are enforced but “strictly construed” by courts. There are ways around them. Some courts have found that these clauses are not enforceable for delays not contemplated by the parties, active interference, or when time extensions are requested by not granted. Contractors facing delays and price increases with unfavorable contract terms have argued that since they are entitled to a time extension, they can stop work under the extension clause until prices return to normal. Owners want to get projects completed. So, concern over a delayed finish might make them more amenable to offer relief even in the face of unfavorable contract terms.

In conclusion, perhaps now more than ever, a subcontractor must read and negotiate its subcontract. This might mean making changes to the subcontract to include a price escalation clause. Or taking out provisions such as the aforementioned no damage for delay clause. (To be sure, many other important terms should be addressed; but, for this article our focus is price escalation and delays.) Another simpler option, although maybe not as foolproof, is to add and include to the subcontract a one-page rider with key clauses such as one of those above for price escalation. For delays added provisions could be:

In the event of a delay that is beyond the control of Subcontractor, as a result of force majeure, Contractor delay, or delay caused by another subcontractor, the Subcontractor shall be granted a reasonable extension of time as necessary as a result of the delay considering the duration, timing, and effect of the delay as well as the need for remobilization, rescheduling of materials and labor, etc. required to complete the project.

For delays caused by the Owner, Contractor, or the Contractor’s subcontractors then Subcontractor shall be entitled to receive payment for costs incurred as a result of such events.

Be sure the rider is attached to and included as a part of the subcontract. If not, then it does no good.

The following exchange from J.R.R. Tolkien’s *The Fellowship of the Rings* is befitting. “I wish it need not have happened in my time,” said Frodo. “So do I,” said Gandalf, “and so do all who live to see such times. But that is not for them to decide. All we have to decide is what to do with the time that is given

us.” That holds true for subcontractors. We cannot do much to change today’s price escalation “times.” But we can decide what we do in light of these times.

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