

**Construction Contracts:
Cost Increases and Delays**

January 2023



1

Presenter




Blake R. Nelson
Attorney & Construction Law Group Chair
Hellmuth & Johnson, PLLC



2

What Do Standard Contracts Say About Cost Increases?


- What Do Standard Contracts Say About Cost Increases?
- What type is the General/Prime Contract – Stipulated Sum vs. GMP?



3

Price Escalation Clauses in Industry Standard Documents


- **AIA Contracts:**
 - A201 General Conditions:
 - 9.1.2 If unit prices are stated in the Contract Documents or subsequently agreed upon, and if quantities originally contemplated are materially changed so that application of such unit prices to the actual quantities causes substantial inequity to the Owner or Contractor, the applicable unit prices shall be equitably adjusted.
 - A401 Subcontract: None.



4

Price Escalation Clauses in Industry Standard Documents


- **ConsensusDocs Contracts:**
 - **ConsensusDocs 200** – Standard Agreement and General Conditions Between Owner and Constructor
 - 8.3.2 If unit prices are set forth in the Contract Documents or are subsequently agreed to by the Parties, but the character or quantity of such unit items as originally contemplated is so different in a proposed Change Order that the original unit prices will cause substantial inequity to the Owner or the Constructor, such unit prices shall be equitably adjusted.
 - 8.4 In general provides that Contractor must give the Owner notice of claims for delays and extra costs within 14 days after the situation arises and must submit documentation of the claim within 21 days after giving notice. The Owner then has 14 days to respond. If there is no reply the claim is considered denied.



5

Price Escalation Clauses in Industry Standard Documents

- **ConsensusDocs Contracts:**
 - **ConsensusDocs 200.1** – Potentially Time and Price-Impacted Materials:
 - This is a new form and is styled as an Amendment to the agreement between Owner and Constructor.
 - ConsensusDocs states that it "is the only publisher of a standard material price escalation clause."
 - Since it is drafted as an Amendment to the original contract it must be mutually agreed upon unless the parties sign it up front along with the original contract
 - **ConsensusDocs 750** – Standard Form Agreement Between Constructor and Subcontractor: None



6


Price Escalation Clauses in Industry Standard Documents

- **EJCDC Contracts (Engineers Joint Contract Documents Committee):**
 - EJCDC C-530 - Agreement Between Owner and Contractor: None
 - EJCDC C-700 - General Conditions

11.04(A): The Contract Price may only be changed by a Change Order.

11.06 Change Proposals. In general states that the Contractor may submit to the Engineer a request for an adjustment in the Contract Price or Contract Time. The Engineer reviews the request and makes a binding decision, unless the Owner or Contractor appeals the decision by filing a Claim.


- EJCDC C-532 - Construction Subcontract: None



7

What if the contract does not have any language about prices increases or delays?


- **Force Majeure Clauses.**
 - In general force majeure is commonly defined as an event that is (1) unforeseen by the invoking party, yet (2) contemplated by the contract.
 - Minnesota courts enforce contracts based on their specific language.



8

What if the contract does not have any language about prices increases or delays?


- **Force Majeure Clauses.**
 - To excuse performance, Minnesota courts would generally require that a party establish four elements:
 - The party had no control over the event that led to its non-performance.
 - The event was not foreseeable.
 - The event was the sole cause of the failure to perform.
 - The exercise of due care could not prevent or avoid the event.



9

What if the contract does not have any language about prices increases or delays?


- **Force Majeure Clauses.**
 - A standard force majeure clause might have worked when the pandemic first emerged, but it would be almost impossible for a party these days to say that price increases or delays were “unforeseen.”
 - Courts have ruled that if an event it reasonably foreseeable it does not fall under the category of force majeure.



10

Impracticability/Impossibility Defense

- If there are no contract provisions about price increases or delays, there might be “common law” defenses that could excuse performance (not pass the extra costs to the other party).
 - **Impossibility:** must be literally impossible, not just more difficult or expensive.
 - **Impracticability:** if, through no fault of the affected party, performance is made impracticable by an event the parties assumed would not occur when they entered into the contract.
 - Must show that the material costs or costs due to delays have risen to the point where the party’s performance is “excessive and unreasonable.”




11

Impracticability/Impossibility Defense

Examples:

- A Massachusetts court found that an increase of 40% in steel prices was not a defense to performance.
- A Utah court found that even an increase in materials costs of over 250% was not sufficient to excuse performance under the contract.
 - In that case a paving contractor submitted a fixed price bid based on a liquid asphalt oil price of \$350 per ton. Soon after the contract was signed the price when up to \$1,005 per ton.
- A Rhode Island court found that a 600% increase in an excavation contractor’s costs was sufficient to excuse performance.
 - But in that case the contractor encountered an unforeseen rock ledge that make the excavation work much more difficult and expensive.

These examples excuse performance. They do not require the customer or other party to the contract to pay the extra costs.




12

Hedging on Price Volatility

- Adding typical construction line items/divisions to the allowance sections in prime contracts and subcontracts.
 - Example: Include lumber as an allowance

- Adding language regarding:
 - Material prices increases
 - Labor shortages
 - Delays



13


Price Escalation Clause - Example for Prime Contract:

Price Sensitive Materials: *[Note the following italicized language is already stated in Section 9.1.2 of the AIA A-201 General Conditions: If unit prices are stated in the Contract Documents or subsequently agreed upon, and if quantities originally contemplated are materially changed so that application of such unit prices to the actual quantities causes substantial inequity to the Owner or Contractor, the applicable unit prices shall be equitably adjusted.]*

The following could be added at the of 9.1.2:

If the cost of the materials described below which are required for the Work ("Price Sensitive Materials") increase by more than ___% over the amount estimated and included for the Price Sensitive Materials in calculating the Guaranteed Maximum Price ("Material Price Threshold"), the Guaranteed Maximum Price shall be increased by ___% of any such increase beyond the Material Price Threshold, but in no event shall the increase exceed \$_____.

Price Sensitive Material:
 HVAC, Electrical, Plumbing equipment
 Appliances and Food Service equipment
 Lumber




14

Price Escalation Clause - Example for Subcontract:

Italicized language is optional and could be added to allocate the risk between the general contractor and subcontractor:

Material Price Increases. Contractor and Subcontractor acknowledge that in certain cases it is not possible to control the pricing for, availability of, or the time for delivery of certain materials necessary for the Subcontractor's Work. If the costs of the materials described below which are required for the Subcontractor's Work increase [by more than ___%] over the "Quoted Amount" stated below, the Subcontract Sum shall be increased by [___% of] any such increase beyond the Quoted Amount [but in no event shall the increase exceed the "Maximum Amount" stated below] ("Material Price Increases").

Materials Quoted Amount	Maximum Amount
Drywall \$ _____	\$ _____
Lumber \$ _____	\$ _____



15


Delays Due to Labor/Material Shortages

Force Majeure ("Act of God") Clauses – that might actually help...

- May add to General Contract or Subcontract – note only covers delays, not cost increases.

(1) Events of "Force Majeure" shall consist of the following: Acts of God, weather events, acts of war, terrorist acts, pandemics, issues or circumstances cause by or arising out of the novel coronavirus and its variants or COVID-19, riots or other civil unrest, newly announced or enacted governmental restrictions or other acts by governmental bodies (local, national or foreign), including but not limited to the imposition of tariffs or other trade restrictions or restrictions on the operation of businesses in the interest of public health or safety, labor disputes, labor shortages (including but not limited to the unavailability of qualified and properly trained labor forces), unavoidable labor or material shortages, unusual transportation delays or travel restrictions, unusual delays in obtaining necessary permits or other approvals granted by applicable governmental bodies, vandalism, fire, flood, tornado, earthquake or other natural disaster or any other casualty loss, or any other events beyond the reasonable control of the Contractor [or Owner] [or Subcontractor].

(2) If the Contractor [or Owner] [or Subcontractor] is at any time delayed, or anticipates a future delay, in the commencement or progress of the Work or performance under this Agreement due to an event of Force Majeure, the affected party shall provide written notice to other party within ten (10) days after the affected party first recognizes the occurrence or potential occurrence any event of Force Majeure and has assessed its impact to the Project. If an event of Force Majeure exists, the Substantial Completion Date for the Work or other time requirements for performance of obligations under this Agreement shall be extended on a day-for-day basis for the entire period of time associated with the event of Force Majeure.



16


Delays Due to Labor/Material Shortages

Force Majeure ("Act of God") Clauses – that might actually help...

- May add to General Contract or Subcontract – note only covers delays, not cost increases.

(1) Events of "Force Majeure" shall consist of the following: Acts of God, weather events, acts of war, terrorist acts, pandemics, issues or circumstances cause by or arising out of the novel coronavirus and its variants or COVID-19, riots or other civil unrest, newly announced or enacted governmental restrictions or other acts by governmental bodies (local, national or foreign), including but not limited to the imposition of tariffs or other trade restrictions or restrictions on the operation of businesses in the interest of public health or safety, labor disputes, labor shortages (including but not limited to the unavailability of qualified and properly trained labor forces), unavoidable labor or material shortages, unusual transportation delays or travel restrictions, unusual delays in obtaining necessary permits or other approvals granted by applicable governmental bodies, vandalism, fire, flood, tornado, earthquake or other natural disaster or any other casualty loss, or any other events beyond the reasonable control of the Contractor [or Owner] [or Subcontractor].


(2) If the Contractor [or Owner] [or Subcontractor] is at any time delayed, or anticipates a future delay, in the commencement or progress of the Work or performance under this Agreement due to an event of Force Majeure, the affected party shall provide written notice to other party within ten (10) days after the affected party first recognizes the occurrence or potential occurrence any event of Force Majeure and has assessed its impact to the Project. If an event of Force Majeure exists, the Substantial Completion Date for the Work or other time requirements for performance of obligations under this Agreement shall be extended on a day-for-day basis for the entire period of time associated with the event of Force Majeure.



17

Using a Rider/Addendum

- **General Contractor:**
 - Use a rider or addendum to alter language in standard form contract documents.
 - The materials include a sample Addendum modifying the AGC Owner – Contractor Agreement (OCA)
- **Subcontractor:**
 - Instead of requesting changes to a subcontractor agreement presented by the general contractor, consider developing a standard rider or addendum and request that it be attached.
 - The materials include a sample Rider containing language to address:
 - Material price increases
 - Approving additional work
 - Deleting the pay-if-paid clause



18

Questions?

North Risk's
Value-Added Services Hotline
(888) 667-4135
☎ Option 3
✉ constructionlaw@northriskpartners.com