

MITIGATING YOUR RISK OF MATERIAL PRICE INCREASES

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As many contractors and subcontractors within the Southwest Florida construction industry are aware, material demand and prices have and continue to increase, while delays in receiving materials have been equally plummeting due to COVID-19 pandemic and more recently, Hurricane Ian. The impacts to the Southwest Florida construction industry are still being felt and many owners, contractors, subcontractors, and material suppliers have been actively seeking ways to equally mitigate their respective risks.

As prices continue to escalate due to the volatility of the material markets, contractors and subcontractors need to be aware of certain contractual provisions that – depending on how they are phrased – may positively or negatively impact your business. In addition to material price increases throughout the construction industry, many businesses are facing unprecedented lead times in obtaining materials due to supply chain and other related problems. Despite being faced with these issues, many construction companies continue to operate without specifically addressing the issue. One of the most useful and proactive approaches to address price increases and supply chain issues is during the negotiation of the construction contract.

As it relates to material price increases, one consideration is a material escalation provision that limits certain exposure to these risks. Securing a material price today may certainly be different than securing a similar price in the future. This volatility and risk impacts pricing and budgets across the entire construction industry – both on commercial and residential projects.

CONTRACTORS & SUBCONTRACTORS BEWARE

Below is an example of a material provision that construction contractors and subcontractors should be aware of:

By executing this Contract, Contractor guarantees its prices contained herein for the duration of the Project. Contractor expressly agrees that any conditions outside the control of Contractor including, but not limited to, material shortages, material and labor price escalations, labor shortages and similar conditions, have been accounted for in the Contract price and shall not constitute a basis for a time extension or a claim for additional compensation of any type.

As you can see, this contractual provision is designed to shift the liability associated with material prices, delays in shipment, and other conditions completely onto the contractor – and potentially down to the subcontractor depending on the language in your agreement.

Below is an alternative, reasonable provision that addresses material price increases:

MATERIAL COST ESCALATION: If, at any time during the performance of this Contract, the cost of materials significantly increases, through no fault of Contractor or Subcontractor, the price of this Contract shall be equitably adjusted by an amount reasonably necessary to cover any such significant increase in the costs of materials. As used herein, a significant cost increase shall mean any increase in cost of materials exceeding ___% from the date of executing the Subcontract. Subcontractor shall document any material increases through quotes, invoices, or receipts and provide them to Contractor for review. Where the delivery of materials is delayed, through no fault of the Subcontractor as a result of the shortage or unavailability of the materials, Subcontractor shall not be liable for any additional costs or damages associated with such delay(s).

As you can see, there are contractual solutions to the material escalation pricing issue that the construction industry has been plagued with since early 2020. With a material escalation provision, you can negotiate and potentially reduce the risk of price increases based on how this risk is addressed in your construction contract.

Please make sure you work with construction counsel to draft, negotiate, and explain the consequences that material escalation provisions can have upon you. At a minimum, all construction contractors should be reviewing their contracts *before* they sign them to understand and appreciate the risks they are agreeing to.



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