



HENDRICK PHILLIPS
SALZMAN & SIEGEL^{PC}
ATTORNEYS AT LAW

LEGAL ADVOCATES, ADVISORS & CONSULTANTS TO THE CONSTRUCTION INDUSTRY

USING CONTRACTS TO MANAGE VOLATILE MATERIAL AVAILABILITY AND PRICING

Prepared by:

Stephen M. Phillips

C. Leanne Prybylski

HENDRICK, PHILLIPS, SALZMAN & SIEGEL

230 Peachtree Street, N.W.

Suite 2500

Atlanta, Georgia 30303

smp@hpsslaw.com

(404) 522-1410

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YEARS OF SERVICE

MANAGING UNCERTAIN MATERIAL DELIVERY AND VOLATILE MATERIAL PRICING

- Unprecedented Period of Material Shortages, Delivery Delays and Volatile Pricing
- Potential for Financial Disaster for the Contractor
- Challenge that each Contractor Must Confront, Plan for and Manage



Price Increases May 2020-May 2021

Inputs to Nonresidential Construction - 24.3%

Iron and Steel – 62.8%

Steel Mill Products – 75.6%

Fabricated Structural Metal Products – 18.3%

Nonferrous Wire and Cable – 31.4%

Softwood Lumber – 154.3%

Prepared Asphalt, Tar Roofing & Siding Products– 12.6%

Crude Petroleum – 186.7%

Source: Associated Builders & Contractors/U.S. Bureau of Labor Statistics



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OVERRIDING LEGAL PRINCIPLE: THE CONTRACT CONTROLS

- What does your proposal to your customer say?
- What does your contract with your customer say?
- What does your purchase order with your supplier say?



FIXED PRICE CONTRACTS

- You are bound to perform in accordance with the provisions in the contract, including the fixed price, unless there is a contract provision that allows for price adjustment. There is usually not such a provision unless you add a provision to your contract.
- The contractor bears the risk of material (and other) price increases.



FOR FIXED PRICE CONTRACTS ALREADY EXECUTED

- Scrutinize the contract to see if there is a provision that might apply
- Early and constant communication with customer and supplier
- Consideration of substitutes
- Request extension of time
- If there has been a delay (e.g., later start date than originally scheduled) for causes other than the delay due to you obtaining delivery of your materials and the price of materials increased during that delay, you may be entitled to a price adjustment.
- Request to receive and review the general contractor's contract. It may have a provision that could be applied. (This underscores need to have a contract provision giving you the rights and remedies the general contractor has toward the Owner.)



FORCE MAJEURE CLAUSE

AIA Document A201-2017

§8.3 Delays and Extensions of Time

§8.3.1 If the Contractor is delayed at any time in the commencement or progress of the Work by (1) an act or neglect of the Owner or Architect, of an employee of either, or of a Separate Contractor; (2) by changes ordered in the Work; (3) by labor disputes, fire, **unusual delays in deliveries**, unavoidable casualties, adverse weather conditions documents in accordance with Section 15.1.6.2, or **other causes beyond the Contractor's control**; (4) by delay authorized by the Owner pending mediation and binding dispute resolution; or (5) by other causes that the Contractor asserts, and the Architect determines, justify delay, then the Contract Time shall be extended for such reasonable time as the Architect may determine.



FORCE MAJEURE CLAUSE

AIA Document A201-2017

§8.3.2 Claims relating to time shall be made in accordance with applicable provisions of Article 15.

§8.3.2 This Section does not preclude recover of damages for delay by either party under other provisions of the Contract Documents.

- Force Majeure Clauses usually only provide for an extension of time, not additional compensation.



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MANAGE VOLATILE MATERIAL DELIVERY AND PRICING

Need to manage and address contractually:

- Unavailability of specified or intended products
- Late delivery of materials
- Increase in price of materials



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POTENTIAL CONTRACT PROVISIONS

- The construction industry is currently experiencing shortages and delays in obtaining construction materials such that reliable assurance of material availability, delivery dates, timely delivery and firm pricing of materials cannot be obtained. The parties acknowledge that some of the materials and products to be used and installed in the construction of the Project may become unavailable, delayed in shipment and/or subject to price increases due to circumstances beyond the control of the Contractor. If a specified product is unavailable or shipment is delayed, Contractor shall provide written notice to Owner and shall be afforded additional time and substitute products may be considered. If there is an increase in price of materials, equipment or products between the date of this Agreement and the time when the Project is ready for installation of the affected material, the Contract Sum shall be increased to reflect the additional cost to obtain the materials, provided that the Contractor provides written notice and documentation of the increased costs.



POTENTIAL CONTRACT PROVISIONS

- The construction industry is experiencing substantial volatility in material prices, material price escalation, material delays and material unavailability particularly with regard to steel, lumber, screws, plates, textures and some insulation products. If the cost incurred by the Contractor/Subcontractor to purchase a material specified or approved for this job increases by _____% or more between the date of this contract and the time when the materials are to be installed, the Contractor/Subcontractor shall be entitled to an equitable adjustment of the contract sum equal to the additional cost incurred by the Contractor/Subcontractor to obtain the material. Contractor/Subcontractor is to provide written notice to customer upon learning of the price increase and provide documentation of the price of the material as of the date of this contract and the revised price.
- Similarly, if the price of a material decreases by _____% or more, the Contractor/Subcontractor shall provide a credit equal to the reduction in purchase price between the cost of the material as of the date of this contract and the price paid for the material for the project. Contractor/Subcontractor shall provide documentation of the price as of the date of this contract and purchase price upon request.



POTENTIAL CONTRACT PROVISIONS

- The parties acknowledge that some of the materials and products to be used and installed in the construction of this project may become unavailable, delayed in shipment and/or subject to price increases due to circumstances beyond the control of the contractor, including the COVID-19 pandemic. If a specified product is unavailable or shipment is delayed, contractor shall provide written notice to customer and shall be afforded additional time and substitute products may be considered. If there is an increase in price of materials, equipment or products between the date of this Agreement and the time when the project is ready for the installation of the affected material, the contract sum shall be increased to reflect the additional cost to obtain the materials, provided that the contractor gives the customer written notice and documentation of the increased costs.



POTENTIAL CONTRACT PROVISIONS

- In lieu of including a price escalation provision in this contract, the parties agree that the Contractor/Subcontractor is authorized to purchase materials for this project upon execution of this contract and the contract sum shall be adjusted to include the cost of storage, additional handling, and insurance to cover the stored materials.



POTENTIAL CONTRACT PROVISIONS

- Because of uncertainty in future material availability and unpredictable and rapidly increasing pricing of some construction materials, the materials referenced in this proposal and contract may not be available when needed for this job or can only be obtained at prices in excess of what has been budgeted for this job. In order to reduce these risks, Contractor recommends that the materials be ordered at this time with payment to be made at the time of delivery and the materials suitably stored, with appropriate insurance in place, until the materials are needed at the job site. The costs to store and insure the materials and to transport the materials from the storage facility to the job site would be at customer's expense.



PROVISIONS TO BE INCLUDED IN PROPOSALS TO OWNERS OR GENERAL CONTRACTORS

- Due to high volatility in material prices, the prices(s) stated in this proposal is/are valid only for contracts accepted and executed within ____ days of the date of this proposal.



PROVISIONS TO BE INCLUDED IN PROPOSALS TO OWNERS OR GENERAL CONTRACTORS

- Due to high volatility in material prices, shortages and material delivery delays, the price(s) provided in this proposal is/are subject to change, and performance of the work may be delayed if materials are unavailable.



POTENTIAL CONTRACT PROVISIONS

- Contractor shall perform the work described herein at the price quoted, provided that in the event the price to the contractor for any materials to be used in the contractor's work shall increase by _____ percent or greater from the price relied upon by contractor in preparing and submitting this proposal/contract, then the owner/general contractor agrees that the proposal/contract price shall be increased to this same extent upon contractor's submitting documentation thereof.



FEDERAL GOVERNMENT CONTRACTING

- FAR 48 C.F.R. § 16.203-2

Permits inclusion of economic price adjustment clauses in fixed-price contracts in situations “when (i) there is serious doubt concerning the stability of market or labor conditions that will exist during an extended period of contract performance, and (ii) contingencies that would otherwise be included in the contract price can be identified and covered separately in the contract.”

The Contracting Officer has the discretion to include this clause in contracts. Contractors contemplating working on government projects should request that this provision be included in the contract documents.



POTENTIAL PROVISIONS – OWNER’S RIGHT TO TERMINATE FOR CONVENIENCE

- If a delay in delivery of materials exceeds ___ days or if the cost to purchase materials for the Project increases by ___% or more, in lieu of the Owner accepting the delay or paying the increased price, the Owner may terminate the contract for convenience. If the Owner opts to terminate the contract for convenience, Contractor shall be paid for expenses incurred by Contractor prior to termination and costs of demobilization, including re-stocking fees if applicable.



RELATIONSHIP/AGREEMENT WITH SUPPLIER-VENDOR

- Avoid being caught in legal quicksand
- Need to have parallel provisions upstream and downstream
- If the price you've been quoted from your supplier is valid only for ten (10) days, the price included in your upstream contract should be valid only for ten (10) days.
- Need a writing to document



PROVISIONS TO BE INCLUDED IN CONTRACTS/PURCHASE ORDERS WITH SUPPLIERS

The following provision is intended for use before a purchase order is issued to lock-in quoted pricing and delivery times for a certain period of time after the date of supplier's/vendor's proposal.

- Supplier/vendor acknowledges that Contractor is relying upon the prices(s) and delivery date(s) quoted by supplier/vendor in submitting Contractor's proposal for this project. Supplier/vendor hereby agrees that it will honor the price(s) and delivery date(s) provided in its proposal, provided that Contractor orders the specified materials within ___ days of the date of supplier's/vendor's proposal.

Supplier/Vendor Signature

Date



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PROVISIONS TO BE INCLUDED IN CONTRACTS/PURCHASE ORDER WITH SUPPLIERS

The following provision is intended to be inserted in the purchase order. If the supplier/vendor issues the purchase order, you will need to obtain a written acknowledgement and signature from the supplier/vendor that this provision is part of the purchase order terms and conditions.

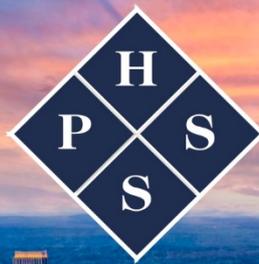
- Supplier/vendor acknowledges that Contractor is relying upon the price(s) and delivery date(s) quoted by supplier/vendor in submitting Contractor's proposal and entering into a contract with its customer for this project. Supplier/vendor is not entitled to an increase in price(s) or an extension of time for delivery of the materials(s) specified in this purchase order, except to the extent Contractor receives from its customer an increase in such price(s) and an extension of time for delivery of such material(s).

Supplier/Vendor Signature

Date



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PREPARED BY:

Stephen M. Phillips, Esq.

smp@hpsslaw.com

C. Leanne Prybylski, Esq.

clp@hpsslaw.com

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Suite 2500
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