

# Impact of Labor Shortage and Material Struggles:

## Mitigating Legal Disputes Arising From Project Delays



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# Labor Shortage Delays

- Extension of Time Provision
- No Damages for Delay Clause
- Termination Provision
- Risk-shifting Provision
- Suspension Due to Temporary Impossibility

# Extension of Time Provision

- Agreement to extend the time period for the Contractor's performance due to a delay outside the Contractor's control
- Include what type of event would merit the extension
- Require the Contractor to give written notice
- Caution: Define what is "outside the Contractor's control" and identify the maximum time period allowed for an extension

# No Damages for Delay Clause

- Prohibits Contractors from submitting delay claims to recover financial losses caused by construction delays
- Five Common Law Exceptions
- **Example:** The Contractor has no claim for monetary damages for delay or hindrance to the work on the Project from any cause, including without limitation any act or omission of the Owner, time impacts associated with the Covid-19 pandemic and any other global, regional, or local pandemic, public health crisis, or emergency, and the global, regional, and local impacts on material production and availability. Contractors only recourse is the ability to request an extension from Owner through a change order.

# Termination Provision

- Allows either party to terminate the contract due to a set length of delay time
- Be sure to include a notice requirement
- **Example:** Either party may terminate this agreement in its entirety, and without liability, if the work is stopped for a period of 30 consecutive days through no fault of the Contractor due to an act of government, such as a declaration of national emergency that requires all work to be stopped.

# Risk-Shifting Provision

- Makes the Contractor responsible for anticipated events or impacts that a reasonable Contractor should have known
- Caution: contract should define what a “reasonable contractor” should know

# Suspension Due to Temporary Impossibility

- When supervening event temporarily causes impossibility, impracticability or frustration of purpose, the parties may suspend the timing of performance or excuse performance until the temporary obstacle is removed
- Most Covid-19 delays can be anticipated
- Contract may define events which create a temporary impossibility

# Poll Questions

# Price Increases

Issues to identify when addressing price increases during drafting and negotiating contracts

- Identify materials susceptible to volatility
- Determine a measure of volatile pricing
- Limitation on time for fixed prices
- Price Escalation Clauses
- Allowances or contingencies
- Payment or Performance bonds
- Obtaining subcontractor default insurance

# Material Price Escalation Clause

- Provision allowing for an increase or decrease in the price of a contract due to market price changes
  - 1) Day One Escalation Clause
  - 2) Threshold Escalation Clause
  - 3) Delay Escalation Clause

# Day One Escalation Clause

- Allows a contract price increase for any increase in material pricing once the contract is executed
- Completely shifts the risk of material price escalations to the Owner
- Example: The price of lumber contained in this contract is that in effect as of (date). The Contractor shall be reimbursed for all increases in the cost of lumber as of the date of purchase. The Owner shall be provided a credit for all decreases in the cost of lumber as of the date of purchase.

# Threshold Escalation Clause

- Sets a specified threshold over which the Contractor is entitled to a price increase
- Parties take on a shared risk for material price increases
- **Example:** In the event the price of lumber, structural steel, or iron increases by more than 10% between the date of this contract and the date of purchase by the Contractor, the Contract Sum shall be equitably adjusted by the amount which exceeds a 10% price increase over the material's baseline price up to 25%. In the event the price of lumber, structural steel, or iron decreases by more than 10% between the date of this contract and the date of purchase, the Contract Sum shall be equitably adjusted to provide a credit to the Owner for the decreased price.

# Delay Escalation Clause

- Holds a fixed price for a limited period of time, but allows the Contractor to receive an equitable adjustment if the project is delayed or if it is not feasible to purchase all materials for the project at the start of construction
- **Example:** This contract contemplates that the Contractor will complete its Work by (date). In the event the Work is not completed by that date, through no fault of the Contractor, the Contractor shall be reimbursed for all increases in the costs of the following materials: lumber, structural steel, and iron plus overhead and profit up to a 25% increase. In the event the price of lumber, structural steel, or iron decreases, the Owner shall be provided a credit for the decreased price.

# Frustration of Purpose

- Offers a defense against enforcement of a contract when the reasons for performing cease to exist due to an *unforeseeable* event
- Cannot be used just because contract has become less profitable
- “Extreme” increases in prices can lead to excused performance

# Termination-for-Convenience Provision

- Allows termination if material prices increase dramatically or securing the materials becomes difficult or impossible to secure
- Define dramatic material price increase
- Specify what materials are covered by the clause
- Require Contractor to prove that it took reasonable steps to secure the materials

# Catch all Provision

This Contract excludes cost and/or time impacts associated with the Covid-19 pandemic and any other global, regional, or local pandemic, public health crisis, or emergency, and the global, regional, and local impacts on material production and availability. Material cost escalation beyond the material costs captured and included in this Contract are excluded. Schedule and cost impacts associated with material delays, Government-issued Covid-19 or pandemic-related mandates or protocols, and personnel impacts related to Covid-19 and other pandemic-related disruptions are excluded.