

Hot Topics in Construction Contracting

August 2022



Agenda

- Force Majeure
- Price Escalation Clauses
- Contracting Methods (Fixed Fee/Lump Sum vs. Cost Plus/Cost Plus with GMP, T&M)
- Early Purchase and Storage of Materials

Force Majeure

Force Majeure

- Most Force Majeure clauses, whether they include pandemics or not, are not written very well to account for pandemics.
- Accordingly your old form, is probably not good anymore.
- Most Force Majeure clauses focus on the unforeseen. The difficulty with a pandemic is that it at some point during the pandemic, it is not unforeseen. Nevertheless people probably can not price in the risk.
- Force Majeure clauses should be adjusted to specify that the unforeseen aspect relates to a project impact.
- Some Force Majeure clauses make reference to impacts to the physical location of where the project is happening (i.e. a hurricane blowing through town). What if an outbreak or government order shuts down a manufacturing facility 1000 miles away where your equipment is being manufactured.
- Force Majeure clauses differ and must be carefully considered.

Force Majeure Clause # 1

- Neither party shall be held liable to the other party for failure or delay in fulfilling or performing any obligation under this Agreement when such failure or delay is caused by or results from causes beyond the reasonable control of the affected party which are unforeseeable, including but not limited to fire, floods, hurricanes, tornadoes, embargoes, war, acts of war, acts of terrorism, insurrections, riots, epidemics, civil commotions, strikes, lockouts or other labor disturbances provided, however, that the party so affected shall use commercially reasonable efforts to remove such causes of nonperformance, and shall continue performance hereunder with reasonable dispatch whenever such causes are removed. Either party shall provide the other party with prompt written notice of any delay or failure to perform that occurs by reason of force majeure.

Force Majeure Clause # 2

“Force Majeure” means an act or event that (i) delays or renders impossible the affected party’s performance of its obligations under a Service Order; (ii) is beyond the reasonable control of the affected party, (iii) not due to the affected party’s fault or negligence, (iv) was not reasonably foreseeable; and (v) could not have been prevented or avoided by the affected party through the exercise of due diligence.”

Force Majeure Clause # 3

“Force Majeure” means an act or event that (i) delays or renders impossible the affected party’s performance of its obligations under a Service Order; (ii) is beyond the reasonable control of the affected party, (iii) not due to the affected party’s fault or negligence, (iv) was not reasonably foreseeable; and (v) could not have been prevented or avoided by the affected party through the exercise of due diligence.”

Force Majeure Clause # 4

“*Force Majeure*” means catastrophic storms or floods, tornadoes, hurricanes, earthquakes and other acts of God, wars, civil disturbances, terrorist attacks, revolts, insurrections, commercial embargoes, **epidemics that require suspension of all Work at the Site**, fires, explosions, Changes in Law and actions of a Governmental Instrumentality that were not requested, promoted, or caused by the affected Party; *provided that* such act or event (i) delays or renders impossible the affected Party’s performance of its obligations under this Agreement, (ii) is beyond the reasonable control of the affected Party, not due to its fault or negligence **and was not reasonably foreseeable (such as, for example, the continued COVID-19 epidemic)**, and (iii) could not have been prevented or avoided by the affected Party through the exercise of due diligence, including the expenditure of any reasonable sum taking into account the Contract Price. For avoidance of doubt, **Force Majeure shall not include any of the following:** (a) economic hardship, (b) changes in market conditions **(including generalized effects of any epidemic, including the COVID-19 epidemic)**, (c) late delivery or failure of Construction Equipment or Equipment, (d) labor availability, strikes, or other similar labor actions, or (e) climatic conditions (including rain, snow, wind, temperature and other weather conditions), tides, or seasons, regardless of the magnitude, severity, duration or frequency of such climatic conditions, tides or seasons (other than catastrophic storms or floods, tornadoes, hurricanes, earthquakes and other acts of God), or (f) nonperformance or delay by Contractor or its Subcontractors or Sub-subcontractors, unless such nonperformance or delay was otherwise caused by Force Majeure.

Force Majeure Clause # 5

Excused Performance. A Party shall be excused from performance and shall not be considered to be in default with respect to any obligation hereunder, except the obligation to make payments previously due in a timely manner for liabilities actually incurred, if and to the extent that its failure of, or delay in, performance is due to a Force Majeure; provided the Party claiming excuse by reason of such Force Majeure: (a) **gives the other Party Notice describing the particulars of the Force Majeure event as soon as reasonably practicable, but in any event within five (5) Business Days of the event's occurrence**; (b) suspends performance only to the extent and for the duration that is reasonably required by the Force Majeure event; (c) **in the case of Contractor claiming excuse by reason of Force Majeure, develops a detailed plan for Owner's approval**, such approval not to be unreasonably withheld, conditioned, or delayed, and a request for Change Order pursuant to Section 15.2 (Contractor Requests for a Change Order) **describing how Contractor will recover from the Force Majeure event** and any adjustments to the Contract Price or Project Schedule that Contractor requests in connection with such recovery plan; (d) is not excused as a result of such occurrence from any obligations of such Party which arose before the occurrence causing the suspension of performance; (e) uses commercially reasonable efforts to overcome or mitigate the effects of such occurrence; and (f) promptly resumes performance hereunder when such Party is able to resume performance of its obligations under this Agreement, and shall give the other Party Notice to that effect.

Force Majeure Clause # 6

“*Force Majeure*” when used herein shall mean only an act or event which **prevents a Party from performing its obligations** or complying with any conditions of the Contract if the act or event is unforeseeable and beyond the reasonable control of such Party, with such acts or events being solely limited to: an embargo, tornado, hurricane, tropical storm, transportation emergency, earthquake, flood of fifty-year or greater severity, epidemic, quarantine restrictions, unanticipated national emergency, strikes against the Site of a national scope, or any unreasonable delay by a Governmental Unit in taking, or unreasonable failure of a Governmental Unit to take, in a manner that disproportionately affects Contractor relative to other similarly situated Persons requested action necessary in connection with performance of ...

Force Majeure Clauses

- Notice of Force Majeure
 - Is it clear what this applies to?
- When does a Force Majeure start and end?
 - What about Hurricanes?
 - Evac and return time
 - What about a Hurricane that misses?

Force Majeure Clauses

- How does the term unforeseeable apply to epidemics or future pandemics?
- Are the characteristics and impacts of a pandemic such as COVID-19 sufficiently similar to other force majeure events to be addressed within the same contract clause?
- What notices should be required in relation to a pandemic?
- Are geographic limitations (e.g. impacts only at the project site) in force majeure clauses appropriate for a pandemic?
- Are typical contract remedies for force majeure events appropriate for a pandemic?

Price Escalation Clauses

Price Escalations

- There have been noted price escalations in many building materials since the start of 2021. (Concrete, Steel, Aluminum, etc.)
- Some have tapered off, some have not, they are expected to, but there is no consensus on when.
- Owner's should consider a price fluctuation clause NOT a price escalation clause.
 - i.e. If Owner takes the risk of prices going up, shouldn't they get the benefit of prices going down?
- Biggest two challenges
 - How do you measure price escalations?
 - Indexes
 - Invoices
 - How do you know that charges are really price escalations and not covering up mistakes.

Price Escalation Clause #1

- **Because of volatility in the economic markets, the following cost escalator shall apply: Any increase in building material cost or fuel cost greater than five percent (5%) during the duration of this contract shall constitute a change order for that increase. These cost increases, however, will not be charged to the Owner until the project contingency is depleted**

Price Escalation Clause #2

- The amount of this Contract is subject to increase if the cost of products increase by more than _____% over the amount quoted to us between the date of this Contract/ Proposal and delivery of such _____ products to the Project. In the event of such increases, and upon written documentation establishing the extent of the increase, the contract amount will be equitably adjusted.

Price Escalation Clause #3

- Owner and Contractor agree that the following subcontractor or vendor proposals described on Exhibit X hereto, and only the following proposals, will be considered in determining whether an adjustment of the GMP will occur due to price escalation (“Applicable Proposals”). Subject to approval by Owner, which will not be unreasonably withheld, additional proposals may be solicited and added to Exhibit X. To the extent such Applicable Proposals do not clearly identify the cost of the material, without markup, and the respective subcontractor or vendor is not able to adequately provide written support demonstrating the cost of the items included in such Applicable Proposals on a per unit and per item basis then such proposal shall not be considered when determining any potential adjustment to the GMP due to price escalation.

Price Escalation Clause #3 (cont.)

- The amount provided for the specific materials included in the Applicable Proposals constitutes the (“Baseline Price”) for that material upon which price escalation will be measured. The costs of specific materials paid by the subcontractor or vendor for the same material at the same quantity in the Applicable Proposals constitutes the “Purchased Price.” If the Purchased Price is greater than the Baseline Price, the difference between them is the “Material Escalation Amount” for that material. The sum of all the Material Escalation Amounts shall be the “Qualifying Escalation Amount”.

Contracting Methods

Pricing Methods

- Lump Sum
 - Parties agree to an “all-in” fixed price to perform the contract.
- Cost Plus
 - Cost Plus a Fee up to a Guaranteed Maximum Price
 - Cost Plus a Fee with no GMP
- Unit Price (more associated with horizontal construction – roads, excavation, utilities, pipelines, etc.)

Pricing Methods

Lump Sum

- Labor
- Materials
- Overhead
- Profit
- Risk

Cost Plus a Fee

- Labor
 - Materials
 - Overhead
 - Profit
 - Contingency
- Costs
- Fee



What to do with price escalation risk?

Pricing Methods

Lump Sum

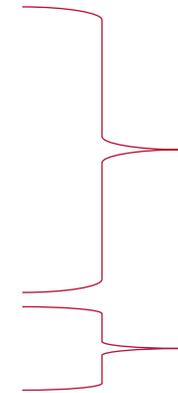


- Labor
- Materials
- Overhead
- Profit
- Risk



Cost Plus a Fee

- Labor
 - Materials
 - Overhead
 - Profit
 - Contingency
- Costs
- Fee



What to do with price escalation risk?

Early Purchase and Storage of Materials

Early Purchase of Materials

- Most contracts permit payment for materials delivered to the jobsite.
- Given the problem with supply chain and long lead time items, more early ordering of materials is occurring.
- What do I need to be concerned with in permitting a contractor to order and store materials off-site?

Early Purchase of Materials

- Location
 - Secure?
 - Proper climate control for sensitive equipment?
 - i.e. near salty air
- Insurance
 - Is it covered by a Property Policy?
 - Is it covered by Builder's Risk?
- Risk of Loss
 - Contractual
 - But what about the real risk of loss after considering limitations of liability, ability of contractor to pay, etc.
 - Does a loss of the item(s) mean a delay in the project?
 - Does this suggest any owner controlled storage location?

Early Purchase of Materials

- Bonding
- Inventorying
 - Upon delivery
 - Periodic
- Proper Storage
 - Any climate control issues?
 - Any security issues?
 - Any environmental issues?

Early Purchase of Materials

- Warranty
 - Many manufacturer's warranties especially for equipment (think HVAC, compressors, moving parts, etc.) equipment begin upon delivery.
 - Extended warranties can be purchased.
 - If materials are stored for 6 months, construction lasts another 6 months, then a 1 year warranty is expired before the equipment is started up
 - Usually can purchase extended warranties, but not without cost.
- Equipment **MIGHT** require a reservicing to clean and lubricate periodically.

Early Purchase of Materials

- Bankruptcy/Judgment
 - What happens if the person storing the equipment files for bankruptcy and/or has a judgment taken against them
- UCC
 - § 2-402. Rights of Seller's Creditors Against Sold Goods.
 - (1) Except as provided in subsections (2) and (3), **rights of unsecured creditors of the seller with respect to goods which have been identified to a contract for sale are subject to the buyer's rights to recover the goods under this Article** (Sections 2-502 and 2-716).

Early Purchase of Materials

- Identification to Order
 - § 2-501. Insurable Interest in Goods; Manner of Identification of Goods.
- (1) (a) when the **contract** is made if it is for the **sale** of **goods** already existing and identified;
- (b) if the **contract** is for the **sale** of future **goods** other than those described in paragraph (c), when goods are shipped, marked or otherwise designated by the **seller** as goods to which the **contract** refers;
- Inventories of stored materials are helpful in this regard.
- Storage in an area segregated from other products is helpful.

Early Purchase of Materials

- What happens if contractor gets paid for off-site stored materials and then returns them for credit?
 - Is it permissible/prohibited under the contract?
 - Is the contract silent on this point?
- Can the contractor move the equipment to store it elsewhere?
- Consider a requirement for notification of moving the materials **UNLESS** they are going direct to the jobsite.

ANCHORAGE
ATLANTA
AUGUSTA
CHARLOTTE
DALLAS
DENVER
HOUSTON
LOS ANGELES
NEW YORK
RALEIGH
SAN DIEGO
SAN FRANCISCO
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