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Price Escalation Risks: The Search for Answers

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Despite progress in the management of COVID-19 impacts, the magnitude of price escalation risks in the construction industry is critically high in the second half of 2021. According to a June report by the Associated General Contractors of America, the price of all materials and services used in construction rose at least 24.3 percent between May 2020 and May 2021. This figure does not reflect the continuing upward trend in pricing or the difficulties in securing delivery.[1] For example, according to a July 14, 2021 Report by Associated Builders and Contractors, an analysis of Producer Price Index data released by the U.S. Bureau of Labor Statistics showed nonresidential construction input prices increased an additional 2.9% between June and July 2021.[2] Unfortunately, volatility of construction material pricing is expected to continue, and with no end in sight.

Does your contract help you with this challenge? It may, but be aware of its likely limitations and the need for proactive negotiation and collaboration. In general, absent contrary contract language, the contractor bears the risk of material price escalation. When a contractor has bound itself to provide labor and materials for a set price, a court will not easily relieve the contractor of the bargain it made. The contractor can argue that its performance is rendered impossible or commercially impracticable by the price escalation, but these are difficult to demonstrate, particularly when the issue is not material shortage but price escalation. The best protection is to specifically address material price escalation in the contract – if you can.

Price Escalation Provisions

None of the standard industry form General Conditions (AIA, EJCDC or ConsensusDocs) provide a clear path to additional compensation for unexpected material price escalations, nor do they contain price escalation clauses.

For new contracts, consider seeking modification to the underlying general conditions, or adding other specific cost/price provisions. ConsensusDocs offers a standard form amendment that allows parties to address price volatility within the context of lump sum contracts. Known as "Amendment No. 1 Potentially Time and Price Impacted Materials," it offers a thoughtful and thorough foundation for price escalation terms. It could provide a model for modification or amendment to other industry form contracts, if the owner is amenable. These are unusual times. If you identify significant price volatility for required material, make the case for a flexible approach to price escalation. For existing contracts without price escalation provisions, other contract provisions likely provide only some small hope.

Force Majeure Provisions

Force majeure provisions typically permit schedule relief for unanticipated events that are beyond the control of the contractor. They do not usually provide price or other monetary relief, as shown by the force majeure terms used by both ConsensusDocs[3] and EJCDC.[4] The ConsensusDocs term is broad, including "epidemics" and "adverse governmental actions" as force majeure events that trigger schedule relief. The American Institute of Architects General Conditions do not contain a traditional force majeure term, but provide an avenue for schedule relief in situations where the contractor asserts that a delay is justified and the architect agrees.[5] Thus, such provisions may work where the contractor

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Read the Fine Print: Recent Decisions Underscore the Importance of Timely Notice of Claims

MATTHEW D. HOLMES

A maxim of construction law stresses the importance of reading your contract. One critical purpose of this is to identify whether the contract imposes time limits on making claims. If it does, the language at issue may consist of only a few words. Do not ignore this language! New York courts consistently enforce contractual notice of claim requirements and impose the harshest result on contractors that fail to comply – the dismissal of their claims. Two recent examples highlight the importance of knowing and adhering to all contractual notice of claim provisions.

In *Universal Constr. Resources, Inc. v. New York City Hous. Auth.*,[1] the contractor filed three actions against the New York City Housing Authority ("NYCHA") alleging failure to pay forced acceleration costs, damages due to delay, breach of contract, breach of the duty of good faith and fair dealing, unjust enrichment, and account stated. Overall, the contractor's combined claims totaled close to $ 9 million.

NYCHA moved to dismiss the actions, arguing that the contractor's notices were untimely under the contract. It also argued that these notice of claim requirements were conditions precedent to the contractor's lawsuits, meaning the contractor's failure to give the notice within the time required defeated its claims. The trial court found otherwise, con-

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faces delay in obtaining necessary materials, but likely will not help with higher material costs.

Equitable Adjustment Provisions

You may think unexpected, significant price escalation would support an equitable adjustment. All three of the standard form General Conditions discussed here include terms that allow contractors to seek additional compensation from an owner based upon principles of fairness.[6] But these are typically tailored for scenarios that involve unexpected changes to the work itself, or some other aspect of construction that is caused by the owner or some other party, not by market forces or even a pandemic.

Other Options

If a contractor cannot secure contract language addressing price escalation, then other options should be explored. The risk of material price escalation can be incorporated into the contract price, but that is difficult to quantify with any certainty and a contractor might price itself out of a project. A contractor might get an owner to agree to employ an allowance to address potential price increases. Pre-purchasing potentially volatilely price materials could also be an option, with the owner's agreement on the pre-payment and stored materials. Value engineering might also identify alternative materials not impacted by serious price escalation. Overall, educating the owner about the risks created by potentially time and price impacted materials is the best first step.

A full contract review will help determine what options could be available to address unexpected price escalations through a change order request, as well as procedures that must be followed to preserve potential claims rights. Document the price changes experienced and make the upstream party aware as required by the contract.

Open Communication and Good Faith Collaboration

The best projects are those where the owner and contractor engage in open communication and collaborate to progress a project to completion, and that includes when a project faces unexpected price changes and supply delays. These conditions are a problem for the owner and contractor alike. Owners choosing to enforce severe inequities are more likely to experience work stoppages, financially strained or bankrupted contractors, unfinished projects, and ultimately higher costs. It is thus in both parties' best interest to address the challenges early, even pre-bid. Research and discuss particularly volatile material pricing and explore the possibility of price escalation terms, alternate materials, or other changes that could avoid the problem. E&D

1 Construction Inflation Alert, AGC The Construction Association [June 2021]).

2 https://www.abc.org/News-Media/News-Releases/entryid/18873/construction-input-prices-rise-2-8-in-june-says-abc.

3 ConsensusDocs 200, Section 6.3 Delays and Extensions of Time.

4 EJCDC 700, Section 4.05(C).

5 AIA A201 2017 Section 8.3.1.

6 E.g. See AIA A201, Article 15; EJCDC C 700, Article 4; ConsensusDocs 200 Article 8.

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cluding that the contractor's allegations of NYCHA mismanagement and delays in reconciling payment for certain costs excused the contractor's noncompliance and raised questions of fact sufficient to deny the motion.

The appellate court disagreed, ruling that NYCHA demonstrated that the contractor failed to serve a notice of claim within 20 days of the accrual dates of the alleged claims, as required by contract. The court rejected the contractor's efforts to rely on various notices and letters sent throughout the project as proper notices of claim under the contract. First, any contractor letter that did not denote itself as a notice of claim, set out the basis of the alleged claim, or list the alleged claim amounts was not proper notice under the contract. Second, though some notices were in proper form, they were untimely, because the claims accrued when NYCHA notified the contractor of changes in or interpretations of the scope of the work. Finally, the court was not swayed by the argument that the contractor's claims accrued when it submitted its last detailed invoice for the work, because that would eviscerate the contract's notice provision. As such, because each of the notices of claim were untimely or otherwise improper, the contractor lost the right to pursue its substantial claims against NYCHA.

The court reached a similar conclusion in *Aps Contrs. v. New York City Hous. Auth.*,[2] reversing the trial court and dismissing the contractor's complaint for additional compensation for painting and lead abatement of roof railings. The contractor argued that certain emails between the parties were sufficient to satisfy the contractual notice of claim requirements since they set forth the nature of the claim and the amount of damages. The court was unpersuaded since none of the emails was designated as a notice of claim, contained all of the information required by the contract in a single document, or expressed a clear intention by the contractor to bring a claim against NYCHA. The court also rejected the contractor's demand that NYCHA's motion be dismissed because it was made before any discovery. The contractor possessed all documents it sent to the NYCHA that it believed satisfied the notice of claim requirement, said the court. Because the contractor failed to produce any document that complied with the contractual notice of claim requirements, it lost the right to assert all of its claims, regardless of actual knowledge of the claims by NYCHA.

These cases demonstrate how important it is for contractors to identify and understand contractual time limits, and specific procedures, for asserting claims. Despite the realities of the on-the-ground pace of a project, being proactive and precise when it comes to claims can prevent the fatal results seen here. E&D

1 192 A.D.3d 470 (1st Dep't March 9, 2021)

2 193 A.D.3d 628 (1st Dep't April 29, 2021).

Toll or Suspension: COVID-Era Executive Orders Impact Legal Deadlines

BRIAN M. STREICHER

For nearly a year, New York attorneys and their clients have been grappling with the ramifications of Governor Cuomo's Executive Order ("EO") 202.8, effective March 20, 2020, and its various renewals through November 3, 2020, which "suspended" or "tolled" most civil deadlines, such as statutes of limitations. The EOs appeared to use the words "suspend" and "toll" interchangeably, but there has been considerable debate among practitioners and judges as to whether they are legally distinct concepts, leading to different results.

Some have argued that suspension means that a deadline is not in effect until the expiration of the suspending law (in this case, EO 202.67, which expired on November 3, 2020). Under this view, any civil deadlines that expired between March 20, 2020 and November 3, 2020 (the "Effective Period") were extended only to November 4, 2020.

Others have argued that EO 202.8 and its renewal through EO 202.67 tolled civil deadlines that occurred during the Effective Period. Under this construction, time does not run during the tolling period, and all impacted deadlines are delayed by up to 228 days, obviously a much longer time period keeping more claims alive.

Both interpretations carried legal support. For example, New York courts after 9/11 and Hurricane Sandy held that EOs were suspensions, not tolls.[1] Other courts, including the New York Court of Appeals[2] and the Supreme Court of the United States[3] have used the terms "suspend" and "toll" interchangeably to mean a true toll. This competing case law added to the confusion regarding the impact of the COVID EOs.

Since the end of the Effective Period, New York courts have resolved this issue in favor of the true toll approach. In *Foy v. State of New York*,[4] the Court of Claims held that the statutory 90-day period for filing a claim for reinstatement of employment was tolled by the EOs, reasoning that the use of the term "toll" in EOs 202.8, 202.67, and 202.72 intended a true toll, not a suspension. In *In the Matter of the Application of 701 River Street Associates*,[5] the court also found that a foreclosure statute of limitations had not lapsed because "[EOs] provided for tolls [and], such tolls were authorized." The decisions of the trial courts favoring the tolling interpretation have now found support in the Appellate Division, where the Second Department, in *Brash v. Richards*,[6] held that the EOs constituted a toll of filing deadlines. The court reasoned that EO 202.67 reiterated and extended the "toll" described in EO 202.8, thereby "expressly and plainly provid[ing] that the subject time limits were 'hereby tolled…'" Although there is no case law yet from the other departments or the Court of Appeals, there now appears to be a growing consensus that Governor Cuomo's COVID-era EOs operated as a toll, rather than a suspension, of various deadlines.

For contractors and their attorneys, these developments are both welcome and significant. Construction law in New York is replete with abbreviated statutes of limitations and filing deadlines, such as the eight-month mechanic's lien filing deadline found in Lien Law § 10, the one-year mechanic's lien foreclosure statute of limitations contained in Lien Law § 17, the ninety-day claim deadline against school districts contained in Education Law § 3813, and the ninety-day tort claim deadline against municipalities found in General Municipal Law § 50-e, among others. It is not uncommon for construction lawyers to learn that these deadlines have come and gone before even receiving the referral from a contractor client. The COVID-era EOs, and their interpretation in the courts as tolls, may offer new life to claims that otherwise were time-barred. This is a positive development, as the point of these EOs was to give businesses the opportunity to address more pressing needs than rushing to the courthouse during the pandemic. Contractors can take some comfort in the fact that the law is trending in the direction of claim survival, rather than claim barring, meaning claims can be decided on the merits rather than on procedural grounds. E&D

1 *Scheja v. Sosa*, 4 A.D.3d 410 (2d Dep't 2004); *Koebel v. New York State Comptroller*, 66 A.D.3d 1307 (3d Dep't 2009); *Randolph v. CIBC World Markets*, 219 F. Supp. 2d 399 (S.D.N.Y. 2002).

2 *Ratka v. St. Francis Hosp.*, 44 N.Y.2d 604 (1978); *Baez v. New York City Health & Hosps. Corp.*, 80 N.Y.2d 571 (1992).

3 *Artis v. District of Columbia*, 138 S. Ct. 594 (2018).

4 71 Misc. 3d 605 (N.Y. Ct. Cl. 2021).

5 EF2021-268027 (N.Y. Sup. Ct., Rensselaer Cnty., April 27, 2021).

6 2021 N.Y. Slip Op. 03436, 2020-08551 (2d Dep't June 2, 2021).

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Ernstrom & Dreste, LLP also publishes the Fidelity and Surety Reporter. If you would like to receive that publication as well, please contact Clara Onderdonk at conderdonk@ed-llp.com. Copies of ContrACT Construction Risk Management Reporter and The Fidelity and Surety Reporter can also be obtained at Ernstrom & Dreste, LLP's website (ernstromdreste.com).

FIRM NEWS

Kevin Peartree attended the AGC NYS Summer Meeting August 5-8, 2021 at The Sagamore in Bolton Landing, New York.

Matthew Holmes, Tim Boldt and Kevin Peartree were on the faculty for the Associated General Contractors NYS training program *Future Construction Leaders of New York State: Educating the Next Generation of Construction's Select Few* on June 29, 2021.

Tim Boldt attended the CFMA Rochester sponsored *Sixth Annual Heidi Caton Classic Golf Tournament* in August, 2021.

Kevin Peartree and Matthew Holmes participated in the Builders Exchange of Rochester and CSI Annual Golf Tournament in June. Ernstrom & Dreste was a beer sponsor for the event.

Brian Streicher attended the Surety Association of Syracuse Summer Event at Saratoga Race Track on August 18, 2021.

Todd Braggins and Matthew Holmes were speakers at the Pearlman Association Annual Conference in Woodinville, Washington, September 8-10, 2021, co-presenting on the topic *"Silence is Golden: Using the Defaulted Principal When the Bond is Silent."*

Tim Boldt will be a featured program speaker for the Surety Association of Syracuse on November 3, 2021.

Clara Onderdonk participated in the Association of Legal Administrators' Chapter Leadership Institute held July 15-17, 2021 at the Hyatt Regency in St. Louis, Missouri.