



38TH CRCA TRADE SHOW & SEMINARS

**JANUARY 19-21, 2022
DRURY LANE, OAK BROOK TERRACE, IL**

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NAVIGATING MATERIAL VOLATILITY

SPEAKER: TRENT COTNEY

JANUARY 2022



Trent Cotney

HOW TO NEGOTIATE EXISTING CONTRACTS?

- Set the stage – identify the issue to the customer
- Identify the key contract provisions that may help you
 - Force Majeure
 - Delay Claim – watch out for no damages for delay provision
- Submit a Change Order
- Negotiate

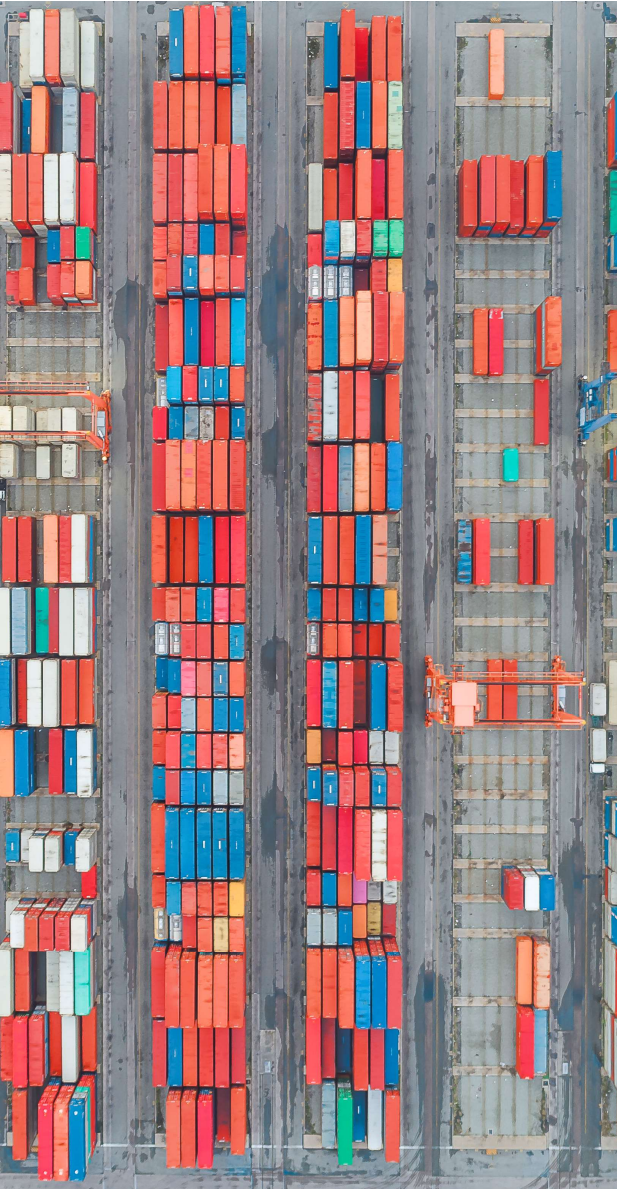


THE ISSUES

Construction industry is faced with material shortage and price increases that have impacted production and caused delays.

Supply chain disruption extends to residential, commercial, industrial, and infrastructure sectors.

Key components of construction including lumber, steel, fasteners, sealants, paints and roofing materials have been impacted.

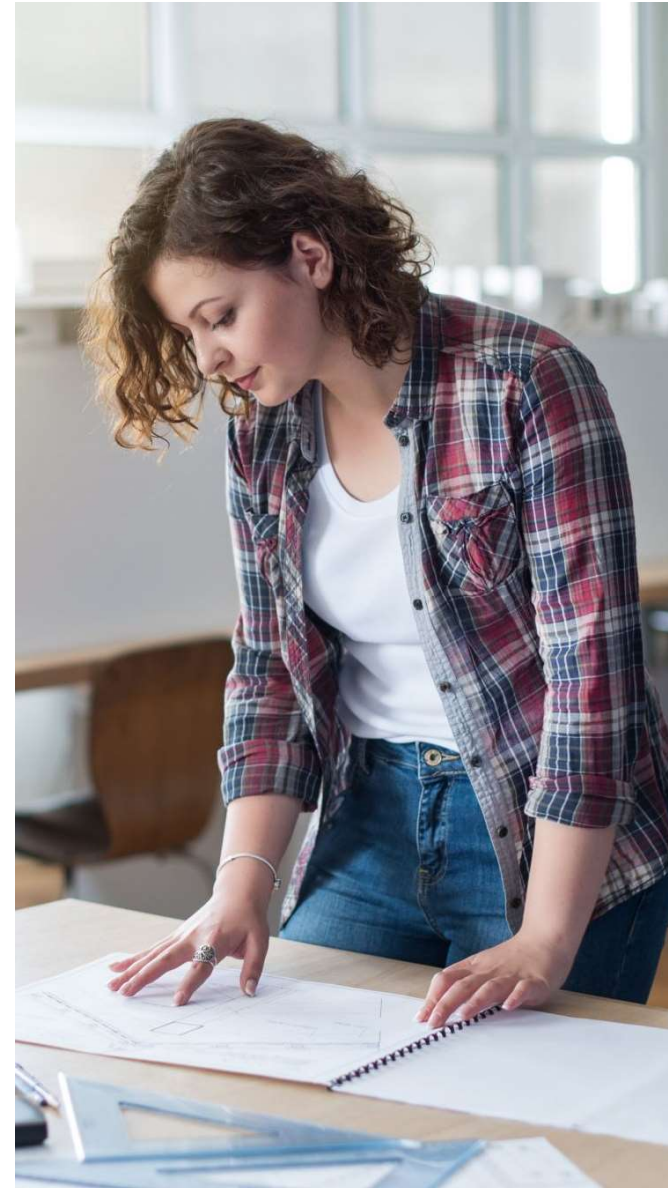


DISTRIBUTOR AND MANUFACTURER NOTICES

- Set the stage with distributor and manufacturer notifications.
- Use industry references to point to the problem.
- Use national news reports.
- Negotiate directly with distributors and manufacturers to provide favorable language in letters that track your contracts: unforeseeable, unforeseen, force majeure

LOOK FOR KEY CONTRACT PROVISIONS

- Force Majeure
- Provisions that govern payment and pricing
- Change order and claims provisions
- Delay provisions – watch out for no damages for delay clause
- Remember: Happy customer, happy contractor



FORCE MAJEURE





WHAT IS FORCE MAJEURE?

- Provides that in the event of a hurricane, war, strike, earthquake or other occurrence beyond control of contractor that performance is excused, project is terminated, or some other form of relief is provided
- Classic Force Majeure Clause:
 - **FORCE MAJEURE.** Any failure or delay by a party in the performance of its obligations under this Agreement is not a default or breach of the Agreement or a ground for termination under this Agreement to the extent the failure or delay is due to elements of nature or Acts of God, acts of war, terrorism, riots, revolutions, or strikes or other factors beyond the reasonable control of a party (each, a "Force Majeure Event"). The party failing or delaying due to a Force Majeure Event agrees to give notice to the other party which describes the Force Majeure Event and includes a good faith estimate as to the impact of the Force Majeure Event upon its responsibilities under this Agreement, including, but not limited to, any scheduling changes. However, should any failure to perform or delay in performance due to a Force Majeure Event last longer than thirty (30) days, or should three (3) Force Majeure Events apply to the performance of a party during any calendar year, the party not subject to the Force Majeure Event may terminate this Agreement by notice to the party subject to the Force Majeure Event.

REVISED FORCE MAJEURE

- **Here is an example of an Acts of God provision that includes pandemics and illnesses like Coronavirus:**
 - **FORCE MAJEURE (INCLUDING PANDEMIC).** Any failure or delay by Contractor in the performance of its obligations under this Agreement is not a default or breach of the Agreement to the extent the failure or delay is due to elements of nature or Acts of God, acts of war, terrorism, material or equipment unavailability, riots, revolutions, pandemics, medical emergencies that have resulted in a local, state or federal state of emergency, COVID-19 or similar viruses or illnesses requiring quarantine, strikes or other factors beyond the reasonable control of the Contractor (each, a "Force Majeure Event"). The Contractor agrees to give notice to the Customer which describes the Force Majeure Event and includes a good faith estimate as to the impact of the Force Majeure Event upon its responsibilities under this Agreement, including, but not limited to, any scheduling changes. However, should any failure to perform or delay in performance due to a Force Majeure Event last longer than thirty (30) days, or should three (3) Force Majeure Events apply to the performance of Contractor during any calendar year, Contractor may terminate the Agreement for convenience as described herein.



The background is a dark blue gradient with various financial-themed elements. On the right, there is a stack of silver coins. Overlaid on the background are several faint, semi-transparent charts: a line graph with circular markers, a bar chart, and a candlestick chart. Text elements include '+5.7% +1.54' and '28.65 29.70' in the top left; '11126.98' and '+2.4%' in the center; and '+135.08 +2.3%' in the top right. The word 'PRICING' is prominently displayed in the center in a large, white, bold, sans-serif font.

PRICING

PRICE QUOTES

What happens if you receive a price quote, but the material prices change?

- Address the issue upstream with your customer
 - Explain the nature of the unforeseen event.
 - Contractual mechanisms – traditional change orders/claims process
 - Price acceleration provision
 - Cost plus as to certain materials
 - Have materials delivered early and store them. You may want to negotiate with owner to prepay for materials or pay storage costs.
 - Consider pricing at time of shipment.





PRICE ACCELERATION PROVISION

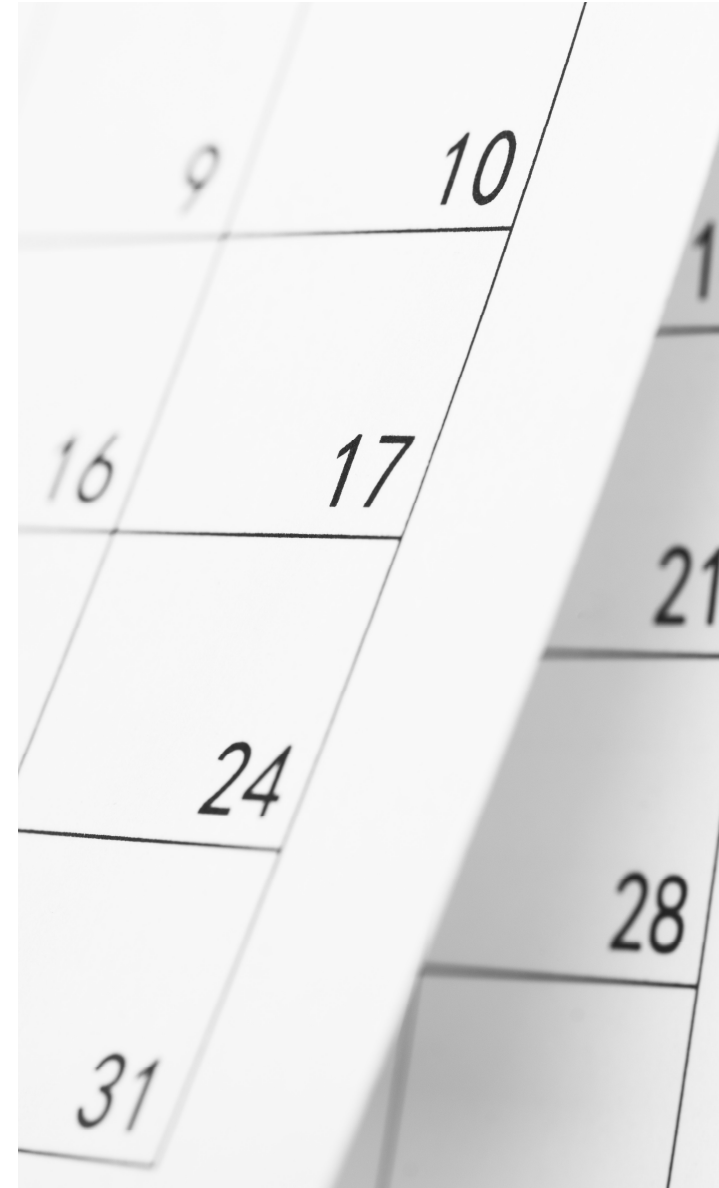
If there is an increase in the actual cost of the labor or materials charged to the Contractor in excess of 5% subsequent to making this Agreement, the price set forth in this Agreement shall be increased without the need for a written change order or amendment to the contract to reflect the price increase and additional direct cost to the Contractor. Contractor will submit written documentation of the increased charges to the Prime Contractor/Owner upon request. As an additional remedy, if the actual cost of any line item increases more than 10% subsequent to the making of this Agreement, Contractor, at its sole discretion, may terminate the contract for convenience.



LEAD TIMES

MANAGING LEAD TIMES

- Systemic issues with long lead times to obtain materials
- How do you address the issue with the customer?
 - Customer service
 - Contractual – material unavailability provision or other provisions that account for the delay
 - Submit a Change Order for time extension
 - Adjust the schedule to accommodate





MATERIAL AVAILABILITY PROVISION

- Due to material shortages, Customer may experience delays related to the inability to timely obtain materials for this project. In the event of such a delay, Contractor shall notify Customer, and Customer agrees to provide Contractor with an extension of time for any delay attributable to the temporary inability to obtain materials.

DELAY PROVISIONS

- Delay clauses may provide the basis to submit a claim for an extension of time and/or price increase.
- Read the clause carefully. No damages for delay provisions will normally prevent the ability to obtain delay-related costs.
- Seek time for every aspect of the project.
- Prior delay may have impacted schedule causing current delay.





HOW TO DEAL WITH LIQUIDATED DAMAGES

- Remember with LD claims, you are just seeking more days to beat the claim.
- Use excusable, concurrent delay such as delay caused by others to knock back days.
- Obtain extensions for every day needed including weather-related delay.
- Use same contractual arguments we mentioned to defend against LDs.
- Rework the schedule to accommodate the lead times so you are maximizing efficiency without acceleration.

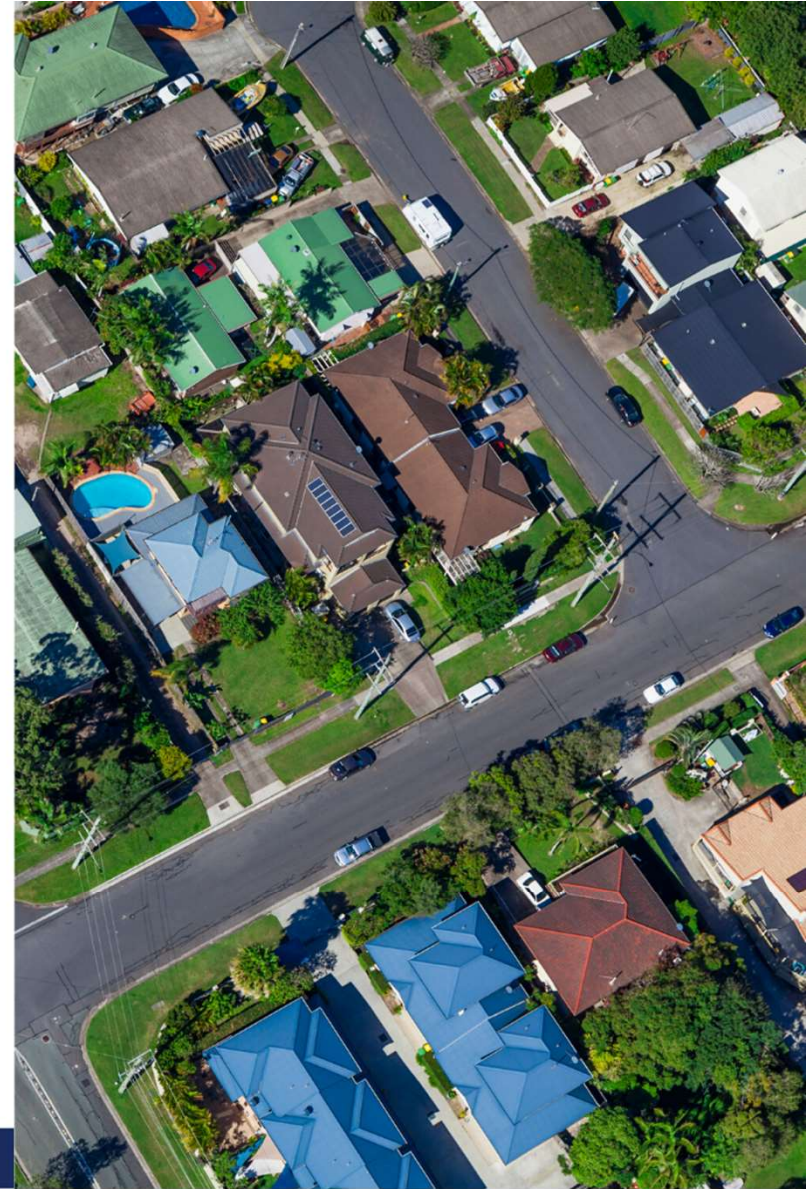
SUBSTITUTION OF MATERIALS

- Make sure to review contracts for your ability to substitute materials in the event of temporary or permanent shortages
- You may be able to substitute materials or entire systems depending on the project.
- But watch out for manufacturer warranties.



Material Substitution

In the event that any specified material or equipment becomes unavailable either temporarily or permanently after the contract is executed, provided that such availability is a result of factors beyond Contractor's control, then in the event of temporary unavailability, the contract time shall be extended to reflect the duration of time that the contractor is delayed by the unavailability, and in the case of permanent unavailability, the contractor shall be excused from providing said material or equipment and allowed to provide an available substitute. To the extent an available substitute is provided by Contractor under this provision, any increase in the cost between the originally specified material and equipment and the substitute shall be paid by the Owner to the Contractor.



Preserving Claims Downstream

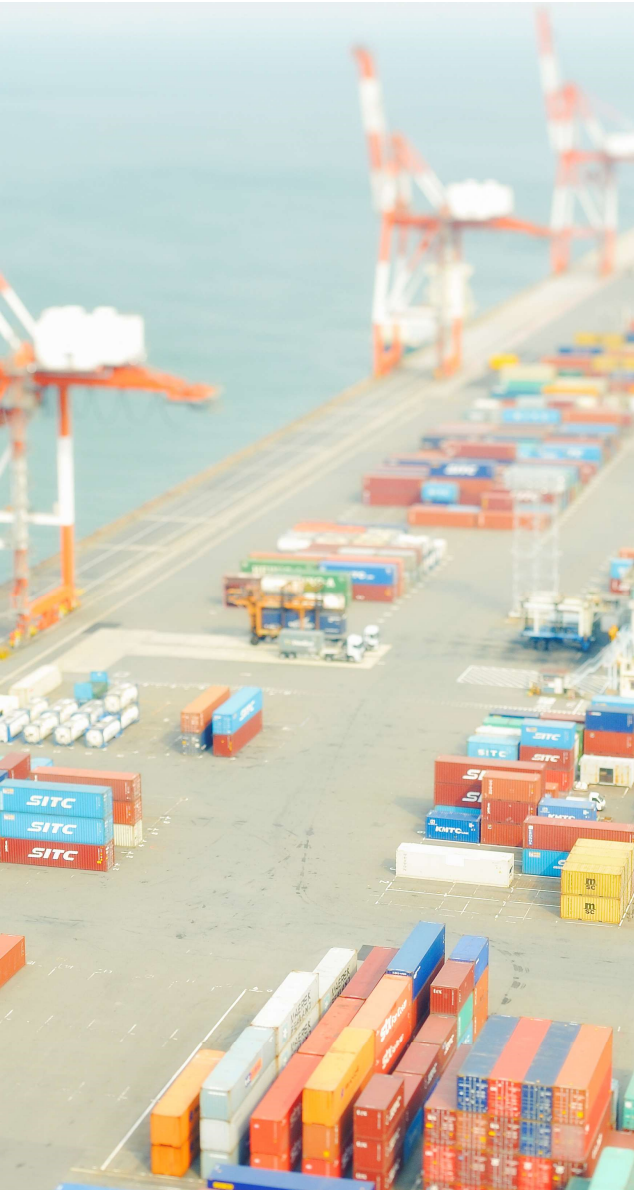
- Great to fly in formation but.... preserve your claims.
- This letter provides notice that you are in breach of the terms of our agreement (applicator/credit) in that you have:
 - Provided guaranteed pricing which you have now increased to our detriment
 - Delayed shipment despite providing a guaranteed ship date
 - Shipping only a portion of the roof system but failing to ship the required fasteners/adhesives/etc.
 - Required an additional payment on top of the guaranteed price in order to receive this shipment.
- As a result, we are reserving all rights, claims, and remedies we may as a result of damages arising out of or relating to your acts or omissions.



FAR Clauses

- 48 CFR § 16.203-2:
 - *A fixed-price contract with economic price adjustment may be used 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. Price adjustments based on established prices should normally be restricted to industry-wide contingencies. Price adjustments based on labor and material costs should be limited to contingencies beyond the contractor's control. For use of economic price adjustment in sealed bid contracts, see 14.408-4.*
- 48 CFR § 52.249-8 – Default provides a fixed-price supply and service clause that the contracting officer may add to your contract. It includes the following language, with paragraphs (c) and (d) being most applicable:
 - **(c)** *Except for defaults of subcontractors at any tier, the Contractor shall not be liable for any excess costs if the failure to perform the contract arises from causes beyond the control and without the fault or negligence of the Contractor. Examples of such causes include (1) acts of God or of the public enemy, (2) acts of the Government in either its sovereign or contractual capacity, (3) fires, (4) floods, (5) epidemics, (6) quarantine restrictions (7) strikes, (8) freight embargoes, and (9) unusually severe weather. In each instance the failure to perform must be beyond the control and without the fault or negligence of the Contractor.*
 - **(d)** *If the failure to perform is caused by the default of a subcontractor at any tier, and if the cause of the default is beyond the control of both the Contractor and subcontractor, and without the fault or negligence of either, the Contractor shall not be liable for any excess costs for failure to perform, unless the subcontracted supplies or services were obtainable from other sources in sufficient time for the Contractor to meet the required delivery schedule.*





CONCLUSION

- Shortages are here to stay.
- Order now and impress upon the customer the importance of doing so.
- Store on site or in the yard but have material in hand.
- Discuss frequently with distributors and manufacturers to determine current status.
- Avoid bids and proposals that lock in prices without caveats.

CONTACT US!



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