

STATEMENT FROM STUART S. ZISHOLTZ

The construction industry is presently dealing with the increase cost in materials including concrete, gypsum, lumber and fuel prices. Contractors are caught in a squeeze as to whether to continue performing the work on a project and lose money or terminate the contract and risk possible legal ramifications.

The best strategy to avoid the severe consequences associated with increased material prices when dealing with a fixed contract price is to address the issue at the time the bid is submitted. This includes incorporating a time period for the acceptance of your bid or locking in the prices from suppliers at the time your bid is submitted.

Once the contract is executed, it is difficult to request a change order or seek an increase in the contract price due to material prices increasing in costs. Under certain circumstances, where events are outside the control of all parties, a change order for increased costs can be requested. Most of the time, a contract permits a change order for unforeseen acts of nature or for acts of God but, generally, not economic events.

A delay or inability to obtain building materials is not a basis for an extra. The contractor will be required to purchase the materials and, if possible, pursue a delay claim or some other claim at the end of the project.

If possible, the contractor can request an escalation clause be inserted into the contract to address price escalation. More likely than not, however, an owner will not agree to the terms of a price escalation clause since it exposes the owner to unnecessary costs above and beyond the agreed upon contract sum.

The worst scenario for the contractor would be to abandon the work due to the increase in material prices. This will result in the owner pursuing a claim against the contractor for all additional costs incurred in completing the contractor's work above the contract sum.

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