

STATEMENT OF STUART S. ZISHOLTZ

Most contracts between an owner and a contractor or a contractor and a subcontractor contain a set price. Occasionally, a contract is based solely on unit prices or time and material. This article will address a contract for a set price.

The construction industry is presently threatened with increases in costs for concrete, gypsum, lumber and fuel prices. Contractors are caught in a squeeze as to whether to continue performing the work and losing money on the project or terminating the contract and risking possible legal ramifications.

The best strategy to avoid the severe consequences associated with increased material prices is to plan for price increases at the time the bid is submitted. This includes incorporating a time period for the acceptance of your bid or locking in the prices for supplies at the time your bid is submitted.

Once the contract is executed, it is difficult to request a change order or 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 at the end of the project.

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

Finally, the worst scenario for the contractor would be to abandon the work due to the increased costs in material prices. This action 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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