



## PRICE ESCALATION AND EXPANDED FORCE MAJEURE CONTRACT LANGUAGE

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It is now an accepted reality of construction that certain products and/or materials specified for a project may be permanently or temporarily unavailable due to shortages of workers or component materials at the manufacturer or in the shipping and distribution channels. A subcontractor has little to no control over the specification and/or availability of materials. Additionally, limited supply of materials and other pressures have caused unabated inflation in the cost of materials. Depending on the trade, some subcontractors are unable to establish firm prices until after materials are received and installed.

Lenders and owners desire certainty in project cost, and general contractors are keen to provide that certainty even if that means transferring the risk of price and supply fluctuations to their subcontractors. Subcontractors cannot and should not bear these risks. These market fluctuations and risks should be borne by the Owner, and the general contractor should at the outset of a project effectively communicate market uncertainties to its customer. Subcontractors should protect against assuming these risks by communicating to the general contractor known market issues and demanding fair and reasonable subcontract provisions to address these issues.

The purpose of the Addendum is to establish a base price for materials and provide a mechanism for the Subcontractor to obtain reimbursement for increases in the price of materials. If the Addendum is used with a Subcontractor's proposal, after the Subcontractor is awarded the job, the Subcontractor must assure that the Addendum or the language set forth in that Addendum becomes part of the Subcontract. The modifications to §8.3 of the AIA General Conditions create a broader force majeure clause which protects the Subcontractor from, among other things, delay in material availability and shipment over which it has no control. This broadened force majeure clause can be adapted for use in any AIA or non-AIA contract form. Note that simply having a broad force majeure clause does not omit the Subcontractor's responsibility to notify its upstream party of delays in writing and seek a proper change order. This is especially the case on projects employing liquidated damages.

## **EXPANDED FORCE MAJEURE CLAUSE**

### **§ 8.3 Excused Delays and Extensions of Time**

§ 8.3.1 If the Contractor is delayed at any time in the commencement or progress of the Work due directly or indirectly to reasonably unforeseen circumstances or a cause or causes beyond the reasonable control or without the fault or negligence of the Contractor, including but not limited to, (1) an act or neglect of the Owner or Architect, of an employee, servant, or representative of either, or of a Separate Contractor; (2) changes ordered in the Work; (3) labor disputes, fire, or delay in deliveries of materials and/or labor due to, among other things, economic and/or supply chain fluctuation beyond the Contractor's reasonable control; (4) unavoidable casualties; (5) adverse weather conditions, including but not limited to, landslides, lightning, earthquakes, hurricanes, storms, floods, washouts, sink holes, snow, ice, or unusually cold or hot temperatures making work conditions unreasonably difficult or intolerable documented in accordance with Section 15.1.6.2, or other such causes beyond the Contractor's control ; (6) delay authorized by the Owner pending mediation and binding dispute resolution; or (7) delay by governmental or regulatory authority; (8) acts of God; (9) unforeseen industrial disturbances such as embargoes, tariff disputes, material shortages, and labor shortages; (10) acts of a public enemy, war or war-like action (whether actual, impending or expected and whether de jure or de facto), acts of terrorists, arrests or other restraints of government (civil or military), blockades, civil insurrection, riots, civil disturbances, public demonstrations and protests; (11) epidemics and/or pandemics including, but not limited to, continuing effects of the Covid-19 pandemic; (12) explosions; (13) unanticipated, significant breakage or accident to equipment or machinery; (14) confiscation or seizure by any government or public authority; and (15) nuclear reaction or radiation, radioactive contamination, pollution or other environmental hazard or contamination; (16) or other causes that the Contractor asserts, and the Architect determines, justify delay, then the Contract Time shall be extended for such reasonable time . In the event of an Excused Delay, the performance of such obligation or responsibility shall be excused and suspended for such reasonable period of delay and the period for the performance of any such obligation or responsibility shall be extended for a period equivalent to the period of such Excused Delay. Notwithstanding any provision to the contrary, Contractor shall make reasonable efforts to provide the Owner with written notice of any excused delay of an event justifying such extension on a monthly basis commensurate with submissions of any payment application and Owner shall not unreasonably withhold execution of a Change Order acknowledging an extension of time.

## **ADDENDUM NO. 1**

**This Addendum No. 1 is made contemporaneous with and modifies the Proposal to which it is attached.**

1. **POTENTIALLY TIME AND PRICE-IMPACTED MATERIAL.** As of the date of this Addendum, markets providing essential materials to the Project are experiencing or are expected to experience significant, industry-wide economic fluctuation during the performance of this Agreement which may impact price, availability, and delivery time frames ("Potentially Time and Price-Impacted Material"). This Addendum provides for a fair allocation of the risk of such market conditions between the parties.
2. **BASELINE PRICE AND TIME.** The price set forth in the Proposal shall be considered the Baseline Price.
  - 2.1. Compensation for any Potentially Time and Price-Impacted Material shall not be duplicated or included in any contingency amounts established under the terms of the Proposal or Prime Contract.
3. **ADJUSTMENT IN BASELINE PRICE.** If during the course of the Project a Potentially Time and Price- Impacted Material item experiences an increase in its Baseline Price, Subcontractor may notify Contractor in writing within thirty (30) Days from the date an equitable adjustment to the Contract Price arises and shall provide appropriate documentation substantiating such adjustment. An adjustment in the pricing for a Potentially Time and Price-Impacted Material shall not include any amount for overhead and profit.
  - 3.1. In the event of an increase in a Baseline Price, the Contract Price shall be equitably adjusted to reflect such increase, subject to section 3.2 of this Addendum, but only for those Potentially Time and Price-Impacted Materials delivered on or after the date on which written notice of the adjustment in Baseline Price is given.
  - 3.2. No adjustment shall be made for any quantities of Potentially Time and Price-Impacted Materials delivered prior to the date on which written notice of the adjustment in Baseline Price is given, unless the failure to deliver such quantities before that date is within the sole control of Subcontractor.
  - 3.3. Payment, if any, for an adjustment shall be made in accordance with the terms of the Proposal.
4. **TIME-IMPACT AND AVAILABILITY.** If the Subcontractor is delayed at any time in the commencement or progress of the Work due to a delay in the delivery of, or unavailability of, a Potentially Time and Price- Impacted Material, beyond the control of and without the fault of the Subcontractor, the Subcontractor shall be entitled to an equitable extension of the Contract Time and an equitable adjustment of the Contract Price in accordance with this Addendum and the Proposal.

Notwithstanding any other provision to the contrary, the Subcontractor shall not be liable to the Contractor for any expenses, losses or damages arising from a delay in the delivery of a Potentially Time and Price- Impacted Material item not the fault of the Subcontractor.