



# NFC Contracting Considerations in a Rising Raw Material Market

Kent Pagel, SBCA Legal Counsel



# Meeting Antitrust Issues

- Avoid communications that may be viewed as a restraint of trade AND specifically there should be no discussion of:
  - Pricing which can include pricing strategies, discounts, margins, and achieving a market selling price
  - A violation of US antitrust law Does NOT require agreeing to a specific price.

# Background

- Lumber and Building Material Suppliers not Locked in Contractually.
  - EXAMPLE: One lumber supplier's "Order Acceptance" Terms and Conditions of Sale state:
    - Prices are subject to Buyer's taking delivery beg. on 4/1/2021 and ending no later than 7/1/2021 with deliveries made evenly over that period.
    - If Buyer does not take delivery Seller has right to either (1) cancel and Buyer pays a cancellation fee of 25% or (2) require Buyer to pay fee to extend contract equal to 10% of unshipped contract balance each month
    - Buyer has no right to cancel or extend deliveries.
    - If Buyer does not take delivery, it pays Seller's storage costs.
    - Seller right to delay shipments on account of Force Majeure types of events, including if underlying lumber shipments are not made.

# Background

- COMPARE to Turnkey Framing Subcontractor Subcontract Agreement Requirements:
  - Lump sum agreement—not subject to escalation on account of fluctuations in cost of labor or materials.
  - Subcontractor not entitled to increase in lump sum as a consequence of delay.  
[Some may provide a carve out for amounts received by GC under Prime Contract with Owner]
  - No right on the part of Subcontractor to terminate except for default.  
[Compare that to the right of Contractor to terminate for convenience].

# Risks to turnkey subcontractors when dealing with increased costs of materials:

- Responsible for the increased costs of the materials and resulting impact on profitability; and
- Faces liability under the contract for delays that may occur if there are material shortages due to price increases.
- TAKEAWAYS:
  - Suppliers seek to push higher costs up the supply chain—because they can.
  - Whether turnkey subcontractors can pass those costs depends on their contracts.

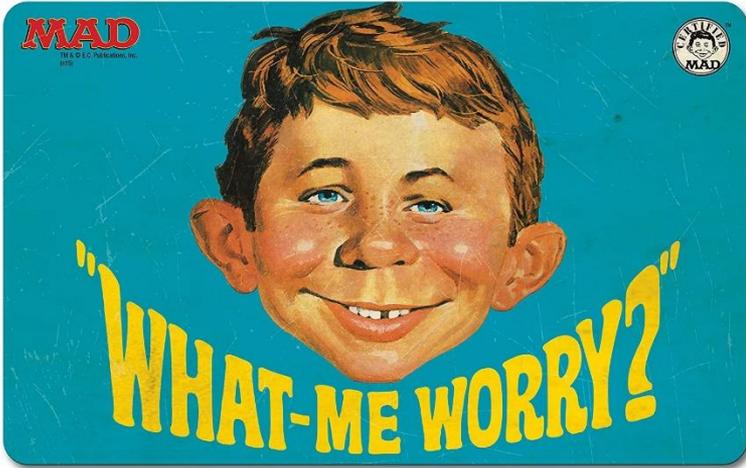


## Similar Actions Being Taken by Truss and Component Manufacturers



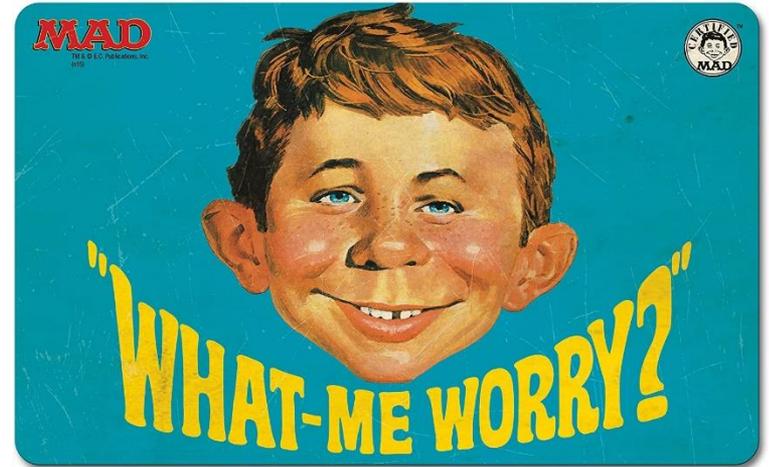
Component Manufacturers have realized they do not make money on wood, but on the value trusses and components add to a project.

More include and are firm on bid acceptance dates, pricing deadlines, and escalation provisions based on raw material price increases.



- Risks have become high on framing contractor pricing when moving from “labor only” to turnkey.
- Originally GCs wanted framers to take material management risk; now they are transferring pricing risks.
- Turnkey framers need to view themselves as middlemen for contracting purposes as do General Contractors.

- Now more than ever turnkey framers should be asking themselves the following questions:
  - If a rapid raw material price increase occurs, can I increase my contract price to reflect the increased cost of the material?
    - Most turnkey framer contracts with their customers do not provide for either indexing of raw material costs or other price adjustments as they are fixed-price/lump sum contracts.
- Can I terminate the contract without liability because I cannot afford to perform the work at the increased price?
  - Most turnkey framer subcontracts do not contain early termination rights.



# Review Your Contracts Where the Work Has Yet to Start

- Review older contracts for “Force Majeure” provisions.
  - First, consider whether you have bonded the project.
  - Force majeure is a contractual provision found within a variety of subcontracts that may allow for you to seek price adjustments or to terminate your contract if a specified event beyond your control occurs.
  - State law specific.
  - Standard force majeure clauses typically include protections against strikes or acts of a labor union, floods, earthquakes, acts of God, and acts of war.
  - Unfortunately, these provisions typically fail to cover material price increases.
- Nevertheless, consider a well drafted force majeure provision in future subcontracts:
  - For example, a properly drafted clause should identify the construction material you are going to supply, the value of said material at the time the contract is executed and explain that material price increases beyond a certain threshold amount, say 20% for example, constitute an event for which you are entitled to additional compensation or to terminate the contract without liability.

# “Impracticability” Defense

- Some states hold the impossibility defense to include impracticability.
- The doctrine of impracticability is easier to demonstrate than impossibility.
- Impossibility/Impracticability excuses performance where a party can demonstrate that performance may be so difficult and expensive that it becomes “impossible or “impracticable,” though technically possible.
- Circumstances rendering performance more difficult or costly than the parties originally contemplated do not necessarily rise to the level of impracticability, however.
- QUESTION: Does ongoing and continuing lumber price volatility make an impracticability argument more difficult?

# Analysis Sequence

- First review your underlying subcontract to see if a force majeure provision exists. Look to the owner's contract as well if incorporated by reference.
- The existence (or absence) of a force majeure clause is not the end of the inquiry.
- The common law remedy of impossibility or the doctrine of impracticability may apply.



# Analysis Sequence

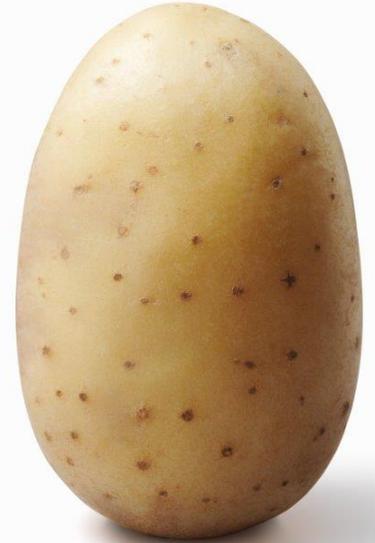
- The analysis must include:
  - State of the project and applicable state law.
  - The terms of the underlying contract.
  - The turnkey framer may be facing the issue of increased price for both truss lumber and framing lumber.
  - If price, does some type of pricing or price protection clause exist.
  - Delays caused by the buyer.
  - Putting together scientific or objective statistics that can be used to augment the shortage of supply or dramatic increase of price defense.

## Practice of GCs keeping turnkey framer on the hook but not letting them make any money.

- It does make practical sense to provide some relief to a subcontractor (or supplier for that matter) rather than face a default precipitating the need to re-procure.
- A replacement framer:
  - Would pass the price escalations onto the GC and quite possibly the owner anyway,
  - Will probably not guarantee the previous subcontractor's work,
  - May possibly cause time delays on the project due to remobilization, and
  - There may possibly be a drop in quality.
- Be wary of the GC who promises to help!

# The old standby—a fixed price contract, no longer cuts it.

- As we see for materials, prices can and have fluctuated rapidly. Someone is going to pay for the price increase—like a “hot potato.”
- Nearly impossible to determine an accurate material price when creating a bid for a project.
- Fixed price contracts are generally quoted months earlier when, in fact, prices have increased since that time.
- The provisions or strategies subcontractors have historically attempted to use to protect themselves from price increases no longer work.



# The old standby—a fixed price contract, no longer cuts it.

- If subcontractors do not alter the language in their contracts to take cost increases that may occur during the term of a contract into account, they may be forced to assert difficult legal arguments for “equitable adjustments.”
- Do not count on equity and fairness arguments to work.
- Stating the obvious:
  - If GCs expect to continue fixed price contracts with no escalation clauses, they have to expect their subcontractors to build a hefty contingency into their bids to cover price increases—with this scenario the GC and owners ultimately pay more when the price increases do not occur.
  - General contractors will do the same and owners will pay more.

# Key Language That Protects Contractors from Price Escalation

- “Day One” provision alternative:
  - The right to capture material price increases immediately.
- Second alternative:
  - Compensation after a set period, i.e., no material cost increases for the first 100 days.

# Key Language That Protects Contractors from Price Escalation

- Third alternative—the sharing option:
  - Entitlement to reimbursement for higher material prices but only after the rate of increase reaches a certain percentage. Up to that threshold, the turnkey framer would bear the risk.
  - EXAMPLE:  
**In the event of significant delay or price increase of material occurring during the performance of the Subcontract through no fault of the Subcontractor, the Subcontract Sum, time of performance, and Subcontract requirements shall be equitably adjusted by change order in accordance with the procedures of the Contract Documents. A change in price of an item of material shall be considered significant when the price of an item increases \_\_\_ percent between the date of this Subcontract and the date of performance of the Subcontract Work.**

# Key Language That Protects Contractors from Price Escalation

- Other examples:
  - Tying to lumber market indexes.
  - Using “collars” to restrict price changes to a range and matching contract terms with those of supplier contracts.
- Consider negotiating out any liability whatsoever to the GC for any damages associated with delays in getting materials.
- Avoid the impact of liquidated damages clauses that can be implicated when delays arise under a subcontract.

## Are early material purchases an effective way to manage the risk?

- May be impractical for GCs and turnkey farmers who rely on draws—but possible perhaps through the owner or GC purchasing the materials.
- Changes become more difficult and expensive in this event.
- Additional costs for storing and handling.
- Extra contracting.

# Bid and Contract Pricing Provisions **BEST PRACTICES**

- Force Majeure Provision;
- Stated period of acceptance on all bids/proposals; and
  - Duration of pricing provision; and/or
  - Pricing tied to raw material escalation provisions.

# Sample Force Majeure

Subcontractor shall not be liable or responsible to Contractor under this Subcontract, nor be deemed to have defaulted under or breached this Subcontract, for any complete or partial failure or delay in fulfilling or performing any term of this Subcontract, when and to the extent such failure or delay is caused by or results from acts beyond Subcontractor's reasonable control, including, without limitation, the following force majeure events ("Force Majeure Event(s)"): (a) acts of God; (b) flood, fire, earthquake, epidemic, pandemic, contagious disease outbreak, explosion, or other similar natural disasters; (c) war, invasion, hostilities (whether war is declared or not), terrorist threats or acts, riot or other civil unrest; (d) government order or law; (e) actions, embargoes or blockades in effect on or after the date of this Agreement; (f) action by any governmental authority; (g) national or regional emergency; (h) strikes, labor stoppages, lockouts, or slowdowns or other industrial disturbances; (i) unavailability of materials or components, insufficient production capacity, or unavailability or shortage of fuel products; (j) shortage of adequate power facilities or transportation means; (k) failure of computer systems to operate properly, destruction or loss of records or data; and (l) other similar, unforeseen events, circumstances, or causes beyond the reasonable control of Vendor. If and to the extent of any delay which is excused pursuant to this section, the relevant scheduling dates for the Work and other excused performance dates will be deemed extended for a period of time equal to the period of such excused delay and the parties may mutually agree on new delivery or performance dates to apply at the conclusion of such extension period. Subcontractor shall give notice within ten (10) days of the Force Majeure Event to Contractor, stating the period of time the occurrence is expected to continue. Subcontractor shall use diligent efforts to end the failure or delay and ensure the effects of such Force Majeure Event are minimized. Subcontractor shall resume the performance of its obligations as soon as reasonably practicable after the removal of the cause.

# Sample Period of Acceptance Bid Language

Your signature below indicates your acceptance of our Bid Proposal and its Terms and Conditions. Our Bid Proposal is open for acceptance for seven (7) days from the date issued (the "Contract Acceptance Date"). After the Contract Acceptance Date, the Bid Proposal shall be considered withdrawn and of no binding effect on Subcontractor.

# Sample Lumber Pricing Escalation Provision

The Subcontract Sum includes a material cost for lumber and lumber value-added products including trusses and components (the "Lumber Products"). The market for lumber, including the species and grades commonly used in the Lumber Products, is volatile and sudden price increases could occur. The material cost of the Lumber Products included in the Subcontract Sum has been calculated based on the [**describe index to be used**, the "Base Index"].

For the Lumber Products purchased to complete Subcontractor's Work, the Subcontract Sum shall be equitably adjusted by [**X% or \$Y**] for each [**\$X**]/Thousand Board Feet or more increase or decrease from the following [**\$Z**]/Thousand Board Feet (the "Base Price") as compared to the price published in the Base Index.

Where the price of the Lumber Products increases above the Base Price as noted, the Subcontract Sum shall be increased as stated and Contractor agrees to pay that cost increase to Subcontractor. Any claim by Subcontractor for payment of a Subcontract Sum price adjustment, shall require written notice delivered by the Subcontractor to Contractor stating the increased cost, supported by references to the Base Index. Where the price of lumber decreases below the Base Price, the Subcontract Sum shall be decreased as stated and the Subcontractor agrees to decrease the Subcontract Sum accordingly.

# Upcoming Webinars

Wednesday, March 31 | 3:00pm EST

## Grow Your Framing Business

*Chris Tatge, Pedro Loureiro, Scott Stevens and Bruce Jones*

These NFC Members know what it takes to grow and lead a highly successful wood framing contracting business. Now they want to give back to you by offering this FREE, 30-minute conversation (with Q&A to follow) about the most impactful lessons they've learned from their years in the business.

This Webinar is Sponsored by:  
NFC and MAGNI. Visit the MAGNI  
website to sign up today:

<https://info.us.magnith.com/framing-webinar>

Tuesday, April 6 | 2:00pm CST

## NFC Framer Roundtable on Navigating a Volatile Lumber Market

*Kent Pagel, SBCA Legal Counsel*

**NFC Members Only  
Webinar**

[webinars@sbcacomponents.com](mailto:webinars@sbcacomponents.com)

# Questions?

**Kent Pagel,**  
**SBCA Legal Counsel**  
kjp@pdhlaw.com

**Thank you for joining us today!**