



Canadian Construction  
Association  
**Best Practices Services**

# Joint TC and GC NAC bulletin: Price instability



## JOINT TC & GC NAC BULLETIN: PRICE INSTABILITY

This two-part bulletin was prepared by the Canadian Construction Association's Trade Contractor and General Contractor National Advisory Councils to provide best practice guidance to contractors on handling cost escalation and price fluctuations.

### PART 1 – TRADE CONTRACTORS

The Trade Contractor National Advisory Council of CCA ("TC NAC") has produced this bulletin to provide recommended best practices that can assist trade contractors in managing cost instability and seeking compensation for extraordinary conditions. The TC NAC recognizes the challenges faced by trade contractors in mitigating risk, most especially by trends and issues that are global and well beyond the ability of a trade contractor to price into a bid.

Managing cost instability begins at the bidding or project pursuit stage. The TC NAC recommends trades use the term "cost instability" in discussing this issue with general contractors and owners.

#### Read your contract

- Read your contract: if there is a flow down provision from the prime contract, get and read a copy of the prime contract.
- Ask and provide clauses to be included that address your concerns: realistically, you probably won't be successful.
- If you don't like the contract and the risk is too much, don't bid and don't sign. Your business and your livelihood may depend on it.

#### Considerations when you are bidding

- If there is contractual language addressing cost instability, has the intent been discussed? Do all parties have the same understanding?
- Is the project's budget disclosed and is it realistic?
- Do you know the general contractor and the owner? Have they been flexible in the past with considerations beyond the scope of the contract, like cost instability?
- Do you know who the project managers are for each party (general contractor, owner, and consultant)? If you have to make a claim, those individuals will likely be the judge and jury.

#### When you are in construction (and in contract)

Get uncomfortable. To make the case for a change in contract price, you will likely have to disclose information that is not typically disclosed on a stipulated sum contract. However, if you want to be compensated, this will likely be required.

- Give Notice in Writing in accordance with your contract.
  - Keep and maintain full and detailed accounts and records necessary to document the situation. This is required under most contracts. Start early in documenting the situation's impact.
  - Explain the situation: do not assume they understand your challenges and your sector of construction.
  - Have a conversation to discuss. Get off email and meet face to face.
  - Come with evidence:
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- o Show emails, quotes, invoices, notices from suppliers, and other relevant documentation.
- o Indices can be helpful in understanding and explaining baseline market pricing to the general contractor and the owner.

### **Be prepared for a claim for credit**

Cost instability goes both ways: be prepared for this eventuality and keep proper records.

### **Talk to Experts**

An expert could be within your company or someone external. If you are ever in doubt, speak with an experienced construction lawyer.

CCA recognizes and thanks the BC Construction Association for their contributions in preparing the Trade Contractor portion of this bulletin.

CCA bulletins are a product of a consensus-building process aimed at balancing the interests of all parties on the construction project. They reflect recommended industry practices. Readers are cautioned that the guides do not deal with any specific fact situation or circumstances. They do not constitute legal or other professional advice. The CCA does not accept any responsibility or liability for loss or damage that may be suffered as a result of the use and interpretation of this bulletin.

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## PART 2 – GENERAL CONTRACTORS

As a benefit to the owner, contractors should let their clients know that without an escalation clause their pricing (and their competitors' pricing), will likely be inflated to protect against the risk of market fluctuations. Explain that it will be cheaper to bid using current material costs, knowing the protection of an escalation clause is in place, rather than imposing significantly higher costs to protect against market conditions that may be encountered in the future.

Construction labour and product costs have experienced material fluctuation over the past few years. The market has also experienced significant supply chain disruptions. As a result, negotiation of changes to this "traditional" risk allocation under standard form contracts has become more prevalent. Certainly, placing the majority of the price fluctuation on a single party is not appropriate, particularly for long-term projects where work will be performed and materials procured over many years.

For this reason, it is recommended that parties consider the inclusion of a material price escalation clause in their contracts to establish an agreed-upon metric for when the price and schedule may be adjusted in response to market price fluctuation and/or supply chain shortages. The issue of price escalation can be addressed in various ways, and parties are encouraged to be creative and flexible in determining what is most appropriate for the subject project and contract. For example, a price escalation clause may allow the fixed price or GMP (Guaranteed Maximum Price) to be adjusted when the difference between the price quoted at bid time and the price of the material when delivered exceeds an agreed-upon threshold. Material price escalation clauses can also work as a savings clause if material prices decrease beyond a certain threshold, which can be a useful incentive to facilitate the inclusion of an escalation clause in the contract.

Key elements to address in a material price escalation clause include:

- **What will trigger the party's entitlement to relief?**
    - Reasonably unforeseen or out of control change in cost of any item of the work or only for specific products or materials?
    - Supply chain disruption within a specified geographic area preventing or delaying product delivery to the site?
  - **How and when will the change be measured?**
    - The difference between the price quoted by a supplier at bid time and the price of the material when delivered, as evidenced by quotes from the same supplier?
    - Change in the building construction price index during the contract term?
  - **What relief will the parties be entitled to?**
    - Adjustment (increase, decrease or both) to the Contract Price or GMP? Can overhead and profit be included in the amount of the adjustment?
    - Adjustment to the schedule/Contract Time?
    - Right of termination?
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An example of a material price escalation clause is set out below. Parties are encouraged to make decisions regarding the use of market price escalation clauses on a contract-by-contract basis and should consult with their legal counsel in determining the most appropriate approach to price escalation for the subject project.

## **EXAMPLE MATERIAL PRICE ESCALATION CLAUSE FOR CCDC 2 – 2020\***

Add new paragraph GC 6.6.7 as follows:

“6.6.7 Either the Owner or the Contractor shall be entitled to give timely Notice in Writing of any substantial change in the cost of Products beyond levels assumed or committed at the time of entering into the Contract, and to present for equitable adjustment of the Contract Price substantiation of the change in costs of the Contractor. A Change Order shall be issued in respect of such changed costs as is reasonably demonstrated by the documentation presented in accordance with Part 6 of the General Conditions – CHANGES IN THE WORK. Similarly, should the Contractor experience a delay in supply of Products beyond that which may reasonably expected as of the time of entering into the Contract, the Owner and the Contractor agree that the Contractor shall be entitled to give timely Notice in Writing of such delay, and to present for equitable adjustment of the Contract Time substantiation of the delay experienced by the Contractor and/or its Suppliers and Subcontractors. The Owner shall issue a Change Order in respect of such delay as is reasonably demonstrated by the documentation presented in accordance with Part 6 of the General Conditions – CHANGES IN THE WORK. This paragraph 6.6.7 shall amend and take precedence over any other provision to the contrary in the Contract Documents.”

### **\*Note:**

- For use of the foregoing clauses in the CCDC 5B – 2010 all references to “Contractor” should be replaced with “Construction Manager” and all references to “Contract Price” should be replaced with “Construction Manager’s Fee and any Guaranteed Maximum Price”
- For use in the CCA 1 – 2021, all references to the terms below should be replaced as noted:
  - o “Contract” replaced with “Subcontract”
  - o “Subcontractors” replaced with “Sub-Subcontractors”
  - o “Contractor” replaced with “Subcontractor”
  - o “Owner” replaced with “Contractor”
  - o “Contract Price” replaced with “Subcontract Price”
  - o “Contract Time” replaced with “Subcontract Time”
  - o “GC 6.6.7” replaced with “SCC 6.6.7”
  - o “Part 6 of the General Conditions – CHANGES IN THE WORK” replaced with “Part 6 of the General Conditions – CHANGES IN THE SUBCONTRACT WORK”

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