



Adapting to Material Shortages & Rising Costs

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Speakers



Since 1999, Trent Cotney, CEO of Cotney Attorneys & Consultants, has dedicated himself to serving the construction industry. He serves as General Counsel to NRCA, FRSA, WSRCA, RT3 and NSA. He is licensed in eight states, and routinely represents contractors on a variety of construction-related matters including contract review, construction disputes, and OSHA defense.



John Kenney has 45 years of experience in the roofing industry. Prior to Cotney, John started his career by working as a roofing apprentice at a family business in the Northeast. Since then, John has worked for multiple Top 100 Roofing Contractors and is intimately familiar with all aspects of production, estimating, and business operations.

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The Issues

Construction industry is faced with material shortage and price increases that have impacted production and caused delays.

Supply chain disruption extends to residential, commercial, industrial, and infrastructure sectors.

Key components of construction including lumber, steel, fasteners, sealants, paints and roofing materials have been impacted.

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The Issues (continued)

Canada has seen disruptions in supply chains which coupled with an explosive housing market, has resulted in some staple building materials like oriented strand board (OSB), to triple in price.

Retailers and Contractors alike expect shortages for more than just lumber. Plumbing pipes, drywall and compound, plus wire, will become difficult to get in quantities.

The Ontario Home Builders Association stated that the building industry has never faced supply chain issues like this before, with shortages causing project delays.

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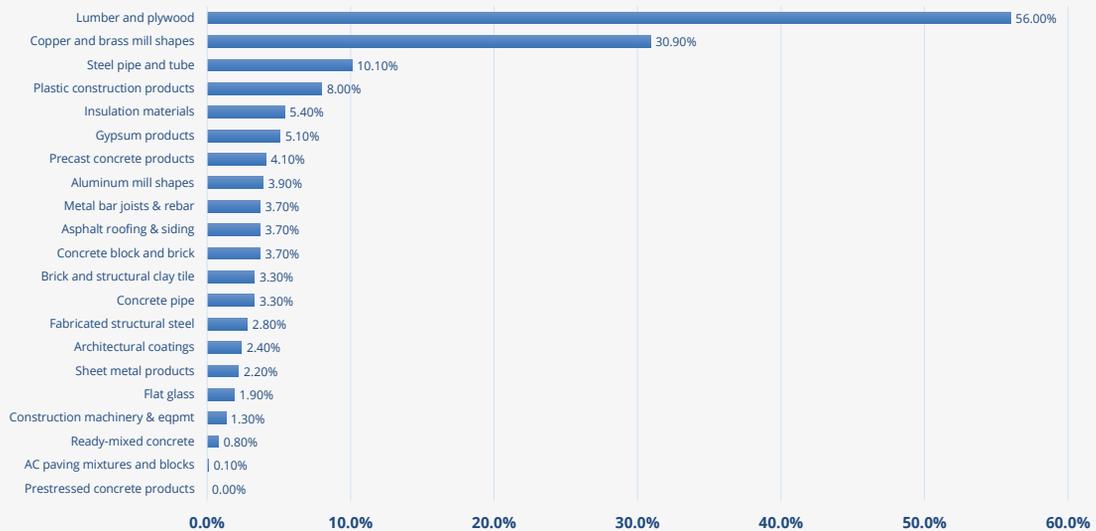
Material Prices Have Risen Over The Past Year

Material	% change, March 2020 to March 2021	% change, Feb. 2021 to March 2021
Softwood lumber	83.4	6.8
Hardwood lumber	27.3	9.0
Sheet metal products	6.3	3.9
Asphalt roofing and siding	4.3	2.5
Enameled iron and metal sanitary ware	2.9	-0.9
Builder's hardware	2.3	1.2
Soft plywood products	101.3	16.2

Sources: Yieldpro.com, Construction materials prices jump again in March

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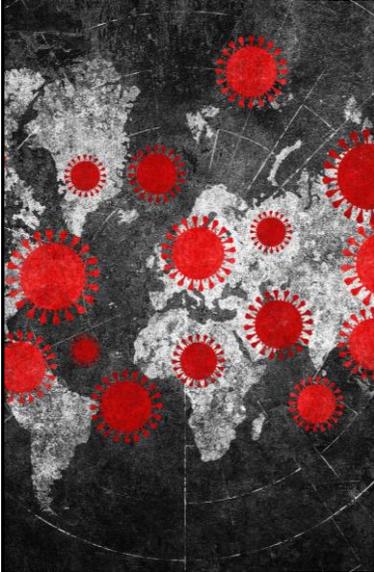
Construction Materials Price Movement - Last 12 Months



Sources: US Bureau of Labor Statistics

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The Causes



- Tariffs and trade war with multiple countries including China, Canada, and EU.
- COVID-19 has resulted in a series of material delays and supply chain disruptions.
 - Manufacturer plant shutdowns
 - 10% reduction in output for some manufacturers
 - Closed borders in Canada and beyond
 - The effect of the lack of supply and increased demand of materials is likely to be felt more acutely in Canada, as provincial restrictions remain.
- Massive storms
 - El Derecho – 17 confirmed tornados. Estimated maximum wind speed of 146 mph. 10 million acres of crops destroyed. \$7.5 billion in total damage
 - Hurricanes – 5 named storms hit Louisiana
 - Heading into storm season again
- California and Pacific Northwest Fires
- Texas refinery shutdowns
- Suez canal blockage

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Addressing Price Increases Contractually

- Consider payment method. Fixed price a/k/a lump sum or cost plus?
- Do you have a time and materials component in your contract?
 - Examples:
 - Contractor will replace decking at the price of \$250 per sheet including labor.
 - Contractor will replace decking at the price of \$50 per sheet plus labor.
 - Contractor agrees to replace decking at the cost of materials plus 15% and \$35 per hour
- Do you carve out exceptions for fixed prices in the event material prices change?
 - Example:
 - The quoted prices for materials are good for 30 days. After 30 days, Owner can anticipate a price increase based on escalating costs for materials of at least _%

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Weaponizing Incorporation by Reference

- **Expert Level tip:** Use exhibits, specifications or plan notes to carve out exceptions for material price increases.
 - Example 1: Exhibit B is your Scope of Work which also contains terms and conditions buried in the means and methods.
 - In those terms, there is a price acceleration provision.
- **Expert Level tip:** Order of precedence clause – In the event of a conflict between this exhibit and any other Contract Document, this exhibit governs, controls and takes precedence.
 - But what happens if the Subcontract and Exhibit B have the same exact provision saying one governs over the other?

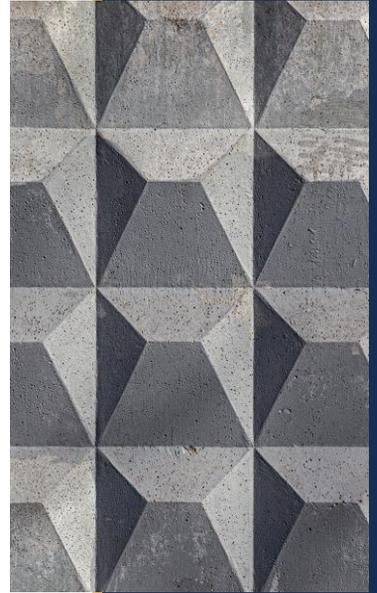
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PRICE ACCELERATION

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Price Acceleration Provision

If there is an increase in the actual cost of the labor or materials charged to the Contractor in excess of 5% subsequent to making this Agreement, the price set forth in this Agreement shall be increased without the need for a written change order or amendment to the contract to reflect the price increase and additional direct cost to the Contractor. Contractor will submit written documentation of the increased charges to the Prime Contractor/Owner upon request. As an additional remedy, if the actual cost of any line item increases more than 10% subsequent to the making of this Agreement, Contractor, at its sole discretion, may terminate the contract for convenience.



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MATERIAL AVAILABILITY

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Material Availability Provision

Due to material shortages, Customer may experience delays related to the inability to timely obtain materials for this project. In the event of such a delay, Contractor shall notify Customer, and Customer agrees to provide Contractor with an extension of time for any delay attributable to the temporary inability to obtain materials.



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Implied Warranty of Availability

- Little known warranty that has been asserted in case law.
- Unlike implied warranty of constructability (Spearin Doctrine), not universally recognized.
- Main case is *Aerodex, Inc. v. United States*, 189 Ct. Cl. 344, 417 F.2d 1361 (1969).
 - Missile system – government specified a specific name brand control component. Sole supplier refused to sell the part to contractor.
 - The owner has breached the implied warranty of constructability and is liable for the contractor's damages arising out of the defective specifications.



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Substitution of Materials

- Make sure to review contracts for your ability to substitute materials in the event of temporary or permanent shortages
- Most contracts remain silent on the right to substitute equivalent materials, but there are some contracts which address the issue. By example, AIA A201 (2017) briefly addresses the ability to make substitutions in Section 3.4.2:
 - *Except in the case of minor changes in the Work approved by the Architect in accordance with Section 3.12.8 or ordered by the Architect in accordance with Section 7.4, the Contractor may make substitutions only with the consent of the Owner, after evaluation by the Architect and in accordance with a Change Order or Change Directive.*
- This provision addresses substitutions with the consent of the Owner but does not address what happens when the specified material is unavailable or has increased dramatically in price.

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Substitution of Materials (Sample Provision)

- Sample Contract Provision:
 - In the event that any specified material or equipment becomes unavailable either temporarily or permanently after the contract is executed, provided that such availability is a result of factors beyond Contractor's control, then in the event of temporary unavailability, the contract time shall be extended to reflect the duration of time that the contractor is delayed by the unavailability, and in the case of permanent unavailability, the contractor shall be excused from providing said material or equipment and allowed to provide an available substitute. To the extent an available substitute is provided by Contractor under this provision, any increase in the cost between the originally specified material or equipment and its substitute shall be paid by the Owner to the Contractor.

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Supplier/Distributor Negotiations

- Ability to work with suppliers depends on reputation, size and longevity of relationship.
- Lock in pricing based on guaranteed volume
- Pre-purchase amounts and negotiate storage
- Look for rebate opportunities



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CHANGE ORDERS

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Change Order Provision

- Subcontractor may be ordered by the Contractor, without invalidating this Subcontract, to make changes in the work within the general scope of this Subcontract consisting of additions, deletions or other revisions. The Contract Sum and the Contract Time for such revised work shall be adjusted in a manner consistent with the Contract Documents. Subcontractor, prior to commencement of such changed or revised work, shall submit promptly to Contractor written copies of any claim for adjustment to the Contract Sum or Contract Time for such revised work.
- No alteration, addition, omission or change shall be made in the work, under any Subcontract, except upon the written change order of Contractor. Any change or adjustment in the Contract Sum or schedule by virtue of such change order shall be specifically stated in said change order. Prior to the issuance of any change order, Subcontractor shall furnish to contractor a detailed breakdown showing the difference in the schedule and in the value of the work, labor, services and materials, altered, added, omitted or changed by the proposed change order. Unless and until the contractor approves the proposed change order in writing, Subcontractor shall be under no duty or obligation to perform or carry out such proposed change order and Contractor shall be under no duty, obligation or liability to pay any increase in the Contract Sum or provide additional contract time as a result of such proposed change order. Only the Project Manager for Contractor is authorized to execute a Change Order under the terms of this Contract.

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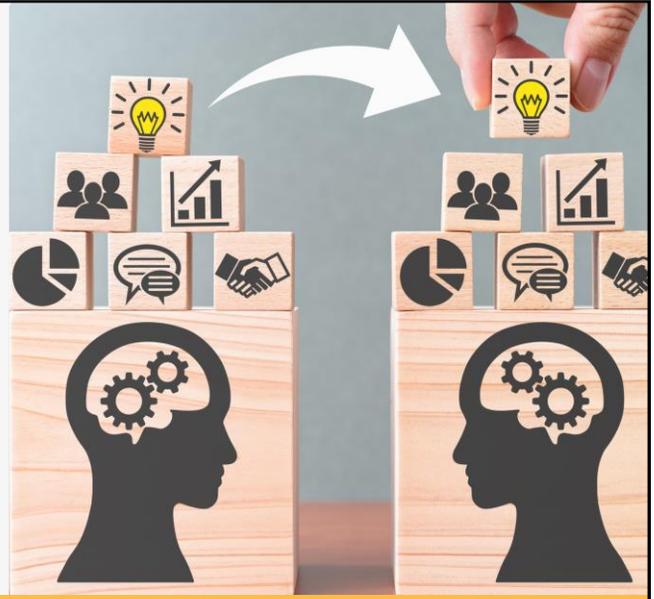
Negotiating Change Orders for Extra Work

- Can you submit a change order for an increased material cost on a fixed price contract?
Yes, but watch out for illusory consideration.
- Advocacy in change orders and RFIs
- Unexecuted change orders – why I still have a job.
 - Expert level tip: combat unexecuted change orders through estoppel.
 - Use daily reports, email notification and other project documents to create the paper trail.
 - Avoid CCDs or change directives on material price increases
 - Seek pre-payment of materials to avoid change orders
 - Expert level tip: seek payment of materials to negate pay if paid clauses

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Knowledge is Power

- Proactive identification of the potential for price increases before they happen.
- Watch market trends and listen to the industry.
- Proactive documentation



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Contact Us!



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