

DYSART  **TAYLOR**

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Attorneys & Counselors

Do You Have Control Issues? Late Delivery and Price Escalation

*Presented by Lee Brumitt of Dysart Taylor
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American Subcontractors Association
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What is “Control?”

According to Webster’s Dictionary, control is “the power to influence or direct people's behavior or the course of events.”



Do You Have Control...

Over:

Cost of Materials?

Cost of Labor?

Overhead Costs?

Availability of Workforce?

Availability of Specified Materials?

Lead times/delivery of Specified Materials?

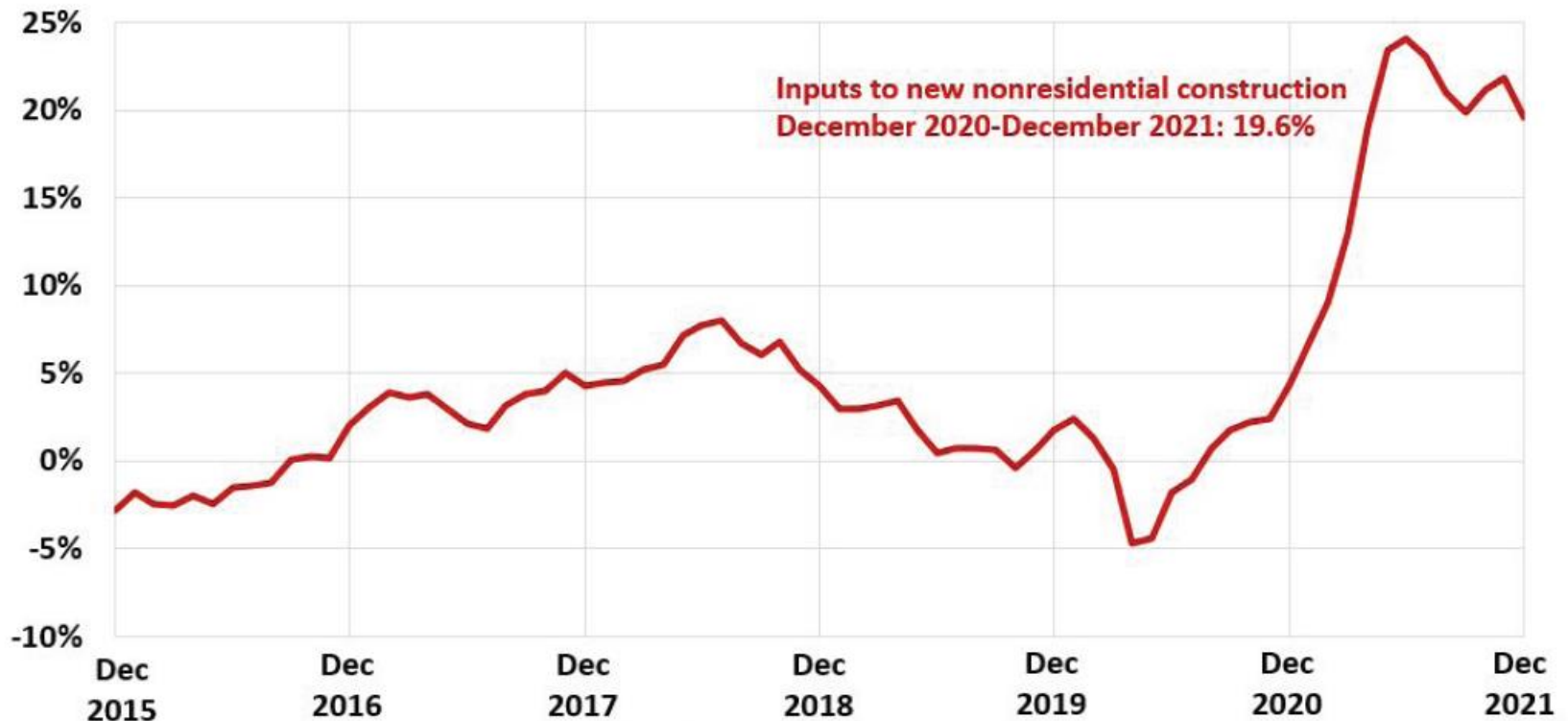
Most Contractors say “NO!”

In a 2022 AGC survey, 84% of responders had incurred “unanticipated costs.”

Loss of Control

Change in prices for inputs to construction

Year-over-year change in PPI, 2015 - 2021, not seasonally adjusted



Source: Bureau of Labor Statistics, producer price indexes, www.bls.gov/ppi

Loss of Control

Price increases for construction inputs Year-over-year change in December PPI

<u>Construction materials</u>	2020	2021
Steel mill products	5.2%	127%
Plastic construction products	5.4%	34%
Aluminum mill shapes	-1.7%	30%
Copper and brass mill shapes	24%	23%
Gypsum products	3.6%	21%
Lumber and plywood	37%	18%
Architectural coatings	1.9%	14%
Asphalt felts and coatings	2.1%	12%
<u>Used by contractors</u>		
Diesel fuel	-2.8%	55%
Truck transport of freight	2.2%	18%
Construction machinery and equipment	1.1%	10%
Truck and offroad tires	0.3%	11%

Source: Bureau of Labor Statistics, producer price indexes, www.bls.gov/ppi

Loss of Control



Loss of Control

Covid-19

Tariffs

- Canadian softwood lumber – 9 to 18%
- Steel – 25%
- Aluminum – 10%

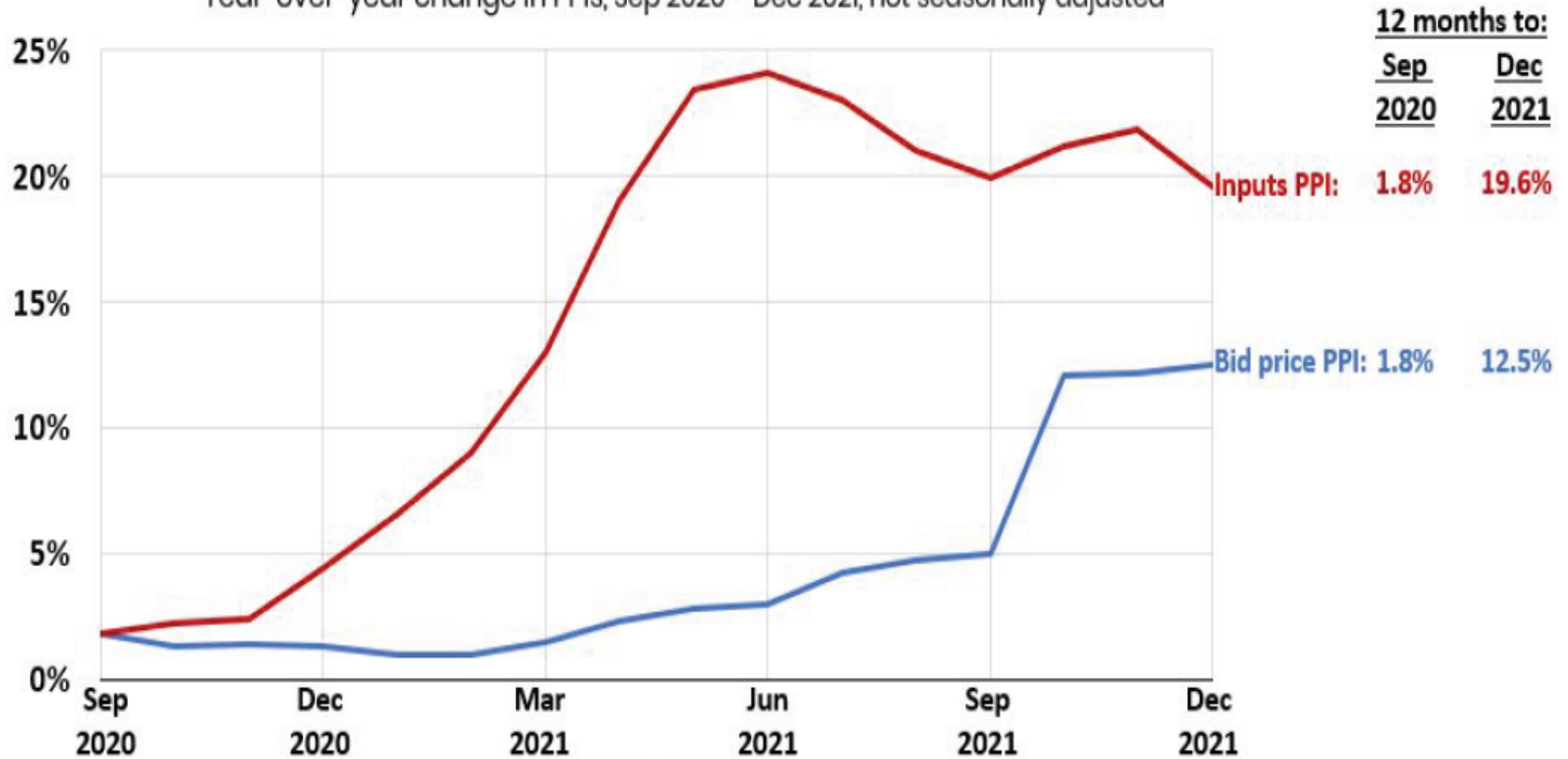
Supply Chain Disruptions and Shortages

- Shutting down factories in China and Italy
- Government edicts led to loss of workers
- Weather events (Texas deep freeze; Hurricane Ida; wildfires and flooding)
- Suez Canal

Loss of Control

Change in prices for new nonresidential construction inputs vs. bid prices

Year-over-year change in PPIs, Sep 2020 – Dec 2021, not seasonally adjusted

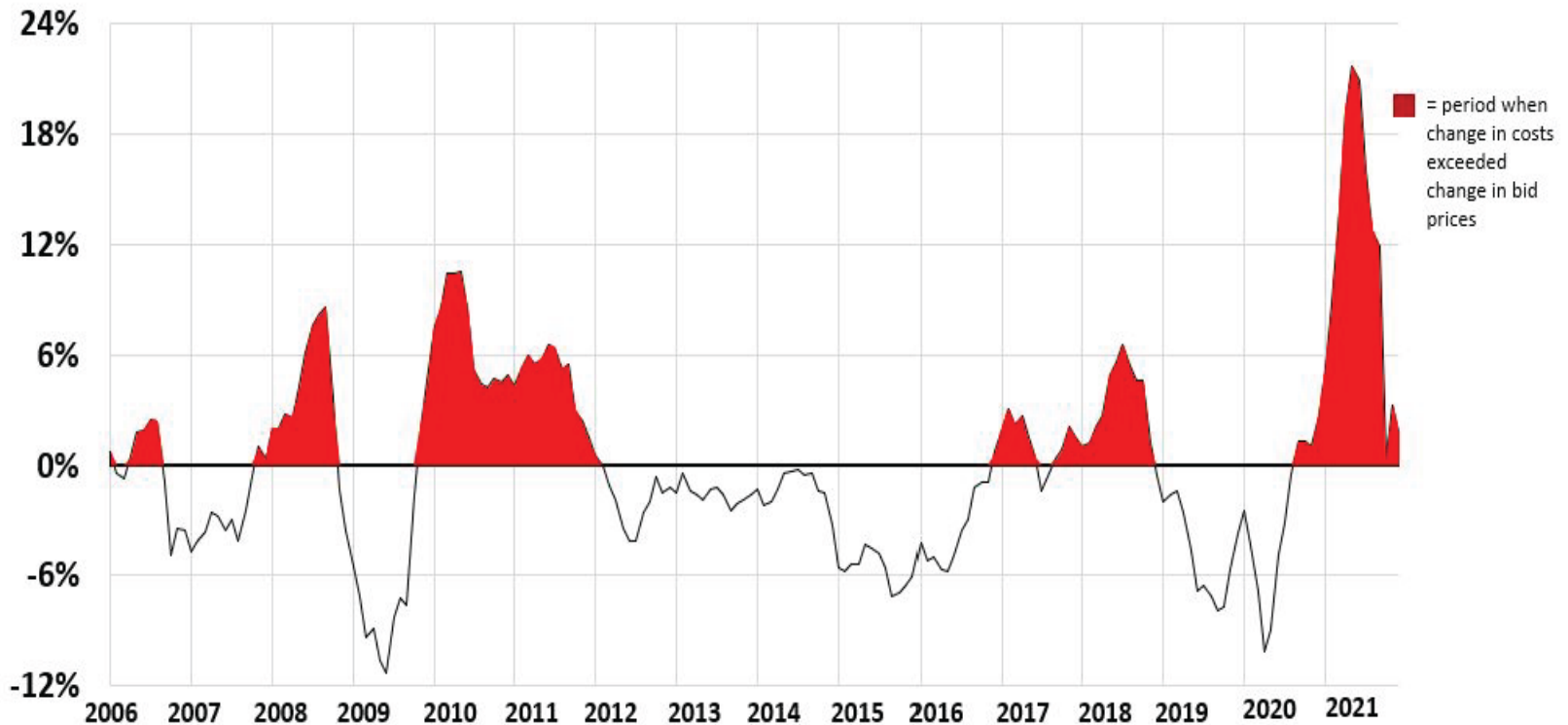


Source: Bureau of Labor Statistics, producer price indexes, www.bls.gov/ppi

Loss of Control

Cost squeeze on contractors can last two years or more

Difference between year-over-year change in materials costs vs. bid prices, Jan 2006-Dec 2021



Source: Source: Bureau of Labor Statistics, www.bls.gov/ppi, producer price indexes for goods inputs to construction (material costs) and new warehouse construction (bid prices)

Loss of Control

Worker Availability

- Construction Industry Loses 1.1M workers in 2 months
- Thousands moved into residential homebuilding and remodeling or left construction altogether
- At end of 2021, 273,000 openings in commercial construction - up 30% from end of 2020
- Firms incentivizing work force with \$\$\$\$\$\$\$



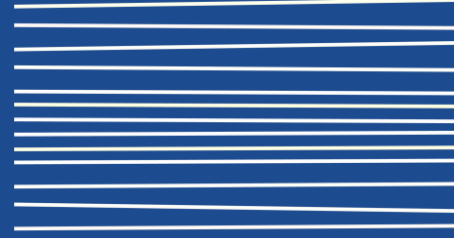
Taking Control



Taking Control



Taking Control



“...like all men of power, when he talked of prices worth paying, you could be sure of one thing.

Someone else was paying.”

Richard K. Morgan from [Altered Carbon](#)

Taking Control

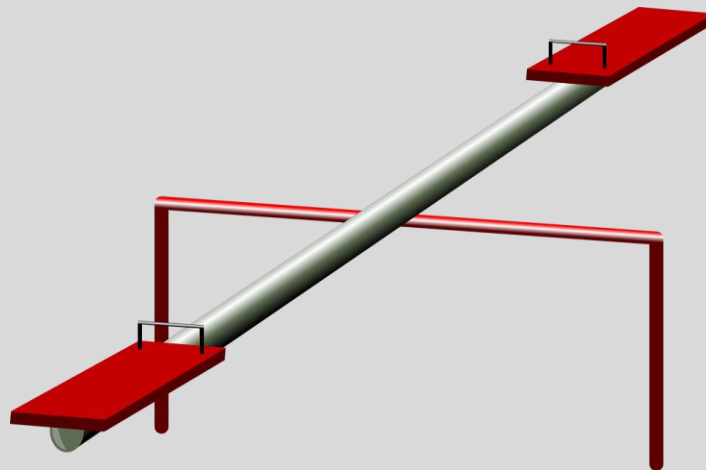
“Risk Is Our Business”



Taking Control

Balancing Risk with Economic Interests

More contractual risk assumed, more exposure to loss.



Taking Control



“You can’t control the weather. You aren’t in charge of the economy. You can’t undo the tsunami or unwreck the car, but ***you can map out a strategy.***”

Max Lucado from **You'll Get Through This: Hope and Help for Your Turbulent Times**

Taking Control

Five Ways to Gain Control over Price Increases and Material Delays

1. Get and understand your Customer's agreement with the Owner!
2. Protect Against Negative Effects of Price Increases and Material Delay By Controlling Risk in Your Subcontract!
3. Insist on a Robust Force Majeure Clause!
4. Comply with Subcontract's Notice Provisions!
5. Control Agreements Downstream, to the extent able!

Taking Control

Get and Read Your Customer's Contract

“Subcontractor binds itself to GC for the performance of Subcontractor's Work in the same manner as GC is bound to the Owner for said performance under GC's contract with the Owner, and all other contract documents referenced in this Subcontract. The term Contract Documents includes this Subcontract, any and all documents forming or referenced in this Subcontract, ***GC's contract with the Owner*** and all other contract documents referenced or incorporate therein.”



Taking Control

Get and Read Your Customer's Contract

“Contractor agrees to pay Subcontractor, upon full performance of the Subcontract Work and fulfillment of this Subcontract the sum of One Million Two Hundred Seventy-Nine Thousand One Hundred Sixty-Five and 00/100 Dollars (\$1,279,165.00) subject to adjustment for all ***authorized*** modifications, changes, additions and deletions thereto effected after this Subcontract is entered into by the parties, and ***subject to the condition precedent of payment by Owner to Contractor.***

Taking Control

Get and Read Your Customer's Contract

“In case of any dispute between Subcontractor and Contractor, Subcontractor agrees to be bound to Contractor ***to the same extent Contractor is bound to Owner by the terms of the Prime Contract*** and by any decisions made thereunder by Owner, Architect or any other party authorized to render the same by the Prime Contract.”



Taking Control

ConsensusDocs Price Escalation Resource Center

<https://www.consensusdocs.org/price-escalation-clause/>

Taking Control

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.

Taking Control

Controlling Risk in Your Subcontract

Incorporate Terms Setting Baseline Price and Lead Times

- Express issue: volatility in price, availability, and delivery times affecting ***“Potentially Time and Price-Impacted Material.”***
- Price in Proposal/Subcontract is a ***“Baseline Price.”***
- Milestone Times or Times for Completion are subject to ***“Baseline Time.”***
- ***Adjustment*** in Baseline Price/Time – must notify in 30 days from date adjustment arises and provide appropriate documentation. Waive overhead and profit on increases.
- ***Shall be*** equitably adjusted unless delivered prior to the notice and unless delivery failure within control of Subcontractor.

Taking Control

Controlling Risk in Your Subcontract

Proposal and Subcontract should contain *Force Majeure* provisions allowing for time and price adjustments

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.

Taking Control

Controlling Risk in Your Subcontract

Proposal and Subcontract should relieve subcontractor of liability for uncontrollable delay

“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.***”

Controlling Risk in Your Subcontract

- Incorporate in Your Bid Proposal
- Make sure Proposal Terms are Incorporated in Your Subcontract either through identifying Proposal as a Subcontract Document or incorporating language.

“The Contract represents the entire and integrated agreement between the parties hereto and supersedes **prior** negotiations, representations and agreements, either oral or written, including any limited authorization to provide any Work.”

Taking Control

Comply with Notice Provisions

“Claims by Subcontractor must be made promptly, and no later than within ***ten (10) days after occurrence*** of the event giving rise to such Claim. Claims must be made by written notice. Such notice shall include a detailed statement setting forth all reasons for the Claim and the amount of additional money and additional time claimed by Subcontractor. Subcontractor shall not be entitled to rely upon any grounds or basis for additional money or additional time not specifically set forth in the notice of Claim. All Claims not made in the manner provided herein shall be deemed waived and of no effect.”

Taking Control

§ 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.

Taking Control

Control Agreements Downstream (to the extent you can)

- Don't take on an obligation without an ability to recover from those you are relying on to help you meet those obligations
 - Price Guarantees
 - Restrictions in Price Fluctuation
 - Guaranteed lead times
 - Consequences if miss lead times
 - Liquidated damages and all other potential liabilities
- If can't get favorable terms downstream, all the more reason to get favorable terms upstream!



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Questions?

