



The summer of 2021 was a time of high anxiety when many contractors faced surging steel prices and lacked the protection of contract material price escalation clauses.

Photo: Richard Korman for ENR

With Trump's Tariff Talk, Time to Negotiate for Escalation Clauses in Construction Contracts

Attorney Ken Rubinstein says contractors should anticipate possible material prices spikes again

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Remember 2019? That's when contractors faced sudden material price surges from tariffs during then-President Donald Trump's first term in office. How about 2021? That's when contractors saw new price surges and long delivery delays because of Covid-19.

That summer of 2021 was [a bummer for homebuilders](#) dealing with lumber prices in the midst of the pandemic. And you [needed nerves of steel](#) to buy steel.

With Trump again making tariffs a foreign policy priority, it's a good idea to seek protection in case short-term price spikes return, advises Attorney Kenneth E. Rubinstein. He's urging contractors to negotiate to include material price escalation clauses in new fixed-price construction contracts, which may have helped during the first Trump Administration and the pandemic.

"I haven't gotten into the deep economic analysis yet," explains Rubinstein, "but if Trump goes forward with a 20% tariff against a country across the board, we could see prices rise" on materials from a particular country and then unpredictable responses from domestic sources of the material.

Rubinstein, along with his colleague at the Preti, Flaherty law firm, Gregory L. Silverman, provided [detailed advice on dealing with material inflation](#) in an ENR commentary that appeared in October 2019—1,000 days into the first Trump administration, shortly after tariffs were announced on steel and aluminum, but six months before the Covid-19 pandemic supply chain crisis poured fuel on already burning inflationary fires.



Rubinstein

Contractors who did not lock in prices from suppliers before tariffs were announced have generally had to bear the brunt, the attorneys wrote at that time, since most standard-form contracts do not allow them to recoup higher costs that result.

Buying out the project at inception comes with some drawbacks, Rubinstein and Silverman noted, limiting ability to take advantage of price declines.

But material cost escalation clauses, the attorneys explained, generally allow a firm to obtain a change order to increase the contract price—or the guaranteed maximum price on a CM-at-risk project—when the price of any particular material rises above an established percentage, usually 10%. This still requires the contractor to bear the burden of ordinary and typical price fluctuations, but allows for relief in the event of major increases that neither party expected when the contract was signed, they wrote.

"Some owners may object to the price escalation clause, feeling that contractors are in a better position to protect against the risk, since they can subcontract early to avoid possible cost increases," Rubinstein and Silverman wrote. "But many owners readily allow these clauses to be part of the contract."

Following the material price increases of 2021 to 2022, there were some patterns in the litigation that followed as contractors tried to make up their losses. "A lot of private developers and institutional clients," Rubinstein noted last week in a phone call, "gave some relief to contractors, often out of good will. But public owners can't grant that relief as matter of law and they have a duty to the public and the right to enforce performance."

"If you look at the first round of Trump tariffs," Rubinstein said, "you will find case after case where the contractor didn't get relief."



Deputy Editor Richard Korman helps run ENR's business and legal news and investigations, selects ENR's commentary and oversees editorial content on ENR.com. In 2023 the American Society of Business Publication Editors awarded Richard the Stephen Barr Award, the highest honor for a single feature story or investigation, for his story on the aftermath of a terrible auto crash in Kentucky in 2019, and in 2015 the American Business Media awarded him the Timothy White Award for investigations of surety fraud and workplace bullying. A member of Investigative Reporters and Editors, Richard has been a fellow on drone safety with the McGraw Center for Business Journalism at the Craig Newmark Graduate School of Journalism at CUNY. Richard's freelance writing has appeared in the Seattle Times, the New York Times, Business Week and the websites of The Atlantic and Salon.com. He admires construction projects that finish on time and budget, compensate all team members fairly and record zero fatalities or serious injuries.