



Protecting Your Company from Material Delays

As stated in our [April Law Alert](#), the pandemic caused a substantial strain on the global supply of construction materials. There was a complete or partial shutdown of numerous plants and dramatically limited shipping options. In addition, [the AGC reports](#) the loss of power and water resulting from the February 2021 freeze further disrupted production by the plants providing construction materials. This disruption of the input for construction plastics affected everything from adhesives, to roofing materials, to PVC pipe and plumbing fixtures, while at the same time the freeze increased the demand for the same materials. Suspension of production at other plants impacted the supply of cement and steel, among other things.

In addition to these production delays, various sources of interference in the shipping markets continue to cause material shortages. The trouble in the shipping markets began with the pandemic but it did not end there. A lack of available containers, ship space, and port availability continues to disrupt intermodal shipping. Labor shortages, closure of a portion of the Mississippi River, blockage of the Suez Canal, tariffs, and increasing diesel costs share the blame for the further unpredictability of the shipping markets over recent months.

Whether resulting from production issues or shipping problems, material delays can delay the completion of a project, resulting in substantial additional expense—potentially far exceeding the cost of the material cost escalation. As such, prudent contractors will seek to avoid, if possible, or mitigate these risks and damages.

Contractors experiencing material delays on existing projects must evaluate the provisions in their contracts related to materials, including the provisions related to the use of alternates, materials on hand, notice, force majeure, and delays. Contractors should also evaluate whether the project insurance covers stored materials in the event the contractor elects to order materials in advance to avoid delays or price escalation. Contractors should also communicate with upstream and downstream parties regarding potential material delays and attempt to mitigate the impact and cost of any such delays on the project through cooperation and planning.

Contractors negotiating and entering into new contracts must acknowledge the current materials environment and possibly reevaluate standard revisions to common contractual provisions. For example, Contractors should avoid provisions in which the contractor represents a familiarity with the cost and availability of materials. Contractors should also avoid termination for cause provisions allowing termination for “repeated failure to provide materials.” Instead, Contractors should seek to negotiate contractual provisions—including the provisions referenced above—anticipating the potential for unavoidable material delays.

For more information, please contact [Clayton C. Utkov](#).