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Whether you are following the financial headlines or reviewing recent supply invoices, one thing is clear: the cost of materials is on the rise and far from slowing down as the rate continues to accelerate. Electrical contractors are under mounting pressure to bid the price of materials sufficiently high to cover escalating costs but low enough to remain competitive. The squeeze is becoming intense.

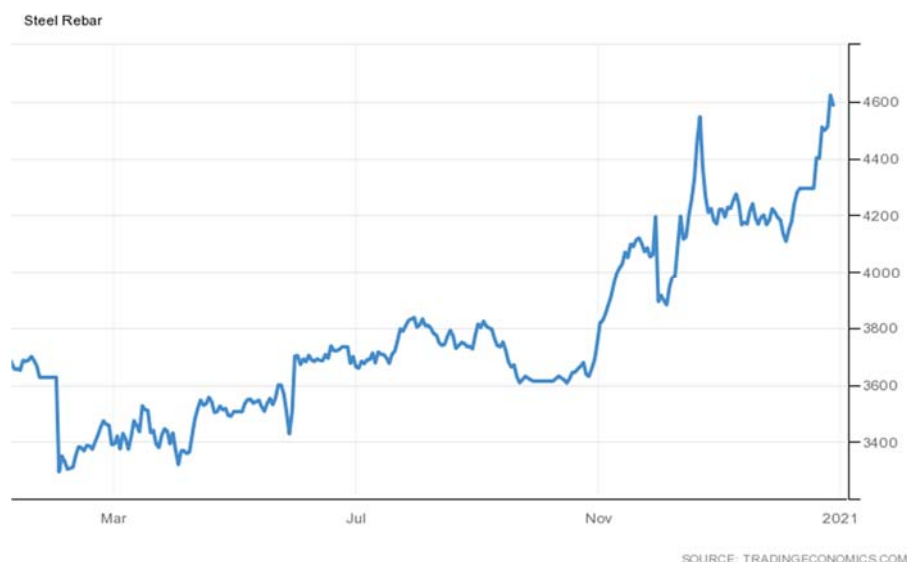
So what is driving cost increases, and what can you do about it?

## Steel and Copper

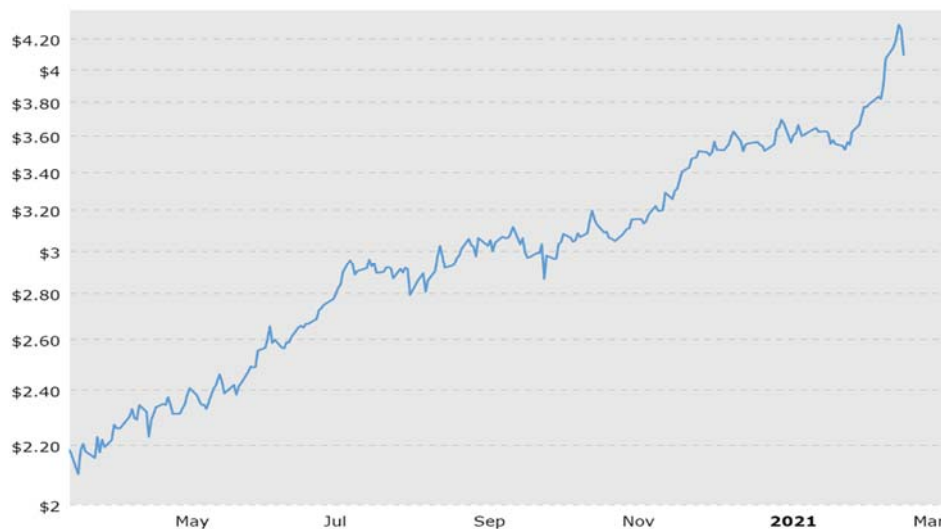
The price of ferrous and non-ferrous metals shot-up significantly over the last year, and for largely the same reasons: scarcity.

Global steel production slowed in response to the COVID-19 pandemic. While prices initially dropped in early 2020, they climbed steadily through the balance of the year due to pandemic-caused mining disruptions. 2021 has seen further price escalation in response to continued supply shortages and increasing demand from a global economy now preparing for recovery from the pandemic.

Steel rebar prices spiked higher multiple times in February and currently exceed \$700/ton; that is \$150/ton more than a year ago. The below chart from Tradingeconomics.com (in Chinese Yuan/ton) nicely shows this dramatic increase.



Copper has outpaced steel, hitting a nine-year high the last week of February and passing through the \$4/lbs. mark; a nearly 100% increase since the beginning of COVID-19. The chart below, courtesy of Macrotrends.net, illustrates this trend.



## PVC

Prices for polyvinyl chloride (PVC) have climbed steadily over the last six months and are up nearly 40% since the beginning of the pandemic. Recent severe weather in Texas caused further spikes in PVC prices and led to shortages as the state is the source of the majority of domestically produced PVC resin.

## You

So, now what? In the wake of this material price explosion, what can you and your company do? Is it possible, for instance, to request price relief under your existing contracts? Is it possible to protect against price increases in future contracts? Although nothing is guaranteed, the answer to these questions is likely “yes.” But you will need to search and ask.

While the specific events giving rise to these impacts are new and unique, the way your contracts and contract law address them is not. Think **force majeure**, **material escalation clauses**, and **equitable adjustments/change orders**. While no one wants to go back to a customer for increased material costs during the course of a project, sometimes doing so is both necessary and justified. There are ways to ask for relief without alienating your customer or placing an uncomfortable strain on the relationship, including:

1. Making it clear in your request to your customer that you are simply following the notice requirements in your contract with it; and
2. If performing for an upstream contractor, couching your request in a way that will allow that customer to make a similar, timely request for relief of its own up the chain.

## Force Majeure Clauses

For existing projects, review your contracts to see what, if anything, they say about *force majeure*, material escalation, and changes. Traditionally, a **force majeure clause** excuses a contractor's performance for catastrophic or otherwise unanticipated events identified in the contract, such as extreme weather, wars, strikes, and changes in the law that would make performance impossible. A well-drafted *force majeure* clause will clarify:

1. Who is entitled to relief under the provision,
2. The circumstances under which they are entitled to relief,
3. The type of relief they are entitled to, and
4. When and how they must provide notice of the underlying condition.

Be aware that it is common for *force majeure* relief to be limited to extensions of time only. If that is the case, you may request an extension of time—which may help you deal with extended material lead times—but you are not entitled to monetary relief for the price escalation.

## Material Price Escalation Clauses

Some contracts include a **material price escalation clause** that allows the parties to adjust the price based on an agreed-upon metric. For example, the measure could be the difference between the price quoted at bid time and the price of the material when delivered if the price change exceeds an agreed-upon threshold. This provision 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 your contracts. Here are a few examples of material price escalation clauses included in contracts:

**§ 8.7.1 Escalation Clause.** In the event of significant delay or price increase of material, equipment, or energy occurring during the performance of the contract through no fault of the Contractor, the Contract Sum, time of completion or contract requirements shall be equitably adjusted by Change Order in accordance with the procedures of the Contract Documents. A change in price of an item of material, equipment, or energy will be considered significant when the price of an item increases 20% percent between the date of this Contract and the date of installation. The amount of the increase shall be capped at five percent (5%) of the original budgeted price for the item.

**§ 5.3.4 ESCALATION.** This Agreement is conditioned upon the ability of Design-Builder to complete the Premises at present prices for material and at the existing scale of wages for labor. If Design-Builder is, at any time or for any reason, unable to complete the above described Premises at the present prices for material or at the existing scale of wages for labor, or if Design-Builder is unable to procure promptly as and when needed, labor and material required for construction as aforesaid, then and in any such event, the Contract Sum, time of completion and/or contract requirements shall be equitably adjusted by Change Order in accordance with the procedures of the Contract Documents. A change in price of an item of material, equipment, or energy will be considered significant when the price of an item increases 20 percent between the date of this Agreement and the date of the applicable Work.

While no one knows what will happen to material prices in the future, recent trends and growing demands suggest that price increases are likely to continue into 2021 and perhaps beyond. For that reason, it is important to request escalation clauses in your future contracts. Let your customer know that without an escalation clause, your pricing, and your competitors' pricing, will likely be inflated to protect against the risk of future increases. Explain that it will be cheaper for you to bid using current material costs, knowing you have the protection of an escalation clause, rather than using significantly higher costs you might see in the coming months and years.

## Equitable Adjustment/Change Order Clauses

If you do not have a *force majeure* clause that permits adjustments to price, or a material escalation clause, you might consider requesting relief by way of equitable adjustment or change order based on the commercial impracticality of the price increase. Some courts have found that unforeseen price increases can be significant enough to merit an adjustment or reformation of a contract. But other courts have been less sympathetic to this type of market-driven argument.

If you have questions about these issues or others like it, please feel free to reach out. Cohen Seglias remains dedicated to assisting NECA and its contractor members through these unprecedented times. We wish you success!



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