

GUIDANCE NOTE: DEALING WITH SUPPLY PRICE INCREASES

The cost of materials, supplies, labour, and subcontractors can change during a project. Whether you can pass on cost increases to a client depends on your contract.

If the contract has agreed prices or agreed rates, and does not allow changes, you can only claim the agreed price or rates. You cannot claim more money for cost increases.

There are options to allow changes to prices and rates in a contract. It will depend on the client (and its bank) agreeing to price increases. The client (and its bank) might agree to a higher fixed price to avoid the risk of even higher costs later.

When quoting or contracting you must consider:

- (a) the prices of suppliers and trades;
- (b) locking-in prices;
- (c) including time limits for accepting quotes;
- (d) price flexibility (this might depend on legislation);
- (e) excluding some work from the contract, and making the client responsible for arranging those works; and
- (f) including rights for extensions of time for delays in materials and trades.

By agreeing a contract, you agree to carry out the works for the prices or rates under the contract. You must ensure you can carry out the works for any agreed price and time before entering a contract.

As discussed below, legislation might affect when you can pass on any increases in costs and time.

Pricing of quotes and offers

Quotes must say they are fixed price, an estimate, conditional, or available for a limited time. Clear conditions on your quotes will reduce disputes later.

We recommend including words like “errors and omissions are excepted” in a quote. While not covering everything missed in a quote, it may help negotiate when something is missed from the quote.

However, a later contract will supersede an earlier quote.

Allowing price changes in contracts

To allow price changes, a contract can include:

- (a) 'cost escalation' or 'rise and fall' clauses setting out:
 - (i) what is a cost increase; and
 - (ii) how to claim a cost increase;
- (b) 'prime cost items' where:
 - (i) an item is not selected, or its price unknown; and
 - (ii) a reasonable allowance for its cost is made; and
- (c) 'provisional sums' for services where a definite amount cannot be stated after reasonable enquiries.

Clauses allowing price changes must be carefully explained to the client. Take care so clauses are not ruled unenforceable as 'unfair contract terms'.

Price changes are restricted in regulated domestic building contracts.¹ For example, a contractor warrants allowances for prime cost items and provisional sums are calculated with reasonable care and skill based on reasonably available information.² Breaching the warranty can mean the contractor cannot claim price increases. Also, prime cost or provisional sum allowances cannot be used if the scope of work and prices could be determined with reasonable enquiries.

While 'cost escalation' and 'rise and fall' clauses are not expressly prohibited by Schedule 1B of the QBCC Act, they need to be carefully drafted to be legally enforceable in domestic building contracts.

Another option is to consider a Cost Plus Contract. These contracts have their own challenges and risks, and are discussed in our separate Cost Plus Contract Guidance Note.

Excluding works from the scope of works

The client can agree to deal directly with suppliers and subcontractors. This can be done where:

- (a) the client supplies some materials and trades; or
- (b) a construction management arrangement, where:
 - (i) a contractor manages and supervises the work; and
 - (ii) the client directly contracts with suppliers and trades.

However, a client needs an owner builder permit to engage multiple trades.

What if my contract does not include price changes?

If the contract has agreed prices or agreed rates, and does not allow changes, you can only be paid the agreed price or rates. You cannot claim more money for cost increases.

¹ See Schedule 1B of the *Queensland Building and Construction Commission Act 1991 (the QBCC Act)*.

² Section 26 of Schedule 1B of the QBCC Act.

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Any changes to prices must be agreed by all parties in writing.

You are more likely to get agreed price changes if you can show:

- (a) your efforts to price the works before contracting;
- (b) your efforts to lock in prices of materials and trades; and
- (c) the unexpected cost increases.

Please note, you will breach the contract if you try to enforce payments you are not entitled to under the contract. Under the Home Warranty Insurance Scheme, a contractor is at greater risk if the client terminates the contract because of the contractor's breach. The client could claim for incomplete work under the Scheme, and the QBCC then has the right to recover the amounts paid from the contractor.

Delays caused by shortages of materials or trades

Contracts can allow extensions of time for delays caused by shortages in materials and trades.

There are some restrictions for regulated domestic building contracts. You can only claim an extension of time if the delay was beyond your reasonable contract and not reasonably foreseeable at the time of entering the contract.³

To claim an extension of time you will need evidence of:

- (a) the delay caused; and
- (b) the efforts to avoid unreasonable delays.

It is important to discuss the potential impact of shortages in materials and trades with clients as soon as possible.

I have a commercial building contract or a subcontract. Does the above apply to my contract?

Yes. If the contract has agreed prices or agreed rates, and does not allow changes, you can only claim the agreed price or rates. You cannot claim more money for cost increases.

However, the restrictions for regulated domestic building contracts do not apply to contracts for non-domestic building work and subcontracts on any project. Those contracts can allow changes to prices for increases in costs, and extensions of time for delays with suppliers and subcontractors.

You can also agree to share the risk of addition costs and delays with agreed percentages, limits on price increases, or caps on extensions of time.

To include a 'cost escalation' or 'rise and fall' clause in the contract you should clearly set out when a party can claim increases in costs or delays. What is agreed must be clearly set out to minimise disputes.

This Guidance Note is not legal advice and ought not to be considered legal advice. We recommend that you engage a lawyer to consider all of the relevant circumstances applicable to your particular set of facts.

³ Section 42 of Schedule 1B of the QBCC Act. A breach can result in a fine of up to 20 penalty units (i.e. \$2,669.00) and 2 demerit points against the contractor's QBCC licence.
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