

Q&A: Price increases and delays



Delays in the supply of building materials from both local and overseas sources has unfortunately continued for our members, well after the initial shock of the pandemic.

The continued pressure on the availability of labour and price increases have unfortunately become a regular issue for builders to negotiate.

While the extent of the delays and cost increases will vary in each state HIA is aware that the labour and materials supply issues are leading to cost pressures which is then impacting the timely progress of building projects.



Can I pass on price increases to products and materials?

In most cases the answer is no, but it can depend on the type of contract you are using and any specific clauses in that contract.

If you are using a **fixed price contract** then the builder is responsible for any costs above the fixed price except for those costs:

- incurred because of variations requested by the client or
- matters outside the control of the builder, such as a fire, war, strike or natural disaster.

If you are using a **cost plus contract**, the client agrees to take on any changes in price. The client is charged for the actual cost of construction “plus” profit, which is normally expressed as a percentage of the costs of construction.

Depending on your state, there may be some restrictions on using cost plus contracts.



But I thought I could pass on a price increase through Provisional Sums and Prime Costs?

Provisional sum or prime cost items for specific trades may provide some protection against cost increases.

Prime cost items are a fixture or fitting that has not been selected, or the price of which is not known when the contract is entered into.

Under the contract the builder must provide a reasonable allowance for these items however the end price may change depending on the items final cost.

This might include the supply and installation of tiles when the homeowner has not made a final selection about which tiles to use. The price can be adjusted accordingly and no variation to the contract is needed.

Provisional sum items are an estimate of the cost of providing particular contracted services that the builder cannot state a definite amount when the contract is entered into. This might include excavation work.

In both cases these items and a reasonable estimate of their costs should be identified in the contract which sets out how to make adjustments to these amounts if needed.



But what if continuing to work under the fixed price contract becomes unprofitable?

Even if the labour and material supply issues continue, and government stimulus push up prices, it is unlikely a Court would intervene and help out the builder. Future material price increases should have been contemplated when the contract was quoted.

Just as an owner is not able to reduce the amount paid if the price of materials decreases a builder is not entitled to pass cost increases to the owner.

So, when you have entered into a fixed price contract, there are very limited ways increases in the cost of labour and materials can be passed onto the client.



I have heard a lot about ‘rise and fall’ clauses or ‘cost escalation’ clauses what are they?

A **cost escalation clause** is a provision that allows the contract price to increase to reflect increases in costs of labour and materials or costs increases due to delays in carrying out the work.

A **rise and fall clause** is a provision that allows the builder to pass on to the client, increases and reduction in the cost of performing work. Generally changes in the price of labour, materials or any other specified factor can be adjusted and passed on to the homeowner according to an agreed formula, despite there being a fixed price under the contract. This can lead to the homeowner paying a lower price.



Does my contract include a 'rise and fall' or 'cost escalation' clause?

No. HIA contracts do not include rise and fall or cost escalation clauses. This for 2 reasons:

- In some places across the country these types of provisions are banned and will either be considered void or unlawful if included in a residential or domestic building contract.
- Where these provisions are allowed they are complex to draft and administer and can result in a builder being worse off.



What about variations? Can I use a variation to pass on price increases?

You may be able to pass on a price increase through a variation if there has been:

- An omission, addition or change to the building work; or
- A change in the manner of carrying out the building work.

This may be suitable where a product or material is being substituted and this results in a price increase.



So how can I respond to price increases during construction work?

It depends...

- Under a fixed price contract, unless there is a contractual provision which allows you to, you cannot pass on a price increase.
- Under a cost plus contract, you can pass on price increases as you are charging the client for the actual cost incurred, at the time you incur it.



Will HIA draft a rise and fall or cost escalation clause?

No. However HIA is happy to discuss the pros and cons of having these types of clauses in your building contracts.



Can I ask for more time to complete the building work?

Yes.

While HIA contracts deal with this slightly differently across the country, generally if something happens during construction work that causes a delay that was:

- Caused by something outside of the builders control; and
- Was not reasonably foreseeable at the time you entered into the contract;

You can ask for an extension of time to complete the work.



I signed the building contract in September last year and commenced work in February, and I have been told that I won't be able to get timber for 2 months, what should I do?

Unfortunately the labour and material supply issues have been impacting our industry for more than two years now.

There is an expectation that builders have factored in delays in the building period. It would be difficult to claim an Extension of Time for a delay in the supply of timber when this has been an issue since 2021.

However, It is worth discussing any supply issues with the owner and requesting more time; particularly if the supply issues could not reasonably have been foreseen.



What if the client is unhappy about allowing me extra time to complete the work?

In some states, you do actually need your client to agree to an extension of time. In other states you don't. In both cases you could:

1. Monitor the progress of the construction work and track it against contracted timeframes.
2. Talk to your client and communicate any delays or disruptions as soon as possible.
3. Provide evidence to support your claim. Economic information or correspondence from suppliers may help convince a client that the delay was not foreseeable at the time of signing the contract.
4. As a last resort use the dispute resolution clause in the contract.

HIA has developed a Tool Kit for members and their clients to help manage delays and price increases during a residential building project.

Members should also contact a HIA Workplace Advisor for advice and assistance.