

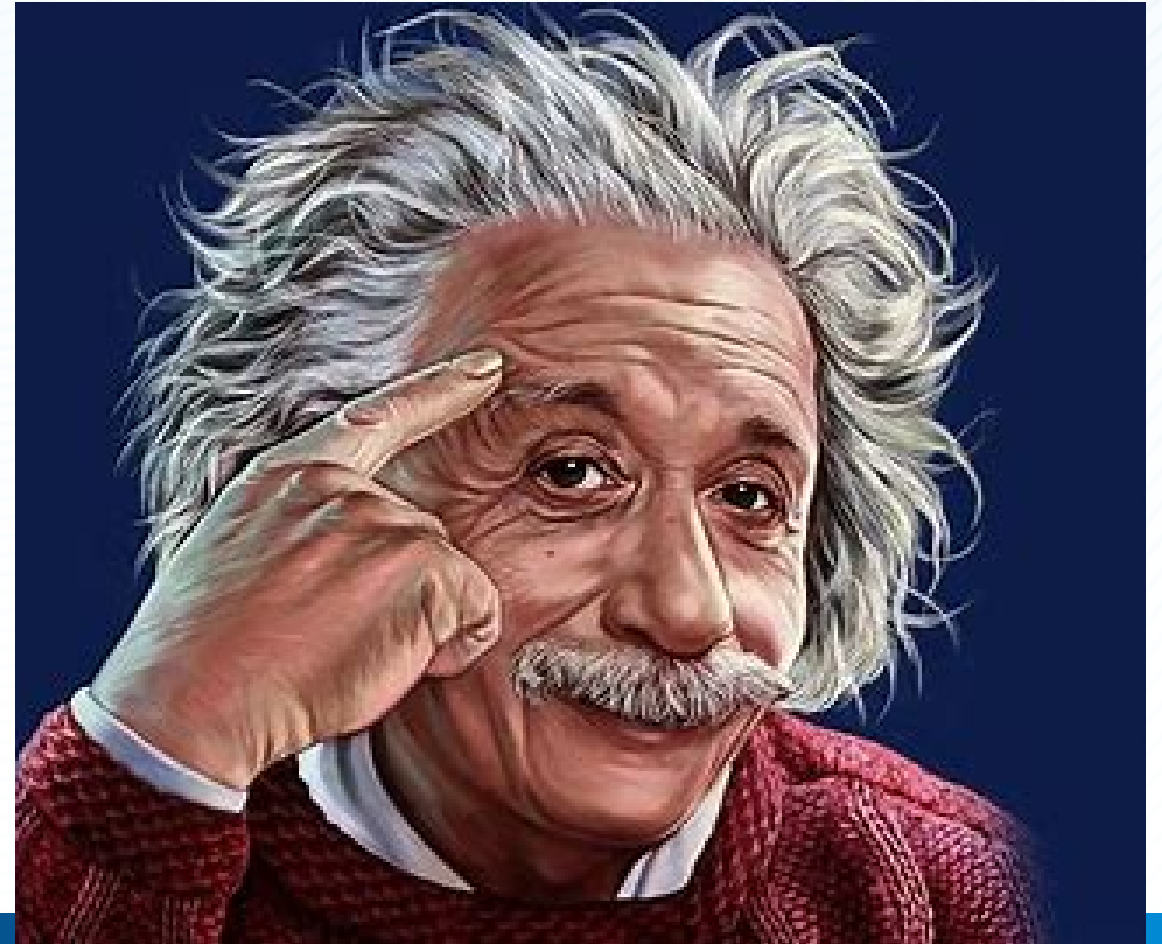


Steel Smart: Tips for Successful Contract Negotiations for Steel Fabricators

GRSM50
GORDON REES SCULLY MANSUKHANI

Get Off to an Intelligent Start

- What are some current challenges facing steel fabricators?
 - » Material Escalation
 - » Delay Claims
 - » Direction to Proceed with Change Orders
- How do you mitigate the risks?
 - » Good Proposal language
 - » Select Contract modifications
 - » Code of Standard Practice



Starting with a Bazinga - Your Proposal Terms

- Begin mitigating the risks starting with the Proposal
 - » How long has it been since you updated your Proposal?
 - » The Proposal can become your binding contract.
 - » Does it include key terms?



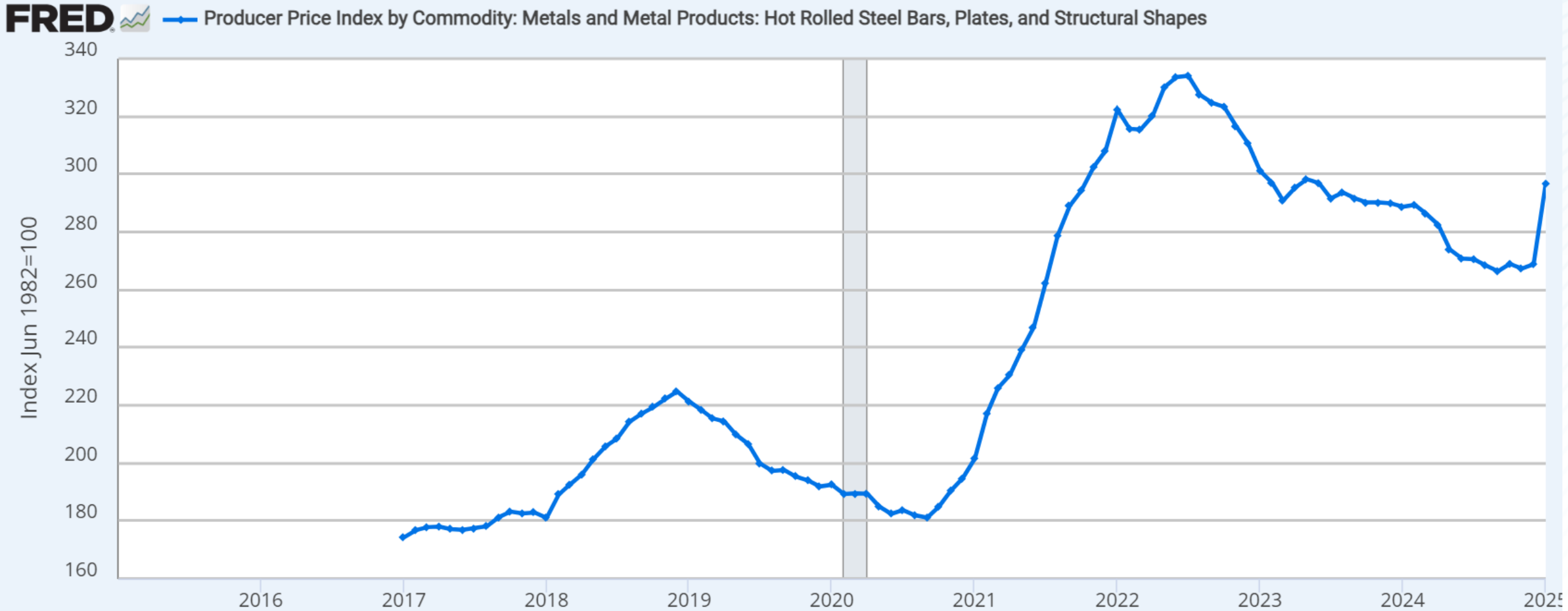
Proposal Terms

- Terms to Include in the PO to keep from becoming the Bank:
 - » Payment Terms
 - Timing of payment
 - Interest if not paid
 - Attorneys' fees for collection of payment
 - » Change Orders
 - Payment for base contract before proceeding with change order work
 - » Escalation Costs
 - » Project Suspensions
 - » Termination



Hot Issues –Material/cost Escalation

PPI – Over 10 years



Source: U.S. Bureau of Labor Statistics via FRED®

PPI – Last Month

Observations ▼

Jan 2025: **296.732**

Updated: Feb 13, 2025 7:56 AM CST

Next Release Date: Mar 13, 2025

Units:

Index Jun 1982=100,
Seasonally Adjusted

Frequency:

Monthly

1Y

5Y

10Y

Max

Edit Graph 

2024-12-02

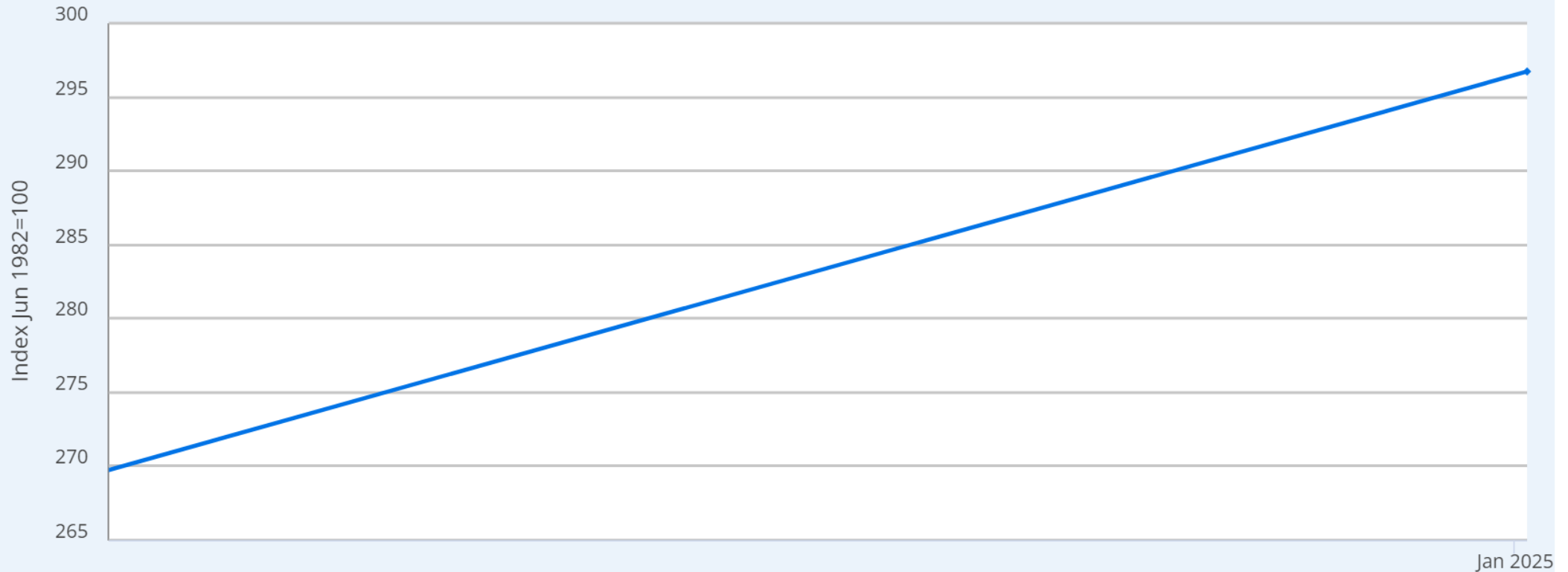
to

2025-01-01

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FRED 

— Producer Price Index by Commodity: Metals and Metal Products: Hot Rolled Steel Bars, Plates, and Structural Shapes



Tips –Before you bid

- **Bids**

- Remove materials from bid – have Owner purchase
- Avoid Bid Bonds: Bid bonds limit fabricators’ ability to refuse unprofitable work.
- Tighten Durations: Shorten price acceptance window.
 - » **“This Proposal is valid for the earlier of 10 days from the date of this initial Proposal or [INSERT FIRM DATE February __, 2025].”**

- **Project Schedule**: Watch schedule for following durations: (1) Issued for construction drawings and (2) approval windows with large durations.
 - Prepare a baseline schedule showing the breakdown of shop drawings sequence using the 14 day approval window.

Tips – After Award/ Before Bid

1. Pre-Purchase Materials:

- a. Require payment of raw materials once received at shop to allow immediate ordering of material
- b. **Subcontract language:** Seller shall invoice for raw materials, mill order invoices including freight charges, and supplies upon receipt of such items by Seller at its plant, and payment for such invoice shall be due from contractor within 30 days of invoice. For purposes of clarity, any pay-if-paid or pay-when-paid provisions in this agreement shall not apply to Raw Materials and Supplies.
- c. **Storage:** Include in your pricing either storage costs for raw materials at the shop's yard, or include pricing of a 3rd party site to store materials to be paid by the Customer/Owner.

2. **Joist and Deck:** Share the joist and deck Quotation with your customer and the Owner and make them aware of the “Must Order by Date” and “Must Ship Complete By Dates” and make sure your contract with your customer allows for a pass-through of these costs if these dates are missed for reasons outside of your control.

Escalation Clause

- Seller's Contract Sum (including but not limited to labor, material, transportation prices) are based on current prices at the time of the Proposal.
- Any significant price increases (meaning a price increase exceeding 10% of the price at time of the Proposal) in materials, transportation, labor, or other services necessary to perform the Work that occur during the period of time between the date of the Proposal and substantial completion of the Project, shall cause the Contract Sum to be equitably adjusted by an amount reasonably necessary to cover any such increase.
- Likewise, if the completion of the Work is extended more than six (6) months beyond the anticipated substantial completion for such Work, then the Contract Sum shall also be equitably adjusted.

Force Majeure

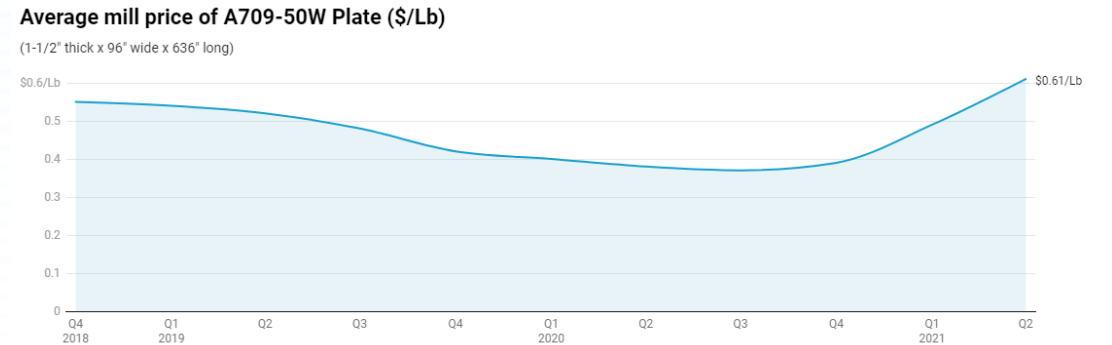
- If the performance of the Contract by Seller is interrupted by any cause beyond the reasonable control of Seller,
 - changes in laws, proclamations, acts, regulations, ordinances, demands or requirements of any governmental authority;

Existing Contracts

- Review Prime Contract – look for escalation
- Advise on notices you are getting.
- Evaluate Design Adjustments:
 - Work with project owners and design teams to modify designs to incorporate alternative or less expensive steel pieces where feasible.

Other Escalation Arguments

- Commercial Impracticability
 - Great unanticipated costs renders performance impracticable
 - Occurrence of an event which was a basic assumption on which the contract was made
 - Party cannot perform w/o extreme unreasonable expense
 - Party did not assume the risk
- Force Majeure
 - Typically Time only
- Public Work
 - Unanticipated and extreme price increases





Payment Terms

Payment

- 2.3 TIME FOR PAYMENT. Payment shall be made to Seller within thirty (30) days of the date of Seller's invoice.
- 2.4 RAW MATERIALS AND SUPPLIES. Seller shall invoice for raw materials, mill order invoices including freight charges, and supplies upon receipt of such items by Seller at its plant, and payment for such invoice shall be as set forth in Article 2, unless specifically agreed to in writing by Seller.
- 2.6 NO OFFSET OR SET-OFF. Buyer shall not set-off amounts due to any alleged claims against Seller on this Project or any other project.



Payment

- 2.7 SERVICE CHARGES. Payments not received when due shall incur service charges at the rate of the prime rate in effect at CIBC, on the date payment is due, plus one and a half percent (1.5%) per month (18% per annum) until paid.
- 2.9 NO RETAINAGE. The Buyer agrees to pay the full purchase price stated in this Proposal. Retainage may not be withheld without the specific written consent of Seller. ..

Remedies for Non-Payment

- 2.5 REMEDIES FOR NON-PAYMENT. If Buyer does not pay Seller any ... without liability to Buyer, and without prejudice to Seller's other lawful remedies
 - (i) terminate Seller's obligations under this Contract;
 - (ii) declare immediately due and payable all Buyer's obligations to Seller;
 - (iii) change credit terms with respect to any further work, including, but not limited to, receipt of cash in advance of further shipment for amounts owed or to be owed;
 - (iv) **suspend or discontinue any further work** and, if suspended, the time to complete the Contract shall be extended for the period of such suspension; and/or
 - (v) repossess the Products.
- The Contract amount shall be increased, by appropriate adjustment, by the amount of Seller's demobilization, delay, and remobilization costs.

Demand for Adequate Assurances

- 2.11 ADEQUATE ASSURANCES. In the event a reasonable doubt exists as to the Buyer's financial responsibility, Seller shall have the right, in addition to all others it may possess,
 - to stop operations,
 - withhold shipment and recall in transit,
 - and/or require a full or partial cash payment,
- until the Buyer shall have paid for all material previously delivered or satisfied Seller of Buyer's financial responsibility and ability to pay the full Contract price.
- Seller shall have no obligation to begin or continue performance until adequate credit and funding information is provided, at any time on request of Seller.
- Seller may stop the manufacture or supply of any labor or materials when it, in its sole discretion, determines that Buyer is in breach of this Agreement or any other Contract with Seller or Seller has insecurity with respect to funding or creditworthiness, until payment is made and any dispute or insecurity has been resolved.

Key Contract Terms

Contract Terms to Look For & Modify

1. Design
2. Engineer
3. Coordinate
4. Code
5. Survey
6. Payment
7. Bond
8. Lien
9. Waive (waiver)
10. Notice
11. Proceed
12. Indemnify (indemnity)
13. Work For Hire
14. Actual cost



Modification to Contract Terms

- **(1) Design and (2) Engineering Calculations**
 - Specifically limit your Work "but only to the extent Connection Design is expressly included in Subcontractor's Work"
- **(3) Duty to Coordinate**
 - Subcontractor shall provide information to Contractor such that Contractor can coordinate Subcontractor's Work with the Contractor and work of other subcontractors.
 - In no event shall Subcontractor be responsible to coordinate the design provided by others.
- **(4) Compliance with "codes"**
 - Nothing contained in this Agreement shall require Subcontractor to conduct a peer review of the design to ensure its suitability, adequacy, or building code conformance.

Modifications to Contract Terms

- **(5) Survey v. Field Verify**

- Duty to survey? Or just field verify?
- Change field verification prior to the start of the work – your shop drawings and fabrication already started before you can field verify

- **(6) Payment Terms & (7) Bond**

- Payment
 - » Pay cycle: 60-90 days
 - » Raw/Stored Materials
 - » Bond rights?
 - » Pay-when-paid/Pay-if-paid
 - Modification: **Provided, however, that if Owner fails to pay one of Contractor's progress payment applications that includes amounts for Subcontractor's Work, for more than sixty (60) days after such payment becomes due under the terms of the Prime Contract, and such failure is based solely on reasons entirely unrelated to Subcontractor or Subcontractor's fault or negligence, then that progress payment will be made within 10 days by Contractor after written demand by Subcontractor.**

Modifications to Contract Terms

- **(9) Waive (waiver)**

- Acceptance of payment = waiver of \$\$\$

- **(11) Proceed**

- Watch for obligations to proceed

- **(12) Indemnify (Indemnity, indemnification)**

- **§ 4.6 INDEMNIFICATION**

- **§ 4.6.1** To the fullest extent permitted by law, the Subcontractor shall indemnify and hold harmless the Owner, Contractor, Architect . . . from and against claims . . . **arising out of or resulting from performance of the Subcontractor's Work** under this Subcontract, provided that any such claim . . . is attributable to bodily injury . . . or to injury to or destruction of tangible property (other than the Work itself), but **only to the extent caused by the negligent acts or omissions of the Subcontractor** . . .

- **§ 4.6.2** . . . Section 4.6.1 shall not be limited by a limitation on the amount or type of damages . . . , compensation or benefits payable by . . . under workers' compensation acts, disability benefit acts or other employee benefit acts.

Modifications to Contract Terms

- **(13) Work for Hire**
 - Who owns the shop drawings?
 - Who owns the detailer's work?
- **(14) Actual Costs**
 - Termination
 - » Base Comp on % Complete – NOT “actual costs”
 - » Have detailing line item in SOV

WARRANTIES

- Is there an express warranty?
 - Implied warranty of merchantability
 - » Goods are fit for the ordinary purpose for which those type goods are used.
 - Implied warranty of fitness for a particular purpose
 - » Seller knows Buyer intends to use goods for a particular purpose.
 - » Seller is relying on Seller's skill in selecting the right goods.
- What is the time period for the warranty?
- What is the remedy for the defect?

Repair or replace?



Change Orders

Remember NEDD - Change Claims

- Change in **Quantity & Character** of the Work
 - » N= Notice
 - » E = Entitlement
 - » D = Damages
 - » D = Don't Waive Your Claims
- Change in Contract Time: **Delay & Acceleration** Claims
 - » Notice
 - » Entitlement
 - » Damages
 - » Don't Waive Your Claims

Limitations to Recovery from the Owner

- **Modify**

- Option 1: "Nothing in this agreement shall be construed to limit Subcontractor's right to seek a change order from Contractor **to the extent such change is attributable to Contractor** and not attributable to Subcontractor, Owner-Directed Changes, or Differing Conditions."
- Option 2: "**Except where such extra work is caused by Contractor or its subcontractors**, Contractor's receipt of compensation from Owner for extra work, changed work or changed circumstance shall be a condition precedent to Subcontractor's right to payment for the same."

Proceeding the Change Order Work

- 7.3 CONDITIONS PRECEDENT TO CHANGE ORDER WORK. Seller shall suspend performance of any change, whether directed by Buyer or suggested by Seller, unless the following conditions precedent are satisfied:
 - (1) Seller is thereafter released in writing by Buyer to perform said change,
 - (2) Buyer and Seller shall mutually agree in writing upon an equitable adjustment in the price and/or delivery date to reflect the effect of such change,
 - (3) Buyer has timely paid all amounts owed under the original scope of Work in accordance with the Contract,
 - (4) Buyer has reviewed and paid for all Changes within thirty (30) days of issuance of the change order request, and
 - (5) Buyer shall continue to make payments in accordance with the Contract Documents
- (“Conditions Precedent to Performance of Change Order Work”).

Lien Waivers

Lien Waivers

- 2.12 LIEN WAIVERS: Nothing in the Contract Documents shall cause to be voided or diminished in any manner Seller's right to enforce its mechanic's lien rights or obtain payment under an applicable payment bond if Seller is not timely paid. Seller will only execute unconditional and/or final lien waivers for amounts actually received and any lien waivers shall only relate to the actual Work performed and not future Work or future payments.
- Any form or release wherein the Subcontractor purports to release the Contractor, Owner, or Design Professional is hereby qualified by the following language, whether or not the Subcontractor specifically adds the language: **“This release shall apply only to work for which payment has been received in full by Seller, and it shall not apply to retainage, unbilled changes, or amounts not yet paid.”**



Limitations of Liability

Duty to Inspect/Accept Steel Prior to Erection

- 3.1 DUTY TO INSPECT PRIOR TO ERECTION. All claims against Seller will be deemed waived unless made in writing **within the earlier of, five (5) calendar days of delivery or two (2) days prior to erection**. Claims against Seller will be waived unless Seller is given adequate opportunity to inspect, approve, and, if required, correct the cause of the claim.
- The provision includes, but is not limited to, errors, material defects, faulty workmanship, shortages, and assessments. A representative of Seller must authorize all claims. **No claim will be allowed for corrections of alleged errors in materials fabricated by Seller unless Seller is notified before the corrections are made** and Seller's responsibility is proven.

Limitation of Liability

- 3.2 LIMITED WARRANTY: Seller warrants that the work described in the Contract shall be free from defects in workmanship and material, which vary from the Contract Documents.
- Seller shall replace or repair any such faulty workmanship or defective material, which varies from the Contract Documents, provided that it is reported in writing to Seller
 - (a) five (5) calendar days after delivery for defects which can be discovered upon a reasonable inspection,
 - or (b) for latent defects, one (1) year from date of on which seller last delivers materials or services within the Scope of this Contract (“Warranty Period”).
 - **THE LIABILITY OF SELLER IS LIMITED TO THE REPAIR AND REPLACEMENT OF ANY DEFECTIVE MATERIALS OR PARTS THEREOF AT ITS SHOP, OR AT SUCH OTHER LOCATION AS SELLER, IN ITS SOLE OPTION SHALL DESIGNATE.**

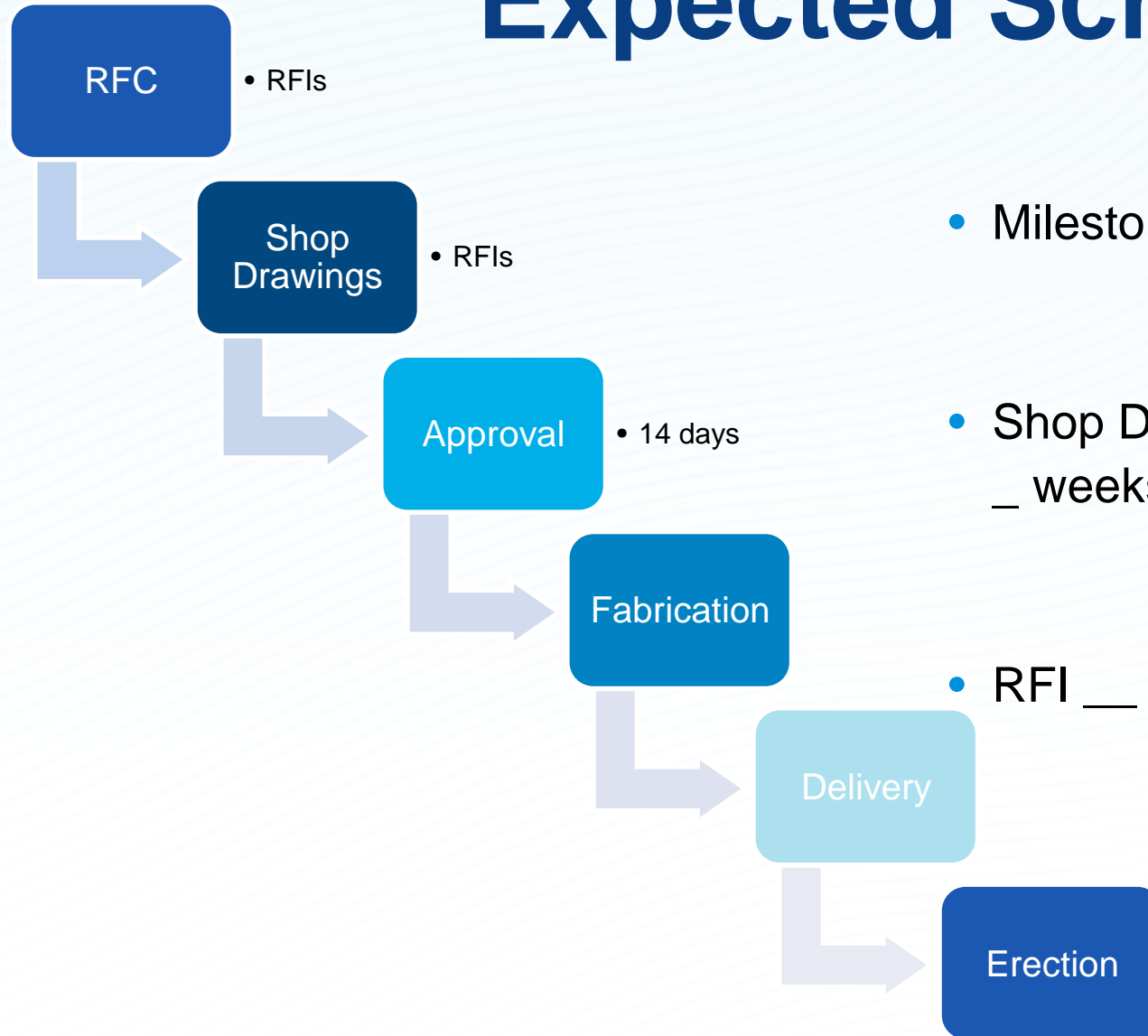
Limitation of Liability

- 3.4 LIMITATION OF REMEDIES. Corrections of non-conformities in the manner and for the period of time provided above shall constitute fulfillment of all liabilities of Seller to Buyer, whether based on warranty, contract, strict liability, negligence, willfulness or any other legal theory. IN NO EVENT SHALL SELLER BE LIABLE TO BUYER OR OTHER THIRD PARTIES FOR ANY SPECIAL, INDIRECT, INCIDENTAL OR CONSEQUENTIAL DAMAGES OR LOST PROFIT ARISING OUT OF OR IN ANY WAY CONNECTED WITH SELLER'S WORK UNDER THIS AGREEMENT.
- 3.9 LIMITATION OF LIABILITY. The remedies of Buyer set forth in Article 3 are exclusive, and the total liability of Seller with respect to the Contract or anything done in connection therewith, such as the timeliness or quality of performance or lack thereof, whether in Contract, in tort (including negligence and strict liability), in warranty or otherwise shall not exceed the amount paid to Seller on account of this Contract. Seller shall not be responsible for any liquidated damages or penalties related to time of performance or delays.
 - Suggest limiting this to a dollar amount.



Protection Against Delay/Acceleration Claims

Expected Schedule



- Milestones contingent on:

- Shop Drawing Return _ days and _ weeks prior to fabrication

- RFI __ days/hrs

No Damages for Delay

- Enforceable? CHECK STATE LAW
- Modify
 - Subcontractor shall be entitled to an equitable adjustment resulting from any change of schedule, acceleration, out of sequence work, or delay **caused by others for whom Subcontractor is not responsible.**
 - Allow recovery of direct and indirect costs

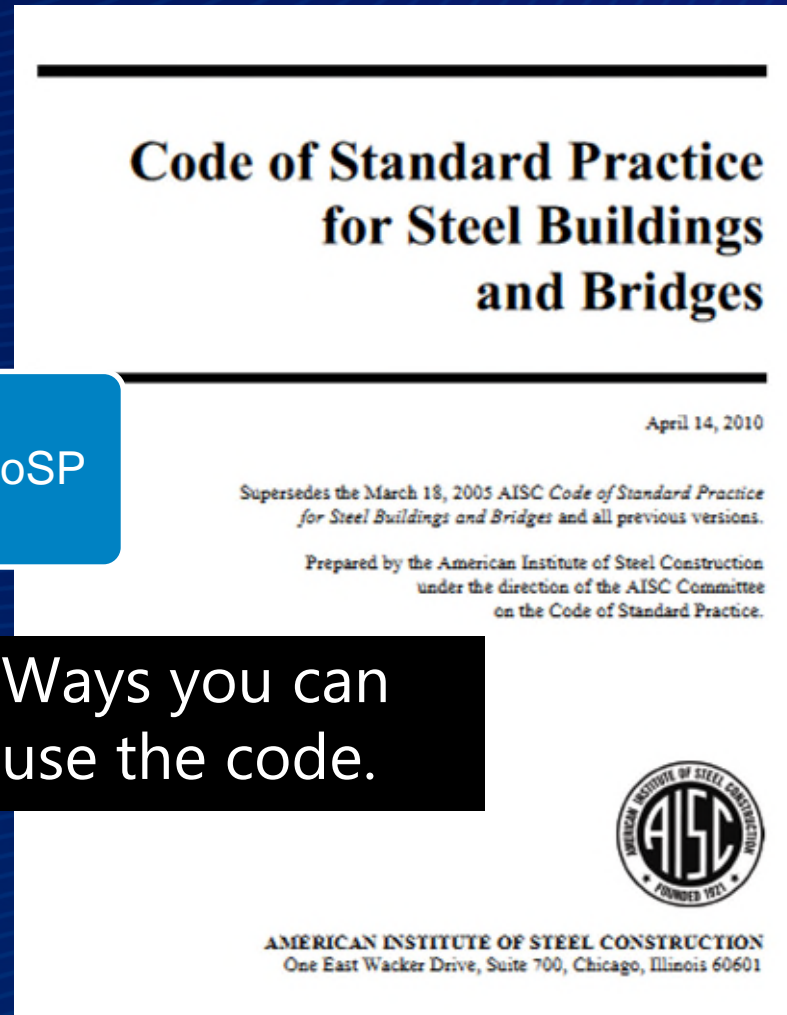
No Damage for Delay Clauses

1. Some states declare them void or allow exceptions
 1. Active interference
 2. Bad faith, willful, malicious, or grossly negligent
 3. Beyond contemplation of parties
 4. Delay so unreasonable = intentional abandonment of contract

Code of Standard Practice



Ways you can use the code.



CoSP 9.5.1 - Release for Construction Date

- “The contract schedule shall state
 - when the design documents will be released for construction, if the design documents are not available at the time of bidding,
 - And when the job site, foundations, piers and abutments will be ready, free from obstructions and accessible to the erector,
 - So that the erection can start at the designated time and continue without interference or delay caused by the owner’s designated representative for construction or other trades.”

CoSP 4.1

- “The owner shall furnish,
 - in a timely manner
 - and in accordance with the contract documents,
 - complete structural design drawings and specifications
 - that have been released for construction.”

CoSP 4.4 Approval

- “The approval documents shall be returned to the fabricator within **14 calendar days.**”
- Commentary: “The intent in this Code is that, in the absences of information to the contrary in the contract documents, 14 days may be assumed for the purposes of bidding, contracting, and scheduling.”

<input type="checkbox"/> Reviewed	<input type="checkbox"/> Furnish as Corrected
<input type="checkbox"/> Rejected	<input type="checkbox"/> Revise and Resubmit
<input type="checkbox"/> Submit Specified Item	
<p>This review is only for general conformance with the design concept and the information given in the Construction Documents. Corrections or comments made on the shop drawings during this review do not relieve the contractor from compliance with the requirements of the plans and specifications. Review of a specific item shall not include review of an assembly of which the item is a component. The Contractor is responsible for: dimensions to be confirmed and correlated at the job site; information that pertains solely to the fabrication processes or to the means, methods, techniques, sequences and procedures of construction; coordination of the Work with that of all other trades and performing all Work in a safe and satisfactory manner.</p>	
Company Name Here	
By: _____	Date: _____
Notes: _____	

CoSP 4.4.2 – RFI Response and Released for Construction

- Commentary:
 - “RFIs should be prepared and responded to in a **timely fashion** so as not to delay the work of the steel detailer, fabricator, and erector.”
 - “[I]f the response will result in an increase in cost or a delay in schedule, Section 4.4.2 requires that the fabricator and/or erector promptly inform the owner’s designated representatives for design and construction.”

CoSP 6.7.1 – Fabricator Determines Sequence Unless Contract Docs State Otherwise

- “Fabricated structural steel shall be delivered in a sequence that will
 - Permit efficient and economical fabrication and erection,
 - AND is consistent with the requirements in the contract documents.
 - » Note: most contracts allow gc to alter sequence; if this happens make sure your contract allows you to seek adjustment to contract sum and time for such changes.
- If the owner or owners designated representative for construction wishes to prescribe or control the sequence of delivery of materials, that entity shall specified the required sequence in the contract documents.



Problem Clause – GC can resequence work

- Do you really want to take on this cost?

D. The sequencing of the work is to be scheduled and approved by . It is understood that reserves the right to change the sequencing of the work, if necessary. After this Subcontractor has reviewed and approved the mutually acceptable revisions, Subcontractor shall be responsible for the costs of all overtime, shift time differentials, and other premium time costs required to make the schedule commitments outlined above. This includes, but is not limited to, work in excess of eight hours per day, forty hours per week, and/or work on Saturdays, Sundays and Holidays.

Problem Clause – Notification of Schedule Conflicts

- Do you really want to agree to take on this risk regarding schedule?

E. Within **20 workdays** after contract execution, the Subcontractor will have notified Turner in writing of any foreseeable conflicts in the project schedule, Exhibit "G". If there is a conflict or concern, this Subcontractor agrees to work with the Project Team to provide a mutually acceptable Recovery Schedule to meet the intended project schedule start dates, durations and completion dates at the Subcontractor's Cost.

CoSP 7.2 Job site conditions

- The owner's designated representative for construction shall provide and maintain the following for the fabricator and erector:
 - (A) Adequate access roads into and through the job site. . .
 - (B) **A firm, properly graded, drained, convenient and adequate space** at the job site . . .
 - (C) Adequate storage space, when the structure does not occupy the full available job site, to enable the fabricator and erector to operate at maximum practical speed.
- Otherwise, the owner's designated representative for construction **shall inform the fabricator and erector of the actual job site conditions . . . Prior to bidding.**"

CoSP 9.5.3 – Delays to Fabricator

- “If the fabrication or erection is significantly delayed
 - due to revisions to the requirements of the contract,
 - or for other reasons that are the responsibility of others,
- the fabricator and/or erector shall be compensated for the additional costs incurred.”



Equitable Adjustments for Time and Money

Agreement to the Project Schedule

- 6.1 CONTRACT TIME. Seller shall **only be bound to the project schedule to the extent it is specifically incorporated as a Contract Document on the face of this Proposal**; otherwise, Seller shall perform the Work within a reasonable amount of time (“Contract Time”). If a schedule is expressly listed on the face of this Proposal, any modification to the agreed upon schedule shall allow Seller a reasonable time to complete its Work in an efficient manner considering the contract completion date and any interim times set forth in the project schedule.
- Seller’s ability to meet the required schedule is based on Buyer’s provision of contract drawings that comply with Section 3.1 of the AISC Code of Standard Practice at the time of bidding. Drawings must be clear and provide all details required for the preparation of shop drawings and fabrication. In the event RFI’s are issued by Seller, schedule impacts should be expected.

Equitable Adjustments to Time and Money

- 6.4 EQUITABLE ADJUSTMENT. This Proposal is based upon:
 - Seller's timely receipt of Buyer's notice to proceed;
 - Issued for Construction Drawings, which comply with Section 3.1 of the AISC Code of Standard Practice, current edition;
 - return of approved shop drawings as set forth in this Agreement;
 - and prompt return of RFI responses to Subcontractor.
- Seller shall be entitled to an equitable adjustment in the Contract Time and Contract Sum, including but not limited to, any increased costs of labor (including, but not limited to, rescheduling work, paint touch-up or repainting, additional handling, increases in labor or subcontract rates, etc.), overtime, and materials resulting from any change of drawings, change of schedule, acceleration, out of sequence work or delay caused by others for whom Seller is not responsible.

Questions?

Send an email to dmotta@grsm.com or arichie@grsm.com

GRSM50

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