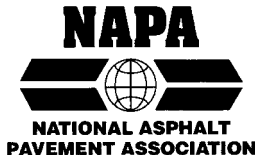


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A Contractor's Guide to Managing Risk

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What Is Happening?

In my 34 years practicing construction law, I have never witnessed a period where contractors have faced greater risks due to things out of their control. The increased cost and unavailability of essential materials for highway construction is a great concern.

I have never seen the news coverage of highway industry prices that has occurred over the last year. Newspapers in large cities and small towns from Boston to Honolulu and Spokane to South Florida, have reported on the increased costs. Here is a sample of recent headlines:

Asphalt Prices Block Road Projects

July 02, 2006 *Colorado Springs Gazette*

Road wage: Asphalt Cost Hits Planners

June 26, 2006 *Denver Business Journal*

Asphalt Prices Soar, But Roadwork Goes On

June 04, 2006 *Rome (GA) News-Tribune*

High Asphalt Prices Stall Roadwork

June 29, 2006 *Boston Globe*

Builders Say They're Getting Hammered by Skyrocketing Construction Costs: South Florida Builders Say They're Getting Nailed

May 14, 2006 *South Florida Sun-Sentinel*

Higher Fuel Prices Crippling Asphalt Industry

June 1, 2006 *Newport (TN) Plain Talk*

Asphalt Prices Stalling Budgets: After Years of Stability, Paving Costs Soar

June 10, 2006 *Milwaukee Journal-Sentinel*

Asphalt Shortage Halts Roadwork

May 16, 2006 *Honolulu Star Bulletin*

NAPA members are acutely aware of the problem addressed in the headlines above. Many contractors are quoted in articles saying they have never witnessed anything like this in their careers. Contractors are caught in the middle of this difficult and risky situation. On the one hand, they are not getting firm prices from liquid asphalt suppliers at the time of bid. On the other hand they may have entered into fixed-price contracts with no price adjustment clauses. The risk of rising liquid asphalt prices, and even availability of liquid asphalt, is quickly becoming a way of life for paving contractors and will likely remain to be a substantial risk for the foreseeable future.

What is the law covering these situations? What rights do contractors have when there is no price adjustment clause in their contract with the owner? What are the legal rules applicable to the supplier? What can a contractor do to protect himself? As shown in

the remainder of this document there are no clear answers to these questions. The law is not the same in each state. Additionally, the law may change due to the severity of the problem.

In a nutshell, contractors today are at greater risk and if they perform business as usual, the consequences could be catastrophic. Generally, absent a price adjustment clause, contractors bear the risk of increases in the prices of materials, even when they are as dramatic as the recent liquid asphalt price increases. The courts consider this to be the very essence of a fixed-price contract. Then again, if a material is unavailable through no fault of the contractor, courts may be more likely to grant some type of relief.

Contractors are also at greater risk if they are relying on oral quotes from suppliers. Under the Uniform Commercial Code, with some exceptions that will be discussed later, oral quotes are not enforceable.

This document will give contractors strategies for managing their existing contracts, and entering into future contracts, so that the contractor's risk is manageable. It will cover both contracts between the contractor and the supplier and contracts between the contractor and his customer, the owner.

— By Cordell Parvin