

RISE & FALL CLAUSES FOR HOME BUILDING WORK (BETWEEN \$7,500 and \$500,000)

Lump sum contracts broadly enable a builder to undertake certain works for a fixed price. This gives owners desired certainty around price, including when a loan is required to fund building work.

Price fluctuations however can occur due to variations to the contract, or if a provisional sum or prime cost allowance is exceeded. Increases in the cost of labour, materials and other items during construction can also impact on the total cost of the home building works.

Whether adjustments to the price of a home building works contract will be allowed, enabling the builder to recover the increased costs, depends on the terms of the contract. Sometimes this situation is dealt with through a 'rise and fall' clause that addresses price fluctuations in costs of labour, materials etc that arise after the parties have signed the contract. However, it is important to note that there are restrictions on when a rise and fall clause can be used in a lump sum building contract, and how it will be administered if it is allowed.

This Information Sheet sets out some of circumstances when price increases may be allowed, and the various issues members should consider before relying on a rise and fall clause in a building contract.

What are the restrictions around how rise and fall clauses can be used in contracts?

Rise and fall clauses are prohibited in contracts for home building work between \$7,500 and \$500,000 in value, and as required under the *Home Building Contracts Act 1991*, except under very limited circumstances. This means that parties in home building works of this value cannot include a rise and fall clause that seeks to apply more broadly than the limited circumstances set out in the legislation.

The limited circumstances where a builder can rely on a rise and fall clause to cover an increase in actual costs are where:

- government taxes or charges increase after the contract is signed;
- the builder is required to comply with a State or Commonwealth law; or
- there was a delay in commencement of the works exceeding 45 working days after the contract was signed that is not caused by the builder.

Contracts over \$500,000 value (and therefore falling outside of the *Home Building Contracts Act 1991*) and commercial contracts may use a rise and fall clause, if appropriate. We recommend that members seek legal advice if unsure of the contract terms or drafting that may be appropriate for a project.

Penalties may apply to builders who include a rise and fall clause in their contract contrary to the law. A builder who enters into a home building contract between \$7,500 and \$500,000 value, that contains a rise and fall clause, may be liable to a maximum fine of \$10,000.

What sorts of delays in commencement of home building work could potentially result in a price increase being allowed?

Any delay that is caused solely by the failure of the owner to comply with a condition imposed on them by the contract could potentially enable an adjustment in the contract price. For example, if there is a delay in commencement of the works due to an owner failing to produce satisfactory

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evidence of their ability to pay the contract price, or failing to demonstrate that they are the registered proprietors of the land on which the work is to be performed in accordance with the conditions imposed on the owner by the contract, then a price adjustment could be justified.

Alternatively, where there is a delay in commencement of the works without any failure on the part of either the owner or the builder to comply with their obligations or to accept a condition or direction, this could potentially also enable a price adjustment.

For example, delays in commencement may occur due to excessive timeframes in obtaining development approval. This can occur despite the owner and builder complying with all their obligations under the contract such as obtaining building permits and the Water Corporation's approval within 45 working days from the date of the contract. As a result, this situation may justify a price adjustment if the cost of labour and materials have increased over that period.

In circumstances where a builder properly submits all necessary applications to the relevant authorities within twenty (20) working days after the date of the contract, a builder will be taken to have complied with their obligations.

Where there is a delay in commencement what is the process for adjusting the contract price?

The price for a home building works contract valued between \$7,500 and \$500,000 can be adjusted where there is a delay in commencement exceeding 45 working days after the contract was signed that is not caused by the builder, by notice in writing to the owner.

The builder must provide the owner with written notice that sets out:

- the increase in price; and
- specifies when the increased amount is payable. This can be ten 10 working days after the notice is given, or at the time of a progress payment.

In circumstances where a contract is for a commercial project or for home building work in excess of \$500,000, it is important to consider the relevant terms of your contract including any special conditions and the process to be followed in adjusting the price of the contracted works. It is worth obtaining specific legal advice if you are unsure of what to do.

Is there a limit on the total price increase under a rise and fall clause, and will other issues arise if I rely on it?

It is important for members to understand that where a rise and fall clause is used to pass on a price rise which is more than 5% of the overall contract price, an owner may elect to terminate the contract within ten (10) working days of receiving written notice of the increase. If the owner elects to terminate the contract, the owner is also liable to pay the builder for the reasonable costs incurred by the builder up to the date of termination.

Regardless of the amount of the price increase, an owner can make a complaint to the Building Commissioner within ten (10) working days if they are of the view that a price increase is excessive or unjustified and may seek to be compensated. In this case, a builder will be required to show that the price was increased to reflect actual increases in costs between the date of the contract and the date of the notice provided to the owner seeking to adjust the contract price. It is always important to retain invoices and price information as evidence justifying the price increase.

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What are other ways in which price fluctuations can be managed?

If members are intending to enter into a contract and are aware from the outset that there is a possibility of price fluctuations, there are some options to consider such as:

- executing a cost plus contract, enabling the costs for materials and labour to be passed on through the building process while charging an agreed margin for overheads and profits for supervising the works;
- utilising provisional sum and prime cost allowances for works which cannot be accurately priced or are likely to be the subject of price increases that cannot be reasonably estimated;
- seeking to obtain fixed pricing and written quotes for a firm period of time from suppliers and contractors before proceeding with executing a contract;
- restricting the scope of works for a contract to those items which are known and fixed in price and excluding certain works from the scope of the contract where possible that are likely to be the subject of price fluctuations.

For any further assistance, please contact Master Builders Association Western Australia on 9476 9800 or mba@mbawa.com.

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