

The Saga of Economic Volatility Continues — Construction Contract Approaches for Potential Economic Issues Arising from the Iran Military Conflict

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Six years ago, the COVID pandemic caused a shutdown of the economy. Since then, continued issues of economic volatility have occurred: supply chain woes; inflation and cost escalation; tariffs; and various other natural disasters. Now, with the Iran military conflict, specific materials and oil prices appear to be at risk. This article presents approaches for addressing these risks in construction contracts.

As a starting point, military conflict is a typical type of force majeure event. But that alone does not necessarily dictate a remedy or relief for impacts. Generally, the best approach is for the construction contract to specifically address both the issue and the afforded relief. One initial issue in negotiating such contract clauses is the definition of the Iran military conflict itself. Does the military conflict constitute a war? Does the clause protect from war, terrorism, or a specifically identified military conflict? Does the current conflict constitute an unusual, unforeseen event? What if you sign a contract today—at this point, does it still remain an unforeseen event?

Because of these complications, it is best to specifically address the issue with a custom contract clause. Instead of relying solely on vague or broad language, any negotiated clause should specifically identify the issue and all broad concerns—impacts of any terrorism, vandalism, armed conflict, military conflicts, or any widening military or government action, including but not limited to, events arising from the Iran/U.S. military conflict. And it should identify the potential problems (price escalation and delay of materials) and the respective relief (increase in price and extension of time through a change order).

Even if a standard construction contract form includes a force majeure clause for “war,” it might not cover all incidents or events. And it might only afford relief of a time extension, but not necessarily additional compensation for price issues.

Relying upon generic common law doctrines, such as commercial impracticability are risky because a court might rule that the issue was foreseeable, especially if the contract is signed while the pending conflict is developing. And a court might rule that the impacts from the event do not rise to the level of commercial impracticability.

Also, when the issue of concern is economic volatility, the more that the event is known as a potential issue at the time of contracting, the more reason to specifically identify the issue and the mechanisms for relief. This is generally true for all the economic issues identified in this article—pandemics; supply chain issues; inflation and cost escalation; and tariffs. If an event is known to exist and might impact the project, best practice is to specifically address the event with a clause that affords either an extension of time, increase in price, or both. Other specific clauses to consider include:

- Price escalator clauses for either tariffs, price increases, or specified categories of materials (e.g., specific oil-based materials or fuel price increases)
- Contingencies or allowances for materials of concern or tariff costs
- Greater flexibility for substitutes or alternatives to allow for the sourcing of differing materials
- Extensions of time if materials are difficult to source
- Termination for convenience clauses if projects become impracticable due to any war-time orders or governmental orders that severely impede the project
- Segregated pricing by agreement for time-and-material budgets for carved-out scope packages that might be more volatile
- Prompt procurement, buy-out administration, and warehousing of goods in advance to avoid potential volatility on specified goods
- Value-engineering during the preconstruction phase to identify different (more easily accessible) materials
- Increased buffers in the contract price to account for the risk of potential tariff impositions

When negotiating and drafting custom contract clauses to address risk on projects, or if litigating claims for equitable adjustments or change orders, best practice is to consult with trusted, experienced counsel that is knowledgeable on the intricacies of construction law.

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