

How Should Construction Contracts Approach Potential Tariffs?

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As an initial primer: tariffs typically work as a tax, charged on goods purchased and imported to the United States from a foreign country. The tariff is charged as a percentage on the price paid for the foreign good. Tariffs are collected at the ports where the goods enter the country. Typically, the tax is paid by the importer directly to the US Customs and Border Protection Service. And, typically, the tax is required to be paid to release the good from the port, although there are some methods to slightly adjust that timing by satisfying certain conditions.

A tariff on construction materials would likely result in additional costs for the project. Intuitively, a tax on the imported materials simply causes the goods to cost more. Also, tariffs on imported goods might cause increased demand for specific alternatively sourced materials (whether that be domestic or non-tariffed foreign sources), which then leads to increased costs for those alternative sources.

As a general rule of thumb, and reflected in most standard construction contracts, the contractor is responsible for providing the labor and materials for the construction project at the agreed upon contracted price, and the contractor is not entitled to any adjustment to the price on the basis of changes in taxes or laws, unless there is a contract clause specifically affording such relief. For example, the AIA A201-2017 section 3.6 General Conditions provides that the contractor is responsible for all taxes on the work. In most standard contracts, there is no specific clause that affords the contractor relief or adjustments in the event of changes in taxes, laws, or tariffs.

Depending on the specific contract, perhaps one could argue that a tariff is an unforeseeable event beyond the control of the contractor; however, most contract clauses would afford limited or no relief, typically an extension of time at best, but not compensation. An example of this difficulty is the force majeure clause that might exist in a contract. Under most contracts, tariffs are not specifically identified in the force majeure clause, and most force majeure clauses provide an extension of time as the remedy and do not afford additional compensation to cover the costs.

Some contractors might be tempted to argue that relief should be afforded under the doctrine of commercial impracticability. That too, is a difficult path. Commercial impracticability sometimes affords relief to a contractor when circumstances on a project have changed so drastically that the performance of the contract is commercially impractical. Theoretically, if a tariff increased the costs so astronomically to make the job financially impossible, there could be an argument under the doctrine. But these circumstances are relatively rare, and courts are rather critical of this argument.

On public federal projects, an argument could be made that a contractor is entitled to equitable relief and an adjustment to the contract price under FAR 52-229.3, which provides for an equitable adjustment for new taxes that arise during a project. It is unclear, however, whether this argument would succeed, because it is uncertain whether a tariff constitutes a new tax under FAR 52-229.3. There is a dearth of decisional law on this point, and a 2022 Armed Services Board of Contract Appeals

decision rejected this argument.

Thus, a tariff on construction materials is likely to increase the costs, and there is no obvious straightforward right to relief in most default contracts. A contractor should consider negotiating a specific clause to address the cost item. A list of potential approaches, including specific negotiated clauses, including the following:

- Price escalator clauses for either tariffs or specified categories of materials;
- Contingencies or allowances for materials of concern or tariff costs;
- Greater flexibility for substitutes or alternatives to allow for sourcing of differing materials;
- 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 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. Offit Kurman construction attorneys are available to advise and counsel contractors, owners and developers, construction managers, design-builders, design professionals, subcontractors, and suppliers on construction contracts, risk, and project disputes.