Article

How to Navigate Tariffs in Your Construction Contracts

10.25.18

Construction Business Owner

Shareholder Mason Hester spoke with Construction Business Owner about the impact of aluminum and steel tariffs on the cost of construction projects. Throughout the piece, Hester offers insight into how construction companies should negotiate their contracts.

"Give yourself enough breathing room to negotiate terms into the contract (and, if you can't get them in the contract, to allow yourself the flexibility to consider walking away from the deal)," said Hester. "This may seem like a simple, obvious point, but I see this pop up all the time in my practice."

To learn more, access the full article here or see below:

Like it or not, tariffs on steel and aluminum are real and very much in effect. And whether directly or indirectly, your construction company will be affected by them. Understanding just how much and in what way is a bit more difficult to define, though. We're here to help. This week, we spoke with Mason Hester, a real estate and construction attorney and shareholder with Munsch Hardt Kopf & Harr, on how to navigate the contractual side of new construction projects in a post-tariff world.

Hester represents design professionals, owners, general contractors, subcontractors and suppliers in a variety of construction transactions and disputes. He was among the first class of attorneys to receive board certification in construction law by the Texas Board of Legal Specialization. Read his insights below.

HOW TO MANAGE PRICING OF MATERIALS & PROJECTS

CBO: What is your advice for managing materials and project pricing in light of the current tariffs?
MH: First, be aware this is a fluid and evolving area of law, with new regulations and orders being issued frequently; therefore, when these issues first pop up for you and your company, it will be essential to check the current status of court opinions, regulations and orders before finalizing your strategy on how to deal with tariffs impacting you. With that said, your best bet generally will be to deal with these issues up front and expressly in your contract, as I discuss in more detail below.

HOW TO MANAGE PROJECTS ACTIVE PRIOR TO THE TARIFFS

CBO: How should contractors best manage projects that were active prior to the current tariffs taking effect?
MH: For these projects (where the contract was executed before the tariffs went into effect), if your contract is cost-plus, tariffs may be part of the cost of the work, but tariffs may cause you to go over your guaranteed maximum price, if applicable. For delays due to shortages, your best bet might be to look at the contract's "force majeure" clause looking for relief, as I discuss below.

However, what if your contract is a lump sum/fixed-price contract? Texas courts—like many other states—generally say if a contractor agrees to construct an improvement for a fixed price, the contractor assumes all risks of subsequent price increases in the work. Relief, if any, will have to be found in the contract. Looking at a familiar form, in the AIA A201 2007 General Conditions, the word "tariff" is not mentioned.

© 2024 Munsch Hardt Kopf & Harr, P.C. All Rights Reserved

Perhaps there is some relief in Section 3.6 on "Taxes," stating "The Contractor shall pay sales, consumer, use and similar taxes for the Work provided by the Contractor that are legally enacted when bids are received or negotiations concluded ..." You might argue a tariff is a tax enacted after your bid was received/negotiated; but there are counter arguments that tariffs are not a "sales, consumer, [or] use" tax envisioned by this clause.

Contractors might find relief in a force majeure clause. The AIA force majeure clause, at A201 Section 8.3.1, may provide relief, stating: "if the Contractor is delayed at any time ... by an act or neglect of the Owner or Architect ... or by labor disputes, fire, unusual delay in deliveries, unavoidable casualties or other causes beyond the Contractor's control ..."

Regardless, care must be taken to preserve such claims by following the claim notice and filing procedures, if any, under the applicable contract. If there is no such language in the contract, is it possible the owner will give the contractor a change order? It may be difficult to get, but it is worth a shot. If not, your last bit of hope may lay in trying to get an exception under the guidelines provided by the Secretary of Commerce (click here for an example).

HOW TO PLAN FOR INCREASED & FUTURE TARIFFS

CBO: What can contractors do to proactively plan for increases in current tariffs and/or the potential for new tariffs?
MH: The answer to the previous question already gives you some of the key points to look for and ambiguities to avoid. In a perfect world, your force majeure clause would clearly state "all tariffs" (not just aluminum/steel) and potentially add further broad language for "any other actions by governmental authorities." Ideally, you would also make sure this language is also provided for in reimbursable cost of work language, if you're dealing with a cost-plus contract.

Further, the contract language preferably should clearly grant you not only an increase in the contract sum but also an increase in the contract time. Contractors will also want to make sure they have provisions that "flow down" these issues in their subcontracts; namely, that the subcontractors will get additional time/money resulting from tariffs only to the extent the owner grants this to the contractor.

HOW TO BETTER NEGOTIATE TARIFFS IN CONTRACTS

CBO: Do you have any practical advice for negotiating contracts in the current climate?
MH: This touches on a key point: because so much of this can come back to the contract, a lot of this can come down to the verbiage you are able to negotiate into your contract. If I had to choose one point, it would be—to paraphrase The Rolling Stones—it's often a good idea to make sure time is on your side; i.e., you generally don't want to wait to start negotiating the above terms (or other key contract terms, for that matter) until the eve of the project commencement date.

Instead, give yourself enough breathing room to negotiate these terms into the contract (and, if you can't get them in the contract, to allow yourself the flexibility to consider walking away from the deal). This may seem like a simple, obvious point, but I see this pop up all the time in my practice.

© 2024 Munsch Hardt Kopf & Harr, P.C. All Rights Reserved

Primary Contacts



Mason Hester
Houston
713.222.4036
mhester@munsch.com

Related Practices

Construction Litigation

Related Industries

Construction

© 2024 Munsch Hardt Kopf & Harr, P.C. All Rights Reserved