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The Tariffs Are Here, Now What?

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Many in the construction industry are already feeling the impact of the steel and aluminum tariffs enacted in March of this year. There are also potentially \$200 billion worth of additional tariffs on the horizon. What can you do to protect yourself from the increased project time and costs caused by these tariffs? This article will focus on impacts to the contractor.

For current projects, 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. What about delays due to shortages? In this case, your best bet might be to look at the contract's "Force Majeure" clause looking for relief, as discussed below.

What if your contract is a lump sum contract? Texas courts generally say if a contractor agrees to construct an improvement for a fixed sum, 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, the AIA A201 2007 General Conditions, the word "tariff" is not mentioned. 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 "[i]f 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 your contract, is it possible the owner will give you 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.

What about future projects, for example, where no contract has been executed? The above discussion already gives you some of the key points to look for and ambiguities to avoid. You will generally want your Force Majeure clause to clearly state the word "all tariffs" (not just aluminum or steel) and potentially add further broad language for "any other actions by governmental authorities." 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 or money resulting from tariffs only to the extent the owner grants this to the contractor.

Finally, this is an evolving area of the 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.

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