FAQs

CONTRACTORS' RESPONSES TO RISING TARIFFS' IMPACT ON MATERIAL COSTS

Material costs in construction are being impacted by tariffs imposed and threatened by the current administration. Contractors should look to their agreements to see what alternatives they have to seek reimbursement for these rising costs. Ultimately, the ability to recover tariff-related costs depends on the terms of the contract.[1]

Question #1: What are tariffs?

A tariff is a tax imposed by one country on goods imported from another country. Tariffs are collected at the ports where the goods enter the country. Many goods frequently used by SMACNA contractors, including steel, aluminum, fasteners, manufactured components, and HVAC units, are frequently procured from outside of the U.S. Thus, for example, a 25% tariff on aluminum imported from Canada would significantly alter the bid and cost structure for a SMACNA contractor installing the HVAC duct in a new office building. So, too, would a 100% tariff on HVAC parts imported from China.

Question #2: What are reciprocal tariffs?

A reciprocal tariff is a tax or trade restriction that one country imposes on another in response to similar actions taken by that country, aiming to create balance in trade. For example, if one country were to raise tariffs on goods from another, the affected country could respond by imposing its own tariffs on imports from the first country. Essentially, "if they charge us, we charge them." Such measures are meant to protect businesses, preserve jobs, and fix trade imbalances. However, such measures can also result in disruptions to supply chains, rising prices for consumers, and slowing economic growth.

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[1] This blog post concerns federal and private contracts. Construction contracts entered into with states, counties, or other local authorities may have substantially different terms and contractors should consult their attorneys for guidance.

Question #3: I am contracting with the federal government and am now subject to tariffs and rising material costs, what can I do?

There are three clauses in Federal Acquisition Regulation ("FAR") contracts that may be used to recoup the rising costs of materials that has resulted from tariffs. Whether acting as a contractor or subcontractor, SMACNA members should look to the language in their existing contracts to determine whether they contain provisions that permit price adjustment. If helpful provisions do not exist, they should be added to future contracts.

New Tax Provision Adjustment

FAR 52.229-3 provides that "[t]he contract price shall be increased by the amount of any after-imposed Federal tax, provided the Contractor warrants in writing that no amount for such newly imposed Federal excise tax or duty or rate increase was included in the contract price, as a contingency reserve or otherwise."

For a tariff to be considered a newly imposed tax, the tariff must be implemented after the date set for bid opening or, for a negotiated contract or modification, after the effective date of the contract or modification. It is important to pay careful attention to this timeline when submitting bids because tariffs imposed after bid submission, but before contract award, will not be considered newly imposed. Further, contractors should also keep in mind that FAR 52.229-3 requires prompt notification of "the Contracting Officer of all matters relating to any Federal excise tax or duty that reasonably may be expected to result in either an increase or decrease in the contract price" and that the contractor "take appropriate action as the Contracting Officer directs."

Overall, this means that if FAR 52.229-3 is in the contract (or is a mandatory clause under federal regulations) and the contractor provides prompt notice to the Contracting Officer that the new tariffs "reasonably may" affect pricing, the contractor may be entitled to an adjustment to account for the increased costs. More specifically, pursuant to this clause, increased costs resulting from Executive Order No. 14193 titled "Imposing Duties to Address the Flow of Illicit Drugs Across Our Northern Border" are likely recoverable to the extent the effective date of the contract or modification is before February 1, 2025, and the contractor provides prompt notification. However, it should be noted that FAR 52.229-3 only protects contractors against tariffs that they pay directly, meaning that it does not protect against tariff-driven cost increases that contractors incur on domestically produced goods.

Economic Price Adjustment Provision

An economic price adjustment clause, including FAR 52.216-4, may be another option if it is included in the contract. FAR 52.216-4 provides that contractors may, at any time during contract performance, notify the Contracting Officer if the unit prices for material shown in the schedule either increase or decrease. Increased prices that are the result of a tariff arguably fall within the scope of this economic price adjustment provision. Notification must be provided within 60 days after the increase, or within any additional period that the Contracting Officer may approve in writing, but not later than the date of final payment under the contract. The notice must include the contractor's proposal for an adjustment in the contract unit prices to be negotiated as well as supporting data explaining the cause, effective date, and the amount of the increase and the amount of the contractor's adjustment proposal.

Promptly after the Contracting Officer receives the relevant notice and data, the Contracting Officer and the contractor shall negotiate a price adjustment in the contract unit prices and its effective date. However, it should be noted that the aggregate of increases is usually limited to 10% of the original unit price. Additionally, the contractor shall continue performance pending agreement on, or determination of, any adjustment and its effective date.

Not all contracts contain economic price adjustment clauses and contracts should be carefully reviewed to determine whether the clause is included and allows for a price increase. If the contract does not include this clause, the possibility always exists to negotiate a modification with the Contracting Officer to include one given the uncertainty in the market with potential tariffs.

Flexibly Priced Federal Contracts

Contractors that are performing flexibly priced contracts generally should rely on the allowability rules under FAR 31.201-2 to recover increased costs associated with tariffs. Flexibly priced contracts include cost-reimbursement contracts and other contracts that are subject to adjustment based on actual costs incurred, including incentive and certain time-and-materials contracts. FAR 31.201-2 requires that a cost is: (1) reasonable; (2) allocable; and (3) consistent with the Cost Accounting Standards' generally accepted accounting principles and practices (if appliable), contract terms, and any FAR cost principles. While not yet determined, it is likely that FAR 31.201-2 will permit recovery of tariff-related cost increases.

Question #4: What provisions can I use to protect myself from rising costs associated with tariffs in private contracts?

Regarding private contracts, the cost-plus contract, price escalation clause, force majeure clause, and impracticability/impossibility defenses may provide relief for contractors facing the rising cost of materials that has resulted from tariffs imposed by the new administration.[2] Whether acting as a contractor or subcontractor, SMACNA members should look to the language in their existing contracts to determine whether they contain provisions that permit price adjustment. If helpful provisions do not exist, they should be added to future contracts.

Cost-Plus Contract

A cost-plus contract is ideal for contractors facing rising costs of materials as a result of tariffs. This is because, in a cost-plus contract, the owner bears the risk of increasing material costs because the contractor simply bills the higher cost of materials to the owner and adds on the agreed upon contractor's fee.

Cost-plus contracts are advantageous to contractors because variable costs-plus improvements to the project are included in the price paid by the owner and are subject to the contractor's fee. This means that the contractor can effectively shift the increased cost of materials as a result of tariffs to the owner. However, contractors should review their cost-plus contracts to

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[2] Please note that this section was largely written with reference to Minnesota state law. Please consult with your attorney for additional guidance.

determine whether these costs are covered by the applicable "Construction Costs Defined" provision.

Price Escalation Clause

Even in a fixed price contract, price escalation clauses can provide a source of relief for contractors facing rising material costs. These provisions provide that a contractor may be entitled to increasing material costs, notwithstanding the fixed price-nature of the contract between the parties. In other words, a price escalation clause permits the contract price to be changed to the extent raw materials or components significantly change in price.

It is important to note that these terms are not a part of the standard ConsensusDocs or AIA. However, they can be suggested as "additional provisions" or amendments and can provide contractors with substantial relief from escalating prices. ConsensusDocs now publishes ConsensusDocs 200.1 as an escalation clause amendment to its Standard Agreement and General Conditions Between Owner and Contractor.

However, even if a construction contract contains a price escalation provision, there is no guarantee a contractor will recoup all additional costs incurred resulting from material cost increases. The precise wording of the provision and any requirements placed on the contractor must be examined closely for the contractor to take full advantage of the provision. For example, many escalation provisions require the contractor to give the owner notice of a price increase in order to receive an adjustment of the contract price. Other escalation provisions may impose other duties on the contractor or may only offer adjustment of the contract price for increases to specific, predetermined construction materials. As always, careful reading of the controlling contract language is crucial.

Force Majeure Clause

Force majeure clauses may offer another route for addressing the increase in material costs. A force majeure clause is defined by *Black's Law Dictionary* as a clause "allocating the risk of loss if performance becomes impossible or impracticable, especially as a result of an event or effect that the parties could not have anticipated or controlled." Similar clauses are also described as "Act of God" clauses. The goal of these two clauses is essentially the same – to protect a party when unanticipated events occur outside of that party's control.

Generally, simply because a product is more expensive does not make it "unavailable," for purposes of force majeure. As such, courts generally will not enforce force majeure provisions where government action, such as the imposition of tariffs, has resulted in the increased cost of performance. Contractors often bear the risk of loss for additional costs due to force majeure events unless the contract specifically shifts the risk to the owner. Thus, while owners may be required to grant time extensions, contractors are often not entitled to additional compensation for the increased costs unless the contract explicitly states otherwise.

Because increased material costs are generally not considered force majeure events, parties look to other methods of capturing increased costs, like cost plus contracts or price escalation provisions. Moreover, in this situation, increased tariff costs have been discussed for years, and, thus, it is not likely to be considered an "unanticipated" event triggering a force majeure clause.

Contractors should consider explicitly including governmental imposition of tariffs in the clause's list of force majeure events in order to shift the risk associated with the future imposition of tariffs to the owner. The clause should clearly and specifically allocate the risk by referring explicitly to tariff-based "unprofitability," "economic hardship," or "market fluctuations" as an excuse for nonperformance.

Impracticability/Impossibility Defenses

Although not a contract clause, the common law recognizes "impracticability" and "impossibility" as defenses to nonperformance under a contract resulting from substantial material cost increases. While "impossibility" and "impracticability" are technically separate legal defenses, their definitions are quite similar, and the application of both defenses often overlaps in case law.

The impossibility doctrine operates to discharge a promisor's performance when an event arises, after formation of the contract, making it no longer possible for the promisor to perform their obligations under the contract. Similarly, performance under a contract may be excused if performance "becomes impracticable in the sense that performance would cast upon the promisor an excessive or unreasonably burdensome hardship, loss, expense, or injury." As such, contractors may attempt to use these defenses to argue that the dramatic rise in material costs has created impossibility of performance.

However, if the circumstance giving rise to nonperformance under the contract was foreseeable by the promisor at the time of entering into the contract, impossibility will not excuse the promisor's performance. Owners may argue that contractors have long been alerted to the possibility of tariffs that could significantly increase the cost of their materials. Furthermore, the fact that performance under the contract is less profitable than a party expected typically does not by itself relieve a party of performance.

However, if a party can show that material costs have risen to the point where the party's performance under the contract is "excessive and unreasonable," impracticability may allow the contractor to be excused from performance. Courts have not established a clear threshold for an increase in financial burden, or accompanying decrease in profit, that would qualify as impracticability/impossibility and excuse a party from performing under a contract. However, as a general rule of thumb, courts will typically not recognize an impossibility unless the cost exceeds 100% of the contract price. The determination of whether a material cost increase constitutes impracticability or impossibility is a fact-specific determination that will vary by jurisdiction.

Question #5: What are strategies for managing supplies?

Traditionally, contractors try to limit the amount of materials they are holding in inventory. The potential significant increases in prices as a result of tariffs could cause contractors to consider holding materials beyond traditional levels. Obviously, this represents both a business risk and opportunity which contractors need to carefully balance and consider.

Additionally, one of the goals of imposing tariffs is to encourage purchasers to buy products from U.S. suppliers. The challenge is establishing new relationships and obtaining timely shipping with domestic suppliers who are experiencing increased demand as a result of the tariffs.

If timing is crucial on purchases, contractors should consider including liquidated damages clauses to compel domestic suppliers to meet delivery timing requirements.

Question #6: What are the tax consequences of tariffs?

Contractors who invest in equipment can use IRS Section 179 deductions to immediately write off qualifying expenses rather than depreciating them over time. This helps offset higher costs caused by tariffs on imported machinery. However, expenses that may be deducted are capped by statute. For 2025, businesses can deduct up to $1,250,000 in qualifying purchases immediately. The equipment must be (1) placed in service during the 2025 tax year, (2) used for business purposes more than 50% of the time, and (3) qualify under IRS guidelines. The Section 179 deduction begins to phase out when the equipment purchases exceed $3,130,000. A Section 179 deduction cannot exceed a business's net taxable income. However, if the Section 179 election exceeds taxable business income, a partial Section 179 election may be utilized. Any unused portion of the deduction carries forward to subsequent tax years, meaning it applies once there is sufficient income.

Question #7: I am a contractor performing work in Canada, what can I do in response to rising costs from tariffs?

Tariffs mandated by both the United States and Canada will likely have a significant impact on the Canadian construction industry, including increasing prices, potential delays to projects, and uncertainty in budgeting and pricing projects. The following are important considerations for contractors involved in the Canadian construction industry.[3]

Current Projects

Contractors should first review their agreements to determine which provisions may already respond to increased tariffs. Standardized contract documents developed by the Canadian Construction Documents Committee ("CCDC") often include provisions that provide for an increase or decrease to the contract price if duties change after bidding closes.

The CCDC 2 and CCDC 14 are fixed price contracts and contain provisions relating to the handling of changes such as tariffs. Under these provisions, any increase or decrease in costs to the contractor due to changes in taxes and duties after the time of the bid closing shall increase or decrease the contract price accordingly. However, some uncertainty remains as to whether tariffs meet the definition of a tax or duty. If tariffs fall under the definition of a tax or duty, then this provision directs that the risk of price increases be borne by the owner, not the contractor.

Additionally, the CCDC 2 includes a provision which states that if, subsequent to the time of bid closing, changes are made to applicable laws, ordinances, rules, regulations or codes of authorities having jurisdiction which affect the cost of the work either party may submit a claim. Unfortunately, this provision does not clearly state who will bear the burden of increased costs associated with tariffs. Instead, it refers the parties to follow a procedure which ultimately fails to

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[3] This provides a general discussion of law. Contractors should consult their lawyer for guidance.

clarify under which circumstances contractors ought to reasonably request a change in contract price under this provision and how this change in price ought to be calculated.

The CCDC 14 contract also has a provision stating that the contract price shall include all taxes and customs duties in effect at the time of the proposal or bid closing. Further, the provision provides that any increase or decrease in costs to the design-builder due to changes in such included taxes and duties after the time of the proposal or bid closing, as the case may be, shall increase or decrease the contract price accordingly. As such, any additional customs or duties that are not in effect at the time of the bid would be paid by the owner.

The CCDC also publishes cost-plus contracts such as CCDC 3 and CCDC 5B. Under these contracts, the construction manager is required to pay all customs, taxes, and duties during the performance of the work. As such, the contractor is entitled to pass along all customs, taxes, and duties to the owner, including price increases due to new or increased tariffs.

More generally, contracts may include change-in-law provisions which are designed to address cost increases due to tariffs or other similar legislative impacts. The wording of these clauses can vary significantly from contract to contract. However, they generally entitle the contractor to relief where there is a change in the applicable laws of Canada after the effective date of the contract. Unfortunately, because the threat of tariffs by the United States and Canada has been looming for some time, it may be difficult to support a change-in-law claim if the contractor knew or should have reasonably anticipated the tariffs prior to signing the contract.

Future Projects

For parties negotiating a contract with knowledge of actual or potential tariffs, it will be especially important to specifically address the potential cost increases and other impacts. Contractors should consider expressly addressing the allocation of the risk of tariffs and price increases by including contractual provisions stating how any increase or decrease in tariffs applied after bid closing will impact the contract price, cost of the work, or other compensation. Alternatively, contractors may also consider including contractual provisions that outline a process for the parties to consider and pursue alternative options should tariffs cause an increase to the project costs. Such provisions should include notice requirements, a process for considering options, and timing for the application of any changes in pricing. Ultimately, proper allocation of risk through careful contract drafting will help manage expectations and ensure that performance proceeds even in the face of unforeseen circumstances.

Question #8: Can Congress block or alter tariffs imposed by the president?

The U.S. Constitution gives Congress broad powers to regulate commerce, impose import tariffs, and raise revenue. Congress has repeatedly delegated authority for implementation of tariffs to the Executive Branch. *See, e.g*., Trade Expansion Act of 1962 (Section 232) and the Trade Act of 1974 (Section 201). Congress can reverse its delegation or cancel a tariff, but it must do so by joint resolution of Congress, which is subject to presidential signature or veto. Put another way, unless the president's actions are found to be unlawful by the courts, opposition to presidential action must be subject to a veto – proof of majority. For an in-depth discussion of presidential and congressional powers relating to imports, see the memo by the Congressional Research Service.

Question #9: If the courts determine that the IEEPA was improperly invoked, will there be a tariff refund?

In *V.O.S. Selections, Inc. v. United States* [4], plaintiffs have challenged the implementation of tariffs under the authority of the International Emergency Economic Powers Act ("IEEPA"). The plaintiffs allege that the imposition of across-the-board tariffs is not authorized under the IEEPA and exceeds executive authority. As such, plaintiffs seek to have the tariffs declared unlawful. This case is currently before the U.S. Court of Appeals for the Federal Circuit and is widely expected to reach the U.S. Supreme Court given the weight of the issues being decided. Although there are numerous other active lawsuits challenging tariffs, this case is the furthest along and its outcome could dictate how other cases fare, including a separate case[5] directly challenging tariffs on aluminum and steel under Section 232 of the Trade Expansion Act of 1962.

The current administration has previously acknowledged its responsibility to issue refunds for tariffs where they have been reduced or rescinded. For example, in April 2025, following a court decision that tariffs cannot be cumulative or "stacked," the President signed an executive order stating that the change would apply retroactively to specific tariffs and U.S. Customs and Border Protection ("CBP") issued procedures for refunding those who paid increased import taxes. Similar information was provided both by the administration and CBP when reciprocal tariffs were announced and CBP issued guidance outlining how importers can request refunds for duties paid on products that later became exempt or subject to lower tariffs.

Thus, if the courts determine that the imposition of tariffs was unlawful, the government may refund tariffs already paid. However, many questions remain regarding the refund process, including which parties will be entitled to refunds and how refunds will be processed. As such, businesses should keep detailed records and importers should monitor their entries, pay close attention to the expected liquidation date, and be prepared to file post summary corrections or protests where applicable. It is also important to note that while importers who paid the tariffs may be reimbursed, those savings are unlikely to be passed on to consumers.

It is also uncertain whether tariff recoupment litigation will be successful. Lawsuits brought by individual entities are most likely to set the tone for what direction the courts will take regarding rights to refunds or other relief and remedies for tariffs that were unlawfully assessed. It is unclear whether class action lawsuits will be successful. Previously, the Court of International Trade declined to certify a class of exporters in a litigation seeking refunds of tariffs deemed unlawful.[6] But it remains to be seen whether the court's reasoning in that case would apply today where the facts and procedural context differ.

Ultimately, only time will tell whether refunds will be available should the tariffs be found unlawful.

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[4] *V.O.S. Selections, Inc. v. United States*, 1:25-cv-00066, (Ct. Intl. Trade).

[5] *Webber v. U.S. Dep't of Homeland Sec.*, 4:25-cv-00026 (D. Mont.).

[6] *U.S. Shoe Corp. v. United States*, 907 F. Supp. 408, 421 (Ct. Int'l Trade 1995), *aff'd*, 114 F.3d 1564 (Fed. Cir. 1997), *aff'd*, 523 U.S. 360 (1998).

Question #10: What building products may be exempt under the USMCA?

While new tariffs may affect a wide range of goods, products that qualify under the United States-Mexico-Canada Agreement ("USMCA") will remain exempt. However, these products will only be exempt from tariffs if proper documentation is in place at the time of import, including a valid USMCA Certificate of Origin from the Canadian or Mexican supplier held by the importer. As such, contractors who import directly without using a customs broker are responsible for securing and retaining this documentation themselves. On the other hand, contractors who buy through a buying group or distributor should confirm that a broker is handling all USMCA compliance.

At this time, it is unclear the extent to which USMCA protections will benefit SMACNA members who are seeking to import products adversely impacted by the current administration's tariffs. To qualify under the USMCA, a product must meet specific rules of origin. This often means that a significant portion of a product's materials must come from North America and certain manufacturing processes must occur within the region as well. Contractors may use the FTA Tariff Tool to quickly learn what criteria a product needs to meet in order to qualify for lower tariffs.

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