

Tariffs and Construction - What Federal and Federal-Aid Contractors Need to Know¹

Background:

President Donald Trump said in an Oval Office signing ceremony January 20, 2025 that his administration will impose 25% tariffs on Mexico and Canada on February 1. The President has mentioned he wants to impose other tariffs, notably on China. President Trump will likely again make use of trade laws, including possibly the International Emergency Economic Powers Act of 1977, 50 USC Ch. 35. Therefore whether implementation occurs later than February 1 based on these trade laws remains to be seen.

What follows are a number of recommendations that AGC members may consider, depending upon the types of contracts they hold. A **direct federal construction contract** refers to a prime contract directly with—or subcontract thereunder—a federal agency (e.g., the Army Corps of Engineers, Naval Facilities Engineering Command, General Services Administration, Department of Veterans Affairs, etc.). A **federally-assisted construction contract** refers to a prime contract directly with—or subcontract thereunder—a state agency where federal funds are used to partially finance the contract (e.g., transportation construction contracts through state DOTs).

Recommendations:

DIRECT FEDERAL CONSTRUCTION CONTRACTS: The federal government procures most construction contracts on a fixed-price basis. To protect themselves, contractors must evaluate the terms of their contracts to determine whether they contain Federal Acquisition Regulation (FAR) clauses that will allow them to recover. If the tariffs lead to shortages, contractors may also need to seek appropriate schedule relief under the FAR. Contractors must pay special attention to the timelines and notice requirements associated with such clauses. Contractors should consider the price and performance risks posed by the possibility of tariffs and structure upcoming bids and subcontracts accordingly.

FAR 52.229-3: Federal, State, and Local Taxes, permits recovery of tariffs imposed after contract award under the heading of “after imposed tax”. Section (c) provides: “The 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.” This longstanding clause requires offerors to include all applicable existing taxes in their bids. *Hunt Construction Corp. v. United States*, 281 F.3d 1369 (Fed. Cir. 2002). The CBCA and ASBCA have also held that offerors must investigate to determine whether such taxes exist based on the clause. *B&M Cillessen Construction Co., Inc.*, CBCA No. 1110, 09-1 BCA P 34069, and *GarCom, Inc.*, ASBCA No. 55034, 06-1 BCA P 33,146. Under FAR 52.229-3, for a tariff to be considered as an after-imposed Federal tax, it must be instated after the date set for bid opening and in a negotiated contract or modification, after the effective date of the contract or modification.

This is key and means tariffs imposed after bid submission, but before contract award, will not be considered newly imposed under FAR 52.229-3. *B&M Cillessen Construction Co., Inc. supra*.

FAR 52.229-3 and Subcontractors. There is scant authority on this FAR clause’s application to subcontractors but there is long standing authority concerning a clause similar to FAR 52.229-3 that is helpful to subcontractors.

¹ This Memo, prepared by Howard Roth of construction law firm Smith Currie Oles LLP, is provided as a general description of circumstances that construction contractors may face in connection with an increase in tariffs. This material does not constitute legal advice. By providing this information, neither AGC, nor Smith Currie Oles LLP provide any assurances that this advice will be relevant to any particular contract or situation that an individual contractor may face in connection with an individual contract. This memo does not create an attorney-client relationship between the firms involved and any person or company.

In *Hegeman-Harris & Co., Inc. v. United States*, 440 F.2d 1009 (1971) the prime contractor submitted a claim for increased costs based on a prime contract escalation clause allowing an increase in contract price for increased federal, state, or local taxes. The court found the prime “may recover those increased State taxes imposed on its subcontractors when [prime] had to bear their burden, either by specific provisions of the subcontracts or by inclusion in the price of those subcontracts let after the . . . tax increase.” However, the court did not allow for recovery on those subcontracts which existed before the state tax increase “barring an escalation clause therein or some other express contract commitment.”

52.216-2, Economic Price Adjustment-Standard Supplies; -3, Economic Price Adjustment-Semistandard Supplies; or -4, Economic Price Adjustment-Labor and Material. Without an appropriate price escalation clause in a firm fixed price contract, spikes in material prices for items such as steel and aluminum can be problematic. FAR subpart 16.203 specifically allows for economic price adjustments clauses in fixed-price contracts. In order for it to assist a direct federal construction contractor, however, the increase must be implemented as part of your contract through FAR clauses 52.216-2, 3 or 4. Moving forward, if tariffs on steel and aluminum or other supplies/materials are implemented, and you discover a solicitation in which you have interest which does not incorporate one of these clauses, formally raise its absence with the source selection authority or contracting officer. Encourage the agency to amend the solicitation to include one of these clauses. Doing so will eliminate bid contingencies and make for a fairer, more balanced bid or proposal process.

52.249-10 Default (Fixed-Price Construction). Excusable delays in fixed-price construction contracts are dealt with in FAR 52.249-10(b), which states that “[t]he Contractor’s right to proceed shall not be terminated nor the Contractor charged with damages under this clause if – (1) the delay in completing the work arises from unforeseeable causes beyond the control and without the fault or negligence of the Contractor.” Such clauses may include “acts of the Government in either its sovereign or contractual capacity.” Courts and boards recognize contractors are provided schedule extensions if experiencing supply shortages beyond their control. Thus this FAR provision may assist in schedule extensions for shortages due to schedule delays.

FEDERALLY-ASSISTED CONSTRUCTION CONTRACTS: If a tariff significantly increases the cost of goods or services needed for a federally funded project, the “recipient” may need to justify and document those increased costs to ensure they are considered allowable under the relevant cost principles outlined in 2 CFR 200. See e.g. 2 CFR 200.470 Taxes (including Value Added Tax). Again, make sure to closely read your contract to confirm the contract deals with after imposed federal taxes, to include tariffs, escalation of prices, and delay associated with tariffs.

Regarding federally-assisted construction contracts—specifically highway construction contracts—Federal Highway Administration (FHWA) policy permits states to include escalation clauses in their contracts, which allow for reimbursement for increased costs. The FHWA must approve the price adjustment index in advance and, of course, the clause has to be in the contract. A state—and, in turn, a contractor—will not be reimbursed for retroactive adjustments to contract prices if an escalation clause is not originally included in the contract. However, FHWA has allowed states to reimburse for price increases at their own expense without federal funds. That said, a contractor should not assume that material price increases for instance will be paid without such a clause in its contract. For more information, you can find a link to FHWA’s policy on Price Adjustment Clauses for Inflation [HERE](#) and a link to the FHWA Contract Administration Manual’s section on “Commodity Price Escalation Clauses” [HERE](#).

APPLICABLE TO BOTH DIRECT FEDERAL & FEDERALLY-ASSISTED CONTRACTS:

Contract Clauses. Contractors offering goods to the government directly and in federally assisted contracts must (1) consider their contract clauses in light of the fact proposed tariffs may increase their performance costs, (2) include increased cost and performance risks into their bids and proposals, and (3) include communications to subcontractors to nail down quotes and scheduling to the extent necessary and consider necessary flow down of prime contract clauses.

Material Cost. Lock in material prices such as steel and aluminum prices as early as possible. In the event that the requisite contractual protections are not in place, this is critical. Doing so mitigates against the possibility of skyrocketing prices later in time, which could make performance extremely difficult, or economically impracticable.

Speaking of economic impracticability, using this argument as the sole basis to obtain a modification for material price escalation is very difficult. In this context, the argument would be that the construction contractor could not have anticipated a 25 percent or 10 percent tariff, and, therefore, the increase in cost is recoverable. Unfortunately, the general rule is that the construction contractor bears the risk of loss in a situation like this.

Delays. In the event that a change, delay, or suspension in the work of an ongoing project causes delays in the purchase of materials that have escalated in price, then, in some circumstances, the contractor might be entitled to recover the increased cost under the contract's terms. In this event, contractors should obtain and keep records of the material costs that they would have incurred but for the delay in order to show the difference in cost.

Conclusion:

As AGC members prepare for the uncertainty ahead, please keep the foregoing in mind and contact the association to the extent that you have questions. AGC remains committed to free and open competition.