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2025

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The Ever-Changing Impact of Tariffs and Executive Orders on the Construction Industry

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Tariff Types

- Base (Most-Favored Nation)
- International Emergency Economic Powers Act (IEEPA)
- Section 232 (Steel, Aluminum, Copper, Lumber, and Trucks)
- Section 301

232 Tariffs – Key Features

Value Splitting

- For:
 - Steel Derivatives
 - Aluminum Derivatives
 - Copper Derivatives

Inclusions Processes

- Department of Commerce accepts requests to extend the tariff to new products
- Brief comment windows
- Decisions in 60 days

Stacking

- Sec. 232 aluminum, steel, copper, lumber, auto, and truck tariffs do not stack on top of:
 - “reciprocal” tariffs under the IEEPA
 - IEEPA tariffs on Canadian and Mexican goods
- Sec. 232 auto and truck tariffs also do not stack on top of:
 - other section 232 tariffs
- Goods subject to sec. 232 tariffs *are* subject to:
 - Base rates
 - Section 301 duties on Chinese goods
 - Antidumping and countervailing duties
 - IEEPA tariffs on Chinese goods

IEEPA Tariff Litigation

- IEEPA Tariffs: a novel development
- Lower Court Rulings: *The IEEPA's grant of Presidential authority does not authorize the challenged tariffs*
- Supreme Court: *Trump v. V.O.S. Selections, Inc.*, No. 25-250
Learning Resources, Inc. v. Trump, No. 24-1287
 - Challenged tariffs remain in effect while the litigation proceeds
 - Expedited briefing
 - Argued November 5

Federal Contracts

Special Consideration for Some Federal Contracts: Duty-Free Entry Certificates

- Pentagon emphasizing use
- Check contracts carefully

The New Normal

Tariffs: Here to Stay

- Alternatives to IEEPA tariffs
- Trading partner acceptance

Prepare for uncertainty

- **More twists and turns likely**

Tariff Volatility

- The IEEPA and volatility
- Flexibilities under other statutes

Prepare to back up your claims

- **More enforcement likely**

How Are Tariffs Impacting Projects?

- Are Tariffs impacting projects?
- How to administer the tariff risk and volatility
 - Size/Cost of the project
 - Large (\$100M+)
 - Small (<\$5M)
 - In Between
 - Basis of price
 - Communicating with Contract Partners
- Owner Tax Advantages in Procurement

Approaches to Tariff Administration

- Full Pre-Project Pricing Analysis
- Specific Allowance or Contingency Clause Covering Tariffs?
 - Contingency Management & Allocation
- Material Cost Escalation Clause
- Shared Savings
- Lump Sum

Other Practical Considerations

- Pros & Cons of Various Project Delivery Methods
- Working with Large and Small Contractors/Vendors
- Take Advantage of the Post-Award/Pre-Contract Time!
- Value engineering/material substitutions

Contract Drafting Considerations

- AIA - no reference to tariffs; “legally enacted” language
 - AIA A201-2017
- §3.6 Taxes¶
The Contractor shall pay sales, consumer, use and similar taxes for the Work provided by the Contractor that are legally enacted when the Agreement is executed, whether or not yet effective or merely scheduled to go into effect.¶
 - AIA A133-2019

¶
§3.2.9 The Construction Manager shall include in the Guaranteed Maximum Price all sales, consumer, use and similar taxes for the Work provided by the Construction Manager that are legally enacted, whether or not yet effective, at the time the Guaranteed Maximum Price Amendment is executed.¶

Contract Drafting Considerations

- ConsensusDocs - no reference to tariffs in base forms
 - ConsensusDocs 200 (2023)
 - 3.17.2 Constructor shall pay applicable taxes for the Work provided by Constructor.
 - 3.21.1 The Contract Price or Contract Time shall be equitably adjusted by Change Order for additional costs or time needed resulting from any change in Law, including increased taxes, enacted after the date of this Agreement.

Contract Drafting Considerations

- Price Escalation or Force Majeure Clause
- Think about Importer of Record responsibility
- Think about who bears the cost:
 - for existing tariffs
 - for tariffs that might be imposed later
- Outs for tariff surprises?
- Think about tariff refund and necessary administrative support

Contract Example 1

The Design-Builder shall pay sales, consumer, use and similar taxes, for the Work provided by the Design-Builder, that are legally enacted when the Design-Build Amendment is executed, whether or not yet effective or merely scheduled to go into effect. Notwithstanding anything herein to the contrary, the parties acknowledge that tariffs or other governmental actions that impose additional costs on imported materials, equipment, or other items used for the Project (“Tariffs”) may increase projected costs and schedule, and that Design-Builder will inform Owner of any such increase in costs and schedule, and after informing Owner and upon exercising reasonable efforts to source materials, equipment, or other items not subject to Tariffs, Design-Builder shall be entitled to an equitable adjustment via a change order for any such cost increases, as well as any time impacts to the critical path as a result of any such Tariffs.

Contract Example 2

Within thirty (30) days of receipt from Owner of evidence of the Phase I Owner Entitlements, Contractor shall provide Owner with an updated Construction Price, which, upon agreement and acceptance by the Owner in writing, shall be the total, lump sum amount of compensation to be paid to Contractor. The Construction Price will be equal to (a) the Initial Budget, plus, (b) a reasonable adjustment to reflect the cost of any Allowable Modifications, plus (c) a reasonable adjustment to reflect increases to the Contractor's cost to perform the work, including but not limited to those related to the imposition of tariffs or other levy. Once accepted, the Construction Price will not be subject to change, except for increases to the Price due to: (i) an act or neglect by the Owner or anyone for whom Owner is responsible; (ii) other reasons outside of Contractor's reasonable control, which include, but are not limited to, labor disputes, acts of God or public enemy, government authority of any nature (including changes in law, tariffs, or other similar regulations and policies), unreasonable material or labor price escalation, unusual delays in deliveries, unavoidable casualties, adverse weather conditions, fire, strikes, flood, epidemics, pandemics, quarantine, abnormal weather, war or riot ("Force Majeure Events"); or (iii) as otherwise set forth herein.

Predictions?

Sources

- Sec. 232 of the Trade Expansion Act of 1962, 19 U.S.C. § 1862
- IEEPA, 50 U.S.C. §§ 1701-1702
- Sec. 301 of the Trade Act of 1974, 19 U.S.C. § 2411
- Sec. 232 Proclamations
- Adoption and Procedures of the Section 232 Steel and Aluminum Tariff Inclusions Process, 90 Fed. Reg. 18780 (May 2, 2025)
- DFARS 252.225-7013

Questions?