Alert

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COZEN O'CONNOR

Tackling Potential Tariff Impacts on Awarded Federal Contracts & Private Construction Contracts

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On February 1, 2025, President Trump issued Executive Order No. 14193, titled "Imposing Duties to Address the Flow of Illicit Drugs Across Our Northern Border" (Tariff EO). The EO announced tariffs that would impact a wide range of Canadian, Mexican, and Chinese goods imported into the United States. Shortly thereafter, on February 3, 2025, President Trump paused the anticipated tariffs for Canada and Mexico for 30 days. However, on February 10, 2025, President Trump signed an order imposing a 25% tariff on aluminum and steel imports as well.

The 30-day pause on Canada and Mexico tariffs has now since expired and on March 3, 2025, those tariffs went into effect, although some have now been placed on hold again. Since the president has announced the imposition of these and other tariffs, and then paused them, this is an evolving situation. That being said, it is a situation that contractors, public and private alike, must be prepared to address now. This is all the more the case because, despite the president's statements to the contrary, it is typically not the tariffed country that pays these fees, but the recipient contractor as a pass through by the importers.[1]

Below is a summary of the current landscape for tariffs (as of the date of publication of this alert) followed by some strategies that contractors should consider when facing the resulting increased costs related to the impacts of these broad and now reciprocal tariffs.

Summary – Current Status of Tariffs

Mexico & Canada: On March 3, the president imposed a **new set of tariffs** under the International Emergency Economic Powers Act (IEEPA) on Canadian and Mexican goods. The duties are levied at a rate of 25%, with Canadian energy resources serving as the reported lone exception to that threshold at a lower 10% rate. President Trump has cited a lack of action by the Canadian and Mexican governments in tackling fentanyl and human migration flows emanating from both the southern and northern borders. In response, the Canadian government announced its own set of tariffs covering more than $20 billion in American products, with the threat of future expansion to that figure if the U.S. tariffs are still in place in the near future. The Mexican government is expected to announce its plans for retaliatory action shortly.[2] In the coming weeks, it is expected that the U.S. government — through the interagency process and led by U.S. Customs and Border Protection (CBP) — will issue a Federal Register notice containing additional details regarding the exact products (via the Harmonized Tariff Schedule) covered under the orders. It is also worth noting that under the president's orders, duty drawback, and duty-free de minimis treatment are not available.

China: Separately, President Trump signed an order on March 3 doubling the duties that went into effect in February 2025 on Chinese imports, increasing them from 10% to 20%. In escalating the tariff level on Chinese imports, the president cited the sustained influx of synthetic opioids, including fentanyl, and the PRC's inadequate steps to alleviate the crisis. In response, China announced that it will impose additional tariffs on U.S. goods, primarily focused on agricultural products, at rates ranging from 10-15%. The Chinese duties are expected to take effect on March 10. The Chinese government also added several U.S. entities to additional export control lists and is filing a new proceeding at the World Trade Organization.

EU: President Trump also indicated that new tariffs on EU trading partners may be forthcoming due to existing tariff and non-tariff trade barriers, including value added taxes (VAT). EU leaders have vowed to retaliate if the United States moves forward with tariff action against its members.

Whether these tariffs (or at least the increased ones) will remain in place for the long term remains to be seen. However, federal (and private) contractors (particularly construction contractors) should expect to start feeling the financial (and possibly schedule) impacts of these tariffs on their awarded projects soon. While there are strategies for recovery of these impacts under a contract's changes clause and possibly other contractual clauses, prompt identification of the impacts and notice to the agency contracting officer or private owner will enhance a contractor's ability to recovery these after-award imposed duties. Based on the foregoing, it is critical that all pending bids/proposals take into consideration the cost risks associated with these "new" tariffs and also that language be added to those bids/proposals in an effort to protect oneself from future imposition of tariffs.

Tariff Cost Recovery Effort Strategies

As an initial matter, taxes, duties, and tariffs are typically seen as a "part of doing business." As such, contractors are often expected to consider and include them (as are their vendors, suppliers, and subcontractors) in their bids. The problem here is slightly different, as this alert contemplates how to deal with the situation where one has already bid the contract and received the award (and often is already performing). While the prior bid included the costs associated with tariffs known at the time of bidding, here, we now have the U.S. government that has imposed new (or higher) tariffs on imported materials, goods, and equipment from other countries, the cost for which was presumably not known or knowable at the time of bidding/award. Can one recover these costs, and if so, how? The type of contract (federal government as the owner versus a locality or private/commercial contract) plays a key role in answering this question. The following "toolbox" of some possible strategies, while not exhaustive, is intended to provide the reader with some "high level" concepts and processes to start the analysis and process to protect your rights and seek recovery.

Federal Government Contracts

Fixed Price Contracts

As is always the case in these types of situations, we recommend contractors start with an analysis of the terms and conditions/clauses incorporated into their contract. These clauses tend to provide the most efficient and effective path towards cost recovery. For instance, fixed price contracts should include Federal Acquisition Regulation (FAR) 52.229-3 that requires a contract price to be increased "by the amount of any after-imposed Federal tax" so long as the contractor warrants that the newly imposed tax was not included in the contract price. The clause defines an "after-imposed Federal tax" as "any new or increased Federal excise tax or duty … that the Contractor is required to pay or bear as a result of … administrative action taking effect after the contract date." FAR 52.229-3(a). Although this FAR clause does not specifically mention "tariffs," inclusion of the term "duty" provides a good argument that this clause is broad enough to cover the cost impacts of a tariff. One can use this FAR clause to recognize that increased costs resulting from the tariffs imposed by the EO and other executive actions should likely be recoverable to the extent the effective date of a contractor's contract or modification is before February 1, 2025 — the date the EO was issued — and the contractor timely notifies the appropriate contracting officer of the tariff that the contractor expects to result in an increase in the contract cost.[3] Likewise, one may argue that the time when a contractor knew or had reason to know of the tariff cost impact may not arise until the contractor receives notice from its subcontractor/supplier/vendor or a resulting cost impact, which appears to be a viable "back-up" argument. Moving forward, now that the tariffs are (at least for the moment) back in place and effective, contractors should price their current proposals to reflect/include the anticipated increased costs due to the tariffs and provide prompt notice and disclosure of these costs to the government.

In addition, contractors performing under fixed-price contracts also should check their contract to see if it includes any economic price adjustment clauses such as FAR 52.216-4. This clause permits a contractor to seek an equitable adjustment related to increased prices in labor or material subject to certain limitations. The clause also requires the contractor to provide prompt notice of a price change to the contracting officer. That being said, FAR 52.216-4 may limit the amount of recovery that a contractor can seek and also allocates some cost impact increase risk on that contractor.

The various FAR changes clauses, such as FAR 52.243-1 also should be reviewed and would be a primary vehicle for consideration in seeking recovery of increased tariffs. This provision, at the federal level, allows recovery under an equitable adjustment for, among other things, changes to the contract that increases the cost or time associated with the contract. One could argue that the imposition of heightened tariffs by the president is a change in the cost to the contract *caused by the government as owner*, and as such, entitles the contractor to a change/modification. Again, timely and proper notice of this changed condition should be followed.

Non-Fixed Price Contracts

Contractors performing under non-fixed price contracts (such as cost reimbursable contacts) should review the FAR's cost accounting principles including the cost allowability rules at FAR 31.201-2 for recovery of increased costs associated with the anticipated tariffs. More specifically, FAR 31.201-2 requires that a cost is: (1) reasonable; (2) allocable; and (3) consistent with the cost accounting standards or generally accepted accounting principles and practices (if appliable), contract terms, and any other FAR cost principles. Of course, while there is no cost principle that specifically addresses tariffs, we would expect contracting officers to apply FAR 31.205-41, "Taxes," for analyzing recovery of costs under the tariffs. FAR 31.205-41 allows recovery of tax costs unless specifically identified as unallowable by paragraph (b) of the cost principle. For example, the cost principle makes tax costs unallowable if an exemption is available to the contractor or the government, except when the contracting officer determines that the administrative burden of obtaining the exemption outweighs any benefit to the government. Given the lack of excluding language relevant to the current tariffs, this should enhance the likelihood of recovery, but a fight or pushback could be expected. [4]

Commercial/Private Contracts

Many of the strategies discussed above may also be attempted in the private or commercial sector, however, given that the tariff increases are by a non-party to those agreements (namely the U.S. government in this context), there may be defenses that owners can attempt to raise to avoid cost liability. Much of this will tie to the terms of the relevant contract, such as is there an economic price adjustment clause (which are not overly common in the commercial environment)? What does the changes, disputes/claims, and any *force majeure*-type clause discuss and allow? Who pays for taxes, duties., and the like?

One issue that we foresee may arise is the situation where a bid/proposal was based on the use of imported goods, equipment, or material and that, as a result of the imposition of these tariffs, (a) the importer will no longer import the items; (b) the duties will result in delays in getting the product to the site or (c) there is now a cheaper domestic product available. This is further complicated by the situation where an owner has sole-sourced a product that is now more expensive due to the tariffs. Under such a circumstance, one can try to argue that this is a changed condition, and the owner has a duty to mitigate damages/cost by either paying for the increased cost or relaxing the specification to allow another product to be used.

Avoiding a *force majeure*-type argument is important as that may create a defense to the claimed cost increase.

Another argument, which is highly fact intensive, is the possibility of arguing commercial impracticability or impossibility, which is a set of legal doctrines that effectively say that due to market conditions, excessive cost increases, or other events, it is not possible (impossible) or impractical to perform the work as originally planned. While recognized in both the government and non-government contracts context, these are arguments that can be made but which are difficult to succeed on. One scenario that one could foresee happening is where the exporting country bans the export of a given item or material to the United States as a protest to the imposition of the tariffs. While we are not aware of such a situation currently, such action could happen and might create some different arguments.

Lastly, with the passing of the Infrastructure Investment and Jobs Act, Inflation Reduction Act, and other laws, there is a significant amount of money that has been allocated in the form of grants to state and local governments and businesses. Often, those agreements flow down FAR and FAR-like regulatory provisions. A review of those provisions may create additional arguments that support recovery for the increased tariffs.

Conclusion

While it is difficult to predict whether the announced tariffs will stay in place and for how long, the potential for cost (or even schedule) impact on already awarded contracts is real and could be significant — particularly for projects that rely on imports from countries now under the Trump tariffs. Luckily, there are ways contractors should be able to protect themselves and, in most cases, contractual remedies available to seek recovery of the impact of these unanticipated costs. Cozen O'Connor's Construction and Government Contracts attorneys are here to help.

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[1] *See Who's Paying for the US Tariffs? A Longer-Term Perspective*, AEA Papers and Proceedings 2020, 110: 541–546 (available at https://www.princeton.edu/~reddings/pubpapers/ARW-May-2020.pdf).

[2] On Thursday, March 6, 2025, President Trump announced another 30-day postponement of tariffs on some Canadian and Mexican goods.

[3] Given the 30-day pause of the anticipated tariffs for Canada and Mexico, there is an argument based on a less conservative interpretation that the EO will not be "effective" for Canadian and Mexican imports until March 3, 2025, thereby creating some ambiguity as to whether a contractor may recover increased costs if a contract is effective after February 1 but before March 3.

[4] Contractors performing under cost-reimbursable contracts also will want to consider whether higher costs associated with tariffs will impact estimated cost or fee as well as any limitation of cost or funds requirements in the contract.