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The 2018 Steel and Aluminum Tariffs— Do Contractors Have Remedies?

The Trump administration's imposition of tariffs on steel and aluminum products entering the United States has been the subject of a great deal of discussion, debate and analysis. Much of the debate focuses on the purpose of the tariffs, their effect on the U.S. economy, and what retaliation other countries may take in response.

For those involved in the construction industry, the tariffs raise direct and immediate legal and business issues. Contractors involved in commercial, industrial and public works construction are often required to furnish and use large quantities of various types of steel products, and the tariffs present substantial uncertainty and monetary risk. The ultimate question becomes whether a contractor adversely impacted by the tariffs has any available remedies to recover additional costs incurred or to be incurred to procure steel materials and perform the work?

The Tariffs

In March 2018, President Donald Trump signed two proclamations establishing global



WALLACK

JEFFREY P. WALLACK is a principal in the firm's construction, government contracts and surety law practice group. He represents owners, general contractors, and specialty subcontractors in construction-related matters, from contract drafting through bid disputes, to project completion and, if necessary, claims submission and dispute resolution. He can be reached at jwallack@postschell.com.



AVRIGIAN

MASON AVRIGIAN JR. is a principal in Post & Schell's construction, government contracts and surety law practice group. For over 25 years, he has represented owners, contractors, subcontractors, material producers and other parties in construction matters and construction litigation in Southeastern Pennsylvania and New Jersey. He can be reached at mavrigian@postschell.com.

import duties on steel mill products entering the United States but with temporary exemptions for certain foreign countries. The import duties—commonly known as tariffs—were issued under authority of Section 232

of the Trade Expansion Action of 1962 after an investigation and findings by the Department of Commerce. Department of Commerce investigations under Section 232 are to determine the effects of imported articles on national security.

The administration took additional action on steel imports. Pursuant to the authority contained in Section 301 of the U.S. Trade Act of 1974, in March of 2018, the administration also announced imposition of tariffs on \$50 billion of steel imports from China. The tariffs under the U.S. Trade Act were imposed as a result of investigative findings by the Department of Commerce substantiating Chinese acts of coercion.

The Effects

The tariffs are a direct charge on imported steel and aluminum products, however, the effect of the tariffs is not limited to imported steel. The anticipated increased cost of imported steel due to the tariffs is causing volatility in the domestic steel market and increased demand for domestic steel. The result is a surge in domestic steel prices.

The price increases affect both private and public construction projects where the contract scope of work includes procurement and installation of various steel products. Public works projects subject to the Pennsylvania Steel Products Procurement Act, 73 P.S. Sections 1881 *et seq.* and/or Federal Buy America Act requirements, 23 U.S.C. Sections 313 *et seq.*, are particularly impacted.

Contractor Options

Contractor impacts from the steel tariffs must be addressed for both existing contracts at the time the tariffs were put into effect and pending bids and future contracts.

Existing Contracts. A contractor on a pending project faced with steel cost increases from the tariffs has essentially one of three options:

- Refuse to accept the cost increases without receiving additional compensation and face a potential default for nonperformance.
- Absorb the cost increases and perform as planned without attempting to recover the added cost of performance.
- Present a change order request or claim for additional compensation to recover the increased cost.

The third option obviously requires analysis to establish a basis for recovery.

As in almost all construction contract claims and disputes, the starting point for the analysis must be the pertinent documents.

One source of information that must be considered is the contractor's quotation or proposal or other pre-contract writings. This information, where applicable, can address the risk of material price increases. For example, does the contractor's proposal make any provision for escalation of labor or materials? Does the proposal state that the pricing is only good for a limited time (60 or 90 day, etc.)? Is the pricing based on taxes in effect at the time of the proposal only? Also, has the proposal been incorporated into the contract? These questions should be addressed and the proposal or other pre-contract documents should be thoroughly reviewed for any terms that can provide grounds to recover the increased costs from the tariffs.

Beyond incorporated or otherwise relevant pre-contract documents, the key document is the contract itself. The contract must be reviewed for any term or clause that can provide grounds for reimbursement of the increased steel costs. Some clauses that should be considered are as follows:

Escalation clauses. Does the contract address escalation of labor and material costs during the lifetime of the project? Very often project owners insist that the contract price include all escalation during the lifetime of the project, but this is not always the case and the issue must be considered. An escalation clause can provide strong grounds for a contractor's entitlement to reimbursement for the steel price increases.

Price Adjustment Clauses.

Some construction contracts contain clauses allowing adjustments, up or down, in the prices of various types of materials based on fluctuations in market prices. These clauses are often tied to specific industry indices to determine applicable price adjustments. For example, Pennsylvania Department of Transportation contracts often contain special provisions for "Price Adjustment for Steel Cost Fluctuations" for certain steel products to be used on the project. These types of clauses, if present, should be analyzed to determine applicability and grounds to recover increased costs.

Taxes. A tariff is a tax under the law. The contract must be analyzed to determine whether it addresses what taxes are included in the contract price. For example, Section 3.6 of the American Institute of Architects A201-2017 General Conditions of the Contract for Construction provides as follows regarding taxes included in the contractor's pricing:

• 3.6 Taxes

The contractor shall pay any sales, consumer, use and similar taxes for the work provided by the contractor that are legally enacted when bids are received or negotiations concluded, whether or not yet effective or merely scheduled to go into effect.

This clause has been interpreted to mean that new taxes, not enacted at the time of bidding or execution of the contract, are

not included in the contract pricing. While the tariffs might not be a direct tax on all steel products, this type of tax clause would clearly be helpful in any claim for additional compensation if the tariffs were first enacted after bidding/contracting.

Force Majeure. A commonly used and often misunderstood contract term is “force majeure.” Force majeure is defined, in part, as a “superior or irresistible force.” Black’s Law Dictionary, 5th ed. The concept of force majeure is not a product of common law, but rather is a function of contract. Thus, the first question is whether the contract contains a force majeure clause, and if so, what does the clause provide? Force majeure clauses have various formulations and types of relief allowed. In construction contracts, force majeure clauses often provide relief for time of performance without compensation but do not excuse performance altogether. As to the steel tariffs, if the contract at issue contains a force majeure clause, the question is whether the clause is broad enough to give the contractor relief. Does the clause provide that the contractor is excused from performance of the work if a force majeure event (as defined in the contract) occurs? Does the clause allow additional compensation in addition to time if a force majeure event occurs? If these types of provisions are present, the contractor will have grounds under the force majeure clause to claim additional compensation to

recover the price increases due to the tariffs.

For contractors involved in federal government contracting, the Federal Acquisition Regulations (FAR) must be considered when evaluating a potential claim due to the tariffs. The FAR tax provisions and economic price adjustment clauses, if applicable, may provide grounds for relief. Federal government contractors faced with impacts from the tariffs should promptly consult with counsel on any relief that might be available under the FAR.

If the contract terms do not provide grounds for relief, other common law legal principles must be considered. These common law principles include impossibility of performance, frustration of purpose and impracticability of performance. These principles, however, are not easily proven, and the remedy generally is relief from performance of the contract as a whole as opposed to an affirmative claim for additional compensation resulting from performance and completion of the contract. Thus, while these principles may provide grounds for negotiation of a price increase, they will likely be of limited use in a claim for additional compensation for steel price increases.

Future Contracts

For future contracts, contractors must monitor steel market conditions to determine if provisions can or must be included in bids/proposals and, ultimately, contracts to minimize or

eliminate the risk of steel price increases. Because the tariffs have been imposed and are now widely known, contractors on future bids and contracts will not be able to claim unknown or unforeseen events and utilize force majeure type clauses. Thus, contractors moving forward must be very clear in the documents if they seek to have protection from the impacts of the steel tariffs.

In sum, the steel tariffs present challenges to contractors who seek to offset or recover the price increases. Contract clauses may provide a source for relief, but unless the contract contains a specific clause allowing the contractor to recover for steel price fluctuations, an effort should be made to negotiate a resolution and thereby mitigate the contractor’s risk, cost and exposure.