

TARIFFS FROM THE CONTRACTUAL PERSPECTIVE

In February 2025, after weeks of looming threats, the Trump administration announced its decision to impose a 25% tariff on Canadian imports, citing border security concerns. In retaliation, Prime Minister Justin Trudeau announced a reciprocal 25% tariff on American imports. Tariffs, both threatened and realized, stand to cause considerable strain on the construction industry, particularly in the areas of rising material costs and supply chain delays. In many cases, the risk of significant tariffs being imposed mid-contract is a risk borne entirely by the contractor. Recent uncertainty over future tariffs may encourage a change in this risk allocation.

Change in Taxes Clauses

Many contracts provide for terms addressing the risk of changes to tax and duties. The CCDC 2 (2020) Stipulated Price Contract, for instance, effectively requires the contractor to shoulder any additional costs incurred due to tariff increases. These clauses may not have been drafted, however, with the risk of sudden 25% or more tariffs in mind.

Tax Changes When Bids are Open for Acceptance

Contractors may also be impacted by tariffs, even with respect to contracts that have not yet been awarded. For example, General Condition 10.1 of the CCDC 2 (2020) Stipulated Price Contract states that contractors bear the responsibility for any cost changes arising from shifts in taxes or duties after bid closing. This means a contractor who submitted an irrevocable bid prior to any tariffs being in place may be stuck with the consequences of higher prices if the contract is awarded after the tariffs are imposed. In light of this, contractors may want to consider negotiating with project owners to better allocate the financial risks linked to rising tariffs. Amending the terms of the CCDC 2 (2020) Stipulated Price Contract to explicitly account for the sharing of the financial burden from increased tariffs may be a proactive solution. Further, the introduction of tariffs, and the resulting economic volatility, requires Canadian contractors to exercise diligence when bidding on new projects or entering contracts.

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Force Majeure Clauses: Do They Apply to Tariffs?

Force majeure clauses enable a party to be excused from liability for delays or non-performance in the case of certain extraordinary events outside the parties' control. Natural disasters and other "Acts of God" are commonly included as "force majeure" events. The definition is mutable, and new events can be added. During the COVID-19 pandemic, for example, many contracts added "pandemic" and "epidemic" as force majeure events. For the purposes of the force majeure clause, however, the impact of the pandemic had to be delays or an inability to perform the parties' obligations under the contract as a result of illness and related social restrictions. If the impact was limited to price distortions arising from COVID-19 supply-chain disruptions, force majeure was unlikely to be triggered. Courts have historically been reluctant to rely on force majeure clauses to relieve parties from their obligations if the only impact of the alleged extraordinary event is a raise in the party's input prices.

What Should Contractors Do If They Have Already Entered a Contract?

Determining whether contractors who have already bid or entered into contracts can protect themselves against rising costs due to increased tariffs remains unclear. Contractors should consider seeking legal advice to determine how the terms of a contract may be applied to protect against sudden and substantial cost

increases from tariffs. It may also be worth pursuing negotiations with the other party if possible. A mutual interest in seeing the project completed without exposing one party to too much financial risk may encourage an agreement to share the financial burden of sudden changes in trade policy.

Key Takeaways

To summarize, contractors should consider the potential impacts and legal implications of rising tariffs on their contracts, both executed and to be bid upon. Proactively strategizing with other key stakeholders such as developers, policymakers and municipal governments will be critical for ensuring that the risk of sudden tariffs are mitigated appropriately.

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Our lawyers combine legal experience in local government, commercial real estate development, and construction law to provide legal services to local governments, owners, builders and developers on a range of projects, from concept to completion, and beyond.

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