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RIDING THE WAVES OF CHANGING ECONOMIC REALITIES: JOINT VENTURES AND TARIFFS

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KEY FACTORS WHEN CONSIDERING WHETHER TO JOINT VENTURE

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General Contractor seeking General Contractor who values safety, collaboration and dedication with a moderate risk appetite and a strong desire to make a healthy profit. Reasonable approach to amicably resolving issues is a must!

Finding the right fit with a joint venture partner is crucial to the success of a construction project. As mega-projects continue to increase, not only in size but also in popularity, contractors will be looking to form joint ventures to pursue and complete such projects. The pooling of capital, resources, capacity, and expertise to meet the demands of mega-projects and successfully complete such projects are the driving motivators for contractor teaming.

Factors To Consider In Finding The Right Fit.

Capital

The pursuit of mega-projects can be expensive, especially for design-build projects which typically include preliminary design fees paid to the designer for the pursuit phase. In a joint venture, contractors share all third-party pursuit costs and reduce the number of personnel working on the bid thereby reducing internal bid phase costs. Post-award, the contractors each contribute their share of the initial working capital necessary to start the project. By sharing these costs for equipment and materials purchases, the contractors are able to reduce their individual capital outlay. Finally, the risk of loss is shared proportionately by the partners per their percentage shares, so that in the event of a loss on the project, the respective hit to each partner's balance sheet is lessened.

Resources

Industry-wide, contractors are struggling to employ sufficient personnel – both at management and labor levels – and this problem is not expected to improve anytime soon. In fact, it will likely get worse. By joint venturing, the strain on contractor personnel for each firm is reduced, which is particularly beneficial on projects with long durations. The JV relationships may also benefit from each individual party's relationship with the owner, knowledge of the regional subcontractor market, local unions and the local labor pool. The JV relationship will also benefit from the contribution of partner-owned equipment. When preparing the proposal, each JV contractor oftentimes prepares an independent estimate of project costs. This allows the parties to conduct an intensive comparison to sharpen the price and to avoid any cost oversights.

Capacity

Each year, mega-projects are increasing in size, complexity and number – often with contract values in the multiple billions of dollars. Many contractors, even the largest U.S. and international firms, need to team on these mega-projects in order to meet the project's bonding requirements. Bid bonds or surety letters confirming sufficient bonding capacity are typically required. In a JV, the partners each contribute bonding capacity equal to their percentage shares in the JV. Although some sureties use the full contract value as the amount reducing a contractor's surety program capacity, some sureties only reduce a JV contractor's bonding capacity based on its percentage interest in the joint venture, thereby "freeing up" capacity for other projects.

Expertise

Another reason contractors may choose to joint venture is to benefit from the combination of their areas of expertise, thereby improving their "score" with respect to the qualifications and experience proposal evaluation. For example, depending on the type of project, large civil contractors may team with a rail transit contractor, a utility contractor or a bridge contractor to bolster the team's experience levels, technical expertise and likelihood of a successful bid. Contractors may also decide to joint venture to expand their business into a new sector, such as data centers. In order to add data center projects to its resume, a contractor may need to team with one that already has such experience to be selected to complete that first data center project. The experienced data center contractor may be motivated to team with the inexperienced contractor to assist with capital requirements, resources or bonding capacity, as discussed above. One additional reason for forming joint ventures has been to meet the owner's disadvantaged business enterprise (DBE) requirements by creating a team with one or more DBEs whose percentage interests in the JV help achieve or equal the DBE percentage requirements. While DBE requirements may decrease or be eliminated on public projects going forward, the DBE's expertise and/or owner relationship will remain as an incentive for teaming.

Due Diligence

Once the determination to joint venture is made, a contractor needs to conduct "due diligence" in selecting the right partner for the project. Evaluating a contractor's capital and capacity requires the exchange of financial statements (at least the last three years), WIP schedules, and current bonding capacity by both partners. If applicable, a contractor's willingness to provide a parent company guarantee to its JV partner should also be considered. Equally important is examining the potential partner's resources and experience. Both parties must be able to commit to providing the required capital, equipment and personnel – especially key personnel – for the life of the project. Further, conducting a detailed dive into the potential partner's experience on similar projects and its relationships with the owner and subcontractor market in the project region may require market research, but is a must. Finally, contractors should learn each other's risk appetite by discussing desired profit margins, willingness to accept project risks passed down by owners, approach to analyzing the likelihood of project risks materializing and appropriate contingencies, as well as their experiences in prior JV relationships, including management and dispute resolution structures.

Critical Terms in the JV Agreement

We found each other – now let's make it official. Joint Venture best practices dictate that the parties negotiate and finalize the terms of their JV relationship prior to submitting their bid (or if the pursuit is a two-step process, prior to submitting their statement of qualifications). The devil is always in the details, especially when relating to a legal agreement, so it is imperative that the JV partnership is clear and solidified to avoid or address disputes post-award. Determining which contractor will be the managing party, the decision-making authority of the managing party and what decisions require unanimous approval are of the utmost priority. Ideally, unanimous consent is required for all decisions; however, a process to timely progress the project must be in place in case of disagreement. Often JV agreements permit the managing party to move forward with its decision if necessary to progress the project and compliance by the minority partner is mandatory, subject to further dispute resolution. The agreement may identify certain types of partner disputes requiring accelerated dispute resolution and may appoint a named neutral party/mediator who will be kept apprised of the project and any issues. This will ensure a knowledgeable decision-maker and prompt resolution of any disputes.

Additionally, the list below highlights other important provisions which should be agreed upon prior to submitting a statement of qualifications or RFP proposal.

- Percent ownership: Each party's percentage interest in the JV (e.g., 60%/40%) and whether the JV will be an integrated JV or a line-item JV. In an integrated JV, the parties share both project profits and losses in accordance with their percentage shares in the JV. Conversely, in a line-item JV, the parties' scopes are clearly segregated and defined in an exhibit to the JV, the parties each retain their own subcontractors and suppliers (although some may be shared), and the profits/losses are realized separately with respect to those individual scopes. Note, however, that whether the JV is integrated or line item, the parties will have joint and several responsibility with respect to claims by the owner or third parties. For example, if one party goes out of business, the remaining party is responsible for full completion of the project, all payment obligations and liability for all claims (subject to indemnity provisions as discussed below and applicable bankruptcy laws).
- Treatment of bid costs: Will the pursuit costs be included in the bid price and reimbursed post-award? Will the partners pay for third-party pursuit costs (e.g., design firm compensation) in accordance with their percentage interest in the JV? How will they handle the loss of a stipend due to a non-responsive bid? How to handle the scenario where one partner drops the pursuit prior to submitting a bid?

- Decision-making: As discussed above, identify all categories of JV decisions that require unanimous approval by the Executive Committee. Often this list includes the following:
  - Amendments to the JV agreement
  - Major increase of the owner contract scope of work
  - The requirement for and amount of a capital contribution by the parties
  - Approval of subcontracts and purchase orders in excess of a certain dollar threshold
  - Settlement of owner or subcontractor claims in excess of a certain dollar threshold
  - Disposition of JV equipment and materials
  - Insurance coverages, limits and deductibles
  - Return of working capital or payment of head office overhead or profits to the parties prior to termination of the JV
  - Any decision to suspend or terminate the owner contract
  - The amount of any reserves required for the warranty period and/or for unsettled claims
- Management Fee: Will the managing party be entitled to a management fee and if so, how much? Typically, the management fee is either a set dollar value or a percentage of the contract value paid monthly. All corporate administration services that are included in the management fee should be identified in an exhibit, as well as what costs are considered JV costs versus individual party costs.
- Dispute Resolution: What is the process to resolve disputes in the event of disagreement and identification of disputes requiring accelerated resolution?
- Default: Default events, cure periods, and the effect on voting rights during default and termination. Typically, even in the event of default, the original percentage shares in the JV will dictate the responsibility for losses on the project. This is necessary to disincentivize a partner from intentionally defaulting on a bad project in order to minimize its share of the losses.
- Capital Calls: Failure to contribute working capital when required by the managing party, including the option for the non-defaulting party to contribute such capital as a demand loan to the defaulting party and the effect on voting rights, repayment of working capital and profits, and responsibility for losses.
- Indemnification: The JV agreement should contain an indemnification provision whereby in the event one party pays more than its percentage share of a loss or claim, the other party must indemnify its partner for the excess portion paid. Fraud and intentional misconduct are excluded from this indemnification.
- Parent Company Guarantee: Whether the parties will exchange parent company guarantees. This is often desired when a parent company has a stronger balance sheet than the operating entity in the JV.
- Self-performance: The JV agreement should address whether either or both parties intend to self-perform any of the scope of the work or how to handle self-performance if this is determined post-award. Issues to address include whether such work will be subcontracted to the JV party, whether that party will first compete with other bidders for such work, what the allowed profit for such work will be and whether the profit is shared between the JV partners in

accordance with their percentage shares or whether the party self-performing the work takes on all profit and loss responsibility.

- Key Personnel: Designation of each party's key personnel who will commit to remaining on the project through completion. Ideally, the list of key personnel is set forth in an exhibit to the JV.
- Signature Authority: Identification of project personnel levels, up to the Executive Committee, permitted to bind the JV in written agreements, typically categorized by the types of agreements and/or dollar amounts. A requirement for both parties to sign checks/money distributions may also be agreed upon for certain dollar thresholds.

Licensing and Registration

Depending on the jurisdiction of the project, even where both partners are licensed, the JV itself may need to obtain a license – in some jurisdictions prior to bid and in others prior to execution of the construction contract. The requirements can include a contractor's license, formal registration of the JV as a legal entity (e.g., partnership or LLC), fictitious name registration ("doing business as"), municipal business license, and/or tax registration, among other things. Prior to bidding a project, the JV should know what the licensing and registration requirements are in the project jurisdiction.

The Dedicated Subcontractor Option

If parties determine that joint venturing is not desired, they may still decide to team on a bid in order to take advantage of their joint qualifications and experience. Often proposals must include a list of key subcontractors. The general contractor and the key subcontractor can enter into a "dedicated subcontractor" teaming agreement whereby they agree to bid and/or complete the project exclusively with each other and they may have the ability to include the teaming agreement in their proposal which may boost their scoring in the bid evaluation process.

'Til Dissolution Do Us Part

Like all successful partnerships, a joint venture requires the parties to be reasonable, nimble, and committed to the relationship until completion of the project. Further, the JV partners should be like-minded on important issues, priorities, values and culture. The importance of conducting due diligence on potential partners, ruling out any potential conflicts of interest, and ensuring the right fit before the project pursuit is underway, cannot be emphasized enough. Once awarded a project, the joint venture partners will need to work hard to maintain an agreeable and trusting relationship, dedicated to the success of each other and of course, ultimately, the project.

TROUBLED BY TARIFFS?

The Trump administration's imposition of new tariffs is anticipated to have large-scale impacts on the construction industry. Regardless of the status of tariffs in effect at the time of the 2025 ALFA International Construction Seminar, there are various actions that contractors and construction attorneys should consider to deal with this uncertainty. This presentation focuses on the risk-shifting contractual provisions that may provide some protection against tariff-driven cost and time impacts.

The Basics On Current Tariffs

A "tariff" is a tax or duty imposed by a government on imported goods. While the terms tariffs and duties are often used interchangeably in international trade, they have distinct meanings. Duties refer to a broader range of taxes and fees imposed on goods. Tariffs, on the other hand, are a specific type of duty, specifically targeting international trade and acting as a tax on imports. The Constitution grants to Congress the exclusive power to "lay and collect Taxes, Duties, Imposts and Excises" and "regulate Commerce with foreign Nations." Constitution Art. I, § 8, Clauses 1, 3. Under the International Emergency Economic Powers Act, Congress has constitutionally delegated some of this power to the President of the United States (the "President"). Specifically, the President is empowered to impose tariffs "to deal with an unusual and extraordinary threat with respect to which a national emergency has been declared for purposes of this chapter and may not be exercised for any other purpose." 50 U.S.C. §1701(b).

President Trump, through the use of Executive Orders, has enacted (1) *Worldwide and Retaliatory Tariffs* to address trade deficits, which currently impose a 10% tariff for all countries with additional country specific tariffs taking effect in July; and (2) *Trafficking Tariffs* to address drug trafficking at the borders, which currently imposes a 25% tariff on Mexican and Canadian products and a 20% tariff on Chinese products. Additionally, the President has exercised his authority under Section 232 of the Trade Expansion Act of 1962 (the "Trade Expansion Act") to reinstate the full 25% tariff on steel imports and increase tariffs on aluminum imports to 25% (the "*Section 232 Tariffs*"). The Trade Expansion Act provides the President with authority to adjust imports being brought into the United States in quantities or under circumstances that threaten to impair national security. Relying on such statutory authority, on June 3, 2025, by Proclamation, the President increased the tariffs on steel and aluminum imports from 25% to 50%.[i]

On April 14, 2025, V.O.S. Selections, Inc. and other plaintiffs filed a Complaint with the United States Court of International Trade ("*V.O.S. Selections v. Trump*"), challenging the *Worldwide and Retaliatory Tariffs* as well as the *Trafficking Tariffs*. On May 28, 2025, a 3-judge panel of the Court of International Trade entered summary judgment against the United States and permanently enjoined the Executive Orders imposing the challenged tariffs.[ii] The United States filed an appeal with the U.S. Court of Appeals for the Federal Circuit (Case No. 25-1812) and was able to obtain an Order on May 29, 2025, granting a temporary stay of the judgment (and injunctions) pending the appellate court's consideration of the appeal.

Regardless of the outcome of that appeal, the *Section 232 Tariffs* remain intact creating increased costs considerations for construction projects. Additionally, if the appeal is ultimately unsuccessful, it is reasonable to assume the Trump administration will pursue other avenues, including possible congressional action, to reinstate the *Worldwide and Retaliatory Tariffs,* as well as the *Trafficking Tariffs*. Consequently, heightened consideration should be given to the risk-shifting contractual provisions that may provide protection against the potential cost and time impacts caused by these tariffs.

Contractual Provisions Related to Tariffs in Existing Contracts Diligence

If your company is working under an existing contract, its options are somewhat limited. Generally, unmodified contracts place the risk of future tariff impacts squarely on the contractor. As described below, if tariffs are increasing costs or delaying performance the following contract provisions may provide some relief.

Delays and Extensions of Time

These provisions are designed to provide the contractor with relief in the event of delays, not caused by the contractor and beyond its control. As we all learned during COVID, these clauses are sometimes referred to as *force majeure* provisions. The unmodified versions of the American Institute of Architects ("AIA") A201 at § 8.3 and the ConsensusDocs 200 at § 6.3 both call for mandatory time extensions (but no additional money) in the event of a delay beyond the control of the contractor. Although neither specifically mentions tariffs, both provisions may help.

The AIA A201 provides:

§ 8.3 Delays and Extensions of Time

§ 8.3.1 *If the Contractor is delayed at any time in the commencement or progress of the Work by* (1) an act or neglect of the Owner or Architect, of an employee of either, or of a Separate Contractor; (2) by changes ordered in the Work; (3) by labor disputes, fire, unusual delay in deliveries, unavoidable casualties, adverse weather conditions documented in accordance with Section 15.1.6.2, or *other causes beyond the Contractor's control*; (4) by delay authorized by the Owner pending mediation and binding dispute resolution; or (5) by other causes that the Contractor asserts, and the Architect determines, justify delay, *then the Contract Time shall be extended for such reasonable time as the Architect may determine.* [Emphasis added.]

The ConsensusDocs 200 offers similar protection:

> 6.3. DELAYS AND EXTENSIONS OF TIME
> 6.3.1 *If Constructor is delayed* at any time in the commencement or progress of the Work *by any cause beyond the control of Constructor, Constructor shall be entitled to an equitable extension of the Contract Time. Examples of causes beyond the control of Constructor include,* but are not limited to, the following: ... (j) epidemics; *(k) adverse governmental actions*.... Constructor shall submit any requests for equitable extensions of Contract Time in accordance with ARTICLE 8. [Emphasis added.]

It's important to emphasize that these provisions will extend the contract time only. They will not excuse nonperformance and will not provide for the recovery of delay costs like extended general costs, or the tariff-driven cost increases of the materials themselves. Special consideration should be given to possible delays at ports of entry due to U.S. Customs and Border Protection uncertainty regarding enforcement of tariffs on imported construction materials and equipment. Additionally, compliance with the contract's notice provisions is always essential to preserving the contractor's right to additional time.

Change in Law

Change in Law provisions typically do not excuse performance. Rather, they entitle a contractor to additional time or money in order to complete its Work. Depending on the language of the clause, a contractor (or subcontractor) may be able to increase the contract price and/or contract time due to impacts caused by tariffs. The AIA does not have a change in law provision. However, ConsensusDocs 200 § 3.21.1 provides:

> The Contract Price or Contract Time shall be equitably adjusted by Change Order for additional costs resulting from any changes in Laws, including increased taxes, which were not reasonably anticipated and then enacted after the date of this Agreement.
>
> "Laws" means federal, state, and local laws, ordinances, codes, rules, and regulations, applicable to the Work with which the Constructor must comply that are enacted as of the Agreement date.

Note that this provision will not apply to domestically produced materials that escalated in price because of tariffs (domestically produced items will increase in cost to capture profit as tariffs increase the cost of similar foreign materials or equipment). Further, it will not apply where the tariffs did not directly impact the contractor's specific material or equipment.

Taxes

The AIA A201 does not directly address tariffs, but states:

> § 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 bids are received or negotiations concluded, whether or not yet effective or merely scheduled to go into effect.

This provides a basis to argue that a tariff is a tax enacted after the bid was received or the contract was negotiated. The counter argument, however, is that tariffs are not a "sales, consumer, [or] use" tax envisioned by this clause.

ConsensusDocs 200 § 3.17.1 states: "The Constructor shall pay all applicable taxes enacted when bids are received or negotiations concluded for the Work provided by the Constructor." However, the ConsensusDocs 200 Change in Law provision at § 3.21.1 provides a better argument and, to the extent it was included, the ConsensusDocs 200.1 Material Price Escalation Amendment deals directly with this issue. *See* discussion below.

Other Contract Clauses

In the absence of obtaining relief from other contract provisions, the contractor can always request that the owner modify or amend the contract under the Changes clause to deal with tariffs. There is no guarantee, however, that an owner would be willing to change the terms of the contract after execution. If an owner declines to modify or amend the contract to address cost increases due to tariffs, the contractor can look at termination of the contract as a measure of last resort. However, extreme caution should be exercised, and close examination of the termination clauses is necessary to seek any relief potentially available under either a Termination for Convenience or Termination for Default provision in the contract. The benefits of invoking a termination clause include: (i) excusing further performance; and (ii) getting paid for work performed through the date of termination.

Federal Construction Contracts

There are two primary clauses in federal construction contracts that govern contractors' rights and responsibilities when it comes to price escalation, increased costs, and taxes imposed after contract execution. The two clauses contractors should look for and review in current federal government contracts are:

After-Imposed Tax Clause – Federal Acquisition Regulation ("FAR") 52.229-3

FAR 52.229-3, Federal, State, and Local Taxes, allows for the recovery of taxes and duties imposed after the bid opening date in sealed bid procurements or after the contract's effective date in negotiated procurements. Initially, this clause seems to provide an easy solution for contractors – tariffs are defined as a form of tax on imported goods. However, the Armed Services Board of Contract Appeals recently decided that adjustments under FAR 52.229-3 must be tied to direct costs incurred to pay increased taxes and duties. *In Appeal of Pangea, Inc.*, the Board held that it was not persuaded that an increase in the price of domestic steel resulting from a tariff on foreign steel is a "federal tax" within the meaning of FAR 52.229-3[iii] and that an increase in the price of domestic steel resulting from a tariff placed by the United States on foreign steel was not a federal tax or duty under the meaning of FAR 52.229-3. Thus, contractors will need to look elsewhere for general inflation costs that may result from the threatened tariffs.

Economic Price Adjustment (EPA) Clauses – FAR 52.216-2. FAR 52.216-3, FAR 52.216-4 and DFARS 252.216-7000

The FAR allows for EPA clauses to be inserted into fixed-price contracts where the contracting officer foresees potential fluctuations in labor, material, and/or supply costs. These clauses shift the risk of price changes to the government, but they rarely appear in fixed-price construction contracts. The government is not obligated to provide price adjustments for inflation without an EPA clause. Accordingly, contractors should check their agreements for the inclusion of an EPA clause, as well as the important terms of the clause, such as: (1) what events trigger application of the clause (e.g., a percentage increase in costs); (2) does the clause dictate limiting bands (i.e., minimums and maximums for price adjustments); and (3) what, if any, labor or material cost indices may be referenced in the EPA clause as the basis for price changes.

Common Law Doctrines – Impossibility, Commercial Impractiability and Frustration of Purpose

Impossibility

To establish the defense of impossibility, a contractor must prove that performance was objectively impossible. It is not sufficient to show that performance was impracticable for the individual contractor–you must prove that performance would have been impossible for any similarly situated contractor. The ability of another contractor to perform the disputed work would be persuasive evidence that the contract was not impossible to perform.[iv] The imposition of new tariffs or the increase of existing tariffs represent cost increases that must be absorbed by the owner or the contractor; but such cost increases do not preclude the performance of the construction contract. Thus, this common-law defense is an extremely difficult one to maintain.

Commercial Impractiability

A contract is commercially impracticable when, because of unforeseen events, it can be performed only at an excessive and unreasonable cost,[v] or when all means of performance are commercially senseless.[vi] Whether performance of a particular contract would be commercially senseless is a question of fact. A contractor is not entitled to relief merely because he cannot obtain a production level sufficient to sustain his anticipated profit margin.[vii] The Supreme Court of the United States has defined the doctrine of commercial impracticability in government contracts stating, "Where, after a contract is made, a party's performance is made impracticable without his fault by the occurrence of an event the non-occurrence of which was a basic assumption on which the contract was made, his duty to render that performance is discharged, unless the language or the circumstances indicate the contrary."[viii] To prove this defense a contractor is required to show that (i) a supervening event made performance impracticable; (ii) the non-occurrence of the event was a basic assumption upon which the contract was based; (iii) the occurrence of the event was not the contractor's fault; and (iv) the contractor did not assume the risk of occurrence. This four-part test is very difficult to prove.

Frustration of Purpose

The legal theory of frustration of purpose excuses performance when the cessation or nonexistence of some particular condition or state of things has rendered performance impossible and the object of the contract frustrated. This theory comes into play when, based on the contract and surrounding context, the parties obviously assumed a particular condition or state of circumstances would continue to exist. If that condition or state ceases to exist, a court may find that the entire purpose of the contract is frustrated. Unlike impossibility or commercial impracticability, which focus on the ability of the contractor to perform, frustration of purpose focuses primarily on the parties' ability to enjoy the benefits of the bargain.

Drafting and Negotiating New Contracts

In the current climate, the best practice is for contractors to include provisions in their contracts that expressly deal with the potential time and price impacts of tariffs. Contractors should include some or all of the following:

Material Price Escalation Clause

Contractors have long dealt with fluctuations in labor and material costs; however, tariffs present a unique challenge—an external governmental action that can cause rapid and unpredictable spikes in pricing and the availability of materials and equipment. To mitigate this uncertainty, many contractors are turning to "material price escalation clauses." These provisions allow for adjustments in the contract price when material costs exceed a predetermined percentage threshold. A well-drafted escalation clause should clearly define which materials are covered, specify how cost increases will be measured, and outline a mechanism for verifying and approving adjustments. Some contracts tie pricing to external indices such as the Producer Price Index for Construction Materials, ensuring that price increases are based on objective market data rather than supplier pricing alone.

There is no Material Price Escalation clause in the AIA A201. The ConsensusDocs do offer a Material Price Escalation Amendment called “ConsensusDocs 200.1 Potentially Time and Price-Impacted Materials.” The following is an example of a Price Escalation clause that can be used in a lump sum fixed-price contract or a cost-reimbursement with a Guaranteed Maximum Price (GMP) contract:

> If the cost of the materials and/or equipment described below increases by more than __% over the amount estimated in calculating the Contract Price, the Contractor shall promptly provide Owner with a written request for an equitable adjustment. The Contract Price shall be increased by the difference between the original cost estimate and the actual costs paid by the Contractor, without markup or overhead. In no event shall the Contract Price, be adjusted more than __% percent over the original Contract Price for the aggregate of all increases. Any adjustment of the Contract Price under this provision shall not be duplicated in any contingency amounts established under the terms of the Agreement, or by any allowance.
>
> <u>Potentially Impacted Materials and Equipment</u>: Steel, Electrical equipment, Aluminum.

As you can see, these types of clauses require cost transparency and can be used in place of allowances or contingencies. Critical here is to establish baseline costs for the material and/or equipment and the price variation that triggers the clause. Further, the clause should address what documentation will be required to substantiate the cost increases. Such mechanisms could include periodic contract reviews for price adjustments, or predetermined responses to potential future tariffs. Best practices also call for the utilization of a rider or addendum to effectuate these changes. This will avoid having to negotiate with an owner to include these terms in standard form agreements, like the AIA or ConsensusDocs. Further, negotiations may encourage an owner to include downward cost adjustments if the cost of materials or equipment actually goes down during the course of construction.

Modified Force Majeure Provision

As discussed above, Delay and Extension of Time provisions should be changed to allow for increased cost, as opposed to only time. See Delay and Extensions of Time, above. Existing *force majeure* language should be updated as follows:

> “Force Majeure” means Acts of God, unusual weather events, acts of war or terrorism, pandemics, epidemics, riots, newly announced or enacted governmental restrictions or other acts by governmental bodies (local, national or foreign), including but not limited to the imposition of tariffs or other trade restrictions, labor disputes, labor shortages (including but not limited to the unavailability of qualified and properly trained labor forces), material shortages, unusual transportation delays, fire, flood, tornado, earthquake or other natural disaster, or any other events beyond the reasonable control of the Contractor. If the cost of materials increases or the Contractor is delayed or

anticipates a future impact or delay due to an event of Force Majeure, Contractor shall provide prompt notice to the Owner and the Contract Time and Contract Sum shall be equitably adjusted.

Although owners may not accept this provision as written, this should be suggested as a starting point. As written here, this provision will protect a contractor from any documented cost increases or delays caused by tariffs. It goes without saying that any cost and time impacts must be identifiable and properly tracked.

Change in Law/Taxes Clauses

As discussed above, § 3.21.1 of the ConsensusDocs 200 and "ConsensusDocs 200.1 Potentially Time and Price-Impacted Materials" provide the contractor with protection against the cost and time impacts of future tariffs. If using AIA contract documents or other contract forms, contractors should seek to add, via an addendum or contract rider, a change in law provision that defines tariffs as a change in governmental regulation that entitles the contractor to additional compensation and provides a clear process for requesting price adjustments due to new tariffs.

Allowance/Tariff Specific Contingency Provision

Allowances are another way to shift price escalation risks posed by tariffs under lump sum, fixed-price contracts. Under most allowance clauses, the amount allocated for a product or material is an estimate. The Owner pays the actual cost of the allowance item, whether it goes up or down, and the fixed contract price, or GMP amount in a cost-reimbursement contract, is adjusted via change order. Contingencies are not normally found in lump sum, fixed price contracts. Under cost-reimbursement GMP contracts, like the AIA A133-2019, the price, although capped, is not fixed. The contractor is paid approved costs and its fee, up to the GMP amount. Many GMP contracts will include a contingency account for unanticipated costs that would otherwise not be reimbursable on the basis of a change order.

It is vital that any contingency provision clearly identify tariffs as an approved expense. The provision should also address whether the contractor can apply any markup on the tariff allowance cost, what impact, if any, on any costs savings sharing clause, and whether the allowance amount or specific tariff cost contingency must be exhausted before the contractor may request a change order. Finally, contractors should consider sharing with the owner the cost risk of tariffs by splitting the risk, reducing the contractor's fee if the owner takes the risk, or by sharing the risk in tranches where the owner covers a set amount of the increase before the contractor is required to absorb the cost, or vice versa.

Material Substitution/Value Engineering Clause

Contractors should seek to ensure the construction contract contains a material substitution clause or a value engineering provision that specifically addresses the cost impact of new or increased tariffs. This provision should allow the contractor to seek a substitution of materials or equipment in the event new or increased tariffs render the provision of such materials or equipment cost prohibitive.

Subcontractor and Supplier Agreements

Contractors (and subcontractors and suppliers) should ensure that their subcontract agreements and purchase orders specifically include language that treats potential price increases due to tariffs in the same manner as the prime contract to avoid gaps in coverage that are disadvantageous for either the contractor or the subcontractor/supplier. In drafting and negotiating such subcontracts and purchase orders, contractors should consider including the following provisions:

Liquidating Provision

A liquidating clause conditions and limits a contractor's liability to a subcontractor or supplier to the amount recovered from the owner on the subcontractor's or supplier's claim. These are non-standard provisions. An example is:

> Subcontractor's right of recovery for any cost or schedule impact resulting from any new tariffs or increase in tariffs, imposed after the effective date of this Subcontract Agreement, on the materials or equipment being furnished by Subcontractor shall be limited to that amount, if any, which Contractor may recover from Owner on Subcontractor's behalf. Contractor shall not be liable to Subcontractor for any amount or time extension except those paid to or granted to Contractor by Owner for the Subcontractor's benefit. Any request for an increase in price or extension of the schedule submitted by Subcontractor must satisfy the written notice requirements of this Subcontract Agreement and the Contract Documents. Subcontractor waives any right to any increase in price or time extension, save and except to the extent that Contractor may receive an increase in price or time extension from the Owner on behalf of Subcontractor, which amount(s) or schedule extension(s) shall be paid to or granted to Subcontractor, as applicable.

Shipping Terms

For contractors, as well as subcontractors and suppliers, who are furnishing materials or equipment to a construction project that will be imported from other countries, consideration should be given to addressing the potential cost impact of new tariffs or increased tariffs in a specific clause regarding the shipment of such materials or equipment from overseas. The vast majority of the time, the purchasing contractor, subcontractor or supplier will seek to impose shipment obligations on the seller using one of the shipping rules from the International Commercial Terms published by the International Chamber of Commerce, commonly referred to as Incoterms 2020.[ix] The specific Incoterms 2020 rule elected by contractors for imported materials and equipment is DDP, which stands for "Delivered Duty Paid". Under this rule, the seller is responsible for arranging carriage and delivering the goods at the named place (i.e., the project site), cleared for import and all applicable taxes and duties paid (e.g. VAT, GST, or any other tariffs or duties). Risk transfers from seller to buyer when the goods are made available to the buyer, ready for unloading from the arriving means of transport. This rule places the maximum obligation on the seller and is the only rule that requires the seller to take responsibility for import clearance and payment of taxes, tariffs, and/or any import duty.

The sellers of imported materials and equipment are increasingly reluctant to assume the cost risk of new or increased tariffs that may not have been included in the sale price. To resolve this reluctance, contractors should consider utilizing a specific shipping clause that treats tariffs and duties as a stand-alone reimbursable cost that is documented by the seller. Here is a sample provision reflecting such an approach:

> Delivery
>
> Delivery of the Materials and/or Equipment will be made to [specify place of delivery, i.e., project site, offsite storage area, etc.]. Delivery terms are DDP at the Contractor's designated place of delivery. The Contractor will reimburse Subcontractor/Supplier for any documented increase in DDP costs after the date of execution of Agreement. If the Materials and/or Equipment is delivered in conformance with this Agreement, then title and risk of loss shall pass to Contractor upon Delivery.

Summary

The uncertainty caused by tariffs is not going away. As tariff policies continue to evolve, implementing good contract strategies is paramount to contractors being able to maintain financial stability in the performance of their construction projects. By taking a strategic approach to drafting, contractors can better position themselves to withstand the economic uncertainties of tariffs and deliver successful projects despite market fluctuations. For those contracts already being performed that are impacted by new tariffs or increased tariffs, hopefully some of the provisions in existing contracts will provide a mechanism for relief as discussed above.

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[i] Referring to the U.S.-UK Economic Prosperity Deal of May 8, 2025, the Proclamation provides different treatment for imports of steel and aluminum articles, and their derivatives, from the United Kingdom, keeping the tariffs at a rate of 25%, subject to later adjustment.

[ii] It should be noted that the *Section 232 Tariffs* were not challenged and are not addressed in the Court of International Trade's opinion.

[iii] *See Appeal of Pangea, Inc.*, ASBCA Nos. 62561, 62640 (January 4, 2022).

[iv] *See Jennie-O Foods, Inc. v. United States*, 580 F. 2d 500, 410 (Ct. Cl. 1978).

[v] *Int'l Elecs. Corp. v. United States*, 227 Ct.Cl. 208, 646 F.2d 496, 510 (1981).

[vi] *Jennie–O Foods, Inc., supra.* at 409.

[vii] *Natus Corp. v. United States*, 178 Ct.Cl. 1, 371 F.2d 450, 457 (1967).

[viii] *United States v. Winstar Corp.*, 518 U.S. 839, 904, (1996) (quoting Restatement (Second) of Contracts § 261).

[ix] Since 1980, the ICC Incoterm have been updated every 10 years, with Incoterms 2020 being the most recent revision.