

Practice Update

Tariff Troubles: Analyzing Construction Contracts in the Current Market

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2025 brought with it many new tariffs, and those tariffs seem to be changing on a near-daily basis. Given this, many in the real estate industry are understandably apprehensive about beginning new projects. Many more are concerned about how tariffs may impact their construction projects. For instance, who is responsible for price increases caused by tariffs, as between the owner and contractor? In addition, would a new tariff give rise to a contract time extension if it caused project delay? Below is a starting point for understanding how to analyze tariff-related issues in construction contracts.

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Relief for Cost Increases

Most parties' primary consideration when evaluating new tariffs is responsibility for cost increases directly arising from the tariff itself.

The AIA A101-2017 stipulated sum agreement and its companion A201-2017 General Conditions do not expressly address tariffs. However, the A201 *does* address taxes. Section 3.6 states:

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.

Many argue that tariffs are a form of tax placed on goods imported into a country.[1] If so, then tariffs may be addressed under the standard A201 General Conditions. The A201 refers to “sales, consumer, use and *similar* taxes” (emphasis added). It is not clear if a court would agree that a tariff is a *similar* tax.

If considered a similar tax, then a contractor would be liable for additional costs caused by any tariffs that were already enacted as of the date bids were received or negotiations concluded (i.e., execution of the contract). Conversely, an owner would be on the hook for cost increases caused by any tariffs enacted after contract execution.

The situation becomes more complicated, however, with some other AIA contract forms. The A133-2019 agreement form, which contemplates the eventual execution of a Guaranteed Maximum Price Amendment, states:

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.

The A133 also uses the A201-2017 as its companion document, so the potential for conflict arises between the two provisions cited above. However, given that a GMP Amendment modifies the parties' agreement, it stands to reason that liability for tariffs for the construction phase work would be addressed as of the date of the GMP Amendment. Specifically, the contractor would be responsible for tariff-related costs if the tariff was enacted prior to execution of the GMP Amendment, while the owner would pay for any later-enacted tariffs.

Keep in mind that both of these clauses use the date of enactment of the tariff as the determining cutoff date, rather than the effective date of the tariff.

Therefore, parties need to be aware of any tariffs that have been enacted, even if not yet effective.

To date, no court has analyzed whether price increases caused by tariffs would entitle a contractor to relief under an AIA form contract.

The ConsensusDocs 200 (2023) does expressly mention tariffs, but only in the context of pricing a change order (contractor entitled to any costs caused by tariffs in the event of a change). The 200 form also addresses taxes, but differently than the AIA forms:

3.17.2 Constructor shall pay applicable taxes for the Work provided by Constructor.

Obviously, this provision lacks any cutoff date for when each party is responsible for cost increases caused by tariffs or taxes. Rather, the contractor would be responsible for all taxes, regardless of when enacted. However, another provision modifies this:

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.

Therefore, assuming tariffs do constitute a form of tax, the contractor would be entitled to relief if there was any price increase due to a tariff that was enacted after execution of the agreement. Again, the cutoff date is the date of enactment of the tariff, rather than the effective date of the tariff.

Similarly, no court has analyzed whether price increases caused by tariffs would entitle a contractor to relief under a ConsensusDocs form contract.

Case law is very scarce in general on a contractor's entitlement to relief when price increases are caused by tariffs. In a somewhat analogous situation, in

Hegeman-Harris & Co. v. United States, 194 Ct. Cl. 574 (Cl. Ct. 1971), the United States Court of Claims allowed a government contractor to recover additional compensation when a new state tax increased its subcontractors' cost of performance. However, that contract contained a clause that specifically addressed the contractor's right to relief if any tax or duty was not included in the contract sum and was later enacted.

Parties also need to keep in mind the possibility that *domestic* materials may increase in price as a result of *foreign* tariffs. In *Appeals of Pangea, Inc.*, ASBCA No. 62561, 2022-1 BCA ¶ 38,026 (ASBCA 2022), the Armed Services Board of Contract Appeals denied a contractor's request for additional compensation when the price of *domestic* steel increased, purportedly as a result of tariffs that the United States imposed upon *foreign* steel. The contractor relied on FAR 52.229-3(c), which stated:

The contract price shall be increased by the amount of any after-imposed Federal tax, provided the Contractor warrants in writing that no amount for such newly imposed Federal excise tax or duty or rate increase was included in the contract price, as a contingency reserve or otherwise.

The Board assumed without discussion that the ad valorem tariffs constituted a tax. However, the Board rejected the notion 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.

Relief for Delays

Enactment of new tariffs can also cause delays, so parties need to consider whether a contractor may be entitled to a time extension and/or additional compensation as a result of such impacts.

With respect to delays, the AIA A201-2017 provides:

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.

Any of the three broad categories highlighted above could potentially entitle the contractor to a time extension if a delay was caused by tariffs.

With respect to the first, the analysis may boil down to whether the enactment of a tariff, and any resulting delay in delivery, was “unusual.” For a contract entered into prior to the current market conditions, such a delay may be considered unusual. Conversely, delays caused by tariffs may not be considered so unusual for any contracts entered into after the onset of the current wave of tariffs. There is no case law on this specific scenario, so the outcome of this is unclear.

“Other causes beyond the Contractor's control” is very broad and would arguably entitle the contractor relief for delays caused by a tariff. Similarly, an architect may determine that tariffs entitle the contractor to a time extension.

Notably, the A201 allows for recovery of damages for delay, but does not specify the method of determining those damages. Therefore, if the contractor's work is determined to have been delayed by a tariff under Section 8.3.1 above, the

contractor can likely also recover some monetary remedy to the extent it was damaged.

The ConsensusDocs 200 (2023) states the following with respect to delays:

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: (a) acts or omissions of Owner, Design Professional, or Others; (b) changes in the Work or the sequencing of the Work ordered by Owner, or arising from decisions of Owner that impact the time of performance of the Work; (c) encountering Hazardous Materials, or concealed or unknown conditions; (d) delay authorized by Owner pending dispute resolution or suspension by Owner under §11.1; (e) **transportation delays not reasonably foreseeable**; (f) labor disputes not involving Constructor; (g) general labor disputes impacting the Project but not specifically related to the Worksite; (h) fire; (i) Terrorism; (j) epidemics; (k) **adverse governmental actions**; (l) **unavoidable accidents or circumstances**; (m) adverse weather conditions not reasonably anticipated.

Again, the broad categories highlighted above could potentially entitle the contractor to a time extension if a delay was caused by tariffs. Importantly, the listed events are not exclusive, but rather the contractor will receive a time extension for *any cause beyond its control*. This would likely include tariff-caused delays.

Similar to the A101, the ConsensusDocs 200 allows the contractor an equitable adjustment in the contract price as a result of excusable delays, but does not specify the exact damages. Therefore, the

contractor can likely recover some monetary remedy to the extent it was damaged by a delay caused by a tariff.

Similar to the discussion above for cost increases, parties also need to be aware of the possibility that *domestic* materials may become scarce or delayed, as a result of the implementation of *foreign* tariffs. It is possible — but not entirely clear — that a domestic delay caused by a foreign tariff would constitute an excusable delay under either of the clauses cited above.

While courts have evaluated these clauses in many contexts, no published case law exists addressing a contractor's entitlement to relief when tariffs cause delays.

Conclusion

In sum, these precise questions have not yet been addressed by the courts. The principles above are a good starting point for analyzing tariff-related issues, but it is not clear how courts may ultimately rule on these questions. Many of these issues will also be highly fact-specific, based on the contract provision and the specific tariff, cost increase, or delay at issue. Note also that this summary only addresses a few common contract templates, but parties are free to negotiate around these topics. Therefore, contracting parties would be wise to address tariff-related issues head-on in their agreements. Construction attorneys can provide advice on how to structure those contracts and the relevant provisions.[2]

[1] *See, e.g.*, Complaint for Declaratory and Injunctive Relief in Case No. 3:25-cv-03372, *State of California v. Donald J. Trump*, filed April 16, 2025, at page 4 (https://www.gov.ca.gov/wp-content/uploads/2025/04/FILE_8502.pdf); *see also* *Brushaber v. Union Pacific Railroad Co.*, 240 U.S. 1 (1916) (often cited as support for the notion that

tariffs are recognized as taxes under the Constitution).

[2] *See, e.g.* <https://www.law360.com/real-estate-authority/articles/2316651/addressing-tariff-price-escalation-in-construction-contracts>.

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