ARTICLE

Expert Q&A on Responding to Trump Tariffs' Impacts on Construction Materials

by Practical Law Real Estate

Status: **Law stated as of 28 Feb 2025** | Jurisdiction: **United States**

This document is published by Practical Law and can be found at: **content.next.westlaw.com/w-045-8871**
Request a free trial and demonstration at: **tr.com/practicallaw-home**

An Expert Q&A with Levi W. Barrett of Peckar & Abramson, P.C. discussing the recent Trump administration tariffs on steel and aluminum materials used on construction projects and steps to respond to and mitigate the associated impacts.

The new Trump administration has announced several early actions on tariffs. While some of these measures have been paused, unqualified tariffs on steel imports and increased tariffs on aluminum material imports into the US are set to take effect on March 12, 2025, absent further action or orders (see Proclamation No. 10895 (Adjusting Imports of Aluminum Into the United States), 90 Fed. Reg. 9807 (Feb. 10, 2025) (Aluminum Tariff Proclamation), Proclamation No. 10896 (Adjusting Imports of Steel Into the United States), 90 Fed. Reg. 9817 (Feb. 10, 2025) (Steel Tariff Proclamation), and Fact Sheet: President Donald J. Trump Restores Section 232 Tariffs (Feb. 11, 2025) (Tariffs Fact Sheet)). For more information on tariff issues generally and a survey of tariff developments under the current administration, see Practice Notes, US and International Regulation of Tariffs and Key Developments Under the Trump Administration Regarding Imports and Tariffs: 2025 Tracker.

Practical Law Real Estate asked Levi Barrett, a partner with Peckar & Abramson, P.C., for his views on these recent tariffs and their potential impact on material pricing for construction projects. Levi serves as co-managing partner of Peckar & Abramson's New Jersey office and chairs the firm's Construction Contracts & Risk Management practice. His primary focus is on construction law, including counseling clients on all aspects of public and private construction contracts. Working closely with contractors, construction managers at risk (CM@R or CMAR), owners, and developers, Levi structures and negotiates contract documents for hundreds of construction projects annually and engages in risk mitigation planning and risk assessment for both public infrastructure and private construction projects.

What are these tariffs and what are their likely impacts on the construction industry?

The Steel Tariff Proclamation and Aluminum Tariff Proclamation:

- Impose tariffs on the import of most steel and aluminum products into the US under Section 232 of the Trade Expansion Act of 1962 (19 U.S.C. § 1862).
- Modify many tariffs that were issued by the first Trump administration beginning in 2018 and later altered by both the Trump and Biden administrations. Those earlier measures included a 25% tariff on steel imports and a 10% tariff on aluminum imports but granted exemptions to certain countries, including Canada and Mexico.
- Eliminate the previous general exclusions. The proclamations reinstate the full 25% tariff on steel imports and increase the aluminum tariff to 25%. No country-based exemptions are allowed, including for Canada and Mexico (both of which export a substantial amount of these materials to the US).

While the tariff adjustments have not yet taken effect, many in the industry have already reacted. For example, the National Association of Home Builders (NAHB) has stated definitively that these tariffs will raise housing costs (see NAHB: Trump's 25% Tariffs on Steel and Aluminum Will Drive Up Housing Costs (Feb. 12, 2025)).

Many US steel and aluminum industry market and labor leaders have expressed support for the tariff modifications. Their reactions stem from concerns about the existing level and pricing of imports.

The Tariffs Fact Sheet notes foreign nations are flooding the US with cheap steel and aluminum with support from their governments. The stated purposes of the tariff adjustments include boosting domestic steel and aluminum production (currently operating under capacity) by making it more price competitive.

Other commentators and industry experts argue the tariffs are likely to:

- Increase the cost of construction projects.
- Lead to project delays due to:
  - pricing renegotiation; or
  - material scarcity and the associated time and expense of developing alternative sourcing.
- Delay new project development as the parties adjust to the potential cost and supply impacts.

How do you anticipate the construction parties will react to these tariffs?

How the parties deal with the tariffs on steel and aluminum imports will depend on several factors, including whether:

- A project has already been bid or contracted using a firm or capped price proposal, including (for example) a lump sum or guaranteed maximum price (GMP) contract.
- Materials can be sourced without delay from domestic suppliers not directly impacted by the tariffs. Notably, domestic materials are not insulated from price increases in the form of demand-driven escalation.
- Parties are willing to balance the risk and exposure to the tariffs through negotiation where the project is not yet bid or under contract.

If the project is underway, what contract provisions could address tariff price and schedule impacts?

If a project is under contract and being performed, there are several issues and related provisions to review, including:

- **Exclusion under a cost-plus contract.** Tariffs may be excluded as a cost of the work under a cost-plus contract (with or without a GMP). A cost-plus contract specifies by category and description the project costs reimbursed to the contractor or CM@R and those that are not. For more information, see Practice Notes, Guaranteed Maximum Price Contracts: Drafting Strategies: Cost of the Work and Construction Pricing: Understanding Pricing Structures: Defining the Cost of the Work.
- **Tax responsibilities.** Tariffs could be expressly included in the contract's tax provisions or implied as taxes under applicable case law interpretation. For example:
  - standard construction contract forms issued by AIA Contract Documents do not reference tariffs in their respective tax provisions but make the contractor responsible for sales, consumer, use, and similar taxes "legally enacted when bids are received or negotiations concluded" (see AIA Document A201™-2017 General Conditions of the Contract for Construction § 3.6); and
  - ConsensusDocs allows for contract time or pricing adjustments resulting from a change in the law (including tax laws) occurring after execution of the contract (see ConsensusDocs 200 Standard Agreement and General Conditions Between Owner and Constructor (Lump Sum) (CD 200) § 3.21.1).
- **Price escalation.** Price escalation clauses may accommodate material import tariffs or impose other restrictions or limitations on price adjustments. Escalation clauses are a favorable option to address the external impacts of tariffs (for example, price increases to domestic materials).
- **Budgeted contingency terms.** Contingencies could offer a source of revenue relief for a contractor incurring additional tariff-related costs. Generally, contingencies are available for contractors to address unexpected costs. The

contract may, however, impose restrictions on the use of any contingency, such as where tariffs are contractually excluded as a cost of the work. For more information on contingencies and related exclusions, see Practice Note, Guaranteed Maximum Price Contracts: Drafting Strategies: Contingencies and Exclusions from the Cost of Work.

- **Force majeure.** The force majeure or equivalent provisions (and applicable law) control whether, and the extent to which:
  - governmental proclamations, orders, or laws are covered events;
  - tariff enactments are included within those terms; and
  - price and schedule adjustments are permitted after a force majeure event.

  (See Practice Note, Force Majeure Clauses: Key Issues and Standard Clause, Force Majeure Claims (Construction).)

For future projects and contracts currently in negotiation, what steps should the parties take to address tariff price and schedule impacts?

The industry will have to wait to see the true impacts these tariffs (assuming they stay in place) will have on project costs and material deliveries in the coming months. Construction parties should closely monitor these factors, determine material supply availability, and possibly accelerate material procurement in much the same manner as if engaging in early purchasing of items with a long lead-time.

Industry participants should be proactive and consider measures designed to mitigate the uncertainty associated with tariffs, escalation, or both. With respect to future contracts, the parties should carefully review and negotiate the terms governing pricing, cost of the work, allowances, escalation, taxes, contingencies, force majeure, and scheduling to address tariff impacts. These are already some of the most heavily negotiated terms in a construction contract in many jurisdictions (see Construction Laws and Customs: State Q&A Tool: Question 11).

A cost-plus contract could accommodate flexibility when pricing tariff-impacted materials. The parties may agree to include tariff-related expenses as a cost of the work. A GMP may still impose budget restraints on the contractor, however, if the tariff impacts are significant. For more information on cost-plus contracts with a guaranteed maximum price, see Practice Notes, Construction Pricing: Understanding Pricing Structures: Cost of the Work Plus a Fee and Defining the Cost of the Work and Guaranteed Maximum Price Contracts: Drafting Strategies: Cost of the Work, as well as Standard Clause, Guaranteed Maximum Price (GMP) Clauses.

Additionally, the parties can include price escalation provisions in their contract to address possible time and schedule consequences. Escalation provisions can take many forms, including:

- A broad "catch-all" provision.
- Narrowly tailored provisions tied to specific materials with specific trigger points.

One example of a comprehensive set of escalation terms comes in the form of the ConsensusDocs 200.1 Amendment No.1 Potentially Time and Price-Impacted Materials (CD 200.1). CD 200.1 was issued well before the enactment of the initial steel and aluminum tariffs under the first Trump administration but can be used to respond to possible tariff impacts. CD 200.1 is to be appended to CD 200 and includes as key features:

- An accommodation of both price escalation and time impacts from materials. The materials must be listed on an attached schedule to CD 200.1.
- The ability for either party to request an adjustment to the identified Potentially Time and Price-Impacted Material (a defined term). A party must support its request with substantiating documentation and may not add any overhead and profit.
- The right to place caps on the amount of the contract price increase from any adjustment.

Another consideration is to use materials allowances or a flexible material substitution approach. While the product must still comply with the performance requirements of the contract documents, being able to source alternative material supplies could avoid the use of imported products affected by tariff escalation.

Contractors could pass some of this pricing and schedule risk to their subcontractors. The subcontractors may, however, already bear this expense if they are to supply tariff-impacted materials. The ability to pass this risk is often dependent on the subcontractor's ability to absorb the impact of the tariff or escalation event. For more information on construction subcontracting strategies generally, see Construction Subcontracts: Contractor's Drafting Checklist.

Is there anything else to consider beyond the parties' construction agreements?

Because significant changes on material pricing and availability may impact both project costs and scheduling, the entire project delivery could be altered. The owner should review its project financing documents to determine:

- What notices it must give to the project lender.
- Whether there are construction loan terms limiting the requested price or schedule relief.

For more information on construction loans, see Practice Note, Construction Financing: Overview