

How Direct Federal & Federally-Assisted Contractors Can Prepare for the Rising Costs of Construction Materials¹

Background:

Over the course of the last year, the president has imposed tariffs that impact the prices of a wide range of construction materials, supplies and equipment. These tariffs cover imports of steel, aluminum, solar panels, Canadian softwood lumber and \$250 billion in Chinese imports—including everything from cement and paint to nails, nuts and bolts. The administration continues to threaten additional tariffs on global partners and adversaries alike. As such, AGC members must prepare for a time of tremendous uncertainty.

What follows are a number of recommendations that AGC members may consider, depending upon the types of contracts they hold. A **direct federal construction contract** refers to a prime contract directly with—or subcontract thereunder—a federal agency (e.g., the Army Corps of Engineers, Naval Facilities Engineering Command, General Services Administration, Department of Veterans Affairs, etc.). A **federally-assisted construction contract** refers to a prime contract directly with—or subcontract thereunder—a state agency where federal funds are used to partially finance the contract (e.g., transportation construction contracts through state DOTs).

Recommendations:

- **DIRECT FEDERAL CONSTRUCTION CONTRACTS:** The federal government procures most construction contracts on a fixed-price basis. Without an appropriate price escalation clause in such a contract, spikes in material prices for items such as steel and aluminum can be problematic.
 - Federal Acquisition Regulation (FAR) subpart 16.203 specifically allows for economic price adjustments in fixed-price contracts. In order for it to assist a direct federal construction contractor, however, it must be implemented as part of your contract through FAR parts 52.216-2, 3 or 4. Moving forward, if you discover a solicitation in which you have interest that does not incorporate one of these clauses, formally raise its absence with the source selection authority or contracting officer. Encourage the agency to amend the solicitation to include one of these clauses. Doing so will help eliminate bid contingencies and make for a fairer, more balanced bid or proposal process.
 - The FAR additionally includes a provision that—if in your contract—could provide an avenue for equitable adjustments for a tax or duty increase that occurs after contract execution. Specifically, FAR clause 52.229-3 (“Federal, State and Local Taxes”) provides for a price increase for after-imposed taxes that a contractor is “required to pay or bear as the result of legislative, judicial, or administrative action taking effect after the contract date.” As such, when a contractor determines that new tariffs “reasonably may” affect its pricing, it should provide prompt notice to the contracting officer. Nevertheless, it must be stated that recovery under this clause for the impact of tariffs on construction contractors remains uncertain.

¹This Memo, prepared by Ed DeLisle with the law firm of Offit Kurman, P.A., and Doug Tabeling with the law firm of Smith, Currie & Hancock LLP, is provided as a general description of circumstances that construction contractors may face in connection with an increase in tariffs. This material does not constitute legal advice. By providing this information, neither AGC, nor Offit Kurman, P.A., nor Smith, Currie & Hancock LLP provide any assurances that this advice will be relevant to any particular contract or situation that an individual contractor may face in connection with an individual contract. This memo does not create an attorney-client relationship between the firms involved and any person or company.

- **FEDERALLY-ASSISTED CONSTRUCTION CONTRACTS:** Regarding federally-assisted construction contracts—specifically highway construction contracts—Federal Highway Administration (FHWA) policy permits states to include escalation clauses in their contracts, which allow for reimbursement for increased costs. However, FHWA must approve the price adjustment index in advance and, of course, the clause has to be in the contract. A state—and, in turn, a contractor—will not be reimbursed for retroactive adjustments to contract prices if an escalation clause is not originally included in the contract. However, FHWA has allowed states to reimburse for price increases at their own expense without federal funds. That said, a contractor should not assume that construction material price increases will be paid without such a clause in its contract.
 - There are currently 13 states that have approved steel escalation clauses. Several states have such clauses for other materials, like asphalt and Portland cement. You can [HERE](#) find a link to an American Association of State Highway and Transportation Officials (AASHTO) survey showing which states have clauses and an indication of the index they are using. If your state DOT is on the list, you may want to reach out to them to be sure the clause is included on future contracts. If your state DOT does not have an escalation clause, you may want to start the discussion about including one moving forward. For more information, you can find a link to FHWA’s policy on Price Adjustment Clauses for Inflation [HERE](#) and a link to the FHWA Contract Administration Manual’s section on “Commodity Price Escalation Clauses” [HERE](#).

- **APPLICABLE TO BOTH DIRECT FEDERAL & FEDERALLY-ASSISTED CONTRACTS:**
 - Lock in construction material prices as early as possible. In the event that the requisite contractual protections are not in place, this is critical. Doing so mitigates against the possibility of skyrocketing prices later in time, which could make performance extremely difficult, or economically impracticable.
 - Speaking of economic impracticability, using this argument as the sole basis to obtain a modification for material price escalation is very difficult. For example, in this context, an argument would be that the construction contractor could not have anticipated a 25 percent tariff on steel, or a 10 percent tax on aluminum, and, therefore, the increase in cost is recoverable. Unfortunately, the general rule is that the construction contractor bears the risk of loss in a situation like this.
 - In the event that a change, delay, or suspension in the work of an ongoing project causes delays in the purchase of materials that have escalated in price, then, in some circumstances, the contractor might be entitled to recover the increased cost. In this event, contractors should obtain and keep records of the material costs that they would have incurred but for the delay in order to show the difference in cost.

Conclusion:

As AGC members prepare for the uncertainty ahead, please keep the foregoing in mind and contact the association to the extent that you have questions. AGC remains committed to free and open competition.