

March 8, 2018

How Private Market Construction Contractors Can Prepare for the Rising Costs of Steel and Aluminum¹

Background:

In January 2018, the U.S. Department of Commerce (“the Department”) provided President Trump with recommendations regarding the imposition of tariffs and/or quotas on steel and aluminum imports. Citing a 1962 trade law which permits the president to impose tariffs in the interest of national security, the Commerce Department recommendations included a 7.7 percent tariff on aluminum imports and a 24 percent tariff on steel imports.

On March 8, the president forged ahead with a slightly altered version of the Department’s recommendations. He formally signed proclamations to impose a 10 percent tariff on aluminum imports and a 25 percent tariff on steel imports, with limited exceptions. The tariffs are slated to take effect 15 days from his signing the proclamations, which is March 23. With strong opposition raised amongst the United States’ trading partners around the world, AGC members must prepare for a time of tremendous uncertainty.

What follows are a number of recommendations that AGC members who work in the private construction market may consider as they grapple with rising material prices.

Recommendations:

- **FOR EXISTING PRIVATE CONSTRUCTION CONTRACTS:**
 - Review your contract to determine if provisions may provide for a price adjustment due to an escalation of material prices or for changes in taxes, including tariffs.
 - If a contract includes such provisions, review the language carefully to ensure that steel and aluminum material costs increases are covered under the language. Some provisions may specify which materials or products are covered or not. In addition, a provision may only cover material price decreases, which would only benefit the owner. As with any legal matter, it would be advisable to doublecheck your understanding of any contract language with an attorney.
 - If a contract does not include such provisions, you may be liable for covering the increased material costs.
- **FOR FUTURE PRIVATE CONSTRUCTION CONTRACTS**
 - Moving forward, if tariffs on steel and aluminum are, in fact, implemented, and you discover a potential project contract in which you have interest, which does not incorporate one of these clauses, formally raise their absence to the owner. Encourage the owner to amend the solicitation with price escalation and/or time and price impacted materials. Doing so will eliminate bid contingencies and make for a fairer, more balanced bid or proposal process.

¹This Memo 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 ConsensusDocs 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.

- A relevant contractual tool that would be helpful should this unfortunate development become a reality is the ConsensusDocs 200.1 Time and Price Impacted Materials Amendment and Schedule A. The document can be attached to any prime agreement potentially and then can be also be used for subcontract agreements as well. The Guidebook for the 200.1 Amendment can be found [HERE](#).
- The 200.1 Amendment is flexible for any material so a specific index is not listed. Also note that prices can escalate or descend, which is one of the reasons why construction owners' groups like the National Association of State Facility Administrators, the Construction Users Roundtable and Construction Owners Association of America, have endorsed this document as part of the ConsensusDocs in 2007 (along with AGC). AGC members can download sample of the 200.1 just by registering on the [ConsensusDocs website](#).
- **GENERAL CONSIDERATIONS FOR PRIVATE CONSTRUCTION CONTRACTORS:**
 - Lock in steel and aluminum prices as early as possible. If 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. In this context, the 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.
 - If 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 to show the difference in cost.
 - Lastly, provisions in ConsensusDocs standard construction contract are relevant to this discussion. Unlike other standard contract document produced in the industry that are all silent on this issue, ConsensusDocs explicitly says that a change of law after contract signing merits a price adjustment through change order. Under the ConsensusDocs 200 Owner/Constructor Agreement and General Conditions ©2016, §3.21 requires the Constructor (General Contractor) to comply with all applicable laws at their costs. However, §3.21.1. explicitly states: "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 (emphasis added)." The 200 is for design-bid-build, but this provision is flowed down consistently to other applicable ConsensusDocs lump sum agreements, such as the ConsensusDocs 415 Design-Build Agreement (Lump Sum).

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.