

Navigating Tariffs: Practical Strategies for ECABC Members



Specifically written for information purposes for ECABC members

The recent tariffs imposed and threatened by both the U.S. and Canadian governments are anticipated to have significant repercussions for ECABC members and the broader Canadian construction industry. Although the precise nature and extent of these impacts remain uncertain, it is crucial for ECABC members to proactively evaluate their agreements to understand how these measures might affect both current and future projects. In this note, we offer practical steps to help you prepare.

Current Projects

As a first step, it is critical to review existing contracts, carefully studying the fine print (including any modifications) for any clauses that may provide relief in the event of tariff-related price impacts or disruptions. If you are not contracting directly with the owner, you should obtain a copy of, and review, the prime contract. Some standard form construction contracts, such as the CCA 1, include flow-down provisions that may transfer certain rights or obligation to subcontractors. While these provisions may impose additional obligations on you, they may also unlock contractual protections or benefits that may not otherwise be obvious in the contract that you signed.

Here are some other clauses to watch out for:

- **Taxes and Duties Clauses** – A few unmodified standard form construction contracts include terms that expressly provide for adjustment to the price when there are changes in taxes and duties. The Canadian Construction Documents Committee has

now officially stated that the intent of GC 10.1 of CCDC 2 – 2020 (and similar clauses) is to capture all taxes and duties, including tariffs, that are levied against the contractor in the performance of the work.¹

- **Change in Law/Change in Condition** – Some contracts, particularly on larger projects, provide for adjustment to the contract time and price in circumstances where a change in law occurs following the execution of the contract. The critical question in respect of such clauses is what constitutes a “law” as defined in the contract. The definition may be broad enough to include tariffs or too narrow to specifically contemplate a tariff imposed by a foreign governing body.

- **Price Escalation/Adjustment Clauses** – A price escalation provision may allow for an adjustment to the contract price if the cost of supplies and/or materials rises as a result of factors beyond the parties’ control. However, unless the price escalation provision explicitly contemplates the imposition of tariffs as a factor beyond the parties’ control, such a provision may not provide contractual relief for any tariffs.

- **Force Majeure Clauses** – *Force majeure* clauses address situations where a party cannot fulfill its contractual obligations due to events beyond its control. In the construction context, a *force majeure* typically refers to uncontrollable events that impact the cost or time required to complete a project. Traditionally, tariffs or government actions are not considered a *force majeure* event. However, you should still check your agreement to see if a *force majeure* clause might apply.

¹Canadian Construction Documents Committee, retrieved from <https://www.ccdc.org/faq>

Once you have a better idea of the terms of your agreement, it is important to maintain open and frequent communication between you and the project stakeholders. Tariffs can lead to material shortages, cost increases, and scheduling delays, all of which require coordination to avoid disputes and minimize disruptions. Regular communication helps ensure that everyone is aligned on potential challenges and can collaborate on finding practical solutions, such as adjusting less critical timelines or renegotiating certain terms. Proactive discussions can also help avoid misunderstandings that could escalate into legal disputes.

Documentation is equally important. You should carefully record any impacts that tariffs have on costs, supply chains, and project timelines. This includes keeping a detailed record of initial price quotes, material cost fluctuations due to tariffs, delays in material deliveries and their impact on schedules, communications with suppliers regarding price adjustments or availability issues, and any contractual claims or notices related to tariff-related disruptions. Good documentation can support potential claims for additional compensation or extensions of time and preserve information in case of future disputes.

Finally, make sure you understand any contractual notice requirements, as failure to adhere to notice requirements might prevent you from making a claim for relief.

Future Projects

For future projects, consideration should be given to account for the potential ongoing risks associated with tariffs.

Where possible, seek to negotiate contract clauses that seek to mitigate financial risks due to yet unknown tariff-related cost increases. For example, consider negotiating a Taxes and Duties Clause that transfers the price risk associated with tariffs to the party best able to manage the tariff related risks.

If more favorable contract terms are not possible, seek to account for financial uncertainty by building a contingency into the contract price. By adding a cushion for unexpected cost fluctuations, you can aim to mitigate the financial risks associated with tariff changes and other cost uncertainties.

You can also work with suppliers to try to lock in delivered material prices early, purchase materials in advance or, where possible, seek out alternative suppliers that meet project requirements that are

not subject to tariffs. If you are purchasing materials early, try to have the purchase price (and any storage costs) covered by the ultimate purchaser, so the risk of delays or cancelled projects are not borne by you.

Conclusion

Navigating the challenges posed by tariffs can be daunting, but the construction industry is resilient. Understanding your project's risk allocation as well as proactive communication, cost mitigation strategies, and comprehensive documentation will put you in the best position to navigate these challenges.

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