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Practical Considerations for Navigating Tariff Risk on Construction Projects

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As the second Trump administration begins next week, developers, contractors, subcontractors and suppliers are evaluating the extent of the construction industry's international ties – and contractual exposure to potential tariff increases. While President-elect Trump has been forthright about his intent to impose and increase tariffs, he has not provided details about which products, goods, and countries may be affected.

This uncertainty leaves many in the construction industry concerned, and both upstream and downstream parties are carefully negotiating contractual risk of changes in tariffs. Broadly speaking, tariffs are typically considered import (or export) taxes imposed on goods and services imported from another country (or exported). In the United States, Congress has the power to set tariffs, but importantly, the president can also impose tariffs under specific laws (most notably in recent years, the Trade Act of 1974), citing unfair trade practices or national security.

Many different contractual provisions may be impacted by the introduction of new tariffs: tax provisions, force majeure provisions, change in law provisions, and price escalation provisions, for example. Procurement contracts routinely rely on Incoterms, which allocate tariff risk to either buyer or seller depending on the selected Incoterm. Negotiating an appropriate allocation of risk of changing tariffs can be as much an art as science and requires consideration of how tariffs are administered and their effects on the market. Consider, for example, the following:

- Tariffs are paid by the importer of record to U.S. Customs & Border Protection. If a contractual party is not the importer of record, such party will not be directly liable for payment of tariffs.
- Instead, tariffs raise the ultimate cost of goods or services because importers increase their price to buyers to account for the tariffs.
- Tariffs also tend to indirectly increase the cost of goods or services related or equivalent to the goods or services subject to tariffs by raising demand for domestic or non-affected substitute goods or services.
- Some goods and services are higher risk than others (e.g., goods originating from China, and potentially in a second Trump administration, goods originating from Canada and Mexico). Understanding the extent of the international reach of a construction project's supply chain

may assist in evaluating exposure and negotiating appropriate relief from imposition of new or increased tariffs.

Having a working knowledge of how tariffs are implemented and their impacts on related markets is important to assessing and mitigating contractual risk. Parties to a construction contract may have different methods for managing tariff impacts. A supplier may choose to source goods from less risky countries, even if the cost of such goods is incrementally higher than their Chinese equivalent in the short term. A buyer may choose to enter into a master supply agreement, allowing the buyer to set a long-term fixed price on a guaranteed volume of goods that in turn permits the seller to better forecast its demand and supply chain. Many developers and contractors may negotiate shared risk of changed tariffs, establishing a change order threshold or cost-sharing ratio. Ultimately, those who consider and carefully negotiate provisions addressing changes in tariffs will be better prepared to face and manage their economic impact.

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