

## Federal Contractors' Avenues For Tariff Mitigation

By **Daniel Wilson**

*Law360 (February 5, 2025, 10:20 PM EST)* -- President Donald Trump's tariff plans threaten to increase costs for federal contractors who won't be exempt from the duties, but contractors may be able to pursue avenues for reimbursement if they follow certain regulatory rules.

If the 25% tariffs on Mexican and Canadian goods, currently paused for negotiations between the countries' leaders, go into effect, companies in industries such as construction and defense that frequently import items such as critical minerals and metals from Mexico and Canada will face significant price increases. Fixed-price contractors who can't easily pass along their costs to the government could face a potentially money-losing situation.

But the Federal Acquisition Regulation has several ways of accounting for unexpected situations that crop up during contract performance that could help ease the burden, even for otherwise fixed-price contracts. FAR 52.229-3, a clause allowing contractors to recover costs for "any after-imposed federal tax," is the most straightforward way to seek reimbursement, but it comes with some important caveats that could sink a related claim if contractors don't carefully adhere to the terms of the clause.

"You have to be careful to make sure that you're going through the procedural steps that you need to, to protect your rights," said Alex Ward, co-chair of Morrison Foerster LLP's government contracts and public procurement group.

That clause, for example, requires that contractors "promptly notify" the relevant contracting officer about any tariff that "may reasonably be expected" to affect pricing, meaning they can't just expect the contracting officer to automatically take the effects of tariffs into account, and can't be tardy in seeking reimbursement.

Contractors also have to prove that they didn't already price the prospect of new excise taxes or duties into their bids as a contingency. And tariffs imposed after a bid is submitted, but before a contract is awarded, do not count as "newly imposed" taxes that trigger the FAR clause.

Companies in the middle of the contracting process when a tariff goes into effect could ask the contracting officer to amend the solicitation, or seek revised proposals, but the contracting officer is not obligated to do so, and a prospective contractor might ultimately have to pull out of consideration, according to Haynes and Boone LLP partner Dan Ramish.

"Worst case scenario, if the effects of the tariffs change whether they would still be willing to perform,

they could withdraw their proposal if the contract has not been awarded yet," Ramish said.

The tax recovery clause also doesn't apply to contracts performed outside the U.S., even if affected by tariffs, or to relatively low-value contracts below the federal simplified acquisition threshold. Nor does it specifically account for indirect effects, such as increased costs across a contractor's supply chain that stem from but aren't directly attributable to tariffs.

In those circumstances, contractors will need to turn to alternative options, such as potentially asking the government to furnish certain items, or asking their contracting officer to use a FAR clause that allows federal agencies to invoke exemptions to duties for certain supplies purchased under federal contracts.

"The problem is, [and] the reason most people don't talk about [that clause], is that the government has to treat you as a buying agent," said Smith Currie Oles LLP partner Howard Roth. "They may not want to do that, and it's complicated."

Another alternative for cost recovery is to invoke an economic price adjustment clause, which allows for contract prices to be adjusted if certain specified contingencies take place. But economic price adjustment clauses are not a standard part of federal contracts, and, even when included, may not cover items affected by tariffs, according to Ramish.

"EPA clauses are still relatively uncommon, and they're generally geared toward a particular type of risk that's contemplated at the time of the contract," he said.

Those clauses also have strict timeliness requirements for making related claims, and the largest adjustment allowed is 10%, which may not account for a contractor's full costs associated with a tariff.

Some contracting officers may allow an economic price adjustment to be worked into an existing contract as a modification, and contractors facing a hit from tariffs should at least ask, although similar requests during the COVID-19 pandemic were rarely successful, according to PilieroMazza PLLC partner Lauren Brier.

"Contracting officers were not willing to consider it, because they don't want to fork over any money, because they have to ask for funding," Brier said. "That funding might not exist — especially with the government these days trying to very much tighten their belt strap."

Without an economic price adjustment clause, contractors could try to seek a more general remedy, such as trying to invoke a contractual changes clause, which applies when a government action interferes with contractual performance.

But examples from during COVID-19 again show those sorts of claims are unlikely to succeed. The government regularly and largely successfully invoked the sovereign acts doctrine during the pandemic, which absolves it from liability for any "public and general" act within its sovereign power that affects a contractor, such as lockdowns and quarantines at federal facilities.

"Absent one of the particular [regulatory] clauses ... or another special [contractual] clause, the sovereign acts doctrine is likely to be a significant challenge for contractors to overcome to obtain relief," said Crowell & Moring LLP partner Chris Haile.

Otherwise, contractors may be able to seek an excusable delay from their contracting officer. In some cases, if the government directs the contractor to move forward immediately despite increased costs from tariffs, the contractor can then claim a "constructive acceleration" of the contract, according to Ward of Morrison Foerster.

"If you are [legally] entitled to a delay, but the government says, 'Sorry, you can't have a delay,' you may then be entitled to compensation for the cost of having to proceed according to the original schedule," he said.

Invoking an excusable delay can also give contractors time to seek out alternative, tariff-free sources, or at least get them off the hook for delays resulting from any supply shortages because of tariffs. Contracting officers were often amenable to granting those delays during COVID-19, according to Brier.

"We were very successful in getting our clients extensions of time," she said. "It's reasonable — no one can get lumber, everyone's in the same boat, we have to extend your performance period an additional six months so that we can actually get this done."

--Editing by Jay Jackson Jr. and Emily Kokoll.