

Managing Tariff Risk Using Standard Form Contracts During Non-Standard Times.

Rising material costs have always been a nail in the foot of construction budgets, and recent proposed tariffs threaten to amplify that pain. As the possibility of a tariff-focused trade dispute looms, construction companies face growing uncertainty in material costs. Savvy companies therefore may need to go beyond traditional cost-control measures, and we suggest that the key is in your contracts. By incorporating carefully drafted clauses and exclusions, you can shield your bottom line from sudden tariff spikes and unexpected supply chain challenges - *before* they wreak havoc on your next project.

Since standard form contracts are widely used in Alberta construction projects, we will specifically focus on how to adapt these industry-standard agreements to better address potential tariff-related risks. CCDC and CCA contracts are widely used for good reason, as they provide a clear framework for managing construction projects and promote fairness, consistency, and transparency. However, any good standard document should be expanded on or amended from time to time to address specific (or rapidly changing) circumstances.

As a brief note, because this article addresses standard form contracts, certain capitalized terms (e.g., Contractor, Consultant) are used to denote defined terms under those contracts.

Standard Clauses Addressing Tariffs

“Are there standard clauses in CCDC contracts that would already protect parties from tariffs?”

In typical lawyerly style, the short answer is “yes, but it depends...” because, of course, nothing in the legal world is ever quite that straightforward.

Contracts often serve as preemptive risk-allocators—even when the language does not explicitly say so. The language, or lack of language, works to determine who will bear the costs associated with various unexpected circumstances; For example: real estate developers/Owners bear the risk of significant changes to the market potentially affecting their ability to sell the project. Generally, Contractor’s bear risks associated with fluctuations in the labor market, or in the cost of materials.

Standard form contracts are drafted to apply to the widest set of circumstances and therefore do not specifically address certain circumstances, such as tariffs. You may wish to consider if amendments ought to be made to clarify the intent of the parties and any unique circumstances that are required to be addressed. With certain modifications to standard form contracts, parties can clearly decide how these risks ought to be allocated *before* any shovels hit the ground. Parties may allocate risk as they want. In the CCDC suite of contracts, one might use supplemental terms, annexed to any standard agreement, to amend (or clarify) the written agreement to align with the parties’ expectations.

Where the greatest challenges are most likely to arise are in stipulated-price contracts like the CCDC 2. These standard agreements typically lock in a lump sum for the entire project, meaning that any sudden increases in material costs are not paid by the Owner.

In looking at a few general examples, cost-plus contracts allocate risk of unexpected increases in material costs, such as those driven by tariffs, to the owner, since the Contractor is paid for all costs of the work. On the other hand, a fixed-price contract places that burden squarely on the Contractor's shoulders, forcing them to absorb any surge in expenses. Tariffs can create significant cost uncertainty in materials, so it's crucial for all parties to be aware of these risks from the outset. Contractors who use fixed price contracts may wish to adjust their quoted price, accordingly, knowing that the current potential for material price volatility is high.

Analysis of Applicable Clauses in Common Standard Form Contracts

In this section, we take a closer look at the specific clauses within standard form fixed price contracts that could be relied on to provide relief when tariffs drive up costs. Understanding how these clauses function is essential for protecting your profit margins and maintaining clear project boundaries.

CCA 1 and CCDC 17 - Stipulated Price Contract between Owner and Trade Contractors for Construction Management Projects

SCC 10.1.2 Any increase or decrease in costs to the Subcontractor due to changes in taxes and duties after the time of the bid closing shall increase or decrease the Subcontract Price accordingly.

The CCA 1 and CCDC 17 contain by far the clearest language of the clauses we reviewed relating to the handling of changes to duties, such as tariffs. It should be noted however that some uncertainty remains; do Tariffs meet the definition of a tax or duty? If they do, SCC 10.1.2 directs that the risk of such increased charges is to be born by the Contractor, and not the Subcontractor. Again, unfortunately this clause does not address *how* the contract price will be adjusted.

Overall, this clause leaves minimal room for disagreement regarding the impact of tariffs on the Subcontract Price; however, even though it seems to be the clearest clause we reviewed, there is still room for disagreement. By comparing this generally clear language in CCDC 17 and the CCA 1, the following clauses stand out as being problematic in their application to tariffs.

CCDC 2 – 2020 – Stipulated Price Contract

GC 10.2.7 *If subsequent to the time of bid closing, changes are made to applicable laws, ordinances, rules, regulations or codes of authorities having jurisdiction which affect the cost of the Work either party may submit a claim in accordance with the requirements of GC 6.6 – Claims for Change in Contract Price.*

The CCDC 2 fixed price contract does address government actions that have the effect of increasing the cost of a project. Unfortunately, although this provides a method of claiming increased costs, it does not clearly state who will bear the burden of such increased costs associated with tariffs, instead it refers the parties to follow a procedure. The procedure provision contemplated in GC 6.6 – Claims for a Change in Contract Price, may provide some avenue of

relief, although GC 6.6 fails to properly outline any decision-making criteria for the Consultant. It seems therefore that the Consultant is permitted to use whichever factors they deem fit when deciding to grant or deny any price increases under this clause. GC 6.6 therefore leaves parties without guidance as to under which circumstances they ought to reasonably request a change in contract price under this provision, and how this change in price ought to be calculated. Consequently, GC 10.2.7 acknowledges government actions impacting the cost of a project but fails to decide how they should reasonably be resolved. The clause therefore falls short of properly clarifying the how tariffs are likely to be handled.

Reliance on this section should only be used as a last resort, as it leaves the decision in the hands of the Consultant, removing the control from the Owner or Contractor.

CCDC 14 – Design Build Stipulated Price Contract

GC 10.1.1 The Contract Price shall include all taxes and customs duties in effect at the time of the proposal or bid closing except for Value Added Taxes payable by the Owner to the Design-Builder as stipulated in Article A-4 of the Agreement - CONTRACT PRICE.

The CCDC 14 specifically notes that customs duties in effect at the time of the bid are included in the Contract Price. GC 10.1.2 goes on to state that

Any increase or decrease in costs to the Design-Builder due to changes in such included taxes and duties after the time of the proposal or bid closing, as the case may be, shall increase or decrease the Contract Price accordingly.

Therefore, any additional customs or duties that are not in effect at the time of the bid would be paid by the Owner.

Conclusion

In a market where tariffs can pop up as fast as a new build, it's the finer points of your contract that decide whether you're protected—or caught off-guard. By scrutinizing standard clauses and supplementing them with precise, tariff-specific language, both Owners and Contractors can manage this looming risk and preserve valuable working relationships. Ultimately, embracing a proactive approach to risk allocation early can spare all parties from a host of financial and legal headaches once construction is in full swing.

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