

Legal experts advise on safeguarding against tariff hikes

■ ED MOLTZEN LIBN CONTRIBUTING WRITER

The construction and contracting trades have been among the most vibrant on Long Island for the past several years, as new housing and related projects have unfolded amid a run of economic expansion.

But new rounds of tariffs from Washington, D.C., are proving vexing for firms whose work relies on stable pricing of supplies ranging from Canadian lumber to aluminum to steel.

The result: General contractors and subcontractors may be searching for remedies to protect them from unanticipated price surges as suppliers pass the cost of new tariffs down the supply chain.

Long Island legal experts say the key to navigating choppy tariff waters will be to address them, where possible, upfront in contracts with provisions specific to wild, tariff-driven price fluctuations.

“The question comes up, if a client enters into a contract to do a job for someone, and they do an estimate based on reasonable costs for materials—and then those costs triple or even go up by 25 percent—that could just really leave them holding the bag,” said Joseph Asselta, a partner and chair of the Construction Practice Group at Forchelli Deegan Terrana LLP.



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As President Trump has announced a series of tariffs against Mexico, Canada and China, imported supplies critical to construction in Nassau and Suffolk counties—including steel, aluminum, copper, Canadian soft lumber and other materials—are subject to tariffs ranging from five percent to 25 percent.

Officials have indicated additional—perhaps steeper—tariffs could be on the way in the short- and long-term on a larger list of imports from those and additional countries.

“Some of the tariffs have gone into effect, some have been postponed, and there actually are anticipatory price increases, especially steel and timber,” said Andrew Wailgum, construction industry team lead for Harris Beach Murtha. “You know, you’re seeing those now, some of it, there’s anticipating it, so they’re raising their prices now.”

For bigger construction-related firms, that could be the difference between profit and loss on a project. For smaller construction firms, a sudden price hike from tariffs could put them out of business.

“The challenge you have is...contracts that are signed today; the work doesn’t start for another month or two,” said Donald Rassiger, a partner at Campolo Middleton & McCormick, LLP. And in that time, tariffs could be enacted, pulled back or even increased.



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That's why price flexibility in contracts—to account for that uncertainty—can save a contractor big bucks down the road.

Customers may otherwise say, "You put a lump sum price in for this...I'm holding you to your price," Rassiger added.

Other issues include the potential for significant product shortages, as demand for domestically produced items overwhelms the supply. During the pandemic, a similar crunch happened four and five years ago, and some remember well the crunch to obtain goods to meet contractual obligations.



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However, at that time, courts were also closed due to the pandemic, so the number of breach-of-contract lawsuits was minimal, meaning contractors and customers had to work it out as best as they could in many situations. Now, courts are open for business, so negotiating contracts in advance to take the uncertainty of tariffs into account is essential.

"Yes, there are some cases that get litigated," Rassiger said. "I've had my fair share of them over the years. I would say, for the most part, these issues do eventually get worked out between the contractors and the owners. But there are instances where they proceed, and I've had my fair share of arbitrations over the years over these issues."

Nobody wants to wind up in a legal tussle, so the best way to ensure projects work to completion without one is to prepare before they start. That means addressing the uncertainty at the contract stage.

Each of the attorneys noted (and agreed) that price escalation clauses inserted into contracts before a project begins can put all parties on notice that uncertainty has already been addressed.

These clauses are not altogether new. Many products used in construction regularly include price fluctuation provisions. For example, asphalt—which contains oil as a primary ingredient—has often seen price changes due to rising or falling oil costs. These costs can also vary from region to region across the U.S. or even the New York area. Escalation clauses ensure that both the supplier and customer receive a fair deal.

"We suggest they add a further clause that states: 'In the event of an increase in a tariff, or an additional new tariff or tax is implemented after the signing of the contract, those additional costs will be paid for and reimbursed as a change order to the contract,'" Asselta said.

And the devil may still be in the details—even with price escalator clauses. Contractors should be aware of how a contract demands they prove a price increase is, in fact, tariff-related.

"Can you show that's really the tariff?," Wailgum said. "Will your supplier have a line item that says, 'regular tax'?"

He added that without documentation from a supplier on tariff-specific costs, "it can be a challenge to demonstrate it."

For smaller contractors without attorneys, or firms on retainers, legal experts advise on staying up to date through industry trade associations or business partners for advice and trend changes.