

LEGAL ALERT

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CONSTRUCTION CONTRACTS FOR MANUFACTURING FACILITIES

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The Federal Government's recent imposition of tariffs appears designed largely to bring manufacturing back inside the United States. News reports indicate the Government understands that tariffs may initially cause pain but accepts that trade-off to press investment in future growth of U.S. manufacturing. As such, there may be increased opportunities for construction companies who build manufacturing facilities. Contracts for manufacturing require special planning and thinking. Key provisions needed to consider include:

- Confirming adequate funding exists to construct the facility. Often projects are started before all funding is in place. Funding for these projects is often a mix of manufacturer cash, lender funds, and government grants. In instances where projects are started before all funding is confirmed, projects can be broken into phases, with separate milestone dates triggered by funding confirmation on a phase-by-phase basis. This can reduce risk of non-payment to the contractor. However, for owners it risks new pricing with each phase, especially if there is a delay in obtaining financing.
- Construction projects involving federal grants are now subject to new requirements governing "DEI" programs under Executive Order 14173. Beginning on April 21, contractors on projects receiving federal funding must certify that they do not operate any programs "promoting DEI that violate any applicable Federal anti-discrimination laws." Failure to meet this certification requirement could result in liability under the False Claims Act. The Government has not yet published formal guidance on what constitutes unlawful "DEI" programs. However, informal guidance from the U.S. Equal Employment Opportunity Commission (EEOC) suggests that an employment action may be considered unlawful if it is "motivated—in whole or in part—by race, sex, or another protected characteristic." Under this informal guidance, as an example, an apprentice or mentoring program that takes into account race or sex would be considered unlawful. Contractors are advised to consult with legal counsel to assist in evaluating whether any of their hiring practices might violate current laws prohibiting unlawful DEI programs. Moreover, contract provisions may require contractors to adhere to these strict limits.
- Late completion of a project can sometimes expose contractors to liquidated damages. The amount of liquidated damages can account for costs the manufacturer may incur on additional financing interest, taxes, or even rent at an existing facility. But these liquidated damages should be proportional to the



damage that the manufacturer might actually suffer. As such, contractors should consider watching for manufacturer overreach on pricing the liquidated damages. The liquidated damages should not attempt to compensate the manufacturer for lost costs related to late start of manufacturing, lost sales, lost profits and the like. Contractors can insist on a fair liquidated damage amount as well as a waiver of consequential damages. After all, contractors are in the business of constructing buildings, and not the business of insuring against manufacturing losses.

- When a contractor serves in the design-build capacity, the contractor may press the owner to provide a clear and well-defined program for the contractor to design around. Time spent up front defining and explicitly writing up the owner's program will enable the contractor to achieve clear requirements and reduces disputes later on. Unclear goals are hard to achieve and lead to unnecessary claims and litigation.
- Contracts should specify who carries risks associated with an uncertain and quickly-changing economic environment driven in part by political forces. Tariffs are currently being imposed and then removed or revised quickly, and it may take time for the markets to pressure the Government to make final decisions that manufacturers can rely on to make investment decisions. Because changes in the government's policies and in the economic landscape will affect the cost, need, or future of a project, construction contracts should strongly consider addressing who carries the risk of those changes and their effects on the cost of a project. Contractors need to know they will be paid for the work, even if the project is suspended or no longer needed. Contractors also should not bear the risk of increased tariffs. Owners, conversely, will want the right to stop a project quickly should policies change that reduce the viability or need for the project.

CONTRACT DETAILS

When it comes to any contract, parties should consider how to negotiate and detail who owns the various risks and benefits. Clear contracts significantly reduce later disputes. Time spent up front is well invested to reduce the risk of disputes, extra costs, or other business issues.

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Executive Order 14173 is subject to litigation, and it is expected that the Office of Federal Contract Compliance Programs will likely introduce guidance interpreting the Order, which is subject to change.