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## FEATURE COMMENT: President Trump And Tariffs—The Procurement Exception

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# THE GOVERNMENT CONTRACTOR<sup>®</sup>

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## ¶ 35 FEATURE COMMENT: President Trump And Tariffs—The Procurement Exception

President Trump's first administration was marked by very strong "Buy American" protectionism, focused closely on procurement. See, e.g., Jean Heilman Grier, *The International Procurement System* ch. 8 (Dalston 2022). Since President Trump took office again on Jan. 20, 2025, the second Trump administration instead has focused, at least preliminarily, on tariffs as a policy and revenue-generating tool.

This *Feature Comment* will review the Trump administration's initial moves to impose new tariffs and their potential effect on procurement. The discussion below will explain that goods purchased by federal agencies are generally exempt from tariffs, as a matter of regulation, though how exactly that exemption will be applied is often unclear. The discussion below will review those and other policy issues which remain open for the procurement community, as President Trump looks increasingly likely to impose significant additional duties on goods coming into the U.S.

**Initial Trump Executive Actions on Procurement Trade**—In his first hours in office, President Trump issued the "America First Trade Policy" directing his administration to "review the impact of all trade agreements," including the World Trade Organization Government Procurement Agreement (WTO GPA), on the volume of federal procurement covered by Trump's "Buy American and Hire American" executive order issued in 2017, during his first term. The "America First Trade Policy" directed the U.S. Trade Representative, in consultation with Peter Navarro, the Senior Counselor for Trade and Manufacturing, to make "recommendations to ensure that such agreements are being implemented in a manner that favors domestic workers and manufacturers, not foreign nations." The policy statement also called for a report, due by April 30, 2025, from the U.S. Office of Management and Budget, on "any distorting impact of foreign government financial contributions or subsidies on United States Federal procurement programs," and to "propose guidance, regulations, or legislation to combat such distortion"—an echo of the EU's Foreign Subsidies Regulation, which bars government subsidies which may give foreign vendors an advantage in EU procurements. See, e.g., Pascal Friton, Max Klasse & Christopher Yukins, Feature Comment, "The EU Foreign Subsidies Regulation: Implications For Public Procurement And Some Collateral Damage," [65 GC ¶ 63](#), available at [ssrn.com/abstract=4403363](https://ssrn.com/abstract=4403363).

On Feb. 4, 2025, President Trump issued another, potentially more sweeping executive order regarding international agreements which also may have an impact on procurement. Because the Executive Order,

“Withdrawing the United States from and Ending Funding to Certain United States Organizations and Reviewing United States Support to All International Organizations,” was focused on the U.S.’ immediate withdrawal from certain United Nations agencies, the longer-term impact of the order was largely overlooked. Included in the order was a direction to Secretary of State Marco Rubio and the U.S. Ambassador to the United Nations (Rep. Elise Stefanik (R-N.Y.) has been nominated for that post) to conduct, within 180 days, “a review of all international intergovernmental organizations of which the United States ... and all conventions and treaties to which the United States is a party, to determine which organizations, conventions, and treaties are contrary to the interests of the United States and whether such organizations, conventions, or treaties can be reformed.” When that review is complete, the secretary of state is to “report the findings to the President” and to “provide recommendations as to whether the United States should withdraw from any such organizations, conventions, or treaties.” If the review results in the U.S. withdrawing, for example, from the UN Convention Against Corruption—which calls in Article 9 for procurement protections, such as an effective bid protest system—there could be serious impacts on international procurement trade.

**Trump Protectionism in Procurement: Trade Agreement Concerns**—While the reports outlined above are underway, the Trump administration has moved forward on tariffs. Significantly higher tariffs in some cases could mark a departure in policy, as the U.S. has historically had low tariff rates compared to other nations. See, e.g., Drew DeSilver, *U.S. Tariffs Are Among the Lowest in the World—and in the Nation’s History*, Pew Research Center (Mar. 22, 2018).

New and targeted tariffs—for example, tariffs heavily focused on one trading partner, rather than all—may trigger concerns under the WTO GPA and other trade agreements which guarantee non-discrimination among trading partners. While Article IV.7 of the GPA, for example, generally exempts customs duties from the non-discrimination obligations (“Paragraphs 1 and 2 [regarding non-discrimination] shall not apply to:

customs duties and charges of any kind imposed on, or in connection with, importation.”), an open question is whether tariffs differentiating among trading partners would otherwise form the basis for a complaint under the GPA. These more general concerns regarding trade agreement compliance, however, have been overshadowed by specific steps that the Trump administration has taken to impose new tariffs.

**Threatened Tariffs on Canada and Mexico, and New Tariffs Against China**—On Feb. 1, 2025, the Trump administration announced it would impose 25 percent tariffs on goods from Canada and Mexico, and 10 percent tariffs on goods from China. See, e.g., White House, Fact Sheet: President Donald J. Trump Imposes Tariffs on Imports from Canada, Mexico and China (Feb. 1, 2025); Megan Cerullo, CBC News, *Trump to Enact Tariffs against Canada, China and Mexico on Feb. 1. Here’s what to know* (Jan. 31, 2025). On February 3, however, in the wake of late negotiations between the U.S., and Mexico and Canada, the Trump administration deferred both the Mexican and Canadian tariffs for one month. The Chinese tariffs went forward, and China announced a suite of retaliatory measures. See, e.g., Ministry of Finance, People’s Republic of China, Announcement of the State Council Tariff Commission on Imposing Additional Tariffs on Some Imported Goods Originating from the United States (Feb. 4, 2025).

The impact in the federal procurement market of the new tariffs on Chinese goods probably will be mixed. Under a very complex regulatory regime (see Federal Acquisition Regulation pt. 25), Chinese supplies on larger federal contracts are generally barred from the U.S. federal marketplace by the Trade Agreements Act, because China has not entered into a free trade agreement covering procurement with the U.S. See, e.g., 63 Fed. Reg. 51642, 51642 (1998); Christopher Yukins & Allen Green, *International Trade Agreements and U.S. Procurement Law*, in *The Contractor’s Guide to International Procurement* (American Bar Association 2018) (Erin Loraine Felix & Marques Peterson, eds.), available at [ssrn.com/abstract=3443244](https://ssrn.com/abstract=3443244). Federal buyers can still make smaller purchases of Chinese goods (including through Amazon and other commercial platforms), subject to the Buy

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American Act (a price preference) and special bars (such as the ban against Huawei products, see, e.g., Congressional Research Service, *U.S. Restrictions on Huawei Technologies: National Security, Foreign Policy, and Economic Interests* (2022)). State, local and tribal governments are not subject to the federal Trade Agreements Act and so can generally purchase Chinese goods—though now subject to additional 10 percent tariffs.

As statutory authority for the tariffs, President Trump invoked the International Emergency Economic Powers Act. See generally Congressional Research Service, *The International Emergency Economic Powers Act: Origins, Evolution, and Use* (2024). As is discussed below, however, when goods are imported for sale to the U.S. Government, if proper procedures are followed, the goods generally should be free from tariffs, per longstanding U.S. regulations. See, e.g., FAR subpt. 25.9; 63 Fed. Reg. 31758, 31758 (1998) (background on exemption process); 64 Fed. Reg. 72416 (1999); Martin J. Golub & Sandra Lee Fenske, U.S. Government Procurement: Opportunities and Obstacles for Foreign Contractors, 20 Geo. Wash. J. Int'l L. & Econ. 567, 592 (1987).

**Potential “Reciprocal” Tariffs on All Goods**—Although, as noted, the Trump administration had days earlier deferred tariffs on Canadian and Mexican goods, on Feb. 7, 2025, President Trump announced that his administration planned to impose “reciprocal” tariffs on other countries that levy tariffs higher than the U.S. See Michael Birnbaum, Michelle Ye Hee Lee & Jacqueline Alemany, As Trump Threatens Tariffs, Japanese Leader Lavishes President With Praise, Wash. Post, Feb. 8, 2025. As *POLITICO* pointed out, under “Trump’s ‘reciprocal tariff’ approach, each individual product—and there are thousands of products in the U.S. tariff code—could have as many different tariff levels as there are countries in the world. That would vastly increase the complexity of collecting tariffs on goods.” Victoria Guida & Doug Palmer, ‘Reciprocal’ Tariffs On Every Country To Be Announced Next Week, Trump Says, *POLITICO*, Feb. 7, 2025. While the scope and nature of the proposed reciprocal tariffs is not yet clear, this constellation of new tariffs could make it more difficult for

contractors to apply the customs duties exemptions outlined below.

On Feb. 13, 2025, President Trump signed a memorandum which clarified his administration’s plans for reciprocal tariffs. The memo did not impose any new tariffs. Instead, President Trump directed various U.S. trade agencies to examine non-reciprocal trade relationships and propose remedies “in pursuit of reciprocal trade relations with each trading partner.”

Since his first term, President Trump and his advisors have criticized so-called non-reciprocal trade policies as a cause of U.S. trade deficits and declining U.S. manufacturing. The Trump administration argues that non-reciprocal trade relationships threaten U.S. economic and national security, and harm U.S. workers and competitiveness. The White House has highlighted specific examples of what it considers non-reciprocal trade, including EU tariffs of 10 percent on passenger cars compared to U.S. passenger car tariffs of 2.5 percent.

The memo directs the Department of Commerce and the U.S. Trade Representative to “investigate the harm to the United States from any non-reciprocal trade arrangements” and “propose remedies in pursuit of reciprocal trade relations with each trading partner.” The memo states that the president will establish a “Fair and Reciprocal Plan,” pursuant to which relevant Government agencies will determine an “equivalent reciprocal tariff with respect to each foreign trading partner.”

The agencies’ assessments of non-reciprocal trade relationships and proposed remedies appear to be due after the reports called for by the America First Trade Policy memo, discussed above. The February 13 memo does not set a deadline for the imposition of reciprocal tariffs or other measures. However, within 180 days (i.e., Aug. 11, 2025), OMB must submit a written report detailing the fiscal impact of the plan. Administration officials have indicated that the process may be completed sooner than 180 days.

President Trump indicated during a press conference that trading partners are welcome to negotiate on the proposed reciprocal tariffs. In prior statements, the president and his advisors have



indicated that countries could lower their tariffs or remove barriers to avoid reciprocal tariffs. Some trading partners have already made public offers of negotiation.

**Steel and Aluminum Tariffs**—President Trump has also announced new 25 percent tariffs on steel and aluminum. See, e.g., Lucia Suarez Sang & Kathryn Watson, *Trump Imposes 25% Tariffs on All Aluminum and Steel Imports*, CBS News (Feb. 11, 2025). These new tariffs on materials regularly used in manufacturing raised a different question for the tariffs exemption in federal procurement, discussed below—how would that exemption affect materials used to produce end items purchased by the Federal Government?

**U.S. Agencies’ Exemptions from Paying Customs Duties**—FAR subpt. 25.9 provides Governmentwide policies and procedures for exempting from import duties certain supplies purchased under Federal Government contracts. Under the policy set forth in FAR 25.901, while U.S. laws “impose duties on foreign supplies imported into the customs territory of the United States,” certain exemptions are available to federal agencies. “Agencies must use these exemptions when the anticipated savings ... will outweigh the administrative costs associated with processing required documentation.” The Defense Department’s subsidiary regulations, also discussed below, provide DOD purchasers with comprehensive guidance for using these customs exemptions.

In 2020, tax expert Jedediah Bodger argued in the *Public Contract Law Journal* that the FAR exemptions from customs duty described below may not be readily workable, and sharply increased tariffs may undercut contractors’ profitability. He noted that while “customs and duty relief is available to government contractors through the [FAR], such relief requires treatment of the contractor as a buying agent for the U.S. Government, which at times may be impractical, and the government may be unwilling to classify contractors as such.” As a result, he said, “the price adjustment mechanism for after-imposed federal taxes may be the best opportunity for government contractors to maintain profitability on contracts impacted by the imposition of increased tariff costs.” Through “careful

planning and review,” he wrote, “there is an opportunity for contractors to preserve their profit margins through a price adjustment from the U.S. Government.” Bodger argued that “the imposition of a tariff is considered the imposition of an excise tax, and contractors may be able to use the FAR in order to preserve their profit margins though a price adjustment for after-imposed federal excise taxes. ... The linchpin in such an analysis will be whether the imposition is considered an after-imposed federal tax as that term is defined at FAR 52.229-3.” Jedediah Bodger, *Maintaining Profitability of Government Contracts in the Age of Increasing Tariffs*, 49 *Pub. Cont. L.J.* 275, 276 (2020).

**FAR—Governmentwide Regulations on the Tariff Exemption**—The federal procedures for addressing tariffs are set forth in FAR subpt. 25.9. The regulation begins by noting that federal purchases must bear the cost of tariffs. FAR 25.902 cross-references the U.S. Customs Service regulations and notes that “[e]xcept as provided elsewhere in the Customs Regulations ... all shipments of imported supplies purchased under Government contracts are subject to the customs entry and examination requirements.” As a result, “[u]nless the agency obtains an exemption [citing FAR 25.903], those shipments are also subject to duty.” (Standard clauses in the Government procurement regulations, such as FAR 52.212-4(k), similarly state that the price paid by the Government (the “contract price”) includes customs duties.) The Customs Regulations echo the FAR and state that, except as exempted, “importations made by or for the account of any agency or office of the United States Government are subject to the usual Customs entry and examination requirements.” 19 CFR § 10.100.

The Governmentwide regulation, FAR 25.903, then provides detail on exemptions from duties for supplies that the Federal Government purchases from abroad. FAR 25.903 notes that the Harmonized Tariff Schedule lists supplies for which exemptions from duty may be obtained when imported under a Government contract. See, e.g., *Harmonized Tariff Schedule of the United States*, Chapter 98, Subchapter VIII: Importations of the United States Government. The draft Federal Reg-

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ister Notice implementing the duties on imports from Canada allowed that the additional duties would not “apply to goods for which entry is properly claimed under a provision of chapter 98 of the tariff schedule, pursuant to applicable regulations of U.S. Customs and Border Protection, and whenever CBP agrees that entry under such a provision is appropriate” except for certain provisions not relevant here. Similar provisions were included in the published China-tariff Federal Register notice. See 90 Fed. Reg. 9038, 9039 (2025).

The procedures that the contractor and the purchasing agency are to follow to exercise the tariff exception are described in a standard FAR clause, FAR 52.225-8, Duty-Free Entry. The clause is to be inserted in any solicitations and contracts for supplies that may be imported into the U.S. and for which duty-free entry may be obtained in accordance with FAR 25.903. Under the FAR clause, contractors generally are not to include customs duties on supplies in the prices paid by the Government. Either the solicitation is to identify goods that are to be duty-free, or (if it does not) the contractor is to notify the contracting officer of purchased items (generally those worth over \$15,000) to be imported under the contract, at least 20 days before the importation. The CO then is to determine if the identified supplies are to be accorded duty-free status and notify the contractor, and the contract price is to be reduced. No notice from the contractor is needed if the supplies are the same as those the contractor purchases commercially and segregating the “Government” items is not economical or feasible. The Government is to provide any required duty-free certificates and is to help the contractor in obtaining duty-free entry for supplies, using shipping documents which note that the supplies are for the contracting agency; the contractor must identify the supplies that will come from abroad.

**DFARS—Defense Department Regulations on the Tariff Exemption**—The Department of Defense has its own regulations (DFARS subpt. 225.9) regarding agencies’ exemptions from customs duties, set forth in the Defense FAR Supplement. Rather than use the FAR implementing clause discussed above, Defense Department purchasers are to use the implementing clause at DFARS

252.225-7013 (reviewed below). These requirements may prove especially important for contractors, as Defense Department procurement constitutes more than half of federal procurement.

DFARS 225.901 says that unless supplies are entitled to duty-free treatment under a special category in the Harmonized Tariff Schedule (discussed above), or the supplies already have entered into the customs territory of the U.S. and the contractor already has paid the duty, the Defense Department will issue duty-free entry certificates for:

- (1) *Qualifying Country Supplies*: This exemption covers both “end products” (the line items called out in a Government contract) and “components” (the constituent parts of an end product or another component) from 28 “qualifying countries” (Austria, Belgium, Canada, Czech Republic, Denmark, Egypt, Estonia, Finland, France, Germany, Greece, Israel, Italy, Japan, Latvia, Lithuania, Luxembourg, Netherlands, Norway, Poland, Portugal, Slovenia, Spain, Sweden, Switzerland, Turkey and the United Kingdom), i.e., those 28 allied countries that have entered into reciprocal defense procurement agreements with the U.S. (see DFARS 225.003). See generally Christopher Yukins & Allen Green, *supra*; Luke R.A. Butler, *Transatlantic Defence Procurement: EU and US Defence Procurement Regulation in the Transatlantic Defence Market*, ch. 2.4 (Cambridge University Press 2022). The reciprocal defense procurement agreements often explicitly exempt covered defense items from customs duties. The U.S.’ reciprocal defense procurement agreement with the United Kingdom, for example, states under Section 4 that the parties “commit that, on a reciprocal basis, they will not include customs, taxes, and duties in the evaluation of offers, and will use their best endeavours to waive their charges for customs and duties for procurements to which this MOU applies.” There is generally no disputes mechanism under the reciprocal defense procurement agreements; they contemplate bilateral consultations between the U.S. and its ally.
- (2) *Eligible Products under Contracts Covered*

*by the WTO GPA or a Free Trade Agreement:* While the DFARS provision exempting “eligible products” from nations that have joined free trade agreements with the U.S. does not identify those nations, FAR 25.003 does identify the members of the WTO GPA (Armenia, Aruba, Australia, Austria, Belgium, Bulgaria, Canada, Croatia, Cyprus, Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Hong Kong, Hungary, Iceland, Ireland, Israel, Italy, Japan, Korea (Republic of), Latvia, Liechtenstein, Lithuania, Luxembourg, Malta, Moldova, Montenegro, Netherlands, New Zealand, North Macedonia, Norway, Poland, Portugal, Romania, Singapore, Slovak Republic, Slovenia, Spain, Sweden, Switzerland, Taiwan, Ukraine, and the United Kingdom). FAR 25.003 also identifies the countries that have joined other relevant free trade agreements with the U.S. (Australia, Bahrain, Chile, Colombia, Costa Rica, Dominican Republic, El Salvador, Guatemala, Honduras, South Korea, Mexico, Morocco, Nicaragua, Oman, Panama, Peru, and Singapore). Left unaddressed by the DFARS: the “least developed countries” and the “Caribbean Basin countries” which are also generally entitled to free trade benefits under FAR pt. 25.

- (3) *Other Foreign Supplies for which the Contractor Estimates that Duty Will Exceed \$300 per Shipment into the Customs Territory of the U.S.:* The threshold for the tariff exception is tied to administrative efficiency: if the expected duties will exceed the estimated administrative costs of \$300 per shipment, the agency is to exercise its exemption from duties. See 81 Fed. Reg. 28732 (2016).

To implement these provisions, DFARS 225.1101 calls for the use of a different clause, DFARS 252.225-7013, Duty-Free Entry, in lieu of the Governmentwide clause (FAR 52.225-8) reviewed above. DFARS 252.225-7013 says that the contractor is to claim duty-free entry for the supplies the contractor intends to deliver, and the agency is to execute duty-free certificates and the assistance appropriate to obtain duty-free entry of supplies that are properly designated through the shipping

and customs process. These procedures for duty-free entry do not apply for otherwise eligible supplies if they are identical to supplies purchased by the contractor (or its subcontractors) in connection with commercial business, and it is not economical or feasible to account for such supplies separately.

The Defense Department procedures for exercising the customs duties exemptions are set forth in DOD Procedures, Guidance and Information (PGI) 225.902. Those procedures say that the DOD administrative CO shall “[e]nsure that contractors are aware of and understand any Duty-Free Entry clause requirements,” and that contractors “should understand that failure by them or their subcontractors to provide the data required by the clause will result in treatment of the shipment as without benefit of free entry.” Under the PGI provision, upon receipt of the required notice of foreign supplies from the contractor (or subcontractor), the CO is to verify the need for the supplies and their duty-free treatment. The CO is also to notify the appropriate Defense Contract Management Agency (DCMA) office in New York City. That DCMA office is responsible for issuing duty-free entry certificates for foreign supplies purchased under DOD contracts and subcontracts, and (with proper documentation) will verify that the supplies are entitled to duty-free treatment and immediate release.

#### **Open Issues: U.S. Tariffs and Procurement—**

The FAR and Defense Department requirements open several questions, should the Trump administration and impacted foreign nations continue to increase tariffs:

- The Defense Department’s regulations and procedures for handling foreign supplies are much more comprehensive than the Governmentwide FAR. If increased tariffs put new strains on the roughly \$800 billion federal procurement system, will the FAR procedures be improved?
- The U.S. rules—even if not perfect—are designed to ensure that items imported for purchase by the U.S. Government are free of customs duties. Will the U.S. regulatory exception dissuade foreign nations from imposing

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retaliatory tariffs against U.S. goods being procured by governments abroad (including U.S. defense materiel), if the Trump administration imposes higher tariffs on those foreign nations?

- Conversely, do the trade agreements and the U.S. rules allowing duty-free entry of items bought by the Federal Government leave an opening for foreign nations to take asymmetrical retaliation in their own procurement markets against Trump administration tariffs?
- The procedures for duty-free treatment are complex and potentially costly. How will those costs and burdens be addressed?
- As noted, contractors need not trigger the process for duty-free entry if the supplies sold to the Government are the same as those the contractor (or its subcontractor) purchases commercially and segregating the “Government” items is not economical or feasible. Does this mean the Government will simply pay the higher duties on those supplies, and if so, how? Alternatively, what means should contractors use to recover tariffs paid on Government supplies (the issue Jedediah Bodger’s article, *supra*, focused on)? And what will happen when Government users purchase in purely “commercial” markets, such as Amazon, under programs such as General Services Administration’s commercial platforms initiative?
- What will happen to state, local and tribal governments, and other federal grantees? Will they bear the costs of higher tariffs? And many states have joined free trade agreements alongside the Federal Government which require those states to hold open their procurement markets—what role will those sub-central agreements play in an escalating trade war?

### Conclusion—Preparation and Coordina-

**tion**—What is clear is that President Trump probably will turn to higher tariffs, both as a foreign policy tool and as a means of gathering more public revenues. Given that likelihood, and the standing tariff exemptions for federal procurement, the public procurement community (both in the U.S. and abroad) should understand the exemptions and how they can be applied.

Preparation will likely require extensive coordination. Legal personnel, both in the Government and in industry, should ensure that contracting personnel recognize the tariff exemption for procurement. Contracting personnel on both sides of public procurement transactions—contractors and agencies—should understand both parties’ obligations under the exception, and how to implement it. This may mean coordinating with customs agents and officials, and with those in the supply chain responsible for procuring and delivering goods from abroad for U.S. Government purchase. While tariff issues can be addressed in a relatively seamless manner in the contract formation process, addressing the cost changes imposed by a new post-formation tariff will prove more challenging as contractors work with their COs to account for increased costs of performance.

*This Feature Comment was written for THE GOVERNMENT CONTRACTOR by Christopher Yukins, the Lynn David Research Professor in Government Procurement Law at the George Washington University Law School and counsel to the firm of Arnold & Porter; Kristen Ittig, a partner in the government contracts/national security group at Arnold & Porter; and Lynn Fischer Fox, a partner in the international trade group there. This article draws from materials prepared for a Feb. 21, 2025 GW Law webinar on EU/US protectionism; further information is available at [www.publicprocurementinternational.com](http://www.publicprocurementinternational.com).*



