

May 6, 2020

Mr. John Landry
Executive Director
Construction Association of New Brunswick
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Phone: (506) 459-5770

Dear John:

RE: Review of DTI wording- COVID-19 Addendum

You have requested our comments on the COVID-19 related provisions that appeared in recent addenda to tender documents provided by the Province of New Brunswick.

The recent addenda add two sections with general wording around the existing COVID-19 issues and a *Force Majeure* clause.

You have asked our opinion with respect to risk taken by contractors as a result of the addition of this wording to tenders by the Province of New Brunswick.

Introduction

We have reviewed the recent addenda to bid documents issued by the Province of New Brunswick, Department of Transportation and Infrastructure (“DTI”).

In preparing this opinion, we have reviewed;

- 1) The standard form Crown Construction Contract (the “Contract”);
- 2) the typical Standard Specification front-end documents; and
- 3) an addendum recently issued by DTI.

No clause in the current Contract excuses the performance of obligations rendered impossible by unforeseen events beyond the contractor’s control.

The Contract includes a provision to extend time when it is in the public interest to do so. Section 15(1) of the General Conditions allow a contractor to apply to the Engineer-Architect, as defined in the Contract, for an extension of time based on public interest. We presume that in the event of a pandemic (such as the current COVID-19 situation), the Engineer-Architect would extend the time for completion. To receive the extension, the contractor must provide notice pursuant to the time limits allowed under Section 33(2) of the Contract.

Although the Contract contains no specific wording regarding COVID-19 or *Force Majeure*, a contractor may be excused from performance of the contract where the legal concepts of impossibility or frustration of a contract is applicable. The legal concepts of impossibility of performance are also captured in legislation with the *Frustrated Contracts Act*, RSNB 2011, c 164.

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Under the Contract, given the lack of specific relief for COVID-19 or *Force Majeure*, contractors currently bear significant risk of increased cost arising from unforeseen events beyond their control.

Addendum Wording

The recent addendum to DTI tenders includes the following wording:

The parties acknowledge that the obligations of each party from time to time to meet certain terms and conditions of this Contract may be impeded by the COVID-19 pandemic and related issues. The parties agree to act in good faith by making all reasonable accommodations as the circumstances of the pandemic may require and each party will exercise reasonable efforts to comply with this Contract notwithstanding the effect of the pandemic. No party will require or encourage any person acting on its behalf to violate the terms of any public health directive or to perform any act which would place such person at a material risk of contracting the COVID-19 virus.

This wording seeks to change the contractual terms such that each party (the contractor and DTI) must make all “reasonable accommodations” as the circumstances of the pandemic may require and exercise “reasonable efforts” to comply with the Contract notwithstanding the effect of the pandemic. A further change prohibits either party from requiring or encouraging any person to violate the terms of a public health directive.

In terms of legal analysis, contractors should be aware of three uncertain obligations introduced by the addendum.

First, the addendum requires each party to make “reasonable accommodations” in the face of the pandemic. The parties must determine on a case by case basis when accommodations are necessary and, if they are, what accommodations are “reasonable”. For example, the circumstances of the pandemic could disrupt supply chains, thereby increasing the cost of materials, or require physical distancing, thereby resulting in delays to construction. It will depend on the circumstances (and is therefore uncertain) whether the situation requires “reasonable accommodation” and, if so, how much accommodation is “reasonable” and who bears those costs.

Second, the addendum requires each party to make “reasonable efforts” to comply with the Contract. The addendum does not specify what makes efforts “reasonable”. Therefore, what the obligation to exercise “reasonable efforts” entails is uncertain.

Third, the addendum prohibits any party from requiring or encouraging “any person ... to violate the terms of any public health directive”. As recent events have shown, public health guidance can change quickly, from one day to the next. Further, public health guidance can originate from multiple sources, including from the Department of Public Health and from WorkSafeNB. All this introduces further uncertainty into each party’s obligations.

Inclusion of Covid-19 construction protocols

The addendum wording also includes:

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We acknowledge that any costs associated with Covid-19 construction protocol related to all required Health and Safety measures during the duration of this construction contract, as referenced in the Tender Documents, shall be included in the base bid for this Contract.

Similar to our comments above, this section may introduce some uncertainty. A contractor should include all known costs at the time of tendering to comply with the current guidance. If a change of public health guidance impacts costs, this wording likely changes the risk to the contractor for compliance.

Whether delays or increased costs constitute a “reasonable accommodation” in the above-noted section is uncertain. Therefore, in the base bid, the contractor likely assumes the risk of the cost of a change in the health and safety measures.

In summary, with respect to the two above noted sections of the addendum, it is our opinion that the contractor assumes the risk of known COVID-19 costs. The contractor is also likely taking the risk of making reasonable accommodations, without certainty of reimbursement or certainty of being granted an extension of time should the virus make performance more difficult or costly.

Force Majeure Clause

With the addendum, DTI seeks to introduce a *Force Majeure* clause, though it is unclear whether this was in addition to the Contract or to specifications. For the purpose of this opinion, we have assumed that it should be read into the Contract.

The addendum includes the following wording:

INABILITY TO PERFORM:

Notwithstanding anything contained in this Contract, if DTI or the Contractor is, in good faith, delayed or prevented from doing anything required by this Contract because of an Event of Force Majeure and claims that an Event of Force Majeure is occurring or has occurred and reasonably establishes that fact, then the performance of the obligation will be deemed to be suspended provided always that:

(a) the non-performing party will give notice to the other party as soon as possible after the Event of Force Majeure is known to the non-performing party, and in any event not later than 12 hours after the time when the Event of Force Majeure is known to the non-performing party;

(b) the non-performing party will make reasonable efforts to counter the Event of Force Majeure or to otherwise remedy its inability to perform its obligations by utilizing all resources reasonably required in the circumstances, including obtaining supplies or services from other sources if

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the same are reasonably available (including seeking injunctive relief or other judicial, quasi-judicial or law enforcement remedy, provided that the non-performing party will not be required to settle or resolve any labour disturbance, strike, lock-out, or work slowdown (collectively "Employment Matters") but excluding any Employment Matters involving persons retained, employed or hired by the Contractor to supply materials or services to meet the Contractor's obligations under this Contract; or any Employment Matter caused by, or attributable to, any act (including any pricing or other practice or method of operation) or omission of the Contractor;

(c) the non-performing party will resume promptly the performance and observance of its obligations after cessation of the Event of Force Majeure; and

(d) neither party will be entitled to compensation for any inconvenience, nuisance or discomfort or damage including: standby costs, rental charges, interest charges, corporate overhead and mobilization or demobilization costs occasioned by the Event of Force Majeure and will not be entitled to terminate this Contract

"Event of Force Majeure" means in relation to the performance of any obligations under this Contract, any cause, event or circumstance (but excluding: (i) insolvency, (ii) lack of funds or other financial cause; (iii) the negligence or wilful misconduct of the non-performing party including those for whom it is responsible at law; and (iv) any act or omission of the non-performing party including those for whom it is responsible at law) which is unavoidable or beyond the reasonable control of the party responsible for performance of such obligation which prevents in whole or in part the performance by that party of its respective obligations under this Contract, including without limitation, natural disasters (but excluding weather conditions that are ordinarily or customarily encountered or experienced) , epidemics or pandemics (both as identified by the chief medical officer for the Province of New Brunswick), quarantine restrictions, Employment Matters (as defined and limited above), wars, act of public enemy, stop work order or injunction issued by a court or public authority having jurisdiction, or governmental embargo;

The addition of the *Force Majeure* clause likely changes some risk to the contractor. Whether that risk is material or real depends on the specific contract work anticipated. The contractor should review the provision in each case to anticipate the material impact of an event of *Force Majeure*.

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Regional Limitation

Although the definition of *Force Majeure* in the addendum includes epidemics or pandemics, the clause limits these to epidemics or pandemics that have been declared by the Chief Medical Officer for the Province of New Brunswick. This introduces a regional limitation and a unique risk to the contractor.

If a pandemic or epidemic abroad should continue to affect business in New Brunswick, without actually being declared a pandemic or epidemic within New Brunswick, that pandemic or epidemic is not by definition an event of *Force Majeure*. For example, the pandemic could continue to affect supply contracts with firms in the rest of Canada, United States, European or Asian countries even though no one in New Brunswick is infected. Disruptions in foreign markets and border closures can increase the cost or decrease the availability of materials needed domestically.

A pandemic or epidemic may affect supply contracts elsewhere without their necessarily being an epidemic or pandemic in this province. The COVID-19 pandemic may continue to affect regions of the world that supply necessary construction materials or may necessitate the continued closure of international or interprovincial borders.

Recent history has shown how the effects of the pandemic abroad and on border traffic has led to difficulties sourcing manufactured electronics, HVAC, alarm systems, large equipment and other similar materials.

Financial Exclusion to the Definition

The contractor should be aware of the risk created by the exclusion of *Force Majeure* events caused by “lack of funds or other financial cause” as a *Force Majeure* event.

As previously discussed, the pandemic can significantly increase the cost of supply contracts. Under the current Contract, the contractor carries the risk of such cost increases. The *Force Majeure* provisions do not remove that risk.

However, given the current COVID-19 issues, the contractor should review its supply contracts to ensure that the supply will be available and at the price included in its bid. The contractor assumes the risk of an interruption of supply where the supply is more expensive but not impossible.

The clause also provides the requirement that the nonperforming party obtain replacement “supplies or services from other sources if the same are reasonably available”. The provision leaves it uncertain as to when a supply is “reasonably available”. The contractor likely assumes the risk of price increases.

Period of *Force Majeure* and Resumption of Work

The work is suspended upon invocation of this *Force Majeure* clause. However, once the *Force Majeure* ends, the contractor must resume performance under Section (c) of the *Force Majeure* clause.

The wording does not create a time limit for the event of *Force Majeure*. Given that a *Force Majeure* event can last a significant time, the contractor takes the risk of price escalation along with the maintenance of overhead cost during the period of suspension.

For example, if a long-term suspension occurs on a large contract with a significant third-party supply contract, the contractor assumes the price risk during the suspension.

We note the clause is specific in that an event of *Force Majeure* does not allow termination of the contract.

Contractors should ensure that any supply contracts or subcontractors are bound by the same terms with respect to *Force Majeure* to mitigate the risk of long delays caused by events of *Force Majeure*.

We also highlight the following term;

neither party will be entitled to compensation for any inconvenience, nuisance or discomfort or damage including: standby costs, rental charges, interest charges, corporate overhead and mobilization or demobilization costs occasioned by the Event of Force Majeure and will not be entitled to terminate this Contract

In the event that DTI or the contractor declares a *Force Majeure*, the contractor may not be entitled to compensation. Although specific categories are listed in the above-noted section, by including the word “damage” DTI is likely attempting to broadly prevent any claims.

The drafter’s intention is likely to ensure that the contractor bears the risk of the cost of an event of *Force Majeure*.

Although the contractor does not compensate DTI for increased costs, it is likely that the contractor will incur actual costs in the event of a *Force Majeure*. The contractor is not entitled to terminate the contract but must continue to pay charges incurred during the event of *Force Majeure*. For example, the contractor would incur rental charges for equipment during the event but they are not recoverable. Based on the provisions of this clause, the contractor is at risk for those charges.

12 Hour Notice Period

The clause includes a 12-hour limitation on the time to give notice of an event of *Force Majeure*.

As a practical matter, 12 hours’ notice is likely an impossible standard. The COVID-19 pandemic likely started to impact supply contracts of material from China early in 2020. New Brunswick issued public health recommendations starting on March 6, 2020, and did not declare a state of emergency until March 19, 2020. A contractor will likely be unable to comply with a 12-hour notice requirement.

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Conclusion

Having reviewed the wording of the addendum, we believe it effectively changes the contractual relationship currently contained in the standard Contract.

The addendum creates some uncertainty around what is a “reasonable accommodation” and what constitute “reasonable efforts”.

The Force Majeure clause incorporated by the addendum creates risk on a contractor of having to incur a long delay during an event of *Force Majeure* without terminating the contract. This would include unreimbursed costs at the risk of the contractor.

The contractor also takes the risks of having an event increasing costs significantly more expensive but not rendering supply impossible. Given the currently known worldwide effect of this pandemic, it is reasonable to assume supply contracts may be more costly but not being made impossible. The contractor assumes this risk.

Yours very truly,

A handwritten signature in blue ink, appearing to read "Matt Hayes", is displayed within a light gray rectangular box.

Matthew T. Hayes