

Early warnings ahead of the end of Brexit transition period

2 December 2020

Introduction

The Secretary of State for Business, Energy & Industrial Strategy (BEIS) recently published a message¹ regarding the transition period ending on 31 December 2020, urging businesses to act so as to avoid business operations being interrupted from 1 January 2021.

The message highlights top actions required for businesses in the construction sector and references available online resources such as www.gov.uk/construction-2021, www.gov.uk/northern-ireland-trade, and www.gov.uk/transition-webinars.

For parties engaged under an NEC3 ECC contract, the early warning mechanism sets out the obligation of the Contractor and the Project Manager to notify each other as soon as either becomes aware of a matter which could (clause 16.1):

- i) increase the total of the Prices;
- ii) delay Completion;
- iii) delay meeting a Key Date; or
- iv) impair the performance of the works in use.

There is an additional provision in the clause with regards to the Contractor giving an early warning about any other matter which could increase its total cost, however the clause states that the Contractor “may” give this early warning, thus it is not an obligatory action².

Notwithstanding that parties to contracts may have already included suitable Z-clauses dealing with Brexit risks, we see below how the above items (i) to (iv) could apply to the new rules as these were set out in the said message by the Business Secretary.

Upcoming changes

Importing and exporting - new customs procedures from January 2021

Delay, disruption or administrative costs related to compliance with new procedures; possible cost and time impact, therefore (i), (ii) and (iii) could apply.

Changes affecting manufactured goods – new marking requirements or approvals needed

Risk of products (such as plant or materials) not being accepted by the Employer; item (iv) could apply with regards to quality standards.

Recruitment requirements for hiring from outside the UK

Contractors need to be registered as licensed visa sponsors and job, salary and language requirements will apply for new employees from outside the UK (Irish citizens and those eligible under the EU Settlement Scheme are excepted); item (i) and possibly items (ii) and (iii) would apply indirectly (if progress is delayed due to lack of specialised resources from outside the UK).

Northern Ireland Protocol

It comes into force at the end of the transition period with special provisions applying which will affect movement of goods into, out of, or through Northern Ireland. Although the policy paper issued by the Cabinet Office, as updated on 17 November 2020, states that in some cases the applicable regime will need to take into account the outcome of discussions between the UK and the EU, and in others the position is the subject of ongoing consultation or consideration, the guidance therein outlines that the

protocol will ensure there will be no changes or if any, will be kept to an absolute minimum. Consequently, all items (i) – (iv) are possible candidates, if of course the contract involves movement of goods to, from or through Northern Ireland.

Risk reduction meeting

Clause 16.2 provides for both the Project Manager (who is obliged to enter the early warning matters into the Risk Register pursuant to clause 16.1) and the Contractor to instruct each other to attend a risk reduction meeting in which, as set out in clause 16.3:

- proposals are made and considered for reducing or avoiding the risks;
- solutions are sought to relieve the affected parties;
- actions are decided as well as the action owners; and
- it is decided which risks have been avoided or have passed in order to be removed from the Risk Register.

Any of the risks associated with the end of the transition period, if notified under clause 16.1, would be entered in the Risk Register and discussed in the risk reduction meeting; the Risk Register is then revised by the Project Manager after each risk reduction meeting and issued to the Contractor.

Conclusion

The early warning process, being the so-called “jewel in the NEC crown”, is essential for dealing with issues such as the upcoming changes taking place at the end the transition period and parties to construction contracts need to fully commit to adhering to it, without any reservation pertaining to compensation events arising under the circumstances or not; clause 16.1 clearly refers to matters that “could” meet the conditions (i) to (iv) stated above.

From the Contractor’s perspective, apart from the obligation arising, it is apparent that this step is not missed because it is critical in the assessment of a compensation event (if a matter turns out to be one later) as set out in clauses 61.5 and 63.5, where the Project Manager decides if the Contractor has given the required early warning and if not, the event is assessed as if it had, i.e. as if the mitigation measures were taken when they should, which could be financially detrimental to the Contractor.

For assistance in related matters, you can contact us at info@pronea.co.uk

The above article is for general information and discussion purposes only. It does not constitute, and should not be used as a substitute for, legal or professional advice. The law or facts may have changed since the date of the article.

[1]: The message can be found in the link below:

https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/934937/transition-letter-to-construction-sector.pdf

[2]: See NEC3 ECC Guidance Notes, page 31 (Explanatory Notes, 1 General, Core clauses, Actions 10.1, third paragraph)