



New NZS Construction Contracts

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For ten years NZS 3910:2003 was the form of construction contract most commonly used in New Zealand. However, following industry feedback, NZS 3910:2003 has now been superseded by three new building and civil engineering contracts:

- NZS 3910:2013 - Construction (**Construction contract**)
- NZS 3916:2013 - Design and Construct (**D&C contract**)
- NZS 3917:2013 - Fixed Term (**Fixed Term contract**)

The last in this trilogy became available on 28 January 2014, while the others were published in October 2013.

The splitting of NZS 3910:2003 into three separate standards provides more tailored general conditions for the different types of contracts and procurement arrangements that feature in the New Zealand construction sector. Their publication follows feedback from the industry and lessons learned from NZS 3910:2003.

The new standards are easier to follow, contain new guidelines (that no longer have contractual status), have a more comprehensive tick-box type table for the Special Conditions, and include additional standard form documents (to save parties developing their own). They also introduce some new terminology.

Among the substantive changes, the payment system has been simplified and contains different time periods, the method of calculating the price in cost reimbursement contracts has been set out more clearly and there is greater certainty about responsibility for arranging insurance and paying the deductibles. The conditions are aligned with the Construction Contracts Act 2002 (as amended to date).

Standards New Zealand says the new contracts “reflect a fair risk allocation between the parties”. While some parties will want to re-allocate risk in different ways for certain projects, overall, the need for Special Conditions should be significantly reduced.

These contracts are likely to become the default choice for most construction projects of any significance in New Zealand. And their publication is timely given the anticipated spike in construction activity over the next decade. Construction and engineering firms, and

particularly those responsible for contract negotiations, should familiarise themselves with the changes.

Please click on the links below for a more detailed discussion of the key features of each new standard:¹

[Construction Contract](#)

[D&C contract](#)

[Fixed Term contract](#)

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¹ Unless otherwise stated, capitalised terms are defined terms in the applicable standard.

CONSTRUCTION CONTRACT (NZS 3910:2013)

The Construction contract most closely resembles the old NZS 3910:2003. It is intended for traditional procurement arrangements involving only construction work.

Structure and terminology

The structure and layout of the Construction contract has been altered to make it more user-friendly. This includes:

- Moving the Contract Agreement to the front. It was previously buried near the back as Schedule 2.
- Re-writing the Guidelines and stipulating that they no longer have contractual status.
- Turning Schedule 1 (Special Conditions of Contract) into a comprehensive tick-box type table to be completed by the parties.
- Adding new schedules (nos. 13-16) to incorporate widely-used documents – ie a form of warranty, an agreement for off-site materials, a practical completion certificate and a final completion certificate.

Some terminology has also changed:

- ‘Defects Liability Period’ is now known as the ‘Defects Notification Period’.
- ‘Defects Liability Certificate’ is now known as the ‘Final Completion Certificate’.
- The reference to ‘Contract Documents’ has gone and a new definition of ‘Contract’ has been included.

Cost Reimbursement contracts (clause 2.4)

Clause 2.4 has been added to avoid confusion in cost reimbursement contracts by setting out more clearly how the Contract Price is to be calculated. In summary, this will be determined by either:

- The Net Cost of the items used in the Contract Works (ie plant, materials, labour and sub-contractor costs) plus allowances for On-Site and Off-Site Overheads and Profit at the percentages stated in the Special Conditions. A reasonableness requirement has also been added: ‘Net Cost’ now means “the *reasonable* actual or assessed expense or direct cost to the Contractor, plus return on investment in Plant, after deduction of trade discounts and exclusive of [overheads and profit]”; or
- Rates where the contract contains rates. Allowances for On-Site and Off-Site Overheads and Profit may only be added if they are not already included in the rates, which must now be stated in the Special Conditions.

Parties can adopt other cost reimbursement methods, but these would need to be expressly incorporated in the Special Conditions.

Clause 2.4 goes on to make clear that certain costs are not claimable – eg where the costs: are not justified from the Contractor’s records, were not reasonably and actually incurred, or

were incurred because of a default by the Contractor. The Contractor is required to maintain records of its costs and allow the Engineer to inspect these.

Further, the parties can elect in the Special Conditions that the Contractor will provide an estimate prior to the start of the works. If required, when submitting each payment claim, the Contractor must also provide a reconciliation of the claim against the estimate, an explanation for any differences and an updated estimate of the Final Contract Price. This is intended to avoid any 'surprises' for the Principal but will put pressure on the Contractor to avoid or justify any material departures from the initial estimate.

Programmes (clause 5.10)

Under clause 5.10 the Contractor must now submit a 'simple' programme for the works within 10 working days of its tender being accepted. This needs to demonstrate how the Contractor proposes to meet the due date for completion.

Alternatively, the Special Conditions may require a 'Comprehensive Programme', in which case the Contractor has 20 working days from acceptance to submit this. As the name suggests, a Comprehensive Programme is more detailed and must include:

- the proposed sequence of works and the dates for commencement and completion of the various activities;
- the critical path network; and
- the dates by which access to the site, or materials, services or work, is to be provided.

The time for submitting either programme is short and, importantly, the Contractor will not be entitled to payment until it has done this. In some instances, it may be sensible to agree a longer period.

Advance Notification (clause 5.21)

Clause 5.21 is an entirely new provision and appears to be based on the early warning system contained in the NEC contracts.

The Contractor and the Engineer are required to notify each other in writing as soon as they become aware of any matter that is likely to: (a) materially alter the Contract Price; or (b) materially delay completion; or (c) result in a breach of a statutory duty. Either of them can also require the other to meet to explore proposals to reduce the impact of the matter or avoid it altogether, which seems sensible.

If the Contractor fails to give advance notice, this may affect the value of any variation arising out of the matter (eg if steps could have been taken to avoid or reduce the impact). However, such notice should not be a condition precedent to claiming a variation.

Insurance (section 8)

The insurance provisions have been completely re-written to make them easier to follow, introduce flexibility and bring them into line with current market practice. In summary:

- The parties will elect in the Special Conditions the risks that are to be insured and who is to arrange the relevant cover.

- The party who arranges the insurance will pay the deductible unless the claim arose from an act or omission of the Contractor. This helps clarify responsibility.
- The forces of nature (eg landslips, earthquakes, etc) selected in the Special Conditions must now be covered by the construction insurance and are no longer excepted risks or excluded perils in relation to care of the works. This is a direct consequence of the Canterbury earthquakes.
- If the Contractor's plant is to be insured (as is likely in most cases), the parties can elect to limit this to: (a) specified items that are critical to the performance of the project (ie items that could delay the works if lost or damaged) or (b) plant above a specified market value. This may help reduce project insurance costs since other ('typical') plant can be readily hired and therefore may not need to be insured.

Variations (section 9)

Oral notice of a matter that the Contractor believes is a variation and which is recorded in writing (eg site minutes, correspondence, etc) has been removed. This means the Contractor will need to issue a proper written notice and can no longer rely on (sometimes vague) statements in project documents. The same goes for the Engineer when notifying the Contractor whether the variation is confirmed or disallowed. This ought to reduce disputes about whether a matter was a variation or has been properly 'notified'.

When it comes to valuing variations, clause 9.3.2 has been modified to allow the Contractor to propose a value – within one month (or as soon as practicable) after the variation is ordered or confirmed by the Engineer. This effectively formalises the previous variation price request process and allows a Contractor to propose a value for a variation.

The method of valuation has also been clarified. Where there is an applicable (or derivable) rate, this is to be used, otherwise the value is to be based on Net Cost plus the nominated (or reasonable) percentages for overheads and profits (see clause 2.4 above). As before, if the value is not agreed, it will be determined by the Engineer.

Defects Liability (section 11)

The timeframes for dealing with defects have been tightened up. Upon receiving notice of a defect from the Engineer, the Contractor has 5 working days (or a reasonable time if agreed) to remedy it. If the Contractor fails to do so, the Engineer must give the Contractor a further five days notice. At the expiry of this, if the defect has still not been remedied the Engineer can direct others to do the work at the Contractor's cost. Previously, under NZS 3910:2003, the Engineer could only take that step after allowing the Contractor a "reasonable time", which was ambiguous and blunted the threat to Contractors who fail to remedy defects.

Payments (section 12)

The payment system has been simplified and contains different time periods.

For progress payments:

- The Engineer has 7 working days after receiving a progress payment claim to issue a provisional Progress Payment Schedule.
- The Principal then has until 10 working days after receipt of the claim to notify any amendments or deductions, with reasons.

- The amount to be paid is determined within 12 working days after receipt of the claim, and is the crucial deadline. If the Principal has notified amendments/deductions, the Engineer will provide a replacement Progress Payment Schedule. Alternatively, if no amendments/deductions have been notified, the provisional schedule is deemed to be the Progress Payment Schedule. Previously, NZS 3910:2003 required the Engineer to re-issue the provisional schedule.
- Payment is due 17 working days after receipt of the claim.

Broadly speaking, the same process applies for the final payment, but with different timeframes:

- The Contractor must submit its final payment claim within 1 month after the Final Completion Certificate. Under NZS 3910:2003, the Contractor had 2 months.
- The Engineer then has 20 working days to issue a Provisional Final Payment Schedule. Previously there was no time limit.

If the Engineer cannot meet that deadline, they must explain why and issue a Progress Payment Schedule as an interim measure by this deadline. However, a long-stop has been introduced, requiring the Final Payment Schedule no later than six months after the Final Completion Certificate.

- The Principal has 30 working days from the claim to notify any amendments or deductions, with reasons.
- The final amount to be paid is determined within 35 working days from the claim. If the Principal has notified amendments/deductions, the Engineer will provide a replacement Final Payment Schedule. Alternatively, if no amendments/deductions have been notified, the provisional schedule becomes the Final Payment Schedule.
- Payment is due 45 working days after service of the claim.

The Guidelines (pp 158 – 160) include useful summary tables, which set out the steps and deadlines in relation to progress and final payments.

If payment is late, the Contractor is no longer required to have their accountant or bank manager certify the rate they would have earned. Instead, interest will be calculated at 1½ times the monthly SME overdraft rate published by the RBNZ. This is a welcome change by simplifying the entitlement to and calculation of interest.

Disputes (section 13)

The most significant change to the dispute resolution provisions is that every decision, valuation, or certificate of the Engineer will now be final and binding after three months unless it has been referred to the Engineer for review or to adjudication (see clause 13.1.1). It follows that, if there is a dispute about payment, the relevant party (usually the Contractor) will need to make sure they take one of these steps before the time limit expires.

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DESIGN & CONSTRUCT CONTRACT (NZS 3916:2013)

The D&C contract is similar to the Construction contract, while obviously being tailored for a design and build context. The key features and main differences with the Construction contract are:

- The Contractor's obligations include responsibility for the design as well as construction of the works.
- The "Principal's Requirements" defines the requirements for the design. As a minimum this will set out the purpose and performance required of the works, and may also include preliminary or conceptual designs, drawings, specifications and other design documents. The Principal's Requirements will usually be described or contained in the tender documents, as modified or developed during post tender negotiations.
- The Principal's Requirements will prevail over the Contractor's tender if there is any conflict between them.
- The Contractor will normally be required to arrange professional indemnity insurance. This will be specified in the Special Conditions (Schedule 1) together with the minimum level of cover.
- The Engineer may review the Contractor's design prior to construction and can request explanations or supplementary design documents if the Engineer believes the design is ambiguous, unclear or does not comply with the contract. The Engineer can also reject design documentation if it does not comply with the Principal's Requirements or the contract (but the Engineer must do so within 10 working days of receipt, unless another time period is agreed). If a design document is rejected, the Contractor is required to submit amended design documents to the Engineer for consideration within a further 10 working days. Construction on this part of the works cannot commence until this process is completed and the relevant documents have effectively been 'approved' by the Engineer.
- Notwithstanding the Engineer's power to review the design, the D&C contract states (clause 5.1.12) that the Engineer owes no duty of care and is under no obligation to identify or point out errors or omissions with regard to the design, and that no review will relieve the Contractor of liability (clause 6.2.5). This is likely to make it difficult (if not impossible) for the Contractor to allege contributory negligence by the Engineer for any design defects.
- The Principal can, in certain circumstances, terminate the Contract if unacceptable conditions are imposed by public authorities in licenses for the design or construction.

We note that the D&C contract does not include a standard form warranty from the Contractor's consultant(s) to the Principal in relation to the *design*. The form of warranty at Schedule 13 applies only to the construction works. As a result, the parties will need to modify this or prepare their own separate warranty for the design.

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FIXED TERM CONTRACT (NZS 3917:2013)

The Fixed Term contract replaces Appendix C to NZS 3910:2003. It is intended to be used for provision of services over a defined period of time (eg maintenance, inspection, testing, cleaning, etc), rather than for a fixed scope of work. Parties to fixed term contracts will find it more convenient using NZS 3917:2013, as stand-alone, dedicated form of conditions.

In broad terms, Fixed Term contracts have a specified Contract Works Period, which begins with the Date of Commencement and ends with the Date of Expiry. The Principal must give the Contractor (non-exclusive) occupancy of the site from the Date of Commencement, so that the Contractor can begin the works. There is a suspension mechanism if occupancy is given late. Within five working days of the Date of Expiry, the Engineer inspects the works (or a separable portion, if applicable) and issues a Certificate on Expiry. If the Contractor has any outstanding obligations (eg un-remedied defects), the Engineer can allow the Contractor to return to site to complete these, or have them completed by a third party at the Contractor's cost. Once all obligations are complete, the Engineer issues a Final Completion Certificate and the Contractor's final payment claim is due within 1 month after this.

Defining the scope of works (including whether they are to be provided exclusively) and the time period(s) is plainly fundamental to Fixed Term contracts and care should be taken when recording these in the Specific Conditions (Schedule 1).

Some of the key changes or features are discussed further below.

Terminology

There is some new terminology, including:

- 'Date of Commencement', which replaces the description "commencement of the contract period";
- 'Date of Expiry', which replaces the ill-suited "Due Date for Completion"; and
- 'Contract Works Period', which had no real equivalent in Appendix C to NZS 3910:2003.

Possession (clause 5.4)

Possession of the site remains non-exclusive, which reflects the fact that the site or assets will remain in use during the provision of the works. Rights of access by others (eg other trades) during the Contract Works Period may now include organisations and body corporates (as well as natural persons).

Programme (clause 5.10)

The Contractor is required to provide a programme within 10 working days after its tender is accepted, and at other intervals thereafter as stated in the Special Conditions. The programme must demonstrate the proposed order of work, specify dates for commencement/completion of the various parts of the works and include anything else agreed. This differs from the programme requirements under the Construction and D&C contracts. However, as with those other contracts, no payment is due until the programme has been submitted to the Engineer.

Insurance (section 8)

Specific insurance provisions have been included, where previously Appendix C to NZS 3910:2003 was silent. These allow the insurance requirements to be tailored bearing in mind that, unlike with a Construction contract, the works do not involve the creation of a financially valuable asset requiring protection. The asset or facilities already exist and may already be insured by the Principal against certain perils. For this reason, the provision of insurance – to protect the works and the assets – should primarily be the responsibility of the Principal (see clauses 8.8 and 8.9). However, the parties will need to consider the particular requirements in each case, and record this in the Special Conditions.

Certificate on Expiry (section 10)

The 'practical completion certificate' regime is replaced with a Certificate on Expiry, which is issued by the Engineer within 5 working days after the Date of Expiry. This certifies the end of the Contract Works Period and lists any obligations that remain outstanding (or have not been properly performed). Where there are outstanding obligations, the certificate will also either:

- give the Contractor a period within which to complete these (eg finish outstanding work, fix damage, remedy defects, etc); or
- give notice that the Engineer will instruct others to undertake the relevant work at the Contractor's cost.

While the Engineer appears to be free to elect either option, in most instances, we would expect them to give the Contractor one final opportunity with the Certificate of Expiry before instructing someone else.

When all outstanding obligations have been completed, the Engineer will issue a Final Completion Certificate in the form set out in Schedule 16.

Defects Liability (section 11)

The defects liability period under Appendix C to NZS 3910:2003 has been done away with as it was ill-suited to a fixed term contract. Instead, all defects should be remedied during the contract works. The Engineer can notify specific defects and/or direct the Contractor to search for defects prior to the Date of Expiry. The cost of such searches and any remedial work will be treated as a Variation, unless the Contractor is responsible for the defect.

If any defects remain at the Date of Expiry, the process described above with the Certificate of Expiry will apply.

Payment (section 12)

A similar payment process to that used in the Construction and D&C contracts has been adopted in the Fixed Term contract. The final payment claim must be submitted within 1 month of the Final Completion Certificate.

Retention monies (clause 12.3)

Parties still have the option to require retention of monies in the Special Conditions. However, this may not be appropriate in some fixed term contracts. If a retention is required, any sums retained will be calculated according to the formula/percentages and maximum retention in the Special Conditions. These formulae/percentages/sums will generally be less

than those in the Construction and D&C contracts. One half of the retention (less the Engineer's assessment of the cost of completing any outstanding obligations) is to be released following the Certificate of Expiry. The remainder is due as part of the Final Payment Schedule.

A bond can be used in lieu of retentions.

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