



## Updated subcontract agreement: SA-2017

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The Subcontract Agreement “SA-2009”, produced by the Registered Master Builders Federation and New Zealand Specialist Trade Contractors Federation, enjoys common usage in the construction industry.

It recently underwent an update and has been released in a new form, “SA-2017”. The foreword explains the impetus came from wanting to ensure compliance with changes to the Construction Contracts Act 2002, and to align and enable the document to be used with NZS 3910:2013 and NZS 3916:2013.

We recommend those in the industry familiarise themselves with SA-2017, and review their precedent SA-2009 forms and special conditions to ensure they are updated for the new version. This note summarises the changes.

### Advance notification

There is a trend in the construction industry towards early warning procedures, which began with the addition of an ‘advance notification’ provision in the standard construction contract NZS 3910:2013 (which we have written about [here](#)). Both [consultants](#) and now subcontractors in SA-2017 have followed suit in their standard forms.

New clause 5.18 obliges both parties to notify the other in writing as soon as either of them becomes aware of a matter which is likely to materially alter the price, materially delay completion, or result in a breach of statutory duty in connection with the Subcontract Works. If the Subcontractor fails to comply, any variation it may otherwise be entitled to arising out of the matter, will be valued as if timely notification *had* been given, and might reasonably have been resulted in the matter’s impact being avoided or reduced.

### Retentions

Under SA-2009, retentions are released to the Subcontractor as follows: an initial release after a practical completion certificate; and a final release after the later of the rectification of all defects in the Subcontract Works, and the issue of a defects liability certificate under the *Head Contract*.

The latter presents a problem. If a Subcontractor is involved in the very early stages of Head Contract works, such as digging foundations, it may be contractually forced to wait a very long time –

long beyond the time it has completed its own work and moved on – until the entirety of the Head Contract works are complete and defects liability over, before it could see its final retentions. Section 18I of the Construction Contracts Act 2002 now makes a term in a construction contract void that purports to make the date on which retention money is payable later than the date the party has performed all its contractual obligations.

Accordingly, this has been fixed in SA-2017. The retention release is now structured along an initial release following notice of completion of the Subcontract Works, with the final release after the later of the Subcontract defects liability period, and once all notified defects are rectified.

Further, to put the position beyond doubt, the defects liability period is also now expressly stated to *not* extend beyond the date of Final Completion under the Head Contract (clause 11.1.7).

### Time for Commencement and Completion

Under SA-2009, the Subcontractor is to carry out and complete the Subcontract Works as required by the Contractor's current construction programme. In contrast, SA-2017 allows for either a specified due date for completion in the Subcontract, or, where there is no fixed time, the Subcontractor is allowed a "reasonable time" considering all the circumstances including the Contractor's current construction programme.

New clause 10.4 sets up a new certification-type mechanism for completion. Once the Subcontract Works, or any separable portion, is complete, the Contractor is notified and will inspect the work. The Contractor will then either issue a notice stating the date and time on which the Subcontract Works (or separable portion) were completed, or notify the Subcontractor of the further work that needs to be done. This is a simplified mirror of the certification procedures in NZS 3910:2013 / 3916:2013.

If the Subcontractor fails to complete on time, SA-2017 provides that the Subcontractor indemnifies the Contractor for any cost or loss the Contractor suffers as a result, which may include, but is not limited to, the liquidated damages (or an equitable proportion of them) under the Head Contract. SA-2009 is drafted slightly differently, presenting the choice for the Contractor as an either/or – either pursue the Subcontractor for Head Contract liquidated damages, or alternatively for such damages that may be suffered as a result of the Subcontractor's default.

### Health and Safety, and other Subcontractor assistance

The Health and Safety clause 5.9 has been updated to align with the Health and Safety at Work Act 2015 (**2015 Act**). There is a new specific carve out from the clause 7.1.1 indemnity to exclude indemnifying the Contractor for liability for fines or infringement fees under the 2015 Act (which is prohibited; see [section 29](#)).

Both parties now acknowledge they are "PCBUs" under the 2015 Act, and so both will have health and safety responsibilities. In that vein, the Subcontractor now agrees specifically to assist the Contractor where the Head Contract requires the Contractor to prepare a Site-specific safety plan.

This 'spirit of cooperation' extends also to new clauses dealing with any comprehensive programme or quality plan requirements of the Head Contract; the Subcontractor is obliged to provide reasonable assistance to the Contractor in preparing these as well (new clauses 5.16 and 5.17).

### Payment claims

The information that must accompany *all* payment claims (whether commercial or residential) for them to satisfy the requirements of the Construction Contracts Act 2002 (per a 2015 amendment) has now

been included as an additional Appendix B4 to SA-2017. (If Subcontractors using SA-2009 have mistakenly *not* been including this accompanying information with their payment claims, they should immediately start to do so if they wish to take advantage of the Act's protections in the event of non-payment.)

### Design documentation and intellectual property under NZS 3916:2013

A new clause 6.2 provides for two simple clauses to apply where the Head Contract is NZS 3916:2013 (used for design and build).

- First, the Subcontractor is specifically required to comply with Head Contract requirements to issue Design Documentation so that the Engineer under the Head Contract has a reasonable opportunity to review it.
- Secondly, all New Intellectual Property (e.g. in drawings created as part of the Subcontract Works) is jointly owned by the Principal, Contractor and the Subcontractor; this is a simple reflection of NZS 3916:2013 under which the Principal and Contractor jointly own New Intellectual Property created by the Contractor.

### The importance of documents

Lastly, likely in recognition of their importance, SA-2017 records the provision of any shop drawings, as-built records, operation and maintenance manuals, and producer statements is an *essential* obligation for completion of the Subcontract Works (clause 5.13).

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