



## Be quick and ensure you have your say: Public Consultation of revised NZS3910:2013 closes on 30 June 2023

Written by: Nick Gillies, Ariana Stuart, Claudia Harnett

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The long-anticipated draft full revision of NZS3910:2013 has been released for a short period of public consultation, with publication of the final revised draft expected in October 2023. A copy of the document can be found [here](#).

On review, several substantial amendments have been proposed by the drafting committee, which attempt to overcome the shortfalls identified by industry and the government with NZS3910:2013, which often resulted in an excess of special conditions. We discuss some we consider key below, but the amendments more widely include:

- Changes to definitions, including renaming “Off-site Overheads and Profit” and “On-site Overheads” as “Margin” and “Preliminary & General (or P&G)”, to accord with the terms used by the industry;
- The addition of a new pricing option (alongside lump sum, measure and value and cost reimbursable), being a Target cost method for the Contract Price, which will allow for parties to share cost under and overruns;
- Removal of joint and several liability for the Principal’s bond and Contractor’s performance bond;
- Introduction of further general obligations on the Contractor to deal with Health and Safety, protection of the environment, reporting and management plans. These bring the Contractor’s obligations in line with industry expectations, and in the case of Health and Safety with the Health and Safety at Work Act 2015;
- The removal of the dual and conflicting role of the Engineer to the Contract (and Engineer’s Representative), and the introduction of two separate roles - the Contract Administrator and Independent Certifier;
- Introduction of a fault-based indemnity and a cap on liability;
- The Variations clause has been re-drafted to include both variations and price adjustments, such as contingency payments, and provisional sums;
- A new section now dealing with the final account;
- The section on how an EOT is to be notified and assessed has significantly changed; and
- The Disputes section has been designed to be simpler, having removed the ‘Engineer’s review’ section and instead splitting it between the Independent Certifier’s Decisions, and the Disputes section.

## **The Engineer to the Contract is no more**

Under NZS3910:2013, the Engineer's dual and conflicting role in section 6 was the most contentious and widely debated aspect, with many viewing it as the key source of disputes. The Engineer was always expected to act independently and impartially in making decisions under the Contract (including ruling on issues in dispute), whilst also being the Principal's representative and issuing instructions to the Contractor.

Having recognised this tension, the proposed draft replaces the Engineer's dual role with two separate roles. These are:

- *Contract Administrator*. Who will act for the Principal and give instructions to the Contractor, and perform the role and functions of the Contract Administrator under the Contract; and
- *Independent Certifier*. Who will act fairly, impartially, and independently from both contracting parties in making decisions. Some of these decisions include valuing the Contract Works, certifying the scheduled amount in any Payment Schedule, considering and granting claims for extensions of time, and issuing completion certificates.

It is expected that the Contract Administrator and Independent Certifier roles will be performed separately by different people especially for large and complex projects. However, it is recognised that in certain situations it would be beneficial to have the same person perform both roles.

This proposed change is certainly long-awaited and welcome news for many in the industry. It will more than likely assist in addressing complaints from contractors about bias (particularly in determining disputes). But without a bar on the same person holding both roles, it may not effectively assist at all.

## **Extensions of time (EOTs) – no time bar but changes to notification and assessment criteria**

Section 10 of NZS3910:2013 sets out the provisions covering the time for completion of the Contract Works. It is often one of the most heavily amended sections, typically inserting more specific and limiting procedures for notifying and substantiating an EOT (time bars), but also rules for assessment by the Engineer (including the treatment of concurrent delays). All of those operate to restrict recovery by a Contractor.

While the grounds for claiming an EOT have not materially changed, the committee in the draft revision of NZ3910 sets out new provisions regarding the notifying of EOTs by the Contractor and the assessment of those requests by the Contract Administrator and Independent Certifier.

### **Essentially, the Contractor must now:**

- Under clause 10.3.2(a), and within its first notice, the Contractor must notify both the Contract Administrator and the Independent Certifier, in writing, that it is claiming an EOT, and that notice must set out the circumstances that are relied on by the Contractor as the grounds for EOT within 20 Working Days of the Contractor becoming aware of the circumstances (rather than from when the event occurred);
- If the Contractor has the information to hand, it must give in the first notice all the details of the period of the extension sought. If it does not, a second notice can follow within a reasonable time with those details. This is largely the same as the existing process under clause 10.3.2; and
- If the ground relied on for the EOT is of a continuing nature, then the Contractor may give notice under 10.3.2 more than once, with each notice claiming the specific period of EOT sought. Again, this is similar to the existing process.

### **Upon receipt of a notice by the Contractor, the following must occur to determine the EOT:**

- The Contractor and the Contractor Administrator shall, as far as possible, determine by agreement the period of extension (clause 10.3.3). This is a new insertion by the committee to clearly encourage collaboration and negotiation between the parties, and to avoid unnecessary disputes. Upon request by either the Contractor, Contractor Administrator or the Independent Certifier, the parties are to meet to try and reach agreement. If agreement is reached the Contract Administrator will issue the agreement as an Instruction (clause 10.3.4).
- If an agreement is not reached, then the responsibility shifts to the Independent Certifier to determine whether the Contractor is fairly entitled to an extension of time (clause 10.3.5).

- But, even during this process of trying to reach agreement (clause 10.3.4), either party may ask the Independent Certifier to make such a decision (clause 10.3.5). If a request is made, the Independent Certifier must make a Decision (including reasons) within 20 Working Days (which will have regard to the criteria in (10.3.6) or as soon as practicable thereafter). This is to ensure timely decisions can be made.

**In making a Decision under clause 10.3.6, the Independent Certifier is required to have regard to:**

- The extent to which the delay has caused (or is likely to cause) delay to the Due Date for Completion of the Contract Works (or any Separable Portion);
- Mitigation by the Contractor – being any reasonable steps taken to mitigate the grounds relied on for the EOT; and
- The impact caused by the Contractor failing to give notice within the required time frames. This will include the period of lateness (and any reasons given to defend it), the impact arising from the late notice, and whether the impact would have been lessened or avoided if the notice had been given earlier. While this is not a time bar, this is intended to operate to ensure EOT claims are given in a timely way.

In short, the new process for an extension of time is in some ways significantly different to the latest NZS3910 and contracting parties should read this proposed draft carefully.

**Dispute resolution – designed to be simpler but not more straightforward**

The committee has made significant changes to the dispute resolution provisions of NZS3910 which is now split into two different clauses: clause 6.4 and section 13.

As noted above, the Engineer’s review section has been removed from section 13. It is now contained within clause 6.4, with some key changes:

- Under clause 6.4.1, any party can request a review by the Independent Certifier of any Instruction (given under clauses 6.3.5 (instructions given by the Contract Administrator), 9.3.4 (valuation of Variations) or 10.3.4 (EOT agreement)) or any Decision (other than a Final Decision). Some commentators have suggested that the inclusion of clauses 9.3.4 and 10.3.4 here is an error.
- The request needs to be made in writing giving reasons and be issued within 3 Months of the original Instruction or Decision (clause 6.4.1). The Independent Certifier’s review can confirm, correct, or amend the original Instruction or Decision by way of a ‘further Decision’ (clause 6.4.2).
- If a party is not satisfied with the ‘further Decision’, it can either request another ‘further Decision’ (under clause 6.4.1) or a Final Decision (under clause 6.4.4). This may invite parties to engage in multiple rounds of ‘further Decisions’ on an issue until one requests a Final Decision.
- A request for a ‘Final Decision’ must be made in writing and include reasons and be made within 3 Months of the date of the Decision under clause 6.4.2. While some commentators have suggested that the time limitation here relates to the original review Decision, and therefore may stop the potential for the continuous merry-go-round of further Decisions, there is no wording within clause 6.2.4 limiting this to the original Decision, and it is currently open to interpretation.
- None of the time limitations referred to in clause 6.4 are conditions precedent, which can be differentiated from the previous section in clause 13.1.1 which decided ‘final and binding’ unless it was referred to a dispute within that time period.
- Parties still can agree to refer matters to an agreed expert to assist the Independent Certifier through a recommendation (clause 6.4.7).

The process under clause 13 still forms part of the tiered dispute resolution process seen in the latest NZS3910:2013, but the process has been simplified and now involves:

- The parties firstly endeavouring to resolve any dispute or difference between them by negotiation in good faith between Senior representatives of the parties before referring any matter for dispute resolution.
- Followed by mediation and/or arbitration.

The new sections dealing with mediation and arbitration have been streamlined, and:

- There are now no longer any prescriptive timelines or requirements as compared to the previous clause in 13.3. This leaves parties free to mediate in any way they see fit, except for the requirements in clause 13.2.1 that all discussions in mediation are without prejudice, parties bear their own costs and half the costs of the mediator, and the mediator will not be a witness in any other proceedings.
- A formal decision is not required to trigger arbitration. Parties are free to refer any dispute or difference between them to arbitration (clause 13.3.1). If the dispute relates to a Final Decision, then the notice requirements to follow are set out in clause 13.3.2 and mirror the old provision. What is missing here is an equivalent process for disputes that are not Final Decisions.

Also of note is the amendment which now will allow a Principal to withhold payments due under section 12 (clause 13.4.2). This is because the process under 12.2.1 to 12.2.8 still applies allowing Principals to make amendments or deductions due to a dispute (which could result in under-payment or no payment at all to a Contractor).

### **The wide-ranging indemnity is gone**

The indemnity provisions contained within clause 7 of NZS3910:2013 were very broad and often subject to significant amendments in the special conditions.

The committee decided to change clause 7.1.1(a) to a fault-based indemnity limiting the scope of the Contractor's indemnity and applying it to the relevant loss. This is in keeping with the amendments/tags often made by contractors.

There is also a change to clause 7.1.1(b) and (c) with the deletion of the Principal indemnifying the Contractor for any losses and costs incurred due to an act or omission of it, the Engineer (and assistants), and any persons for which the Principal is responsible. While on its face this may be concerning, it is likely to be because of the introduction of the fault-based indemnity, and coverage of these acts or omissions as 'excepted risks' in clauses 7.1.2(c) and 5.7.6(h)).

Finally, the committee have continued with the recommendation of the Contractor's aggregate liability cap in clause 7.2. This was originally introduced in the interim review conditions released in October 2022. This caps the maximum aggregate liability of the Contractor to the amount recorded in the Special Conditions, but under clause 7.2.2 this will not cover infringement of intellectual property rights, indemnifying the Principal for third party liability, abandoning the Contract, penalties (under any Act, secondary legislation, instrument, bylaw, or licence) or fraudulent conduct, illegal acts or omissions, reckless or wilful misconduct or wilful default (in performing the Contract).

While these changes reflect the frequent amendments by Contractors, there is no recommendation to exclude liability for consequential or indirect losses. It is curious as to why this was omitted.

### **Get in quick to have your say**

The amendments are intended to enable NZS3910 to be more user friendly, limiting the need for special conditions and allocate risk fairly, and remain current to keep up with changes in the industry. It is important that all that use NZS3910 review the changes and provide feedback.

Contracting parties that use NZS3910 are strongly encouraged to review the new version as public consultation ends on 30 June 2023, with publication of the final revised template currently scheduled for October 2023. If you have any views on the proposed amendments and wish to be heard on these, you will need to act quickly.

If you have any questions about this, please get in touch with our construction team or your usual contact at Hesketh Henry.

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