

TOP 7 CHANGES IN NZS3910:2023



1. Collaborative Approach / Refined Risk Allocation – While no good faith provisions have been included (as are found in some international forms such as NEC), there is an increased focus on clarifying roles / processes and encouraging accountability and engagement. Items 3, 4, 5, 6 and 7 below are all examples of steps to achieve this. In addition, the early warning provisions have been expanded to include the Principal (6.10).



2. 'Quality of Life' Improvements – There are a host of significant tweaks including requirements to refer to specific contractual clauses when exercising contractual powers (eg 6.4.1(d)), consistent references to the Specific Conditions for contract information (rather than the Special Conditions), increased requirements for the parties to agree Variations (9.2.4), valuations (9.3.4) and extensions of time (10.3.4), and a continuous recording of the unfolding of the Contract through Instructions and Decisions (which will also record agreement between the parties) and the preparation of Completion Records required for Practical Completion. While each of these changes alone may appear small, they will change the way projects are administered day to day, and potentially shift the behaviour of contract participants.



3. Target Price – This pricing option (2.4 and 2.5) builds upon the cost-reimbursement pricing option to set an agreed 'Target Price' (including Preliminaries and General and Margin) which is identified in the Specific Conditions.

The 'Target Price' can be adjusted by Variations or other price adjustments, but parties may expressly provide in the Specific Conditions that certain clauses providing for Variations or adjustments will **not** adjust the 'Target Price'.

Savings / Overruns against the 'Target Price' are shared between the Principal and Contractor according to agreed percentages set out in the Specific Conditions. A mechanism is provided for paying / clawing back savings / overruns in progress Payment Claims / Schedules.

While a close relative of this mechanism (Target Cost) is well-known and applied worldwide to encourage good cost control and equitable risk allocation, the default (Target Price) mechanism in NZS3910 lacks nuance, flexibility and the usual 'open book' accounts and verification processes usually found in Target Cost contracts; amendments should be considered if this pricing mechanism is adopted.



4. Indemnity and Liability Cap – The indemnity under NZS3910:2023 is now fault-based (7.1), which is a shift away from the wide-ranging indemnity provisions in NZS3910:2013. This, together with the new limitation of liability clause (7.2), means that NZS3910:2023 is comparable to other international standard-form contracts, and will stop parties introducing these amendments via the Special Conditions.

Special Conditions may still be required however, particularly to address the removal of the indemnity for losses arising out of the Principal's acts or omissions, or to exclude indirect and consequential losses.

Also potentially problematic is that the cap for liability can be the amount of insurance cover that a party has arranged under the Contract (7.2.3) even if the maximum aggregate liability recorded in 7.2.1 is less. Parties may seek to delete or amend this clause.



5. Engineer replaced with 'Contract Administrator' and 'Independent Certifier' – The dual role of the 'Engineer to the Contract' (who had to act at times as agent for the Principal, and other times independently fairly and impartially) has been split into the Contract Administrator (acting for the Principal: 6.2.1 in giving day-to-day Instructions and working to agree Variations, valuations and extensions of time with the Contractor) and the Independent Certifier (as independent and impartial decision maker: 6.2.2/6.2.3).

However, the same person can fulfil both roles (6.1.2). It has been suggested this option was included to facilitate smaller projects where having both a Contract Administrator and an Independent Certifier may not be economical. This said, there is nothing within the Guidelines or otherwise which demarcates when the same person should fulfil both roles. The only guidance given in the Guidelines is that if one person is nominated by the Principal to undertake both roles, this person should ensure and make it clear which role they are fulfilling at any given time.



6. Split Final Account / Final Payment Claim Process – A new final account process has been introduced (9.11) allowing the final Contract Price to be agreed collaboratively (9.11.7) and submitted to the Independent Certifier in two stages (both with sufficient detail to allow review and approval of each item (9.11.4)): (i) an Interim Final Account up to the date of Practical Completion (9.11.1(a)) and (ii) a Final Account within 20 Working Days after the Final Completion Certificate (9.11.1(b)). Both timeframes can be extended by the Independent Certifier. Agreement is crucial (9.11.7) but the Independent Certifier can step in and decide the Final Account where required (9.11.7).

Neither the Interim Final Account or Final Account may be payment claims or schedules under the CCA (9.11.8). It is only on receipt of an Instruction (9.11.7) either recording the agreed Final Account or the Independent Certifier deciding the Final Account that the Contractor submits the final payment claim (12.4.1). This mechanism is to allow space for agreement and negotiation without the pressures that may be imposed by the CCA's 'sudden death' payment regime.



7. Dispute Resolution Provisions – While parties may still refer disputes to the Independent Certifier for decision (6.4) this is no longer a precondition to formal dispute resolution (13).

Formal dispute resolution (13) requires initial good faith negotiation (13.1.1) after which parties can mediate or arbitrate. These provisions have been heavily stripped back and simplified effectively allowing parties to arbitrate at any stage. This avoids the situation that arose in *SRG Global Remedial Services (NZ) Ltd v Body Corporate 197281* [2022] NZCA 518 where arbitration was not available where an Engineer was *functus officio* and a formal decision could not be obtained.