

Legal update - Construction contracts makeover

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4 March 2014

The NZS3910 form of contract is well established and widely accepted in New Zealand in the construction, engineering and building industries as incorporating a reasonable balance of risk and obligation between the Contractor and the Principal. In a recent review of NZS3910:2003 Standards New Zealand considered hundreds of submissions and feedback from these industries provided over a two year period. The reviewing committee decided that the standard should be split into three tailored standards:

- NZS3910:2013 - Conditions of contract for building and civil engineering construction
- NZS3916:2013 - Conditions of contract for building and civil engineering - Design and construct
- NZS3917:2013 - Conditions of contract for building and civil engineering - Fixed term.

together superseding NZS3910:2003. In doing so, the reviewing committee wished to provide clearer, more comprehensive and user-friendly standards. This legal update provides a brief overview of some of the main changes.

NZS3910:2013 - Conditions of contract for building and civil engineering construction

This new edition, published on 1 October 2013, includes significant changes and improvements in the content and presentation of the document. Some of the changes include:

- Specific provisions have been added for 'cost reimbursement' contracts. These provisions provide much needed detail that did not previously exist. However, these provisions will not remove the need for the parties to elaborate on the costs that are reimbursable in the circumstances
- Mandatory provision for the Contractor to complete a programme for the Contract Works within 10 working days of the date of acceptance of the tender. No payment will be due to the Contractor until the programme has been provided. This change highlights the importance of the programme as a mechanism for managing the progress of the Contract Works
- The Principal can require the Contractor to provide a site specific safety plan and traffic management plan. These were previously only required on local authority contracts
- The Contractor may also be required to provide a quality plan (which replaces the quality management provisions) describing the quality requirements of the contract such as for the materials and workmanship, record keeping, inspection and testing to name a few
- The following schedules were added:
 - Schedule 13 - Form of Contractor (or SubContractor) Warranty
 - Schedule 14 - Agreement for Off-Site Materials
 - Schedule 15 - Practical Completion Certificate
 - Schedule 16 - Final Completion Certificate
- The form of Contractor warranty will need to be amended to ensure that the remedies for defects are appropriate for the circumstances (particularly, the Contractor's right to offer compensation in lieu of remedying a defect)
- The insurance provisions have been completely restructured to improve their ease of use:
 - the special conditions must now state the required insurances, the parties responsible to effect the insurances, and the amounts or values of the insurances

- the party taking out the cover is liable for the payment of the insurance deductibles except where cover is taken out by the Principal and the loss, damage or liability arising out of an act or omission of the Contractor, then the Contractor is liable for the full deductible (or the nominal deductible as stated in the special conditions)
- a new clause was added specifying the forces of nature to be included in the insurance arranged by either the Principal or the Contractor

We are likely to see standard amendments proffered by insurers though we think that the provisions have been drafted to address previous fixes

- The guidelines at the back of the form no longer have contractual status.

NZS3916:2013 - Conditions of contract for building and civil engineering – Design and construct

This completely new form of contract was published on 31 October 2013. Up until this date there was no form of contract for design and construction tailored to New Zealand law and practice. The new standard covers procurement where the Contractor is engaged to carry out both the design and the construction of the Contract Works. This form of contract differs from the NZS3910 in the following aspects:

- Addition of design responsibilities to the Contractor's obligations
- The contract shall either be a lump sum contract or a cost reimbursement contract only. In contrast with NZS3910 and NZS3917, there is no measure and value option (where the contract price is calculated according to the measured quantity of each item carried out at the rates set out in the schedule of prices)
- Instead of 'Specification and Drawings' in NZS3910, there are 'Principal's Requirements'. These include broad concepts of the design, include the purpose and performance requirements for the Contract Works and may include a preliminary design, drawings and/or specifications. These are described in the tender documents. The detail of the design is then developed by the Contractor
- An express statement in relation to the order of priority of the contractual documents though curiously this is still not contained in NZS3910
- The Contractor is responsible for locating, protecting and repairing (if damaged during the Contractor's operations) the underground utilities
- Where unacceptable conditions are imposed by public authorities in the licences for design or construction, the Principal has a right of termination

NZS3917:2013 - Conditions of contract for building and civil engineering - Fixed term

The new NZS3917 is the third standard based on NZS 3910:2003 and includes some of the content of Appendix C (Term Maintenance Contracts) of the NZS3910:2003 edition. This form of contract is intended to be used for all fixed term contracts, including works running for a defined period of time (and as such extensions of time do not arise). This is in contrast to contracts for a defined scope of work. Works may include maintenance or other building or engineering works, provision of services such as inspection and testing, cleaning, painting, preventative maintenance and repairs.

When defining the Contract Works, a clear description of nature of the services and which party has the exclusive right to provide such services to the Principal is required.

Other points to note:

- Due to the fixed term nature of this contract, late completion is not an issue and liquidated damages do not arise. However, liquidated damages can be provided for in the special conditions for certain obligations, for example, if maintenance work was not carried out by the required date or to the specified standard
- If applicable, performance payments may be paid as an adjustment to the contract price in respect of actual performance against performance indicators as specified in the contract
- In addition to preparing and submitting a programme after tender acceptance, the Contractor is also required to submit a programme to the engineer at regular intervals

- Given that work under NZS3917 involves maintenance work performed on existing structures, plant or utilities, the insurance provisions differ from NZS3910 in that new clause 8.9 provides for the Principal to arrange insurance for the replacement values of the existing structures or property (including the Principal's contents contained therein) and the structures or property in the vicinity. The words 'in the vicinity' are not defined and are left necessarily vague but are intended to cover situations where the other existing structures or property could be at risk from the Contract Works.

Our team will be happy to discuss with you how the new standards and the changes to them will affect your work.

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