

An improved construction contract for the Christchurch rebuild

NZS3910, the standard construction contract, will come in for heavy use in the Christchurch rebuild so the decision by Standards New Zealand to review and update it is timely.

The proposed changes are practical and will be generally beneficial but this is an important opportunity to get it right, so we urge you to engage in the consultation process.

Submissions close on 9 November 2012.

Key changes

The most significant proposals include:

- additional clauses (including standard amendments to the general conditions) when NZS3910 is used for design and construct contracts
- specific clauses dealing with programmes for completion of the Contract Works, including a new concept, the Comprehensive Programme
- similar provisions for the requirement of a Quality Plan for completing the work to the standards required by the Contract
- clarified provisions for the pricing of cost reimbursement contracts
- updated provisions for the obtaining of insurance by one or both parties
- substitution of "Defects Liability Period" with "Defects Notification Period" and "Defects Liability Certificate" with "Final Completion Certificate"
- provision for advanced notification by the parties of any matter likely to delay the Contract Works or materially increase their cost
- clarified provisions for notifying and valuing variations
- more streamlined processes for issuing payment schedules, and
- the inclusion of standard form agreements and deeds, including standard Contractor's warranties and an agreement in respect of off-site materials.

By and large, these changes are to be welcomed.

Design and construct projects

A new Appendix E in NZS3910 better equips the contract for design and construct projects and should remove the need for the heavy editing which is now required.

The new provisions go so far as to deal with the novation of design service agreements from the Principal to the Contractor (a standard form of novation deed is included for this purpose), the ownership and use of existing and newly created intellectual property and additional insurance requirements to be met by the Contractor.

Comprehensive Programmes and Quality Plans

The proposed amendments include the option to require a Comprehensive Programme, showing activity duration estimates, dependencies between activities, baseline early and late start dates and appropriate allowances for float.

The Contractor is then required to supply regular progress updates, either at contractually specified intervals or as required by the Engineer, detailing how actual progress is tracking against the Comprehensive Programme. The Engineer may require the Contractor to amend the programme as the project proceeds, in order to take account of the actual progress of the works.

A Quality Plan describing procedures for meeting the requirements of the Contract in respect of, among other things, materials and workmanship and the monitoring and maintaining of subcontractor performance may also be required. This should also specify standards for record-keeping, levels of documentation and auditing of the Quality Plan itself.

Both of these additions no doubt reflect what is happening on the better-managed construction projects in New Zealand. But in our experience, these features are not always present, and where present they are often the source of dispute over what is in fact required and how they are to be administered.

Their inclusion in the standard form provides a welcome opportunity for consensus on how these project management tools are to be effectively implemented and maintained.

Defects Notification Period

Replacing "Defects Liability Period" with "Defects Notification Period" and "Defects Liability Certificate" with "Final Completion Certificate" (as used in other standard forms – such as FIDIC), while largely semantic, is also sensible.

These new terms will help dispel a common (and sometimes self-serving) misconception that the "Defects Liability Period" limits the liability of the Contractor to remedy defects and that his liability ceases on the issue of the "Defects Liability Certificate".

Early notification of problems

The addition of an explicit obligation on both the Contractor and the Engineer to notify each other as soon as either becomes aware of any matter which is likely to materially alter the Contract Price, materially delay completion of the Contract Works, or result in a breach of statutory duty in connection with the Contract Works is also good.

Both parties are then entitled to require the other to meet in order to explore proposals for avoiding or minimising the effect of the notified matter. If the Contractor does not notify such a matter, any subsequent variation will be priced on a basis that excludes any increase in cost or time which could have been avoided by prompt notification. This is potentially implicit in the current version, but making it express will incentivise early communication.

Again, this is no doubt a feature of best practice adopted on many sites. But it is positive to see it included in the standard form. Early notification of potentially adverse circumstances is always calculated to minimise the possibility that those circumstances will derail the project as a whole.

Other changes

The changes to the Variation provisions, particularly the valuation of Variations, should make these processes clearer and easier to apply.

Likewise, the process for issuing payment schedules under the Contract has been simplified to avoid the need for both a separate provisional payment schedule and a progress payment schedule each time a payment claim is submitted. Now, a progress payment schedule issued by the Engineer, while initially provisional, will become the progress payment schedule unless the Principal notifies the Engineer of any amendments or deductions.

The inclusion of the standard form agreements and deeds that were previously omitted (in particular the standard Contractor's warranties and agreement in respect of off-site materials) is useful to "plug the gaps" in the Contract that, in the absence of specific consideration by the parties, may otherwise be unfilled.

These are only some of the many changes proposed by the Standards Committee, though in our view they are the most significant. A number of the other changes are also aimed at clarifying the meaning of the standard form, or simplifying the procedures it requires.

New Zealand is about to enter an intense phase of construction activity, particularly in Canterbury. Project management resources will be constrained, and contractors and subcontractors will be under pressure to manage projects effectively and efficiently. In these circumstances a clear, well drafted and well understood standard form contract will be a substantial aid to the smooth running of projects and the avoidance of disputes.

We urge anyone with comments on the proposed amendments, whether positive or negative, to make these known to the Standards Committee prior to submission date.

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