

The New Standard Construction Contracts: NZS3910, 3916 and 3917

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Introduction

- Standards New Zealand has recently completed the first review of NZS3910:2003 in ten years
- As well as revamping NZS3910, two new construction standards have been produced which are both based on the revamped NZS3910, being:
 - NZS3916 conditions of contract for building and civil engineering – design and construct
 - NZS3917 conditions of contract for building and civil engineering – fixed term

Ground covered

- 3910: Key changes
- 3916: Key differences to 3910
- 3917: Key differences to 3910
- Concluding remarks



The New NZS3910 Build-Only Contract

The New NZS3910 - Build-Only Contract

Introduction

- The contract is the product of what was described as a 'limited technical review', which belies the amount of significant changes and new features
- Many of the changes reflect what would typically have been included by Principals in their Special Conditions of Contract, prompted by feedback from the market
- As a result, 3910 is now more in line with the market. It is also more comprehensive and user-friendly

The New NZS3910 - Build-Only Contract

Summary of key changes

Key change	More important	Less important
Structure: Contract Agreement at front		•
More comprehensive: revamped Schedule 1	•	
Clarification that the Guidelines do not form part of the contract		•
'Beefed-up' cost reimbursement provisions	•	
New assignment provisions		•
Revised Contractor bond provisions	•	
Revised Principal bond provisions		•
New programming provisions	•	

The New NZS3910 - Build-Only Contract

Summary of key changes

Key change	More important	Less important
Revised unforeseen licence/ consent condition provisions		•
Revised safety, quality and traffic management plan provisions	•	
New advance notification provisions ('early warning' notices)	•	
Clarification of the effect of Engineer review, approvals etc		•
Clarification on extent of Contractor indemnity		•
Revised insurance provisions	•	
New "Defects Notification Period" and "Final Completion Certificate" terminology		•
Revised Variation provisions	•	
New time and money for Principal default provision	•	

The New NZS3910 - Build-Only Contract

Summary of key changes

Key change	More important	Less important
New Contractor/ Subcontractor Warranty Agreement provisions	•	
Revised payment provisions		•
New Provisional Item provisions		•
New Off-Site Materials Agreement provisions	•	
Termination regime anomaly rectified		•
Revised dispute resolution provisions		•
Revised notice provisions		•
Revised Conditions of Tendering		•

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Key changes

STRUCTURE

- The Contract Agreement is now at the front of the document, which is logical given the way the contract is typically compiled for signing



The New NZS3910 - Build-Only Contract

Key changes

MORE COMPREHENSIVE

- Schedule 1 – previously known as the First Schedule and which contains the “Specific Conditions of Contract” – is now more comprehensive. For instance, it captures matters that may otherwise have been left to be addressed in another part of the contract documentation (so it lessens the risk of such items not being properly addressed in the contract) such as:
 - description of any Separable Portions
 - description of Separate Contractors and site facilities to be used by Separate Contractors; and
 - licences/ consents for which the Principal is not responsible for obtaining (similar for the Contractor)

The New NZS3910 - Build-Only Contract

Key changes

GUIDELINES (CLAUSE 1.3.8)

- It has been clarified that the Guidelines – appearing at the back of the document – do not form part of the contract
- Instead they are to help users understand the principles behind various substantive clauses



The New NZS3910 - Build-Only Contract

Key changes

COST REIMBURSEMENT CONTRACTS (CLAUSE 2.4)

- More definition has been included for cost reimbursable contracts
- For instance:
 - the Contract Price is calculated by applying agreed rates, or, to the extent there are no such rates, on a Net Cost plus overhead and margin basis (previously it was simply on a 'Cost plus' basis)
 - the Contractor is not entitled to recover certain costs e.g. costs that are not justified or not reasonably and actually incurred, cost incurred due to default of the Contractor; and
 - the Contractor may be required to give an upfront indicative estimate of the Contract Price and provide updates to the same along the way
- The lump sum and measure and value pricing options remain in the document

The New NZS3910 - Build-Only Contract

Key changes

ASSIGNMENT (CLAUSE 2.9)

- Neither party can assign without the prior written consent of the other party (not to be unreasonably withheld or delayed)
- The 2003 version is silent on assignment

The New NZS3910 - Build-Only Contract

Key changes

CONTRACTOR'S BOND (CLAUSE 3.1)

- New provisions have been inserted. For instance:
 - prohibiting the Principal from calling on the bond where:
 - the Contractor has carried out and fulfilled all its obligations up until Practical Completion
 - the Contractor has paid the Principal any damages sustained by the Principal for all defaults by the Contractor up until Practical Completion; or
 - a Practical Completion Certificate for the whole of the Contract Works has been issued

[Note that the above provisions have effectively been relocated from the form of Contractor's bond. This arguably weakens the Principal's position.]

- prohibiting an expiry date in the bond unless agreed by the Principal (in which case there is a 'replenish' mechanism if the bond is going to expire before Practical Completion)

The New NZS3910 - Build-Only Contract

Key changes

CONTRACTOR'S BOND (CLAUSE 3.1)

- There is potential for some confusion around the release of the Contractor's bond: in clause 3.1.7 the Principal is obliged to release and return the bond to the Contractor soon after Practical Completion, but clause 3.1.9 seems to envisage the Principal being able to retain the bond should the Principal contend that the Contractor has outstanding performance obligations (unless the Contractor provides a replacement bond in respect of such obligations)
- Note that the form of the Contractor's performance bond is still not robust from a Principal's perspective (it is not an on-demand bond)

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Key changes

PRINCIPAL'S BOND (CLAUSE 3.2)

- New provisions have been inserted. For instance:
 - prohibiting the Contractor from calling on the bond where the Principal has paid the Contract Price and all other amounts payable to the Contractor

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Key changes

PROGRAMME (CLAUSE 5.10) ◆

- The Principal can elect to require the Contractor to provide and update from time to time a “Comprehensive Programme” (in both hard and soft copy format)
- Comprehensive Programmes are to contain information on matters such as:
 - sequencing
 - commencement and completion dates for activities
 - critical path network analysis
 - dates by which the Contractor reasonably requires materials, services or work to be provided by the Principal, the Engineer or any Separate Contractor; and
 - any other specified requirements of the Principal (which could include, for instance, identifying float)

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Key changes

PROGRAMME (CLAUSE 5.10)

- A Comprehensive Programme will allow the parties and the Engineer to better monitor and evaluate progress including the impact of Variations and interface issues with Separate Contractors and may be useful to the Engineer in assessing delay and/ or extension of time claims
- It is worth noting that the Contractor is not entitled to any payment until it has submitted the required programme to the Engineer

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Key changes

UNFORESEEN LICENCE/ CONSENT CONDITIONS (CLAUSE 5.11)

- It appears that the Variation ground for dealing with unforeseen licence/ consent conditions has been narrowed slightly:
 - under the 2013 version the Contractor may be entitled to a Variation for unforeseen conditions that attach to licences/ consents for which the Principal is responsible to obtain or otherwise where they affect the design or Specifications; whereas
 - under the 2003 version the Contractor may be entitled to a Variation if any unforeseen conditions – whether attaching to licences/ consents for which the Principal or the Contractor is responsible – affect the carrying out of the Contract Works

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Key changes

SAFETY, QUALITY AND TRAFFIC MANAGEMENT (CLAUSES 5.17, 5.18 AND 5.19) ◆

- New and improved provisions have been inserted which allow the Principal to require the Contractor to deliver, for the review and approval of the Engineer, project specific safety, quality assurance and traffic management plans
- The inclusion of the specific requirements for each type of plan in the new form will promote a more consistent approach across the construction industry



The New NZS3910 - Build-Only Contract

Key changes

ADVANCE NOTIFICATION (CLAUSE 5.21)

- The Contractor and the Engineer are to notify each other as soon as either of them become aware of any matter that is likely to:
 - materially alter the Contract Price
 - materially delay completion of the Contract Works; or
 - result in a breach of a statutory duty in connection with the Contract Works
- If the Contractor fails to provide such notice, the value of any corresponding Variation could be reduced: the Variation is to be valued as if notification had been given and that notification might reasonably have resulted in the impact of the matter being avoided or reduced. This will encourage the Contractor to promptly communicate important matters

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Key changes

REVIEW, INSPECTION, ACCEPTANCE OR APPROVAL BY THE ENGINEER (CLAUSE 6.2.5)

- It has been clarified that such matters do not relieve the Contractor from any obligation or liability under the contract



The New NZS3910 - Build-Only Contract

Key changes

INDEMNITY (CLAUSE 7.1.2(D))

- It has been clarified that the Contractor's indemnities to the Principal in clause 7.1.1 (in respect of loss suffered by the Principal arising out of the construction of the Contract Works or injuries to people or damage to property) do not apply in respect of the 'excepted risks' set out in clause 5.6.6
- Arguably this was always intended to be the case under the 2003 version

The New NZS3910 - Build-Only Contract

Key changes

INSURANCE (CLAUSE 8)

- The insurance provisions have essentially been re-written to bring them more into line with the market and to be more comprehensive and user-friendly
- For instance:
 - Specific forces of nature to be covered by the construction 'all risks' policy are to be listed in the Specific Conditions of Contract. This removes an anomaly in the 2003 version which permitted the Contractor to exclude from the construction 'all risks' policy – where it was required to take out such insurance – certain forces of nature. In addition, such 'covered' forces of nature do not amount to an 'excepted risk' under clause 5.6.6 (refer to clause 5.6.6(f))

The New NZS3910 - Build-Only Contract

Key changes

INSURANCE (CLAUSE 8)

- More detail is to be recorded in the contract on any Principal arranged insurances such as extraordinary exclusions and conditions and the level of deductibles (the Principal pays these except where the loss or damage was caused by the Contractor). This will be welcomed by Contractors, given that Contractors are often heavily reliant on insurance arranged by the Principal
- Given the large number of changes, many Principals and Contractors will seek input from their insurance advisers on the new provisions

The New NZS3910 - Build-Only Contract

Key changes

DEFECTS NOTIFICATION PERIOD/ FINAL COMPLETION CERTIFICATE (CLAUSE 11)

- These terms replace “Defects Liability Period” and “Defects Liability Certificate”, respectively
- These changes are aimed at reducing confusion: at law, a Contractor’s liability for defects does not necessarily end upon expiry of the “Defects Liability Period” or issue of the “Defects Liability Certificate”



The New NZS3910 - Build-Only Contract

Key changes

DEFECTS NOTIFICATION PERIOD/ FINAL COMPLETION CERTIFICATE (CLAUSE 11)

- Further, the Contractor effectively has a 10 working day period in which to remedy defects during the Defects Notification Period (as opposed to a “reasonable time” in the 2003 version), otherwise the Principal may carry out the remedial works at the reasonable cost of the Contractor



The New NZS3910 - Build-Only Contract

Key changes

DEFECTS NOTIFICATION PERIOD/ FINAL COMPLETION CERTIFICATE (CLAUSE 11)

- Clause 6.5 has also been 'beefed up' to require the Contractor to rectify defects within a more defined time period, failing which the Principal may carry out the make good work and recover the reasonable cost of doing so from the Contractor



The New NZS3910 - Build-Only Contract

Key changes

DEFECTS NOTIFICATION PERIOD/ FINAL COMPLETION CERTIFICATE (CLAUSE 11)

- Clause 6.5 is interesting as it covers defects that are already covered by clause 11 (as well as other defects), so the Principal appears to have multiple remedies for defects that are discovered during the Defects Notification Period (this is also the case under the 2003 version)
- Forms of Practical Completion Certificate and Final Completion Certificate have been included in Schedules 15 and 16, respectively



The New NZS3910 - Build-Only Contract

Key changes

VARIATIONS (CLAUSE 9)

- There is still no formal process for the Principal or the Engineer to request the Contractor to quote a price for a Variation before it is instructed



The New NZS3910 - Build-Only Contract

Key changes

VARIATIONS (CLAUSE 9)

- The Engineer is now obliged to give notice either confirming a Variation or disallowing a Variation, in response to a notice from the Contractor that it believes a matter amounts to a Variation
- The procedure for valuing Variations – by applying agreed rates, or, to the extent there are no such rates, on a Net Cost plus overhead and margin basis – has been simplified. However, it is still not particularly straight-forward



The New NZS3910 - Build-Only Contract

Key changes

TIME AND MONEY FOR PRINCIPAL DEFAULT (CLAUSES 10.3.1(G) AND 10.3.7) ◆

- The Contractor now has an express entitlement to claim an extension of time and associated time-related cost for default by the Principal or any other person/ entity for whose acts or omissions the Principal is responsible



The New NZS3910 - Build-Only Contract

Key changes

CONTRACTOR/ SUBCONTRACTOR WARRANTY AGREEMENT (CLAUSE 11.5 AND SCHEDULE 13) ◆

- A basic form of Contractor/ Subcontractor Warranty Agreement has been included to enable the Principal to require specified work, materials or equipment to be subject to an extended or additional warranty period. Of note it does not include a continuity guarantee from the Subcontractor for the benefit of the Principal, and the Contractor does not 'back-stop' the obligations of the Subcontractor
- Clause 11.6 also gives the Principal the ability to specify that the Contractor must deliver further guarantees. These could include, for instance, a weathertightness warranty/guarantee or 'business as usual' warranties/guarantees (no forms are provided in the document for these)

The New NZS3910 - Build-Only Contract

Key changes

PAYMENT (CLAUSE 12)

- The procedure for issuing payment schedules has been streamlined in clause 12.2. In particular, if the Principal does not have any comments on a payment schedule issued by the Engineer, that payment schedule will apply without having to be re-issued by the Engineer
- The final payment claim/ final payment schedule procedures in clauses 12.4 and 12.5 have been 'fleshed out'.
For instance:
 - the Contractor's final payment claim is now expressly stated as being the final payment claim of the Contractor; and
 - a time limit has been placed on the issue of the final (35 working days) and provisional (20 working days) payment schedules by the Engineer

The New NZS3910 - Build-Only Contract

Key changes

PAYMENT (CLAUSE 12)

- There is provision for election on whether payment schedules are to be issued by the Engineer as GST invoices or whether separate GST invoices are required
- The default interest rate – payable by the Principal for late payment – has changed to 1.5 times the monthly small-to-medium sized enterprise overdraft rate published by the Reserve Bank of New Zealand, currently (as at early February 2014) equating to a bit under 15% (the rate under the 2003 version was 1.25 times the rate payable by the Contractor for its overdraft facilities)

The New NZS3910 - Build-Only Contract

Key changes

PROVISIONAL ITEMS (CLAUSE 12.10)

- A new concept of Provisional Items has been inserted, being individual elements of work with agreed rates but where the quantum of the work required is not known
- Provisional Items are to be carried out only on the instruction of the Engineer (similar to Provisional Sums in this regard) and are to be valued by applying the said rates to the actual measured quantities. Provisional Sums, on the other hand, are valued as Variations

The New NZS3910 - Build-Only Contract

Key changes

OFF-SITE MATERIALS AGREEMENT (CLAUSE 12.1.3(B)(IV) AND SCHEDULE 14)

- A basic form of Off-Site Materials Agreement has been included to enable the Principal to require the Agreement to be delivered as a pre-condition to paying the Contractor for off-site materials (should the Principal agree to such payments). There are some issues with the form – for instance, there is some ambiguity as to whether or not the Principal takes full ownership of the materials

The New NZS3910 - Build-Only Contract

Key changes

OFF-SITE MATERIALS AGREEMENT (CLAUSE 12.1.3(B)(IV) AND SCHEDULE 14)

- The key drivers behind such an Agreement are to ensure that the Principal purchases the materials free of any security interests existing in the materials prior to the Principal's payment being made, and that title passes to the Principal and the Principal remains the absolute owner of the materials so that in any receivership (or similar) of the Contractor or any Subcontractor, the materials do not form part of the Contractor's/ Subcontractor's assets

The New NZS3910 - Build-Only Contract

Key changes

DISPUTES (CLAUSE 13)

- Clause 13.1.1 has been amended to make it clear that every decision, valuation or certificate of the Engineer (excluding relating to progress payment schedules) is final and binding if neither party has referred it to the Engineer or to Adjudication within 3 months after it has been given
- This is a useful clarification

The New NZS3910 - Build-Only Contract

Key changes

TERMINATION REGIME ANOMALY RECTIFIED (CLAUSE 14.2.5)

- A cross reference error has been rectified in clause 14.2.5. This is a significant 'fix' as the error caused confusion and complexity as to the Principal's rights in the event of it terminating the contract due to Contractor insolvency



The New NZS3910 - Build-Only Contract

Key changes

NOTICES (CLAUSE 15)

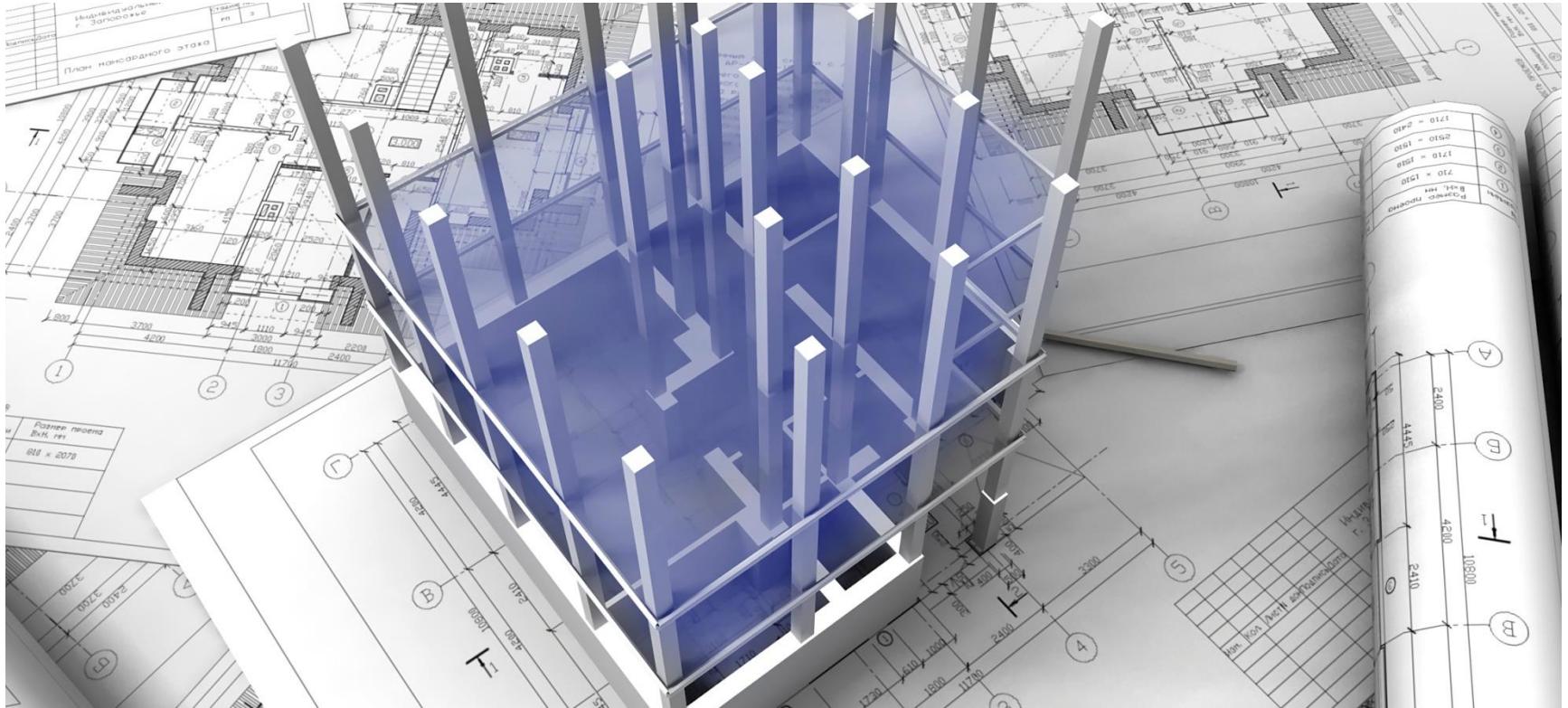
- The notice provisions have been 'beefed up'. For instance:
 - the parties can agree to serve notices by way of email; and
 - notices served on a day other than a working day or after 5pm on a working day will take effect on the next working day

The New NZS3910 - Build-Only Contract

Key changes

CONDITIONS OF TENDERING (THESE APPEAR AFTER THE SCHEDULES)

- A number of changes have been made to the Conditions of Tendering forming part of 3910. For example, provision has been included to enable the Principal to include tender evaluation criteria
- Of note to Principals, the Conditions of Tendering still do not provide protection for Principals from potential liability in respect of process contracts



NZS3916:2013 Design and Build Variant

NZS3916 - Design and Build Contract

Introduction

- On the whole, NZS3916:2013 closely follows NZS3910:2013, with the exception that it moves the responsibility for design from the Principal to the Contractor
- Thus, NZS3916:2013 is a design and build contract, whereas NZS3910:2013 is essentially a build-only contract
- Traditionally, Developers procuring on a design and build basis have had to make considerable amendments to NZS3910 in order to 'convert' it into a design and build contract. NZS3916 offers Developers a better starting position for their design and build contracts

NZS3916 - Design and Build Contract

Introduction continued

- The key upsides to a Developer of procuring on a design and build basis are that, generally speaking:
 - the Contractor cannot 'hide' behind design prepared by the Developer i.e. the Contractor has 'single point responsibility' for the delivery of the project; and
 - the project can be 'fast-tracked' as the Contractor is in control of both the design and construction
- The main downsides are that:
 - the Developer loses a significant amount of control over the design (noting that the interests of the Contractor and the Principal in design development can often conflict); and
 - the Contractor will typically include a price premium for taking on design risk

NZS3916 - Design and Build Contract

Key differences to NZS3910:2013

- These are as follows:
 - Rather than traditional Principal (being the Developer) supplied specifications and drawings, there are “Principal’s Requirements”. From the Principal’s perspective, it will be important to ensure that the Principal’s Requirements are robust, as they will effectively set the bar in terms of design and specification
 - The Contractor develops and completes the design from the Principal’s Requirements
 - The Engineer (being the contract administrator) has the opportunity to review the design and, to the extent that the design does not comply with the Principal’s Requirements or the contract, reject the design
 - The Contractor generally accepts responsibility for any prior design prepared by the Principal

NZS3916 - Design and Build Contract

Key differences to NZS3910:2013 continued

- Provisions have been included to allow the Principal to transfer (novate) any agreements it has with design consultants to the Contractor:
 - Privity of contract with the design consultants will typically give the Contractor more comfort as if problems arise with design it may have contractual recourse against the design consultant to help off-set liability in this regard to the Principal
 - A basic form of deed of novation has been included in this regard. Of note it does not include warranties nor a continuity guarantee from the consultant for the benefit of the Principal, and nor does it place restrictions on the ability of the consultant and the Contractor to amend or terminate the consultant agreement – things which Principals typically look for

NZS3916 - Design and Build Contract

Key differences to NZS3910:2013 continued

- The Contractor is responsible for obtaining all consents necessary for design and construction
- Where the conditions attaching to such consents are unacceptable to the Principal, the Principal can terminate the contract (in which case the 'termination for frustration' provisions in clause 14.1.2 apply)
- The contract strengthens the intellectual property provisions, with the Contractor's design for the project being jointly owned by both parties
- Unlike NZS3910:2013, NZS3916:2013 does not contain a Variation ground for extra work in dealing with unidentified utilities or utilities in the 'wrong' place



NZS3917:2013 Fixed Term Variant

NZS3917 - Fixed Term Contract

Introduction

- NZS3917:2013 is also based on NZS3910:2013
- As the name implies, NZS3917:2013 is designed for use where the contract is intended to operate over a defined period of time e.g. 1 year, rather than until a defined scope of work has been completed
- It could, for instance, be used for repair, maintenance or renewal works
- It essentially replaces Appendix C to NZS3910:2003 (Term Maintenance Contracts)

NZS3917 - Fixed Term Contract

Key differences to NZS 3910:2013

- There are a significant number of departures from NZS3910:2013 in NZS3917:2013, such as:
 - There is a Contract Works Period, which has a commencement date and an expiry date (as opposed to a regime under which defined works have to be completed by a due date for completion)
 - Accordingly, there is no extension of time regime. Interestingly, liquidated damages can still be applied for Contractor delay or any other Contractor failure should this be specified in the Specific Conditions of Contract

NZS3917 - Fixed Term Contract

Key differences to NZS 3910:2013 continued

- The Contractor is entitled to occupy the site on a non-exclusive basis to perform the works, as opposed to it being given “possession” of the site under NZS3910:2013. This recognises that the Principal is likely to be using the site for its day-to-day operations. The Principal may also require Separate Contractors to have sole occupancy of portions of the site, to the exclusion of the Contractor, which is to be treated as a Variation
- There is no “Comprehensive Programme” regime (being a regime under which the Contractor has to provide a detailed programme for the execution of the works) although the Contractor is required to provide a basic programme and there is flexibility for the Principal to require a detailed programme

NZS3917 - Fixed Term Contract

Key differences to NZS 3910:2013 continued

- There is no “Defects Notification Period” regime (being a regime under which the Contractor has to rectify defects attributable to it for a defined period following completion). The Contractor is obliged, however, to rectify defects attributable to it that may arise prior to the expiry of the contract period
- Once work is complete and capable of use by the Principal, the Contractor is generally no longer responsible for the care of that work (as opposed to the Contractor generally being responsible for the care of the works until completion of all of the works or completion of the applicable “Separable Portion”)
- Note that a number of the above departures are, in effect, captured in Appendix C to NZS3910:2003, so they are not really new changes



Concluding remarks

Concluding remarks

- This review has delivered significant gains
- NZS3910:2013 is an improvement on its predecessor document – being more in line with the market, more user-friendly and more comprehensive
- NZS3916 offers Developers a better base contract for design and construct procurement
- NZS3917 offers a base contract for fixed term works

Concluding remarks

- However, as with all standard documents, discerning Developers will still want to customise them to reflect their specific needs and risk appetite
- We are confident that the new forms will be widely used in the New Zealand construction industry and that, over time, Developers will base their template or 'in-house' NZS construction contracts on the new forms
- We would now expect NZS3915:2005 – which is similar to NZS3910:2003 except that a Principal's Representative administers the contract instead of an independent Engineer – to be revised to capture the changes in NZS3910:2013