

## The refurbished NZS 3910 – What's new?

### NZS 3910:2023 is a major update from the 2013 edition, here's what you need to know

The revised NZS 3910 has been unanimously approved by all 23 committee members, including Lauren Whitehead of Anderson Lloyd, and is scheduled to be published in December 2023.

New Zealand's most prevalent construction contract has been under review ever since a 2018 Infrastructure New Zealand report recognised significant issues with the contract, particularly on major infrastructure projects. These issues, and an overwhelming consensus in the construction sector that the 2013 edition of the contract was overdue for an overhaul, prompted a comprehensive review with the aims of reducing the need for special conditions, fairly allocating risk, and encouraging collaboration between the parties.

#### Project management and decision-making have been reviewed

##### Engineers and the Engineers' Representatives have been replaced by Independent Certifiers and Contract Administrators

The Engineer's traditional dual role has been split, in recognition of the concern voiced by parts of the industry about a perceived lack of independence and the balancing challenges that had been inherent in the role. Under the new Contract:

- the Contract Administrator (**CA**) acts for and on behalf of the Principal in giving Instructions to the Contractor, and
- the Independent Certifier (**IC**) acts fairly, impartially and independently in making Decisions. However, there are still situations when the IC will be authorised to act purely as the Principal's agent (for example, when issuing payment schedules).

However, regardless of the newly split role, the CA and IC are allowed to be the same person, which will make sense for many projects.

##### Advisers are expressly permitted

Recognising other roles commonly involved in projects, such as designers, quantity surveyors, and specialist programmers, the new Contract expressly permits the Principal to engage Advisers and that those Advisers may advise the CA or IC. However, those Advisers have no authority to issue Instructions or make Decisions.

##### There is a new distinction between Instructions and Decisions, and a process for reviewing each

Instructions (e.g. design changes and administrative exercises for the CA) are now distinguished from Decisions (e.g. valuing variations, considering extensions of time and other assessments by the IC). The Contract also sets out factors that the IC may consider when making a Decision, and requires written reasons for those Decisions.

A review process is set out for both Instructions and Decisions, potentially culminating in a Final Decision. However, unlike in the previous edition, the Contract does not provide a time-bar for undisputed Final Decisions.

##### There are two new ways to price a project

In addition to the classic lump sum, measure and value, and cost reimbursement options, the new Contract includes two new ways to price projects.

**Target Contract Price:** The parties can agree a target price and share in the cost overruns or savings.

**Mixed Contract Price:** It's not uncommon for projects to mix-and-match pricing elements, with some pricing fixed and other elements to be based on actual quantities. The new Contract expressly recognises that mix-and-match approach.

##### Variations have varied

Variations and pricing, including Cost fluctuations, Provisional Sums, Provisional Items and Prime Cost Sums, have been brought under one section. There is also greater emphasis on promoting agreement

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between the Contractor and the CA on the valuation of Variations.

### Final Accounts have been reopened

The Contract has introduced Interim Final Account and Final Account processes, allowing the Contractor to amend the Contract Price after Practical Completion to include subsequent Variations or Instructions.

The Final Account will be agreed as far as possible or, if not, decided by the IC. The Contractor will then submit a final payment claim.

### Contractor obligations have evolved

**Design responsibilities:** Even when it is not a design and build contract, Contractors often do some design, so the Contract now incorporates prompts to better identify the extent of Contractor design obligations.

**Health and Safety:** The new Contract now aligns with the Health and Safety at Work Act 2015.

**Management plans and reporting:** The Contract has collated the sections on management plans, albeit with particular requirements for Site-specific safety plans, including a new prompt for a Sustainability Plan and a placeholder for any other required plans.

**Protection of the environment:** There is a new and specific focus on the Contractor taking practicable steps to ensure no act or omission discharges contaminants into the environment, causes any adverse effect on the environment or exceeds any boundary noise levels.

### Contractor liabilities may be limited

There is now an option to cap the Contractor's overall liability to an agreed amount, subject to specified exceptions. In addition, the Contractor's indemnities are now expressly fault-based. This significantly narrows the Contractor's overall exposure.

### Dispute resolution has been streamlined

There is a new emphasis on endeavouring to resolve disputes between the parties by negotiation in good faith. If that is unsuccessful, the processes for

referring the matter to mediation and arbitration have been simplified.

### Both parties to communicate

The early warning requirement, previously described as advance notification, has been expanded to include the Principal, not just the Contractor. Now each party must give notice in writing as soon as it becomes aware of any matter which is likely to materially alter the Contract Price, delay completion of the Contract Works or result in a statutory breach.

### 3910 has been modernised and is now more user-friendly

The Contract has been modernised to use straightforward, consistent, and gender-neutral plain language throughout. Further, the terminology has been aligned with common industry language:

- On-site Overheads are now called Preliminary & General (or P&G); and
- Off-site Overheads and Profit are now called Margin.

### How can you prepare for these changes?

- Existing practices and assumptions may not align with the new Contract, and could trip up regular users. It's important to get familiar with the new Contract, which may require some retraining.
- Old templates will not easily slot into the new structure, so it may be worth reviewing templates and risk positions before the next time-critical project arises.

If you have any questions about the new NZS 3910:2023, or if you'd like some guidance on preparing and using it on your projects, please contact [Lauren Whitehead](#), [Anton Trixl](#) or [Steve O'Dea](#) in our specialist [Projects Team](#).