

UPDATE

DATE	30/09/2022
TO	P3910 Committee and nominating organisations
FROM	David Wilkie, Chair – P3910 Conditions of contract committee
SUBJECT	Update on the revision of NZS 3910

PURPOSE OF THIS UPDATE

The committee revising NZS 3910 has had seven meetings to date. The seventh committee meeting was a two-day, in-person meeting, which was held in Wellington. Due to the ongoing disruption of COVID-19, some committee members attended virtually.

This progress update will be circulated to the committee members, who are encouraged to inform their nominating organisation.

It needs to be noted that committee deliberations are confidential. This is to ensure, among other things, that committee members are not subjected to undue pressure and that assumptions are not made by members of the public as to what may be published.

Nominating organisations are also encouraged to provide feedback to their committee member(s) on any proposed changes.

COMPLETED & UPCOMING MILESTONES

The following milestones have been completed:

1. Initiation phase – completed February 2022
2. Development phase:
 1. Committee meeting 1: Kick-off meeting completed February
 2. Committee meeting 2: Completed April (2-hour online meeting)
 3. Committee meeting 3: Completed May (2-day in-person meeting)
 4. Committee meeting 4: Completed June (3-hour online meeting)
 5. Committee meeting 5: Completed July (2-day in-person meeting)
 6. Committee meeting 6: Completed August (3-hour online meeting)
 7. Committee meeting 7: Completed September (2-day in-person meeting)

Upcoming meetings:

1. Committee meeting 8: October ((3-hour online meeting)
2. Committee meeting 9: November (3-hour online meeting)
3. Committee meeting 10: November (2-day in-person meeting in Auckland)

SUMMARY OF MEETING 7 – KEY POINTS

The P3910 committee convened in Wellington on September 6 & 7 for a two-day in-person meeting. Twenty-one committee members attended the meeting with some members joining online. Five committee members were excused due to sickness or annual leave. One person stepped in to replace a committee member while on annual leave.

Key points discussed

1. Interim review

The committee reached consensus on the content of the interim document. This guidance and advice document will be published as recommended *Special Conditions* and is due to be published in the first week of October 2022. The document will be freely available from Standard New Zealand's web shop.

The following topics are covered:

- legislative updates
- Health and Safety at Work Act 2015
- Indemnity and Liability Limit
- Advance Notification

2. The role of the Engineer to the Contract (ETC)

The role of the ETC is one of the core topics for review and has been subject of considerable debate by the working group (WG) and full committee.

As mentioned in the last update the committee has progressed to split and improve the definition of the ETC role, and do away with the role of the Engineer's Representative ([refer to Chair update 3](#) for further information).

In addition to refining the roles and contract drafting, the committee decided on new names for the 'fair and impartial' role and the 'directive' roles and corresponding verbs to better clarify the meaning and execution of each role within the contract. These names are placeholders and will be trialled during the remainder of the revision. We anticipate a high level of discussion and debate from the sector on these names when the draft standard is released for comment.

3. Contract Agreement

The following topics were discussed:

- Contract agreement (including order of precedence)
- Interpretation (Section 1) (clarifications)
- The Contract (Section 2)
- Bonds (Section 3)
- Indemnity and Insurance (Sections 7 & 8)

Great progress was made, but there remain some outstanding points that require further discussion. Work on the insurance section will be continued after further advice has been received from the insurance experts.

4. Obligation (section 5)

The following topics were discussed with general alignment around most, with some further definition and debate on others:

- Contractor's Responsibility for Design: The WG is task to remove ambiguity and improving transparency on Contractor's design responsibilities.
- Health and Safety: The WG will liaise with Construction Health and Safety New Zealand so that relevant information is provided in the Standard without repeating the legislation.
- Compliance with laws and consents.
- Environmental: The WG will address requirements for environmental plans.
- Payments: The committee discussed the term 'principal deductions' which causes ambiguity in the industry and agreed to clarify the term.
 - ✓ Clarify relationship between Principal's deductions and payment schedules
 - ✓ Clarify timing of GST Invoice where supplied by Contractor
 - ✓ Explore options to achieve earlier final payment claim/ final account
 - ✓ Identify changes if any to align with impending CCA retention regime changes (Amendment Bill is presently at second reading stage)

5. Appointment of Advisers

The issues of appointment and engagement of Advisers was discussed. The committee agreed that the Advisers should be nominated by the Principal.

6. Extension of Time, Variations Costs and Liquidated Damages

The following topics were discussed:

- Concurrent delay: It is acknowledged that this is an issue upon which the new standard needs to provide greater clarity. There is still work to be done as to which principles to apply to the contract, and how best to address this in the draft standard.
- Time bars: Agreement was reached that no hard time bars will be introduced, and that the revision of drafting should balance the obligations and remedies in relation to notices.
- Accelerations and Expedition: The question was raised whether there is a need to include an expedition clause as it is currently not in the 3910 but often added. The committee will progress the development of an expedition clause.
- Variation cost calculation and processing cost: The working group is progressing improvements to the contract to provide additional clarity around common areas of difference.
- Liquidated Damages (LD): The committee discussed LD values and caps, and responsibilities for programme management. The working group was asked to take this topic back to their nominating organisations for feedback before the committee could finalise these topics.

7. Technology

The format of the document was discussed in detail during the scoping workshop in March 2021.

The industry specified that the contract should:

- be available in hard copy and printable electronic form and be able to be completed online by licenced users using an intelligent interface.
- be produced in such a form that special conditions, when properly inserted by a user, will appear as tracked changes within the body of the text.

The Standards New Zealand's Digital Advisor joined the meeting to understand how the committee would like to interact with the General Conditions and the Schedules. The different options (e.g. tracked – changes and licensing agreements) were explored.

The decision was made to set up a workshop to discuss the options more in depth. Lawhawk (Legal Automation Specialists), Standards New Zealand's Senior Digital Advisor, committee members and technical experts will be invited to attend this workshop. A workshop debrief will be provided to the committee.

8. Plain language

The committee was asked to read and follow the plain language guidelines when holding the pen. When following these universally applicable language rules we will ensure that the revised NZS 3910 is easily understood by all users of the contract.

9. In conclusion

The committee continues to make very good progress towards the target release of the new draft standard for public consultation.

I continue to be very impressed by the highly collaborative and respectful (and fun!) conversations, high quality of preparatory work and informative debate at committee meetings. If the behaviours demonstrated by representatives of all nominating organisations are any indication of the behaviours of our construction as a whole, then it bodes well for the future of the sector.

David Wilkie
Chair – P3910 Conditions of contract committee

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