

UPDATE

DATE	1/08/2022
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 five meetings to date. The fifth committee meeting was a two-day, in-person meeting, which was held in Auckland. 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:
 - a. Committee meeting 1: Kick-off meeting completed
 - b. Committee meeting 2: Completed (2-hour online meeting)
 - c. Committee meeting 3: Completed (2-day in-person meeting)
 - d. Committee meeting 4: Completed (3-hour online meeting)
 - e. Committee meeting 5: Completed (2-day in-person meeting)

Upcoming milestones:

1. Committee meeting 6: Mid-August (3-hour online meeting)
2. Committee meeting 7: Beginning of September (2-day in-person meeting)

SUMMARY OF MEETING 5 – KEY POINTS

The P3910 committee convened in Auckland on July 5 and 6 for a two-day, in-person meeting. All committee members were in attendance for the first day. One member was not available for the second day owing to prior arrangements. Some members joined the meeting online.

Key points discussed

1. Interim review

After deliberation and debate, the committee, in collaboration with the commissioner (the Accord) and Standards New Zealand, decided to not to continue with the intended publication of an interim standard.

Reasoning

The interim standard would not be subject to the normal public consultation and review processes required for normal standards, and as such the overarching test for release of an interim standard is that the content must be non-controversial. The interim review is also content that would be paid for by subscribers, so any issue needs to be considered from a value for money perspective.

The topics that were within scope for the interim review were collaboration, pandemic and liability caps, and a general update to reflect legislative changes. Following working group consideration and development of the content across all topics, and review by the wider committee, it was agreed that the only non-controversial item was “legislative changes”. An interim review that dealt solely with legislative change was not considered value for money or worth the considerable effort to publish, especially given the full review due to be issued a short time thereafter.

It is recognised that the sponsors and review funding agencies are expecting an interim release, so the committee endorsed the publication of a P3910 “special document”. This will be a guidance and advice document, not a standard.

This special document is scheduled to be published in September 2022 and will be freely available from Standard New Zealand’s web shop. It will cover the following topics:

- legislative changes
- a pandemic clause (the committee endorsed an Optional Clause for those that wanted a clause to use)
- a liability cap clause (the working group and the insurance industry representative are finalising content)
- collaboration, renamed “engagement/cooperation” (an overarching principle as well as opportunities to encourage better engagement in individual clauses could be provided).

2. The role of the engineer to the contract

The role of the Engineer to the Contract (ETC) is one of the core topics for review and subject of considerable debate by the working group and full committee.

Currently, NZS 3910 refers to the Engineer to the Contract at least 130 times. On any occasion, the ETC may be required to act independently and impartially, and/or as the principal’s representative, and/or as the contract administrator. In practice, some of these 130 roles are performed by third parties. This reinforces the complexity of the role and is a cause of some of the problems the industry has recorded in respect of the ETC role.

I am pleased to report that following a thorough review by the working group and the full committee we have aligned and endorsed an important new direction to modify the roles and responsibilities of the ETC.

The new direction redefines the ETC role to be split into two distinct roles:

- the Contract Administrator (CA), who provides direction behalf of the Principal; and
- the ETC who providing determinations under the contract, acting fairly and impartially, with duties that cannot be delegated.

It is anticipated that for large or complex contracts the roles may be performed by different individuals or a team, and for smaller contracts they may be all undertaken by an individual.

The Contract Administrator may appoint assistants who will support and assist the CA but are not authorised to direct the contractor. Assistants may include

- Architects, Engineers and technical consultants in relation to design, surveillance, and quality assurance support
- Quantity Surveyor to prepare payment recommendations and variation valuations
- Specialists for targeted advice and support (eg programmers, with regards to delay analysis)

In addition, P3910 will include a new role, being the Principals Representative.

3. Early contractor involvement

The committee debated the benefits and difficulties of including specific clauses to address Early Contractor Involvement (ECI) in P3910. This discussion considered the reason why ECI services are utilised, the services typically provided, the implications if there is a continuing construction contract, and how P3910 might respond.

The motivations for Principals to engage a contractor in an ECI role are broad, and the scope of service vary greatly from minor advice on limited scope, to full team formation, risk management, design support, construction planning and procurement. The ECI role is contracted as consultancy role outside of the construction contract.

If a Contractor transitions from an ECI role (under a consultancy agreement) to a Construction contract (under 3910) there is no mechanism in 3910 to recognise the ECI services. If there was to be recognition of ECI services, any such recognition could only be in respect of the contracted ECI role. Having discussed the matter, the committee decided that it will not include specific content in relation to ECI in the revision at this stage. Where an ECI role delivers project specific knowledge and understanding this should be documented and included in the construction contract: this is recommended as the appropriate link between ECI role and 3910.

As an aside, the committee considers that the development of a standard scope of service for ECI would be of value to the industry. It is proposed that Standards NZ and Sponsors (including the Construction Sector Accord and NZ construction Industry Council) consider the benefit of the development of a standard ECI scope of service as part of the NZCIC design guidelines.

4. Force majeure

Whilst not specifically within scope of the review, the relevance of a Force Majeure (FM) clause is an obvious extension of the pandemic clause deliberations. Following discussion, the committee

decided that P3910 will be enhanced by inclusion of a force majeure (FM) clause. A FM clause, if added, will likely supersede the need for a specific pandemic clause. FM drafting will continue within by a working group for a committee decision in a future meeting.

5. The Programme

The committee had a long discussion around role of the programme, the difficulties of managing time on a contract, the challenges of monitoring programming and how the contract can be improved.

An interesting insight was the importance of the programme as a collaboration and risk management tool.

The key areas for further attention of the committee were identified as;

- Time bars – fairness, balance and relationship to 5.21 and alignment with the intent for greater collaboration and engagement between the parties
- Information requirements – clarity around timing and quality of information to be produced during the Contract by the Principal and the Contractor. This may include detailed design, shop drawings, proprietary design, produced statement etc
- Concurrency – how to deal with concurrency issues when assessing delays and extension of time claims

The working groups have been tasked to continue to develop content and options to improve the contract, for inclusion on future committee meeting agendas.

6. Other topics

There were a range of other topics addressed which included

- Engagement and Collaboration – elevation of clause 5.21, and general review of obligations (including the ETC) to encourage and support communication and agreement.
- Schedule 13 – subcontractor warranty: the committee endorsed minor improvements to Schedule 13.
- Technology – confirmed key functionality for the technology to be used to publish the standard. Contracts should be easily populated, have a “track changes” function, and be built on a “future-proof” framework.
- Definitions – agreed to change onsite overheads to ‘Preliminaries and General’.
- GMP price inclusion – decided not to include in the standard.
- Target Cost inclusion – to be considered and subject of future committee discussion.

7. In conclusion

Following healthy debate, the committee is aligned, and good progress is being made around the key issues of the role of the engineer, and programme.

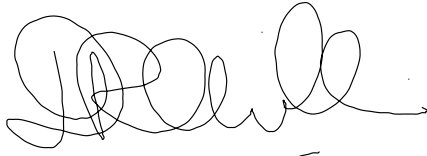
With clear direction around some of the bigger issues, the working groups can make progress on the long list of topics they are assigned. The working groups are now tasked with drafting content for discussion by the full committee.

Publication of the P3910 “special document” (scheduled for September) is a priority and will be dealt with in the next online meeting.

We are on track to achieve our objectives.

Thank you to all the participants and their nominating organisations for their energetic and active engagement, and their considered and thoughtful contributions.

David Wilkie

A handwritten signature in black ink, appearing to read 'D Wilkie', with a horizontal line underneath it.

Chair – P3910 Conditions of contract committee

Copies to:

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