

P3910 Review Committee – Recommended Special Conditions

The P3910 Review Committee recommends that the Special Conditions below be incorporated into *Schedule 2 – Special Conditions of Contract – Other Conditions of Contract* pending publication of the new edition of NZS 3910, which is currently scheduled for the latter part of 2023.

The P3910 Review Committee, in consultation with Standards New Zealand and the Commissioners, has elected to publish these recommended Special Conditions rather than an interim updated Standard Conditions of Contract due to the limited scope of these recommended Special Conditions, and in order to make them freely available to users of NZS 3910:2013 – *Conditions of contract for building and civil engineering construction*.

NOTES FROM THE P3910 REVIEW COMMITTEE

These notes do not form part of the recommended Special Conditions (below).

Notes re. the Health and Safety at Work Act 2015

The P3910 Review Committee is considering further changes to NZS 3910 to reflect the requirements of the Health and Safety at Work Act 2015, but in the meantime recommends Special Condition 5.7 (see below). Users of NZS 3910:2013 may consider that further Special Conditions are required in relation to health and safety.

Notes re. clause 5.11 (compliance with laws)

This clause as amended by Special Condition 5.11.10 below entitles the Contractor to a Variation if the Cost to the Contractor of performing the Contract increases by reason of the making of or an amendment to any ‘secondary legislation’ or ‘instrument’ (which are generally the form of any Government public health order relating to a pandemic).

Notes re. collaboration

The P3910 Review Committee is considering further changes to NZS 3910 relating to collaboration, but in the meantime recommends limited changes to include the Principal in the advance notification regime under 5.21. See recommended Special Condition 5.21 below.

Notes re. liability limit

See Special Condition 7 below, which contains a limitation of liability clause.

Notes re. Special Conditions 8.5 and 8.9 regarding public liability insurance

Special Conditions 8.5 and 8.9 deal with the impact of the repeal of the Forest and Rural Fires Act 1977 on the public liability insurance clauses.

RECOMMENDED SPECIAL CONDITIONS

Special Condition 5.7 – Protection of Persons and property

Amend 5.7.1 and 5.7.2 as follows:

- 5.7.1 ~~The Contractor and the Principal shall comply with the Health and Safety at Work Act.~~ So far as the Site and the Contract Works are under the Contractor's control, the Contractor shall take all reasonable reasonably practicable steps to keep them in an orderly state and in such a condition as to avoid danger to Persons and property.
- 5.7.2 The Contractor shall take all reasonably practicable steps to:
- (a) Provide and maintain a safe working environment;
 - (b) Identify ~~any significant hazards~~ and manage all risks to health and safety;
 - (c) Ensure that any employee ~~or Subcontractor involved in carrying out the Contract Works is not unnecessarily exposed to hazards which are under the Contractor's control, Subcontractor, visitor to the Site and other Persons are protected as far as reasonably practicable from risks which are under the Contractor's control~~; and
 - (d) Have proper procedures for dealing with emergencies that may arise.

Amend 5.7.4 as follows:

- 5.7.4 The Contractor shall give to the Principal through the Engineer a copy of any report which the Contractor is required to make to a public authority under the Health and Safety at Work Act. ~~on any accident which is associated with the carrying out of the Contract Works and results in serious harm to any Person.~~

Amend Guideline G5.17 – Safety Plan as follows:

In addition to the Contractor's obligations under the ~~Health and Safety in Employment Act~~ Health and Safety at Work Act, a Site-specific safety plan may be required by the Special Conditions. The Engineer shall either accept the plan or give reasons why it is not accepted.

Where a Site-specific safety plan is required, work cannot commence on Site until the Site-specific safety plan has been accepted.

Special Condition 5.11: Compliance with laws

Amend 5.11.1 as follows:

- 5.11.1 In respect of the Contract and the Contract Works, the Principal and the Contractor shall comply with all statutes, ~~regulations~~ secondary legislation, instruments, and bylaws ~~of government, local, and other public authorities~~ that may be applicable to the Contract Works.

Delete 5.11.10 and replace with the following:

- 5.11.10 If, after the closing date for tenders, the Cost to the Contractor of performing the Contract increases or decreases by reason of:
- (a) The making of or an amendment to any statute, secondary legislation, instrument, or bylaw; or
 - (b) The imposition by the Government or a local authority of any royalty, fee, levy, or toll or any amendment to them,
- and the effects are not otherwise provided for in the Contract, the effect shall be treated as a Variation.

Special Condition 5.21 – Advance notification

Amend 5.21.1 and 5.21.2 as follows:

- 5.21.1 The Principal (via the Engineer), the Contractor and the Engineer shall each notify the others in writing as soon as they become aware of any matter which is likely to:
- (a) Materially alter the Contract Price;
 - (b) Materially delay completion of the Contract Works; or
 - (c) Result in a breach of a statutory duty in connection with the Contract Works.
- 5.21.2 ~~Either The Principal (via the Engineer), the~~ Engineer or the Contractor may require the others to meet for the purpose of proactively exploring proposals for avoiding, reducing or mitigating the impact of the notified matter.

Special Condition 7 – Indemnity

Change heading to:

7 INDEMNITY AND LIABILITY LIMIT

Insert new clause 7.2 as follows:

7.2 Contractor's liability limit

- 7.2.1 Where provided in the Special Conditions, subject to 7.2.2 and 7.2.3 and to the extent permitted by law, the maximum aggregate liability of the Contractor to the Principal under or in connection with the Contract whether in contract, tort (including negligence) or otherwise is limited to the amount recorded in the Special Conditions.
- 7.2.2 7.2.1 does not limit the Contractor's liability:
- (a) To indemnify the Principal under 5.12.2;
 - (b) To indemnify the Principal under 7.1.1(b) in respect of any liability incurred by the Principal to a third party;
 - (c) In the case of fraudulent conduct, illegal act or omission, wilful or reckless misconduct or wilful default by the Contractor in the performance of its obligations under the Contract;
 - (d) If the Contractor has abandoned the Contract; or
 - (e) In respect of any penalties applicable under any Act, secondary legislation, instrument bylaw or licence (as defined under 5.11.2).
- 7.2.3 Notwithstanding 7.2.1, where the level of any insurance policy that the Contractor is required to effect and maintain under the Contract is greater than the maximum aggregate liability of the Contractor recorded in 7.2.1 and such policy responds to a loss (or would have responded but for any failure to claim and/or breach of the relevant insurance policy by the Contractor, or due to the failure by the Contractor to maintain an insurance policy), the Contractor's liability in respect of such loss shall be the level of cover under the applicable insurance policy.
- 7.2.4 This 7.2 will survive expiry or termination of the Contract for any reason.

Insert into Schedule 1 – Special Conditions of Contract – Specific Conditions of Contract

7. INDEMNITY	
7.2 Contractor’s liability limit	
7.2 Is this a contract to which 7.2 applies?	<i>(yes or no)</i>
7.2.1 Subject to 7.2.2 and 7.2.3, the maximum aggregate liability of the Contractor to the Principal under or in connection with the Contract is:	<i>(If 7.2 is ‘yes’, select one to apply (i), (ii) or (iii))</i>
(i) The percentage in the right-hand column of the Contract Price:	<input type="checkbox"/> <i>(% of the Contract Price)</i>
(ii) 100% of the Contract Price	<input type="checkbox"/>
(iii) The amount in the right-hand column:	<input type="checkbox"/> (\$)

Special Condition – Legislative references

Update the legislative references under the ‘New Zealand legislation’ heading on page viii as follows:

- Delete Forest and Rural Fires Act 1977;
- Delete Health and Safety in Employment Act 1992 and insert Health and Safety at Work Act 2015.

Special Conditions 8.5 and 8.9 regarding Public Liability Insurance

8.5 Contractor-arranged public liability insurance

Amend 8.5 as follows:

Delete 8.5.1(c) and shift the ‘and’ at the end of 8.5.1(b) to the end of 8.5.1(a).

8.9 Principal’s option to insure public liability

Amend 8.9 as follows:

Delete 8.9.2(c) and shift the ‘and’ at the end of 8.9.2(b) to the end of 8.9.2(a).

Schedule 1 – Special Conditions of Contract – Specific Conditions of Contract

Amend Special Condition 8.5.1 as follows:

Delete the row referring to the Forest and Rural Fires Act 1977.

Amend Special Condition 8.9.2 as follows:

Delete the row referring to Forest and Rural Fires Act 1977.

Guideline G8.5 or G8.9 Public liability insurance

Amend the third paragraph as follows:

The policy is required to include cover for liability arising out of vibration, weakening or removal of support. This is considered a higher risk than general liability and is therefore often sub-limited in value within the overall policy. Similarly the policy shall extend to cover liability for contributions to fire-fighting expenses under the Forest and Rural Fires Act. Typically if the Contract is for work in an urban area, vibration, weakening and removal of support will be more important than the Forest and Rural Fires Act, with the converse being the case under a Contract for work in a rural area. Schedule 9 provides for notification of any sub-limits applied by the insurer.

Schedule 9 – Information on public liability insurance

Delete the reference to the Forest and Rural Fires Act 1977.