



association of  
consulting and  
engineering



# COVID-19

dealing with  
NZS 3910 issues  
as engineer to  
contract



The purpose of this Advisory is to provide some general guidance to those administering contracts as Engineer to the Contract under standard NZS 3910:2013 “Conditions of Contract for building and civil engineering construction” on projects affected by the Covid-19 epidemic and particularly the Government’s Alert Level 4 lockdown (“the Lockdown”).

The Advisory principally discusses extension of time (“EOT”) and Variation issues associated with entire site shutdowns as these are the main areas where decisions by Engineers to the Contract will likely be needed. In the course of this, it touches on similar issues relating to compliance with quarantine, isolation and other Health and Safety requirements before the Lockdown or continuing after it has been lifted. The Advisory also considers care of works and site issues arising during the Lockdown.

Engineers should consider obtaining legal advice if they have any substantial uncertainty or concern about their role and obligations under a contract, whether generally or because of specific special conditions or factual circumstances. While the Lockdown is currently for 4 weeks from 26 March 2020 to 22 April 2020 inclusive, it could well be extended resulting in greater impact on the financial positions of the contract parties.

During this unprecedented national event, Engineers are recommended to communicate proactively with the contract parties and encourage them to co-operate in finding mutually agreed solutions to the project issues needing to be addressed. A cooperative approach is more likely to facilitate better outcomes for all, and enhance relationships and project prospects. However, in doing so Engineers should remind the parties that until there is an agreement in writing between them recording any renegotiated terms, their rights and obligations remain governed by the existing contract.

The potential for a suspension of work on negotiated terms is expressly raised in clause 6.7.5 of NZS 3910, and a negotiated outcome to issues arising under other clauses is equally available.

## check special conditions

Most contracts using NZS 3910 contain Special Conditions amending the General Conditions. Engineers should therefore check if any of the provisions referred to in this Advisory have been amended, and also whether any relevant clauses have been added. Notably, as NZS 3910 does not have a force majeure clause, it is relatively common for one to be added. If so, the general commentary on force majeure in the Advisory "*Covid-19 – dealing with the unforeseeable in contracts*"<sup>1</sup> may be useful.

## EOT & variation claims

### Generally

The Contractor makes the decision whether or not to seek an EOT and/or Variation and if so which provision(s) to rely on. The Engineer's job is to assess and determine the claims advanced, not to propose alternative claims. The main clauses potentially relevant to a Contractor's claim arising from the Lockdown are:

EOT – Unforeseeable circumstances [clause 10.3.1(f)]; Net effect of Variation [clause 10.3.1(a)].

Variation – Change in law [5.11.10]; Suspension by Engineer [6.7.1, 6.7.3].

Engineers need to be aware of the time limits and procedural requirements applicable to the Contractor:

For EOT claims – notification of the claim with the specified details within 20 Working Days after the relevant circumstances arise (or as soon as practicable thereafter) [10.3.2].

For Variation claims – notification of the claim within 1 month of becoming aware of the matter (or as soon as practicable thereafter) [9.2.3].

Engineers also need to be aware of the time limits and response requirements applicable to them:

For EOT claims – notification of the Engineer's decision within 20 Working Days after receipt of the claim (or as soon as practicable thereafter) [10.3.4], and notification of the decision on the claimed period of extension as soon as practicable after receipt of the Contractor's details of the period claimed [10.3.5].

For Variation claims – notification of the Engineer's decision within 1 month of receipt of the claim (or as soon as practicable thereafter), failing which the claim is allowed as a Variation by default [9.2.4].

Notifications need to comply with the service of notice requirements in clause 15.1.

### Decisions generally – Engineer's obligation to act fairly and impartially

Under NZS 3910 the Engineer's role includes being a fair and impartial decision-maker in relation to decisions entrusted to the Engineer under the contract.

Before making those decisions the Engineer should consult with the Principal and Contractor, giving both of them an equal opportunity to put their position and respond to the other's. This approach should be taken when assessing/deciding a Contractor's EOT or Variation claim. It is also advisable when assessing/deciding whether circumstances have arisen necessitating the suspension of the Contract Works in accordance with clause 6.7.1.

<sup>1</sup> [bit.ly/ACEcontractsandcovid](https://bit.ly/ACEcontractsandcovid)



## Extension of time

The qualifying events under NZS 3910 are set out in clause 10.3.1.

### Unforeseeable circumstances – clause 10.3.1(f)

Although an epidemic is not specifically referred to, clause 10.3.1(f) requires the Engineer to grant an EOT if the Contractor is “fairly entitled” to an extension by reason of “any circumstances not reasonably foreseeable by an experienced contractor at the time of tendering and not due to the fault of the Contractor”.

### Was Covid-19 and its impact reasonably foreseeable?

Drawing on the standard legal meaning of “reasonably foreseeable”, a circumstance would be reasonably foreseeable when:

there was a real risk of it occurring; and

the risk was one a reasonable contractor would be aware of and not ignore as far-fetched,

assessed against the objective standard of an experienced contractor involved in the same type of contract work as the Contractor.

In the context of the impact of Covid-19, the Engineer’s application of the test would vary depending on the nature of the circumstance being relied on by the Contractor for an EOT claim under clause 10.3.1(f). The Engineer should therefore investigate and assess the “reasonably foreseeable” issue on a case by case basis.<sup>2</sup>

<sup>2</sup> starting by asking the Contractor why it considers the circumstance was not reasonably foreseeable at the time of tendering if this was not included in the grounds relied on.

For instance, if the claim relates to the unavailability of materials and equipment from China due to the impact in China of Covid-19, then it seems that it became increasingly known in the wider industry during February and early March 2020 that supplies from there could be affected. Accordingly, it is suggested it would have been reasonably foreseeable by an experienced contractor tendering after February/early March 2020 that there was a real risk of supplies from that source not being available. However, the issue will need to be assessed on a contract by contract basis as the objective awareness of the experienced contractor against which the Contractor’s position is to be assessed would likely vary depending on the particular industry sector, the type of project, the type of work being done by the Contractor, and the type of materials/equipment needed.

If the claim relates to the effect of the Lockdown, it seems it was not widely known before 19 March 2020 that the Government would introduce a national lockdown if community spread of Covid-19 occurred.<sup>3</sup> However, there appear to have been no Government announcements at the time as to what a lockdown would involve. It is therefore suggested it was not widely known until 21/22 March 2020 that a lockdown would involve businesses being closed (except for essential services) and home isolation. This followed the Government announcing the Alert system with 4 levels around midday on 21 March 2020 and outlining what a level 4 Alert would involve. Accordingly, it is suggested it would have been reasonably foreseeable by an experienced contractor tendering after 22 March 2020 that there was real risk of a Covid-19 lockdown affecting a project.

<sup>3</sup> On that date Deputy Prime Minister Winston Peters was widely reported stating this. On the same date it was widely reported that while Prime Minister Jacinda Ardern had dismissed social media speculation that the Government was poised to announce a national lockdown, she warned everyone to start getting prepared for one.

### Is the Contractor fairly entitled to an EOT?

The Engineer should assess whether the delay claimed has been directly caused by the circumstances relied on by the Contractor, whether the delay affects the project's programme to completion, and whether all reasonable steps have been taken by the Contractor to mitigate the delay.

### Reaching a decision

If Engineers are unsure how to apply the objective "reasonably foreseeable" test or the "fairly entitled" test in a particular case, or if their preliminary view reached is contrary to the Principal's view, they should consider obtaining legal advice.

Note that a Contractor entitled to an EOT by clause 10.3.1(f) is not entitled also to time-related Cost [see clause 10.3.7].

### Net effect of a Variation – clause 10.3.1(a)

While an EOT entitlement for "unforeseeable circumstances" via clause 10.3.1(f) does not include an entitlement to time-related Costs, the same circumstances may entitle the Contractor to a Variation. In that situation where the net effect of a Variation has caused delay, the Contractor may also be entitled to an EOT under clause 10.3.1(a) and to time-related Cost.

### Loss or damage to Contract Works or Materials – clause 10.3.1(d)

Where the Contractor needs to repair loss or damage to the Contract Works or Materials, the Contractor may be entitled to an EOT (but no time-related Cost) under clause 10.3.1(d) depending on the circumstances.

If the loss or damage arose from an "excepted risk" under clause 5.6.5(c), the Contractor would be entitled to a Variation to recover the Cost of repair, and may also be entitled an EOT and time-related Cost via clause 10.3.1(a) [net effect of Variation] [see the comments in the section below on "Care of works and site during the Lockdown" regarding excluded risks].

## **Variations**

NZS 3910 provides a range of circumstances which are either to be treated as a Variation or entitle the Contractor to claim a Variation. Ones potentially relevant to the impact of Covid-19 resulting in delay and/or additional cost for the Contractor include: the late issuing of documents, Drawings or instructions by the Principal or Engineer [2.7.7]; the late supply of any Materials, services or work required to be supplied by the Principal [5.16].

As regards Government restrictions including the Lockdown, there are two other more specific potential grounds for Variations – a change in law [5.11.10] and suspension by the Engineer [6.7.1, 6.7.3].

### Change in law

Clause 5.11.10 relevantly states:

*"If after the date of closing of tenders the making of any statute, regulation, or bylaw, or the imposition by the Government or local authority of any royalty, fee or toll increases or decreases the Cost to the Contractor of performing the Contract, such increase or decrease not being otherwise provided for in the Contract, the effect shall be treated as a Variation."*





The scope and application of the clause are not straightforward.

As regards Contractor claims relating to the Lockdown, the clause applies where the “making” of any statute or regulation after the tender closing date causes additional Cost to the Contractor. The legal source of the Lockdown is not however the making of a statute or regulation in a literal sense because the source is an Order under the Health Act 1956, triggered by a state of the emergency declaration under the Civil Defence Emergency Management Act 2002 and/or an epidemic notice under the Epidemic Preparedness Act 2006 i.e. the Government is acting under existing statutes.

However, it is considered that a wider interpretation is appropriate as the clause appears intended to provide a recovery route for a Contractor incurring additional Cost in performing the Contract due to needing to comply with a change in regulatory law in a broad sense. On that basis, a Contractor would be entitled to recover extra Cost directly related to complying with the Lockdown requirements, and also complying with quarantine, isolation and other measures to prevent the spread of Covid-19 provided they were similarly imposed by law (in contrast to Government policy/recommendations).

A further issue is whether the Variation could also give rise to an EOT claim and the additional recovery of some time-related Cost in relation to an EOT due to complying with the Lockdown requirements.

Clause 10.3.1(a) requires the Engineer to grant an EOT where the Contractor is fairly entitled to an extension by reason of “*the net effect of any Variation*”. If such an extension is granted, the Contractor is additionally entitled under clause 10.3.7 to recover time-related Cost incurred in relation to the EOT.

Deciding whether to grant an EOT under clause 10.3.1(a) involves as a first step the consideration of the nature of the Variation and whether its subject-matter has directly caused delay affecting the programme for completion.

In the case of a Variation under clause 5.11.10, its subject-matter is relevantly the Contractor’s entitlement to a Cost increase resulting from complying with a change in regulatory law. Unlike most Variations, this subject-matter does not seem to be a matter with the potential to cause a need for additional work taking time and affecting the programme. In that situation a Contractor’s entitlement under clause 5.11.10 to a Variation for a Cost increase resulting from complying with the Lockdown’s requirement to close the site would not appear to give rise to an EOT.

If Engineers are assessing a Variation claim under this clause and the Variation is also being relied on for an EOT and the additional recovery of some time-related Cost, they should consider obtaining legal advice. This consideration may be especially warranted if large sums were in issue and the Engineer’s preliminary view was contrary to the Principal’s view.

Note that a Contractor may in any event be entitled to an EOT under clause 10.3.1(f) “*Unforeseeable circumstances*” as a result of needing to comply with a change in regulatory law. But if so, the Contractor would not be entitled to recover any additional time-related Cost in relation to the EOT due to the effect of clause 10.3.7.

### Suspension by Engineer

Clause 6.7.1 states:

*"If the suspension of the whole or a part of the Contract Works becomes necessary, the Engineer shall instruct the Contractor in writing to suspend the progress of the whole or any part of the Contract Works for such time as the Engineer may think fit, and the Contractor shall comply with the instruction."*

Unless the suspension is due to the Contractor's default, the suspension is treated as a Variation [6.7.3].

If the suspension continues from more than 3 months, the Contractor may request the Engineer in writing to lift the suspension. If at the end of a further month the suspension remains in place, the Contractor is entitled to terminate the contract where the suspension affects the whole of the Contract Works [6.7.4].

The following observations are made:

It is far from clear that the Lockdown necessitating site shutdowns falls within the scope of clause 6.7.1. This is because:

- Work has ceased as a consequence of the operation of a Health Act Order dated 25 March 2020 which included requiring non-essential premises to be closed until further notice. In effect, the suspension has been imposed by law irrespective of any instruction by the Engineer.
- The clause provides that the suspension continues "for such time as the Engineer may think fit" whereas that discretionary power cannot apply to the situation of a Government-ordered lockdown.
- If the clause was intended to extend to a suspension resulting from the exercise of Government or other legal authority, arguably it could have been expected to expressly state this.

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If the clause does apply to the Lockdown situation, a suspension for longer than 4 months would entitle the Contractor to terminate the contract, which is a significant potential consequence.

Engineers receiving a Variation claim based on clause 6.7.3 should consider taking legal advice if the Principal disputes the applicability of clause 6.7.1 to the ceasing of the Contract Works due to the Lockdown.

As mentioned above, the potential for a suspension of work on negotiated terms is expressly raised in clause 6.7.5.

### **Remember: Engineer's decisions not final**

While there are some novel and challenging issues arising under NZS 3910 due to the impact on projects of the Covid-19 epidemic, Engineers should take comfort in remembering:

They are not necessarily the final arbiter. Either party can dispute an Engineer's decision via the review and dispute resolution provisions of section 13 and via the Construction Contracts Act 2002.

They fulfil their role by making decisions in good faith, acting fairly and impartially, and exercising reasonable professional judgment.

## Health & Safety Obligations relating to Covid-19

Under the Health and Safety at Work Act 2015, the Principal, the Contractor and the Engineer are all PCBUs with each having health and safety obligations prescribed by the Act.

Under clause 5.7 of NZS 3910 the Contractor, however, has the primary obligation for the safety of the Site and Contract Works under its control, and is required to take all practicable steps to provide/maintain a safe working environment and to ensure no workers are unnecessarily exposed to hazards.

When the Site is operational during a period with a Covid-19 infection risk, it is therefore likely that the Contractor's obligations would include taking appropriate measures for identifying and quarantining workers, cleaning, social distancing and the like to prevent the spread of Covid-19 on site.

Whether the Contractor would be entitled to a Variation claim for additional Cost would be assessed by the Engineer under clause 5.11.10 (see the comments in the section above on "Change in law"). Whether the Contractor would be entitled to an EOT claim for delay would be assessed by the Engineer under clause 10.3.1 (see the comments in the section above on "Extension of time").

## Care of works and site during the Lockdown

### Contractor's responsibility

During the Lockdown, the Contractor remains responsible for:

the care of the Contract Works and all Plant<sup>4</sup> [clause 5.6.1];

the care of all Materials in its care or possession awaiting incorporation in the Contract Works [clause 5.6.2];

loss or damage to the Contract Works after Practical Completion or to the Site arising out of execution (or non-execution) of the Contractor's obligations under the contract [clauses 5.6.3 and 5.6.4].

<sup>4</sup> provided Practical Completion has not occurred, or any occupancy taken up by the Principal (in which case responsibility for the relevant portion ceased from the pre-Lockdown date of occupancy).





### Essential service repairs only

However, notwithstanding those contractual responsibilities, the Contractor is prohibited during the Lockdown from repairing any damage or loss to the Contract Works, Plant, Materials or Site unless the work fits the criteria of an essential service. That means the minimum amount of work required in order to address an immediate health or safety risk to people (such as the securing of roof or structure putting people at risk in public spaces), or to prevent serious environmental harm. All repair or other work including, for instance, preventative work to avoid or minimise damage from weather, is prohibited.

### Building/site security – an essential service

Building/site security is categorised as an essential service to keep properties secure to ensure the health and safety of their occupants and the general public. Although not specifically addressed by MBIE in its "*COVID-19: Building and construction sector guidance*"<sup>5</sup>, based on its definition of an essential service, the installation or repair of security fences and security camera systems is permissible for unoccupied building sites with hazards to human health and safety or containing potentially significant risks to the environment. Unoccupied partially-built buildings may also be monitored (but preferably remotely) if at risk of loss or damage, especially from fire (including arson) and theft.

### Repairing after lifting of Lockdown

The Contractor is responsible under clause 5.6.5(c) for the cost of repairing any loss or damage to the Contract Works, Plant, Materials or Site needed for the completion of the Contract Works unless it is excluded by clause 7.1.2 (limits to Contractor's Indemnity liability) or covered by clause 9.5 (unforeseen physical conditions) or excluded as a risk under clause 5.6.6. If the necessity to repair arises from an "excepted risk" under clause 5.6.6, the Contractor is entitled to a Variation to recover the Cost of the actual repair (and may also be entitled to an EOT and to recover time-related Cost).

Assuming the contract has no relevant risks specifically excluded via the Special Conditions and the loss/damage has not arisen from any act or omission by the Principal or Engineer, the only potentially relevant excluded risk in clause 5.6.6 concerns loss/damage arising from the operation of "*forces of nature*". But they need to be forces which an experienced contractor "*could not reasonably foresee or make provision for*" and also not forces which a party was required under the contract to insure against via construction insurance [clauses 5.6.6(f) and 8.1.6]. The forces of nature which can be specified (or not) for inclusion in that insurance are: landslip, earthquake, tsunami, tornado, cyclone, storm, flood, lightning strike, volcanic activity, hydrothermal activity and geothermal activity.

5 [www.building.govt.nz/covid-19/](http://www.building.govt.nz/covid-19/)



There then appear to be four possible scenarios regarding the Contractor's position if loss/damage has occurred during the Lockdown which the Contractor couldn't avoid or minimise due to the site access prohibition:

If the loss/damage arose from a force of nature specified for the project's construction insurance, then the Lockdown's site access prohibition likely made no meaningful difference and the repair cost would likely be paid by the insurance.

If the loss/damage arose from a force of nature which was either an uninsured specified force under the contract or some other force, then the Contractor would be entitled to a Variation if it was a force of nature which an experienced contractor "*could not reasonably foresee or make provision for*". The initial focus here would be on what was the real cause of the loss/damage – a force of nature event, the Lockdown's site access prohibition precluding damage/loss avoidance measures, or some other cause. If it was a force of nature event, then a Variation entitlement would arise if the objective test was met (was it a force of nature event which an experienced contractor could not have reasonably foreseen and provided for).

If the real cause of the loss/damage was the Lockdown's site access prohibition precluding damage/loss avoidance measures, then an EOT entitlement may be available for the Contractor under clause 10.3.1(f) "unforeseeable circumstances" (see the comments relating to 10.3.1(f) in the above section "Extension of time").

If neither a Variation nor an EOT entitlement are available, the Contractor would be responsible for the repair cost and any associated delay liability under the contract and also for any associated loss to the Principal.<sup>6</sup>

6 April 2020

This Advisory is provided for general information purposes only. It is not legal advice and should not be relied on as an alternative to specific legal advice. ACE New Zealand and CEAS disclaim liability for any such reliance.

<sup>6</sup> The Contractor may have insurance of its own which might assist its position.



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