

Te Kāhui
Whaihanga
New Zealand
Institute of
Architects



COVID-19 Info

COVID-19 – The Architect’s role in administering a construction contract under Alert Level 3

On Monday 20 April 2020 at 4pm, the Prime Minister made an announcement that New Zealand will be coming out of Alert Level 4 Lockdown on Monday 27 April at 11:59pm. The lowering of the alert level will allow parts of the economy to reopen, including many construction sector businesses (**Businesses**).

As Businesses start preparations to return to work, a number of important health and safety measures will need to be taken to keep workers safe as COVID-19 is a disease transmitted from person to person.¹ To limit the spread, new measures for operating under COVID-19 Alert Level 3 have been developed by industry and these are set out in the ‘COVID-19 Standard for New Zealand Construction Operations’ (**Standard**) and the ‘New Zealand COVID-19 Construction Protocols’ (**Protocols**). The Protocols have been developed for the residential sector and the civil and vertical construction sectors.²

The Standard and the Protocols set out the key principles and operating requirements for healthy and safe construction-related operations and will ensure consistent health and safety standards across all construction sites. They represent current best practice and include measures around physical distancing and hygiene, and the expectation is all Businesses and workers will apply their intent and do the right thing. Worksafe New Zealand (**Worksafe**) has recognised and endorsed the Standard and the Protocols as industry standards. In the event of a dispute, Worksafe would use the Standard and the

1. According to the WHO (World Health Organization), The COVID-19 virus spreads primarily through droplets of saliva or discharge from the nose when an infected person coughs or sneezes. Talking and breathing can also release droplets and particles. Droplets generally fall to the ground or other surfaces in about 1 meter, while particles behave more like a gas and can travel through the air for longer distances, where they can transmit to people and also settle on surfaces. The virus can be picked up by hands that touch contaminated surfaces or be re-entrained into the air when disturbed on surfaces.

2. Refer to NZIA member notice (COVID-19: New health and safety standards for construction) issued on Friday 17 April at 9:13 am. For a copy, refer to <https://www.nzia.co.nz/explore/covid-19-information/safe-return-to-work-processes>

Protocols to help determine what would be considered ‘reasonably practicable’, which means, taking the course of action that provides the highest level of health and safety protection (against the spread of COVID-19), which is reasonably practicable in your circumstances. Individual business may need to adapt the protocols to suit their specific circumstances. The protocols are a ‘living document’ and will be updated by Construction Health and Safety New Zealand (CHASNZ) as best practice develops and further industry feedback is received.

Outlined below is an overview of the Architects role in administering a construction contract under the NZIA Standard Construction Contract 2018 (SCC 2018) while the Government’s COVID-19 alert level is at Level 3.

NZIA Standard Construction Contract 2018

The health and safety obligations of the Principal and the Contractor under SCC 2018 will be extended to incorporate the public health measures identified in the **Standard and Protocols**. In summary, the existing health and safety obligations of the Principal and the Contractor are:

1. The Principal³ is required to comply with its obligations under health and safety related law.⁴
2. The Contractor must ensure so far as is reasonably practicable, that each subcontractor is aware of, and complies with its obligations under health and safety related law.⁵
3. The Contractor must take all practicable steps so far as is reasonably practicable to eliminate risks to health and safety. Where this is not possible, the Contractor must

3. The capitalised words, unless otherwise defined in this note, are defined terms in SCC 2018.

4. NZIA SCC 2018 cl 8.10.1.

5. NZIA SCC 2018 cl 8.10.2.

minimise the risks so far as reasonably practicable and ensure the Site is safe for any Person involved, including those visiting, the public and any person in the vicinity of the site.⁶

For the Principal and the Contractor to discharge their obligations under the Contract, the site as far as reasonably practicable needs to be free from risks to health and safety. To help achieve this, the Contractor is expected to have created a plan that has assessed the risks presented by COVID-19, and to have implemented the most appropriate controls to mitigate its transmission so far as is reasonably practicable. For Contractors, this plan is to be documented in the form of a site-specific safety plan that is to sit alongside any pre-existing site-specific safety plan required by the special conditions.⁷ On larger projects, the Principal has a significant role to play in ensuring the Contractor meets the Standard and adheres to the Protocols and the Architect should encourage cooperation and facilitate collaboration and co-ordination between the Principal and the Contractor.

The Contractors starting point for creating a COVID-19 site-specific safety plan (**SSSP**), should be the Standard and the Protocols. The Standard describes the principles that must be achieved, and the Protocols translates these principles into practical measures. The Contractor is required to implement these measures to ensure all work is undertaken in a way that reduces any possible contact between workers and promotes physical hygiene wherever possible.

The Architect has no management or control function over the Contractor or the Site and the Contractor must determine the methodology and safe work practices required to complete the Contract Works.⁸ Under the Health and Safety at Work Act 2015 (**Act**), the Architect⁹ and the Contractor as PCBUs share health and safety duties.¹⁰ One of those duties is for the Architect to 'consult, cooperate and coordinate' with the Contractor to avoid any potential gaps in managing the spread of COVID-19.¹¹ Note that under the Act a PCBU's duties cannot be delegated to another PCBU, and contractually under cl 1.3.1(d) the Architect 'has no authority to relieve the Contractor from any of the Contractor's obligations stated in the Contract, except as expressly stated in the Contract'.

6. NZIA SCC 2018 cl 8.10.8.

7. Unlike NZS 3910:2013, SCC 2018 does not have an option requesting the Contractor to submit a site-specific safety plan (cl 5.17). The Contractor as part of its tender bid, may have submitted a site-specific safety plan. Unless any special conditions dedicate to the contrary, it is unlikely the Architect would be required to accept the plan or give reasons why it has not been accepted.

8. NZIA SCC 2018 cl 8.10.6. This clause states that the *'the Contractor and the Principal agree that for the purpose of health and safety related law, at no time will the Architect or other consultants have management or control of the Workplace where the Contract Works are being carried out'*.

9. The Architect is likely to be employed by a PCBU and considered under the Act to be a worker.

10. The Architect and the Contractor, must so far as is reasonably practicable, consult, cooperate and coordinate, and this is to avoid duplicating each other's efforts and to prevent any gaps in managing a shared health and safety risk arising. The more influence and control a PCBU has over a health and safety matter, the more responsibility the PCBU is likely to have for ensuring any overlapping duty under the Health and Safety at Work Act 2015 is met.

11. Under sections 36(1) and 36(2) of the Health and Safety at Work Act 2015, a PCBU has a primary duty of care to ensure so far as is reasonably practicable, the health and safety of workers who work for the PCBU while at work, or workers whose activities in carrying out the work are influenced or directed by the PCBU while the workers are carrying out the work.

Under SCC 2018, there is no requirement for the Contractor to submit a SSSP to the Architect. Given public health is the main criteria the Government has used to decide and define alert levels, a SSSP is a reasonable and practicable expectation on the Contractor. The Architect should ensure the Contractor has in place a SSSP before the Contractor remobilises and site activity begins. The Architect should request the SSSP be submitted to the Architect, and, after review and to the reasonable extent of its expertise and knowledge, the Architect should provide comments (if any) to the Contractor. The Architects starting point for reviewing the Contractors SSSP should be the Standard and the Protocols and whether the proposed SSSP contains measures to provide for physical distancing, recording site work and visitor movements and enhanced hygiene.

Once construction progresses under Alert Level 3, the Architect should monitor the Contractors implementation of its SSSP and help where possible with the mutual requirements of all PCBUs under section 36(1) of the Act.¹² This places a duty on the Architect as a PCBU to ensure that, so far as is reasonably practicable, the health and safety of workers, whose activities are influenced by the Architect, or the Architect's PCBU, is without undue risk. The Architect should consider what aspects of the SSSP should be monitored and with what frequency.¹³ If the Architect is on site and sees an activity that he or she considers unsafe, or has the potential to cause harm, the Architect must raise the issue with the Contractor immediately and if necessary, the work must be stopped.

As a PCBU in relation to its own employees the Architect should also review the SSSP to maintain the health and safety of its employees when visiting the site. Where employees have reasons for feeling it unwise to visit site in accordance within the Standards and Protocols, or otherwise; or feel unsafe once on site they should be required to immediately notify the Architect, and leave the site when applicable.

Should a worker of the Contractor or a subcontractor breach the Contractors SSSP and place other workers at undue risk, under cl 8.9.1 (emergency action), the Contractor must take the necessary action that is proportionate to the risk, to protect any Person affected by the carrying out of the Contract Works. The Architect can help the Principal to take the necessary action, by issuing a direction, if the Contractor is unable or unwilling to do so.

Summary

In summary, an unintended effect of COVID-19 on SCC 2018, is that no existing provisions exist that require a Contractor to create a SSSP that has been designed to limit the transmission of a pandemic (COVID-19).

As Businesses navigate Alert Level 3 and the continued fallout from COVID-19, the Architect in collaboration with the Principal and the Contractor, would be advised to choose a course of action that attempts

12. The Health and Safety at Work Act 2015, *'a PCBU must ensure, so far as is reasonably practicable, the health and safety of (a) workers who work for the PCBU, while the workers are at work in the businesses or undertaking; and (b) workers whose activities in carrying out the work are influenced or directed by the PCBU, while the workers are carrying out the work'*.

13. The Architect should keep records of each visit including what was monitored and whether it complied with the Contractors COVID-19 SSSP.

to mitigate the spread of COVID-19 where reasonably practicable. Attention should be given by all parties to the thoroughness of the SSSP and its consistency with the Standard and Protocols. The sooner we can stamp out COVID-19 in New Zealand, the sooner our construction sector can commence rebuilding. A return to Alert Level 4 would have severe consequences on the construction sector, Businesses, jobs and the economy.

Regardless of the provisions of the Contract, the Principal and the Contractor would be advised to focus on the ongoing viability of the project and to collaborate in the mitigation of any costs associated with implementing the health and safety measures required by Alert Level 3. Collaboration will lead to a more viable resolution during and after COVID-19.

Where Architects are uncertain of their role in this, whether as a representative of the Principal or as impartial administrator, and the Principal and Contractor cannot agree on the course of action, Architects should seek advice on their role and liabilities to avoid any later challenges.