

*The new industry standard for construction contracts has arrived and its name is NZS 3910:2023. This latest evolution aims to lower the number of special conditions, improve understanding of obligations and clarify risk-allocation. Read on for the important changes.*

### WHAT'S NEW?

#### **Contract Administrator and Independent Certifier**

The role of Engineer to Contract has been replaced by the Contract Administrator (**Administrator**) and Independent Certifier (**Certifier**).

- The Administrator acts as an agent of the Principal and issues contract instructions.
- The Certifier is required to act fairly, impartially and independently to issue Payment Schedules, Certificates and make Decisions.

The working assumption is that the roles will be held by different people. This addresses historical concerns about a lack of independence of roles, although it remains an option to appoint one person to both roles.

#### **Instructions, Decisions and Review**

A party can ask the Certifier to review an Instruction by the Administrator. The Certifier can review its own Decision unless it is a Final Decision. If unhappy with the Final Decision, a party can refer the matter to Dispute Resolution.

#### **New Pricing Model: Target Cost**

With the addition of the "Target Price" mechanism, there are now four pricing models for determining the Contract Price:

1. Lump Sum.
2. Measure and Value.
3. Cost Reimbursable.
4. Target Price.

The Target Price model allows the parties to agree on a target price for the project and divide equally the cost or savings of any deviation in the final price.

#### **Final Account and Final Payment Claim**

There is a prescribed process for dealing with the Interim and Final Account. This needs to take place before the Final Payment Claim can be submitted. The process includes a requirement to attempt to reach agreement on the Interim and Final Account. If no agreement is reached in respect to the Final Account, it can be determined by the Certifier.

#### **Contractor's Liability Limit and Fault-based Indemnity**

There are options in the Specific Conditions for the Contractor to limit liability. Contractor indemnities are now fault-based, meaning they only extend to losses resulting from Contractor negligence or breaches of the Contract.

#### **Dispute Resolution**

The dispute resolution processes have been simplified. The parties must first endeavour to promptly resolve disputes by good faith negotiation. If that fails, then there is the option but no requirement to go to mediation. Any dispute can be referred to arbitration.

#### **Design Responsibilities**

There is a requirement to clearly define responsibilities for design in the Specific Conditions to the contract. This should bring greater clarity for both the Contractor's and Principal's design responsibilities.

### ***Mutual Early Warning Duties***

The Principal, Administrator and Contractor are now required to provide early warning notifications of any matters likely to impact price, completion or breach of statutory duty. They may then be required to meet to explore proposals to avoid, reduce or mitigate the impact of the issue. Late notification by the Contractor can be taken into account when valuing any variation.

### ***New Contractor Obligations***

There are now express obligations on the Contractor to comply with the Health & Safety at Work Act and to protect the environment. This includes contaminants, emissions and compliance with the resource consent and Resource Management Law.

The Principal may also require the Contractor to provide specified reports throughout the construction project. There is provision in the Specific Conditions to specify the reports required, frequency, form and contents.

### **WHAT NOW?**

The revisions to the widely used NZS3910 construction contract are a positive step towards greater clarity of roles, obligations and risk allocation.

We have expertise in both the preparation of construction contracts and resolving issues that arise during the project. We would be happy to help you.

## **KEY JACKSON RUSSELL CONTACTS**

Mark Sullivan PARTNER  
LITIGATION AND DISPUTE RESOLUTION  
M: +64 21 163 9997  
E: [Mark.Sullivan@jacksonrussell.co.nz](mailto:Mark.Sullivan@jacksonrussell.co.nz)

Oliver Denny LAWYER  
LITIGATION AND DISPUTE RESOLUTION  
M: +64 21 295 6073  
E: [Oliver.Denny@jacksonrussell.co.nz](mailto:Oliver.Denny@jacksonrussell.co.nz)



**Disclaimer:** The information contained in this document is a general overview and is not legal advice. It is important that you seek legal advice that is specific to your circumstances.