

COVID 19: GOVERNMENT CONTRACT GUIDELINES FOR NZS3910:2013

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The Government has announced contract guidelines to help support the construction industry during the Covid-19 restrictions. These apply to contracts based on NZS3910:2013 (un-amended), being the most common form of contract for construction projects in New Zealand.

The guidelines were developed by the Construction Sector Accord steering group with the support of the Building and Construction Minister, and are the first action from the Accord's Covid-19 Response Plan. Strictly speaking, they only apply to government agencies working with the construction industry. Nevertheless, they send a very clear message to the entire industry about the Government's interpretation and expectation, which will be hard to ignore.

The issues

Since New Zealand moved to Level 3 and then Level 4 restrictions, much of the sector has been grappling with two immediate issues under NZS3910:2013:

- a. Whether the Engineer was obliged to suspend the whole or part of the works in response to these restrictions under clause 6.7.1; and
- b. Whether these restrictions amounted to effectively a change of law under clause 5.11.10.

The significance of these issues is that in each case the Contractor becomes entitled to a Variation (if there is a suspension or a change of law), which in turn enables the Contractor to recover time-related costs for the period of the restrictions.

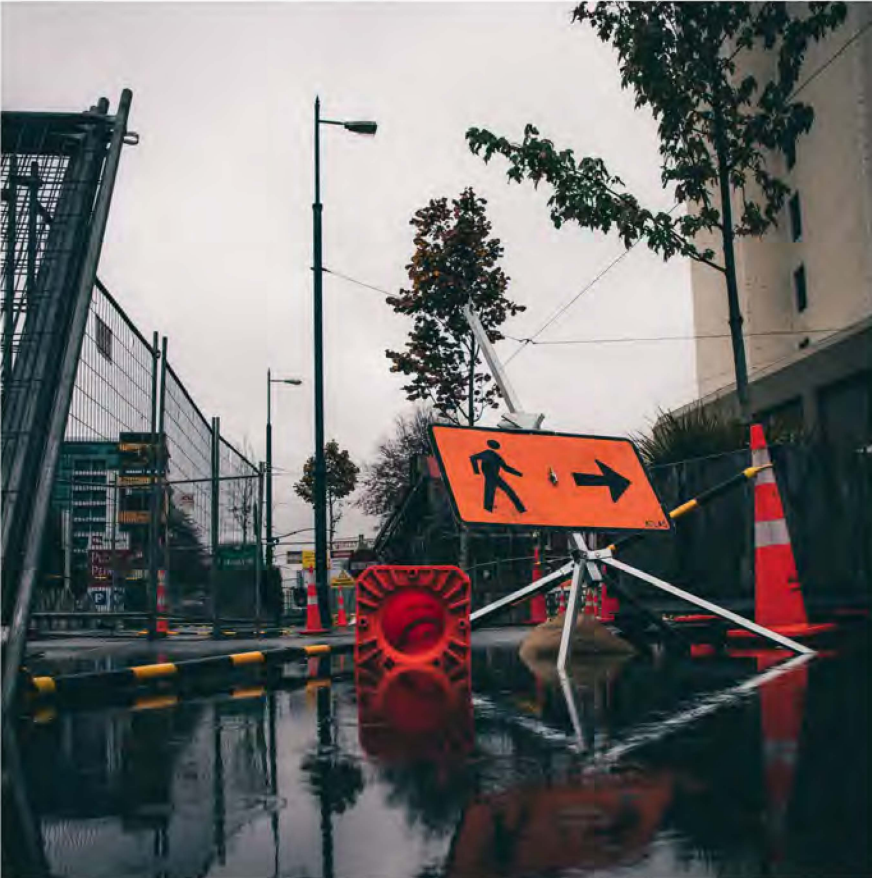
There seems to have been little, if any, dispute that the restrictions, being entirely unforeseeable events if the contract was entered before Covid-19 arose, would lead to an extension of time under

clause 10.3.1(f). While that may provide a Contractor with relief against liquidated damages, an extension for an unforeseen event does not give rise to time-related costs. Under clause 10.3.7, time-related costs are only available where an extension is granted for the net effect of a Variation (10.3.1(a)) or for a default by the Principal (10.3.1(g)). Since the restrictions are not due to the default of the Principal, any entitlement to time-related costs rests on whether there is Variation, which is why a suspension (6.7.1) and/or a change of law (5.11.10) becomes relevant.

Contractual Guidelines

Engineer Suspension

The guidelines suggest, but fall short of stating expressly, that suspension of the Contract Works has "*become necessary*" because of the Covid-19 restrictions (ie that the Engineer was obliged to suspend). They do, however, affirm that where a suspension notice has been issued by the Engineer, the Contractor is entitled to a Variation under clause 6.7.3 for the suspension.



Change in Law

In any event, the guidelines state that the Government's actions to enable the establishment of the Alert Level 4 directive "constitute the making of a statute and/or regulation" that gives rise to a Variation under clause 5.11.10. In other words, it was a change of law. This is the Government's interpretation of 5.11.10 in the circumstances.

Entitlement to a Variation

The upshot is that, where the guidelines apply, a Contractor will be entitled to a Variation – because the Engineer has issued a suspension notice under

6.7.1 and/or as a result of new Covid-19 laws or regulations under 5.11.10. Any increase in costs, including any time-related costs, will therefore be treated as a Variation and recoverable by the Contractor on that basis.

The quantification of such costs is a separate issue, which the industry is still working through given the unique circumstances. That aspect will be contract-specific to some extent and best resolved by agreement between the contracting parties in each case. The guidelines intended to remove in many cases unnecessary disagreements about whether there is an entitlement in the first place.

Cashflow and additional hardship

Despite the above clarifications, the guidelines also recognise that there is still likely be significant financial consequences for Contractors from the Covid-19 restrictions, which stands to affect the industry and economy as a whole. To that end, they ask government agencies to consider:

- a. Other mechanisms to improve cashflow and remobilisation. Specific suggestions include: forward ordering, payment in advance/prepayment, faster payment cycles,

issuing purchase orders for costs incurred, interim payments, or for results-based contracts, basing payment values on previous months; and

- b. Whether additional extra-contractual financial relief for individual Contractors is warranted and in the public interest. MBIE says it is developing processes for considering and approving requests for special relief.

Relevant links

[Government Announcement](#)

[Contract Guidelines](#)

Government guidelines contact:
procurementplanning@mbie.govt.nz

[Hesketh Henry Covid-19 Webpage](#)

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