



**As the Procurement and Property Functional Leader, I am pleased to introduce this guidance to help agencies support the construction sector during the COVID-19 lockdown period:**

## **Guidance for public sector agencies dealing with the contractual implications for construction projects of the COVID-19 lockdown period**

**These guidelines are intended for all internal and external project leads within Government agencies.**

Since New Zealand moved to COVID-19 Alert Level 4 on 26 March, many public sector agencies have had to close active construction and infrastructure worksites for an initial period of 4 weeks. This will have consequences on the timing and costs for delivery of these projects under their respective contracts.

Under the terms of their contracts, in many cases Contractors will be entitled to recover time and costs resulting from the lockdown period. Establishing the value of the claim will be complex and require case-by-case assessment of affected projects.

In order to provide confidence and certainty to the construction sector, it is important that Government agencies adopt a consistent approach. This guidance has been developed to help agencies work through the legal and commercial issues associated with the lockdown period. However, it applies to standard NZS 3910:2013 contracts so may need to be adjusted to suit your specific contract conditions.

If you are unsure about how this guidance applies to any of your individual contracts, please seek specific legal advice.

### **1. Contractual position under NZS 3910:2013**

#### **Engineer Suspension**

With the commencement of the COVID-19 Alert Level 4, many Engineers overseeing contracts for non-essential businesses have issued instructions for Contract Works to be suspended in accordance with clause 6.7.1, on the basis that the suspension of the Contract Works have “become necessary”.

In these cases, the Contractor is entitled to a variation under clause 6.7.3 for the suspension, as the suspension is not due to default on the part of the Contractor.

Where a suspension notice has been issued by the Engineer, agencies should discuss with the Contractor what will happen if the suspension continues beyond 3 months.

#### **Change in law**

However, where the Engineer hasn't issued a suspension notice, it is clear that the Principal and the Contractor are obliged to stop any non-essential works in order to comply with the government's Alert Level 4 directive.

Clause 5.11.10 of the General Conditions of Contract provides:

If after the date of closing of tenders the making of any statute, regulation, or bylaw, or the imposition by Government or by a 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 Government's interpretation is that the various restrictions put in place by the Government, including moving to COVID-19 Alert Level 4, all emanate from regulations or statutes. These include the [Infectious and Notifiable Diseases Order \(No 2\) 2020](#) which came into force on 11 March 2020 and added 'Novel coronavirus capable of causing severe respiratory illness' to the list of notifiable diseases, which in turn enabled the establishment of the Alert Level 4 directive. These actions by the New Zealand Government would constitute the making of a statute and/or regulation giving rise to a variation claim under clause 5.11.10.

**On this basis, whether the Engineer has issued a suspension notice under 6.7.1 or not, the Contractor will be entitled to a variation** under 5.11.10 as a result of new laws and regulation recently made relating to COVID-19. Any increase in costs arising from a change in law under 5.11.10 is treated as a variation, much the same way as a suspension instructed by the Engineer under 6.7.1 is treated as a variation.

## 2. Payments and cash-flow

As set out above, under NZS 3910:2013, Contractors will be entitled to recover time and costs under their respective contracts. However, there will likely be significant financial consequences associated with the standing down of construction workforces until claims for time and cost have been lodged and processed. This will threaten the long-term viability of Contractors.

**Without steady cashflow, Contractors will not have the confidence or financial ability to retain their workforce.** If financial support is not available, it is highly likely Contractors will have to permanently stand down a portion of their workforce.

Agencies must consider the mechanisms they have to mitigate the risks and associated additional costs of delayed remobilisation. This includes considering a range of approaches such as 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. Agencies should also consider changing commercial terms, such as the release of retentions or bonds that would help give Contractors additional financial flexibility during this time.

This approach could be recorded either via an agreement reached under 6.7.5 between the Principal and Contractor to suspend the Contract Works, or independently of any contractual process. Such an agreement would need to cover the payment terms and conditions that will best support cash solvency during the lockdown, the cost recovery principles that will determine the value of the variation claim, and the process for effective remobilisation.

It would also be appropriate for such an agreement to record the agreed scope of ongoing work (both on-site and off-site) during the period of the suspension, any daily rate payable for the period of Alert Level 4; and/or termination rights in the event of long term delay. Any such agreement should be for a specified period, for example until the lockdown period ends or for another mutually agreed period of time.

As a precondition of any changes to payment terms, agencies should consider how they will ensure that any financial support or benefits intended for subcontractors actually reaches them. The full supply chain will be critical to remobilisation and it is important to ensure relief flows through it in a timely fashion.

Such an approach will avoid uncertainty of entitlement in the immediate term, if it is treated urgently and carried out as a matter of priority.

An example of a process implemented by another agency can be found on the [NZTA](#) site.

### 3. Consideration of additional hardship

Finally, agencies should consider whether additional extra-contractual financial relief is warranted and in the public interest for Contractors who have been affected by COVID-19. Where an agency recognises that a supplier's financial health may be at risk because of COVID 19, while taking into account the Government financial support options that are available, they should be invited to submit an interim payment proposal which sets out the additional relief required and why it is needed (e.g. staff wages, subcontractor payments).

MBIE is currently developing processes for considering and approving requests for special relief and for collecting information from agencies on payments to Contractors. If you require further support to implement this guidance in the short-term, please contact [procurementplanning@mbie.govt.nz](mailto:procurementplanning@mbie.govt.nz).



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