

# COVID-19 Construction Risk Management

A recommended approach to COVID-19  
commercial principles and risk management

FEBRUARY 2022





# CONSTRUCTION SECTOR ACCORD

## Foreword

This recommended approach, as described further in the Overview, provides tools and principles to follow when approaching the management and mitigation of risks associated with COVID-19 in a construction or infrastructure project. While primarily written for public sector agencies, adopting the recommendations can also help private sector clients exemplify the principles of the Construction Sector Accord.

Whether directly related to COVID-19 or not, issues with the global and domestic supply of materials are clearly impacting current and upcoming projects. This situation presents risks to clients in terms of cost certainty. For contractors, the terms of their contract may not account for these significant cost fluctuations. The guidance and recommendations in this document are focused on the contractual arrangements between public sector agencies and main contractors. The same principles can be applied to consultant contracts, contracts held between the main contractor its sub-contractors, and material suppliers.

This guidance was first issued in July 2021, and since then COVID-19 continues to evolve and impact the industry. Omicron in particular may exacerbate supply chain issues, and there is a risk that productivity in the sector will slow down due to illness or isolation requirements. This could result in delays to project completion and cash-flow difficulties for some businesses. The guidance has been updated to support public sector agencies and private sector clients in facing the ongoing challenges from COVID-19.

The Accord continues to monitor the situation, but encourages open and transparent dialogue between clients and their supply chain partners to try and achieve the best outcome for the project.

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July 2021	Guidelines published
February 2022	Guidelines updated to reflect ongoing impacts of COVID-19

## Overview

In March 2020, New Zealand introduced a four-tiered alert level system as part of the health response to COVID-19. Many public sector agencies had to deal with the resulting impacts of delay, disruption and postponement of their construction and infrastructure projects and worksites. This has had consequences on the delivery timing and costs of these projects under their respective contracts.

In early 2022, COVID-19 continues to disrupt the construction industry and wider country. New Zealand has entered the “Red” light of the traffic light system in order to mitigate the spread of the highly contagious Omicron variant. This will have continued impact on the construction industry.

Construction contracts do not specifically reference the treatment of the effects of COVID-related issues. And in order to provide confidence and certainty to the construction sector when COVID-19 hit, New Zealand Government Procurement and the Construction Sector Accord issued reactive guidance offering an approach for agencies to work through the [legal and commercial issues associated with COVID-19, particularly in relation to standard NZS 3910:2013 contracts](#).

The projects that have addressed COVID-19 with the most success are those that have engendered a spirit of collaboration between all project team members, through the entire supply chain.

This guidance provides tools to proactively manage COVID-19 related risks and suggests a practical and fair commercial position for agencies to consider when entering into new construction contracts. The intention is for the guidance to be built into business as usual practices, rather than being an additional layer of governance and reporting. The tools for managing COVID-19 related risks will not be suitable for all project types, and project management plans should ensure that any guidance adopted is appropriate for the scale and complexity of the project.

While this guidance is aimed at those entering new contracts, public sector agencies and private sector clients are encouraged to adopt this guidance for existing contracts where possible, in order to exemplify the [Construction Accord's guiding principles](#).

The suggested commercial positions within this document are not definitive. Government Agencies should develop a position that fits with their project’s scope, scale, and complexity. While this advice relates specifically to COVID-19, it could also provide a mechanism for agencies to address other pandemics should they arise.

This guidance should be read in conjunction with resources listed on the [COVID-19 guidelines, information and practice](#) section of the Construction Sector Accord website. It should also be read in conjunction with the [Risk Management](#) section of the Construction Procurement Guidelines.

**NB** in Appendix B we have included an example COVID-19 contract clause wording for NZS3910:2013 from Kāinga Ora. This clause is included for context and information purposes only. The clause is not issued by the Construction Sector Accord and we recommend agencies develop their own contract clauses.

Agencies wanting further assistance, or to clarify more complex commercial matters, can contact MBIE's Construction Procurement Advisory Team at [constructionadvisory@mbie.govt.nz](mailto:constructionadvisory@mbie.govt.nz).

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## Risk Management

### NZS3910:2013 and COVID-19

NZS3910:2013 is generally considered to be the standard form of contract for the construction and infrastructure sector in New Zealand. There are no provisions for force majeure events in the standard drafting of this form of contract that could be interpreted to apply to project impacts caused by COVID-19.

In the absence of force majeure provisions, and to provide confidence and certainty to the construction sector, NZGP and the Construction Sector Accord issued reactive guidance on an approach for agencies to work through the legal and commercial issues associated with COVID-19. Initial advice from the Ministry of Business, Innovation and Employment (MBIE) related to interpretations of general condition 5.11.10 in the NZS3910:2013 contract (the 'change of law' provision), describing how the introduction of the four-tiered alert level system should be considered a change of law.

While addressing the initial impacts of COVID-19, the guidance didn't describe the ongoing risk management approaches and contract mechanisms that would be needed to fully address ongoing COVID-19 related risks.

### Culture of good risk management

Good risk management requires commitment, ownership and understanding of the process from senior management, and an active risk management system that is proactively reviewed throughout the project in a constructive "no-blame" environment.

Attitudes to risk will have a significant effect on the success of the project. An objective of "not failing" will have a very low tolerance for risks of any kind. Conversely, an objective of "succeeding" will encourage participants to be more innovative, take more calculated risks where appropriate and make more effort to monitor and manage the recognised risks.

Source: [Risk Management, Construction Procurement Guidelines, 2019](#)

The Risk Management section of the Construction Procurement Guidelines refers to a culture of good risk management.

In the context of COVID-related issues in construction contracts, the culture of risk management must consider the macro-environmental factors affecting the sector, including:

- prioritisation of workers' health and well-being;
- mandatory government issued COVID-19 guidance e.g. the four-tiered alert level system (recognising current guidance may evolve);
- the Government's focus on New Zealand's economic recovery from COVID-19, meaning:
  - government projects are seeking to **protect and create jobs**, supporting job transitions and skills development;
  - **assistance is provided for firms** through government subsidies, cash flow relief such as advance payments and shorter payment terms;

- embedding the culture change sought by the Construction Sector Accord by taking more partnership or collaborative approaches, and ensuring **risks are transparent and fairly allocated** (i.e. to the party best-placed to manage them); and
- expediting the delivery of government investment by using **rapid mobilisation** techniques such as those described in the Rapid Mobilisation Playbook.

[See the Rapid Mobilisation Playbook on the NZ Government Procurement website](#)

Recurring COVID-19 issues have created a dynamic and evolving environment and as a result, MBIE’s guidance has prioritised these macro-environmental factors over traditional construction contract positions. Agencies are also expected to consider this broader approach when considering COVID-19 related risks in their construction contracts.

## Risk management plan

While it is not always practical to actively manage all risks, COVID-related risks are likely to be significant and as such, should be actively managed in most construction projects.

Active management requires agencies to implement a specific risk management plan for COVID-19 related issues, which must be approved by the project governance board through the Senior Responsible Officer (SRO) (supported by the project director, consultants, main contractor and subcontractors/suppliers where appropriate). The risk management plan should include:

- establishment of a COVID-19 risk oversight and governance group made up of project participants and stakeholders chaired by the SRO and reporting to the project governance board;
- a meeting schedule for the COVID-19 risk oversight and governance group;
- a list of roles and responsibilities in monitoring trigger events and managing risk controls if they eventuate;
- establishment of a risk monitoring and audit regime;
- creation of a reporting regime to inform the project governance board;
- development of business continuity planning protocols for the project;
- scenario planning to understand the likely implications of any COVID-19 effects on the construction project at key stages in the project’s life-cycle;
- an assessment of impacts of scenario planning and any mitigation or control measures to be employed including any project dependencies;
- a list of contact details for all affected parties - consultants, contractors, subcontractors and suppliers – that is grouped according to likely impacts, for example suppliers importing international products;
- a decision making and escalation process for risk management and control;
- project communication protocols that can be implemented once a COVID-related risk trigger occurs;
- the procedure for detailing the lessons learned at each significant milestone; and
- consideration of feedback and lessons learned from similar projects undertaken by other government agencies, clients or support organisations, such as MBIE.

## Who is best placed to manage COVID-related risk?

It is good practice to allocate construction-related risks to the contracting party that is best equipped to control and manage a risk. The table below considers each party's ability to control, provide for, and manage COVID-related risk, and the extent to which they benefit from avoiding risks.

	Client	Contractor	Sub-contractor	Consultant
Ability to control the risk	LOW	LOW	LOW	LOW
Ability to provide for the risk*	Medium	LOW	LOW	LOW
Ability to manage the risk	Medium	Medium	Medium	Medium
Benefits from risk avoidance	HIGH	Medium	Medium	Medium

\*Where the construction contractor, subcontractor or consultant has little or no control over a risk, but is responsible for the risk anyway, empirical data through the Construction Sector Accord indicates the contractor is likely to react in one of two ways:

- make such a *large* risk provision for associated time and costs that the output will be at odds with the 'as low as reasonably possible' (ALARP) principle on page 6 [Risk Management](#) in the *Construction Procurement Guidelines* or,
- make such a low risk provision for associated time and costs to increase their market competitiveness that the output may increase the risk of contractor default on the project.  
[See the Risk Management Construction Procurement Guidelines](#)

Both outcomes are likely to be unpalatable to agencies. Therefore it is recommended that agencies retain the risk of COVID-related risks on construction projects.

An effective way to manage COVID-related risk is through collaborating with all contracting parties, construction project partners and stakeholders. A collaborative approach can be implemented through a contract partnering agreement, similar to the format prescribed by the Construction Sector Accord's Contract Partnering Agreement or through an Early Contractor Involvement process as described in the Early Contractor Involvement Guidelines.

[See the Contract Partnering Agreement on the Accord website](#)

[See the Early Contractor Involvement Construction Procurement Guidelines](#)

Public health measures aim to minimise the societal impacts of COVID-19. As COVID-19 is dynamic and ever changing, the public health measures also continue to evolve. While COVID-19 has been in known existence in New Zealand since early 2020, the Construction Sector Accord believe that the impacts of COVID-19 are not reasonably foreseeable by an experienced main contractor.

The Accord believes that a fair and reasonable position for new construction contracts under NZS 3910:2013 is for agencies to define impacts of COVID-19 upon the works as a variation and valued in accordance with Clause 9.3.

As the main contractor is in control of the works programme, it will be best placed to advise agencies of any potential impacts to the contract price or contract completion date. The Accord

recommends that main contractors and clients connect with one another urgently, in order to discuss these and work collaboratively to find solutions.

The Construction Sector Accord's view is that the advance notice provisions of Clause 5.21 under NZS 3910:2013 should be used to their full extent. The provisions aim to create a "no surprises culture" providing the opportunity for both the Engineer to the Contract and the main contractor to meet and discuss in advance how any impacts may be reduced or avoided. Noting that any failure by the main contractor to give advance notification can be taken into account by the Engineer to the Contract in valuing any variation claims for additional time and cost.

It is recommended that the Special Conditions under NZS 3910:2013 include for the impacts of COVID-19 on the works to be treated as a variation and valued in accordance with Clause 9.3, subject to the advanced notice provisions provided under Clause 5.21.

The allocation of risk and the associated contract conditions should be managed through a risk allocation table, such as the one provided in Appendix A, which is an enhanced version of the format previously included in the Rapid Mobilisation Playbook.

[See the Rapid Mobilisation Playbook on the NZ Government Procurement website](#)

### **Engaging with others on risk**

Good risk management includes processes for engaging with all contracting parties, construction project partners and project stakeholders, including the supply chain, to ensure a balanced, fair and transparent approach. This is particularly important for dynamic risks like those associated with COVID-19.

As with most construction risks there is likely to be a level of uniqueness to each construction project, meaning the management of risks cannot be generic or prescribed and requires an ongoing engagement model with all contracting parties, construction project partners and project stakeholders.

Engaging with the supply chain (consultants, contractors and suppliers) should be an ongoing process, beginning in the pre-tender stage, and continuing through the tender and negotiation phases and respecting contractual protocols, into the project delivery phase. Of these stages, the most critical engagement point is during the pre-tender stage when consultants and contractors should establish availability of products at the time of specification development. This should help identify problems early and enable the project team to make timely and informed decisions in response.

This early and ongoing engagement will inform a balanced approach to COVID-19 risk management by ensuring the supply chain fully understands the proposed risk allocation, which helps avoid ambiguity and potential disputes. It will also enable the effects of the proposed risk allocation to be monitored, and provide valuable insights that can be used for future projects.

## Potential engagement through pre-contract stages with the supply chain

Some suggested methods of engaging with the supply chain during the pre-contract project phases are provided below:

### PRE-TENDER

As part of the business case and feasibility stages of a project, consider market sounding on COVID-19 risk allocation and potential risk factors so the implications can be reflected in investment decisions.

Consider the proposed delivery models and form of contract in the context of the project and the proposed risk allocation throughout the supply chain.

Early engagement with the market through Early Contractor Involvement or bidder briefings to discuss initial thinking on COVID-19 risk allocation and to receive initial feedback.

Discuss lessons learned about COVID-related risks from similar projects with MBIE's Construction Procurement Advisory Team or other procuring agencies.

### TENDER

Include a risk allocation table in the tender documents setting out the agency's proposed risk allocation including those related to COVID-19.

Be open to amending the proposed COVID-19 risk position and hold risk allocation meetings with bidders to test the proposed thinking and inform agreed changes to contract conditions.

Consider feedback from risk allocation meetings and whether further amendments are required to the risk allocation table.

Re-issue risk allocation table to bidders, if amended following bidder feedback.

Review bidder responses to risk allocation, including cost and management approach, to assess value for money.

### NEGOTIATE

Be open to amending the proposed COVID-19 risk position and discuss any further clarifications and amendments on the risk allocation table with the preferred tenderer.

Agree on the final risk allocation table and contract clause wording with the preferred tenderer and include this in the contract documentation.

Agencies should take probity advice, as required, to make sure engagement with the supply chain complies with legislative requirements, Government Procurement Rules and their own procurement policies.

## Risk allocation table

The use of a risk allocation table promotes transparency and appropriate risk allocation, particularly for COVID-related risks which can be significant and dynamic. The risk allocation process should be undertaken in conjunction with all project partners collaboratively, rather than being prescribed by the Principal. The Risk allocation table published in the Rapid Mobilisation Playbook has been enhanced in Appendix A to provide the following:

[See the Rapid Mobilisation Playbook on the NZ Government Procurement website](#)

- a **risk breakdown structure** to allow risks to be allocated in more detail
- **apportionment of risk** between the principal, main contractor and any nominated subcontractors so that ultimate liability and ownership of time and cost implications is clear
- the roles of project participants in **managing risks** using the following terminology. Note that parties may have multiple roles:
  - **pays** - the party that has ownership of the time and cost implications of a risk;
  - **evaluates** – the party responsible for evaluating claims for the management of risks; this would normally be the Engineer to the Contract or an independent expert;
  - **monitors** – the party that monitors the management of risks and ensures the link between the ownership of risk and the management of risk are aligned in execution; this would normally be the project manager;
  - **informs** – the party that provides advice and assistance in managing the risk, and is well placed to take ownership of or manage a risk; this would normally be the design team;
  - **controls** – the party that is best placed to control the management of risks across multiple participants and put in place control mechanisms and reporting; this would normally be the main contractor;
  - **manages** – the party that is best placed to directly influence the management of the effects of a risk. This does not mean the party has to assume ownership of the costs related to management. This would normally be the supplier or subcontractor.
- a space for showing links between risks and **contract clauses** in the construction contract.

## Roles and responsibilities relating to COVID-19 risk

Risk management at a project governance level involves:

- **project governance board**, who should receive regular status reports on significant risks, and make decisions on risk mitigation measures recommended by the SRO. The board should support the SRO to consider a broader view of the management of COVID-19 risk.
- **senior responsible officer (SRO)**, who should ensure all project participants have an appropriate business continuity plan that adequately plans for risks.
- **project director and manager/s**, who should continuously manage and monitor the risks, and provide regular status reports to the project governance board. They should ensure contractual claims associated with COVID-19 are proactively addressed.

Source: [Risk Management, Construction Procurement Guidelines, 2019](#)

Each participant directly involved in project delivery also has a significant role to play in managing risks and planning mitigations such as the:

- **project consultants**, who should:
  - continuously manage and regularly report on risks to their own work, and assist monitoring of project risks;
  - stay informed about the availability of plant and materials that have been specified, and proactively recommend or review alternate products in the event of delayed supply;
  - proactively work with the project team to address contractual claims associated with COVID-19;
- **main contractor and subcontractors**, who should:
  - put in place a business continuity plan for each firm as required in a form that details how the main contractor and/or subcontractors will operate in the different COVID-19 alert levels;
  - collaborate on risk management processes;
  - consider possible COVID-19 restrictions in their work planning;
  - proactively respond to risk management positions put forward in project documentation and risk allocation tables during the pre-contract phases;
  - review and where possible, improve the management of risk positions posited by the project governance team and existing project documentation;
  - identify elements of the supply chain or expertise that is sourced internationally and identify potential mitigation measures such as locally sourced products;
  - provide regular status reports to the project director;
- **main contractor, or nominated suppliers of products and systems**, who should:
  - identify elements of the supply chain that are being sourced internationally;
  - work collaboratively with consultants and contractors to provide clear and sound advice on the probable impacts to delivery periods, particularly for those materials sourced internationally; and
  - Continually provide advice to account for a dynamic national and international environment.

## SRO's responsibility for overall risk management

The SRO should have responsibility for overall risk management including active management of COVID-related risks. They should oversee the preparation of the risk management plan with support from the project director and managers, independent client advisers, subject matter experts and others in the project team, and monitor its implementation.

The SRO should review the risk management plan and individual risk mitigation measures throughout the life of the project and at each major decision point.

The project governance board should be satisfied that the SRO has put in place appropriate risk management plans, risk mitigation measures and contingencies, as required by the investment business case. This includes ensuring there are business continuity plans from the key project participants, such as the client, consultants and contactors.

From that point on, reporting of COVID-19 risks and recommended mitigations should be provided to the project governance board in a collaborative way by all key project participants. The SRO should seek clarification from all participants that the level of risk associated with COVID-19 remains acceptable.

## Approach to Risk Management

A normal risk planning approach aims to eliminate or mitigate construction project risks. This approach assumes project parties have a level of influence on a project risk. However, parties to the project have little, if any, ability to mitigate, minimise or eliminate most COVID-related risks, meaning projects need to have a contingency planning approach instead.

A contingency planning approach accepts there is a high likelihood that a risk will eventuate or that there is little ability to mitigate a risk, and so suggests how a risk should be handled when it is realised. The plan will be activated by a trigger event, so it is essential to highlight what such an event will look like and how the response is managed.

### Risk Mitigation Approach



### Risk Contingency Approach



It's important to make sure all members of the project team and project stakeholders have the opportunity to engage in a discussion that will promote good risk management.

### Identifying risks

Refer to Risk Management in the Construction Procurement Guidelines for guidance on identifying risks. A check list of potential COVID-related risk areas is provided below. Note, this

list offers a reference point to prompt discussion with contracting parties, construction project partners and stakeholders. It is not intended to be an exhaustive list.

[See the Risk Management Construction Procurement Guidelines](#)

### **Macro-environmental risks**

- international lockdowns, travel restrictions or other adverse situations affecting supply chains
- New Zealand border controls affecting supply chains
- international lockdowns, travel restrictions or other adverse situations affecting specialised labour or expertise
- New Zealand border controls or Managed Isolation and Quarantine requirements affecting specialised labour or expertise

### **Project risks**

- reduced productivity
- labour shortages
- shortages of material supplies leading to delays and/or increased costs
- prolonged costs of plant and equipment retained on site
- prolonged costs for off-site storage of materials
- weather damage to works and materials retained on-site
- health and safety issues due to unfinished construction
- increased likelihood of vandalism
- negative impacts on site personnel's mental health and well-being
- further changes of law creating new restrictions for projects, including changes to the four-level alert system
- full or partial site shutdown due to COVID-related health and safety issues occurring outside of a change in a government system e.g. alert level remains the same.

### **Consequences of risks**

- costs with degradation (such as materials exposed to weather and unable to practicably be protected) and damage (for example, vandalism) and any subsequent impact to warranties and guarantees
- delays to project completion (where activities affected are on the critical path)
- increased costs for out of sequence working to recover programme delays
- increased preliminaries and general costs, such as site management costs
- loss of overhead and profit that would normally be made on the contractors' prime cost for the project

### **Indicative cost headings for risk claims**

- |  |   |   |
|--|---|---|
| • demobilisation and remobilisation costs                      | • make the site safe during lockdown                        | • implementation of business continuity planning  |
| • extended and increased site management costs (e.g. security) | • costs of additional controls to visitor management system | • additional storage costs for materials off site |
| • increased costs due to special measures to                   |   | • increased costs for extended plant hire         |

- increased labour costs during lockdown (e.g. furlough)
  - creation of controlled work areas within sites including appropriate record keeping
  - assessment regime to ensure site operatives are fit for duty
  - sanitary measures such as hand sanitisation, additional hand washing facilities, disinfectant wipes
  - provision of appropriate Personal Protective Equipment and safe disposal
  - effects to work methodology affected
- by COVID-19 restrictions such as social distancing
  - additional consideration of work method statements and risk assessments
  - site operative training and associated materials
  - additional cleaning
  - implications for work vehicles that are used to transport workers
  - effects of limitations on inter-regional travel
  - increased controls for site deliveries
  - implications associated with a positive COVID-19 case on site
- including data gathering, cleaning and site shutdown
  - other preliminary and general costs
  - extended scaffold hire costs
  - traffic management costs
  - costs of any rework required due to weather damage
  - increased material costs due to supply shortages
  - main contractor's overhead costs
  - main contractor's profit (refer note on COVID-19 and contractors profit)

#### **COVID-19 AND CONTRACTORS PROFIT**

One of the things that agencies need to consider when drafting their contract clauses to consider COVID-19 related risks is whether main contractors are paid profit over and above their costs.

Internationally, different clauses have emerged with differing positions on whether contractors should be paid for profit.

Whether contractors are paid profit or not, empirical data suggests that contractors are not typically profitable at times of COVID-19 enforced lockdowns.

Duncan Kenderdine, GM Strategy of Downer states:

“During the recent COVID-19 lockdowns in New Zealand, any offsite overhead and margin that was paid on COVID-19 related claims, served only to contribute towards our overhead costs to keep the business running. Our experience was that annual profits declined due to the COVID-19 lockdowns.”

#### **Assessing the impact of risk**

Refer to [Risk Management](#) in the Construction Procurement Guidelines for guidance on assessing the impact of risks to a construction project.

[See the Construction Procurement Guidelines on the NZ Government Procurement website](#)

## Quantifying risk

Refer to [Risk Management](#) in the Construction Procurement Guidelines for guidance on quantifying risk for a construction project.

[See the Construction Procurement Guidelines on the NZ Government Procurement website](#)

## Contingency Planning

The process to consider contingency planning associated with COVID-related risks could be as follows:

1. Establish likely risk scenarios that may eventuate e.g. COVID-19 alert level 4.
2. Conduct an analysis of the impacts of each risk scenario and the parties affected.
3. Identify the trigger events of each scenario that will signal the need to implement the contingency response.
4. Identify any controls and management responses to the trigger events.
5. Create contingency response strategies including any guidance, resources and protocols.
6. Ensure any pre-emptive strategies and planning is clearly detailed.
7. Provide a gap analysis of any planning and/or information that may preclude appropriate contingency planning.
8. Ensure the contingency plan is maintained and updated throughout the project life cycle.
9. Make realistic financial provisions to cover likely risk scenarios.

## Monitoring and reviewing risks

Refer to [Risk Management](#) in the Construction Procurement Guidelines for guidance on monitoring and reviewing risks of a construction project.

[See the Construction Procurement Guidelines on the NZ Government Procurement website](#)

## COVID-19 and construction contracts

A new set of clauses should be added to a construction contract to provide for the active management of COVID-19 related risks in construction contracts and in Appendix B, an example COVID-19 contract clause for NZS3910:2013 is provided from Kāinga Ora. It is expected that the standard form NZS3910:2013 clauses most significantly affected would be as follows:

### Clause 1.2 Definitions

An example of how COVID\_19 could be defined in the Contract is as follows:

"Covid means(a) any pandemic, or epidemic, as classified by the World Health Organisation, and/or the New Zealand government including or not limited to COVID-19, coronavirus disease 2019, novel coronavirus, 2019-nCoV and SARS-CoV-2; or"

Should an agency wish to broaden the definition, an example of how this could be defined in the Contract is as follows:

"An act of government in response to any pandemic or, any epidemic including but not limited to being a Notifiable Disease pursuant to Schedule 1 and 2 of the Health Act 1956."

## **Clause 2.7 Documents prepared by the Engineer or Principal**

Responsibility to develop a risk management plan must be borne by the Principal with collaborative input from the consultants, contractor & other project stakeholders through the project life cycle

## **Clause 2.8 Documents prepared by the Contractor**

The main contractor should prepare a business continuity plan post contract award so it is clear how they will operate under the COVID-19 alert level system and provide regular reporting to the Principal

## **Clause 5.9 Materials, labour and plant**

In line with previous government advice on options to assist a Contractor's cash flow during COVID-related events, agencies should consider mechanisms for interim payments such as paying for materials stored off site.

[Refer to COVID-19 guidelines, information and practice on the Construction Sector Accord website.](#)

### **Clause 5.11 Compliance with laws**

In the absence of a force majeure clause in the Contract, COVID-related risks should be considered a variation and valued in accordance with clause 9.3. Any change to existing COVID-related government guidance in any form, should be considered a change of law

### **Clause 5.21 Advance notification**

If a COVID-19 related risk event is triggered, to expedite deployment of contingency planning protocols and time and cost claims procedures, the Engineer should be compelled to bring the contract parties together to collaboratively manage and discuss resolution of the issues

## **Clause 6.7 Suspension of the Work**

The parties may agree to a threshold by which the suspension of the work, or even termination (but not termination for convenience) is triggered if the costs of COVID-19 related variations exceed the cost benefit of a construction project. For instance Appendix B includes an example of COVID-19 contract clause wording from Kāinga Ora used with NZS3910:2013 that suggests that if COVID-related variation costs accrue to 20% of the Contract Price at the date of the Contract Agreement, then suspension of the work can be triggered by the principal

## **Clause 9.1 Variations permitted**

COVID-related risks should be considered a variation and valued in accordance with clause 9.3

## **Clause 9.3 valuation of Variations**

Agencies should value COVID-related variation costs on an open book basis using a collaborative approach.

Agencies should refer to the note on Contractor's profit.

### **Clause 10.3 Extension of time**

An Extension of Time should be granted for any COVID-related event where it is demonstrated to extend the contract period.

### **Clause 12 Payments**

In line with previous government advice on options to assist a Contractor's cash flow during COVID-related events, agencies should consider mechanisms for "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" should COVID-19 related delays occur.

[Refer to COVID-19 guidelines, information and practice on the Construction Sector Accord website.](#)

Agencies should ensure that flow-on positive outcomes of payment relief measures provided to contractors are replicated through the supply chain and sub-trades.

**Appendix A – Risk allocation table format 2.0 ([refer Excel spreadsheet](#))**

## Appendix B – Example COVID-19 contract clause wording from Kāinga Ora for use with NZS3910:2013

### 9.6 Covid Variation

9.6.1 If during the Contract a Covid Impact occurs, then, the Covid Impact shall be treated as a Variation, subject to this 9.6.

9.6.2 This 9.6 represents the Contractor's sole remedy in respect of Covid and any Covid Impact. The Contractor shall have no right to make any claim (whether for time, Cost, Variation or otherwise) in respect of Covid and any Covid Impact under any other provision of the Contract or at law.

9.6.3 If a Covid Impact occurs, then the Contractor shall:

- (a) Keep the Principal informed at all times (and on request) of the likely effect of the Covid Impact and the value of the Covid Variation;
- (b) Work collaboratively with (and meet and consult with) the Principal and the Engineer to:
  - (i) Explore proposals for avoiding or reducing (including by innovation) the Covid Impact's effect on the Contract Works, the Contract Price or the programme; and
  - (ii) Minimise the Covid Impact's effect on Subcontractors and the Contractor's supply chain; and
- (c) To the extent possible, obtain the approval of the Engineer prior to incurring or committing to any Cost due to a Covid Impact.

9.6.4 Subject to 5.21.3 (if applicable), the value of a Covid Variation shall as far as possible be valued by agreement between the Contractor and the Engineer. Failing agreement, the value shall be determined by the Engineer in accordance with 9.3.

### Termination

9.6.6 If at any time the aggregate value of all claimed Covid Variations whether or not, at that time, accepted by the Engineer exceeds the Covid Threshold, then the Principal shall, in its sole discretion, be entitled to terminate the Contract by 1 Months' notice to the Contractor, and in such case 14.1.2 shall apply excluding 14.1.2(e) and (g) and the Contractor shall not have any right to claim further compensation (including for any loss of profits, opportunity or revenue).

9.6.7 If the Contract is terminated under section 9.6.6, then:

- (a) 14.2.6\* shall apply to the extent required by the Engineer; and
- (b) The Contractor shall properly secure and protect the Contract Works against damage and leave the Site in a clean and tidy condition.

Any reasonable Costs incurred by the Contractor in complying with this 9.6.7 shall be payable by the Principal.

### Interpretation

9.6.8 For the purposes of this 9.6:

**Covid** means the coronavirus disease of that name, as classified by the World Health

Organisation on 11 February 2020, also known as COVID-19, coronavirus disease 2019, novel coronavirus, 2019-nCoV and SARS-CoV-2.

**Covid Impact** means any increase or decrease in the Cost to the Contractor of performing the Contract that is directly caused by Covid, howsoever arising whether including as a result of, or in connection with, any matter that would give rise to (or be treated as) a Variation under any other provision of the Contract, including without limitation:

- (a) A change in law;
- (b) A suspension of the Contract Works in whole or part;
- (c) Any impact of Covid on the Contractor's Sub-contractors or the supply of any Materials to the Contractor; and
- (d) Any act or omission of the Principal or the Engineer.

**Covid Variation** means a Variation under this 9.6.

**Covid Threshold** means an amount equivalent to 20% of the Contract Price at the date of the Contract Agreement.

\* note that 14.2.6 is a special condition within the Kāinga Ora NZS3910:2013 standard contract which states:

14.2.6 Without limitation or prejudice to the above provisions of this 14.2, the following will apply where the Principal resumes possession of the Site or terminates the Contract under 14.2.1 or 14.2.2:

- (a) The Contractor will, to the extent required by the Principal, assign to the Principal all of its rights and benefits under its subcontracts within 10 Working Days of being requested to do so;
- (b) The Contractor will co-operate with the Engineer in the transfer of information and disposition of work in progress so as to mitigate the cost to the Principal of removing the Contractor;
- (c) The Contractor will comply with all other reasonable requests from the Engineer regarding the terminated works and co-operate with and provide all reasonable assistance to the successor contractor (if any) and the Principal following the removal of the Contractor to ensure that there is a smooth and efficient handover of the Contract Works to any successor contractor and the Principal; and
- (d) The Principal may pay any Subcontractor for any Materials delivered or works or services executed for the purpose of the Contract (whether before or after the date of resumption or termination) insofar as the price thereof has not already been paid by the Contractor, and any such payments may be deducted from any sums due or to become due to the Contractor.

## Appendix C – Other COVID-19 related guidelines, information and practice

### Important links to COVID-19 information

Official government website for COVID-19 – <https://covid19.govt.nz/>

COVID-19 health information – <https://www.health.govt.nz/our-work/diseases-and-conditions/covid-19-novel-coronavirus>

COVID-19 information specific to the construction sector – <https://www.building.govt.nz/covid-19>

Workplace health and safety during COVID-19 – <https://www.worksafe.govt.nz/>

Construction sector standards and protocols – <http://www.chasnz.org/covid19>

### Health and safety

Content	Link	Type	Source
COVID-19 – construction industry health and safety standards	<a href="#">CHASNZ</a>	Information	CHASNZ
MATES in Construction mental health support line and other resources	<a href="#">Mates in Construction</a>	Information	MATES in Construction
General mental health resources list	<a href="#">Ministry of Health</a>	Information	Ministry of Health

### Procurement and contract management

Content	Link	Type	Source
Guidance to government agencies on an approach to construction contracts during the COVID-19 disruption. Private sector clients are also encouraged to follow the guidelines	<a href="#">Contractual guidelines for procuring agencies [PDF, 527 KB]</a>	Guidance	MBIE
Guidance to government agencies on determining the fair value of variations due to COVID-19 disruption	<a href="#">Contract variation guidelines [PDF, 758 KB]</a>	Guidance	MBIE/Construction Sector Accord
Guidance to government agencies on discussions with contractors regarding essential services, procurement, contracts, and business continuity plans	<a href="#">General COVID-19 procurement guidance [PDF, 303 KB]</a>	Guidance	Construction Sector Accord
Contract management guidance for government agencies requiring COVID-19 vaccinations for access to their premises	<a href="#">COVID-19 Vaccination Guidance</a>	Guidance	MBIE

## Pipeline and productivity

Content	Link	Type	Source
Rapid mobilisation models for central and local government agencies	<a href="#">Rapid mobilisation models [PDF, 3.6 MB]</a>	Advice	Construction Sector Accord

## General construction information

Content	Link	Type	Source
Guidance on checking on the impact and damage caused by exposure of sites during lockdown	<a href="#">The condition of your site after lockdown</a>	Guidance	BRANZ
Guidance on exposure limits for different types of building materials	<a href="#">Exposure limits</a>	Guidance	BRANZ



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