

Standards New Zealand | Te Mana Tautikanga O Aotearoa

A business unit in the Ministry of Business, Innovation & Employment HIKINA WHAKATUTUKI

## **Summary of the Scoping report NZ 3910 *Conditions of contract for building and civil engineering***

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## Purpose

The purpose of this report is to define the scope and outline the process steps for the revision of NZS 3910:2013 *Conditions of contract for buildings and civil engineering construction* to ensure the end product is fit for purpose and widely accepted.

The contract between Standards New Zealand (SNZ) and the New Zealand Construction Industry Council (NZCIC) includes the following as the agreed outputs:

- Agreed finalised scope for a project to revise NZS 3910;
- A description of likely risks or impact of proposed changes if NZS 3910 is revised;
- A description of contentious issues that could arise during the revision;
- Feedback on revision of associated standards NZS 3915, NZS 3916, NZS 3917;
- The possibility of setting up a standing committee;
- The format of the document; and
- A list of relevant stakeholders.

Furthermore, the committee agreed that the objective of this revision is to ensure that the Standard remains up to date and consistent with industry-wide expectations. It aims to:

- Incorporate industry-accepted best practice in procurement;
- Strengthen the independence and impartiality of the Engineer;
- Support a culture of greater trust and encourage collaboration between parties;
- Align with changes in legislation since the 2013 edition;
- Provide for pandemic-type events;
- Define the allocation of risk and any limits of liability; and
- Incorporate new technology where it will make the Standard more effective for users.

## Executive Summary

As a result of the discussions held by the scoping group and SNZ, it is recommended that a development committee is formed that will be responsible for:

- a) drafting a NZS 3910 interim standard; and simultaneously
- b) revising the full NZS 3910 standard.

The standards will be published in a smart format that can easily be updated and enables users to immediately see any changes that have been made in the Special Conditions section.

## The Collaborative Process

23 November 2020 – 1 day scoping workshop in Wellington

A scoping workshop was organised by SNZ with a wide range of stakeholders.

The following topics were discussed:

- a. Should NZS 3910 be an official NZ Standard or a sector-maintained standard?
- b. The process and frequency of updates
- c. The future format of the Standard
- d. The scope for a future revision
- e. Risks, contentious issues and mitigation strategies
- f. The benefits of a review

- g. Decisions (recommendations) to determine the scope and timing for the review of associated Standards NZS 3915, NZS 3916 and NZS 3917
- h. Funding of revision
- i. Advice on committee representation for the NZS 3910 revision

#### *Key documents produced from the meeting*

- Minutes (Appendix A in full Scoping Report NZS 3910: 2013)
- Stakeholder survey (Appendix B in full Scoping Report NZS 3910: 2013) – This outlines the sector consultation on a proposed revision to NZS 3910:2013 – scope definition. The survey was designed to receive feedback from the wider industry with regards to:
  - The need for a revision and if it should be an interim standard and/or a full revision of the standard or no revision
  - The scope of an interim and/or full revision of NZS 3910: 2013
  - The revision of NZS 3915, NZS 3916, NZS 3917

#### *18 December 2020 to 14 February 2021 – survey opened for participation*

The purpose of the sector consultation survey was to collate feedback on the proposed scope for the revision of NZS 3910 from as many individuals associated with the construction sector as possible. The survey was distributed via the following channels:

- Standards NZ email list of organisations/people who purchased the previous NZS 3910 (3,600 people)
- Civil Contractors New Zealand (CCNZ) (3540)
- Construction Accord newsletter (numbers to be confirmed)
- NZCIC (50 member associations, many of whom distributed it to their own members)
- Society of Construction Law
- Scoping group (30)

Individuals and organisations were encouraged to share the survey with members of the construction industry association and/or individuals with an interest in the construction sector.

#### *Survey results*

- Summary of survey responses (is available in Appendix C of the Scoping Report NZS 3910)
- Revision scope interim vs full revision – content of open questions categorised in interim and full revision (can be found in Appendix D of the Scoping Report NZS 3910)

#### *1 March 2021 – Post public consultation meeting*

The following topics were discussed at the meeting:

- a) High level summary of survey responses
- b) Key conclusions
- c) Process overview from SNZ
  - i. Interim standard
  - ii. Timelines – Interim standard & full revision
  - iii. Governance
- d) Feedback and discussion on:
  - i. Topics listed for interim and full revision
  - ii. Interim revision (Q2)

- iii. Full revision (Q5)
- iv. Scoping group recommendation
- e) Expectations going forward – sharing information
- f) Funding and resources
- g) Next steps

#### *Key documents produced from the meeting*

- Minutes (Appendix E of the Scoping Report NZS 3910)
- Survey on the scope of interim vs full revision sent out to the scoping group after the meeting (Appendix F of the Scoping Report NZS 3910)
- Results from scoping group feedback (Appendix G of the Scoping Report NZS 3910)

## Outcomes

### Decision regarding retaining NZS status

During the initial scoping workshop, the group was asked whether NZS 3910 should stay as a New Zealand Standard or become an industry-owned standard.

There was broad support for the view that if the current Standard's issues were addressed (the development of a smart contract with track changes to reflect amendments in Special Conditions, the set-up of a standing committee to address ongoing/quick changes) then the industry should continue with the Standard. Key reasons for this support were the mana of having a contract developed through NZ Standards, the independence of Standards NZ, the strong linkage with NZ Government, and Standards NZ experience, structures and its declared willingness to be flexible in the way they approached the review. The issues concerning the current Standard raised by the group were addressed by Standards NZ in a letter to Peter Silcock, NZCIC Executive member (Appendix H).

### Decision regarding the need for an Interim standard and/or full revision

Subsequently, the scoping group decided to opt for the revision as an interim standard while simultaneously revising the full standard. This decision was supported by 80% of the scoping group, and 41.7% of the wider sector engagement was in favour of this approach, 25.1% in favour of a limited review only and 23.2% a comprehensive review only.

The idea to introduce an interim revision (initially called a fast-tracked revision) originated from the initial scoping workshop when discussing the scope. The standard had not been revised since 2013, which was a limited scope revision, and therefore a full revision was deemed necessary. However, concerns we raised with regards to timeframes. The revision of the full standard might take years while there is a need for a fast -tracked revision to address the non-contentious issues. An interim standard would offer an 'interim' solution with a more fit for purpose document in the short term while the full review is underway.

An interim standard can only address non-contentious issues. The changes made in the interim standard need to be agreed upon by the whole committee (100% consensus).

Key differences between an interim standard and a normal standard:

- An interim standard does not require a public consultation period
- The interim standard is approved by the National Manager of SNZ and does not require approval from the Standards Approval Board.

Defined scope/s for interim standard and full revision

The key content to be included in the interim and full revisions is summarised below:

*Interim revision – non-contentious issues:*

- Legislative amendments
- Covid-19 (pandemic) clause
- Collaboration (Accord objectives)
- Liability cap optional clauses

*Full revision – remaining issues:*

- Bond
- Contract type
- Concurrent delay
- Default and termination
- Defects
- Design obligations
- Disputes
- Disruption
- Early Contractor Involvement (ECI) provisions
- Engineer and Engineer Rep roles
- Environmental / social
- Extension of Time (EOT) PROVISIONS
- Final account
- Guidelines
- Insurances
- Indemnity
- Limitation of liability issues
- Liquidated damages
- Optional clauses to minimise special conditions
- Order of precedence
- Payments
- Personnel
- Procurement / Conditions of Tendering
- Programme
- Quality
- Retentions
- Risk
- Technology
- Time limits / notices
- Time – related cost
- Tracked changes
- Utilities
- Variations
- Warranty

The time frame to complete the interim standard is anticipated to be seven months from the date of securing the funding.

The timeframe to complete the full revision of the NZS 3910 standard (which would run concurrently with the interim standard development) is 21 months from securing the funding.

Potentially contentious issues that could arise during the revision

The topics identified in the scope for the revision are potentially all contentious. Some scope items may not be capable of being addressed as there is no clear answer. However, most items will relate to risk allocation, which could be addressed with optional clauses or provisions and defined in a table.

Contract risks need to be fairly and clearly allocated to the party best able to manage and mitigate the risks.

Controversial topics

*The position/role of the Engineer to the Contract*

When discussing the Engineer to the Contract amendments, the interests of the different parties involved have to be taken into account. This might lead to strong discussions and/or the risk of disengagement of committee members.

*Format of the document (See expected benefits of revising NZS 3910)*

*Poor timelines*

The revision can also be hindered by delays when the committee fails to complete tasks within the scheduled timeframes and/or when parties cannot come to a consensus.

All the above problems will be mitigated by having a clearly defined scope, effective governance and by appointing a Chair with excellent leadership skills.

Proposed change potential risks or impacts

The key risks are that the Standard changes to such an extent that:

- Industry members are reluctant to use it (adapt to it); or
- The Standard is amended in a way that is unsatisfactory to a segment of the sector (for example, principal/contractor).

This will lead to inconsistent use of the Standard.

It was noted that some organisations are happy with their current contract which has been tailored to their needs by Lawhawk (Document Automation Specialists, the company that provided the value-add project on NZS 3910). A number of people raised in discussion the importance of avoiding “throwing the baby out with the bathwater” if fundamental changes are made to a widely accepted document. This could result in a migration from NZS 3910 to other contractual formats such as FIDIC or NEC.

All risks should be mitigated. Risks are mitigated by ensuring that the balanced committee represents all sectors impacted by the standard, and that there is extensive public consultation.

*Expected benefits of revising NZS 3910*

The purpose of the scoping workshop was to engage with a working group representing the sectors impacted by the standards and to test their findings with the wider industry through a survey. Through this robust process, the NZCIC commissioner intends to have a solid understanding of the sector’s thinking and to make available a revised standard that:

- is widely accepted and fit for purpose

- improves understanding of contracts due to fewer special conditions
- allocates risk fairly
- results in more contracts that embody Construction Accord Principles
- allows the industry to document contracts quickly and easily (improving productivity) and address common issues

#### Proposed format and key features of the document

The format of the document was discussed in detail during the scoping workshop, the post public consultation meeting and was addressed in the stakeholder survey. The industry specified that the contract should:

- be available in hard copy and printable electronic form and also be able to be completed online by licenced users using an intelligent interface.
- be produced in such a form that special conditions, when properly inserted by a user, will appear as tracked changes within the body of the text.

Standards NZ confirmed that they will collaborate with the industry and the vendor to improve the end product. This will better align the product (contract) with the needs of the industry, within the boundaries of the *Standards and Accreditation Act 2015*.

Following a meeting with Lawhawk, Standards NZ suggested that more research needed to be done on how the industry would like to move forward with the smart document. It became clear that changing the format of the document would probably not be a “quick fix” and should therefore be categorised as a topic to be tackled under the full revision rather than as part of the interim standard revision.

It was also suggested that councils, government departments, contractors and lawyers would be willing to share a copy of standard amendments for NZS 3910 for committee consideration. The committee would then be able to select the best features that fit with 3910 default risk allocation. This would add to the efficiency of the revision process. This was agreed by the scoping committee.

#### Request to update the standard regularly

During the scoping workshop Standards NZ was asked to recognise a properly constituted standing committee which would review and initiate amendments or addenda to the published Standard regularly (perhaps annually) or on an emergency basis. The purpose of this standing committee would be to bring the Standard into line with legislative changes or industry issues (such as the proper treatment of COVID-19) and initiate future reviews.

Standards NZ is supportive of having a standing committee set up after the revision and to trial this new way of working for 2-3 years.

#### How this would work

- The committee makes a consensus-based decision as to who will be part of the standing committee (core group of 8 to 10);
- This core group will respond in a frequent and timely matter to industry changes;
- Additional experts can be formally on-boarded as required for any revision;
- The Board will be informed of this set up, the normal approval of the revision procedure will operate;



- The standing committee will follow the Standards NZ process but with reduced timeframes due to the limited change required. The timeframes will be set in collaboration with SNZ;
- The effectiveness of this way of working is dependent of a high level of co-ordination and facilitation from those involved, the standing committee members, the chair, and SNZ.

#### Feedback on the need to update NZS 3915, NZS 3916, NZS 3917

The results of the survey indicated a preference for a revision of the associated standards. However, the scoping workgroup decided that the revision of the associated standards would not be part of the interim or full revision. The standing committee is to make a decision on when the associated standards should be revised.

#### Next steps

While Standards NZ can make recommendations, it is up to the commissioner(s), to make a decision on how to progress the revision.

Once the commissioner(s) indicates the project will go ahead, Standards NZ will provide:

1. A proposal which will include:

- Standards NZ's approach
- Assumptions
- Indicative timelines
- Budget (partnership approach will be included)
- Project team
- Quality assurance
- Risk management

and

2. A contract which will be drafted and signed by the parties when mutually agreeable to its content.

The project will start on signing of the contract.

If you would like a copy of the full scoping report, please email [enquiries@standards.govt.nz](mailto:enquiries@standards.govt.nz). Please note, the full Scoping Report is not in accessible format.