

DZ 3910 SUBMISSION

Section	Clause	Type	Comment	Proposed Change
01. Interpretation	1.2	Editorial	'Time Related Costs' is not defined. The scope of time-related costs often causes issues.	Include a definition of "time-related costs"
01. Interpretation	1.2	General	Engineering New Zealand welcomes the removal of the terms "Engineer" and "Engineer's Representative". This change addresses a longstanding area of confusion surrounding the use of the term "Engineer". The term is ambiguous due to the lack of requirement for individuals holding that position to hold engineering qualifications. The introduction of new terms will provide greater clarity to all parties involved in the contract, ensuring a better understanding of the roles and their responsibilities.	N/A as we agree with the changes proposed to the terms "Engineer" and "Engineer's Representative".
01. Interpretation	1.2	General	Engineering New Zealand welcomes the introduction of the roles of "Contract Administrator" and "Independent Certifier" with their respective definitions. These provide clarity. However, while the name "Contract Administrator" accurately defines the role, the term "Independent Certifier" does not best reflect the role of the former Engineer to Contract as it emphasises the certification aspect of the role rather than the decider role.	Replace "Independent Certifier" with the term "Executive to Contract" or "Contract Executor". The former would have the benefit of retaining the acronym "EtC".
05. General obligations	5.12.4	Technical	The words "further time" do not allow for short times should these be required for a specific project or need.	Replace "further time" with "other time"

0.5 General obligations	5.3.1	Editorial	5.3.1 requires for a competent individual but provides no definition of competency means. Engineering New Zealand in collaboration with the Construction Sector Accord has established an independent EtC Panel that is assessed and commits to a Code of Ethical Conduct. It is our view that this arrangement supports good accountability and vetting for the role. We recommend that the Review Panel consider providing clarity on what competency looks like for Independent Certifiers and Contract Administrators.	Include a definition of competence.
06. Contract administration	6.10 Early Warning	Editorial	Early Warnings can be seen as a heightened Obligation, as opposed to Contract Administration.	Move to Section 5, as this is an obligation on all parties.
06. Contract administration	6.1.6	Technical	We do not support the introduction of this clause. It is our view that the introduction of this clause adversely affects the contract, particularly in relation to the separation of responsibilities between the Contract Administrator and Independent Certifier. The separation of functions was introduced to address the inherent conflicts associated with the role. It is our view that the addition of clause 6.1.6 is a regression of that progress and maintaining a clear division of duties is essential for the contract to operate effectively. We understand that this clause will significantly benefit smaller value contracts due to cost saving benefit of only having to hire a single person to undertake both roles. However, the risk of this clause being misused or overused by larger value contracts is high and may render the changes proposed by this contract as redundant.	(a) Repeal the clause 6.1.6 and keep the functions separated. or (b) Keep clause 6.1.6 but introduce a value threshold to prevent large value contracts from misusing this clause. Suggest rewording as 'The Contract Administrator and the Independent Certifier are separate persons unless described otherwise in the Special Conditions'. Potentially add to the schedule a 'tick box' option to expressly highlight they are the same person should it be so
06. Contract administration	6.2.1	General	We support the role of the Contract Administrator as prescribed by clause 6.2.1 and appreciate the explicit differentiation between the responsibilities of the Contract Administrator and the Independent Certifier. This amendment acknowledges the dual and conflicting roles in NZS 3910:2013 and eliminates any perceived bias towards the Principal when resolving disputes. It is our view that this change enhances fairness and transparency within the contract.	N/A as we agree with the proposed change associated with the role of the Contract Administrator.
06. Contract administration	6.3.1	Technical	The wording "without delay" could be interpreted as immediate in all cases. This conflicts with other clauses where "as soon as practicable" or "undue delay" are used.	Replace with: "The Contract Administrator and Independent Certifier shall perform their roles and functions under the Contract without undue delay."

06. Contract administration	6.3.6	Technical	Under this draft, only the Principal can appoint advisors. Should they elect not to, this may leave the CA and IC without the required support, noting they are named persons. The IC or CA should be permitted to appoint assistants. There is still the ability to involve an agreed expert under 6.4.7.	Have a provision for the CA and/or the IC to be able to request that the Principal engage Advisors, which should not be unreasonably withheld. (NZS3910:2013 Clause 6.3.5 allows the EtC to do this.)
06. Contract administration	6.3.6	General	We welcome the introduction of the "Adviser" role as specified in 6.3.6, which serves to assist the Independent Certifier and/or Contract Administrator in carrying out their duties. We commend the clarification which affirms that Advisers have no authority to issue instructions or make decisions. This will ensure that no conflict will arise from the role.	N/A we support the introduction of the "Adviser" role and its responsibilities as stated in 6.3.6.
06. Contract administration	6.4.3	General	The addition of this clause risks undermining the independent position of the IC if they have made a decision, then adjusted under 6.4.2, then are asked to change again.	Consider deletion of this clause.
06. Contract administration	6.4.7	Technical	How is an "agreed expert" different from an Advisor? Also the term expert carries additional legal emphasis.	"Expert" needs to be clearly defined, or this clause should be deleted.
06. Contract administration	6.4.7	General	The statement "The Contractor and Principal shall each pay one half of the costs of the agreed expert" is a barrier to the timely resolution of issues, placing a cost burden on the Contractor that must be recovered, with little control over its value.	Delete the statement: "The Contractor and Principal shall each pay one half of the costs of the agreed expert."
07 Indemnity and Liability Limit	7.1	General	Fault based indemnity. We welcome the recommendation to revise clause 7.1.1(a) to incorporate a fault-based indemnity. This amendment improves upon the previous provision, which had a broad, no-fault indemnity. It is our view that this change promotes fairness by holding parties accountable only if they are at fault or have breached their obligations, resulting in a more balanced and reasonable indemnification process.	N/A as we welcome the amendments.

07 Indemnity and Liability Limit	7.2	General	Contractor's Liability Limit. We support the introduction of a liability limit for the Contractor, aligning with the recommendations made by Standards New Zealand in October 2022. This amendment offers increased assurance for Contractors operating under NZS 3910:2023 and fosters a more equitable contractual relationship. Further, we agree with the Committee's inclusion of exceptions to this clause such as fraud, illegal acts, wilful or reckless misconduct, ensuring that culpable actions are not protected by the liability cap.	N/A as we support the committee's recommendation to include a liability cap.
09. Variations and contract price adjustments	9.1.1	Technical	The new roles of Construct Administrator and Independent Certifier have been split on basis of "instruct" and or "decide" type inputs. Consistent use of language will reinforce that mindset.	Change the word "order" to "instruct" to maintain consistency of role as noted under clause 6.2.1.
09. Variations and contract price adjustments	9.1.3	Editorial	The new roles of Construct Administrator and Independent Certifier have been split on basis of "instruct" and or "decide" type inputs. Consistent use of language will reinforce that mindset.	Change the word "order" to "instruct" to maintain consistency of role as noted under clause 6.2.1.
09. Variations and contract price adjustments	9.1.4	Editorial	The new roles of Construct Administrator and Independent Certifier have been split on basis of "instruct" and or "decide" type inputs. Consistent use of language will reinforce that mindset.	Change the word "ordered" to "instructed" to maintain consistency of role as noted under clause 6.2.1.
09. Variations and contract price adjustments	9.1.4	Technical	Contractors often state they will not undertake variations instructed until the cost is agreed.	Proposed addition: "Notwithstanding clause 9.3.1 the failure to agree costs in advance of the works is not a valid reason for the Contractor to delay commencement of the variation works instructed."
09. Variations and contract price adjustments	9.11.5	Editorial	The IC "may" give notice to the Contractor requiring the Final Account to be submitted. This creates ambiguity.	Add to the clause: "The Independent Certifier shall not Decide the Final Account under this clause unless they have first given 20 Working Days' notice to the Contractor under this 9.11.5."
09. Variations and contract price adjustments	9.11.8	Editorial	Both Interim and Final Account are in the nature of a claim by the contractor, neither can be a payment schedule under the CCA.	Remove "payment schedule"
09. Variations and contract price adjustments	9.2.1	Technical	The removal of the words "in writing" from the draft implies that verbal instructions are accepted. This may lead to misunderstanding.	Amend wording to say "... without a written Instruction.."

09. Variations and contract price adjustments	9.2.2	General	The wording "within 20 Working Days" is inconsistent with the onus placed on all parties to raise issues in writing as soon as practicable.	Replace with "Where an Instruction given by the Contract Administrator is not expressly stated to be a Variation, and the Contractor considers that the Instruction involves a Variation, the Contractor shall as soon as practicable give written notice to the Contract Administrator to that effect."
09. Variations and contract price adjustments	9.2.3	Technical	The draft retains undefined timelines which permit commercial uncertainty that can be taken advantage of by either Contractor or Principal. Setting specific time related objectives are beneficial.	Define timelines clearly.
09. Variations and contract price adjustments	9.3.5	Technical	This clause refers to the expiry of a time period stated in 9.3.2. Clause 9.3.2 states 20 working days, or as soon as practicable. That is not a defined period.	Define timelines clearly.
09. Variations and contract price adjustments	9.4.3	General	Signing of dayworks sheets on a daily basis is not practicable on a project unless the CA is based full-time on-site.	Change wording to read: "on a regular basis, at least weekly if possible."
09. Variations and contract price adjustments	9.4.3	Technical	When provided, dayworks sheets should be legible. If not they should be discounted.	Change wording to read: "in a legible manner acceptable"
09. Variations and contract price adjustments	9.8.2	Technical	The person best placed to measure is the Contractor, not the CA.	Amend the first sentence of the clause to read "as calculated by the Contractor"
10. Time for completion	10.3.7	Technical	If the events leading to an Extension of Time are a variation, which seems likely, then moving this clause to Section 9 may be more appropriate, with the first part of the sentence deleted.	Move to section 9 and change to: "The Contract Administrator may, subject to the agreement of the Principal and the Contractor, instruct the taking by the Contractor of steps to accelerate the work. In such case the Independent Certifier shall grant either no extension of time or such lesser extension as may be agreed. The Contractor shall be entitled to be paid such sum as may be agreed or failing agreement such sum as is reasonable to compensate the Contractor for the additional Cost of the agreed steps taken to accelerate the work and of the effect of those steps on other aspects of the work valued as a Variation."

10. Time for completion	10.7.2	General	Any approvals noted in the agreement should be confirmed in writing for certainty of record.	Amend second and final sentences to read: "written approval"
11. Defects liability	11.3.1	Technical	There is a need to confirm with Contract Administrator that requirements have been met.	Clarify process and responsibilities in Guidelines.
		General	Within the existing EtC and ER roles framework there is a clear career progression that allows individuals to progress to higher roles or projects of higher complexity. Under the revised standard, this is now unclear. With the proposed clear demarcation between CA and IC being independent, and also with the use of Advisors, it is our view that the current revision limits future-proofing of the industry.	Allow the Independent Certifier to appoint assistants.
		General	The ability, particularly for the CA, to obtain assistance to fulfill obligations will be made difficult if the Principal is unwilling to appoint Advisors. What is the obligation of the CA, being named in the contract, to continue, if (for example) the Principal refuses to procure the required Advisors to make the role achievable for larger/complex projects?	Make provision for the CA and/or the IC to be able to request the Principal engage Advisors, which should not be unreasonably withheld.
		General	If the Advisor role is to remain, 'Advisors' must be explicitly described in the contract. Where would the contractual status/responsibility lie when the CA or IC has relied upon advice from an individual or Person not named as an Advisor?	Consider more appropriate and/or wider definition of the 'Advisor'