

Te Kāhui
Whaihanga
New Zealand
Institute of
Architects



COVID-19 Info

COVID-19 – The Architect’s role in administering a contract (NZS 3910:2013) under Alert Level 3

On Monday 20 April 2020 at 4pm, the Prime Minister made an announcement that New Zealand will be coming out of Alert Level 4 Lockdown on Monday 27 April at 11:59pm. The lowering of the alert level will allow parts of the economy to reopen, including many construction sector businesses (**Businesses**).

As Businesses start preparations to return to work, a number of important health and safety measures will need to be taken to keep workers safe as COVID-19 is a disease transmitted from person to person.¹ To limit the spread, new measures for operating under COVID-19 Alert Level 3 have been developed by industry and these are set out in the ‘COVID-19 Standard for New Zealand Construction Operations’ (**Standard**) and the ‘New Zealand COVID-19 Construction Protocols’ (**Protocols**). The Protocols have been developed for the residential sector and the civil and vertical construction sectors.²

The Standard and the Protocols set out the key principles and operating requirements for healthy and safe construction-related operations and will ensure consistent health and safety standards across all construction sites. They represent current best practice and include measures around physical distancing and hygiene, and the expectation is all Businesses and workers will apply their intent and do the right thing. Worksafe New Zealand (**Worksafe**) has recognised and endorsed the Standard and the Protocols as industry standards. In the event of a dispute, Worksafe would use the Standard and the

1. According to the WHO (World Health Organization), The COVID-19 virus spreads primarily through droplets of saliva or discharge from the nose when an infected person coughs or sneezes. Talking and breathing can also release droplets and particles. Droplets generally fall to the ground or other surfaces in about 1 meter, while particles behave more like a gas and can travel through the air for longer distances, where they can transmit to people and also settle on surfaces. The virus can be picked up by hands that touch contaminated surfaces or be re-entrained into the air when disturbed on surfaces.

2. Refer to NZIA member notice (COVID-19: New health and safety standards for construction) issued on Friday 17 April at 9:13 am. For a copy, refer to <https://www.nzia.co.nz/explore/covid-19-information/safe-return-to-work-processes>

Protocols to help determine what would be considered ‘reasonably practicable’, which means, taking the course of action that provides the highest level of health and safety protection (against the spread of COVID-19), which is reasonably practicable in your circumstances. Individual business may need to adapt the protocols to suit their specific circumstances. The protocols are a ‘living document’ and will be updated by Construction Health and Safety New Zealand (CHASNZ) as best practice develops and further industry feedback is received.

Outlined below is an overview of the Engineer’s role in administering a construction contract under the New Zealand Standard Conditions of Contract for Building and Civil Engineering Construction (NZS 3910:2013) while the Government’s COVID-19 alert level is at Level 3.

New Zealand Standard Conditions of Contract for Building and Civil Engineering Construction

The health and safety obligations of the Principal and the Contractor under NZS 3910:2013 will be extended to incorporate the public health measures identified in the Standard and Protocols. In summary, the existing health and safety obligations of the Principal and the Contractor are:

1. The Contractor³ is responsible for the safety of its operations on site.⁴
2. The Contractor will take all practicable steps to:⁵
 - a. Provide and maintain a safe working environment;
 - b. Identify any significant hazards;

3. The capitalised words, unless otherwise defined in this note, are defined terms in NZS 3910 2013.

4. NZS 3910:2013 cl 5.1.5.

5. NZS 3910:2013 cl 5.7.2.

- c. Ensure that any employee or Subcontractor that is involved in carrying out work on site is not unnecessarily exposed to hazards which are under the Contractor's control.

3. The Principal is to notify the Contractor, through the Engineer of any safety hazards associated with the Contract Works, or special safety measures required, that both the Principal and / or the Engineer are aware of, and which an experienced Contractor may not be familiar with.⁶

4. Where required by the Special Conditions, the Contractor is required to prepare and submit to the Engineer a Site-specific safety plan (SSSP).⁷

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5. The purpose of the SSSP is for the Contractor to show how it intends to meet its obligations of taking all reasonable steps to:
- a. Avoid danger to people on the site;
 - b. Provide and maintain a safe working environment;
 - c. Identify any significant hazards; and
 - d. Ensure that any employee and subcontractor is not unnecessarily exposed to any hazards on site.⁸

For the Principal and the Contractor to discharge their obligations under the Contract, the site as far as reasonably practicable needs to be free from risks to health and safety. To help achieve this, the Contractor is expected to have created a plan that has assessed the risks presented by COVID-19, and to have implemented the most appropriate controls to mitigate its transmission so far as is reasonably practicable. For Contractor's, this plan is to be documented in the form of a SSSP that is to either sit alongside any pre-existing SSSP required by the special conditions or to be an amendment of an existing SSSP. On larger projects, the Principal has a significant role to play in ensuring the Contractor meets the Standard and adheres to the Protocols and the Engineer should encourage cooperation and facilitate collaboration and co-ordination between the Principal and the Contractor.

The Contractor's starting point for creating a COVID-19 SSSP, should be the Standard and the Protocols. The Standard describes the principles that must be achieved, and the Protocols translates these principles into practical measures. The Contractor is required to implement these measures to ensure all work is undertaken in a way that reduces any possible contact between workers and promotes physical hygiene wherever possible.

6. NZS 3910:2013 cl 5.7.5. It is likely all Contractors are aware of their obligations to follow the Government's guidance on the measures required to keep workers safe under Alert Level 3. For the avoidance of doubt, the Principal should notify the Contractor through the Engineer of the health and safety risks of COVID-19 and the need for the Contractor to take 'all practicable' steps to ensure the health and safety of all workers on site. This notice should draw attention to the Standards and Protocols developed by the Construction Sector Accord which set out the key principles and requirements for healthy and safe construction operations. Refer to the following link for further information on the Standards and Protocols - <https://www.nzia.co.nz/explore/covid-19-information/safe-return-to-work-processes>

7. NZS 3910:2013 cl 5.17.1.

8. NZS 3910:2013 cl 5.17.2.

The Engineer has no management or control function over the Contractor, or the Site and the Contractor must determine the methodology and safe work practices required to complete the Contract Works. Under the Health and Safety at Work Act 2015 (**Act**), the Engineer⁹ and the Contractor as PCBUs share health and safety duties.¹⁰ One of those duties is for the Engineer to '*consult, cooperate and coordinate*' with the Contractor to avoid any potential gaps in managing the spread of COVID-19.¹¹ Note that under the Act a PCBU's duties cannot be delegated to another PCBU, and contractually under cl 6.2.5, only a variation will relieve the Contractor of any obligation or liability under the Contract.

Under NZS 3910:2013, the Contractor must prepare and submit to the Engineer a SSSP. The SSSP must show how the Contractor intends to meet its obligations of taking all reasonable steps to avoid danger to any person, employee and subcontractor on site and to identify any significant hazards, and how it intends to provide and maintain a safe working environment.¹² Within five working days of receiving the Contractor's SSSP, the Engineer is to notify the Contractor in writing of whether or not the Engineer has accepted the Contractor's SSSP. The Engineer should not unreasonably withhold the acceptance of the SSSP. In the event the Engineer does not accept the SSSP, the Engineer is to provide the Contractor with his or her reasons and the Contractor is required to submit a revised SSSP addressing the Engineer's concerns.¹³ The Engineer's starting point for reviewing the Contractor's SSSP should be the Standard and the Protocols and whether the proposed SSSP contains measures to provide for physical distancing, recorder site work and visitor movements and enhanced hygiene. It is important to note, that the Contractor cannot commence any part of the Contract Works on Site unless the Engineer has accepted the SSSP or the revised SSSP.¹⁴

Once construction progresses under Alert Level 3, the Engineer should monitor the Contractor's implementation of its SSSP and help where possible with the mutual requirements of all PCBUs under section 36(1) of the Act.¹⁵ This places a duty on the Engineer as a PCBU to ensure that, so far as is reasonably practicable, the health and safety of workers, whose activities are influenced by the Engineer, or the Engineer's PCBU, is without undue risk. The Engineer should consider what aspects of the SSSP

9. The Engineer is likely to be employed by a PCBU and considered under the Act to be a worker.

10. The Engineer and the Contractor, must so far as is reasonably practicable, consult, cooperate and coordinate, and this is to avoid duplicating each other's efforts and to prevent any gaps in managing a shared health and safety risk arising. The more influence and control a PCBU has over a health and safety matter, the more responsibility the PCBU is likely to have for ensuring any overlapping duty under the Health and Safety at Work Act 2015 is met.

11. Under sections 36(1) and 36(2) of the Health and Safety at Work Act 2015, a PCBU has a primary duty of care to ensure so far as is reasonably practicable, the health and safety of workers who work for the PCBU while at work, or workers whose activities in carrying out the work are influenced or directed by the PCBU while the workers are carrying out the work.

12. NZS 3910:2013 cl 5.17.2.

13. NZS 3910:2013 cl 5.17.3.

14. NZS 3910:2013 cl 5.17.4.

15. The Health and Safety at Work Act 2015, 'a PCBU must ensure, so far as is reasonably practicable, the health and safety of (a) workers who work for the PCBU, while the workers are at work in the businesses or undertaking; and (b) workers whose activities in carrying out the work are influenced or directed by the PCBU, while the workers are carrying out the work'.

should be monitored and with what frequency.¹⁶ If the Engineer is on site and sees an activity that he or she considers unsafe, or has the potential to cause harm, the Engineer must raise the issue with the Contractor immediately and if necessary, the work must be stopped.

As a PCBU in relation to its own employees the Engineer should also review the SSSP to maintain the health and safety of its employees when visiting the site. Where employees have reasons for feeling it unwise to visit Site in accordance with the Standards and Protocols, or otherwise; or feel unsafe once on site they should be required to immediately notify the Engineer, and leave the site when applicable.

Should a worker of the Contractor or a subcontractor breach the Contractor's SSSP and place other workers at undue risk, under cl 5.3 (Control of employees), the Engineer may direct the Contractor to remove from Site an employee of the Contractor or of a Subcontractor who has, by the reason of their misconduct, incompetence or negligence in the performance has become a danger to the health, safety and welfare of others.¹⁷ The Engineer can help the Principal to take the necessary action, by issuing a direction, if the Contractor is unable or unwilling to do so.

Summary

As Businesses navigate Alert Level 3 and the continued fallout from COVID-19, the Engineer in collaboration with the Principal and the Contractor, would be advised to choose a course of action that attempts to mitigate the spread of COVID-19 where reasonably practicable. Attention should be given by all parties to the thoroughness of the SSSP and its consistency with the Standard and Protocols. The sooner we can stamp out COVID-19 in New Zealand, the sooner our construction sector can commence rebuilding. A return to Alert Level 4 would have severe consequences on the construction sector, Businesses, jobs and the economy.

Regardless of the provisions of the Contract, the Principal and the Contractor would be advised to focus on the ongoing viability of the project and to collaborate in the mitigation of any costs associated with implementing the health and safety measures required by Alert Level 3. Collaboration will lead to a more viable resolution during and after COVID-19.

Where Engineers are uncertain of their role in this, whether as a representative of the Principal or as impartial administrator, and the Principal and Contractor cannot agree on the course of action, Engineers should seek advice on their role and liabilities to avoid any later challenges.

16. The Engineer should keep records of each visit including what was monitored and whether it complied with the Contractor's COVID-19 SSSP.

17. Under cl 5.3, the employee who was removed from site, is not to be reemployed on Site without the permission of the Engineer.