



Construction Sector Contracts

A review of amendments made to standard form contracts by state sector entities

December 2022

Executive Summary

The two most used contract templates in the construction sector are **New Zealand Standard 3910:2013 – Conditions of Contract for building and civil engineering construction (NZS 3910)** for physical works and **ACENZ Conditions of Contract for Consultancy Services (CCCS)** for construction consultancy services.

The Construction Sector Accord (the Accord) has reviewed how these contracts are used by a cross section of state sector entities (agencies). The review has highlighted that agencies are modifying these standard contracts through ‘special conditions’ that either change existing clauses in the contracts or add new clauses.

The review found inconsistency in the numbers and types of special conditions used by agencies. In the case of NZS 3910 the number of special conditions ranged from 4 to 310 special conditions. In the case of CCCS, the number ranged from 13 to 81 special conditions.

The special conditions are often used to modify the risk balance of standard contracts by changing who is responsible for risks or by identifying new risk and assigning this to one of the parties to the contract. There was little correlation between the scale and complexity of a typical project delivered by an agency, and the risk transferred or retained through special conditions.

Agencies delivering the most construction projects tended to have fewer special conditions, with more reasonable allocation of risk. This indicates that one of the most significant factors in the simplification (i.e., fewer, fairer special conditions) of construction contracts is the maturity of the client.

The practice of heavily amending standard contracts with extra clauses defeats the purpose of standardised contracts. It means every project must spend resource, time, and effort in understanding the intent of contracts and negotiating terms. This can lead to misunderstandings among the project team, and difficult project relationships.

With central government being responsible for around a fifth of all construction spend in New Zealand, there is a need for government agencies to lead from the front in driving better outcomes for construction projects and better outcomes for Aotearoa New Zealand. This approach is exemplified in the principles adopted by the Construction Sector Accord Transformation Plan 2022 – 2025.

The principle of ‘Be Bold’ focusses Accord members on not accepting conduct and culture contrary to the principles of the Accord and to focus on whole of life when procuring buildings or infrastructure. The adoption of fair and reasonable contract terms is a key factor that can assist with delivering whole of life value as it ensures agencies do not pay a premium for excessive risk transfer. It has the potential to reduce tender costs to all parties through reduced effort in negotiating appropriate contract terms and consequently quicker tender processes.

Accord Recommendations

The Accord Transformation Plan 2022-25 is committed under its Client Leadership mandate to drive greater standardisation and consistency across construction contracts, to deliver fairer risk allocation, avoid excessive risk pricing, and improve productivity.

Accord network members, and procuring agencies in particular, hold client leadership responsibilities across construction and infrastructure and have a unique opportunity to drive the

change needed to deliver on the Accord's commitments. The Accord has sought a renewed commitment from member agencies to:

1. **Ensure special conditions enable best for project outcomes**
The Accord has recommended agencies review their special conditions to ensure they do not risk the development of trust and co-operative working relationships among project team members which are critical in driving best for project outcomes
2. **Time bars being used to unfairly deny claims from contractors or consultant**
The Accord has recommended agencies consider the need and appropriateness of their time bars, and whether other mechanisms can be put in place to drive contractor performance (such as collaborative working practices and early risk identification principles), that do not contribute to a 'culture of contractor disenfranchisement'.
3. **Ensuring that intellectual property is only retained by the Crown when necessary**
Several agencies included special conditions requiring that that new IP developed under the project be vested in the Crown. Whilst this may be appropriate for some projects, it is often not the most appropriate starting position. Agencies have been recommended to review their IP clauses to ensure they balance public value against the wider benefit to New Zealand of allowing the supplier to commercialise IP. Where it is determined that IP is to be owned by the Crown, the Accord has recommended agencies should ensure they have a method to track this and to share this IP between itself, and other Crown agencies.
4. **Reduce clauses that relate to operational and technical matters**
Agencies often introduced special conditions that related to the nature of their organisations, or the scope of work to be delivered. Agencies often duplicated legislative requirements. The number of conditions this results in creates an administrative burden on both clients and contractors/consultants as well as confusing where the contractor/consultant's scope or general obligations sits. There is benefit to all parties in a reduction in the total number of special conditions
5. **Limit the use of termination for convenience provisions to exceptional circumstance**
Termination for convenience special conditions are included by agencies to provide a way to manage risks such as funding being withdrawn from the project due to a change in government. Agencies should ensure that these clauses are only relied on in exceptional circumstances outside of their control. Where they are included, agencies should prescribe the circumstances in which these will be used.

The Accord has also sought a mandate from Accord Agency Chief Executives¹ for a greater standardisation and consistency across construction contracts. This is anticipated to start with Accord agencies adopting the recommended special conditions for NZS 3910 that are due to be released by Standards New Zealand in October 2022. In 2023 it is expected that the Accord Agencies will work together to identify deficiencies in the Crown CCCS special conditions with an updated version issued and adopted. It is also expected that the full revision of NZS 3910 will be adopted by Accord agencies towards the end of 2023/beginning of 2024.

¹ Accord Agencies are key government agencies that hold policy, regulation and client leadership responsibilities across construction and infrastructure in Aotearoa New Zealand. They are: Ministry of Business Innovation and Employment; Ministry of Housing and Urban Development; Ministry of Health; Ministry of Education; Kāinga Ora; New Zealand Defence Force; Department of Corrections; Waka Kotahi, New Zealand Transport Authority; Ministry of Justice; WorkSafe; and Te Waihanga Infrastructure Commission.

Context

The construction sector is our fourth largest industry contributing 6.75 percent of GDP (\$18.1 billion) in the year ending March 2022², up from 5.4 percent of total GDP in 2010³.

The construction sector employed 292,800 people at the end of 2021, accounting for 10.3 percent of the workforce. Government makes up around a fifth of the construction spend across the country and has a powerful role to play in leading and improve procurement practices throughout the sector.⁴

Construction Contracts

The projects delivered by government agencies are some of the higher value and more complex construction projects in New Zealand. Whilst there are a range of standard contracts in New Zealand, when it comes to these larger scale projects, the most common contract forms in the construction sector are:

- For building and civil engineering projects (including both horizontal and vertical construction and infrastructure) **New Zealand Standard 3910:2013 – Conditions of Contract for building and civil engineering construction (NZS 3910)**
- For professional consulting services **ACENZ Conditions of Contract for Consultancy Services (CCCS)**

These standard form contracts have been carefully developed in consultation with clients and construction industry bodies and associations. They have been agreed as being fair and reasonable and provide a common basis upon which to contract that all parties are familiar with.

Agencies often heavily modify these standard contracts with ‘special conditions’ which either change existing clauses in the contracts or add new clauses. The special conditions usually come in the form of a schedule to the standard contract and often number in the hundreds.

The practice of heavily amending these contracts with extra clauses defeats the purpose of standardised contracts. It means every project must spend resource, time, and effort in understanding the intent of contracts and negotiating terms. This is especially true when suppliers are dealing with more than one agency as there is not a common position across government.

The Government Procurement Rules (Rule 69) requires agencies to follow the construction procurement guidelines when procuring construction works. The Construction Procurement guidelines identify specific standards of good practice, including an obligation that agencies must limit their use of special conditions when using standard form contracts.

The Construction Sector Accord (the Accord) has reviewed the usage of special conditions by a cross section of state sector entities. This review was focussed on the commercial aspects of special conditions and did not constitute a legal review. The findings of this review are set out in this report.

² <https://www.stats.govt.nz/information-releases/gross-domestic-product-march-2022-quarter/>

³ Which industries contributed to New Zealand’s GDP? - <https://www.stats.govt.nz/tools/which-industries-contributed-to-new-zealands-gdp>

⁴ National Construction Pipeline Report 2021 - <https://www.mbie.govt.nz/dmsdocument/18150-national-construction-pipeline-report-2021>

"The number one factor identified as contributing to disputes is a lack of understanding of contract obligations within the industry, with bespoke contract amendments reportedly not always read and understood by all parties."

Getting it Right from the Ground Up, Russell McVeagh survey, 2018.

Construction Accord Transformation Plan

Transformation Plan 2020 – 2022

The Construction Sector Accord Transformation Plan 2020-2022 (TP22) identified that a common issue in the sector is the use of unnecessarily complex contracts that contain many non-standard conditions. The lack of transparency in contracts can lead to parties unwittingly taking on risk they are not prepared for and increases the likelihood of disputes. The sector must work toward a culture of greater transparency where the risks are clear, and parties accept those risks they are in the best position to manage

Transformation Plan 2022 – 2025

Transformation Plan 2025 (TP25) builds on the work of TP22, placing a greater focus on client leadership, recognising that clients sit at the top of the supply chain and can set the priorities and culture for projects.

Both transformation plans seek to drive adoption of best practice in procurement, contracting and contract management. Although good progress was made through TP22, there remains inconsistency in agencies' approach to standard contracts and risk allocation. TP 25 seeks to drive better outcomes in projects through improved planning, procurement, and delivery practices.

NZS 3910 Review

NZS 3910 was last updated in 2013. Since then, there have been significant changes in relevant legislation, approaches to project delivery, a global pandemic, and other changes in the construction sector. NZS 3910 has not kept pace with these changes.

A scoping review undertaken by Standards NZ in early 2021⁵ identified one of the challenges with the existing version of NZS 3910 was the extensive use of special conditions "as contractors and consultants, who do not have a legal background, may not understand them".

A full review of NZS 3910 is underway. This is led by Standards New Zealand and is expected to deliver a revised version of NZS 3910 in mid-2023. A set of recommended special conditions was released in October 2022 to address a set of critical issues identified in the scoping review. This includes legislative changes, liability caps and collaborative approaches to contract management.

⁵ [Summary of the Scoping report NZS 3910 Conditions of contract for building and civil engineering \(standards.govt.nz\)](https://standards.govt.nz)

Review of Special Conditions used in construction contracts

NZS 3910 Special Condition Review

Agencies face common challenges when delivering construction projects. Industry reasonably expect that agencies would deal with these challenges in a common manner. This was not reflected in the special conditions reviewed. There was divergence across agencies in terms of the number of special conditions, and the risk transfer effected by these clauses⁶.

The number of special conditions ranged from 4 to 310 special conditions. Each of these was assessed for its impact on risk allocation; this was a commercial assessment undertaken by the Construction Sector Accord and did not constitute a legal review. The Accord’s assessment is not necessarily aligned with the views of industry bodies, client or contractor organisations it is a comparative assessment across a selection of government agencies.

The scoring scale used was coarse, scoring the impact on risk allocation from minimal impact on risk (+/- 1) to significant impact on risk (+/- 3). This scale did not reflect the comparative materiality of a significant impact versus a minor or moderate impact; it provided a comparative basis between agencies.



Figure 1 - Plot of number of NZS3910 Special Conditions against risk transfer effect

It is accepted that agencies may need to modify the standard conditions of contracts to deal with the specific operational or logistical requirements of their organisations and the nature of the projects they are delivering. The Accord has recommended that, where practicable, these modifications should be limited and only deal with areas where the base agreement is silent (for example pandemic provisions or termination for convenience clauses). Agencies should avoid amending standard contract clauses, as this is not in line with the requirements of the Government

⁶ Appendix 1 describes the methodology used to assess the special conditions and categorise the risk transfer

Procurement Rules unless there is a compelling reason that prevents the Crown from complying with the standard condition (e.g. Public Finance Act, risks to national security, or public safety).

Where there is a genuine need to modify standard conditions, and this applies across all Crown agencies, there should be a commonality in approach. This is not currently the case. The Accord has recommended that agencies should develop standardised approaches and proactively adopt these.

In 2019, The Treasury commissioned an examination of issues associated with the use of NZS 3910 conditions of contract⁷. This review identified issues with the approach to NZS 3910 across the crown, including mistrust between the public sector and industry, a perceived use of special conditions to get ‘something for nothing’ and a lack of liability caps. Some work has occurred to remedy this, with liability caps now included as a special condition by half of the agencies reviewed. However even here, there is disparity across Crown agencies on how these are applied, what they are applied to, what exceptions apply to the cap, and the value of the cap.

The inconsistency in both the number of special conditions, and the way special conditions handle the same risk presents a challenge to industry partners, especially so if working for multiple agencies. This can lead to increased legal and compliance costs, or in the worst case, risk being allocated to parties least able to manage it. This can result in poor working relationships among project team members, a blame culture, disputes, and delays.

“Respondents identified a number of anticipated causes of disputes... with poor quality documentation the most likely cause of dispute identified. The perception of unfair risk allocation in construction contracts continued to be of concern for many contractor respondents, who identified it as a key cause of construction disputes.”

Building Up New Zealand’s Construction Industry, Russell McVeagh survey, 2020.

Collaboration versus culture of mistrust

The Treasury report in to NZS 3910 conditions of contract identified that there was ‘mistrust between the public sector and industry’ with this lack of trust resulting in the extensive addition of special conditions leading to ‘misunderstanding, confusion and ultimately, litigation’. An important aspect of the Accord is the need to reset the culture in the industry to lift the performance of clients, consultants, and contractors. Public sector investment is significant in terms of achieving a thriving construction sector for the economy. It is therefore in the best interests of agencies to develop and manage contracts in a way that enables participants to operate in a fair and reasonable manner, to build trust and a high degree of co-operation. This must be front of mind of every individual on a project such that, instead of engaging in unhelpful behaviours, all parties are incentivised to work collaboratively.

The Accord was pleased to see several instances where agencies had taken positive steps to amend the special conditions to introduce collaborative behaviours. For example, by focussing on the collaborative resolution of disputes, rather than having immediate recourse to the contractual provisions.

⁷ <https://www.treasury.govt.nz/sites/default/files/2019-08/Treasury-NZS-Conditions-of-Contract-Report.pdf>

The alternative to this approach is to have many special conditions, attempting to anticipate every project risk. This approach was seen where an agency's special conditions have 'grown' organically over time and clauses have been added to respond to the real risks and issues that projects have faced.

The Accord has recommended agencies review their special conditions to ensure they do not risk the development of trust and co-operative working relationships among project team members; these are critical in achieving best for project outcomes.

Impact of the NZS 3910 review

The full release of NZS 3910 is expected in the second half of 2023. This is anticipated to cover many of the areas of the contract that agencies currently amend with special conditions. The Accord's expectation is that agencies will review and remove special conditions in areas of the contract that will be addressed through the revised NZS 3910⁸.

The NZS 3910 review includes a review of the time limits and notices currently specified for contractors making claims for variations and extensions of time. This was a common area amended by special conditions, with some agencies removing terms such as "or as soon as practicable thereafter" to effectively turn the clause into a time bar.

The Treasury report identified that contractors felt the use of time bars had led to a 'culture of disentitlement' and the 'public sector trying to get "something for nothing"'. The Accord can appreciate the view of both clients and contractors in these situations.

The Accord has recommended that agencies consider the appropriateness of time bars, and whether they are truly needed. Whilst there is a need to drive timeliness of performance, if there is a genuine reason that time periods cannot be met, this should not be a reason for a disentitlement to be applied to a contractor. Agencies should consider whether other mechanisms can be put in place to drive contractor performance (such as collaborative working practices, early risk identification principles or independent assessment by the Engineer to the Contract of the reason for not meeting the time period), that do not contribute to this 'culture of contractor disentitlement'.

⁸ A full list of focus areas can be found in the NZS 3910 scoping report available online via Standards New Zealand

CCCS Special Condition Review

New Zealand Government Procurement (NZGP) has developed a standard set of special conditions for government agencies to adopt. These are mandated for engagements through the All of Government construction consultancy services panel (AoG CCCS Panel) and are publicly available for clients procuring outside of this panel to use. The conditions are comprised of two parts:

- **Crown core special conditions** - the Crown's agreed special conditions to be used for all engagement from the AoG CCCS panel
- **Crown project specific special conditions** - a collection of special conditions, that can be included depending on the scale and nature of the project

These special conditions have been developed by Crown agencies and the NZGP and tested and accepted by relevant industry bodies such as the Association of Consulting Engineers New Zealand and the New Zealand Institute of Architects.

Of the agencies reviewed there was good adoption of the Crown special conditions (both Crown core and Crown project specific) however there was a tendency to deviate slightly from the accepted crown drafting.

The Accord has recommended that agencies should review their usage of the Crown specials conditions to ensure that where possible they are adopting the industry accepted, Crown endorsed versions of special conditions. This is particularly the case where agencies have developed bespoke conditions that handle the same risk as those covered by the Crown special conditions.

Consistent with NZS 3910, there was a divergence between agencies on the number of specials and the effect of these specials in risk. Due to the smaller nature of the CCCS agreement, the spread of special conditions was fewer, ranging from 13 to 81 special conditions.

Like the review of NZS 3910 standards, each special condition was assessed from a commercial perspective for its impact on risk allocation, from minimal impact on risk (+/- 1) to significant impact on risk (+/- 3). This assessment is not necessarily aligned with the views of industry bodies, client or consultant organisations.

Unlike the NZS 3910 review, a set of All of Government special conditions exists for CCCS agreements. Some agencies had only minor amendments or additions to these special conditions that relate to the unique nature of their business. These agencies are depicted by the green bubble in the below.

Any material amendment to the contracts beyond the AOG special conditions could be considered a high-risk transfer approach. Due to the coarseness of the scoring scale described above, this is not necessarily reflected in the below graph. For that reason, a red bubble has been used to show the agencies with material deviations from the AOG standard approach.

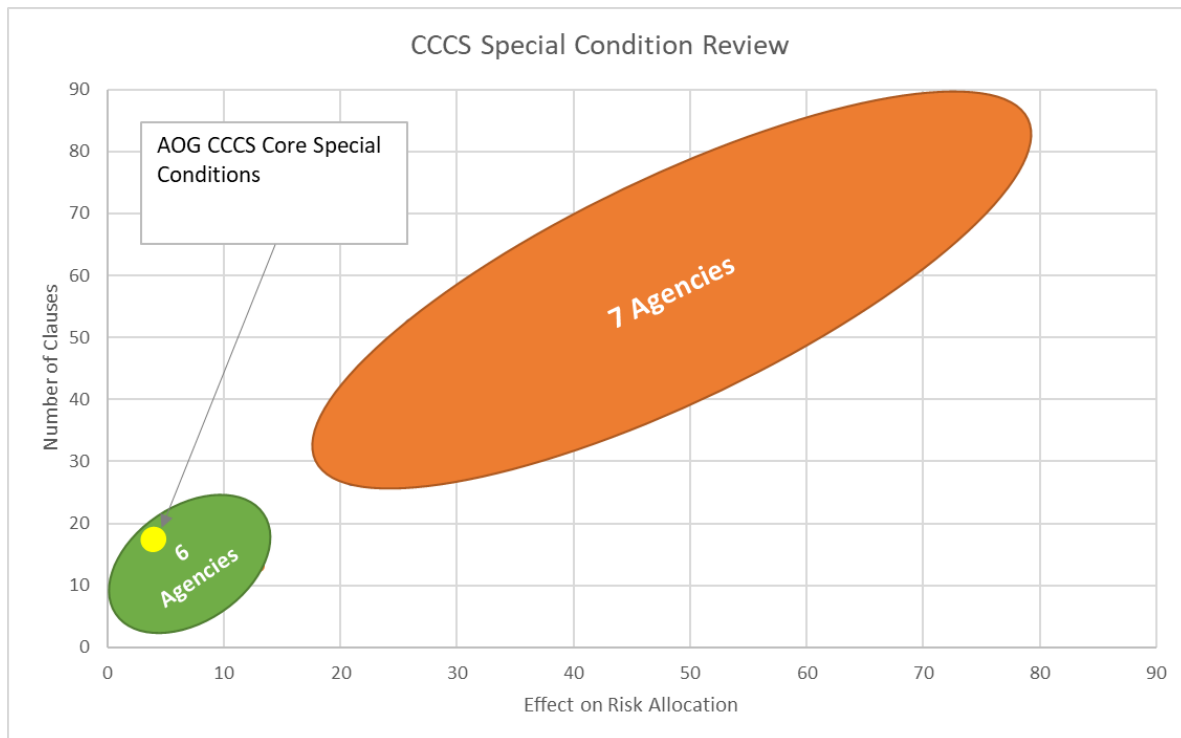


Figure 2 - Plot of number of CCCS Special Conditions against risk transfer effect

Crown Project Specific Special Conditions

The Accord review found that Agencies were regularly deploying these across all their projects, rather than applying project specific consideration to whether or not the condition was needed.

One Crown Project Specific special conditions that was regularly used by agencies was to change the ownership of new IP from joint ownership to Crown ownership. When this approach was queried with agencies, the common responses was “we’ve paid for it, why shouldn’t we own it” or “we need the ability to modify it for future projects”.

There are few mechanisms for government agencies to access IP owned either within their own organisation or across government organisations. The government ownership of IP can result in a tendency for IP to be ‘locked up’ and a decreased likelihood that its potential as either a public or commercial asset is fully exploited. Consistent with the Procurement rules⁹, the Accord has recommended that agencies should consider whether New Zealand can get the best value from the joint ownership of IP or by amending the standard agreement to allow for the client to modify jointly owned IP.

Other Special Conditions

There were some areas where the agencies included bespoke special conditions beyond the Crown conditions. The Accord has recommended that agencies should review these areas to determine if the conditions are required. If it is determined these are included due to a deficiency in special conditions, the Accord has recommended that agencies should work with NZGP and relevant industry partners (if applicable) to update the Crown special conditions and reduce the need for agencies to make bespoke amendments. Examples of areas where this may be the case include

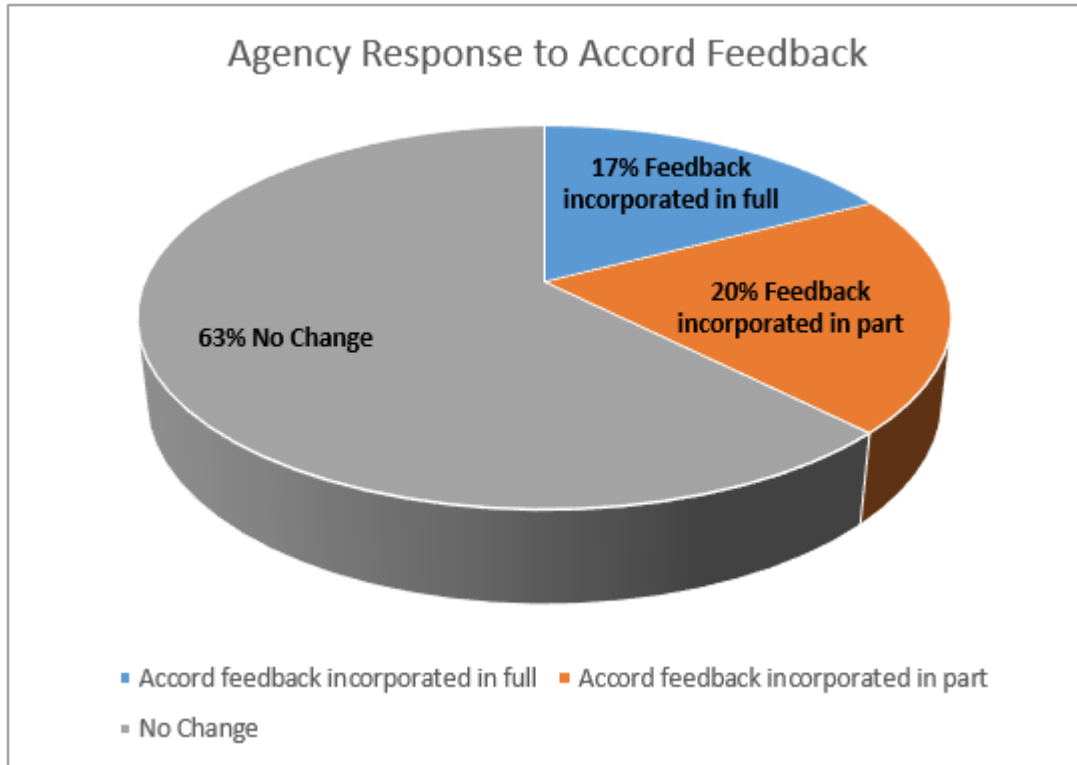
⁹ Rule 63 of the Government Procurement Rules: [Intellectual property | New Zealand Government Procurement and Property](#)

updating contracts to reflect relevant legislative requirements, confidentiality requirements or conflict of interest obligations. The Accord has recommended that agencies should be working to a position where minimal or no special conditions are adopted beyond the Crown special conditions.

The Accord recognises that it may take some time to develop and agree updates to the Crown Special Conditions. In the interim, the Accord has recommended agencies should seek to ensure consistency between construction and consultancy contracts (where applicable) and ensure that CCCS contracts are aligned with industry wide updates. Agencies have been advised to review the recommended special conditions released for NZS 3910 in October 2022 and, if appropriate, apply these principles to their CCCS contracts.

Conclusion

The observations above have been shared with agencies that participated in the review process along with some specific feedback on a subset of each agencies’ special conditions¹⁰. Agencies have in turn provided a response on this feedback.



Across the agencies reviewed, over 35% of special conditions discussed were amended either in full or part. This represents significant movement from a cross section of some of the biggest procurers in government, however, there remains some way to go to ensure contracts fully exemplify the commitment of the Accord.

The upcoming revision of NZS 3910, along with the momentum of the Accord, provide a unique opportunity to ensure that construction contracts issued by agencies are fit for purpose and represent best practice. The Accord has recommended that agencies should take this opportunity to enhance the delivery of value to New Zealand, working with bodies such as NZGP to review contracts, adopt standard approaches, and minimise usage of special conditions. To support this the Accord is engaged with leadership from the highest levels within organisations. The Accord remains optimistic on the opportunity to achieve greater standardisation and of improving contract management practice across procuring entities.

¹⁰ The criteria used to identify special conditions for agency feedback is included at the methodology appendix to this report.

Appendix 1 - Methodology

In March 2022, the Accord commenced a review of the special conditions used by government entities on NZS 3910 and CCCS contracts. This review sought to compare the special conditions used across a cross section of crown entities, including State Owned Enterprises, Section 4a Companies, Central Government and Local Government. In this report, these entities have been grouped under the umbrella term of ‘agencies’. The findings of the review were provided to the NZS 3910 review committee to inform their update of the standard.

In total, 25 agencies were invited to take part in the review and requested to provide copies of their special conditions for their construction contracts.

The sets of special conditions were reviewed to categorise them and to assess how they impacted the risk balance between principal/client and contractor/consultant when compared with the standard contracts. The risk transfer was assessed against the standard contracts, using the following assessment scale:

Score	Impact on Risk
-3	Significantly removes risk in favour of the contractor
-2	Removes moderate risk in favour of the contractor
-1	Removes some risk in favour of the contractor
0	Does not affect risk transfer compared to the base agreement
1	Places some additional risk on the contractor
2	Places moderate additional risk on the contractor
3	Places significant additional risk on the contractor

The scoring and categorisation process identified a range of special conditions for further discussion with agencies. These clauses were identified through the following questions:

- Is the special condition aligned with those included by other government entities with a similar risk profile and similar scope and scale of contract works (where such entity exists)?
- Does the special condition result in the risk residing with the party best able to manage the risk?
- Does the special condition use plain English, is it readable, and is it concise?
- Is the special condition needed or does it duplicate the effect of other clauses in the document?
- Does the special condition support working in a collaborative and inclusive way?

If the above questions identified a special condition for review, it was documented, along with the issue identified by the Accord and a general query. E.g.

Clause	Issue	Accord Query
9.1.7 <i>The contractor is not entitled to make any claim in relation to costs in compiling estimates it is required to give under this clause.</i>	The Accord notes the contractor may incur costs in preparing these estimates	The Accord query the rationale for not reimbursing these costs

All agencies that provided special conditions were offered the opportunity to be debriefed on where their agency sat in relation to other agencies (in terms of numbers of clauses and the risk transfer), as well as those clauses that were identified as meriting further discussion.

Generally, agencies were receptive to the feedback provided on their special conditions and appreciated of the questions asked. Most agencies thanked the Accord for the work undertaken in reviewing the special conditions, and for the opportunity to receive feedback as it was noted that sometimes information such as this can 'disappear into a silo'. The agencies that received the feedback were asked to respond in writing to the queries identified by the Accord.

The Accord used this information to provide context to the scoring and categorisation process undertaken previously. This was used to identify the trends and themes articulated in this report.

In reviewing their responses back to the Accord, it was possible to identify whether agencies had taken on board the feedback/query raised and whether this was likely to result in any changes to their special conditions. This information informed the conclusions section of this document.