

Contractual guidance due to severe weather and flooding events

Recent severe weather and flooding events in Aotearoa New Zealand have significantly impacted people, communities, and organisations. These events have also impacted construction activity in the affected regions, with ripple effects in other regions due to resource sharing. Initial focus is on recovery and the Construction Accord seeks to provide guidance to support the sector on key steps and points to consider in relation to the contracts for projects that have been impacted as a result of these events.

Consulting with a wide range of stakeholders, Government clients, legal and industry bodies, The Accord has put together this contractual guidance for those have been impacted by the recent weather events.

The Accord encourages open and transparent dialogue between clients, suppliers and their supply chain partners to try and achieve the best outcome for the project. All parties taking the appropriate actions in a collaborative and constructive manner will help avoid disputes.

The Accord recognises that the impact of these events will continue to unfold over the coming weeks and months. We will seek to update or provide further guidance when necessary.

Guidance focus

This guidance is focused on NZS3910: 2013 General Conditions of Contract (**3910**) and while it does not take into account any special conditions that may have been agreed, the general principles and approach reflect good practice and may be relevant to projects or contracts on similar or modified terms. Capitalised words or terms are as defined in 3910 and clause references are to 3910.

Key points

- Make sure the Site and workers are safe;
- Communicate with clients, contractors, consultants, suppliers, insurers, and end users;
- Make sure you are:
 - giving all required notices e.g. under contracts and relevant insurance policies;
 - mitigating the risk of any future or ongoing loss or damage;
 - keeping records and evidence (e.g. photos of damage); and
 - ensuring instructions are given, and claims are made, in writing; and
- Review your contracts and insurance policies and comply with any procedural or other requirements to avoid jeopardising your right to pursue a claim or seek relief (e.g. requirements to notify clients or insurers of claims within a prescribed time or in a particular format).

1 NOTIFICATION AND ONGOING COMMUNICATION

1.1 Timely notification and ongoing communication between contractual parties and wider stakeholders will be crucial to mitigate the impact on affected projects and, in particular, ensuring that:

- (a) all people working on the project are safe and will continue to be safe while working on the project and neither party breaches duties owed at law or under any consents (including the Resource Management Act);

- (b) the insurances in place respond as they should and are not compromised by a failure to follow policy terms and conditions;
 - (c) the parties can work together to ensure losses are mitigated (including whether the contract conditions and risk allocations remain deliverable and whether the project as a whole remains feasible); and
 - (d) all claims are dealt with in a collaborative and constructive manner which avoids disputes.
- 1.2 In order to mitigate the risk of disputes, parties should ensure that all claim related communications (both insurance and contractual) are supported by appropriate evidence. In practice, this may mean ensuring that:
- (a) all loss and damage is photographed or video recorded;
 - (b) all repair works are appropriately documented and supported by insurance approvals or clear instructions from Principals if the Principal holds the insurance;
 - (c) all notices, claims, or instructions are made, or confirmed, in writing; and
 - (d) potential supply chain disruption is investigated and confirmed as soon as possible, and mitigation measures explored.
- 1.3 Where detailed information is not provided with claims, Principals and the Engineer to Contract should work collaboratively with Contractors to understand what contemporaneous information is available, noting that during the initial response Contractors may have prioritised safety of people or property over record-keeping.

2 INITIAL ASSESSMENT AND MAKING SAFE

- 2.1 Under 3910, if the Contractor has possession of the Site (5.4) and the floods have caused loss or damage (and assuming the Site has not been destroyed and can still be accessed), the Contractor is obliged to take immediate action to make the Contract Works, Materials and the Site safe and to mitigate any immediate environmental impacts (5.6.5(a)).
- 2.2 Where the floods affect the areas surrounding the Site (but are outside the control of the parties) such that these areas pose a material risk to the Site, then the parties should agree appropriate steps to eliminate or minimise risks to health and safety and to mitigate loss and damage to the Contract Works, the Site and Materials.
- 2.3 If the project involves works within a building or site which cannot be accessed due to a Council instruction (e.g. red sticker), then suspension may be “necessary” and, if so, should be instructed by the Engineer to Contract under 6.7.1. The parties may elect to mutually agree a suspension if this was considered appropriate (this was a useful mechanism in response to COVID).
- 2.4 If the flooding affects the feasibility of the project for the Principal, then it may consider suspending the Contract Works and discussing options with the Contractor. While this may give

rise to a Variation claim, it would prevent costs and time being sunk on a project which may not progress further (irrespective of the contract terms and termination rights).

- 2.5 If flooding or landslips make performance of the Contract Works impossible, the parties may consider whether the Contract is frustrated (14.1) but this is a high bar to establish so mutual agreement may be required.

3 **INSURANCE**

- 3.1 The parties will need to review the terms of the contract and insurance policies for their particular projects. It is important that insurance claims are made in timely manner and in accordance with the terms of the policy. The insurer will require evidence to support the claim – the types of records described above are a good guide. A failure to keep records may compromise a claim.
- 3.2 The below is a summary of the insurance position under 3910 for loss or damage caused by floods or landslips:
- (a) Flood and/or landslips need to be expressly selected by the parties as risks to be insured under the Contract – see 8.1.6 (if not selected, then repairs will be treated as a Variation and will be at the Principal’s cost).
 - (b) Different policies may respond to different damage:
 - i. damage to the Contract Works and Materials is usually covered by the construction insurance policy (assuming those risks are selected);
 - ii. damage to the existing structures and contents within a building where the Contract Works are carried out (e.g. a fit-out or a refurbishment) is usually covered by the building insurance policy;
 - iii. damage to Plant is usually covered by the Contractor’s Plant insurance; and
 - iv. damage to an neighbouring property (or third-party property) is usually covered by the public liability insurance.
 - (c) The construction insurance policy is required to be in the names of the Principal and the Contractor if taken out by the Contractor. It is required to be the names of the Principal, the Contractor and Subcontractors if taken out by the Principal (or a policy which provides the Contractor and Subcontractors with the same level of indemnity as if they were taking out the policy). The Principal also must ensure that the policy covering the existing structures names or provides an indemnity in favour of the Contractor and Subcontractors for value(s) required to be insured under the contract.
 - (d) Assuming the policy provides cover, the deductible under the policy will be borne by the Contractor where it takes out the relevant policy and the Principal where it takes out the relevant policy (save where the loss, damage or liability is due to an act or omission of the Contractor in which case the nominal deductible stated in 3910 will be borne by the Contractor).
 - (e) 3910 is light on detail as to how insurance proceeds are to be used for insured repair and reinstatement work and this will need to be worked through with the insurance broker.

- 3.3 In practice, there may be a disconnect between what is required under 3910 and what / who is actually insured under an insurance policy. As such, the parties will need to consult with their insurance brokers to fully assess the position.

4 **POTENTIAL CONTRACTUAL ENTITLEMENTS**

- 4.1 Where a project is affected by rain, floods or landslides, the Contractor may be entitled to bring the following claims (noting that this list is not exhaustive, and entitlement will vary based on the particular contract):

Time only

- (a) For weather sufficiently inclement to interfere with the progress of the works – time only claim under 10.3.1(b);
- (b) Loss or damage to the Contract Works or Materials – time only claim under 10.3.1(d) (but see below regarding the right to claim Variations for repair work under 5.6.5 and 5.6.6);
- (c) Flood – time only claim under 10.3.1(e); and
- (d) Any circumstance not reasonably foreseeable by an experienced Contractor at the time of tendering – time only claim under 10.3.1(f).

Note that none of these heads of claim give rise to an entitlement to costs or time related costs (10.3.7).

Time and cost (Variation entitlement)

- (e) Under 5.6.5 and 5.6.6, if flood and landslips cause loss or damage to the Contract Works and these are not required to be covered by insurance under the Contract, then these events will be treated as “excepted risks” and repair work will be treated as a Variation. However, if the contract states that these events are to be covered by the insurance, then repair work will not be treated as a Variation (so will be at the cost of the Contractor, who will need to pursue a claim under the insurance policy to recover the cost of carrying out the repairs).
- (f) If the scope of the repair work goes beyond the scope of the original Contract Works, then this may give rise to a Variation (9.1). The Contractor should ensure it considers notice requirements under 9.2.2 or 9.2.3 if a Variation instruction is not given by the Engineer to Contract.
- (g) If the Engineer to Contract suspends the Contract Works or gives an instruction which changes the scope of the Contract Works, then this may give rise to a Variation (6.7 and 9.1).
- (h) If the flood or landslide creates a change in physical conditions at the Site which could not have been foreseen by the Contractor when tendering and this significantly increases Costs, then this may give rise to a Variation (9.5). Note that physical conditions under 9.5 do not include weather conditions or conditions due to weather unless those conditions occur as a result of weather away from the Site (so localised flooding on the site might not

- (i) qualify for a Variation under 9.5, but floodwater or debris that come onto the Site from elsewhere might).

5 SUPPLY CHAIN POSITION

- 5.1 Contractors (and Principals if there are any Separate Contractors) should check with their supply chain as soon as possible to confirm whether there are any immediate or anticipated delays arising from the floods. This may be due to the impact that the floods have had on infrastructure, factories or storage facilities, and increased consumer demand for replacement goods and equipment damaged by the floods. While the full impact may not be immediately known, it is important that the potential for disruption is ascertained as soon as possible, and communication lines remain open to mitigate the impact of this.
- 5.2 Contractors should also check the terms of subcontract and supply agreements to assess any anticipated delays and any increases in costs (as these may inform claims that the Contractor has to make under its contract with the Principal).

6 AVOIDING DISPUTES THROUGH COLLABORATION AND GOOD CLAIM MANAGEMENT

- 6.1 Good claim management is important as:
 - (a) 3910 requires each party to give the other early warning of any matters which could impact on the price or time for completion (5.21). If the Contractor fails to do that and the impact of the matter could have been avoided or reduced by early notification, then that may compromise the extent of the Contractor's recovery;
 - (b) 3910 requires the Contractor to notify the Engineer within 1 month of becoming aware of the matter giving rise to the Variation or extension of time, or as soon as practicable thereafter (9.2). While not drafted as a time bar, failure to submit in time may compromise the Contractor's claim and create mitigation related issues;
 - (c) 3910 requires the Contractor to notify the Engineer within 20 Working Days of becoming aware of the matter giving rise to an extension of time or as soon as practicable thereafter (10.2.2(b)). The Engineer is not bound to grant the extension if the Contractor fails to do this so a late claim could compromise entitlement; and
 - (d) 3910 imposes similar duties regarding substantiating the claims so it is important that claims notified are appropriately substantiated as soon as the details are known.
- 6.2 It is also important for avoiding disputes and ensuring issues are resolved productively as it:
 - (a) enables Principals to make informed decisions and pursue contingency plans including varying the Contract Works or, in extreme cases, commence discussions with the Contractor to end the project (e.g. if no longer feasible or financially viable);
 - (b) enables the parties to potentially revisit a contractually agreed position which may no longer be feasible and to explore alternatives (which may be better for the project than pursuing an unachievable contractual position) before it is too late to do so; and

- (c) prevents Contractors accumulating major costs which it may not recover (either through lack of entitlement or the Principal being unable to pay but losing the ability to pursue a contingency plan as a result of the Contractor failing to notify in a timely manner).