



## **Towards better contracts: Building better relationships for better project outcomes**

**Interviews summary report**

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## Executive summary

A good construction contract sets the ground rules for project execution and is a fundamental document to ensure good outcomes are achieved. The Advisian Report – *An examination of the issues associated with the use of NZS Conditions of Contract* – produced in 2019 – had found evidence of a ‘culture of mistrust’ between the public and private sectors and identified poor contracting practice and unfair risk transfer. Following an increased awareness and focus on fair contract practices, Te Waihangā sought to find out how the sector is currently choosing the form of contract to use, if these contracts effectively manage disputes and what other factors may be influencing the outcomes being achieved.

Te Waihangā initiated interviews with 26 construction contract participants covering three themes to investigate our current contracting practice and to seek opportunities to allow the sector to move towards better contracts.

The interviews found that *NZS 3910: Conditions of Contract for Building and Civil Engineering Construction* (NZS 3910) and its variants were by far the most commonly used contract forms, and this was based mainly on the sector’s familiarity with them. However, there were inconsistent and varied views on what was best contract administration practice and process.

Extensive special conditions continue to be prevalent. Little has changed in our procurement and contracting practice in the last five years, despite an increasing general awareness of the benefits from fair and clear risk transfer and collaboration. Special conditions are still being used extensively to customise contracts and there is significant opportunity in harmonising special conditions across client organisations.

Collaborative contracting can lead to improved contract performance and better project outcomes, but its uptake is low. The use of early contractor involvement (ECI) services has become more common, but the potential benefits of ECI are often not being realised, in part due to poorly defined objectives, scoping and allocation of responsibilities.

Capability is limited and lacking across the sector. All interviewees agreed that the knowledge, level of experience, capability, and behaviours of individuals acting in key contract administration roles has a significant impact on project outcomes. Those acting with integrity and good behavioural skills enabled good relationships whereas poor behavioural skills engendered poor relationships. There were few clients with any strategic processes or evaluation structure in use when selecting individuals for key contract delivery roles.

Relationships and the incentive to protect reputations often enable disputes to be avoided or resolved outside of the mechanisms within the contract. This was often achieved by initiating ‘off line’ or executive level discussion, however there was no evidence of a defined process for these interventions. Resolving disputes by initiating the Construction Contracts Act adjudication process was common, but seen as increasingly expensive. Dispute resolution processes within contracts are seen as a last resort, expensive and often producing unsatisfactory outcomes.

There was a sense that procurement, specifically the tender stage, was somewhat disconnected from the overall project delivery, and all interviewees (client and contractor) considered continuity of representation throughout the procurement and delivery process to be beneficial to the contract outcomes.

# Introduction

## Purpose and introduction

Te Waihangā initiated interviews with 26 construction contract participants covering three themes to investigate our current contracting practice and to seek opportunities to move towards better contracts. We sought to understand whether our 'construction contract' practice is generating efficient processes and optimal project outcomes or if it is contributing to our sector's poor productivity.

This report provides a summary of responses to themed questions gathered from 26 interviews with a wide range of infrastructure contract participants. Those interviewed included government clients, designers, project managers, contractors and industry bodies. The interviews discussed three key issues that can affect contract performance across the construction and infrastructure sector:

1. **Issue one: Contract selection** – What influences the decision to use one standard form of contract over another and how does that decision affect the project outcome?
2. **Issue two: Working relationships** – Contract administration and the individuals administering contracts can influence the processes, relationships and ultimately project outcomes. How does the performance of these roles (and the individuals carrying out these roles) affect the project outcomes?
3. **Issue three: Dispute mechanisms** – Contained within standard contract forms are prescribed dispute avoidance and resolution mechanisms. How well do these serve the contracted parties in providing greater certainty and clarity in project, and outcomes in disputes?

The interview responses identified common challenges faced by the sector and the opportunities to improve our contractual frameworks so they are genuinely supporting relationships that will enable better delivery of infrastructure in New Zealand.

For each of the three issue themes outlined, this paper investigated the issues and looked at the interrelationships between them. The report identifies opportunities raised by respondents where the industry can work together to produce better project outcomes.

## Background

In early 2019, the Infrastructure Transactions Unit (now the New Zealand Infrastructure Commission, Te Waihangā) in response to the Entwine Report (*Creating value through procurement: a report into public sector procurement of major infrastructure projects*, August 2018, Entwine) commissioned a review of the use of NZS Conditions of Contract in public sector-initiated infrastructure projects (often referred to as the Advisian Report – *An examination of the issues associated with the use of NZS Conditions of Contract*, August 2019, Advisian). This review found evidence of a 'culture of mistrust' between the public and private sectors. The lack of trust was evident in the approach to procurement and contracting (including unfair transfer of risk).

In November 2021, the Construction Sector Accord and Te Waihangā, on behalf of the wider sector, engaged Standards NZ to undertake a review of NZS 3910:2013. This review of NZS 3910 was undertaken in parallel with the *Towards Better Contracts* interviews, and care was taken during the interviews to avoid discussing specific NZS 3910 contract clauses by focussing the discussion on contracting practice and the behaviours of and relationships between contract participants.

## Method

Te Waihanga commissioned ALTA to investigate three key issues apparent in construction contracting practice in New Zealand.

The scope of the study was to:

- prepare an issues paper which included a set of questions to understand the issues that impact project performance and outcomes (see Appendix 1)
- interview a wide range of infrastructure participants, including clients, designers, project managers, contractors, sub-contractors and industry bodies, on the three issues contained within the Issues Paper to identify common challenges, as well as areas of excellence
- produce a summary report from the interviews (this report).

This interviews summary report is a factual summary of the outcomes of the interviews, without attributing any comments to a particular organisation or individual interviewed. Whilst there were areas of difference between interviewees, common themes were apparent and these have been summarised in this report.

Some comments recorded during the interviews have been included in italics within the report.

A standard set of questions were developed as part of the issues paper and were used to guide the industry interviews to ensure a level of consistency in the discussions. Individual responses to these specific questions have been merged with other responses and a summary only is recorded in this report.

Although some time has passed since the interviews were conducted, including the intervening development of an update to NZS 3910, we consider that the themes discussed continue to be highly relevant to and consistent with anecdotal feedback on current practice, and point to future opportunities for improved contracting practices.

# Interviews summary

## 1. Contract selection (Issue one)

Selecting a contract form to use for a project (including drafting, modifying, and preparing additional contract documents) needs to be a deliberate, intentional and informed decision because it can significantly impact project execution and outcomes. In the interview, respondents were questioned on a wide range of project characteristics that may be considered when selecting a contract, including:

- familiarity of the parties with the selected standard contract form
- the project value and the real or perceived project complexity
- design completeness
- the real or perceived project risk
- if the project requires input from specialist parts of the supply chain
- if there are complex finance or funding considerations.

All the industry participants interviewed have a strong preference for the use of NZS 3910 over other forms of contract.

There appears to be limited consistency in approach to contract selection (both within and between procuring organisations). In general, clients did not have specific processes, systems or criteria matrices for the selection of the contract form. In most cases, decisions seem to be made on an ad-hoc basis depending on the understanding of the project at or near the time of procurement. This includes taking into consideration the value and complexity of the project and taking specialist advice when necessary.

Contractors are of the opinion that they have very limited ability to influence the form of contract to be adopted. Whilst clarifications and certain conditions may be able to be negotiated, the form of contract is fixed by the client at the time of the request for proposal and there was little evidence to suggest that contractors had any influence on the form of the contract selected.

### 1.1 Stick to what we know - familiarity of the contracting parties with the contract form

There is a widely held view that familiarity with NZS 3910 was seen as a significant benefit by all of the parties interviewed. Whilst other forms of contract may provide some benefits (including better conditions) in terms of distribution of risk and contract administration, familiarity with the general conditions of NZS 3910 was of greater importance to all interviewees.

***"Fear of the unknown and the depth of experience the client has led to fear and suspicion in using alternative methods of contracts".***

Familiarity with NZS 3910 by the wider supply chain (sub-contractors and suppliers) was also considered preferable to alternate forms of contract. Interviewees who had previously used alternate forms of contract such as NEC and FIDIC commented that often NZS 3910 derived SA-2017 was used for subcontract agreements, as the supply chain is more familiar with their obligations under an NZS 3910 head contract than the NEC subcontract form.

***"We usually find that different forms of contract are difficult for clients and contractors to understand".***

This also extended to special conditions (particularly NZS 3910 Schedule 2 - Special Conditions of Contract – Other Conditions of Contract) where most clients are of the view that their main suppliers are also familiar with their typical special conditions. Whilst this may be true, it potentially excludes or deters new suppliers who may want to provide services to a particular client but lack the same familiarity with their prescribed contract special conditions.

Limited cases of other forms of contract being used were identified, but generally this was only considered appropriate for complex contracts or those with specific or bespoke elements of procurement. Examples noted included:

- FIDIC for some international contracts, particularly those in regions such as the Pacific Islands where there may be international partner organisations such as the World Bank
- NEC for limited and specific contracts, although interviewees commented that often NEC was heavily modified making it “similar to NZS 3910” or that the NZS 3910 derived SA-2019 was used for subcontract agreements instead of the NEC subcontract form
- alliances for large or complex projects, although this tended to be limited to a number of very specific projects.

The consensus among interviewees is that a change in commonly used contract forms would require considerable further education in the sector.

***“If we are to use contractual models that are not currently prevalent in New Zealand (i.e., anything other than NZS 3910) then.... we will need to educate not only the client but also the contractor”.***

### 1.1.1 Use of special conditions

There is a generally accepted view that NZS 3910 always requires some modification through the special conditions to give effect to the contract. This primarily relates to conditions in NZS 3910 Schedule 2 – Special Conditions of Contract – Other Conditions of Contract, that modify the General Conditions.

Interviewees provided no examples where an unmodified contract has been used. Several contractors interviewed observed that an unmodified contract would be treated with suspicion, and that there were General Conditions that needed to be modified to provide a balanced distribution of risk.

***“With respect to special conditions...the motto is ‘less is more’”.***

All the client organisations interviewed noted that they either have, or intend to have, common special conditions for use in all their contracts. Whilst this is a step in the right direction for client organisations, most considered that their operations had a level of uniqueness which means they cannot adopt broader or simpler special conditions common to other clients.

There is likely to be significant opportunity in harmonising special conditions across client organisations.

The use of extensive special conditions was largely criticised by all the interviewees, and it was acknowledged that excessive special conditions can result in a higher incidence of conflict between the contract conditions and the contract documents.

***“Lots of special conditions sets up the project as combative, them and us, and does not set a scene of collaboration.”***

All organisations discussed the issue of contract conditions “by stealth” where contract obligations are buried in lower order documents like product specifications, and all agreed that this creates unknown contract obligations and can cause conflict between documents and ultimately disputes. Client

organisations noted that they are trying to stop this, confining contract conditions to the contract schedules. However, there were no clear processes identified to achieve this.

***"The thing that complicates relationships and behaviours is over complicating agreements with project requirements and which are often written by people who don't manage the project."***

Some organisations commented that the inclusion of an order of precedence clause clarifies the relationship between documents and mitigates the risk of contract conditions being relied upon in subordinate documents.

### 1.1.2 Preparing and drafting the contract documents

Having a clear, easily understood contract helps reduce misunderstandings between contracted parties.

However, interviewees gave no examples of a standard process for compiling the contract documents, and they expressed mixed views around whether a contract should be compiled using the procurement stage documents such as notices to tenderers and post tender correspondence, or whether it should be fully 'conformed' (i.e., the final contract being a clean, edited version that incorporates all post tender tags, clarifications and amendments).

In general, there was a preference to have fully conformed contracts, although this was seen as time consuming and more complex to implement.

The interviews indicated that the current quality of contract documentation is entirely subject to the diligence of the team drafting the documents and may be highly variable in different organisations and at different levels.

All those interviewed recognised the need for clear orders of precedence in the contract, and almost all considered this a satisfactory way to help to resolve conflicts in the documents.

***"Client teams don't usually conform contracts."***

***"People who conform the contract are the ones that see it as a transaction as opposed to a long-term relationship."***

***"Conforming the contract is the correct approach."***

Similarly, there were mixed views on whether a contractor's tender should form part of the contract. In general, it was the contractors' preference to have this included, since this was considered to be important in defining what has been allowed for in the offer. Opinion among client organisations was far more mixed, with the preference being to exclude the contractor's tender from the final contract.

All the interviewees acknowledged the need for clarifications (tags) in the negotiation of contracts. Client organisations were generally receptive to clarifications, but all interviewed noted that "non-negotiable" conditions existed. Some client organisations have prescriptive processes for the assessment and acceptance or rejection of clarifications, others expressed greater flexibility. Almost all interviewees (clients and contractors) noted that legal advice was usually required before clarifications to either the general conditions or special conditions could be accepted.

***"Typically, most client organisations are going to listen to their lawyer, rather than their project manager."***

One contractor commented that "there doesn't seem to be a lot of appetite on the client side for forming contracts that are balanced". There was also a widely held view among contractors that they have limited influence and ability to negotiate contract conditions.



### 1.1.3 Approach to procurement

Very few of the client organisations interviewed were able to identify clear processes for the selection of procurement models or contract forms. All organisations interviewed acknowledged that scale and complexity are key considerations in determining the procurement approach and the subsequent contract form.

All the client organisations recognised the need for risk-based decision making when selecting a procurement model and contract form.

There was a sense that procurement, specifically the tender stage, was somewhat disconnected from the overall project delivery, and all interviewees (client and contractor) considered continuity of representation through the procurement process to be beneficial to the contract outcomes.

***“Procurement isn’t just the act of running a tender and signing a contract. Often people that are leading procurement are only interested in that two month [tender] window.”***

Several interviewees expressed the view that procurement should be considered to encompass the entirety of the project from inception to completion, and that the narrow focus of procurement on the tender stage was often detrimental to the wider project outcomes.

***“Procurement planning is important...it starts from the time you think up a project to the time of delivery.”***

## 1.2 Project value and complexity

Almost all interviewees considered NZS 3910 to be scalable for most projects, with only the largest and most complex projects warranting the use of alternate procurement or contract forms.

Project value or duration are not considered to be an impediment to the use of NZS 3910.

Some client organisations use a simplified set of NZS 3910 special conditions for low risk and low value projects. This approach was seen as beneficial in expediting the procurement of simple projects.

Some client organisations noted that they use NZS 3915 (where no person is appointed to act as engineer to the contract) for low risk and low value projects. They considered this provides good outcomes, especially where the work was highly repeatable and delivered by the same suppliers.

Generally, alliance contracts were seen as the most advanced and most appropriate form of procurement and contract for large and complex infrastructure projects.

***“Alliancing is collaborative and gets good outcomes. The energy in an alliance is quite positive and quite conducive to good outcomes.”***

## 1.3 Project timeframes and programme

All interviewees agreed on the importance of working through and addressing project issues, including contract and technical clarifications, before starting physical work.

There was a common view that contracts often move into construction too hurriedly with a mindset that “things will get resolved through the construction period”. Whilst this behaviour was acknowledged, all noted the significant risks associated with this approach.

A greater focus on ‘readiness to deliver’ ahead of moving into the delivery phase was seen as beneficial. However, time constraints, often imposed by the client’s programme, mean that in most projects there is insufficient time allocated to achieve this.

In general, it was considered that NZS 3910 is limited in terms of clauses clearly defining programme requirements. The majority of the client organisations interviewed introduced additional special conditions and specification requirements to address this and these are broadly accepted by contractors.

## 1.4 Design progress and completeness

It was widely recognised that design was often incomplete at the tender stage and that programme pressure on design organisations is limiting the ability to provide well developed design for tenders. One interviewee expressed that it is key to “land and nail the design early” – if this is done well the “contract should flow out the other end”.

There was concern from most contractors interviewed that construct-only projects are being procured with very limited or incomplete design information (30% complete or less), and often with no statutory approvals in place. Incomplete or low levels of design during tender and contract agreement was acknowledged as a risk to project performance and a significant risk to contractors.

***“All things being equal, better-quality design and better quality [project] documents mean better outcomes.”***

The inclusion of contractor design elements and a lack of clarity regarding the design liability was perceived as increasing the likelihood of ‘risk-transfer-by-stealth’. This includes elements designed by the contractor or their supply chain (such as propriety items like pre-cast concrete), where the contractor takes on risk that is usually held by the client and the client’s designer.

Contracts often had key design obligations “buried” in the specifications, drawings and other subordinate documents. Some contractors apply a catch-all clarification to try to limit the extent to which these can be relied on in the execution of a contract.

Design completeness did not seem to significantly influence the selection of the contract form.

## 1.5 Project risks

Contractors interviewed observed that in heavily modified NZS 3910 contracts (with multiple pages of special conditions) it is more difficult to work out where contract risk sits. These situations require more time for intensive review during the tender period, often including a more significant legal review.

It was recognised by all interviewees that knowledge and experience of contract and commercial risk was variable across the sector. Greater commercial capability in the sector would likely improve the understanding of risk, risk distribution and lead to improved contract performance.

***“There is a lack of competency in clients. There are those that still don’t understand some contracts and commercial risks.”***

Contractors interviewed expressed a concern that NZS 3910 promotes conflict through the administration processes and is structured to protect the client and limit the contractor’s ability to make legitimate claims.

The view that a fairer allocation of risk was likely to improve contract outcomes was expressed and clients interviewed acknowledged that a reasonable and consistent allocation of risk was preferable. Although no interviewees were able to provide tangible examples of how this could be achieved.

***“There is a lot of emphasis that public sector doesn’t understand the private sector risk, quite often, the private sector doesn’t understand the public sector risk.”***

Contractors interviewed considered more collaborative forms of contract, particularly alliance contracts, as being better at fairly distributing risk. One contractor suggested the NEC form of contract as being more transparent and fairer in the allocation of risk.

**“NEC Contracts take a collaborative approach to contracting.”**

## 1.6 Supply chain input during procurement

### 1.6.1 Design and construct approach

Whilst NZS 3916 is specifically provided for design and construct (D&C) contracts its use is somewhat limited. There are some client organisations that are using heavily modified NZS 3910 contracts to deliver D&C work.

Some contractors noted that the NEC suite of contracts is better suited to D&C works and is more scalable for D&C. However, there was very little enthusiasm among all of the interviewees for the use of NEC contracts.

Contractors considered that D&C contracts often had key design risks “buried” in the Principal’s requirements, and other subordinate documents. Of particular concern is the inclusion of fit-for-purpose clauses within subordinate design elements.

Most interviewees considered a lack of experience and capability across organisations reduced the likelihood of using D&C contracts. This included limited experience among client organisations in the procurement of D&C projects as well as limited appetite for higher levels of risk associated with design management for contractors.

### 1.6.2 Early contractor involvement approach

Most interviewees from client organisations reported mixed results with the use of early contractor involvement (ECI) during the procurement of a contractor.

Some contractors accepted that ECI is “a good idea in theory” but that work done in the ECI stage was often used against the contractor during contract execution, specifically that the contractor is “deemed to be aware” of all potential site conditions.

Contractors considered use of ECI in procurement to be “tough” – with great results for the winning contractor. However, the lack of profitable revenue from staff engaged during the ECI phase and risk of not proceeding with the contractor to construction was seen as a barrier to engaging in ECI.

Whilst contractors are often paid for ECI, payments do not often meet the true cost of the process and contractor’s do not consider this to be a profitable stage of the project. Contractors noted that ECI procurement takes up time for valuable staff that can be more profitably employed on projects during delivery.

Interviewees acknowledged a capability gap in the planning, design, procurement and subsequent delivery of projects procured through ECI. The consequence of this is the observation that ECI may not be adding the expected value in most cases.

The overall experience expressed by the majority of interviewees is that ECI has not delivered the expected outcomes for either contract party. Factors affecting performance are late involvement of the contractor, a transactional approach to the process and a lack of trust between the parties in agreeing sole source cost estimates.

***“ECI is a valuable tool, but it is still not done well in NZ.”***

A small number of interviewees commented that an ECI approach can add significant value for repeatable design and construct arrangements under framework agreements, where the parties work together often and the work is well understood.

The need for a high level of trust between the parties in an ECI arrangement was also discussed and the importance of getting the “right people” to foster the behaviours that promote collaborative working and successful outcomes.

## 1.7 Impact of finance and funding in selecting the contract form

Generally funding doesn’t influence the decision to use NZS 3910 for projects, and client organisations interviewed did not have criteria linking the contract form selection to funding.

Where funding is limited or highly constrained this may have the effect of introducing further special conditions to limit variations. This may be an issue where multiple agencies have funding input to a project.

For projects with alternative finance models, such as Public Private Partnerships (PPP), bespoke contracts are developed specifically for that project. Contractors noted that these typically transfer greater risk to the contractor and are often commercially more aggressive than NZS 3910.

## 1.8 Alternatives to NZS 3910

Among all interviewees there was a broad preference to use NZS 3910 (or one of the other NZS contracts) over alternate forms of contract. Familiarity was considered to be more important than most other considerations when choosing a form of contract. Whilst all interviewees acknowledged flaws in NZS 3910, it was considered generally acceptable and fit for purpose for most projects over a wide range of values and varying complexity.

Only one contractor expressed a preference for the use of NEC contracts and noted a general resistance to its use among New Zealand clients.

Whilst the more integrated nature of NEC contracts was seen as a benefit by some, it was observed that, when used in New Zealand previously, the wider suite of contracts has not been used and sub-contractors and designers have been engaged using other contracts forms, negating some of the benefits of NEC. The rationale for this approach being that local sub-contractors and consultants are more familiar with New Zealand forms of subcontract agreement.

***“People are scared by the language of NEC but from a legal perspective it is incredibly efficient and accurate in its language. It deals with complicated issues very efficiently and well.”***

There were a few examples of the use of FIDIC contracts, however this was largely limited to projects in the Pacific Islands and specific procurement of plant from international suppliers.

There were some examples of using other forms of contract or purchase agreements with overseas suppliers or using supplier-specific agreements for internationally procured plant and equipment. This was done on an ad-hoc basis depending on the nature of the items being procured and the supplier’s requirements.

Key barriers to the use of other forms of contract that were indicated are:

- lack of familiarity in New Zealand
- lack of available skilled resource to administer alternate forms of contract
- sub-contractors and suppliers are unfamiliar with alternative forms of contract.



It was acknowledged that some forms of contract may be more collaborative and have the potential to deliver better project outcomes, however interviewees generally agreed that there were other mechanisms outside of the contract that could be used to promote collaboration.

International contractors were broadly accepting of NZS 3910 and noted that the general contract conditions are similar to construction contracts in most jurisdictions.

Discussion with international procurement organisations in Australia also indicated that there is a preference for familiarity of contract form in most states and the issues associated with adopting alternate forms of contract are similar to those being observed in New Zealand.

## 2. Working relationships (Issue two)

Contract administration involves several parties fulfilling various roles. Some roles are clearly defined by the contract (such as the Engineer in NZS 3910:2013) and others are not.

Throughout the interview process, all interviewees agreed that the knowledge, level of experience, capability and behaviours of individuals fulfilling these roles can have a significant impact on contract performance and project outcomes.

At the time of undertaking the interviews, NZS 3910 was being redeveloped. This section relates to the issues and challenges with the roles defined in NZS 3910:2013. Changes made in NZS 3910:2023 are expected to go some way to improve the working relationships under an NZS 3910 contract. Those changes being:

- the dual role of the Engineer has been replaced, as it was a common cause of friction. It has been replaced with two distinct new roles: *Contract Administrator* – who instructs under the contract and ‘acts on behalf of the Principal’ and *Independent Certifier* – who decides and ‘acts fairly impartially and independently’. It is important to note that the Contract Administrator and Independent Certifier can be the same person. This change to NZS 3910 is intended to ensure clarity on the purpose of each role, emphasising when specific activities demand fairness and impartiality
- collaboration enhanced by changes throughout the contract include role clarification of the Contract Administrator, Independent Certifier and Adviser roles, a new section ‘reviewing instructions and decisions’ (section 6.4) and an enhanced ‘early warning’ mechanism (section 6.10). Collaboration was enhanced to avoid misinterpretation, clarify intent and process, balance risk allocation and to simplify administration.

Although the 2023 edition of NZS 3910 is expected to address several of the issues with the underlying contractual framework, it may not be able to influence the processes, behaviours and relationships that are fundamental to delivering successful project outcomes.

### 2.1 Participants in the contract

All the interviewees have a clear understanding of the defined roles formalised in NZS 3910, and recognised that there are wider roles influencing project performance and outcomes. For example, the behaviour of the client and their subject matter experts and designers can have a significant impact on the administration of the contract, whilst not having defined roles.

***“When contracts don’t work it is more about the people [involved] than the [contract] clauses.”***

***“It isn’t the contracts that push the behaviour, it is the people administering them or aligning the roles and clarity around who does what”.***

The importance of having the most appropriate, capable and experienced people for both defined roles and wider roles associated with the contract was raised by all interviewees. There is a widely accepted view that the competence and experience of individuals has a significant impact on project outcomes. Access to resources with the correct skills and appropriate experience to fulfil both contract and wider roles is considered to be severely limited across the sector.

***“We have not previously considered well the impact of a ‘best fit’ Engineer and tend to add this into project management or quantity surveying services.”***

Few of the client organisations had specific criteria for the appointment of persons into contract roles such as the Engineer or Engineer’s Representative. Whilst technical competence is considered important, many interviewees recommended that behavioural skills should also be considered in selecting people to fulfil key contract roles.

***“We should be testing behaviours of individuals prior to entering into contracts.”***

Contractors interviewed commented that the approach to addressing commercial risk during tender preparation is often influenced by the person(s) fulfilling named contract roles such as the Engineer and Engineer’s Representative.

***“It is ridiculous to select the Project Manager or Engineer on price.”***

## 2.2 The role of the Engineer and Engineer’s Representative

The role of the Engineer and their representative was discussed at length, and interviewees provided mixed views on the extent to which the Engineer should be involved in the day-to-day administration of the contract. The view of most interviewees for all organisations is that the Engineer should have limited involvement in the day-to-day execution of a project to protect their independence in the event of a dispute.

No interviewees identified significant alternatives to the current structures used in the administration of construction contracts. There are limited examples of the use of NZS 3915 where there is no Engineer. NZS 3915 was considered suitable for small value or simple projects and had been used with a high degree of success by one organisation interviewed.

One client respondent considered the role of the Engineer to be an anachronism that could be removed from the contract.

Designers commented that there were some benefits in using the designer in the roles of Engineer or Engineer’s Representative, specifically that this approach provided continuity of knowledge.

All contractors interviewed expressed concerns with the dual role of the Engineer as both the client’s agent and advisor together with their role in making decisions and resolving disputes. Contractors commented that some of their commercial decision-making at the time of tender will be dependent on the persons fulfilling key contract roles.

***“The person taking on the role of the Engineer or Engineer’s Representative needs experience and maturity, experience in the industry and dealing with contracts.”***

There is genuine concern among contractors that the Engineer is likely to be biased in decision making on critical issues, particularly where there are significant time and cost impacts on projects. Whilst interviewees fulfilling these roles did not share the same concern.

***“Impartiality of the Engineer to the Contract is key”.***

There was further concern that terms of engagement may place restrictions on the Engineer's powers under the contract and may mean that matters cannot be decided without the express acceptance by the client. Some interviewees considered this to be a risk in terms of bias when seeking decisions from the Engineer.

Among interviewees fulfilling the role of the Engineer there were mixed views as to the extent to which the Engineer should make formal decisions. The use of the Engineer's formal decision process was seen by some to be a failure in the effective administration of the contract.

***"If the contract can sit in the bottom drawer for the duration, then you have a good project outcome."***

***"Unless someone can recite 100 pages of NZS 3910, then the contract should be out on the desk. Make it sit next to the partnering charter."***

***"The contract needs to be out on the desk...it is there to protect both parties and it is there as a tool to be used."***

There was significant support for the cost of the Engineer's services to be shared jointly between the contracting parties to remove the perceived tendency to make biased decisions.

## 2.3 The role of the client's project manager

The role of the client's project manager was also seen as critical in supporting good project management. However, there was no support among interviewees for the formalisation of this role as a defined role (Principal's Representative) in the Contract.

Whilst the principal is named in NZS 3910 Schedule 1 – Special Conditions of Contract – Specific Conditions of Contract, unlike the Engineer, Engineer's Representative or Contractor's Representative, the principal does not have to be a natural person. There is no 'Principal's Representative' in the 2013 edition of NZS 3910 and therefore no named individual with defined powers and responsibilities in the contract. Generally, this means that the principal's project manager and that person's relationship with the named contract parties is critical to the success of the project.

The need for having people of significant experience and competence in this role was considered important by all interviewees.

***"The principal's competence is far more important and means the form of contract is irrelevant."***

## 2.4 The role of the Contractor's Representative

The role of the Contractor's Representative was perceived by most interviewees as a figurehead role and is often not on site. As a result, the representative actually onsite may not be empowered to make decisions on behalf of the contractor.

***"There are situations where the Contractor's Representative does not have the requisite authority to do something quickly and often can't give you a quick answer."***

Often the role of Contractor's Representative is fulfilled by a senior manager who is largely off site. This does not necessarily comply with the requirements of the role in the contract.

***"We should be putting non-price attributes [in tenders] to consider people skills and communication skills and psychometric testing that picks up behaviours of contractors representative and the person that will be doing this day-to-day."***

### 3. Dispute mechanisms (Issue three)

An effective dispute resolution mechanism is efficient, cost effective, accurate and provides lasting or enduring outcomes. This section discusses the industry's feedback on whether the current dispute resolution mechanisms used within the sector result in optimal outcomes for parties.

#### 3.1 Dispute mechanisms in NZS 3910

Disputes are dealt with in Section 13 of NZS 3910:2013, which identifies three methods of dispute resolution:

1. Engineer's review
2. mediation
3. arbitration.

Parties cannot contract out of the adjudication process contained in the Construction Contracts Act 2002 (CCA).

##### 3.1.1 Engineer's review

The industry is of the view that Engineer's reviews (including "formal" binding or non-binding decisions) are relatively ineffective in providing clarity to issues in dispute. Concerns regarding perceived bias undermine the decisions made and the use of the process is often seen as a wider failure in good contract administration and relationships.

The perception that the Engineer does not act independently and a lack of confidence in Engineer's decisions means that decisions are not regularly sought by either contract party. Interviewees performing the role of the Engineer considered their personal reputation to be linked to being seen to act impartially.

***"The Engineer's personal reputation is important when making an impartial decision."***

Among interviewees who perform the role of the Engineer there are mixed views as to the use of the Engineer's decision-making powers in accordance with the contract. One view is that the Engineer should make decisions and close matters out as the project progresses, the other is that issues should be kept open for as long as possible to be assessed towards the time of completion – when the full impact of issues may be more clearly apparent.

Contractors are of the view that it is preferable to close matters as soon as possible as the project progresses, although there was a preference to avoid formal decisions that cannot be challenged except through the subsequent dispute processes.

***"The Engineer's review and decision is good and useful."***



### 3.1.2 Mediation

Based on the experience of the interviewees, it seems that there was little use of mediation and many mentioned that the outcome of mediation was often unsatisfactory.

Legal counsel interviewed commented that the mediation process is largely aimed at fair division between the parties, and that this is not always possible. This is especially true where the matter in dispute is one of contract entitlement where there is unlikely to be a "middle ground".

It was recommended that mediation type processes should be used earlier in the dispute resolution process, rather than after the Engineer's decision process when relative positions may have become entrenched.

***"Mediation seeks to maintain the relationship, but it is too late if the relationship has already deteriorated into a dispute."***

Access to suitable, experienced resources to run mediation processes is also considered to be limited and timely availability of mediators was considered to be a barrier to its use.

Whilst mediation was acknowledged as being relatively simple there is still a high dependence on legal resources.

### 3.1.3 Arbitration

None of the interviewees had significant experience with arbitration for resolving disputes. Most considered it to be expensive and time consuming with limitations in terms of timely access to suitable and experienced resources to run arbitrations. Further, arbitration was seen as heavily dependent on legal resources.

## 3.2 Other dispute processes used in New Zealand

Other mechanisms that sit outside of the contract are often used to avoid or resolve disputes and it was widely accepted that these play a fundamental part in the timely resolution of disputes.

### 3.2.1 Adjudication under the Construction Contracts Act

All interviewees were familiar with the adjudication process under the Construction Contracts Act (CCA) and most have experience using this process for the relatively quick resolution of disputes. However, the process is seen as becoming increasingly expensive.

Clients and Engineers interviewed did express concern that the process required very rapid response times that are considerably shorter than the time that a contractor might have to prepare an adjudication claim prior to filing and serving it. This was perceived to give an unfair advantage to the claimant.

Concerns were raised by all interviewees, including those in the legal profession, regarding the availability of suitably experienced adjudicators.

There is also a concern that the selection of the adjudicator is a process that is often 'gamed' by the parties to obtain an advantageous outcome.

Experience of those interviewed suggests that many disputes that go to adjudication are settled prior to being determined.

### 3.3 Negotiation by senior organisation representatives

All interviewees considered senior level negotiations to be an effective mechanism in both the avoidance and resolution of disputes. These negotiations were generally expected to be at a senior executive or CEO level. Interviewees proposed that this process is used early in the dispute process rather than later.

***“The goal and outcome of a contract is to not end up in court.”***

Contractors commented that it was important to have empowered decision makers involved in these negotiations, able to commit their organisations to any agreed dispute outcome. Whilst this was also preferable for clients interviewed, it was recognised that this may be more difficult in the public sector.

#### 3.3.1 Dispute avoidance and resolution

The use of wholly independent dispute resolution experts or dispute resolution boards was identified by some interviewees as an effective dispute resolution process that is free of the perceived bias of an Engineer’s decision. However, this was considered a costly process and unlikely to be well suited to low risk and/or low value projects.

The use of senior level or executive negotiation was recommended as a dispute avoidance mechanism provided it is implemented early and that those negotiating can commit the organisations.

***“Contractors want good relationships with principals. Having conversations and early warnings assists to iron out the big issues.”***

Project charters have been used with success on some contracts. These are generally not bound into the contract, but rather set out the behaviours conducive to the rapid resolution of issues. Since these have limited contractual or commercial strength, the extent to which they might be relied on is also limited.

There were limited examples referred to of behaviours being included in the contract document or special conditions, but it was acknowledged that the wording of these clauses was contractually weak.

***“Selection of people is more important than writing a partnering charter.”***

None of the interviewees identified alternate contract forms as providing better dispute processes, although some contract forms were considered more collaborative and less likely to result in disputes.

## Appendix one –

# Questions from the issues paper -

## **Towards better contracts:**

Building better relationships to get the most out of building

Supporting document for interviews

# 1. Context

## 1.1. Purpose of the issues paper questions

These issues paper questions were used to facilitate discussion with the construction and infrastructure sector. They are intended as a 'provocation' and question the common use and potential misuse of NZS 3910: Conditions of Contract for Building and Civil Engineering Construction (NZS 3910) as a 'one size fits all' contract. They ask both agencies and contractors to consider whether there are different ways in which we could be approaching our contractual frameworks to ensure they are genuinely supporting relationships that will deliver the public infrastructure that New Zealand needs.

APPENDIX A



## 2 Issue one: Contract selection

### 2.1.1 Client and client advisor questions

1. As a client selecting a contract form, does your organisation apply criteria when deciding whether to use NZS 3910? If so, what criteria?
2. Are there circumstances when you might use a different form of contract to NZS 3910? If so, what are those circumstances?

### 2.1.2 Contractor questions

3. As a contractor, to what extent can you influence the form of contract adopted and does this differ between public and private clients?
4. As a contractor receiving an NZS 3910 contract at tender, what are the most important considerations when deciding whether to accept the conditions and proceed?

### 2.1.3 Familiarity of the contracting parties with the contract form

5. How familiar, confident and receptive is your organisation's management and board with using alternate forms of contract?
6. What advice do you obtain when selecting and drafting contracts?
7. Do you seek wider industry engagement when selecting the form of contract and how do you incorporate industry feedback into your contract preparation?

### 2.1.4 Approach to procurement

8. When preparing the contract and tender procurement documentation, how does your organisation determine how project risks will be distributed between the parties?
9. To what extent is the contractor able to influence the distribution of risk during the tender process?

### 2.1.5 Use of special conditions

10. How does the use of numerous or significant special conditions impact relationships, project outcomes and eventual disputes between parties?
11. When NZS 3910 is heavily modified, the allocation of risk can become unclear. Are there other contracts that have a clearer / more transparent allocation of risk?
12. Do you use other forms of contract that require less modification? Give examples.
13. To what extent does your organisation consider it reasonable to amend NZS 3910? Is there a level of amendment when the contract is considered bespoke and requires special attention?
14. When entering into a contract, are there any common special conditions clauses your organisation insists on or refuses to accept? If so, what are these?

## 2.1.6 Preparing and drafting the contract documents

15. Does the quality of contract information contribute to your organisation's decision making when selecting NZS 3910?
16. Are there other approaches or contract forms that are better at capturing and organising the contract / pre-construction information? How do these differ from NZS 3910?
17. There are often conflicts between the contract and subordinate documents (i.e., the specifications, drawings and other associated documents are often the source of issues and disputes during contract execution). To what extent is this true and are there common areas where this occurs? How does your organisation deal with such conflict?
18. Do you include tender negotiation records and post tender correspondence into your contracts or do you fully conform them into your contract agreements? What influences the approach?
19. Are there changes to existing special conditions that are often met with resistance?

## 2.2 Project value and complexity

### 2.2.1 Impact of project value in selecting the contract form

20. Is the contract value considered when determining the contract form? If so, what thresholds influence this?

### 2.2.2 Impact of project complexity in selecting the contract form

21. Is project complexity a significant consideration when selecting a contract form? If so, what factors or details contribute to this?
22. Does your organisation use other contract forms for complex projects? If so, how or why do these forms better accommodate complexity?

## 2.3 Project timeframes and programme

23. Do you amend the NZS 3910 programme clauses or add additional requirements in special conditions to give better effect to the programme?
24. Are there circumstances where the project timelines would affect the choice of contract form? If so, what circumstances?
25. Do other contract forms provide better programme outcomes for the project?

## 2.4 Design phase progress and completeness

26. To what extent does the phase and completeness of design information influence your organisation's decision to use NZS 3910?

## 2.5 Project risk

27. How does the distribution of risk in the contract influence the relationships and the management of the contract during execution?

- 28. Does your organisation consider unamended NZS 3910 to be a fair distribution of project risk? If not, what aspects are favourable to one party?
- 29. What are the aspects of the contract that are changed most? Do these address areas of concern for the principal and contractor?

## 2.6 Supply chain input during procurement

- 30. Do you use the standard NZS 3910 conditions of tendering?
- 31. Are there contract forms that better accommodate supply chain input before or during the tender?

### 2.6.1 Design and construct approach

- 32. When would your organisation choose to use NZS 3916?
- 33. Does your organisation have the capability to deliver D&C projects?
- 34. Are there particular contract conditions your organisation uses when developing D&C contracts?

### 2.6.2 Early contractor involvement approach

- 35. Is ECI a mechanism that adds value and creates greater certainty of outcome in your business?
- 36. When does your organisation use an ECI approach?
- 37. Does your organisation use specific contract forms when entering an ECI contract?

## 2.7 Impact of finance and funding in selecting the contract form

- 38. To what extent does the contract form influence access to funding? Are there circumstances when an alternate contract model is required by the finance and funding organisation?
- 39. To what extent are other commercial models such as TOC considered acceptable? How is this affected by the finance and funding agency?

## 2.8 Alternatives to NZS 3910

- 40. What are the other contract forms your organisation uses? Give examples.
- 41. Do you use alternative contract forms when considering international project participants?

## 3 Issue two: Working relationships

- 42. How are contract administration structures and mechanisms driving good behaviours and providing good outcomes for the industry? What different options could be adopted to further drive constructive behaviours and optimise project administration?
- 43. To what extent do the individuals acting in the roles of Engineer and Engineer's Representative influence project outcomes?

### 3.1 The role of the Engineer as defined by the contract

- 44. Is the role of the Engineer or a contract administrator necessary? Are there contracts where the role might not be required, providing an opportunity to use NZS 3915 more often?

### 3.2 The role of the Engineer's Representative

- 45. Does your organisation have selection criteria, evaluations, standards for the engagement of an individual as the Engineer and/or Engineer's Representative? If so, what are these?
- 46. When engaging an Engineer, does your organisation restrict the powers ordinarily granted to the Engineer under the contract?
- 47. Are there any real or perceived issues or benefits if the Engineer and Engineer's Representative are provided by different organisations?
- 48. The Engineer's Representative may be performing a significant proportion of the Engineer's duties. How does this affect the contract's outcomes?

### 3.3 Other participants in the contract

- 49. How much importance does your organisation place on the role of the Principal's Representative / Contractor's Representative and can the person that fills this role influence project outcomes? In your organisation, is the Contractor's Representative sufficiently empowered to act for the contractor when dealing with the Engineer or Engineer's Representative?
- 50. Are there other contract forms your organisation uses that place different obligations on the Contractor's Representative? Does this improve project outcomes?
- 51. How does the designer's engagement affect project outcomes during delivery?
- 52. Are there other contract forms your organisation uses that better incorporate the role of the designer in the contract?
- 53. Are there other roles (and individuals performing these roles) that can have a significant impact on the administration of the contract? How are these incorporated into the contract?



### 3.4 Acknowledging the upcoming revision of NZS 3910

54. Is the clearly defined splitting and separation of the dual role likely to ease the perceived conflict that results from Engineers performing the dual role, while improving efficiency and project outcomes?

### 3.5 Advantages and disadvantages of the Engineer's dual role

55. Are there other contracts or contract mechanisms that could be introduced to mitigate the Engineer acting with bias?

APPENDIX 1

## 4 Issue three: Dispute mechanisms

### 4.1 Dispute mechanisms in NZS 3910

#### 4.1.1 Engineer's review

- 56. Does your organisation consider the Engineer's decision process to be objective? Do you rely on this to provide clarity and resolve disputes?
- 57. If the Engineer had access to and used independent legal advice, would your organisation have more confidence in their decisions?

#### 4.1.2 Dispute avoidance

- 58. What dispute resolution methods does your organisation use to provide greater certainty of outcome in disputes (i.e., negotiations by senior representatives, mediation, adjudication under the CCA, arbitration, court). What method do you find most effective?
- 59. Are there other dispute avoidance mechanisms (i.e., a dispute resolution board) that your organisation has used and could be used to provide greater certainty of outcome in disputes?