

ISSUE	NZS 391X:2013 CLAUSE & SUMMARY	COMMENTS	The engineer
Notification	5.21: Notification of material delay or change in the contract price.	Notice should be given as soon as a party becomes aware of a matter likely to result in that delay or alteration of contract price.	<p>The NZS suite does not prescribe an express regime to deal with multiple overlapping claims and rights, as may be the case with COVID-19 and its impacts.</p> <p>In the first instance it falls to the engineer to decide upon nature of relief for the contractor in a fair and impartial way (see: clause 6.2).</p> <p>ACENZ has published guidance to those administering contracts as engineer to the contract under NZS 3910:2013.</p>
	9.2.2: The contractor must notify the engineer if it believes an instruction received involves a variation.	This must be within 1 month or as soon as practicable of receiving the instruction.	
	10.3.2(b): The contractor must notify the engineer of circumstances relied on to claim an extension of time.	This must be within 20 working days of those circumstances arising.	
Potential variations: Things outside the control of contractor	2.7.7: Late issue of instructions, documents or drawings.	Late issue by principal or engineer of instructions, document or drawings that causes delay or incurs additional cost to the contractor will be treated as a variation, where that delay or additional Cost could not reasonably have been foreseen by the contractor when tendering.	<p><u>Note on variation claims</u></p> <p>Where a contractor is entitled to a variation under the Contract, this may also trigger an extension of time entitlement under clause 10.3.1(a), as well as entitlement to time-related costs under clause 10.3.7.</p> <p>We anticipate that if entitlement to time-related costs is triggered, principals and engineers will look to interrogate any nominated Working Day Rate or percentage to ensure that amounts recovered are fair based on the contractor's actual costs as a result of COVID-19 (and that amounts claimed elsewhere in the variation claim do not overlap).</p> <p>An engineer may look to rely on clause 9.3.8-11 or 9.3.12 in doing so, and insist upon a reasonable percentage or rate, where it believes that the nominated percentage or rate is clearly inequitable.</p>
	4.2.6: Nominated subcontractors.	Where a nominated subcontractor (by the principal or the engineer) fails to enter into a subcontract within 10 working days of a request to do so, or repudiates its subcontract or makes default such that the contractor is entitled to treat the subcontract as at an end, and the contractor suffers delay or incurs additional cost, this shall be treated as a variation.	
	5.11.10: Contractors may be entitled to a variation where there is an increase or decrease in costs due to a change in law.	<p>The Government recently extended guidance to public sector agencies on the "change of law" clause in NZS 3910, setting out the Government's view that the COVID-19 regulations satisfy the "change of law" clause triggering a variation. However, this decision is not necessarily definitive or binding on non-Government principals. It is clear that the Government was looking for a way to support the industry and pay contractors for additional costs during the shutdown. The Government was no doubt also keen not to be seen as relying on its own actions to put anyone unfairly out of pocket.</p> <p>That said, engineers and contractors are likely to find the Government's position persuasive and it allows the engineer to avoid a decision on whether suspension is "necessary" (whilst giving contractors a variation). It also increases the risk that a decision maker (adjudicator etc.) would side with the Government's interpretation.</p>	
	5.16: Contractors may be entitled to a variation for any delay or cost incurred where materials, services, or work provided by the principal are delayed.	Impacts on the principal and its own deliverables should be considered.	
	6.2.4: Contractors may be entitled to a variation for any delay or costs where the engineer is unable to carry out its duties.	Some of the engineer's functions may be able to be performed remotely, but some (such as inspections will not be able to continue e.g. for Practical Completion under clause 10.4.3).	
Potential variations: Suspension	6.7.1: If suspension becomes 'necessary', the engineer shall suspend the contract works and the contractor will be entitled to a variation (and any associated extension of time).	<p>Contractors will likely argue that a suspension has become necessary as a result of Alert Level 4.</p> <p>An engineer may suspend 'part' of the contract works (e.g. just on-site work). Essential site work, and work that may be undertaken from home (e.g. design and programming) can continue under Government directives.</p> <p>It is open to a contractor at any time to argue that a suspension of the contract works is 'necessary'. Unless due to the fault of the contractor, a contractor will be deemed to be entitled to a variation under clause 6.7.3 if a suspension occurs.</p> <p>If a suspension continues for longer than 3 initial months plus 1 further month, it could result in termination or a negative variation.</p>	
	10.3.1(f): The engineer must grant an extension of time where the contractor is fairly entitled to an extension by reason of "any circumstances not reasonably foreseeable by an experienced contractor at the time of tendering and not due to the fault of the contractor".	<p>Key points relevant to a potential claim include:</p> <ul style="list-style-type: none"> Foreseeability: Was COVID-19 and the Alert Level 4 foreseeable by an 'experienced contractor' at the time of tendering? Probably not if entered prior to January 2020 (the WHO declared a Pandemic on 11 March 2020, although its existence and impacts were being felt in NZ before then). Fault: Did the contractor do anything to cause or exacerbate delays? Fairly entitled: Is the critical path impacted and has the contractor taken reasonable steps to mitigate delays? 	
Extension of Time	10.3.7: A contractor will only be entitled to compensation for time-related costs under clause 10.3.1(a), or due to default by the principal (clause 10.3.1(g)).		
Acceleration	10.3.6: Where the engineer determines that the contractor is entitled to an extension of time, the engineer may approve the taking by the contractor of steps to accelerate the work.	<p>The shutdown may provide an opportunity for the contractor to consider resequencing of the remaining contract works to accelerate the remainder of the project. Discussions with the principal and the engineer should also consider appropriate compensation for this.</p> <p>The engineer may approve acceleration work, but only in agreement with the principal and contractor – there is no obligation on the contractor to take such steps. However, the contractor does have a general duty at common law to mitigate its losses.</p> <p>The contractor shall be entitled to be paid an agreed or reasonable sum as compensation for the acceleration, including an allowance for profit.</p>	

ACENZ Conditions of contract for Consultancy Services (CCCS) Fourth edition 2017

ISSUE	ACENZ CLAUSE & SUMMARY	COMMENTS
Variations	<p>2.13: The consultant may notify the client if it believes it is entitled to a variation. It must then provide details of the impact within 15 working days.</p> <p>7.1: The client must respond to this within 15 working days.</p>	<p>If the client agrees to a variation, it will be valued under clause 7.2, along with the impact on the programme – this is where the consultant may be entitled to extra time to complete the services.</p>
Suspension	<p>12.5: If an event occurs which is beyond the control of (and not directly or indirectly caused by) either party, and that event prevents the performance of the services then those services will be suspended until it is practicable to recommence the services.</p>	<p>Where the consultant cannot progress portions of work because it is prevented by unavailability of its subcontractors, it may still be able to continue 'essential' site work, and any work that can be progressed from home. In this case, it is only those services which are unable to be performed which the consultant is entitled to have suspended.</p> <p>Note that this does not include ill-health, or lack of funding or resources. However, it is likely that a Government mandate will trigger this clause. In this circumstance, the consultant is allowed reasonable extra time to complete the services.</p>
Change of law	<p>12.4: Any extra costs incurred due to a change or addition to any statute, regulation, or by-law, or requirements of any authority that has jurisdiction over any part of the works or services, will be treated as a variation.</p>	<p>The requirements of Alert Level 4 likely fall within the ambit of the phrase "requirements of any authority".</p>
Extension of time	<p>10.3: Extension of time provisions.</p>	<p>Entitlement to an extension of the completion date is only available under the variation provision in clause 7.2, or under the circumstances in clause 12.5.</p>
Other observations about form of contract	<p>11.1: It is worth noting that the client may terminate the agreement <i>at any time</i> by written notice, under clause 11.1. The consultant may only terminate the agreement under clause 11.1 if the client has materially breached the terms of the agreement.</p> <p>2.12: Where any delay occurs due to matters within the control of the consultant, the consultant must notify the client, and must take all practicable steps within its control to remedy such delay.</p>	<p>If the consultant fails to notify the client under clause 2.13 but those circumstances lead to a variation entitlement, the variation will be treated as if notification had been given, and that notification might reasonably have resulted in the impact of the matter being avoided or reduced.</p>

Master Builder Subcontract Agreement (MBSA) 2017

ISSUE	CLAUSE	COMMENTS
Pass through	Clause 2.1: Head contract 'pass through'.	The terms of the head contract are passed through to the Subcontract, except where specifically varied by the Subcontract. All powers and obligations of the principal and engineer under the head contract must be exercised by the contractor under the Subcontract Therefore if the head contract is suspended, or if the contractor is issued a variation, the Subcontract responds in the same way. See our table on NZS 391X:2013 for possible variation entitlements.
Advance notification	Clause 5.18.1: Advance notification.	Notice should be given if there is likely to be a material delay in the Subcontract works or change in the Subcontract Sum.
	Clause 10.2.2: Notification.	Subcontractor is not entitled to extension of time unless the subcontractor has given notice within 5 working days of the circumstances which resulted in grounds for the suspension.
Potential variations: things outside the control of the contractor	Clause 9.1.3: The subcontractor may notify the contractor if it believes a variation to the works has occurred. If required the contractor must get the principal's approval.	There is no specific provision in the MBSA which provides the grounds for variations (although see the pass through provision above).
Extension of time	Clause 10.2.1: The subcontractor may be entitled to an extension of time if a delay arises from any of the grounds which would entitle an extension of time under the head Agreement.	Whether the subcontractor is entitled to an extension of time will depend on the contract agreement between the contractor and principal. Subcontractors will need to engage with contractors to establish their rights.
Other observations about form of contract	Pass through It is important to consider that the rights and obligations within the head contract are incorporated into the Subcontract. Unless the Subcontract says otherwise, the contractor will have an obligation to pay out to the subcontractor where it receives a variation under the head contract. If the head contract is from the NZS 391X suite, we have identified the provisions in the table above.	