

SCCP Guidance Note – Navigating Fuel and Freight Disruption

Purpose and Context

Recent geopolitical developments involving Iran, Israel, and the United States are contributing to volatility in global energy markets and disruption to international shipping networks. For New Zealand’s construction sector which is highly reliant on imported fuel, materials, and equipment; these events are expected to have material impacts on project cost, programme, and risk allocation.

This guidance note provides members with practical considerations for contract administration under the NZS 39xx suite of contracts. It is intended to support Principals, Contractors, and Contract Administration practitioners in navigating the emerging issues. It is expected that guidance will continue to be updated and developed as the global situation and its impacts evolves.

This guidance note invites members to approach this situation in the following sequence:

1. Review the contract baseline: including the contract schedules, order of precedence, and any Special Conditions that amend standard risk allocation (including fluctuation settings, nominated suppliers, Principal-supplied items, and bespoke clauses).
2. Consider the impact being experienced: clarify whether the current issue is primarily cost escalation, delay/non-availability, productivity disruption, or a combination.
3. Check cost recovery options: confirm whether the contract includes fluctuations, and other pricing mechanisms that may apply (e.g., variation pathways or change-in-law) could be relevant to the specific facts.
4. Check time recovery options: assess whether an extension of time mechanism may apply (including notice requirements, critical path impacts, and mitigation expectations).
5. Communicate and maintain records early: ensure notices, supplier correspondence, fuel/freight data, and programme logic are captured contemporaneously so any assessment (or claim) is easier to evaluate.
6. Commercial agreements: If the standard position creates pressure or is commercially difficult for either party, consider whether a mutually agreed approach is appropriate, and document any agreement clearly.

Characteristics of the Current Situation

While the current impacts being experienced are market-driven rather than regulatory driven there are some similarities emerging that relate to our experiences with the COVID-19 event, and some of the approaches and learnings from that event are likely to underpin the contract administration response to this event in some respects.

The most immediate impacts can be characterised by:

- Rising fuel and energy prices
- Increased freight and logistics costs
- Increased materials costs for products that are derived from crude oil e.g. bitumen, plastics etc
- Delays and potential non-availability associated with the delivery of imported products

When faced with these impacts, contract participants should assess how your contract allocate the resulting time and cost risks between the parties and what contractual mechanisms may apply.

Many contracts will not have anticipated these specific shocks to the global supply chain, and so it is important to review the contract terms to understand how risks are allocated and to assess whether any special conditions or amendments will apply.

Contractual features for your consideration

NB – clauses quoted are the NZS3910:2023 clause, and while NZS3910:2013 may be a different clause reference, the contractual features referenced here is the same.

Consider the full Contract document set

Any assessment should be based on the complete Contract document set and its order of precedence (Contract Agreement). This includes Special Conditions, the Schedule of Prices, any agreed post-tender documents listed as Contract documents, and any Instructions that are confirmed/treated as Variations.

Under NZS 3910, the Contractor is generally responsible for providing the inputs needed to deliver the Contract Works, including labour, Materials, Plant, transport, and other resources (5.1.1 and 5.12.1). In practical terms, that means day-to-day procurement and supply chain disruption risk will often sit with the Contractor, unless the Contract documents clearly reallocate it (i.e. Principal supplied items).

General position

Delays or cost increases caused solely by supplier non-performance, shipping congestion, freight constraints, or market shortages will not automatically be grounds for a Variation or Extension of Time. Any departure from the default position will be found in the Contract documents specific to a project (e.g., Special Conditions, tender clarifications that are expressly included in the Contract, Principal-supplied items, or an Instruction that is confirmed to be a Variation under section 9).

Early Warning (6.10) & Notice (9.2.3)

- The Principal, Contract Administrator and the Contractor have an obligation to notify each other with a copy to the Independent Certifier as soon as they become aware of any matter which is likely to materially alter the contract price or materially delay the completion of the works or results in a breach of a statutory duty in connection with the Contract Works
- There is the ability for the Principal, Contract Administrator, Contractor or the Independent Certifier to require a meeting to discuss proposals for availing, reducing or mitigating the matter.
- If the Contractor does not notify then this may affect how the matter is valued under 9.3.
- **Notice of Variation 9.2.3:** This clause requires the Contractor to give notice where the Contractor considers that a matter (other than matters Instructed by the Contract Administrator under 9.1) should be treated as a Variation. The notice should identify the matter and the Contract basis on which the Contractor considers it a Variation eligible for cost or time relief. The later valuing of any such claim is a separate matter governed by 9.3.

Cost relief pathways

- **Cost fluctuations (9.6 & Appendix A):** Check whether cost fluctuation adjustments apply under **9.6.1** (as selected in the Specific Conditions Schedule A clause 9.6.1) in your contract. If Appendix A applies, eligible cost fluctuation adjustment is dealt with through that indexation method. If cost fluctuations are excluded, ordinary price escalation is less likely to be recoverable unless another Contract mechanism applies.
- **Any Other Matter 9.2.3:** This clause provides the ability for a Contractor to give notice of a claim for cost relief due to matters that are not the result of a Contract Administrators Instruction under 9.1. In the event that the cost fluctuations mechanism does apply under 9.6, this 9.2.3 notice would be left for matters other than material input costs. Note that this clause 9.2.3 is about serving of notice only, and it would need to include reference to the Contract basis that creates the entitlement to claim.
- **Change in law / government imposed charges (5.14.9):** If, after tender closing, the Contractor's cost increases (or decreases) due to a change in legislation or the imposition/amendment of a royalty, fee, levy, or toll, and the Contract does not otherwise address the effect, then the impact is treated as a Variation (5.14.9). This may be relevant where government action directly drives cost impacts. That is not the case at the date of this guidance note.
- **Supply by Principal (5.19):** if the Principal is required to supply Materials or other things for the completion of the works. The late supply of such Materials, services or work shall be treated as a Variation.
- **Separate Contractors (5.6):** Where provided under the Contract, the Principal may arrange for work on the site to be carried out by Persons other than the Contractor. If the Contractor suffers delay or incurs additional costs arising from these Persons than this shall be treated as a Variation.

Time relief pathways

The current situation is an external event that may be outside either party's control or something neither party could reasonably have been expected to have made provision for. Some contracts address that type of exceptional external disruption through an express "force majeure" clause (sometimes defining war as a force majeure event). NZS 3910:2023 does not use that label or approach. Instead, it addresses such circumstances through its extension of time provisions. In particular, Clause 10.3.1(f) is not framed as a right to claim simply because "war" (or a pandemic) has occurred; it focuses on the *consequences* of such external events.

- **Unforeseeable circumstances:** Clause **10.3.1(f)** is the key time-relief clause for external disruption (including consequences of war or pandemic) that an experienced contractor could not reasonably foresee at tender and that is not due to the Contractor's fault. This is subject to notice (10.3.2) and continued updates (10.3.3); an ability for the Contractor and the Contract Administrator to agree (10.3.4), if no agreement is reached for the Independent Certifier to decide (10.3.5); criteria for the Independent Certifier to consider (10.3.6) and for the Decision to be challenged (6.4 and 13)
- **Variations (including a 5.14.9 change in law treated as a Variation):** If a Government imposed change is treated as a Variation under 5.14.9, any resulting delay may also support an extension of time under 10.3.1(a) (net effect of a Variation), also being subject to notice and critical path provisions.
- **No time-related cost for 10.3.1(f) events:** Where an extension is granted on grounds other than Variations (10.3.1(a)) or Principal default (10.3.1(g)), the Contractor is not entitled to time-related costs (10.3.8).

Fairness in the context of the Contract

The current global situation may cause the risks allocated under the Contract to fall on one party in a materially significant way - for example where cost fluctuations are not permitted (making them a Contractor risk), or perhaps where Appendix A does apply but the indexation method doesn't provide adequate compensation. Most standard construction contract insurance policies exclude price shocks, inflation and supply chain disruption costs caused by war, exacerbating the uncertainty for construction contracts.

This may prompt discussions about what is “fair” in the circumstances. It is therefore important to distinguish between (a) the requirement of the decision-maker to *act fairly* and (b) a broader notion of achieving an overall “fair” outcome. Under NZS 3910, the person appointed to make Decisions (the Independent Certifier under NZS 3910:2023, or the Engineer under NZS 3910:2013) **must act fairly, independently, and impartially** (clause 6.2.2 in 2023; clause 6.2.1(b) in 2013). However, when making a Decision, the IC (or the Engineer) **must apply the Contract terms as agreed**, rather than re-allocate risk based on fairness considerations.

That said, they can use their experience to help the parties explore options and, if the parties reach a mutually acceptable commercial agreement, the CA (or Engineer) can record that agreement and administer the Contract on that basis. Experience from the COVID-19 market disruptions suggests this was a common (though not universal) approach.

Claim Submission Principles

Given the uniqueness of this situation, it is recommended that parties communicate openly about the impacts they are facing and share perspectives in search of alignment on how the Contract addresses the matter. Early discussion, including transparency about the true commercial impacts that this situation places on the parties, is an important first step toward commercial alignment.

In the event that the parties elect to use the claim process, then the usual approach and expectations will apply, such as:

- If entitlement to a variation and/or Extension of Time exists under the contract, then effective presentation of the claim is important to enable timely analysis and confirmation of any approvals.
- Claims must be evidence based and clearly demonstrate cause and effect, be supported by verifiable cost data, be supported by detailed/contemporaneous records e.g., fuel usage, freight delay notifications, supplier price adjustment letters etc.
- Care is required to ensure overheads are not recovered multiple times, and time related costs are not duplicated within percentage mark-ups.
- It is inherent on the Contractor to actively mitigate cost and delay impacts where possible, consider alternative suppliers/methodologies/sequencing, and demonstrate mitigation efforts as part of any claim.
- When adjusting and submitting programmes alongside claims be aware that increased scrutiny of float ownership and critical path logic is likely to occur. Attempt to address these items proactively in the claim and provide explanation of why the adjustments are reasonable and justifiable and not purely risk driven.

Mitigation Measures

Circumstances will differ across individual contracts, and there may be opportunity to modify or negotiate depending on what phase contracts are at in the procurement phase. Below are some items parties may consider to mitigate or reduce the various impacts due to this event:

- Early procurement of critical materials and equipment
- Temporary relief on ‘advances for materials’ payment terms
- Documented requirement for cost transparency by the Contractor
- Agreement on baseline prices or indices to be used for analysis e.g., the price of diesel (\$/litre), shipping rates (\$/TEU) for 20-foot shipping containers, NZTA Bitumen Cost Adjustment Series
- Agree trigger mechanisms for fluctuation beyond baseline
- Works acceleration as a strategic tool
- Air freight as an alternative
- Proactive review and adjustment of Schedule of Prices (SoP) rates
- Increased supply chain collaboration
- Inclusion of special condition clauses into new contracts regarding how the event will be treated

Proactive Approach

Parties should avoid reactive decision making driven by potentially short-term volatility. Overreliance on lagging indices, informal or undocumented arrangements, and claims that lack proper substantiation can undermine sound contract administration and increase the potential for dispute.

A proactive approach across all parties is critical to achieving effective outcomes during periods of uncertainty. Early, open, and ongoing communication between the Principal, Contractor, and contract practitioners is paramount. This should be openly discussed to assess the current mechanisms available within each individual contract to cover the potential impacts and the formal raising and update of early warning notifications. Risks should be identified and communicated as soon as practicable, supported by clear, contemporaneous records and a structured, evidence-based assessment of impacts.

Disclaimer: This guidance note is provided for SCCP Members as general industry guidance only. It does not constitute legal, contractual, or professional advice. Parties should seek project-specific advice where required. This guidance reflects information available at the time of publication and may change as the situation evolves. [Publication Date: 25 March 2026]