



Guidance Note

Major Works Contract

This Major Works Contract (**Contract**) has been developed by the Ministry of Education (**Ministry**) for the engagement of Contractors for high value property construction projects. It is suitable for use in both Ministry and Board of Trustees (**Board**) engaged projects. These guidance notes are intended to provide guidance to the Ministry and Boards and to those managing projects on their behalf.

These guidance notes, as well as those guidance notes included within the Contract, will help the Ministry and Boards choose an appropriate contract with the right terms and conditions for each engagement, and give certainty to Contractors providing construction services to the Ministry and Boards.

The Ministry's construction contract templates should be used instead of the Government Model Contracts, which are not designed to be used for construction projects.

This Major Works Contract is designed so that the main body contains the standard terms and conditions of contract, with all the specific project details contained in the schedules. You should not change the standard terms and conditions of contract as they have been tailored specifically to Ministry requirements.

When to use the Major Works Contract	
The following are guidelines for when you should use the Major Works Contract	
Type of work:	Major construction or building works.
Value:	Over \$500,000 excluding GST and disbursements.
Suitable for:	Demolition and general construction, refurbishment or remediation of buildings or infrastructure or internal fit out work above \$500,000 in value.
Further information:	Weathertightness Requirements: http://www.education.govt.nz/school/property/state-schools/design-standards/weather-tightness-and-durability-design/ . Health and Safety Management: Requirements: www.education.govt.nz/school/property/health-and-safety-management/ . Asbestos Handling Requirements: www.education.govt.nz/school/property/state-schools/fixing-issues/asbestos .
Questions?	
For Ministry led projects:	Should you have a question regarding the terms and conditions of this Major Works Contract or its use, please contact EIS Legal.

	<p>Amendment of the Ministry’s standard terms and conditions should not be made without EIS Legal’s prior approval.</p> <p>EIS Legal can be contacted at eis.legal@education.govt.nz.</p>
For Board led projects:	<p>Any queries raised by the Board in relation to the terms and conditions of this Major Works Contract and its use should be directed in the first instance to the School Property Advisor. If legal assistance is required, the School Property Advisor will provide guidance on obtaining legal advice through the New Zealand School Trustees Association.</p>

Getting started

Because you are acting on behalf of the community and using public money, you need to use processes that ensure responsible use of funds. Even when you know and trust the person or company doing the works, there are certain basics that you need to cover when setting up a building contract for your school.

Who are the Parties?

Principal to the Contract:	<p>The Contract uses the word “Principal” to refer to the entity engaging the Contractor to carry out the works. Either the Ministry or the Board (as appropriate) is the legal body that has the authority to enter into the Contract on behalf of the school and can be the “Principal” under the Contract.</p>
Contractor:	<p>It is important to use the full legal name of the Contractor. Is it a company, individual, or a company trading under a different name?</p> <p>If the Contractor is a company (or some other legal entity such as a registered Limited Partnership) then check the New Zealand Companies Office to ensure that the Contractor entity actually exists. Entities can be searched at https://www.business.govt.nz/companies.</p>

Managing the Contract

The Project Manager	<p>The Project Manager manages the design, procurement and construction phases of a project on behalf of the Principal. This may include overseeing the preparatory work on a project before the Engineer to the Contract is appointed, and managing the process of setting up and finalising the construction Contract with the Contractor.</p>
The “Engineer” to the Contract	<p>The Major Works Contract requires a high degree of contract administration and requires the Principal to appoint an “Engineer” to the Contract to administer the day to day running of the Contract on its behalf. The Engineer acts as agent to the Principal and provides directions to the Contractor on behalf of the Principal and certifies money due to the Contractor.</p> <p>The Engineer has a duty to act independently of the Principal and Contractor in being fair and impartial in making decisions and issuing certificates. The Engineer can be a professional engineer, architect, surveyor or project manager.</p>
Consultants	<p>Consultants such as Architects, Quantity Surveyors, Project Managers,</p>

Engineers to Contract and others are engaged to provide advice to the Principal to help the Principal prepare the Contract and make decisions in relation to the Contract. As set out above, the Engineer to the Contract has a dual role, as they both advise the Principal and perform certain specific roles under the Contract independently of either the Principal or the Contractor.

Consultants should be engaged using the Ministry of Education's template contracts for consultancy services. The Ministry also has a specific template contract designed to engage Project Managers. These templates are available on the Ministry's website: <http://www.education.govt.nz/school/property/state-schools/project-management/procurement/contracts/>

Legal Authority – Board of Trustees

The only "person" with the legal authority to enter into a contract on behalf of the school is the Board, or someone the Board has formally appointed at a Board meeting to act on behalf of the Board.

The person or people authorised to deal with the building project by the Board should be recorded in the Board minutes for the meeting at which the Board made the decision to appoint the authorised person or people.

Legal Authority - Ministry

Persons with legal authority to enter into contracts on behalf of the Ministry are the persons holding the relevant Delegated Financial Authority (DFA) for the value of each contract. Please contact your team leader at the Ministry to identify the relevant DFA for your Contract.

When should the Contract be prepared?

Check that you have the most up to date version of the Major Works Contract available from: <http://www.education.govt.nz/school/property/state-schools/project-management/procurement/contracts/>

The Contract should be prepared and issued as part of the tender documents. The Contract includes important information that will be required by the Contractor in preparing its quote (e.g. price and programme) for the project. It is also important that the Contractors have this information up front to ensure they understand the terms and conditions upon which they will be appointed. Providing this information at tender stage will avoid any potential surprises further down the line.

It is important to have details of the construction work agreed and the Contract signed, before the Contractor starts any work on the project.

Subcontractors

Generally, the Contractor is allowed to subcontract parts of the work to subcontractors listed in their tender. You should review the subcontractors listed in the Contractor's tender to ensure you are happy with their proposed subcontractors. The Contractor is not allowed to subcontract the whole or substantially the whole of the contract works without consent from the Principal. Contractors are responsible for the work carried out by their subcontractors, and can be required to fix any defective works. Contractors are also responsible to replace Subcontractors if they fall over.

There are also some specific types of subcontractors:

Nominated Subcontractors: Nominated Subcontractors are subcontractors selected by the Principal who the Contractor is required to use for specific parts of the works. However, the Principal will be liable for the cost of any delay or other loss caused by a Nominated Subcontractor. You should only use a Nominated Subcontractor if it is *essential* for that particular subcontractor to carry out part of the works.

Key Subcontractors: Key Subcontractors are subcontractors who the Contractor needs the Principal's consent to replace. The Principal can also require Key Subcontractors to enter into Subcontractor Continuity Guarantees, requiring the Key Subcontractor to continue working on the project if the contract between the Principal and Contractor comes to an end.

Contract Works Insurance

The Ministry provides contract works insurance at a minimal cost to the construction project at state schools. The contract works insurance covers accidental loss and damage to the works being undertaken (including temporary works) under the Contract including off-site materials, subject to certain limits specified by the policy. It does not cover damage to existing property or contents. If the project involves a building or other asset that is, or will be, owned or partly owned by the Ministry, then you must use the Ministry's contract works insurance. If the project is wholly funded by the Board on a school site, you can choose to use the Ministry's contract works insurance at no cost to the Board.

To obtain contract works insurance for your project, the Ministry requires that the details of the Contract are entered into the Ministry's insurance broker's website. The Ministry's insurance broker's website can be accessed via: <http://www.education.govt.nz/school/property/state-schools/project-management/procurement/insurance/#contract-works-insurance>

The insurance is effected jointly in the names of the Principal, the Contractor and its Subcontractors. Damage to the contract works caused by the Contractor will be subject to "nominal deductibles". Nominal deductibles are specified amounts equal to, or less than, the sum of any excess required to be applied under the policy (Nominal Deductibles).

Professional Indemnity Insurance

If the Contractor is responsible for any element of design of the contract works (e.g. design of foundations, design of fire systems or design of temporary works), the Contractor is required to hold Professional Indemnity Insurance as set out in the Contract.

Existing Structures Insurance

The Contract requires that any Principal owned property is insured by the Principal. This is because the Principal will have existing insurance policies and will be better placed to assess the level of cover required to protect existing structures. It also avoids duplicating insurances which can increase the costs of a project. These structures needs to be listed in the Contract, and where Board owned structures are involved you should ensure that your insurance provider is made aware of the construction work to ensure that the policy is extended to cover damage arising from construction activity. Damage to Principal owned property caused by the Contractor will result in the Contractor being liable for payment to the Principal of Nominal Deductibles.

Contents Insurance

This will typically apply to Board led projects. The Contract requires that any Principal owned contents are insured by the Principal following the same principles as those outlined above for existing structures. Any damage to contents caused by the Contractor will result in the Contractor being liable for payment to the Principal for any specified Nominal Deductibles.

The insurance provider must be notified of the construction work taking place to ensure that the policy is extended to cover damage arising from construction activity.

Weathertightness Warranty

A Weathertightness Warranty will be required if the works impact the building envelope and therefore may present weathertightness issues. It is not required for works that are entirely within the envelope of the building, or for emergency “patch repairs” to the envelope.

If you feel that the works may pose a weathertightness risk then you must make it a requirement in the Contract that the Contractor provides a weathertightness warranty.

Subcontractor warranties

The Contractor is required to obtain materials and workmanship warranties from their Subcontractors, for the work packages and time periods set out in Appendix C. The form of the warranty is set out in Schedule 13 to the Contract. If the Contractor or Subcontractors consider that the warranty periods specified in Appendix C are not readily available in the market, they need to raise this in their tender.

When are the Works completed?

There are two stages of “completion” under the Major Works Contract: “Practical Completion” and “Final Completion” as follows:

<p>Practical Completion</p>	<p>Practical Completion occurs when all works have been substantially completed to the satisfaction of the Principal, except for minor omissions and minor defects.</p> <p>The works must achieve Practical Completion by the Due Date for Completion set out in the Contract. Delay to achieving Practical Completion by the Due Date for Completion may give the Principal the right to levy liquidated damages against the Contractor. Liquidated damages are a pre-determined sum, usually a daily rate, which must be paid by the Contractor for each day of delay it is responsible for. Liquidated damages must be a genuine pre-estimate of the financial loss that the Principal might suffer as a result of delay. The Principal will need to specify a rate in the Contract based on its own assessment of potential loss.</p> <p>Before issuing a Practical Completion Certificate the Contractor must provide the Principal with notice that it has completed the Contract works and there are a number of requirements that the Contractor needs to satisfy in terms of specific documentation (e.g., producer statements, Code Compliance Certificate (CCC) or Certificate of Public Use (CPU) under the Building Act, Weathertightness Warranty, etc). The list of documents required can be added to or varied in the Special Conditions of the Contract.</p> <p>Certification of Practical Completion triggers release of the Contractor’s bond (if a bond is required for the Contract – see below) and half the retentions, and therefore it is important that Practical Completion is not certified until all the requirements of Practical Completion are met.</p>
<p>Defects Notification Period and Final Completion</p>	<p>The Defects Notification Period (DNP) is the period after Practical Completion has been certified, where the Contractor is required to complete any minor outstanding works, and can also be required to come back to the site to</p>

remedy any defects in the works that come to light during this time.

The standard DNP is 12 months and commences upon issue of the Practical Completion.

Final Completion occurs upon the expiry of the DNP or once the Contractor has remedied all defects in the works (whichever occurs later), at which point the Contractor must issue a Final Completion Certificate.

The Final Completion Certificate triggers the obligation to pay the Contractor the balance of retention monies (see below).

Retentions

Retentions are set at 10% of each progress payment with a total retention of:

- 10% on the first \$200,000, and
- 5% on the next \$800,000, and
- 1.75% on amounts in excess of \$1,000,000 and
- With a maximum total retention when aggregated of \$500,000, and
- With a defects liability retention which is half the total retention.

Upon Practical Completion half of the defects liability retention will be released with the remaining retention (the “defects liability retention” referred to above) released upon issue of the Final Completion Certificate.

Requirements for Contractor’s Performance Bond

A Contractor's bond is required if:

- the project value is in excess of \$1 million; or
- if the project is considered high risk.

The bond provided must be for an amount equal to 5% of the Contract Price. The surety must be a bank registered in New Zealand or surety that has a minimum Standard & Poor's (or such other credit rating agency approved by the Principal) financial strength rating of at least 'A'. The bond is an “on demand” bond and must be in the form attached as Schedule 3 to the Contract. No amendments to the form of bond in Schedule 3 should be accepted without EIS Legal approval.

Substituted Materials

The Contractor may recommend that a product or material that your design consultant has specified could be substituted with an alternative product or material. You must consult your design consultant to establish whether any substitution of products or materials would result in a deficiency in the design – as they are responsible for the design, they will need to sign off that any alternative product or material will not compromise the design.

You may need to consider any potential design variation costs resulting from your consultant having to spend additional time and effort in validating alternative products or materials. The Contract includes a clause that sets out the process that should be followed in the event that the Contractor recommends an alternative product or material.

Salvaged Materials

If the project includes demolition of existing buildings or removal of existing features of the site it is important that you and your consultant team consider at an early stage whether there are any specific items considered to be of significant value that you would like to keep (e.g. particularly significant items of furniture, artwork etc).

Items can be of significant value in terms of their cultural or heritage significance to the school or to the local community, or they could have a high monetary value or could be re-used on future school projects.

If there are any such features or materials, these should be listed as “salvaged materials” in the relevant clause of the Contract as part of the tender documents, Any features or materials found during construction that are not clearly identified in the Contract are considered to be the property of the Contractor i.e. to be disposed of off-site. Should the Principal decide that it wishes to keep any features or materials not identified in the Contract, the Contractor will be entitled to a variation under the Contract and this may result in additional cost to the Principal as a result of the Contractor having to change its planned method of work.

Conflicts of Interest

The Contractor and all members of the Board are required to disclose any actual or likely conflicts of interest in writing to the Principal before signing the Contract.

A conflict of interest includes any family or business relationship between the Contractor (including the Contractor’s directors and senior managers) and any member of the Principal’s organisation, or any staff at the school.

In the Contract itself, the Contractor is also required to declare:

- that they are not aware of any further conflict of interest that has not already been disclosed in writing to the Principal.
- any conflict of interest that arises after signing the Contract; and
- any claims by the Principal against the Contractor (including any claims against a majority shareholder or director of the Contractor) in relation to construction work or work of a similar nature.

Completing the Major Works Contract details

Overview of structure of Major Works Contract

The Major Works Contract incorporates the terms of NZS 3910:2013 Conditions of Contract for Building and Civil Engineering Construction by reference. NZS 3910:2013 is a standard form of general conditions of contract that is commonly used in the industry. It enables Principals, Engineers, and Contractors to quickly establish contractual arrangements. NZS 3910:2013 is available at the NZ Standards website.

It is important that you read over the whole Contract to ensure you understand what you are committing to, and what you are entitled to expect from your Contractor.

You should keep a copy of the properly signed Contract stored for reference during the time that the Contractor carries out the work. You should also safely store the original (or a copy of) the Contract for ten years, in case any defects in the work are discovered later. As there is a high probability that key people in the school and at the Ministry will change over that time, it is important to make sure that all property documentation is kept together, and that the Board and the school principal have clear records of where they are stored and how to access them. This should include any passwords or other security

measures.

The Major Works Contract is in three parts:

- Contract Agreement: this section confirms the documents that form part of the Contract and is signed by the Principal and Contractor to legally bind the parties to the Contract
- Schedule 1: Special Conditions of Contract; Specific Conditions of Contract - this section requires you to complete the specific details and Contract requirements for the project
- Schedule 2: Special Conditions of Contract; Other Conditions of Contract - this section provides details of the Ministry's amendments to the NZS 3910:2013 standard contract

Some of the key provisions of the Major Works Contract are listed in the table below for ease of reference. Schedule 1 of the Contract includes additional guidance notes around these key provisions as well as others. This guidance is provided in Schedule 1 as [blue text](#).

Subject matter		Clause number
Contractor's Bond		3.1, Schedule 3
Key Subcontractors (and Continuity Guarantees)		4.1.4 and 4.1.5
Nominated Subcontractors		4.2.1
Contractor Design Responsibility		5.1.3
Frequency of Health and Safety Reports		5.7.18
Insurance		Schedules 8 - 12
	Professional indemnity insurance (where Contractor has any design responsibility)	8.1 and 8.6.1
	Noting of interests on construction insurance policy	8.3.2 and 8.8
	Public liability insurance (including sub-limits)	8.5.1
	Motor vehicle third party liability insurance	8.5.2
	Principal arranged construction insurance	8.8
	Existing school structures and other nearby structures	8.8.2(a) and (b)
	Contents insurance	8.8.2(c)
Variations		
	For on-site overheads	9.3.9
	For off-site overheads and profit	9.3.10
	Working day rate for time related cost	9.3.11
Practical Completion Certificate		Schedule 15
	Contractor's notice requirements for Engineer and Principal	10.4.2,
	Additional requirements for issue of Practical Completion Certificate	10.4.5

Liquidated Damages		10.5.1
Defects Liability		
	Defects Notification Period	11.1
Final Completion Certificate		Schedule 16
	Requirements for issue of Final Completion Certificate	11.3.2,
Warranties		
	Warranties required from the Contractor	11.5, Appendix C, Schedule 13
Guarantees		
	Guarantees required from the Contractor	11.6
Retentions		
	Amounts to be retained from payments to Contractor	12.3.2