



Engineer to the Contract: Is there a better way?

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Infrastructure, and how much of it New Zealand needs, has been the subject of keen examination. It's uniformly acknowledged—by the players, by various stakeholders, by Treasury—that we need much more of it, and we need the proper capacity to build it.

What does *proper capacity* look like? Perhaps: a healthy construction sector; a pool of capable, solvent contractors who can competently deliver quality projects; strong, lasting relationships amongst that relatively small pool, from one project to the next.

Arguably we have a way to go yet.

The question of disputes and the way they are resolved, is significant here. The pool of players in the sector is not large. Parties to a dispute are very likely to find themselves around another table somewhere down the line. Ideally the various entities will remain willing and able to work together again. The effectiveness of dispute resolution can have a very large bearing on that. Do we have the best, most effective arrangement for resolving them?

Treasury's August 2019 report—An examination of issues associated with the use of NZS Conditions of

Contract suggested some reasons for concern. It identified a number of issues with the New Zealand Standard contract conditions for construction projects, as used on Government projects.

One of those was the role of the **Engineer to the Contract**. The Engineer is intended to be an independent party who brings a level of fairness and impartiality to the administration of the construction contract. In conception, it's a valuable role; in execution, it is potentially compromised to a substantial degree.

Under the NZS conditions of contract the Engineer finds they are required to wear two hats: one to act as the owner's representative and issue instructions to the contractor on its behalf, and another to independently and impartially make decisions under the contract, including ruling on issues in dispute.

This dual role creates an inherent tension, the Treasury report notes. **Can the Engineer be truly independent when they are exercising the decision-making part of their function? Is the role of the Engineer as currently outlined in NZS appropriately framed?**

The question has not yet been addressed in The Construction Sector Accord workstream. It's very desirable that it should be. There is room for improvement here. Doing so might help unlock disputes at the back end of the project.

On larger projects, the day-to-day role of the Engineer tends to be performed by an Engineer's Representative who is employed either by the Principal, or a project management company acting on the Principal's behalf.

It's inevitable that there will be a conflict between this role and that of a person independently and impartially making decisions about matters in dispute.

A better approach could be to separate the responsibilities. Rather than expecting an individual to uncomfortably wear two hats, the *owner's representative* part of the Engineer's role should be carried out by a different person.

That would leave the core independent function to be performed by an Engineer who is able to bring a level of distance and perspective to their decision-making, without any burden or distraction of day-to-day running of the project. That would still leave plenty for the Engineer to do—value the work (including Variations), award extensions of time, and review decisions and payment schedules issued by the Engineer's Representative.

The question then arises whether the Engineer would be the right person to be making rulings on disputes between the parties as issues escalate through the disputes process in the contract.

The dispute process set out in clause 13 of the NZS contracts rarely receives much attention at the project procurement stage. Parties are not at that time envisaging there will be any disputes. The NZS conditions have the Engineer sitting as the "gateway" to escalating the dispute to more formal dispute resolution processes, such as mediation and arbitration.

The present arrangement sees the Engineer asked to review and decide on the issue in dispute, which is very often already the subject of his or her own decision. The outcome in this scenario seems more or less inevitable. What is likely to be achieved by asking the Engineer to review his or her own decision? It will be rare for anyone in the Engineer's position to make a different decision on the same issue as their previous decision, unless there is some important new information that changes things.

An alternative option is to have an independent expert, appointed by the parties and paid for jointly by both parties to perform the role currently filled by the Engineer in clause 13.

The joint appointment of the expert is very important to the parties' willingness to accept the decisions of this person and critically, it will not be the same person who has made the decisions that have given rise to the dispute in the first place.

This approach would give real meaning to the Engineer's review process and prevent it from being a "going through the motions" exercise that delays the resolution of disputes and adds limited real value to either party.

This would also be more cost-effective than a dispute resolution board (or DRB) which often does not serve its intended purpose of preventing issues from developing into disputes as some DRBs are set up as quasi-judicial bodies and even have hearings before making rulings on issues, and is a less 'nuclear' option than the statutory adjudication process under the Construction Contracts Act.

A healthy construction sector is vital for the industry to survive the challenging economic conditions ahead. Owners (government and non-government) will need a pool of capable, solvent contractors who can competently deliver quality projects. The more effectively disputes are resolved, the better the prospect that both parties can and will be prepared to work together again.

If the industry is serious about learning from past problems, finding a better way to resolve disputes efficiently could be key to unlocking stronger, lasting relationships from one project to the next.

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