



NEC3 Engineering and Construction Contract (ECC)

Secondary Option Y clauses for New Zealand

to take into account

The Construction Contracts Act 2002

and

The Contracts (Privity) Act 1982

October 2011

INTRODUCTION

This document is written for users of NEC3 Contracts in New Zealand, addressing the legislative issues arising through a series of specific New Zealand clauses. This document comprises the following:

- 1) Additional contract clauses for using the NEC3 Engineering and Construction Contract (ECC) when the Construction Contracts Act (2002) applies. These are in the form of Y(NZ)1;
- 2) An optional additional contract clause in consideration of The Contracts (Privity) Act 1982. This is in the form of Y(NZ)2;
- 3) Guidance Notes, which follow the same format as other Guidance Notes for NEC3 Contracts;
- 4) Replacement ECC Contract Data part one, highlighting the specific entries that need to be made in the ECC Contract Data part one to bring these clauses into effect;
- 5) A diagram to illustrate the timeline for payment provisions under Y(NZ)1.

Generally, the NEC3 suite of contracts may be used in New Zealand without the need for significant amendment or additional clauses. The Construction Contracts Act (2002) (the 'Act') however, does introduce some specific requirements for contracts falling within its scope, which are not provided for in NEC3 Contracts. The main content of this document is therefore the Y(NZ)1 clauses, which bring the ECC into line with the payment terms and dispute resolution provisions of the Act.

OPTION Y

Option Y(NZ)1: The Construction Contracts Act 2002

	Y(NZ)1	
Definitions	Y(NZ)1.1	<p>(1) The Act is the Construction Contracts Act 2002.</p> <p>(2) A period of time stated in days in this Option Y(NZ)1 is a period calculated using working days in accordance with the Act.</p> <p>(3) The Due Date for Payment is seventeen days after the assessment date or a different period if stated in the Contract Data.</p> <p>(4) The Claimed Amount is the amount claimed in the Payment Claim.</p> <p>(5) A Payment Claim is a <i>Contractor's</i> application for payment which</p> <ul style="list-style-type: none"> • is in writing, • identifies the contract to which the progress payment relates, • identifies the work and period to which the progress payment relates, • indicates a Claimed Amount and the Due Date for Payment, • indicates details of how the <i>Contractor</i> calculated the Claimed Amount and • states that it is made under the Act. <p>(6) The Payment Schedule is a statement which</p> <ul style="list-style-type: none"> • is in writing, • identifies the Payment Claim to which it relates and • indicates a Scheduled Amount. <p>If the Scheduled Amount is less than the Claimed Amount, the Payment Schedule shows</p> <ul style="list-style-type: none"> • details of how the Scheduled Amount is calculated, • the reasons for the difference between the Scheduled Amount and the Claimed Amount and • in a case where the difference is because the <i>Employer</i> is withholding payment on any basis, the <i>Employer's</i> reasons for withholding payment. <p>(7) The Scheduled Amount is an amount of progress payment specified in a Payment Schedule that the <i>Employer</i> proposes to pay to the <i>Contractor</i> in response to a Payment Claim.</p>

Submitting Payment Claims	Y(NZ)1.2	The <i>Contractor</i> may submit a Payment Claim not more than three days before the assessment date. The <i>Contractor</i> submits the Payment Claim to the <i>Employer</i> and a copy to the <i>Project Manager</i> .
Assessing the amount due	Y(NZ)1.3	Delete sub clause 50.4 and replace with: In assessing the amount due, the <i>Project Manager</i> considers any Payment Claim the <i>Contractor</i> has submitted. If the <i>Project Manager's</i> assessment of the amount due differs from the <i>Contractor's</i> Payment Claim, the <i>Project Manager</i> provides to the <i>Contractor</i> with his certificate <ul style="list-style-type: none"> • details of how the amount due has been assessed and • the reason for the difference between the amount due and the Claimed Amount. The <i>Project Manager's</i> certificate is not a Payment Schedule.
Notice of Employer's intention to pay less	Y(NZ)1.4	If the <i>Employer</i> intends to pay less than the amount due certified by the <i>Project Manager</i> he notifies the <i>Contractor</i> and provides not later than seven days before the Due Date for Payment <ul style="list-style-type: none"> • details of how the deductions or amendments have been calculated and • reasons for the difference between the sum certified by the <i>Project Manager</i>. He provides a copy to the <i>Project Manager</i> .
	Y(NZ)1.5	If the <i>Employer</i> does not notify his intention to pay less than the amount due, it does not prevent the <i>Employer</i> notifying his intention to pay less in a later Payment Schedule.
Payment Schedule	Y(NZ)1.6	The <i>Project Manager</i> issues the Payment Schedule on behalf of the <i>Employer</i> , not later than five days before the Due Date for Payment.
	Y(NZ)1.7	If the <i>Project Manager</i> does not certify the amount due in accordance with this contract and the <i>Employer</i> intends to pay less than the amount claimed by the <i>Contractor</i> in a Payment Claim, the <i>Employer</i> issues the Payment Schedule to the <i>Contractor</i> not later than five days before the Due Date for Payment.
Payment	Y(NZ)1.8	Delete the first sentence of subclause 51.2 and replace with:

		Each Scheduled Amount is paid on or before the Due Date for Payment.
Suspension of performance	Y(NZ)1.9	If the <i>Contractor</i> exercises his right under the Act to suspend performance, it is a compensation event.

Adjudication	Y(NZ)1.10	A Party may refer a dispute arising under or in connection with this contract to adjudication under the Act.
Review by the tribunal	Y(NZ)1.11	<p>(1) If the dispute has been referred to adjudication under the Act, a Party does not refer the dispute to the <i>tribunal</i> unless it has first been determined by the adjudicator.</p> <p>(2) If, after the adjudicator's determination under the Act a Party is dissatisfied, that Party may notify the other Party of the matter he disputes and state that he intends to refer it to the <i>tribunal</i>. The dispute may not be referred to the <i>tribunal</i> unless this notification is given within four weeks of the adjudicator's determination under the Act.</p> <p>(3) If the dispute is not referred to the adjudicator then the dispute may be referred to the <i>tribunal</i> at any time.</p>
		(4) The <i>tribunal</i> settles the dispute referred to it. The <i>tribunal</i> has the powers to reconsider any decision of the adjudicator, and to review and revise any action or inaction of the <i>Project Manager</i> or the <i>Supervisor</i> related to the dispute. A Party is not limited in the <i>tribunal</i> proceedings to the information or evidence put to an adjudicator.
		<p>(5) If the <i>tribunal</i> is arbitration, the <i>arbitration procedure</i>, the place where the arbitration is to be held and the method of choosing the arbitrator are those stated in the Contract Data.</p> <p>(6) A party does not call the adjudicator as a witness in <i>tribunal</i> proceedings.</p>

Option Y(NZ)2: The Contracts (Privity) Act 1982

Third party rights	Y(NZ)2 Y(NZ)2.1	A person or organisation who is not one of the Parties may enforce a term of this contract under the Contracts (Privity) Act 1982 only if the term and the person or organisation are stated in the Contract Data.
---------------------------	--------------------	--

Guidance Notes

Y(NZ)1 Y(NZ)1 should only be used in New Zealand where the contract is a 'construction contract' within the definitions in Section 6 and in accordance with Section 9 to 11 of the Construction Contracts Act 2002 (the 'Act'). If the *Employer* is in any doubt as to whether or not their contract comes within those definitions he should take legal advice.

If the contract is subject to the Act, this Option is incorporated into the NEC3 Engineering and Construction Contract (ECC) by reference in the Contract Data part one. It is used to:

- i. Supplement the core clause payment provisions in order to ensure that they comply with the Act. The effect of incorporating this secondary Option is to make the payment process in line with the process under the Act
- ii. Align the contract with the dispute resolution provisions of the Act. In this Option reference is made to the Act, rather than attempt to duplicate the provisions of the Act.

Dispute resolution procedure W1 or W2 must not be included in the Contract Data part one when using Y(NZ)1.

Payment Provisions

Y(NZ)1.1 In the NEC3 family of contracts, periods of time are usually measured in weeks to avoid complications of rest days and statutory holidays. However, to comply with the Act, in this Option time periods are stated in days, using the same definition as the Act.

This subclause also defines terms introduced from the Act.

Y(NZ)1.2 The *Contractor* has a right to submit a Payment Claim under the Act. In order to comply with Section 20 of the Act, this subclause defines when the Payment Claim becomes due and the manner in which it must be served. The Act states that Payment Claim must:

- a) Be in writing; and
- b) Contain sufficient details to identify the construction contract to which the progress payment relates; and
- c) Identify the construction work and the relevant period to which the progress payment relates; and
- d) Indicate a claimed amount and the due date for payment; and
- e) Indicate the manner in which the payee calculated the claimed amount; and
- f) State that it is made under the Act.

If the payment claim is served on a residential occupier, it must be accompanied by:

- a) An outline of the process for responding to that claim; and
- b) An explanation of the consequences of:
 - i. Not responding to the payment claim; and
 - ii. Not paying the claimed amount, or the scheduled amount, in full.

Submission of a Payment Claim is not mandatory under the Act. Hence, this sub clause uses the word “may”, as the *Contractor* is not obliged to submit a claim. It is the *Project Manager’s* responsibility to assess the amount due. The *Project Manager’s* responsibility to assess the amount due is not diminished or affected as a result of whether or not the *Contractor* submits a Payment Claim under the Act.

Subclause 13.1 of the ECC refers to communications being in a form which can be read, copied and recorded. The Act has a specific requirement for the Payment Claim being made in writing. Parties using electronic forms of communication (e.g. email, project extranets, etc.) are referred to the Electronic Transaction Act 2002, which deals with the issue of electronic communications.

The reader is referred to the Act for further details of the provisions for making a Payment Claim.

Y(NZ)1.3 If the certified amount due is less than the amount claimed by the *Contractor* in his Payment Claim, in order to comply with the Act the *Project Manager’s* certificate must:

- a) Indicate the manner in which the *Project Manager* calculated the scheduled amount; and
- b) Provide reason or reasons for the difference between the certificate amount and the claimed amount; and
- c) In a case where the difference is because the payer is withholding payment on any basis, provide the reason or reasons for withholding payment.

The subclause confirms that the *Project Manager’s* certificate is not a Payment Schedule.

Y(NZ)1.4 The reader is referred to the Act for details of the requirements for the *Employer* serving notice of intention to withhold payment.

Y(NZ)1.7 Whereas the *Project Manager* assesses the amount due in accordance with the provisions of the contract, the Act makes provisions for the payer to issue a Payment Schedule in response to a Payment Claim. Hence Y(NZ)1 requires that the *Project Manager* assess the amount due under the contract and issues his certificate in the first instance. Upon receipt of the *Project Manager’s* certificate the *Employer* is provided with opportunity to notify the *Contractor* of his intent to withhold payment (if any). Thereafter the *Project*

Manager, upon receipt of any notification from the *Employer*, issues the Payment Schedule, and does so acting on behalf of the *Employer*. If no notification is issued by the Payer, the *Project Manager* certifies his assessment as the final Payment Schedule.

Subclause 13.6 of the ECC requires that the *Project Manager* issues his certificates to the *Employer* and the *Contractor*. The Act requires that the payer responds to a Payment Claim by providing a Payment Schedule to the payee. The explicit requirement to issue the Payment Schedule to the payee is not made in this Y(NZ) subclause, as it is already a requirement of ECC subclause 13.6.

Y(NZ)1.8 This subclause defines when the payment becomes due in order to comply with Section 14 of the Act.

Y(NZ)1.9 Under Sections 23 and 24 of the Act, the *Contractor* has the right to suspend the carrying out of work. If the *Contractor* exercises this right it is a compensation event.

Dispute resolution

The dispute resolution clauses in Y(NZ)1 refer to the provisions for Adjudication in the Act, as it is not possible to contract out of the Act. Note that W1 or W2 should not be used when incorporating Y(NZ)1.

For contracts in New Zealand that do not fall within the scope of the Act, then Y(NZ)1 is not needed. For contracts that fall outside the Act, it is recommended that the dispute resolution procedure W1 is used.

Y(NZ)1.11 The effect of this subclause is to provide a time limit for referral of disputes to the *tribunal* if the dispute has been through adjudication under the Act. If either Party is dissatisfied with the adjudicator's decision they have a short period to notify the other of their dissatisfaction. If neither Party does so within that period, the adjudicator's decision becomes final as well as binding and it can no longer be referred to the *tribunal*.

The stated period is only for notification of dissatisfaction. The dispute can be, and normally is, referred to the *tribunal* at a later date.

Y(NZ)2 This Option should be used only for projects carried out in New Zealand or where the *law of the contract* is the law of New Zealand

The Contracts (Privity) Act 1982 allows a third party to a contract, i.e. not the *Employer* or the *Contractor*, to enforce a benefit contained in that contract in certain circumstances. This Option will ensure that only those terms that are clearly set out in Contract Data part one can be enforced by those persons, or

class of persons, that are named. This will ensure that third party rights cannot be implied from any of the other terms of the contract or Works Information.

If the *Employer* wishes to provide such a right to a third party he should take legal advice on the full implications and the words to be used in the Contract Data part one before doing so.

Replacement Contract Data

Part 1 This example should be read in conjunction with the ECC Guidance Notes and provides guidance for the specific entries to the Contract Data when using Y(NZ)1. Where example entries are left blank the treatment should be in accordance with the standard ECC Guidance Notes.

CONTRACT DATA

Part one – Data provided by the Employer

Completion of the data in full, according to the Options chosen, is essential to create a complete contract.

Statements given in all contracts

1 General

- The conditions of contract are the core clauses and the clauses for main Option, dispute resolution Option and secondary Options of the NEC3 Engineering and Construction Contract June 2005 (with amendments June 2006)
- The works are
.....
- The Employer is
Name
Address
- The Project Manager is
Name
Address
- The Supervisor is
Name
Address
- The Adjudicator is
Name
Address
- The Works Information is in
.....
- The Site Information is in
.....

Strike out “, dispute resolution Option....”

Insert “Y(NZ)1” and if appropriate “Y(NZ)2”, together with any other secondary Options that apply

Strike out “The Adjudicator is
Name.....
Address.....”

Strike out “If Y(UK)2 is used and the final date for payment is not 14 days after the date when payment is due
 •The period for payment is”,

and insert:
 “If Y(NZ)1 is used and the Due Date for Payment is not 17 days after the assessment date
 •The Due Date for Payment is days after the assessment date.”

Enter the number
 number of days required

If the *Employer* has decided the *completion date* for the whole of the works

- The *completion date* for the whole of the works is

If the *Employer* is not willing to take over the works before the **Completion Date**

- The *Employer* is not willing to take over the works before the **Completion Date**.

If no programme is identified in part two of the **Contract Data**

- The *Contractor* is to submit a first programme for acceptance within weeks of the **Contract Date**.

If the *Employer* has identified work which is to meet a stated *condition* by a *key date*

- The *key dates and conditions* to be met are

<i>condition to be met</i>	<i>key date</i>
1.....
2.....
3.....

If the period in which payments are made is not three weeks and Y(UK)2 is not used

- The period within which payments are made is

If Y(UK)2 is used and the final date for payment is not 14 days after the date when payment is due

- The period for payment is

If there are additional *Employer's risks*

- These are additional *Employer's risks*

- 1.....
- 2.....
- 3.....

If the *Employer* is to provide **Plant and Materials**

- The insurance against loss of or damage to the works, **Plant and Materials** is to include cover for **Plant and Materials** provided by the *Employer* for an amount of

Strike out "If Option Y (UK)3 is used"
 And insert
 "If Y(NZ)2 is used"

If Option X18 is used

- The Contractor's liability to the Employer for indirect or consequential loss is limited to
- For any one event, the Contractor's liability to the Employer for loss of or damage to the Employer's property is limited to
- The Contractor's liability for Defects due to his design which are not listed on the Defects Certificate is limited to
- The Contractor's total liability to the Employer for all matters arising under or in connection with this contract, other than excluded matters, is limited to
- The end of liability date is years after the Completion of the whole of the works.

If Option X20 is used (but not if Option X12 is also used)

- The incentive schedule for Key Performance Indicators is in
- A report of performance against each Key Performance Indicator is provided at intervals of months.

If Option Y(UK)3 is used

• term	person or organisation
.....
.....
.....

If Option Z is used

- The additional conditions of contract are

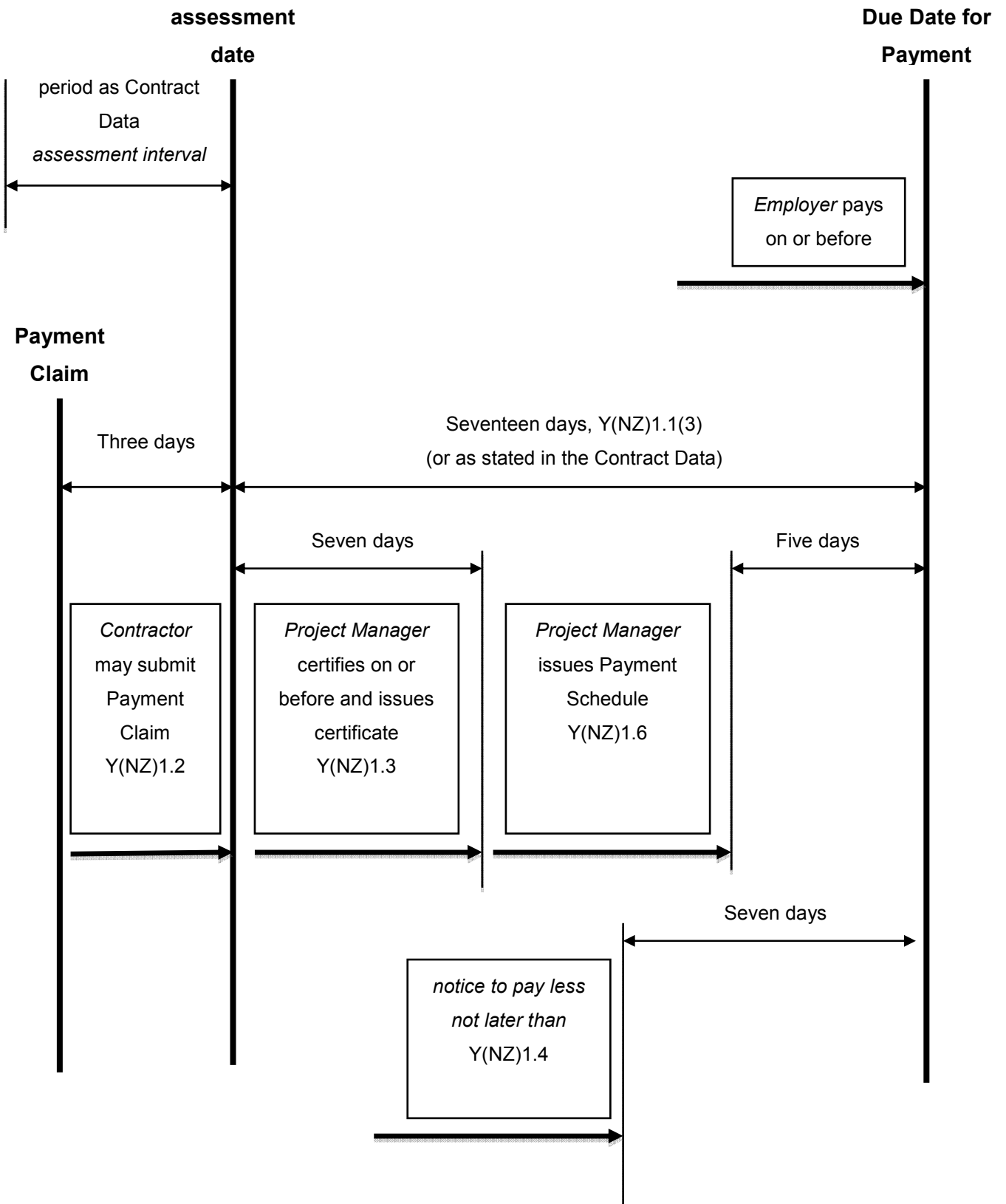


Figure 1 Payment periods when Option Y(NZ)1 is used