

## INTERPRETATION

### Definitions

1. For the purposes of this Building Contract, unless the context requires otherwise, the capitalised use of the following words and phrases have the following meanings:
  - a **Adjustment:** means a change to the Contract Price as provided for in this Building Contract.
  - b **Building Contract:** means the contract set out in the Building Contract Agreement; and includes the documents listed in the Building Contract Agreement.
  - c **Claim:** means a written request or demand for payment including a Payment Claim issued under the Construction Contracts Act 2002 or an ordinary invoice.
  - d **Contract Price:** is the amount, or method for calculating such amount, recorded in Part 2 of this Building Contract and is subject to Adjustments.
  - e **Defect:** means a fault or flaw in the workmanship or materials supplied by the RMB that consists of:
    - i workmanship that has not been carried out in a competent manner and with reasonable skill and care;
    - ii materials supplied by the RMB that are not fit for purpose;
    - iii unauthorised use of second-hand materials;
    - iv any unauthorised departure from what was prescribed by the Building Contract Documents;
    - v in matters not specifically prescribed by the Building Contract Documents:
      - I an unauthorised departure from manufacturer's tolerances;
      - II if manufacturer's tolerances are not available, current tolerance schedules published by the RMBA will apply;
      - III if they are not available, then current tolerance schedules published by the Ministry of Business Innovation and Employment will apply;
      - IV if they are not available, then current tolerance schedules published by Standards New Zealand will apply.

For the avoidance of doubt, a "Defect" does not include:

- i fair wear and tear after Practical Completion;
  - ii damage not caused by the RMB or the RMB's agents (e.g. damage caused by the Owner);
  - iii defective workmanship or materials not supplied by the RMB or the RMB's agents;
  - iv problems or damage resulting from the Owner's failure to carry out normal or reasonable or prescribed maintenance;
  - v problems or damage resulting from the Owner's failure to follow the RMB's reasonable instructions (e.g. adequate ventilation for new works); or
  - vi further problems or damage resulting from the Owner's failure to remediate or failure to advise the RMB once a defect became apparent.
- f **Dwelling Cost:** means the total of the staged payment stages or the progress payments for the works which form the dwelling structure, being works including and inside the building envelope, except for those works listed as Other Items E.g. Prime Cost Sums.

- g **Expected Completion Date:** means the date, recorded in Part 2 of the Building Contract, at which the RMB reasonably believes that Practical Completion will be achieved.
- h **Expected Start Date:** means the date, recorded in Part 2 of the Building Contract, at which the RMB reasonably believes that work will commence on site.
- i **MBS:** means Master Build Services Limited.
- j **Other Items:** means Prime Cost Sums, Provisional Sums and includes works that are not part of or inside the building envelope. Such works include, but are not limited to:
  - i excavations or site works;
  - ii drainage and power and water connections;
  - iii site set up;
  - iv the total cost of all completed service connections;
  - v retaining walls and driveways decks or pergolas; and
  - vi landscaping.
- k **Owner:** means the party or parties recorded as the Owner in Part 2 of this Building Contract (and may include their authorised agents).
- l **Practical Completion:** means when all the Works have been completed except for minor defects and minor omissions, which do not prevent the Works from being used for their intended purpose and which can be remedied in the defects period or at such other agreed time by the RMB without causing significant inconvenience to the Owner.
- m **RMB:** means the party (which may be a company) which is recorded as the RMB in Part 2 of this Building Contract. "RMB" and "Registered Master Builder" mean the same thing.
- n **RMBA:** means the Registered Master Builders Association of New Zealand Incorporated.
- o **Substantial Completion:** means when the Works (or, where the context requires, a specific part thereof) is 95% completed.
- p **Subcontractors:** means third parties engaged by the RMB in respect of the Works; and includes sub-trades, specialist contractors and contracted professionals and experts (but does not include carpenters or labourers who are contracted by the RMB on substantially a full-time basis for the duration of the Works, or the substantial portion thereof).
- q **The Site:** means the land, as recorded in Part 2 of this Building Contract, where the Works are being carried out.
- r **The Works:** means the building work described in the Building Contract Documents.
- s **Working Day:** means a day that is not:
  - i Saturday, Sunday, Good Friday, Easter Monday, Anzac Day, the Sovereign's birthday, Labour Day, and Waitangi Day; and
  - ii if Waitangi Day or Anzac Day falls on a Saturday or a Sunday, the following Monday; and
  - iii the day observed in the appropriate area as the anniversary of the province of which the area forms a part; and
  - iv a day in the period commencing on 24 December in any year and ending with the close of 5 January in the following year.

## General

2. Where the context requires, words importing the singular shall include the plural and vice versa, and words importing the masculine, feminine, and neuter shall include all three.
3. The headings to clauses are for convenience only and shall not affect their interpretation.

## UNDERLYING OBLIGATIONS

### Parties' obligations

4. Subject to the terms of this Building Contract, the RMB will undertake the Works and the Owner will pay the RMB the Contract Price, subject to any Adjustments under the Building Contract.

### Possession of the Site

5. The Owner shall grant the RMB possession of the Site on the Expected Start Date. Except as expressly provided to the contrary in this Building Contract, the RMB's possession shall be exclusive.
6. Despite clause 5, the Owner is entitled to have reasonable access to inspect the Works if all of the following conditions are met:
  - a it is with the RMB's consent (which the RMB will not arbitrarily withhold);
  - b it is at reasonable hours and in the presence of the RMB;
  - c the Owner has provided the RMB with specific notice (by email or telephone) 24 hours before exercising access;
  - d the RMB is not responsible for any damage done to the Works by the Owner;
  - e the Owner does not interfere with the progress of the Works;
  - f the Owner does not exercise access with such frequency or duration so as to unduly distract the RMB (or the RMB's agents); and
  - g the Owner complies with all requirements of health and safety legislation, including all reasonable and relevant instructions provided by the RMB (including wearing protective clothing, which the Owner may be required to provide).

### RMB's warranties

7. The RMB warrants that Works it is responsible for will be carried out:
  - a in a tradesmanlike manner;
  - b with reasonable care and skill;
  - c in accordance with the drawings and specifications (as amended, where applicable);
  - d in accordance with building consents;
  - e using materials that are fit for purpose;
  - f using materials that are new (unless agreed otherwise); and
  - g in accordance with all laws and legal requirements.

### Statutory compliance

8. The Owner and the RMB will comply with all statutes, regulations and bylaws of government, territorial and other public authorities that may be applicable to the Works.
9. The implied warranties for building work in relation to household units under section 362I of the Building Act 2004 apply to the Works.
10. Proceedings for a breach of the implied warranties may be taken by a non-party to the Building Contract in accordance with section 362J of the Building Act 2004.
11. In accordance with section 362K of the Building Act 2004, no provision in the Building Contract restricts or removes the right of a person to take proceedings for a breach of any of the warranties set out in section 362I in so far as the provision relates to a breach other than a breach that was known, or ought reasonably to have been known, by the person to exist at the time the agreement or instrument was executed.

### **Persons carrying out or supervising the Works**

12. The persons carrying out or supervising works are those persons recorded in Part 2 of the Building Contract.
13. If the persons designated to carry out the Works or to supervise the Works become unavailable (or it is otherwise not reasonably practical for the RMB to secure their services), then the RMB may substitute other suitably qualified or experienced people. The RMB shall promptly notify the Owner of such substitutions.

### **Owner's title**

14. The Owner undertakes that they have title or other legal entitlement to the land to allow the Works to be carried out.

### **Health and safety**

15. The RMB will comply with health and safety legislation (including any applicable regulations) when managing the Works. The Owner will support and cooperate with the RMB's compliance with health and safety legislation.

### **Failure by the Owner to meet their obligations**

16. Where the RMB incurs any additional costs resulting from a failure or delay by the Owner in complying with their obligations under this Building Contract, the RMB shall be entitled to an Adjustment.

## **CONTRACT PRICE & PAYMENT**

### **Contract Price**

17. The Owner agrees to pay the Contract Price to the RMB in accordance with the Payment Method recorded in Part 2 of this Building Contract. The Contract Price is subject to Adjustments under the Building Contract.

### **Owner's undertaking as to finance**

18. The Owner confirms that they have (or, prior to the Expected Start Date, will have) sufficient funds or finance to meet their financial obligations to the RMB (as those obligations fall due). The RMB may at any time, including prior to the Expected Start Date, require the Owner to provide documentary proof that they have such sufficient funds or finance, and the Owner will provide such proof within 5 Working Days.

### **Contract Deposit**

19. Immediately upon signing this Building Contract, the Owner will pay the RMB the Contract Deposit. The RMB shall be under no obligation to perform any steps under the Building Contract until the Contract Deposit is paid.
20. If, whether prior to the Expected Start Date or otherwise, the Owner decides not to proceed with the Works (other than by reason of justified cancellation resulting from a breach of contract by the RMB), any Contract Deposit paid by the Owner to the RMB is not refundable.
21. If, prior to the Expected Start Date, the Owner decides not to proceed with the Works, the RMB's recoverable loss will be deemed to be the greater of:
  - a the Contract Deposit; or
  - b the loss as is quantifiable and provable by the RMB including, but not limited to, loss of profit.

### **Valuation of Adjustments**

22. Except as expressly provided to the contrary in the Building Contract, Adjustments which result in an increase to the Contract Price shall be valued as follows:
  - a The Owner and the RMB shall attempt to agree a price for the Adjustment; or
  - b If there is no agreed price for the Adjustment, the RMB shall be entitled to be paid the actual and reasonable cost of the Adjustment, plus margin where applicable, determined at the time the Adjustment arose.

23. Except as expressly provided to the contrary in the Building Contract, Adjustments which result in a reduction to the Contract Price shall be valued as follows:
  - a The Owner and the RMB shall attempt to agree a price for the Adjustment; or
  - b If there is no agreed price for the Adjustment, the Owner shall be entitled to a credit equivalent to the actual and reasonable cost of the Adjustment determined at the date of the Building Contract.
24. Adjustments arising from substitutions in the Building Contract shall be valued at the net value of:
  - a Any increase to the Contract Price determined in accordance with clause 22; and
  - b Any reduction to the Contract determined in accordance with clause 23.

### **Margins**

25. The RMB is entitled to add a margin to the price it charges the Owner, for the costs set out below:
  - a Materials, including delivery costs, where they are supplied for:
    - i A charge-up contract; or
    - ii An Adjustment where there is no agreed price;
  - b Subcontractors where they are engaged for:
    - i A charge-up contract; or
    - ii An Adjustment where there is no agreed price;
  - c The costs of hiring plant and equipment for:
    - i A charge-up contract; or
    - ii An Adjustment where there is no agreed price; or
    - iii Where these costs are expressly excluded from the Contract Price;
  - d Prime Cost Sums where the price to be paid to the RMB after the Prime Cost Sum is spent is not an agreed price;
  - e Provisional Sums where the price to be paid to the RMB after the Provisional Sum is spent is not an agreed price;
  - f Adjustments where the price to be paid to the RMB is not an agreed price.
26. The margin provided for in clause 25 shall be the rate recorded in Part 2 of the Building Contract. If no rate is recorded, the margin shall be 15%.
27. Clauses 25 and 26 do not apply to the items listed below which are already inclusive of the RMB's margin. The margin included in the items listed below is not required to be that provided for in clause 26:
  - a The Contract Price for a Staged Payment or Progress Payment contract;
  - b The hourly rates or costs specified in the Charge-up Schedule;
  - c Where the RMB and the Owner agree to a price for an Adjustment.

### **Payment Procedure**

28. The RMB is entitled to submit Claims to the Owner at the intervals recorded in Part 2 of the Building Contract. The RMB is entitled to issue invoices for such Claims. Claims may be submitted in the form of an invoice and/or as a payment claim in accordance with Part 2 of the Construction Contracts Act 2002.
29. If the Owner wishes to dispute the amount of any payment claim, he or she must do so in accordance with Part 2 of the Construction Contracts Act 2002. Payment schedules under the Construction Contracts Act 2002 must be served on the RMB within 5 Working Days of service of a payment claim under that Act.
30. The Claims must be paid within the period recorded in Part 2 of the Building Contract.

31. The Owner shall make payment by the method recorded in Part 2 of the Building Contract.
32. The RMB will provide the Owner with a written receipt for each payment, if requested by the Owner.

#### **No set-off**

33. The Owner shall have no entitlement of set-off, against any sums payable to the RMB under the Building Contract.

#### **Suspension of Works for non-payment**

34. Without prejudice to the RMB's rights under the Construction Contracts Act, the RMB may suspend the Works if the Owner fails to pay any invoiced amount in full by the due date for payment. The RMB shall provide the Owner with five Working Days written notice of its intention to suspend the Works under this clause.
35. The right to suspend work under clause 34 ceases when the Owner pays the amount in full. The RMB may at any time lift the suspension, even if the amount has not been paid.
36. Where the RMB has suffered any loss or expense because of the suspension of the Works, the RMB shall be entitled to an Adjustment.
37. The RMB is not liable for any loss or damage suffered by the Owner, or by any person claiming through the Owner, because of the suspension of the Works.
38. The RMB is entitled to an extension of time to complete the Works where work has been suspended under clause 34.

#### **Default interest**

39. The Owner must pay the RMB default interest compounding monthly on all amounts due but unpaid, for the period from the expiry of the time provided for payment until actual payment. The right to default interest is additional to any other remedy that the RMB may be entitled to. The rate of default interest is the rate recorded in Part 2 of the Building Contract (compounding monthly). If no rate is recorded, the rate of default interest shall be 15% (compounding monthly).

#### **Prime Cost Sums**

40. Prime Cost Sums are defined items which will be parts of the Works but at the time of entering into this Building Contract:
  - a the price for that part of the materials or fittings is uncertain; or
  - b the materials or fittings to be used are uncertain;
  - c the price for that part of the Works has not been finalised between the parties; or
  - d the extent of that part of the Works is outside the control of the parties; or
  - e the extent of that part of the Works is unknown; or
  - f any combination of the above.
41. The Prime Cost Sums in the Contract Price are preliminary allowances. For the avoidance of doubt, Prime Cost Sums can allow for:
  - a Items which allow for supply of material or fittings; or
  - b Items which allow for a part of Works, in which case the allowance provides for labour and related materials.
42. When a Prime Cost Sum is spent, the provisions of clauses 88 and 89 apply.

#### **Provisional Sums**

43. Provisional Sums are defined parts of the Works where the decision to undertake that part of the Works has not been finalised between the parties. In addition:

- a the price for that part of the Works has not been finalised between the parties; or
  - b the extent of that part of the Works is outside the control of the parties; or
  - c the extent of that part of the Works is unknown; or
  - d any combination of the above.
44. The Provisional Sums in the Contract Price are preliminary allowances for labour and related materials.
45. When a Provisional Sum is spent, the provisions of clauses 90 and 91 apply.

#### **Cost fluctuations**

46. The Contract Price is deemed to have due regard for the prices of all materials and services and plant/equipment hire costs at the date of the Building Contract. Any subsequent increases in prices or additions to costs resulting in the RMB incurring additional expense shall be an Adjustment with the RMB entitled to additional payment.
47. Any subsequent decreases in prices shall be an Adjustment with the Owner entitled to an appropriate credit.

## **THE WORKS**

#### **Drawings and Specifications**

48. The details of the Works are contained in the documents recorded in Part 2 of the Building Contract.
49. If there is any discrepancy between the drawings and the specifications, precedence will be determined based on the election recorded in Part 2 of the Building Contract. If no election has been made, then the drawings will take precedence.
50. Unless the context requires otherwise (and subject to clause 49):
- a figured dimensions take precedence over scaled dimensions;
  - b large scale dimensions take precedence over small scaled dimensions; and
  - c amended drawings take precedence over older drawings.
51. Drawings and specifications are subject to any building consent.

#### **Building and resource consents**

52. The Owner must obtain and pay for any building consent and resource consent and other necessary approvals and inspections required for the Works, including consents and approval required after commencement of the Works. Where it is recorded in Part 2 of the Building Contract, the Owner may appoint the RMB to act as its agent for the purpose of this clause. It shall be the Owner's obligation to do all things necessary to facilitate such agency.
53. The RMB must comply with the terms and conditions of the building and resource consents and approvals as far as such consents and approvals relate to the carrying out of the Works.

#### **Code Compliance Certificate**

54. Subject to section 362V of the Building Act 2004, the Owner must obtain and pay for any Code Compliance Certificate for the Works. Where it is recorded in Part 2 of the Building Contract, the Owner may appoint the RMB to act as its agent for the purpose of this clause. It shall be the Owner's obligation to do all things necessary to facilitate such agency.

#### **Care of the Works**

55. The RMB will be responsible for the Works while they are under the RMB's care, from the date that the RMB takes possession of the Site until Practical Completion. However (without limiting the effect of any insurance or guarantee or warranties, and subject to the RMB's obligation to use reasonable skill and care), the RMB is not responsible for any loss or damage caused by:

- a the Owner using, occupying or taking over any part of the Works;
- b a defect in design other than by the RMB;
- c forces of nature;
- d man-made events (e.g. war, riot or civil commotion); or
- e man-made or natural contamination.

#### **Materials on site**

56. The RMB retains both legal and equitable ownership in any goods or materials it has brought onto the Site until the Owner has paid the RMB all monies due, or they are affixed to the Works.

#### **Sub-contractors**

57. The RMB may subcontract any portion of the Works but may not assign or sublet the whole of the Works without the written consent of the Owner.
58. The RMB is responsible for:
- a its Subcontractors' work; and
  - b making all reasonable endeavours to ensure that its Subcontractors have appropriate insurance in place; and
  - c making all reasonable endeavours to obtain applicable warranties, guarantees, certificates and records of work required from its employees and its Subcontractors; and
  - d taking all reasonably practicable steps to ensure its employees and its Subcontractors comply with health and safety legislation in respect of the Works.

#### **Owner's work or materials**

59. The provisions of clauses 60 to 66 will apply whenever any part of the Works is undertaken by the Owner with the consent of the RMB, or any materials forming part of the Works are supplied by the Owner with the consent of the RMB. That consent must be written and will be at the sole discretion of the RMB.
60. The RMB may insure any Owner's work and materials under the RMB's insurance (doing so at the Owner's cost). The Owner will ask the RMB (in writing) whether it has insured the Owner's work and materials; and if not, the Owner must insure its own work and materials.
61. Any work undertaken by the Owner must be executed in accordance with a timetable provided to the Owner by the RMB and must be undertaken strictly in accordance with the building consent, the drawings and specifications, the Building Act 2004 or the Building Act 1991 (whichever is applicable) and the relevant regulations made under those Acts including the Building Code, and any directions given by the RMB. Any occupation of the Works by the Owner for this purpose will only be temporary.
62. If the Owner fails to undertake relevant work strictly in accordance with clause 61, the RMB will be entitled to rectify that failure (to make good any defect). Where the RMB incurs any additional costs under this clause, such additional costs shall be an Adjustment.
63. Where the RMB consents to any specific work or materials being supplied by the Owner, and the RMB incurs additional labour or costs from the Owner's activity which are not provided for in the Contract Price, such additional costs shall be an Adjustment.
64. The RMB is not liable for any loss or damage or defect or maintenance if it relates to work performed by the Owner or the Owner's agent (unless that agent is the RMB or the RMB's Subcontractor who is acting under the RMB's control).
65. If any loss or damage arises from any materials supplied by the Owner (whether installed by the Owner or the RMB), the Owner will be liable for that loss or damage.

66. When the Owner is undertaking work under these clauses 59 to 65, the Owner must:
- a take all practical steps to prevent harm to the RMB and its Subcontractors;
  - b comply with health and safety legislation; and
  - c make all reasonable endeavours to ensure its agents comply with health and safety legislation.

## **THE SITE**

### **Survey pegs & Site boundaries**

67. Survey pegs required by the RMB to define Site boundaries, unless already established, must be provided by the Owner (through a surveyor employed by the Owner). If and when required by the RMB, the Owner must show the RMB the survey pegs, offset pegs and datum pegs (and the RMB will record the position of those pegs). The RMB will take all reasonable steps to maintain the survey pegs. The Owner shall indemnify the RMB for any expense, loss, action or claim arising out of the position of pegs or mistakes by the Owner as to the correct boundaries of the Site.

### **Utilities**

68. The Owner is responsible for providing utilities (such as electricity and water), including final connection costs to such utilities. The RMB shall be entitled to reasonable use of such utilities for the Works. Unless expressly provided for in the Contract Price, if the RMB incurs costs in accessing and using utilities (such as electricity and water) then the RMB shall be entitled to an Adjustment.
69. The Owner must locate all underground utilities. The Owner shall advise the RMB of the location of such utilities, who will record their position. The Owner shall indemnify the RMB for any expense, loss or claim arising out of any damage to utilities or, if need be, their relocation, unless such damage has been caused by a negligent act or omission on the part of the RMB.
70. Where reasonable endeavours have been made by the Owner to locate all underground utilities and underground utilities are nevertheless discovered preventing reasonable progress with the Works, the parties may agree to terminate the Building Contract. If the parties agree to terminate the Building Contract under this clause, Subpart 4 of Part 2 of the Contract and Commercial Law Act 2017, pertaining to frustrated contracts, shall apply.

### **Unforeseen physical conditions**

71. Unforeseen physical conditions may include artificial obstructions and weather conditions at or away from the Site. The Owner acknowledges that the RMB has not, and could not have, allowed for such unforeseen physical conditions in the Contract Price.
72. The Owner indemnifies the RMB against any claim made against the RMB by any person for damages or expenses incurred by reason of unforeseen physical conditions.

### **Land subsidence and inadequate earth fill**

73. The RMB is not liable for:
- a any damage to the Works caused by subsidence of the whole or any part of the Site, or any damage to the Site from any cause during the RMB's occupation of the Site, unless such damage has been caused by a negligent act or omission on the part of the RMB; or
  - b any damage, or for any additional costs of the Works, resulting from absence of information on any foundation, defects or difficulties which was not discoverable by the RMB on a reasonable inspection of the Site.
74. The RMB is not liable for any damage or deterioration of the Works or the Site caused by or resulting from the inadequacy or negligent application of earth fill, unless such damage or deterioration may be properly attributable to a negligent act or omission on the part of the RMB.

75. The Owner indemnifies the RMB against any claim against the RMB by any person whatsoever for damages or expenses incurred by reason of inadequate earth fill or subsidence.

#### **Site and Works to be kept clean and tidy**

76. The RMB will keep the Site and the Works clean and tidy and regularly remove all the RMB's rubbish and surplus materials.
77. The RMB will leave the Site and the Works clean and tidy upon completion of the Works or upon Practical Completion.

## **VARIATIONS**

### **The Works are subject to variation**

78. A variation is any change to the Works including but not limited to:
- a an increase or decrease in the quantity of any work, including services ancillary to any building work; or
  - b omission of any work; or
  - c change in the character or quality of any material or work; or
  - d requiring additional work to be done; or
  - e changes to the level, line position, or dimensions of any work; or
  - f changes to the timing or sequencing of any work.
79. Unless expressly agreed to in writing by the RMB, the Owner shall not be entitled to vary the Works in order to have any omitted work carried out by a third party or by the Owner.
80. A variation may result in an Adjustment and the RMB may claim additional payment or provide credit for each variation as appropriate in accordance with the Claim procedure under this Building Contract (unless agreed otherwise). The RMB may invoice for variations separately.

### **Variations requested by the Owner**

81. The RMB must consider the Owner's written request that a variation be agreed and undertaken and may not arbitrarily withhold agreement to undertaking that variation.
82. Where the RMB and the Owner agree to a variation, there shall be an Adjustment valued in accordance with clauses 22, 23, or 24 as appropriate.
83. The Owner must not negotiate variations directly with the RMB's Subcontractors or merchants without the RMB's written consent.

### **Variations for additional works or items reasonably required to complete the Works**

84. Where RMB considers that work or materials not included in the Building Contract are reasonably required to complete the Works then the RMB and the Owner must consult concerning the requirement for a variation. The Owner must advise the RMB whether they wish the variation to be carried out; or whether an alternative arrangement can be made that will avoid the need for the variation.
85. Where the RMB and the Owner agree to a variation, there shall be an Adjustment valued in accordance with clauses 22, 23, or 24 as appropriate.

### **Variations required by a territorial authority**

86. If a variation is required:
- a by the territorial authority (e.g. as a condition of the granting or retaining a building consent); or

- b for any part of the Works to comply with the Building Code,  
then the RMB and the Owner must consult concerning the requirement for the variation. The Owner must advise the RMB whether they wish the variation to be carried out; or whether an alternative arrangement can be made that will avoid the need for the variation.

87. Any additional costs from a variation arising as specified in clause 86 shall be an Adjustment, valued in accordance with clauses 22, 23, or 24 as appropriate, if it is required:

- a by the territorial authority due to any discrepancy, error or defect in any Building Contract Documents supplied by the Owner;
- b by the territorial authority due to the Owner's work being non-compliant (or deemed non-compliant by the territorial authority); or
- c due to changes in the legislation (such as the Building Act 2004 or the Resource Management Act 1991).

#### **Variations arising from Prime Cost Sums**

88. Where a Prime Cost Sum is spent it shall be a variation. A Prime Cost Sum shall be spent and valued as set out below:

- a the RMB will spend the Prime Cost Sum for the purpose agreed with the Owner;
- b if the final cost of the Prime Cost Sum does not differ from the allowance in the Contract Price the Owner shall pay the RMB that allowance;
- c if the final cost of the Prime Cost Sum differs from the allowance in the Contract Price there shall be an Adjustment, whereby:
  - i if the final cost of the Prime Cost Sum exceeds the allowance in the Contract Price the Owner shall pay the RMB that allowance plus an additional payment comprising the difference between the final cost of the Prime Cost Sum and the allowance for the Prime Cost Sum, plus the RMB's margin; or
  - ii if the final cost of the Prime Cost Sum is less than the allowance in the Contract Price the Owner shall pay the RMB that allowance less an appropriate credit for the difference between the final cost of the Prime Cost Sum and the allowance for the Prime Cost Sum.
- d if requested by the Owner, the RMB will supply copies of all invoices and records of the cost of the Prime Cost Sum.

89. A Prime Cost Sum item may only be omitted from the Building Contract with the written consent of the RMB. Where a Prime Cost Sum is not spent, it shall be removed from the Contract Price.

#### **Variations arising from Provisional Sums**

90. Where a Provisional Sum is spent it shall be a variation. A Provisional Sum shall be spent and valued as set out below:

- a the RMB will spend the Provisional Sum for the purpose agreed with the Owner;
- b if the final cost of the Provisional Sum does not differ from the allowance in the Contract Price the Owner shall pay the RMB that allowance;
- c if the final cost of the Provisional Sum differs from the allowance in the Contract Price there shall be an Adjustment, whereby:
  - i if the final cost of the Provisional Sum exceeds the allowance in the Contract Price the Owner shall pay the RMB that allowance plus an additional payment comprising the difference between the final cost of the Provisional Sum and the allowance for the Provisional Sum, plus the RMB's margin; or
  - ii if the final cost of the Provisional Sum is less than the allowance in the Contract Price the Owner shall pay the RMB that allowance less an appropriate credit for the difference between the final cost of the Provisional Sum and the allowance for the Provisional Sum.

d if requested by the Owner, the RMB will supply copies of all invoices and records of the cost of the Provisional Sum.

91. Where a Provisional Sum is not spent, it shall be removed from the Contract Price.

#### **Variations because of unprocurable materials**

92. If any specified materials are not reasonably procurable, the RMB may substitute other materials of similar quality and nature. The RMB will consult the Owner before making such a substitution which shall be a variation. Any difference in the cost of such substituted materials shall be an Adjustment valued in accordance with clauses 22, 23, or 24 as appropriate.

#### **Variation because of unforeseen physical conditions**

93. Where there are unforeseen physical conditions as provided for in clause 71, any additional work the RMB may reasonably decide is necessary to properly complete the Works shall be a variation. If the RMB incurs additional cost arising from a variation under this clause, the RMB shall be entitled to an Adjustment valued in accordance with clauses 22, 23, or 24 as appropriate.

#### **Variation because of land subsidence and inadequate earth fill**

94. Where there is land subsidence or inadequate earth fill as provided for in clauses 73 and 74, any additional work the RMB may reasonably decide is necessary to properly complete the Works shall be a variation. Such additional work may include but is not limited to remedying foundation defects or earth fill or procuring any engineering report. If the RMB incurs additional cost arising from a variation under this clause, the RMB shall be entitled to an Adjustment valued in accordance with clauses 22, 23, or 24 as appropriate.

#### **Processing of variations**

95. In addition to any Adjustment for variations under clauses 81 to 94, the RMB shall be entitled to an Adjustment for the RMB's time and expenses in assessing and pricing any variation, whether or not the variation goes ahead. The Owner shall pay a reasonable additional fee based on the RMB's usual hourly rate and expenses.

This clause shall also apply where the Owner requests the RMB to take any steps in preparation for a variation which, for any reason, does not proceed.

## **TIME**

### **Time for completion**

96. Subject to the provisions of this Building Contract, the RMB must commence the Works on or about the Expected Start Date shown in this Building Contract.

97. Subject to the provisions of this Building Contract, the RMB must exercise reasonable diligence in seeking to achieve Practical Completion of the Works on or about or before the Expected Completion Date recorded in this Building Contract.

98. Where the Building Contract does not record an Expected Completion Date, the Works shall be completed within a reasonable time.

### **Extension of time**

99. Without limiting the RMB's other rights and remedies, the RMB is not liable for any delay caused by:

- a variations or additional work;
- b a failure or delay on the part of the Owner in complying with their obligations under this Building Contract, including but not limited to a delay in:
  - i paying the contract deposit;
  - ii providing proof of finance;
  - iii providing proof of insurance;
  - iv obtaining sufficient title;

- v obtaining consents;
  - vi ensuring all necessary services are available at the Site; or
  - vii providing the RMB with access to and possession of the Site for the purpose of carrying out the Works;
- c any other delays (or problems resulting in delays) in matters that the Owner is responsible for (including problems or delays caused by other persons contracted by the Owner);
- d suspensions of the works under clause 34;
- e delays on the part of a consenting or territorial authority;
- f inclement weather;
  - g unforeseen health and safety requirements;
  - h where, despite the RMB's reasonable endeavours, Subcontractors are unavailable;
  - i where, despite the RMB's reasonable endeavours, materials are unavailable;
  - j unforeseen physical conditions;
  - k unexpected conditions of any existing structure being built onto;
  - l any matter covered by the force majeure provisions of this Building Contract;
  - m industrial action (e.g. strikes or lockouts);
  - n dispute resolution procedures invoked by either party in circumstances that, in the RMB's reasonable opinion, make it impracticable for the RMB to proceed as otherwise planned;
  - o legal proceedings, relating to the Works, commenced or threatened by a third party in circumstances that, in the RMB's reasonable opinion, make it impracticable for the RMB to proceed as otherwise planned; or
  - p any other matter outside the RMB's reasonable control.

100. Where a delay under clause 99 has occurred the RMB shall be entitled to an extension of time to complete the Works and, acting reasonably, to amend the Expected Completion Date. The RMB shall, within a reasonable time after the delay becomes apparent, issue a notice to the Owner setting out the amended Expected Completion Date.

101. If the RMB is undertaking work for a third party prior to the Expected Start Date, and the RMB encounters delay in completing that work (including delay by reason of unforeseen circumstances, or delay by reason of circumstances outside the RMB's control, or delay by reason of being asked to do variation or additional work that the RMB believes that it cannot in good conscience decline), then that delay shall entitle the RMB to amend the Expected Start Date and the Expected Completion Date. The RMB shall, within a reasonable time after the delay becomes apparent, issue a notice to the Owner setting out the amended Expected Start Date and the amended Expected Completion Date.

#### **Costs arising from delay**

102. Where a delay under clause 99 has occurred and the RMB has incurred additional costs from that delay, the RMB shall be entitled to an Adjustment.

## **INSURANCE**

### **Insurance to be obtained by the RMB**

103. The RMB must, from the commencement of the Works until the date of Practical Completion, keep the Works insured under a contract works insurance policy in the joint names of the Owner, the RMB and the mortgagee (if any). The details of the contract works insurance shall be recorded in Part 2 of the Building Contract.

104. The RMB must maintain a public liability insurance policy indemnifying the RMB against claims in respect of loss or damage against property, or injury, death, or illness to any person arising out of the operations of the RMB, RMB's Agent, or any of its Sub-contractors in connection with the execution of the Works. The policy

must be for the benefit of both the RMB and the Owner and must be for an amount of not less than one million dollars. The details of the public liability insurance shall be recorded in Part 2 of the Building Contract.

### **Proof of insurance**

105. When a party has agreed to take out insurance it must, prior to the commencement of the Works, provide to the other party documentation showing that the agreed insurance cover has been obtained.

## **POST CONSTRUCTION**

### **Notice of Practical Completion**

106. Upon Practical Completion and before possession by the Owner under clause 108, the RMB and the Owner must sign and date a Notice of Practical Completion. The Owner shall not unreasonably refuse to sign and date a Notice of Practical Completion prepared under this clause.

107. Where the RMB has provided the Owner with a Notice of Practical Completion and the Owner has not within five Working Days of receipt of that Notice of Practical Completion either signed it or provided reasons to the RMB as to why it has not been signed, then Practical Completion shall be deemed to have occurred five Working Days from the day the RMB provided the Owner with the Notice of Practical Completion.

### **Possession by Owner**

108. On Practical Completion of the Works and as soon as the Owner has paid to the RMB the Contract Price, the Owner is entitled to immediate possession of the Site and the Works.

109. The Owner is in breach of this Building Contract if, without the prior written consent of the RMB, the Owner takes possession of the Site or the Works prior to Practical Completion or prior to making payment in full to the RMB. If this happens, the RMB may, by notice in writing, notify the Owner that it has two Working Days to vacate possession of the Site and the Works.

110. If the Owner does not vacate the Site and the Works within two Working Days of notice under clause 109, the RMB is entitled to cancel this Building Contract immediately.

**NOTE:** *Not complying with its obligations under clauses 106 to 109 can have serious consequences for the Owner; including:*

- The Owner being liable to the RMB for all sums payable under this Building Contract, plus any damages, costs, expenses or loss of profits of the RMB;
- The RMB having no further obligations to the Owner under this Building Contract; and
- The Master Build Guarantee being void or being terminated by MBS.

### **Defects warranty period**

111. The Owner must notify the RMB of any Defects in writing as soon as reasonably possible after the Defect becomes apparent.

112. If a Defect is notified to the RMB within the period recorded in Part 2 of the Building Contract, the RMB must remediate it within a reasonable time from notification. If no period is recorded, then it shall be 12 months from Practical Completion.

113. These defects warranty provisions do not mitigate the Owner's responsibility for maintenance.

114. The Owner is responsible for ensuring gradual start up and shut down of heating systems in cold weather and for providing adequate ventilation during hot weather (to prevent excessive movement of the structure and cracks or other damage to the internal linings and finishes of the Works). Any damage or problem resulting from a failure to meet these requirements is the Owner's responsibility.

115. These defect warranty provisions do not limit the provisions of section 362Q of the Building Act 2004.

## DEFAULT

### Default by the Owner

116. If the Owner fails to perform their obligations under this Building Contract or if the Owner becomes bankrupt or goes into liquidation (other than for the purpose of amalgamation or reconstruction) or has a receiver or statutory manager appointed, then the RMB, without prejudice to its other remedies, may exercise all or any of the following remedies:

- a cancel the Building Contract;
- b suspend the carrying out of the Works until that default has been remedied; or
- c whether the Works have been suspended or not, take action in any Court or other legal forum of competent jurisdiction.

117. The RMB must notify the Owner in writing and give the Owner five Working Days to remedy the default before exercising any of the remedies under clause 116.

**NOTE:** *Where the RMB lawfully cancels the Building Contract, any Master Build Guarantee provided will be cancelled or rendered void.*

118. Where the RMB exercises the right to suspend the Works under clause 116, that does not:

- a limit the RMB's right to cancel the Building Contract;
- b enable the Owner to cancel the Building Contract; or
- c result in the RMB having any liability for resulting delay.

### Default by the RMB

119. Without prejudice to its other remedies, the Owner may cancel the Building Contract if the RMB commits any of the following acts of default and the RMB has not remedied the default within ten Working Days of receiving written notice of the default from the Owner:

- a the RMB becomes bankrupt or goes into liquidation (other than for the purposes of amalgamation or reconstruction) and the assignee or liquidator fails within ten Working Days to make arrangements satisfactory to the Owner for the execution of the Works;
- b the RMB has a receiver or a statutory manager appointed, and the receiver or statutory manager fails within ten Working Days to make arrangements satisfactory to the Owner for the execution of the Works;
- c the RMB has persistently failed to proceed with the Works with reasonable diligence, in a manner that causes serious prejudice to the Owner; or
- d the RMB has persistently, flagrantly or wilfully neglected to carry out its obligations under the contract, in a manner that causes serious prejudice to the Owner.

**NOTE:** *Where the Owner cancels the Building Contract any Master Build Guarantee provided may also be cancelled or rendered void, subject to the Master Build Guarantee provisions for termination. To avoid rendering the guarantee void the Owner must adhere to the consent provisions set out in the Master Build Guarantee (including obtaining MBS's prior written consent to a proposed cancellation).*

### Repossession of goods or materials

120. If the Owner fails to make any payment by the due date under the Building Contract, the RMB is entitled to retake possession of the goods or materials which have been brought onto the Site. The RMB has the option to resell the goods or materials (without prejudice to its other rights and remedies).

121. The RMB must notify the Owner in writing (of the failure to make payment) and give the Owner five Working Days to remedy the failure before the RMB retakes possession of the goods or materials under clause 120.

122. The Owner gives the RMB irrevocable authority to enter onto the Site to recover possession of goods or materials under clauses 120 and 121.

### **Memorandum of mortgage**

123. If the Owner fails to pay any money payable to the RMB under this Building Contract on the due date for payment, then on demand the Owner will straight away provide the RMB with an executed and registrable memorandum of mortgage over the Land (for the purpose of securing all money owing from time to time by the Owner to the RMB under the Building Contract). That mortgage will be in the form of the All Obligations form produced by the Auckland District Law Society and approved by the Registrar General of Land under number 2011/2200 together with Memorandum number 2011/4300. The Owner also undertakes to complete any Authority and Instruction ("A & I") form that is necessary to register that mortgage and to instruct their solicitor (or other relevant agent) to take whatever step is necessary to register that mortgage.
124. The Owner also acknowledges that the RMB is entitled to register a caveat or similar charge against the title to the Land in circumstances where the RMB is entitled to demand a registrable memorandum of mortgage.
125. The RMB must notify the Owner in writing and give the Owner five Working Days to remedy the default before demanding a registrable memorandum of mortgage over the Land or registering a caveat over the Land.
126. The Owner appoints the RMB (and if the RMB is a Company, then every officer of the RMB) to be the Owner's attorney for the purposes of giving and executing in favour of the RMB a registrable memorandum of mortgage over the Land (i.e. for the purposes of clause 123). The Owner acknowledges that the appointment of the RMB as the Owner's attorney is made for valuable consideration (i.e. the RMB entering into the Building Contract) and is irrevocable.
127. The Owner must ensure that any existing mortgagee is aware of and does not oppose the RMB's rights under clauses 123 to 126.

### **Costs of recovery of any amount due and payable by the Owner under the Building Contract**

128. The RMB is entitled to recover from the Owner, on an indemnity basis, all costs and expenses (including legal costs on a client/solicitor basis) incurred in connection with the recovery of any amount due and payable by the Owner under the Building Contract including, without limitation, all costs and expenses incurred:
- a repossessing and/or selling any goods or materials;
  - b registering any memorandum of mortgage or caveat; or
  - c in relation to any court proceedings.

### **Preservation of rights following termination**

129. Where the Owner or RMB exercise a right to terminate the Building Contract due to the default of the other party, such termination is without prejudice to any other rights and remedies the terminating party may have arising from the default.

## **DISPUTE RESOLUTION**

130. A party to this Building Contract wishing to invoke these dispute resolution procedures must give written notice to the other party to the Building Contract specifying the nature of the dispute.

### **Negotiation**

131. If notice of a dispute is provided, the parties must in good faith promptly endeavour to resolve the dispute by negotiation.

### **Mediation**

132. The parties will refer the dispute to mediation if they are unable to resolve it within five Working Days (or before that, if the circumstances involve urgency). Mediation may be:

- a a formal mediation through a professional mediator (unless agreed otherwise, using the services of a mediator nominated by the President of the Arbitrators and Mediators Institute of New Zealand Inc); or
- b an informal mediation through an agreed third party (e.g. an industry representative).

### **Adjudication**

133. Nothing in these Dispute Resolution provisions limits any right the parties may have to refer a dispute to adjudication under the Construction Contracts Act 2002.

### **Arbitration**

134. If no agreement has been reached in mediation within twenty Working Days of the referral to mediation, or within such further time as the parties may agree, then either party may refer the dispute to arbitration. The arbitration will be by a single arbitrator and in accordance with the Arbitration Act 1996.

135. Arbitration in relation to this Building Contract is subject to section 11 of the Arbitration Act 1996 pertaining to consumer arbitration agreements.

### **Litigation**

136. Nothing in these dispute resolution provisions limits any right the parties may have to bring a claim before the District Court or the High Court or the Disputes Tribunal.

## **MISCELLANEOUS**

### **Jurisdiction**

137. This Building Contract is to be interpreted subject to New Zealand law. Disputes arising under this Building Contract are to be resolved in New Zealand.

### **Contact Details for Serving Notices**

138. Every notice given under this Building Contract (including Construction Contracts Act 2002 payment claims) will be sufficiently given if served at the address for service recorded in Part 2 the Building Contract (except when written notice has been provided of a change of address). The parties also agree that information or notices may be provided using the parties' email addresses recorded in this Building Contract. Further details of the parties required by Regulation 6(2)(b) of the Building (Residential Consumer Rights and Remedies) Regulations 2014 are recorded in Part 2 of the Building Contract.

### **Privacy**

139. The Owner consents to the RMB providing MBS and RMBA with any information about the Owner relating to the Building Contract. That information may be stored electronically by MBS and RMBA and where applicable is subject to the Privacy Act 1993. The Owner has the right to access and correct personal information.

140. The RMB shall have no entitlement to use any information about the Owner for promotional purposes unless the Owner consents to such use in writing.