

New Zealand
Certified
Builders
Association



Sample

Fixed Price+

Building Contract

Fixed Price⁺ Building Contract

Between

("the Builder")

(The name of the legal entity that carries on the building business. If a company, insert the full company name. If a partnership, all of the partners should be named. If a trading trust, all of the trustees should be named. If an individual, insert that individual's name.)

(Trading name)

(Physical Address)

<input type="text"/>	<input type="text"/>
----------------------	----------------------

(Postal Address if different from above)

(NZCB No)

(Address for Service)

(Phone)

(Mobile)

(Email)

And

("the Owner")

(The owner or owners of the land on which the Building Work is to be carried out. Where the owners own the land as trustees, all of the trustees should be named. Where the land is owned by a partnership, all of the partners should be named. Where the land is owned by a company or other legal entity, the name of that entity should be used.)

(Street Address)

(Postal Address if different from above)

(Address for Service)

(Contact Person)

(Phone)

(Mobile)

(Email)

SCHEDULE

A. THE PROPERTY

Street Address:

legally described as *(delete all but one)*: Fee simple / Leasehold / Cross lease / Unit Title / Other

Lot		DP		Title No. or Unique Identifier		Land area	m ²
-----	--	----	--	-----------------------------------	--	-----------	----------------

B. THE BUILDING WORK**Description:** Describe in general terms the type of Building Work to be carried out

Personnel: List the person or persons who will be carrying out the Building Work

Supervisors: List any person or persons who will be supervising the Building Work (if appropriate)

Materials: List the materials or products to be used in carrying out the Building Work (if known)

Roof:

Floors:

Framing:

Cladding:

Other:

As per the Contract Documents.

Intended use:

Solely residential

☐

Spec House

☐

Commercial

☐

If only partially residential, provide details:

--

Number of Buildings:

--

Number of storeys in each Building:

--

Expected start date of the Building Work*

(Day)

(Month)

(Year)

Expected completion date of the Building Work**

(Day)

(Month)

(Year)

*Or the date referred to in clause 9.1, whichever is the later

**Subject to clause 9.5

C. ORIGINAL CONTRACT PRICE (inclusive of GST)

\$	
----	--

Amount in figures

Amount in words

D. DEPOSIT (inclusive of GST) (See Clause 7.2 of this Contract for more guidance on the application of the deposit)

\$	
----	--

Amount in figures

Amount in words

E. METHOD OF PAYMENT

Tick selected option below (If no option is ticked or both options are ticked then Option B applies with monthly payments)

EITHER:

Option A ☐ Progress payments on the completion of the following stages (subject to adjustments for Provisional Sums, cost fluctuations, and Variations*):

Establishment	Including but not limited to preliminary costs, consent application costs (if applicable) and special material procurement costs.	5%*	\$	inc GST*
Floor down	Completion of foundations and floor structure	15%*	\$	inc GST*
Framing erected	Completion of all wall and roof framing	15%*	\$	inc GST*
Roof on	Installation and fixing in place of the roof & fascia	15%*	\$	inc GST*
Closed in	Doors and windows installed, interior protected from the elements	15%*	\$	inc GST*
Exterior Cladding	Exterior wall linings in place, stopped & sealed ready for final coating	15%*	\$	inc GST*
Painting & kitchen	Kitchen installed and all exterior & interior decorating/coating completed	10%*	\$	inc GST*
Other (Please specify)			\$	inc GST*
Final Payment	Practical Completion achieved – the final payment must be paid before possession is transferred to the Owners	10%*	\$	inc GST*
Total Progress Payments (this should be equal to the Original Contract Price and is subject to adjustment for Provisional Sums, cost fluctuations and Variations)		100%	\$	inc GST*

*The percentages listed above are indicative only and the monetary sums override the percentages if there is any inconsistency between the two. Adjustments for Provisional Sums, cost fluctuations and Variations will be made to the next invoice after they have been quantified. If any such adjustment has not been made in that invoice, the adjustment may be made at any time subsequently.

OR:

Option B ☐ By (tick one) Weekly ☐ Fortnightly ☐ Monthly ☐

progress payments for the value of Building Work completed and materials supplied up to the end of the relevant period, less amounts already paid. Notwithstanding the period chosen between progress payments, the Builder shall be entitled to invoice separately for subcontractors costs or materials supplied as and when the Builder is invoiced for them. If no period or more than one period has been chosen above then the default progress payment period for Option B shall be monthly.

F. DUE DATES FOR PAYMENTS ** Five (5) Working Days after the invoice is served on the Owner unless otherwise stated.

Due date for progress payments: ☐ Working Days after the invoice is served on the Owner **

Due date for final payment: ☐ Working Days after the invoice is served on the Owner **

G. VARIATION RATES**Labour rates:**

The following hourly rates are inclusive of GST but exclude the Builder's margins for Off-site Overheads and profit.

Carpentry

Owner/Operator	\$	per hour inc GST	Apprentice	\$	per hour inc GST
Carpenter	\$	per hour inc GST	Labourer	\$	per hour inc GST

Other Trades

Trade Type	<input type="text" value="Name"/>	\$ <input type="text" value="per hour inc GST"/>
Trade Type	<input type="text" value="Name"/>	\$ <input type="text" value="per hour inc GST"/>
Trade Type	<input type="text" value="Name"/>	\$ <input type="text" value="per hour inc GST"/>
Trade Type	<input type="text" value="Name"/>	\$ <input type="text" value="per hour inc GST"/>

Agreed Builder's Margins

Agreed margins for Builder's Off-site Overheads and profit, applicable to the following inputs provided in connection with the Project: *(insert only those that apply)*

Materials, whether provided by the Builder or other suppliers

 %

Labour and other inputs supplied by subcontractors or suppliers of trade services to the Builder

 %

Labour supplied by the Builder or its employees

 %
H. INSURANCE (See Part 13 of this Contract for more guidance on the parties' insurance obligations.)

Type of Insurance:	Contract Works	Public Liability
Party Responsible:	Owner <input type="checkbox"/> Builder <input type="checkbox"/> (tick one)*	Builder
Total sum insured*:	\$ <input type="text"/>	\$ <input type="text"/> (Minimum \$1,000,000)

*The total sum insured under the Contract Works policy must be at least as much as the Original Contract Price, plus a reasonable allowance for the following:

Owner supplied Materials					\$ <input type="text"/>
Expediting Expenses	5.00%	or	%	=	\$ <input type="text"/>
Removal of Debris	10.00%	or	%	=	\$ <input type="text"/>
Professional Fees	5.00%	or	%	=	\$ <input type="text"/>
Increased Costs During Construction	5.00%	or	%	=	\$ <input type="text"/>
Increased Costs During Re-construction	5.00%	or	%	=	\$ <input type="text"/>
Materials in Storage (off Project site)					\$ <input type="text"/>

I. GUARANTEE

Is this a residential building contract? (tick one)

Yes

☐

No

☐

**(If in doubt, see the definition of residential building contract in section 362B of the Building Act 2004)*

Is the Original Contract Price (see Part C of the Schedule) more than \$30,000 incl. GST? (tick one)

Yes

☐

No

☐

If the answer to the above two questions is "Yes", the Builder will apply for a Guarantee in relation to the Building Work.

If the Original Contract Price (see Part C of the Schedule) is \$30,000 incl. GST or less, will the Builder apply for a Guarantee regardless? (tick one)

Yes

☐

No

☐

J. CONTRACT DOCUMENTS

The Contract Documents comprise this Contract together with any of the following documents or records that exist in relation to the Building Work (to the extent that they have not been superseded). If they exist and are current then the corresponding box on the right hand side of the list should be ticked, and they should be attached to this Contract. However, regardless of whether the corresponding box is ticked or whether the documents have been attached, if they exist in relation to the Building Work then to the extent that they have not been superseded they shall form part of the Contract Documents.

Plans and Drawings☐

Notated Drawings comprising

sheets numbered

to

☐**The Specification**☐

The Builder's scope of work for the Building Work or other document describing and/or providing a breakdown of the Building Work and materials that will be required to construct the Building and listing any Building Work or materials that are the Owner's responsibility

☐**Any Addition or Modification to the Specification**☐**Other relevant Communications**

Specify

☐**Other relevant Notes, Images, Mock-ups, Diagrams or Records**

Specify

☐**SIGNED FOR & ON BEHALF OF THE BUILDER****Name of Signatory**

Name the person who is signing this Contract on behalf of the building company, partnership, trading trust, sole proprietor or other entity.

(NZCB No)

Signature

Date

SIGNED FOR & ON BEHALF OF THE OWNER(S)

If Part 4A of the Building Act 2004 applies to this Contract, I/we acknowledge that the Builder has supplied, and I/we have received, the disclosure information and checklist prescribed in regulation 5 of the Building (Residential Consumer Rights and Remedies) Regulations 2014.

Name(s) of Owner(s)

Signature

Date

Signature

Date

Signature

Date

THE PARTIES AGREE as follows:**1 Interpretation**

- 1.1 In this Contract, unless inconsistent with the context, the following expressions shall have the following meanings:
- a) "Building" means the product or tangible result of the Building Work, whether it existed only temporarily to facilitate the Building Work, or remains as a permanent or semi-permanent feature at the conclusion of the Building Work.
 - b) "Building Consent" means a Building Consent issued for the Project by a building consent authority under the Building Act 2004.
 - c) "Building Work" means the building services to be provided by the Builder (and/or the Builder's subcontractors and suppliers) as described in the Contract Documents (subject to any Variations) and (if applicable) the relevant Building Consent.
 - d) "NZCB" means New Zealand Certified Builders Association Incorporated.
 - e) "CCA" means the Construction Contracts Act 2002.
 - f) "Code Compliance Certificate" means a certificate issued by a building consent authority under section 95 of the Building Act 2004, and once section 6(3) of the Building Amendment Act 2012 comes into force, means a "Consent Completion Certificate" as defined in that Act.
 - g) "Contract" means this Building Contract together with the other Contract Documents.
 - h) "Contract Documents" means the plans, drawings, specifications, or other documents which contain the detailed descriptions, diagrams and instructions relating to the performance of the Building Work, including any document detailing the scope of work (to the extent that it has not been superseded).
 - i) "Deposit" means the figure entered in Part D of the Schedule.
 - j) "Final Contract Price" means the total amount payable by the Owner to the Builder for the Building Work, being the Original Contract Price adjusted for Provisional Sums, cost fluctuations, and Variations.
 - k) "Guarantee" means the Halo 10 Year Residential Guarantee Insurance available exclusively to members of NZCB.
 - l) "Margin" means the percentage figure entered in the relevant box in the section headed "Agreed Builder's Margins" in Part G of the Schedule for Off-site Overheads and profit.
 - m) "Off-site Overheads" means expenses or losses not incurred on-site that are attributable to the general overall running of the Builder's business.
 - n) "Original Contract Price" means the figure entered in Part C of the Schedule.
 - o) "Parties" means the Owner and the Builder.
 - p) "Practical Completion" means both the point in time, and the stage in the progression of the Building Work, when the Building Work is so far advanced that the Building can effectively be used by the Owner for its intended purpose, notwithstanding that certain non-critical or aesthetic features are yet to be completed or minor omissions or defects are yet to be rectified.
 - q) "Project" means the combination of the Building Work and all other inputs required to achieve the completion of the structure that the Owner intends to have built.
 - r) "Property" means the place where the Building Work is to be performed, or (if the Building is to be partly or wholly constructed off-site) the place where the Building is to be located after completion, as identified by the address and/or legal description entered in Part A of the Schedule.
 - s) "Provisional Sum" means a sum included in the Original Contract Price, for Building Work or materials to be supplied by the Builder, which is an estimate or an approximation made either by the Builder or subcontractor carrying out that Building Work or by the supplier who is to supply those materials, in circumstances where it is impractical to precisely calculate the true cost at that point in time.
 - t) "Served" means sufficiently served within the meaning of section 80 of the CCA or Regulation 9 of the Construction Contracts Regulations 2003 and "Serve" has a corresponding meaning. For the purposes of those Regulations the Parties shall be deemed to have unconditionally consented under Regulation 10(1)(b).
 - u) "Variation" means any Building Work or materials that are not, whether expressly or by necessary implication, provided or allowed for in the plans, drawings or specifications forming part of the Contract Documents at the time this Contract is signed by the Builder, or any other event or circumstance described in this Contract which is, or is to be treated as, a Variation, and includes any preparatory work done in connection with a proposed Variation whether or not it proceeds.
 - v) "Working Day" means any calendar day other than Saturday, Sunday, statutory holidays, any applicable regional holiday, and the period 24 December to 5 January inclusive.
- 1.2 The headings to clauses in this Contract are for convenience only and shall not affect their interpretation.
- 1.3 Any references in this Contract to a statute or regulation shall be taken to refer to that statute or regulation as subsequently amended, consolidated or re-enacted.

- 1.4 This Contract together with the Contract Documents constitute the entire agreement between the Parties in relation to the Project and they supersede any and all other agreements, arrangements, understandings or representations whether spoken or in writing in respect of or in connection with the Building Work.

2 Builder's Primary Obligations

- 2.1 The Builder shall carry out and perform the Building Work to the standard required by the Contract Documents (subject to any Variations) and (if applicable) the relevant Building Consent.
- 2.2 The Builder shall carry out and perform the Building Work diligently and conscientiously, and shall complete the Building Work as soon as is reasonably practicable.
- 2.3 If this is a Contract to which sections 362I-362K of the Building Act 2004 apply, then the Builder warrants that:
- a) The Building Work will be carried out:
 - i. in a proper and competent manner; and
 - ii. in accordance with the plans and specifications forming part of this Contract; and
 - iii. in accordance with the relevant Building Consent.
 - b) All materials to be supplied for use in the Building Work:
 - i. will be suitable for the purpose for which they will be used; and
 - ii. unless otherwise stated in this Contract, will be new.
 - c) The Building Work will be carried out in accordance with, and will comply with, all laws and legal requirements, including, without limitation, the Building Act 2004 and its regulations.
 - d) The Building Work will:
 - i. be carried out with reasonable care and skill; and
 - ii. be completed by the date (or within the period) specified in this Contract or, if no date or period is so specified, within a reasonable time.
 - e) The Building, if it is to be occupied on completion of the Building Work, will be suitable for occupation on completion of that Building Work.
 - f) If this Contract states the particular purpose for which the Building Work is required, or the result that the Owner wishes the Building Work to achieve, so as to show that the Owner relies on the skill and judgment of the Builder, that the Building Work and any materials used in carrying out the Building Work will:
 - i. be reasonably fit for that purpose; or
 - ii. be of such a nature and quality that they might reasonably be expected to achieve that result.
- 2.4 If the Building Work constitutes services to which the Consumer Guarantees Act 1993 applies, then the Builder guarantees that:
- a) The Building Work will be carried out with reasonable care and skill.
 - b) The Building Work, and the Building, will be:
 - i. reasonably fit for any particular purpose; and
 - ii. of such a nature and quality that it can reasonably be expected to achieve any particular result, that the Owner makes known to the Builder, before or at the time of the making of this Contract, as the particular purpose for which the Building Work is required or the result that the Owner desires to achieve, as the case may be, except where the circumstances show that:
 - A) the Owner does not rely on the Builder's skill or judgment; or
 - B) it is unreasonable for the Owner to rely on the Builder's skill or judgment.
 - c) The Building Work will be completed within a reasonable time in any case where the time for the Building Work to be carried out is not:
 - i. fixed by this Contract; nor
 - ii. left to be fixed in a manner agreed by this Contract; nor
 - iii. left to be determined by the course of dealing between the parties.
 - d) The Owner is not liable to pay to the Builder more than a reasonable price for the Building Work in any case where the price for the Building Work is not:
 - i. determined by this Contract; nor
 - ii. left to be determined in a manner agreed by this Contract; nor
 - iii. left to be determined by the course of dealing between the parties.

- 2.5 If the warranties and/or the guarantees set out in clauses 2.3 or 2.4 apply, then notwithstanding any other provision of this Contract they shall be subject to the same preconditions, exceptions, qualifications, limitations, constraints and prescribed procedures (including remedies and enforcement rights) as are set out in the Building Act 2004 or the Consumer Guarantees Act 1993 (as the case may be) as if those statutes were reproduced in full in this Contract.
- 2.6 If the Building Work is to be carried out for the purposes of a business, then all guarantees, warranties, rights or remedies implied by the Consumer Guarantees Act 1993, the Fair Trading Act 1986 or any similar statutes are expressly excluded. To the maximum extent permitted by law, all guarantees, warranties or provisions that would otherwise be implied by statute or rule of law are expressly excluded, as are any representations or statements made prior to these terms and conditions taking effect.

3 Owner's Primary Obligations

- 3.1 The Owner shall pay the Builder the Final Contract Price, in progress payments in the manner set out in Part E of the Schedule on or before the due dates for payment stated in Part F of the Schedule.
- 3.2 The Final Contract Price shall be the Original Contract Price adjusted as follows:
- Any Provisional Sums shall be recalculated in accordance with Part 4.
 - Adjustments shall be made for any cost fluctuations in accordance with Part 5.
 - Adjustments shall be made for any Variations in accordance with Part 6.
- 3.3 To the extent that the Owner is to supply any products or services in connection with the Project, whether personally or by arrangement with a supplier or contractor, then the Builder's prior written consent is required, and the Owner must ensure that:
- those products or services meet the same standards as the Builder is required to attain in respect of the products and services the Builder is responsible for supplying under this Contract; and
 - those products and services are delivered at such a time and in such a manner that the Builder is not impeded from complying with the Builder's obligations under this Contract.
- 3.4 The Owner must proceed with the Project expeditiously and without delay, and must not unreasonably impede the Builder in the performance of the Builder's obligations. Without limiting the above obligation the Owner must promptly and comprehensively provide any information and make any decision that the Builder may reasonably request.

4 Provisional Sums

- 4.1 Calculation of Provisional Sums by the Builder must be based on a reasonable estimate of the likely cost of the materials or services specified.
- 4.2 Any Provisional Sums shall be recalculated by reference to the actual expenditure incurred in connection with the relevant aspect of the Building Work, as soon as it is known. The actual expenditure shall be calculated on a cost reimbursement basis using the actual cost of labour, materials and other inputs provided in connection with the relevant aspect of the Building Work, plus the relevant Builder's Margin for Off-site Overheads and profit, all as set out in Part G of the Schedule. Any difference between the Provisional Sum and the actual expenditure shall be reflected in either a credit or an additional charge in the next or any subsequent Builder's invoice.

5 Cost Fluctuations

- 5.1 The Original Contract Price shall be adjusted for any increase in the cost of subcontractors or materials that could not reasonably have been foreseen by the Builder at the time this Contract is signed by the Builder, and which would otherwise have the effect of eroding the Builder's profit margin. The Builder must be able to substantiate the increase by reference to written evidence such as quotations or invoices, both of the subcontractor or supplier pricing that formed the basis of the Original Contract Price, and the increased price of the same item. The Builder shall whenever reasonably practicable, resist any price increases and procure subcontracts and materials on the basis of fixed prices that cannot be increased during the course of the Building Work.
- 5.2 If the subcontractor or supplier pricing that formed the basis of the Original Contract Price decreases for any reason (other than rebates or discounts provided to the Builder as a result of such factors as loyalty, volume of business, enticement to form a new or long term trading relationship, or membership of a trade association or cooperative company), the Original Contract Price shall be adjusted downwards accordingly.
- 5.3 The Original Contract Price shall be adjusted to include any increases or decreases in Goods and Services Tax ("GST") that come into effect after this Contract is signed by the Builder, unless the parties have expressly agreed in writing that the Original Contract Price already allows for any such increase or decrease in GST.

6 Variations

- 6.1 The Builder shall carry out all Variations that the Owner or the Owner's authorised agent instructs or requests the Builder to carry out, provided that any such Variation does not impose an unreasonable burden on the Builder. Wherever reasonably practicable any Variation shall be recorded in writing and the estimated cost of the Variation advised to the Owner by the Builder, but any failure to do so shall not disqualify the Owner from his/her/its entitlement to have the Variation carried out, nor disqualify the Builder from his/her/its entitlement to be paid for the Variation in accordance with the provisions of this Part 6.
- 6.2 The Builder shall be entitled to add the cost of any work performed on a Variation, to the Builder's next invoice for the relevant stage of completion or invoice period, depending on whether Option A or Option B in Part E of the Schedule is chosen. Whenever reasonably requested by the Owner, the Builder shall separately identify the cost of the Variation from the cost of the other Building Work to which the invoice relates, and provide reasonable documentary evidence to verify the cost of the Variation. However separate identification and verification shall not be a prerequisite to payment of the relevant invoice on or before its due date.
- 6.3 The cost of each Variation shall be equivalent to the total sum the Builder would have charged the Owner for the relevant Building Work, if the Builder had carried out the Variation on a charge-up or cost-reimbursement basis. The Builder shall be entitled to charge for and recover all costs that the Builder would not have incurred but for the Variation and that are reasonably necessary to carry out the Variation to the standard required by this Contract, plus the relevant Builder's Margins. Those costs include (without limitation):
- The Builder's own labour and labour performed by the Builder's employees and contractors.
 - Products or services from subcontractors or specialist trades.
 - Professional advice such as architecture and engineering.
 - Building materials and consumables.
 - Hireage of tools, plant, equipment, appliances or vehicles.
- 6.4 The cost of labour shall be calculated using the labour rates set out in Part G of the Schedule, or where no rates have been specified in any particular case, at the prevailing market rates for the personnel in question. The labour rates set out in Part G of the Schedule apply to normal working hours and days, and in calculating working hours no deduction shall be made for work breaks that are reasonably necessary for the consumption of food or beverages or to ensure the continued health, safety, productivity and efficiency of the relevant personnel. Where in order to comply with the Builder's obligations under this Contract it is reasonably necessary for the Builder and/or the Builder's employees and subcontractors to carry out a Variation outside of normal working hours or on weekends or public holidays, and the Builder is required to pay penal or overtime rates as a result, those penal or overtime rates shall be included in the calculation of the cost of the Variation.
- 6.5 All the costs of the Variation apart from labour shall be calculated by reference to the invoice issued to the Builder for the relevant item, or if no invoice was issued, by reference to what the Builder actually paid. Where such costs cannot be separately identified or accurately ascertained through timesheets, invoices or otherwise, the cost of those items shall be calculated having regard to the prevailing market price for the relevant items.
- 6.6 The relevant Builder's Margins shall be applied to all costs of the Variation including labour. The total cost of the Variation shall be calculated as follows:
- Any GST component shall be deducted from all costs of the Variation including labour.
 - The relevant Builder's Margins shall be applied to all costs (excluding GST).
 - GST shall be added to the total of b) above.
- 6.7 Notwithstanding clause 6.6 above, if a Variation results in a net decrease in the Original Contract Price, the Margins on that net decrease shall be nil.
- 6.8 Where a Variation results in a reduction in the scope of the Building Work the Builder would otherwise have had to perform, with the result that the Original Contract Price would have been less if the Builder had priced the job on the basis of plans and specifications that included the Variation, then the Original Contract Price shall be reduced accordingly. The amount of the reduction shall be calculated in the same way as an increase would be. However the Builder shall be entitled to set off against that reduction, any costs or wasted expenditure incurred as a result of making the change during the course of the Project, including any expenditure that was incurred in the reasonable expectation that the original plans and specifications were going to be adhered to, plus the Builder's Margin.
- 6.9 The Owner may only reduce the scope of the Building Work if the Owner no longer requires the eliminated work to be carried out. To clarify, the Owner may not reduce the scope of the Building Work if the Owner intends to carry out the eliminated work personally or engage a substitute builder or contractor to carry it out.

7 Invoices and Payments

- 7.1 The Builder is not obliged to commence the Building Work until any deposit payable in accordance with clause 7.2 has been paid.
- 7.2 The Deposit shall be paid by the Owner upon signing the Contract. The Deposit shall be held by the Builder and applied towards payment of the final invoice, or as provided by clause 20.9 or clause 21.4. The Deposit is therefore not to be treated as a progress payment. If the final invoice is less than the Deposit then the Builder shall pay the Owner the balance of the Deposit upon issuing the final invoice.
- 7.3 The Owner shall make progress payments to the Builder for Building Work completed and materials supplied, including any adjustments for Provisional Sums, cost fluctuations or Variations, up to the end of the applicable period or stage of work. The payments shall be made into a bank account provided by the Builder via internet banking or direct deposit, unless the parties agree on a different payment method.
- 7.4 Where the parties have agreed to progress payments at completion stages (Option A in Part E of the Schedule) the Builder may issue an invoice at any time after a relevant stage of completion is reached. If a completion stage cannot be reached due to matters beyond the Builder's reasonable control, and one month has elapsed since the previous invoice, the Builder may invoice for the proportion of that completion stage that has been reached.
- 7.5 Where the parties have agreed to progress payments at the end of defined periods of time (Option B in Part E of the Schedule) the Builder may issue an invoice for the Building Work completed up to the end of each such period. Any invoice issued in advance of the end of the relevant period (other than a final invoice) shall be deemed to have been issued on the last working day of that period.
- 7.6 The Owner must pay the invoiced amount in full within 5 Working Days of the invoice being delivered or sent to the Owner or such other time as is stated in Part F of the Schedule. If the Owner does not consider that all or any part of the invoiced amount is payable, the Owner must, within 5 Working Days after the invoice was delivered or sent to the Owner:
- reply in writing to the Builder stating the amount that the Owner considers payable (the undisputed amount), and specifying the reasons why any part of the invoiced amount is disputed, and the method in which the disputed amount has been calculated; and
 - pay the undisputed amount.
- 7.7 If the Builder's invoice is or is accompanied by a payment claim made under the CCA, then any payment schedule as defined in section 5 of that Act must be provided to the Builder within 5 Working Days of the payment claim being served on the Owner.
- 7.8 The Owner shall pay progress payments on the due dates, irrespective of when the Owner's bank or financier is prepared to advance any monies required by the Owner in order to meet the Owner's payment obligations under this Contract. It is the Owner's responsibility to ensure that sufficient funds are available to comply with the Owner's payment obligations under this Contract. The issue of a Code Compliance Certificate is not a prerequisite to Practical Completion or the Builder's entitlement to payment of the final invoice.
- 7.9 The Owner may at any time request the Builder to provide a receipt or statement recording or evidencing the payments received from the Owner.
- 7.10 The Parties will comply with their obligations (if any) under Subpart 2A of the CCA (which requires certain retention monies to be held on trust or otherwise secured) to the extent that Subpart 2A applies to this Contract. The purpose of this provision is to ensure that an adjudicator appointed under the CCA or an arbitrator appointed under the Arbitration Act 1996 has jurisdiction to make a determination in respect of any such obligations, as if they were expressly incorporated into this Contract.

8 Possession of Site

- 8.1 Once the Contract has been signed by both parties the Owner shall give the Builder free and uninterrupted access to and possession of the site until possession is transferred to the Owner as provided by Part 17 of this Contract.
- 8.2 Subject to the provisions of Part 12 of this Contract, the Builder shall during the period of possession, control all matters concerning access to and work undertaken on the site and may take whatever steps he deems necessary to comply with the Health and Safety at Work Act 2015 and all similar requirements.
- 8.3 Once possession of the site is returned to the Owner, the Owner shall give the Builder free and uninterrupted access to the site to enable the Builder to undertake any remedial work that is necessary after Practical Completion.

9 Commencement and Completion of Work

- 9.1 The Builder shall commence the Building Work within a reasonable time after:
- the Contract has been signed by both parties; and
 - any deposit payable in accordance with clause 7.2 has been paid; and
 - any necessary Building Consent or resource consent or other requisite consents or licences or consent amendments have been issued.
- 9.2 Unless otherwise agreed in writing between the Parties, the Owner shall obtain all project information memoranda, Building Consents, resource or other consents or licences, and consent amendments required for the Building Work.
- 9.3 The Owner shall promptly provide all information reasonably required by the Builder to enable the Builder to comply with the Builder's obligations under this Contract, whether prior to the commencement of, during the performance of, or after the completion of the Building Work.
- 9.4 Where the Owner has been issued a Guarantee, the Owner shall be responsible for completing the steps referred to in clause 9.1 to enable the Guarantee application to be processed and (if applicable) approved.
- 9.5 The expected completion date stated in Part B of the Schedule shall be automatically extended by a reasonable time where delays arise due to:
- Variations;
 - Any strike, lockout, or other industrial action;
 - Loss or damage to the Building Work other than loss or damage caused by the Builder's breach of its obligations under this Contract;
 - Flood, volcanic, or seismic events;
 - Inclement weather;
 - Failure to obtain consent or approval through no fault of the Builder;
 - Failure by the Owner to give timely directions;
 - Unforeseen physical conditions;
 - The Builder exercising its right to suspend the Building Work under this Contract;
 - Act, omission or default by the Owner or any person for whose acts or omissions the Owner is responsible;
 - A separate contractor's act or omission;
 - Unavailability or shortage of materials;
 - Any other event which is beyond the reasonable control of the Builder and for which the Builder is not responsible.

10 Contract Document Flaws

- 10.1 In the event of any conflict or inconsistency between any of the Contract Documents, the Project-specific documents such as the plans and drawings and any detailed scope or description of the Building Work shall take precedence over standard form or generic documents. Figured dimensions shall take precedence over scaled dimensions.
- 10.2 If any error, omission, mistake or discrepancy in any of the Contract Documents, or any conflict or inconsistency between any of the Contract Documents, results in the Builder incurring costs or suffering a loss which could not reasonably have been anticipated at the time the Builder signed this Contract, those costs or that loss shall be treated as if they were a Variation.
- 10.3 The Builder is entitled to rely on the designer of the Building, the relevant Building Consent authority, and any publicly or privately owned accreditation entity charged with approving building designs, products or processes, to ensure that the Contract Documents and any directives issued by any of those parties, if faithfully adhered to, will result in compliance with the Building Code. Notwithstanding this, the Builder is not obliged to carry out any Building Work that the Builder reasonably believes does not comply with the Building Code, and may require the Owner to approve a Variation in order to ensure compliance.

11 Survey Markings

- 11.1 Unless they are already in place and there is no reason to doubt their accuracy, the accurate location of all site boundary pegs, offset pegs, and datum pegs shall be verified or established by a registered surveyor employed by the Owner.
- 11.2 Any additional Building Work required or costs incurred by the Builder as a result of the inaccurate location of any site boundary pegs, offset pegs, and datum pegs, shall be treated as a Variation unless the inaccuracy is caused by the Builder or someone for whom the Builder is legally responsible.
- 11.3 The Builder shall take reasonable care to maintain and protect all such pegs.

12 Right of Access

- 12.1 The Owner, the Owner's authorised representatives, and any separate contractors engaged by the Owner shall be entitled to have access to and inspect the Building during normal working hours, and outside of those hours only if reasonably convenient to the Builder. In either case the access must be in the presence of the Builder or one of the Builder's employees or contractors who is in charge of the site, unless otherwise agreed.
- 12.2 The Builder shall not be responsible for any damage done to the Building by the Owner, the Owner's authorised representatives, and any separate contractors engaged by the Owner, whether or not the Builder or one of the Builder's employees or contractors who is in charge of the site is present at the time.
- 12.3 The Owner shall indemnify the Builder against any loss, damage or claim resulting from:
- any damage to the Building caused by the Owner, the Owner's authorised representatives, and any separate contractors engaged by the Owner; and
 - any breach of the Health and Safety at Work Act 2015 caused by the Owner, the Owner's authorised representatives, and any separate contractors engaged by the Owner.
- 12.4 Nothing in this clause shall limit or negate sections 222-228 (inclusive) of the Building Act 2004 (which relate to the powers of a territorial authority to carry out inspections and enter land).

13 Insurance

- 13.1 Part H of the Schedule contemplates that the Parties will elect who is responsible for arranging the contract works insurance. If the Parties have not made that election or if their intention is unclear, then the Owner must arrange contract works insurance if the Building Work involves changes, alterations, renovations, restoration, repairs or maintenance to existing structures, and the Builder is responsible for arranging contract works insurance if the Building Work involves constructing an entirely new stand-alone structure. Irrespective of who arranges the contract works insurance, the excess on a contract works claim is payable by the Owner. Given that such insurance typically expires on Practical Completion, the Owner must ensure that the Building is insured from that point onwards.
- 13.2 The amount insured must be at least as much as the Original Contract Price, plus an allowance for Owner-supplied materials, expediting expenses, removal of debris, professional fees, increased costs during construction, increased costs during re-construction, and materials in storage (off the Project site). Unless otherwise agreed, the allowances for these items shall be those shown in Part H of the Schedule, and if no allowance is made in that Part for any item then the allowance must be reasonable in the circumstances.
- 13.3 The Owner must arrange contract works insurance against loss or damage to the Owner's existing structures made available by the Owner to enable the performance of the Building Work, or existing structures adjacent to the Building, and to the Owner's contents. This insurance must be for the full replacement value, and for consequential loss arising from loss or damage to those structures and contents.
- 13.4 The Builder must arrange public liability insurance for loss or damage to any property, or illness, injury or death to any person, that arises from the performance of the Building Work.
- 13.5 In the event of loss or damage to any part of the Building which is not caused by the Builder or any party for whom the Builder is responsible:
- The Builder is not required to carry out any restoration work at the Builder's own expense.
 - The Builder will restore all loss or damage to the Building and the restoration work will be treated as a Variation.
 - The restoration work will be paid for from the proceeds of the contract works insurance.
 - If the delay in confirming insurance cover after loss or damage to the Building has occurred is such that the Builder can no longer reasonably afford to maintain spare capacity to perform the Building Work when required, the Builder

may suspend the Building Work as if clause 20.2 applied, and if the Builder has not cancelled the contract in the meantime, the Builder shall not be obliged to resume the Building Work until the Builder's commitments reasonably allow for a resumption.

- 13.6 If this Contract is completed on-line, and either Party has selected the option to apply for a contract works policy marketed under the "REDi" brand, then an application for such a policy will be automatically generated from the information entered into the Schedule of this Contract.
- 13.7 The insurance broker responsible for arranging the REDi contract works policy and the underwriter(s) to whom the application is submitted together with their respective representatives or agents are authorised to obtain from, and disclose to, any other party any information they consider relevant to the assessment of the application for the policy.
- 13.8 For the purpose of section 12 of the Contract and Commercial Law Act 2017, the provisions in this Part 13 are intended to create obligations enforceable by the insurance broker and the underwriter(s) referred to in clause 13.7 and their respective representatives or agents, whether or not they are parties to this Building Contract.

14 Unprocurable Materials

- 14.1 If any materials specified are not reasonably procurable, the Builder may substitute other materials of a similar nature and quality after consultation with the Owner.
- 14.2 If the substitution requires an amendment to the plans, specifications or the Building Consent, the Owner shall be responsible for obtaining and paying for the amendment, and any time spent by the Builder in assisting the Owner with the amendment shall be treated as a Variation and charged in accordance with Part 6.

15 Materials on Site

- 15.1 The Builder shall retain legal, equitable and beneficial ownership of and title to any plant, equipment, appliances, products or materials that are intended to be incorporated into the Building, even once they have been brought onto the Property by the Builder or the Builder's subcontractors or suppliers (the "Builder's Materials"), until the progress payment relating to the Builder's Materials, and all preceding progress payments, have been paid in full.
- 15.2 Notwithstanding the attachment or intermingling of the Builder's Materials to or with any other object or materials, the Builder's Materials shall retain their identity as personal property of the Builder for as long as the Builder retains legal, equitable and beneficial ownership of and title to them.
- 15.3 In the event of the sale of the Property or of the Builder's Materials by the Owner, the Owner must hold on trust for the Builder that part of the proceeds of the sale that is equal to the amount owing to the Builder at the time of receipt of the proceeds, and immediately pay such proceeds to the Builder on demand.
- 15.4 Should the Owner default in any payment due to the Builder, or breach any of the Owner's other obligations under this Contract, the Builder shall be entitled to enter the Property and remove any of the Builder's Materials and to sell any of them in order to recover any monies owing by the Owner under this Contract. All costs and expenses incurred by the Builder in doing so shall be paid by the Owner on demand or deducted from the proceeds of sale.

16 Alteration to the Works

- 16.1 In the event that any alteration to the Building Work is required:
- a) as a condition of the granting of any Building Consent or other consent or licence or;
 - b) as a result of changes to applicable law relating to building; or
 - c) by any regulatory agency either before or after the Building Work commences,
- and the requirement for the alteration to the Building Work was not reasonably foreseeable by the Builder when calculating the Original Contract Price, the alteration shall be deemed to be a Variation.

17 Practical Completion and Possession by the Owner

- 17.1 On Practical Completion and as soon as:
- a) The Owner has signed the Certificate of Practical Completion (Appendix 1) and any similar certificate required as a condition of the Guarantee;
 - b) The Owner has paid to the Builder the Final Contract Price; and

- c) Where the Builder is a commercial on-seller as defined in section 362V of the Building Act 2004, the territorial authority has issued a Code Compliance Certificate or the Owner and the Builder have entered into a separate written agreement under section 362V of the Building Act 2004;

the Owner shall be entitled to immediate possession of the Building.

- 17.2 The parties agree that the three prerequisites to possession outlined in clause 17.1 are essential terms of this Contract. If the Owner, without the Builder's prior written consent, takes or attempts to take possession of the Building without having satisfied sub-clauses (a) and (b) (and sub-clause (c) if applicable), then without prejudice to the Builder's other rights and remedies:
- a) the Builder shall be entitled to cancel this Contract;
 - b) the Builder shall not be obliged to provide any information or documentation or take any other action necessary to enable a Code Compliance Certificate to be issued in respect of the Building Work, except that any Licensed Building Practitioner engaged by the Builder shall remain obliged to provide a Record of Work in relation to any Restricted Building Work carried out or supervised by that Licensed Building Practitioner; and
 - c) the Builder shall be immediately discharged from any further obligation or liability in respect of the Building, the Building Work and this Contract.
- 17.3 Where the Owner requires possession of the Building prior to Practical Completion, the Owner must pay to the Builder the Final Contract Price (or the Builder's reasonable estimate of what the Final Contract Price will be) prior to taking possession.
- 17.4 The Builder may, at the Builder's absolute discretion, allow the Owner to take possession prior to payment of the Final Contract Price in full, provided that the Owner provides such security as the Builder may reasonably require for payment of any unpaid or disputed amounts, at the Owner's expense.
- 17.5 Following Practical Completion and satisfaction of the three prerequisites to possession outlined in clause 17.1, and provided that the Owner is not otherwise in default of the Owner's obligations under this Contract, the Builder shall provide the Owner with all information and documentation as may be reasonably required, and take all reasonable and necessary actions, to enable the Owner to apply for a Code Compliance Certificate.
- 17.6 The issue of a Code Compliance Certificate under the Building Act 2004 is not a prerequisite to Practical Completion, nor is practical completion of the whole Project a prerequisite to Practical Completion when the Builder is only engaged to construct a part of it.

18 Rectification of Defects

- 18.1 Any defect in the Building which is notified to the Builder in writing within 45 days after Practical Completion, or within 12 months after completion of the Building Work if section 362Q of the Building Act 2004 applies to this Contract, shall be rectified by the Builder at the Builder's expense, within a reasonable time. The notification of any defect must be sufficiently detailed so that the Builder knows precisely what is required to be done.
- 18.2 In this Part 18 a "defect" means any fault or flaw in the Building Work or the Building which is sufficient to constitute a breach of the Builder's obligations under clauses 2.1 and 2.2 of this Contract or any implied warranties or guarantees, and "rectified" means remedied, re-done, fixed or completed so that the relevant item complies with those obligations. Defects do not include:
- a) Mere cosmetic blemishes, imperfections, or trivial faults or flaws that are within the tolerances normally regarded as acceptable according to common trade practice.
 - b) Any failure to achieve standards of finish or detail that are beyond what is required by the Contract Documents (subject to any Variations) and (if applicable) the relevant Building Consent.
 - c) Any fault or flaw that is attributable to the acts or omissions of, or materials supplied by, anyone who has contracted directly with the Owner.
 - d) Any fault or flaw that is attributable to any event or occurrence beyond the Builder's reasonable control or the acts or omissions of anyone for whom the Builder is not responsible.
 - e) Any fault or flaw that is attributable to fair wear and tear, or any failure by the Owner to adequately maintain, preserve, protect and care for the Building.
- 18.3 The Builder is both obliged and entitled to rectify any defects in accordance with clause 18.1. The Owner must give the Builder a reasonable opportunity to rectify any defects that are notified in accordance with that clause and shall not engage anyone else to do so unless and until a reasonable time has elapsed and the Owner has given the Builder at least 20 Working Days notice of the Owner's intention to engage someone else, or the Builder has permanently and unequivocally abandoned the Project. If the Owner engages someone else to rectify any defects when the Owner is not entitled to do so, then without prejudice to the Builder's other rights and remedies:
- a) the Builder shall be entitled to cancel this Contract;
 - b) the Builder shall not be obliged to provide any information or documentation or take any other action necessary to enable a Code Compliance Certificate to be issued in respect of the Building Work, except that any Licensed Building

Practitioner engaged by the Builder shall remain obliged to provide a Record of Work in relation to any Restricted Building Work carried out or supervised by that Licensed Building Practitioner; and

- c) the Builder shall be immediately discharged from any further obligation or liability in respect of the Building, the Building Work and this Contract.

- 18.4 Any period during which the Building Work has been suspended as a consequence of Owner's default shall not be counted when calculating what is a reasonable time for rectification, and any such suspension shall not be construed as a permanent and unequivocal abandonment.

19 Guarantee

- 19.1 The Builder warrants that the Builder is a Business Member of NZCB, and by virtue of that membership is able to arrange for a Guarantee to be issued to the Owner (subject to any applicable conditions and qualifying criteria being satisfied) for an additional cost. In general terms, and subject to the express wording of the Guarantee itself, the Guarantee is intended to protect the Owner against:
- a) The loss of any deposit paid to the Builder if the Builder for a variety of reasons does not commence the Building Work.
 - b) Losses sustained by the Owner if the Builder for a variety of reasons does not complete the Building Work.
 - c) The cost of remedying defects in the Building Work and resulting damage that are attributable to the Builder and are not put right by the Builder after Practical Completion.
- 19.2 The Guarantee is a separate Contract between the Owner and the insurance underwriter, and is arranged by an insurance broker. Unless and until otherwise advised, the insurance underwriter is Lloyd's of London Syndicate 4444, acting through the agency of Archer Group Ltd and under the management of Canopus Managing Agents Ltd, and the insurance broker is BrokerWeb Risk Services Ltd. Although they work closely together, the underwriter, the agent, the manager and the insurance broker are all independent of both the Builder and NZCB.
- 19.3 The following clauses 19.4-19.7 apply if the parties have indicated in Part I of the Schedule that the Builder will apply for a Guarantee.
- 19.4 If this Contract is completed on-line then an application for a Guarantee in relation to the Building Work will be automatically generated from the information entered into the Schedule of this Contract. If instead this Contract is completed in hard copy then an application for a Guarantee in relation to the Building Work will be completed by the Builder and then signed by both the Builder and the Owner before being submitted by the Builder to the insurance broker who arranges the Guarantee.
- 19.5 In either case, the application for the Guarantee forms the basis of, and will become incorporated into, the Guarantee. The underwriter, the agent, the manager and the insurance broker referred to in clause 19.2 and their respective representatives or agents are authorised to obtain from, and disclose to, any other party any information they consider relevant to the assessment of the application.
- 19.6 The application for the Guarantee must be accepted by or on behalf of the underwriter, and the appropriate premium paid, before the Guarantee comes into effect. An acceptance letter, policy schedule and the Guarantee policy wording will be sent to the Owner once cover has been confirmed.
- 19.7 For the purpose of section 12 of the Contract and Commercial Law Act 2017, the provisions in this Part 19 are intended to create obligations enforceable by the underwriter, the agent, the manager and the insurance broker referred to in clause 19.2 and their respective representatives or agents, whether or not they are parties to this Building Contract.

20 Owner Default

- 20.1 If at any time the Owner fails to pay any sum owed to the Builder in full by the due date, the Owner shall pay interest on the amount outstanding from the due date until the date of payment. The interest rate shall be the Builder's default bank overdraft borrowing rate, or one and a half times the Builder's non-default bank overdraft borrowing rate, whichever is the higher. The entitlement to interest is without prejudice to any of the Builder's rights and remedies in respect of the non-payment.
- 20.2 If at any time the Owner fails to pay any sum owed to the Builder in full by the due date, or any act, omission or default by the Owner effectively precludes the Builder from continuing the Building Work or performing or complying with the Builder's obligations under this Contract, then without prejudice to the Builder's other rights and remedies, the Builder may suspend the Building Work immediately after serving on the Owner a written notice specifying the payment default or the act, omission or default upon which the suspension of the Building Work is based. All costs and expenses incurred by the Builder as a result of such suspension and any recommencement shall be payable by the Owner as if they were a Variation.
- 20.3 If pursuant to any right conferred by this Contract the Builder suspends the Building Work and the default that led to that suspension continues unremedied for at least 40 Working Days, the Builder shall be entitled to cancel this Contract.
- 20.4 If at any time the Builder has reasonable grounds for concern about the Owner's ability to pay any sum due to the Builder in the future, the Builder may request security for payment from the Owner, for any amount then owed to the Builder, and any

further amount that the Builder reasonably anticipates will become payable under the Contract. The security for payment shall be in a form that is reasonably satisfactory to the Builder, which may include (without limitation) payment in advance of a sum that the Builder estimates will be sufficient to cover the next invoice, or the provision of a personal property security interest over an asset or assets of sufficient value to cover all future invoices plus enforcement costs. If the security is not provided within 10 Working Days of such a request from the Builder, then the Builder may suspend the Building Work immediately after serving on the Owner a written notice to that effect.

- 20.5 In consideration of the Builder entering into this Contract the Owner irrevocably grants to and agrees to execute in favour of the Builder:
- a) A registerable all obligations mortgage (Memorandum of Mortgage RGL 2011/4300, or the most current Auckland District Law Society all obligations Memorandum, which is registered at the various land registries of Land Information New Zealand) over all of the Owner's estate and interest in the Property (the "Mortgage") to secure payment of the Builder's invoices and any other sums payable to the Builder pursuant to this Contract; and
 - b) An unconditional irrevocable power of attorney in favour of the Builder to execute the Mortgage on the Owner's behalf, whether or not the Builder has made demand on the Owner to do so.
- 20.6 The Builder may, in the Builder's sole and unfettered discretion and at any time, register a caveat against the title to the Property in respect of the Builder's interest as mortgagee, and the Owner must not challenge or contest the Builder's right to maintain the caveat unless and until any dispute in connection with this Contract has been finally and conclusively resolved and all the Owner's obligations under this Contract (or arising out of any adjudication or settlement of such a dispute) have been fully discharged.
- 20.7 The rights to perform all acts and do all things under all or any of the terms and provisions contained or implied in the mortgage or conferred by statute, may (without any obligation whatsoever) be performed and done by the Builder in the capacity of attorney pursuant to clause 20.5.
- 20.8 Interest on any sums secured by the Mortgage and remaining unpaid beyond the due date shall accrue on a daily basis and shall be payable at the higher of the two rates referred to in clause 20.1. All costs of and incidental to the preparation of the Mortgage, preparation of the caveat and all registration and other fees incurred by the Builder (including incidental recovery costs) shall be deemed to be included in the principal sum secured by the Mortgage. The date of advance shall be the date the sums were due for payment or any subsequent date nominated by the Builder.
- 20.9 If at any time the Owner has failed to comply with any of the Owner's obligations under this Contract then without prejudice to the Builder's other rights and remedies the Builder may forfeit the deposit or any sum paid in advance of the Builder's entitlement to payment, and apply it to any damages, costs, interest or other sums to which the Builder is entitled.
- 20.10 The Owner shall be liable for all costs and expenses incurred by the Builder as a result of the Owner's default, including but not limited to all costs of debt collection, suspension and (if applicable) recommencement of work, preparation, execution, registration and discharge of securities, and the Builder's actual and reasonable legal costs, including those incurred in the course of litigation, adjudication, negotiation, mediation, arbitration or any other method of dispute-resolution.

21 Cancellation of the Contract

- 21.1 If either party commits any act of bankruptcy, enters into any scheme of arrangement or compromise with its creditors, does any act which would render it liable to have a liquidator, receiver, voluntary administrator or statutory manager appointed over its property, or if a resolution is passed that it cease trading or be liquidated, the other party may immediately cancel the Contract.
- 21.2 Other than pursuant to clause 21.1, the Owner may only cancel this contract if one or more of the following criteria have been satisfied:
- a) If the Owner has a right to cancel this Contract under Part 2 Subpart 3 of the Contract and Commercial Law Act 2017 or any other statute in the circumstances in question.
 - b) If any provision in this Contract expressly authorises the Owner to cancel in those circumstances.
 - c) If the Builder has permanently and unequivocally abandoned the Project prior to completion of the Building Work, or has become permanently and unequivocally incapable of complying with the Builder's obligations under this Contract.
 - d) If the Contract has become impossible to perform or has been otherwise frustrated in the sense contemplated by Part 2 Subpart 4 of the Contract and Commercial Law Act 2017, through no fault of the Owner or anyone under the Owner's authority or control.
- 21.3 Other than pursuant to clause 21.1, the Builder may only cancel this contract if one or more of the following criteria have been satisfied:
- a) If the Builder has a right to cancel this Contract under Part 2 Subpart 3 of the Contract and Commercial Law Act 2017 or any other statute in the circumstances in question.
 - b) If any provision in this Contract expressly authorises the Builder to cancel in those circumstances.

- c) If the Owner has permanently and unequivocally abandoned the Project prior to completion of the Building Work, or has become permanently and unequivocally incapable of complying with the Owner's obligations under this Contract.
 - d) If the Contract has become impossible to perform or has been otherwise frustrated in the sense contemplated by Part 2 Subpart 4 of the Contract and Commercial Law Act 2017, through no fault of the Builder or anyone under the Builder's authority or control.
- 21.4 If the Builder chooses to cancel the Contract in accordance with this Part 21 then without prejudice to the Builder's other rights and remedies the Builder may forfeit the deposit or any sum paid in advance of the Builder's entitlement to payment, and apply it to any damages, costs, interest or other sums to which the Builder is entitled.
- 21.5 If either party becomes entitled to cancel this Contract, the cancellation shall take effect on service on the other party of a notice advising of the cancellation and the particular statutory provision, clause, or grounds relied upon to justify the cancellation.
- 21.6 If either party exercises a right to cancel this Contract, then without prejudice to each party's other rights and remedies:
- a) The Owner shall pay the Builder for all materials delivered and all Building Work performed up to the date of cancellation, and if the amount owed for those materials or that Building Work is not apparent from the provisions of this Contract, it shall be calculated as if the relevant materials and Building Work were provided pursuant to a Variation.
 - b) Upon payment pursuant to paragraph (a), the Builder shall deliver up possession of the Building to the Owner (if not already done) and remove from the Property all materials, tools, plant, equipment, appliances or vehicles belonging to the Builder or the Builder's subcontractors.
 - c) All provisions of this Contract which expressly or by necessary implication are intended to continue in force beyond cancellation (including, without limitation, the provisions of this clause 21.6 and the dispute-resolution provisions of Part 23) shall continue to bind the parties.
 - d) Subject to paragraph (c), each party shall be immediately discharged from any further obligation or liability in respect of the Building, the Building Work and this Contract, without prejudice however to any right or remedy arising out of either party's prior breach of this Contract or unlawful act or omission occurring prior to cancellation.

22 Extent of Liability

- 22.1 Unless and to the extent that this Contract expressly or by necessary implication provides otherwise:
- a) each party's total liability to the other in respect of the Building Work, the Building or this Contract, whether in contract, tort or otherwise, shall not in any event exceed the Final Contract Price; and
 - b) neither party shall be liable to the other for any consequential, indirect or special loss, damage or injury of any kind whatsoever.

23 Dispute Resolution

- 23.1 If any dispute or disagreement (a "dispute") arises between the parties concerning the Building Work, the Building or this Contract, it shall be resolved in accordance with this Part 23. A dispute shall be deemed to have arisen when the first written communication evidencing the dispute (which may include an electronic transmission such as a fax or e-mail, but not a text message) has been delivered or sent by one party to the other.
- 23.2 As soon as reasonably practicable after the dispute has arisen, the parties shall meet together or otherwise communicate with each other and attempt to resolve the dispute in good faith through negotiation.
- 23.3 After 10 Working Days if the dispute has not been resolved by negotiation, the parties may agree to attempt to resolve it by mediation. Mediation shall not be compulsory unless both parties agree to it, and that agreement may be revoked by either party at any time up until 5 Working Days before the scheduled date for the mediation. The parties shall share the mediator's fees and expenses equally and meet their own costs. If the parties cannot agree on a mediator within 5 Working Days of the agreement to mediate, then either party may request the President or relevant nominating officer of the Arbitrators' & Mediators' Institute of New Zealand Inc ("AMINZ") or of LEADR (NZ) Inc. to select a mediator.
- 23.4 If the dispute has not been resolved within 20 Working Days of the dispute arising, and there is no agreement to mediate currently in force and being actively pursued, then the dispute may be resolved by any of the following methods:
- a) Adjudication under the CCA;
 - b) Adjudication before a Disputes Tribunal under the Disputes Tribunal Act 1988;
 - c) Arbitration under the Arbitration Act 1996; or
 - d) Legal proceedings through the appropriate Court.
- 23.5 If either party elects to have the dispute resolved by adjudication under the CCA, then once either party has served a notice of adjudication complying with the requirements of the CCA, if the other party wishes to serve its own notice of adjudication in respect of the same or a different dispute relating to the Project, it must do so within 5 Working Days of service of the first

notice, and the claims arising from those notices shall be consolidated, with the same adjudicator appointed to hear each claim.

- 23.6 Neither party may elect to have the dispute resolved by adjudication before a Disputes Tribunal under the Disputes Tribunal Act 1988 if either party's claim against the other exceeds the Tribunal's jurisdiction, and for that purpose neither party shall be obliged to agree to an extension of the Tribunal's jurisdiction under section 13 of that Act.
- 23.7 If the dispute is referred to arbitration then the arbitration shall be governed by the Arbitration Act 1996 but the degree of formality adopted with respect to the arbitration shall be commensurate with the amounts at stake and the issues involved. Where the Owner is a consumer as defined in the Arbitration Act 1996, this agreement to arbitrate is subject to a separate written agreement being entered into after the dispute has arisen in accordance with section 11 of that Act.
- 23.8 Notwithstanding clauses 23.2 - 23.7, nothing in this Part 23 prevents:
- a) either party from exercising any statutory rights to the extent that those rights cannot lawfully be contracted out of; or
 - b) the Builder from commencing and continuing legal proceedings for the enforcement of one or more payment claims under the CCA at any time, provided that once the outcome of the underlying dispute is finally determined, any such legal proceedings must be discontinued, subject only to either party's entitlement to costs or other incidental relief.
- 23.9 To the extent that the dispute relates to alleged defects in the workmanship or materials provided by the Builder or the Builder's subcontractors or suppliers, then the following provisions shall apply.
- a) The Parties shall before initiating any of the dispute-resolution procedures referred to in clause 23.4, jointly engage a suitably qualified and independent building surveyor to make a ruling on the alleged defects in the workmanship or materials.
 - b) A notice requiring the appointment of a building surveyor shall be in writing and shall be given by the Owner or the Builder to the other of them.
 - c) The Owner and the Builder shall endeavour to agree on the building surveyor to be appointed but if they have been unable to agree upon one within 10 working days of the notice, then either party may request the President or relevant nominating officer of the New Zealand Institute of Building Surveyors or the Building Officials Institute of New Zealand (or the nearest equivalent body if it no longer exists) to nominate the building surveyor.
 - d) The building surveyor shall be instructed to identify what workmanship or materials (if any):
 - i. are defective and require rectification at the Builder's expense;
 - ii. are merely unfinished rather than defective and are required to be completed by the Builder (or, if the Contract has been validly terminated, then by another builder) at the Owner's expense; or
 - iii. meet the requisite legal standards and are not required to be rectified or completed.
 - e) Before completing his/her determination the building surveyor shall conduct one or more site visits in the presence of the Owner and the Builder (or separately if the building surveyor so decides) and shall interview each of the parties on as many occasions as are reasonably required.
 - f) In determining whether and to what extent any workmanship or materials are defective and require rectification, the building surveyor shall apply the principles set out in the latest edition of the Ministry of Business, Innovation and Employment's *Guide to tolerances, materials and workmanship in new residential construction* to the extent that it may be applicable.
 - g) The building surveyor shall be instructed to issue a written determination as soon as reasonably practicable and that determination shall be final and binding on the parties insofar as it relates to the alleged defects in the workmanship or materials, except in the case of manifest error, breach of the principles of natural justice, bad faith or fraud.
 - h) Each party shall pay half the costs of the building surveyor.
 - i) The parties may agree to give the building surveyor authority to make a final and binding ruling on any other matter in dispute, including alleged delays or overcharging.
 - j) If either of the parties initiates any litigation, adjudication or arbitration to resolve any matter in dispute that is not within the building surveyor's scope of authority, and the building surveyor has issued a written determination, that determination shall be tendered to the relevant court, tribunal, adjudicator or arbitrator as evidence of the matters within the building surveyor's scope of authority.
 - k) If either of the parties initiates any litigation, adjudication or arbitration to resolve any matter in dispute, in the course of which the Owner alleges there are defects in the workmanship or materials provided by the Builder or the Builder's subcontractors or suppliers, and no determination has been obtained from a building surveyor in accordance with the above provisions as a result of the obstruction or default of one of the parties, then the party responsible shall not be entitled to advance any argument or submit any other evidence in relation to the alleged defects in any such proceedings.
- 23.10 If the dispute relates to a sum of money allegedly owed to the Builder, and the disputed amount is greater than NZ\$10,000, then the Owner must pay the disputed amount into escrow. Payment into escrow does not constitute payment to the Builder. "Escrow" means one of the following:
- a) Depositing the disputed amount into a solicitor's trust account.

- b) In circumstances where the dispute is being resolved by legal proceedings in a Court, by paying the disputed amount into the appropriate Court.
- c) Depositing the funds with an entity carrying on business as an escrow agent which has a contractual arrangement with a trustee corporation (as defined in the Trustee Act 1956) or any other trustee officially approved by the New Zealand Companies office, to hold the funds.

23.11 In each case, the Owner must ensure that as far as is reasonably possible, the funds are held on the following terms:

- a) The funds shall be placed on interest-bearing deposit with a bank or similar institution at the best available rate for on-call funds.
- b) The funds shall not be released from escrow until the earlier of:
 - i. mutual settlement of the dispute; or
 - ii. a ruling in respect of the dispute being issued by a CCA adjudicator, a Disputes Tribunal Referee, an arbitrator or a Court, and any appeal or judicial review rights having been exhausted or the statutory time limits for an appeal or judicial review having lapsed.
- c) The funds shall be released to the appropriate party or parties promptly after, and strictly in accordance with, the settlement, the ruling, or the outcome of the appeal or judicial review.
- d) The entity holding the funds shall be entitled to be paid a reasonable and competitive administration charge for providing the escrow service, and that charge shall be deducted from the funds before release.
- e) Any interest earned on the funds shall be paid to the recipient(s) of the funds in the same proportion as the amounts paid to the recipient(s) bear to the total funds deposited.

23.12 The Owner's obligation to pay a disputed amount into escrow pursuant to clause 23.10 is an essential term of this Contract and is intended to ensure that each party has a similar incentive to resolve the dispute promptly and cost-effectively. If the Owner fails to comply with that obligation and provide adequate evidence of having done so, the Builder may serve a notice on the Owner requiring the Owner to comply with the obligation. If the Owner has still not complied with the obligation within a further 5 Working Days after service of the notice, then without prejudice to the Builder's other rights and remedies:

- a) the Builder shall be entitled to cancel this Contract;
- b) the Builder shall not be obliged to provide any information or documentation or take any other action necessary to enable a Code Compliance Certificate to be issued in respect of the Building Work, except that any Licensed Building Practitioner engaged by the Builder shall remain obliged to provide a Record of Work in relation to any Restricted Building Work carried out or supervised by that Licensed Building Practitioner;
- c) the Builder shall be immediately discharged from any further obligation or liability in respect of the Building, the Building Work and this Contract; and
- d) for every day that the Owner has failed to pay the disputed amount into escrow, the Owner shall pay the Builder interest on the disputed amount at the higher of the two rates referred to in clause 20.1, which shall be in addition to any interest that may be owed by the Owner to the Builder in accordance with clause 20.1.

24 Force Majeure

24.1 Neither party is liable for any failure to perform its obligations to the extent that that failure is due to some cause or causes beyond that party's reasonable control, including (without limitation):

- a) natural disasters such as earthquakes, land subsidence, geothermal or volcanic eruptions, fires, floods, tidal waves or tsunamis, lightning strike, tornados, or hurricanes, snow or dust storms;
- b) significant human conflict such as war or similar hostilities, embargos, blockades, insurrection, riots, civil disobedience or industrial action;
- c) governmental or quasi-governmental intervention such as a declaration of a state of emergency, martial law, confiscation or seizure of private property; or
- d) procurement difficulties or logistical obstacles such as shortage of labour, materials, specialist subcontractors, transportation, energy or essential plant or equipment that could not reasonably have been foreseen prior to its occurrence.

24.2 Each party relieved of liability pursuant to clause 24.1 shall use all reasonable endeavours to overcome the relevant obstacle and resume performance of its obligations as soon as reasonably practicable.

24.3 If despite complying with clause 24.2 the Builder is effectively prevented from carrying out the Building Work by one or more of the causes referred to in clause 24.1 for more than 5 Working Days, and there is no immediate prospect of a resumption of the Building Work, the Builder may suspend the Building Work as if clause 20.2 applied. If the Building Work cannot be resumed for at least 40 Working Days, the Builder shall be entitled to cancel this Contract.

25 Parties to this Contract

- 25.1 The person or persons purporting to sign this Contract for or on behalf of the Owner, warrant(s) that he/she/they has/have the authority to bind all of the registered proprietors of the Property (jointly and severally if more than one), to the Owner's obligations under this Contract.
- 25.2 The terms "Owner" and "Builder" shall also be deemed to include their respective executors, administrators, successors and permitted assigns.
- 25.3 Where the Owner is made up of two or more individuals or entities then each of them shall be bound jointly and severally by the Owner's obligations under this Contract.
- 25.4 If the Property is owned by trustees, and any of the trustees is not a beneficiary (actual or contingent) of the trust, then the liability of that trustee (the "Independent Trustee") is limited to the assets of the trust. However if any other party to this Contract suffers loss as a result of the intentional default or the dishonesty (but not negligence) of the Independent Trustee in breach of trust, then the Independent Trustee will be personally liable to the extent that the trust assets do not satisfy the loss.

26 Notices

- 26.1 A notice served by a party is deemed to be received, -
- a) If it is personally delivered, when delivered; or
 - b) If it is posted, 3 working days after posting; or
 - c) If it is sent by fax, on production of a transmission report (by the machine from which the fax was sent) that indicates that the fax was sent in its entirety; or
 - d) If it is sent by email, when the email leaves the communications system of the sender, provided that the sender does not receive any error message relating to the sending of email.
- 26.2 Despite clause 26.1, any notice served after 5 pm, or received on a day that is not a working day, is deemed not to have been received until 9 am on the next working day.

Appendix 1

CERTIFICATE OF PRACTICAL COMPLETION pursuant to clause 17.1 of the Building Contract.

This Certificate needs to be completed by the Owner when the Building Work has achieved Practical Completion.

The Owner certifies that:

1. The Owner has inspected the Building, and agrees that Practical Completion has been achieved.
2. The defects notification period set out in clause 18.1 of the Contract begins from the date of this certificate.
3. The Owner has arranged insurance cover for the Building and understands that all cover previously provided by the Builder will lapse from the date of possession entered below.
4. The Owner accepts possession of the Building from the date of possession entered below.

Date of Possession	(Day)	(Month)	(Year)
--------------------	-------	---------	--------

SIGNED FOR & ON BEHALF OF THE OWNER(S)

Name(s) of Owner(s)

Signature

Signature

Signature