

## CONDITIONS OF CONTRACT

### 1. RESPONSIBILITY OF BUILDER

The Builder must execute and complete the Works in a workmanlike manner and ensure the Works are adequately supervised.

### 2. WORK PERFORMED OR MATERIALS SUPPLIED BY OWNER

(a) Where the Contract provides that the Owner may supply materials, the Builder agrees to install those materials. The Builder cannot and does not provide any warranty that those materials are fit for their intended purposes or are new and suitable for incorporation into the Works. The Builder does not accept any responsibility and is not liable for performance of those materials. The Owner indemnifies and will keep indemnified the Builder against any loss or damage suffered by reason of the performance of those materials.

(b) Where the Contract provides that the Owner will carry out any work (the **Owner's Work**), the Owner takes full responsibility for performance of the Owner's Work, for protection of the Owner's Work and for any damage to the Works caused by performance of the Owner's Work. The Builder is not liable for the Owner's Work and the Owner indemnifies and will keep indemnified the Builder against any loss or damage suffered by reason of the performance of the Owner's Work.

### 3. DISCREPANCIES AND AMBIGUITIES

(a) If the Builder finds any discrepancy or ambiguity in the Drawings or between the Drawings and the Specification, the Builder must immediately refer the matter to the Owner who must direct the Builder in writing what is to be done. If the Owner fails to direct the Builder within 5 working days of the request for directions, the Builder may determine what is to be done.

(b) Where the Builder determines what is to be done, the Builder must advise the Owner in writing of the course adopted.

(c) Notwithstanding paragraphs (a) and (b), if there is a difference between scaled dimensions and figures on the Drawings, the figures prevail. Drawings to a larger scale take precedence over those to a smaller scale.

(d) If there is any ambiguity in the Contract Documents the following order of precedence must be used to resolve the matter:

(i) the Agreement and the Conditions

(ii) the Specification

(iii) the Drawings

### 4. SUPPLY OF DRAWINGS AND SPECIFICATION

(a) If the Owner is to supply the Drawings and/or the Specification, then without cost to the Builder, the Owner must provide the Builder with 6 copies of the Drawings and/or the Specification as the case may be to enable the Builder to perform the Works and obtain the consents, permits and authorities required.

(b) Where the Owner provides the Drawings and Specification, the Owner expressly warrants that they are accurate in each and every particular.

(c) Where the Builder provides the Drawings and Specification, the Builder expressly warrants that they are accurate in each and every particular.

### 5. SET OUT

The Owner must indicate to the Builder the Site's boundaries or position and the starting point of the Works and accepts responsibility for correctness of the positions indicated. If the Builder has any reasonable doubt as to the correctness of the indicated boundaries the Builder may request the Owner in writing to have the Site surveyed. If the Owner fails to do so within 5 working days after receiving the request, the Builder may have the Site surveyed and may charge the cost of the survey plus the percent set out in Appendix I Item 1 to the Owner.

### 6. COPYRIGHT

Where the Builder:

- (a) does not prepare the Drawings; or
- (b) prepares the Drawings under the Owner's instruction, direction or supervision, or from sketches supplied by the Owner

the Owner indemnifies the Builder against all actions, proceedings, claims and demands for, or in respect of, any breach of copyright by the Builder.

#### 7. EVIDENCE OF TITLE

- (a) Before the Works commence, the Owner must produce to the Builder evidence to the Builder's satisfaction of title to the land on which the Works are to be executed.
- (b) If the Owner fails to produce the evidence within 10 working days after the Builder's written request to do so, the Builder may terminate the Contract under clause 22.

#### 8. EVIDENCE OF CAPACITY OF OWNER TO PAY CONTRACT SUM

- (a) Before the Works commence or during construction of the Works, the Owner must produce to the Builder evidence to the Builder's satisfaction of capacity to pay the Builder the Contract Sum or the remainder of the Contract Sum at the times and in the manner specified in the Conditions.
- (b) If the Owner fails to produce the evidence within 10 working days after the Builder's written request to do so, the Builder may terminate the Contract under clause 22.
- (c) The following is *prima facie* evidence of the Owner's capacity to pay the Builder the Contract Sum:
  - (i) a letter from an officer of a bank or financial institution undertaking to lend the necessary funds to the Owner on terms and conditions customary for the institution, or
  - (ii) a statement of account or other document issued by a bank or financial institution indicating that the Owner has on deposit with the institution, sufficient funds to discharge the Contract Sum.

#### 9. DELIVERY OF SITE

Unless otherwise agreed, the Owner must give immediate possession of the Site to the Builder on the execution of the Contract, and the Builder is entitled to continue in possession until payment on Practical Completion is made under clause 27. The Builder's possession includes the right to exclude or remove unauthorised persons.

#### 10. DATE FOR COMMENCEMENT AND TIME FOR COMPLETION

The Builder must commence the Works within 10 working days of the issue of all necessary approvals by relevant authorities or the Owner delivering to the Builder evidence of title to the land under clause 7 or evidence of capacity to pay the Contract Sum under clause 8, whichever is the later. Subject to clause 19, the Builder must bring the Works to Practical Completion under clause 26 within the number of working days stated in the Particulars of Contract Item E.

#### 11. BUILDING APPROVALS

- (a) Subject to paragraph (b), the Contract is conditional on:
  - (i) a building permit being issued in respect of the Works within 45 working days from the date of the Contract;
  - (ii) where any condition is attached to the building permit which will result in a variation to the Contract, the Owner and the Builder acknowledging in writing within that period that each of them accepts that condition;
  - (iii) it becoming lawful under the Water Act as defined in section 9(6) of the *Home Building Contracts Act 1991* for the Works to be commenced within 45 working days of the date of the Contract; and
  - (iv) where a direction is given under the Water Act by the Water Corporation in connection with the carrying out of the Works which will result in a variation to the Contract, the Owner and the Builder acknowledging in writing within that period that each of them accepts that direction.
- (b) A condition referred to in paragraph (a) does not apply to the Contract:

- (i) to the extent that the condition's subject matter was completed before the Contract was entered into;
  - (ii) where the only work to be performed under the Contract is the construction or carrying out of associated work as defined in section 3(1) of the *Home Building Contracts Act 1991*; and
  - (iii) for any other home building work that is prescribed for the purpose of section 9(5) of the *Home Building Contracts Act 1991*.
- (c) The Builder must:
- (i) do all things required to be done by the Builder to ensure that any condition referred to in paragraph (a) (i) and (iii) applicable to the Contract is fulfilled; and
  - (ii) not unreasonably decline to accept a condition or direction referred to in paragraph (a) (ii) or (iv) that applies to the Contract.
- (d) If the Builder properly submits to the relevant authorities within 20 working days after the date of the Contract, all necessary applications required for the purpose of having conditions referred to in paragraph (a) (i) and (iii) fulfilled, the Builder is to be taken to have complied with the obligations contained in paragraph (c) (i).
- (e) The Owner must:
- (i) do all things required to be done by the Owner to ensure that any condition referred to in paragraph (a) (i) and (iii) applicable to the Contract is fulfilled; and
  - (ii) not unreasonably decline to accept a condition or direction referred to in paragraph (a) (ii) or (iv) that applies to the Contract.
- (f) If a condition referred to in paragraph (a) is not fulfilled, the parties' respective consequences, rights and remedies are set out in clause 34.

## 12. COMPLIANCE WITH REQUIREMENTS OF LOCAL AND OTHER AUTHORITIES

- (a) The Builder must comply with, and give all notices required by, any Act of Parliament or by any regulations or by-laws of any local authority or of any authority which has jurisdiction over the Works or with whose systems the Works are or will be connected. The Builder must pay and indemnify the Owner against any fees or charges legally demandable under that Act, regulation or by-law in respect of the Works in force at the date of the Contract.
- (b) If the amount paid by the Builder as fees and charges legally demandable by any authority in respect of building approvals and local and supply authority permits varies from the rates existing on the date of the Contract, then the amount of the difference must be added to or deducted from the Contract Sum as the case requires.

## 13. OWNER'S ACCESS TO SITE

- (a) The Owner or a duly appointed representative (if any) identified in Appendix I Item 9 and any authorised officer of the Lending Authority have access to the Site to inspect and view progress of the Works, but only during the Builder's normal working hours, unless otherwise agreed by the Builder and in a manner which does not prevent the Builder from properly discharging the Builder's obligations under the Contract.
- (b) The Owner (or representative) must not give and is not entitled to give at any time, directions to the Builder's workmen or subcontractors on the Site or elsewhere relating to the Works.

## 14. LENDING AUTHORITY

The following provisions apply to any part of the Contract Sum for which a Lending Authority is providing finance to the Owner:

- (a) Progress payments will be at the Lending Authority's customary rate.
- (b) Before the Works commence, the Owner must irrevocably authorise and direct the Lending Authority in writing to pay the Builder all money due to the Builder.
- (c) The Owner must give the Builder written notice of the various stages at which the Lending Authority will require inspection of the Works and the Builder must notify the Lending Authority when the stages are reached.

- (d) Where the Lending Authority requires check or progress surveys, the Builder must promptly inform the Owner when the Works reach the required stage and the Owner is responsible for having the surveys carried out.
- (e) The Builder must take reasonable steps to facilitate inspection of the Works by the Lending Authority.
- (f) Before executing any variation, the Builder may require the Owner to produce the Lending Authority's written consent to the variation.

#### 15. AVAILABILITY OF MATERIALS

- (a) Subject to clause 2, all materials must be suitable for incorporation into the Works and, unless otherwise specified, must be new. If any material specified for use in the Works is not available in a time which enables the Builder to fulfil the requirements of clause 10, the Builder must promptly advise the Owner in writing and require that substitute materials be selected and notified to the Builder in writing within 5 working days of the Builder's notification.
- (b) Any change of cost arising from the substitution of materials is a variation and the Contract Sum will be adjusted under clause 16.

#### 16. VARIATIONS

- (a) The Contract may be varied at the Owner's request with the Builder's consent. The Builder's consent must not be unreasonably withheld. No variation vitiates the Contract.
- (b) The Builder may decline to execute any variation required by the Owner unless the Owner first:
  - (i) gives written notice of the requirements of the variation; and
  - (ii) in response to the Builder's written notice requiring evidence to the Builder's satisfaction of capacity to pay for the variation, gives that evidence.
- (c) If the Builder agrees to undertake any variation, then the details:
  - (i) must be in writing:
    - (A) setting out the cost and all the terms of the variation;
    - (B) showing the date of the variation;
  - (ii) must be signed by the Builder and the Owner or their respective agents; and
  - (iii) the Owner or Owner's agent must be given a copy of the signed variation:
    - (A) as soon as reasonably practicable after it has been signed by both parties; and
    - (B) before the work to which the variation relates is commenced.

This paragraph does not apply to any variation arising under paragraph (d).

- (d) Where any variation to the Contract is necessary:
  - (i) to comply with any written direction lawfully given by a building surveyor or other person acting under a written law; or
  - (ii) because of circumstances that could not reasonably be foreseen by the Builder at the time the Contract was entered into

then the Builder is entitled to be paid for the variation provided that before carrying out the work relating to the variation, the Builder gives to the Owner a statement setting out the reason for, and the cost of the variation, together with a copy of any written direction referred to in subparagraph (i).

- (e) The Builder must give the statement referred to in paragraph (d) to the Owner within 10 working days after the Builder:
  - (i) received notice of the direction under paragraph (d) (i); or
  - (ii) became aware or should reasonably have become aware of the circumstances referred to in paragraph (d) (ii).

- (f) Where a statement is given to the Owner by the Builder for the purposes of paragraph (d) (ii) and the Owner considers the variation is not one to which that paragraph applies, the Owner may make a complaint under the *Building Services (Complaint Resolution and Administration) Act 2011* section 5(2) for relief under section 17 of the *Home Building Contracts Act 1991* provided that the complaint is made within 10 working days after the statement was given to the Owner.
- (g) Paragraph (d) (ii) does not enable the Builder to vary the Contract, except under clauses 16(c), 25(g) or 34(d), by reason only of an increase in the costs of labour (including related overhead expenses) or materials, or both, to be incurred by the Builder.
- (h) The value, inclusive of GST, of all omissions from the Works less the allowance specified in Appendix I Item 1 must be deducted from the Contract Sum.
- (i) The value, inclusive of GST, of all extra work must be:
  - (i) added to the Contract Sum; and
  - (ii) added to the next progress payment due after the execution of that work.
- (j) Where practicable, the following applies in calculating the price for extra work:
  - (i) any subcontract price, inclusive of GST, plus the percentage stated in Appendix 1 Item 1 will be included.
  - (ii) the rates of the Builder's labour will be those set out in Appendix I Item 3; and
  - (iii) the price for materials used in the work will be the actual cost, inclusive of GST, to the Builder plus the percentage stated in Appendix I Item 1.
- (k) The Builder is not entitled to payment for any variations which are due to the Builder's default.

#### 17. ASSIGNMENT AND SUBCONTRACTING

- (a) Neither party to the Contract may assign the Contract without the other's written consent, which consent must not be unreasonably withheld.
- (b) The Builder may subcontract any portion of the Works, but subcontracting does not relieve the Builder of full liability and responsibility.

#### 18. INSURANCE

##### (a) Injury to Persons or Property

The Builder is solely liable for and must indemnify the Owner in respect of and must insure for the amount given in Appendix I Item 8 (or if not provided for, \$5,000,000) in the joint names of the Builder and the Owner against any legal liability, loss, claim or proceedings arising under any statute (other than as provided in paragraph (b)) or at Common Law in respect of personal injury to or death of any person and in respect of any damage to any real or personal property arising out of or in the course of or caused by the execution of the Works unless due to any act or neglect of the Owner or of other persons for whom the Owner is responsible.

##### (b) Workers' Compensation

The Builder must insure against any legal liability, loss, claim or proceedings, whether arising at Common Law or under any statute relating to Workers' Compensation or Employers' Liability by any person employed or engaged by the Builder in or about the execution of the Works and must ensure each subcontractor is insured against any such liability in the case of employees of the subcontractor.

- (c) Notwithstanding these provisions, if any portion of the Works is used by the Owner or tenant, or their employees during the progress of the Works, the Builder is not liable for any injury to or the death of any person or loss or damage to property which is caused by that use.

##### (d) Contractor's Risk

The Builder must in the joint names of the Builder and the Owner and, where applicable, the Lending Authority insure against any loss, destruction or damage to the Works (including but not limited to fire, explosion, earthquake, lightning, storm, tempest, civil commotion or theft) for at least the full reinstatement value of all work executed and materials and goods on the site, including any unfixed materials or goods, and must keep that work, materials and goods insured until the Works are delivered to the Owner.

On request, the Builder must provide evidence of the insurance before the first progress payment.

- (e) On the insurer's written authorisation or settlement of any claim under the policies, the Builder must diligently proceed to rebuild or repair the Works and replace or repair the materials or goods lost, destroyed or damaged. The Builder is not entitled to any payment in respect of the rebuilding or repair of the Works or the replacement or repair of the materials or goods lost, destroyed or damaged other than the money received under the policies. If the Builder defaults in the obligation to insure under this clause, the Owner may insure and deduct the premium paid from any money due or to become due to the Builder.

(f) **Alterations and Additions**

If the Works comprise or include alterations or additions to an existing structure, then notwithstanding the Builder's obligation to insure under these provisions, the Owner agrees:

- (i) to provide and to maintain adequate insurance against the risk of any loss or damage to the existing structure together with all its contents (excluding the Builder's plant, machinery, tools and equipment);
- (ii) to take all reasonable precautions to protect any contents from damage and to safeguard persons from injury that might be sustained through the Builder's normal and proper execution of the Works.

(g) **Owner's Goods**

Unless arranged in writing with the Builder, any goods supplied by the Owner remain at the Owner's risk in respect of any loss or damage until they are required for the Works.

(h) **Home Indemnity Insurance**

Where the total amount payable under the Contract exceeds \$20,000 or any other amount prescribed under the *Home Building Contracts Act 1991*, the Builder must obtain a policy of Home Indemnity Insurance with respect to the Works that complies with section 25D of the Act.

Before the Works commence and the Builder makes any demand for payment, the Builder must provide a certificate in a form approved by the Minister pursuant to section 25C of the *Home Building Contracts Act 1991* that evidences the taking out of the policy.

19. DELAYS AND EXTENSION OF TIME

- (a) If the progress of the Works is delayed by any of the following causes or conditions resulting from the causes:
- (i) because of authorised variations or extras;
- (ii) by suspension of the Works under clause 20;
- (iii) by inclement weather or conditions resulting from inclement weather;
- (iv) because of proceedings being taken or threatened by, or disputes with, adjoining or neighbouring owners or residents;
- (v) because of any civil commotion, or combination of workmen or strikes or lockouts affecting the Works or affecting the manufacture or supply of materials for the Works;
- (vi) any act, default or omission on the Owner's part (including but not limited to any delay of the Owner in complying with clauses 7, 8 or 15);
- (vii) by any other matter, cause or thing beyond the Builder's control including the unavailability of labour or materials;

then the Builder is entitled to a fair and reasonable extension of time in which to bring the Works to Practical Completion.

- (b) No later than the date of bringing the Works to Practical Completion, the Builder must notify the Owner in writing stating the cause and extent of the delay. If the Owner disputes the Builder's entitlement to any extension of time, the Owner may refer the dispute for resolution under clause 31. If the Owner does not object to the extension of time in writing within 5 working days after receiving the Builder's notice, the time in which to bring the Works to Practical Completion is extended by the amount stated in the Builder's notice.
- (c) Subject to the *Home Building Contracts Act 1991*, the Builder is entitled to be paid reasonable costs arising from any extension of time and the costs will be added to the Contract Sum and to the next progress payment due after the Builder's notice.

## 20. SUSPENSION OF WORKS

If the Owner fails to pay, or cause to be paid, any progress payment under clause 25 or commits any other breach of the Contract, then without prejudice to the right to terminate the Contract under clause 22, the Builder may give 10 working days' written notice of the Builder's intention to suspend the Works. If the Owner's default continues for 10 working days after notice, the Builder may suspend the Works and must promptly give written notice of the suspension to the Owner. The Builder must lift the suspension within 15 working days of the progress payment being made or the breach being remedied and the time in which to bring the Works to Practical Completion will be extended by the period equivalent to the delay during which the Works were suspended and any consequential delays.

The Builder is entitled to be paid loss and damage arising from any suspension of the Works.

## 21. TERMINATION BY OWNER

(a) If the Builder defaults in any of the following respects:

- (i) has an execution levied or commits an act of bankruptcy or executes a Deed of Assignment or Deed of Arrangement or enters a composition or other arrangement with creditors or, if a company, goes into voluntary or compulsory liquidation (except for the purpose of reconstruction); or
- (ii) fails to diligently or in a competent manner commence or proceed with the Works; or
- (iii) wholly suspends carrying out the Works before Practical Completion without reasonable cause; or
- (iv) refuses or persistently neglects:
  - (A) to comply with the requirements of clause 12; or
  - (B) to remove or remedy defective work or improper materials, allowing the Works to become materially affected; or
- (v) intimates inability or unwillingness to complete the Works or abandons the Contract;

and, if the Builder continues the default for 10 working days after written notice has been given specifying the default and stating the Owner's intention of terminating the Contract, then without prejudice to any other rights or remedies, the Owner may terminate the Contract by notice by certified mail.

(b) If the Owner terminates the Contract under paragraph (a), the Owner may engage another builder to carry out the Works and the following applies:

- (i) if the reasonable cost of the Works exceeds what otherwise would have been payable under the Contract, then that excess is a debt due and payable by the Builder to the Owner;
- (ii) if the reasonable cost of the Works is less than what otherwise would have been payable under the Contract, then, up to the reasonable unpaid cost of work completed by the Builder, that difference is a debt due and payable by the Owner to the Builder;
- (iii) the Owner is entitled to recover from the Builder all loss, damage and/or reasonable expenses caused to the Owner by reason of or arising out of the termination.

(c) The provisions of paragraphs (a) and (b) do not apply to a termination of the Contract resulting from circumstances set out in clause 34 or under the provisions of section 4(5), 10(4) or 14(3) of the *Home Building Contracts Act 1991* in which case section 19 of the Act applies and the Owner may give notice of termination to the Builder and the Contract is terminated when notice is given.

(d) Notice given by the Owner under paragraph (c) must be in writing signed by the Owner and must be given to the Builder before the completion of the Works under the Contract.

(e) If the Contract is terminated under paragraph (c), the Owner or the Builder may make a complaint under the *Building Services (Complaint Resolution and Administration) Act 2011* section 5(2) claiming that the Owner or Builder is entitled to:

- (i) the return or repayment of the whole or part of any consideration, or the value of any consideration, given by the Owner under or in relation to the Contract; or
- (ii) payment to the Builder in respect of:
  - (A) any materials supplied;

- (B) the Works or other services performed;
- (C) costs, including overhead expenses and loss of profit incurred by the Builder under or in relation to the Contract.

## 22. TERMINATION BY BUILDER

- (a) If the Owner defaults in any of the following respects:
  - (i) fails to provide evidence of title satisfactory to the Builder under clause 7; or
  - (ii) fails to produce evidence of capacity to pay the Contract Sum satisfactory to the Builder under clause 8; or
  - (iii) fails to pay the Builder any amounts due and payable under the Contract; or
  - (iv) has an execution levied or commits an act of bankruptcy or executes a Deed of Assignment or Deed of Arrangement or enters a composition or other arrangement with creditors or goes into liquidation; or
  - (v) if the Owner or any person authorised by the Owner takes possession of the Works or any part of the Works without the Builder's written agreement;

and the Owner continues that default for 10 working days after written notice has been given to the Owner specifying the default and stating the Builder's intention of terminating the Contract, then without prejudice to any other rights or remedies, the Builder may terminate the Contract by notice by certified mail.

- (b) On termination of the Contract under this clause, the Builder is entitled to recover from the Owner all loss, damage and/or reasonable expenses caused to the Builder by reason of or arising out of performance of the Works and the termination.
- (c) The provisions of paragraphs (a) and (b) do not apply to a termination of the Contract resulting from circumstances set out in clause 34 in which case section 19 of the *Home Building Contracts Act 1991* applies and the Builder may give notice of termination to the Owner and the Contract is terminated when notice is given.
- (d) Notice given by the Builder under paragraph (c) must be in writing signed by the Builder and must be given to the Owner before the completion of the Works under the Contract.
- (e) If the Contract is terminated under paragraph (c), the Owner or the Builder may make a complaint under the *Building Services (Complaint Resolution and Administration) Act 2011* section 5(2) claiming that the Owner or Builder is entitled to:
  - (i) the return or repayment of the whole or part of any consideration, or the value of any consideration, given by the Owner under or in relation to the Contract; or
  - (ii) payment to the Builder in respect of:
    - (A) any materials supplied;
    - (B) the Works or other services performed;
    - (C) costs, including overhead expenses and loss of profit incurred by the Builder under or in relation to the Contract.

## 23. PROVISIONAL SUMS AND PRIME COST ITEMS

- (a) The Builder must exercise reasonable care in estimating Provisional Sums and Prime Cost Items.
- (b) To ensure there is no delay in the progress of the Works:
  - (i) the Builder must ask the Owner for information relating to Provisional Sums and Prime Cost Items within a reasonable time.
  - (ii) the Owner must give the Builder necessary directions promptly.
- (c) In valuing Provisional Sums and Prime Cost Items:

- (i) the Owner is entitled to normal trade discounts.
  - (ii) the Builder is entitled to any cash discounts or special discounts for bulk purchasing or personal reasons.
- (d) In valuing Provisional Sums:
- (i) the final cost is the net cost to the Builder for materials, labour, subcontractor charges, delivery to the Site and installation.
  - (ii) if the amount spent on Provisional Sums, including GST, exceeds the total amount included in the Contract Sum, the excess must be added to the Contract Sum together with a percentage of the excess as stated in Appendix I Item 2.
  - (iii) if the amount spent on Provisional Sums, including GST, is less than the total amount included in the Contract Sum, the difference must be deducted from the Contract Sum.
- (e) In valuing Prime Cost Items:
- (i) the Builder must allow for cartage, installation, fixing, supervision, overhead and profit in the Contract Sum.
  - (ii) if the amount spent on Prime Cost Items, including GST, exceeds the total amount included in the Contract Sum, the excess must be added to the Contract Sum together with a percentage of the excess as stated in Appendix I Item 2.
  - (iii) if the amount spent on Prime Cost Items, including GST, is less than the total amount included in the Contract Sum, the difference must be deducted from the Contract Sum.
- (f) Until Practical Completion, the Builder is responsible for any damage to, or any loss of, any goods supplied by the Builder and which are on the Site prior to being fixed in position.

#### 24. SUBSURFACE WORKS

- (a) Where the Drawings and Specification indicate the nature of the ground below the surface of the Site and/or the depth of excavations to provide footings, foundations or services, then any extra work caused by conditions being other than indicated or necessary to excavate to a greater extent than indicated will be deemed a variation to which section 8(1)(b) of the *Home Building Contracts Act 1991* applies.
- (b) If it appears in excavating for footings and/or services that the Site will not support the Works as designed, then the Contract may be terminated without liability on either side except that the Builder is entitled to be paid the actual cost of work to the date when it was ascertained that the Site would not support the Works. Any dispute as to whether the Site is capable of supporting the Works may be referred for resolution under clause 31.

#### 25. PAYMENT

- (a) The Contract Sum must be paid to the Builder by payments made progressively during the execution of the Works. The method of payment is specified in Appendix I Item 5.
- (b) A claim for payment submitted to the Owner by the Builder must show:
  - (i) the accumulative percent of the Contract Sum appropriate to the stage the Works have reached in accordance with Appendix I Item 5.
  - (ii) a schedule of variations under clause 16 and any adjustments under the Contract, each briefly described and priced and with a total for the schedule.
  - (iii) the total value of the Works executed being the total of subparagraphs (i) and (ii).
  - (iv) a schedule of the amounts paid and received to date with a total for the schedule.
  - (v) the amount now claimed being the difference between subparagraphs (iii) and (iv).
  - (vi) the amount of GST included in the amount now claimed.
- (c) Payment of progress claims must be made by the Owner to the Builder within the period stated in Appendix I Item 4 or, if not stated, within 10 working days of the date of submission to the Owner of the claim or account.

- (d) The making of any payment to the Builder is not proof or admission that any Works have been executed in accordance with the Drawings and Specification but is payment on account.
- (e) If the Builder does not receive any or part of any progress payment from the Owner by the due date the Builder is entitled to interest on the outstanding amount at the rate specified in Appendix I Item 6.
- (f) If the Owner disputes the Builder's entitlement to any claims, the Owner may refer the dispute for resolution under clause 31.
- (g) The Contract Sum is subject to adjustment to reflect further costs actually imposed on, or incurred by, the Builder:
  - (i) as a direct consequence of a State or Commonwealth law;
  - (ii) because of an increase in any tax, duty or other charge imposed under any such law after the date of the Contract; or
  - (iii) because of a delay in the commencement of the Works beyond 45 working days after the date of the Contract being a delay:
    - (A) that is caused solely by the Owner's failure to comply with a condition imposed on the Owner by the Contract, including a condition to the effect that the Owner produce satisfactory evidence of the ability to pay the Contract Sum or of the Owner's title to the land on which the Works are to be performed; or
    - (B) that occurs without any failure on the part of either the Owner or the Builder to comply with their obligations under the Contract.

In which case the parties' respective consequences, rights and remedies are as set out in clause 34.
- (h) This clause is subject to clause 14.

## 26. PRACTICAL COMPLETION

- (a) Practical Completion is that stage when the Works are completed except for any omissions or defects which do not prevent the Works from being reasonably capable of being used for their intended purpose by the Owner, and testing or certification by any authority having jurisdiction has been complied with. For the purposes of this clause the phrase "the Works" does not include the Owner's Work.
- (b) When, in the Builder's opinion, the Works reach Practical Completion, the Builder must give the Owner written notice in the form set out in Appendix III.
- (c) Within 5 working days after notice, the Owner must give the Builder written notice of matters and things (if any) which the Owner considers are required by the Contract to be done for Practical Completion. The Builder must promptly do those things (if any) which are required by the Contract to achieve Practical Completion and then give the Owner further written notice of Practical Completion.
- (d) If the Owner does not give any notice within the time specified in paragraph (c), the Works will be deemed to have reached Practical Completion at the date of service of the Builder's notice under paragraph (b).
- (e) If the Owner or any person authorised by the Owner takes early possession of the Works or any part of the Works without the Builder's written agreement, the date of Practical Completion will be the date possession is taken, unless Practical Completion has already been reached.
- (f) On Practical Completion, the Works are at the Owner's risk in all respects.

## 27. PAYMENT ON PRACTICAL COMPLETION

- (a) When the Works reach Practical Completion, the Builder is entitled to the unpaid balance of the Contract Sum, and any other money payable under the Contract.
- (b) If the Builder does not receive payment on Practical Completion by the due date, the Builder is entitled to interest on the outstanding amount at the rate specified in Appendix I Item 6.
- (c) The Owner is not entitled to take possession of the Works nor receive the keys to the Works until the Builder has been paid all money remaining due under paragraph (a) and any accrued interest.
- (d) On full payment, the Builder must hand all keys to the Works to the Owner or other person authorised by the Owner to receive them.

## 28. DEFECTS LIABILITY PERIOD

- (a) The Defects Liability Period commences on Practical Completion of the Works and continues for the period stated in Appendix I Item 7 which must be not less than 4 months. If no period is stated, the Defects Liability Period is 4 months.
- (b) Before the Defects Liability Period ends, the Owner must give the Builder a written list of any defects. The Builder must make good the defects during normal business hours at the Builder's cost within 30 working days of the end of the Defects Liability Period or within an agreed alternative time.
- (c) If the Builder fails to make good the defects under paragraph (b), the Owner may give 10 working days' written notice stating the Owner's intention to engage others to make good the defects. To the extent of the Builder's failure, the Owner may recover from the Builder the costs incurred in making good the defects.

## 29. COMPLETION OF WORKS

Except in cases of fraud, dishonesty, deliberate concealment or defects which a reasonable inspection would not have disclosed, the end of the Defects Liability Period or completion of work notified to be made good under clause 28, whichever is later, is evidence of the sufficiency of the Works and materials to comply with the requirements of the Contract.

## 30. NOTICES

- (a) Notices under the Contract cannot be given by e-mail. Unless otherwise expressly required or agreed, notices are sufficiently given if:
  - (i) served personally;
  - (ii) sent by prepaid post to, or left at, the address in the Particulars of Contract of the relevant party; or
  - (iii) sent by facsimile to the number stated in the Particulars of Contract of the relevant party.
- (b) Postal notices are deemed to be received 2 clear working days after posting and facsimile notices on confirmation of transmission.

## 31. SETTLEMENT OF DISPUTES

Subject to the provisions of section 17 of the *Home Building Contracts Act 1991*, if a dispute or difference arises between the Owner and the Builder in connection with the Contract then:

- (a) Either party may give written notice to the other of the existence of the dispute or difference.
- (b) Notice must provide sufficient detail to identify the cause and nature of the dispute or difference and call on the other party to rectify the matters complained of or otherwise attempt to settle them.
- (c) At the end of 5 working days after notice, the dispute or difference, unless it has been settled, may then be submitted for resolution by one of the following procedures:
  - (i) by reference to the Building Commissioner under the provisions of the *Home Building Contracts Act 1991*, or
  - (ii) by reference to arbitration under the *Commercial Arbitration Act 1985*.

The arbitrator will be agreed by the parties or, if they fail to agree on a choice within 5 working days of it being requested, then the arbitrator will be the current President of the Master Builders Association of WA (**Master Builders**), or the President's nominee.

In seeking the nomination, the party who served notice under paragraph (a) must deposit \$500 with Master Builders as security for the arbitrator's costs. The security will be applied according to the arbitrator's directions.

- (d) In the event of a payment dispute, as defined by the *Construction Contracts Act 2004*, if either party makes an application for adjudication, the parties agree that the adjudicator will be appointed by Master Builders. In seeking the appointment, the party making the application for adjudication must deposit \$500 with Master Builders as security for the adjudicator's costs. The security will be applied according to the adjudicator's directions.

## 32. MONEY ADVANCED ON SECURITY OF LAND

The Owner agrees that all money (if any) which may be advanced after the date of the Contract on the security of land which includes that on which the Works are to be erected will be paid to the Builder direct by the mortgagee from time to time until the total amount that may become payable under the Contract is satisfied. The Owner agrees to execute and give any authority and/or direction necessary to give effect to this clause.

Money received by the Builder under this clause will be in satisfaction, or in reduction, of money that may be due or may become due to the Builder under the Contract.

### 33. SECURITY

The Owner charges the parcel of land on which or on part of which the Works are to be erected with due payment to the Builder of all money that may become payable to the Builder under the Contract or otherwise from carrying out the Works.

### 34. CONSEQUENCES OF NON-FULFILMENT OF CONDITIONS

- (a) If any condition in clause 11(a) is not fulfilled solely because the Builder has failed to comply with the Builder's obligations under clause 11(c), the Contract is not affected but remains in force on the same terms and conditions except as otherwise agreed between the parties.
- (b) If any condition in clause 11(a) is not fulfilled solely because the Owner has failed to comply with the Owner's obligations under clause 11(e), the Contract remains in force on the same terms and conditions until the parties agree otherwise but subject to the provisions of clause 34(d).
- (c) If any condition set out in clause 11(a) is not fulfilled and both the Owner and the Builder have, or neither has, failed to comply with their respective obligations under clauses 11(c) and (e) the Contract remains in force on the same terms and conditions until the parties agree otherwise but subject to the provisions of clause 34(d).
- (d) Where paragraph (b) or (c) or clause 25(g) (iii) applies:
  - (i) the Builder may by written notice to the Owner:
    - (A) increase the price stipulated in the Contract by an amount set out in the notice; and
    - (B) specify when any increased amount is payable, which must be either:
      - I. not later than 10 working days after notice; or
      - II. at the time of a progress payment;
  - (ii) if the amount of an increase exceeds 5% of the Contract Sum, the Owner may terminate the Contract under clause 21 within 10 working days after receiving notice under paragraph (d) (i); and
  - (iii) if the Owner so terminates the Contract, the Owner is liable to compensate the Builder for the Builder's reasonable costs up to the date of termination.
- (e)
  - (i) if the Owner considers a price increase notified under paragraph (d) (i) is excessive or unjustified the Owner, within 10 working days after receiving notice, may make a complaint under the *Building Services (Complaint Resolution and Administration) Act 2011 section 5(2)* for a review of that increase.
  - (ii) on a review under this clause, the Builder is required to show that the price has been increased to reflect actual increases in costs between the date of the Contract and the date of notice under paragraph (d) (i).

### 35. REGISTRATION OF PARTIES' INTERESTS

In this clause, the Builder and the Owner are referred to as the parties to the Contract.

- (a) If, in the opinion of a party (**First Party**), a PPS Law applies, or will in the future apply to this Contract, or any other agreement between the parties (**Transaction Documents**) or any other transactions provided for or contemplated by them, and that PPS Law:
  - (i) adversely affects, or would adversely affect, the First Party's security position or the First Party's rights or obligations under or in connection with the Transaction Documents (**Adverse Effect**); or
  - (ii) enables, or would enable, the First Party's security position to be improved without adversely affecting the other party (**Second Party**) in a material respect (**Improvement**);

the First Party may by written notice to the Second Party require the Second Party to do anything (including amending any Transaction Document or executing any new document) that in the First Party's opinion is necessary or desirable to ensure that, to the maximum possible extent, the First

Party's security position, and its rights and obligations, are not subject to an Adverse Effect or are improved by an Improvement. The Second Party must comply with the requirements of that notice within the time stipulated in the notice.

- (b) Without limiting any other provision of this clause, each party agrees to do anything the other party requests (such as obtaining consents, providing information and signing and producing documents) in order to perfect, preserve, maintain, protect or otherwise give full effect, under the PPS Law, to any Transaction Document and the security interest created by any Transaction Document, including registering any one or more financing statements in relation to the security interest created by any Transaction Document or any register established under PPS Law.

#### 36. COMPETITION AND CONSUMER ACT 2010

Nothing in this Contract will be read or applied to exclude, restrict or modify, or have the effect of excluding, restricting or modifying, the provisions of the *Competition and Consumer Act 2010* as amended and in force from time to time or any relevant State Act or Territory Act which by law cannot be excluded, restricted or modified.

#### 37. SEVERANCE

If at any time any clause of this Contract is or becomes illegal, invalid or unenforceable under the law of any jurisdiction, that will not affect or impair:

- (a) the legality, validity or enforceability in that jurisdiction of any other provisions of this Contract; or
- (b) the legality, validity or enforceability under the law of any other jurisdiction of that or any other provision of this Contract.

#### 38. INTERPRETATION

- (a) The following words or phrases in the Conditions, Drawings, Specification or any other document having reference to the Works, mean as follows unless the context indicates otherwise:

"Builder" and "Owner" mean the parties named in the Particulars of Contract, including anyone acting by their authority or on their behalf and when the Contract so admits, include their respective heirs, executors, administrators, assigns or transferees.

"Building Commissioner" means the officer referred to in the *Building Services (Complaint Resolution and Administration) Act 2011* section 85.

"building permit" means building permit as defined in the *Building Act 2011* section 3.

"Conditions" means the Conditions of Contract and Special Conditions of Contract.

"Contract Documents" means this Agreement, Conditions, Particulars of Contract, Appendices, Drawings and Specification and any incorporated documents.

"defect" means a failure:

- (i) to perform the Works in a proper and workmanlike manner and in accordance with the Contract; or
- (ii) to supply materials that are of merchantable quality and reasonably fit for the purpose for which the Owner required the Works to be performed,

not being a failure for which the Builder is specifically declared by the Contract to be not liable.

"Drawings" and "Specification" means the Drawings and Specification referred to in the Particulars of Contract.

"GST" has the meaning given to that term in *A New Tax System (Goods and Services Tax) Act 1999* of the Commonwealth.

"Lending Authority" means a person or body corporate which agrees to make a loan to the Owner to enable the Owner to pay any money which may become payable to the Builder under the Contract or in relation to the Works.

"PPS Law" means:

- (i) the *Personal Property and Securities Act 2009 (Cth)* (**PPS Act**);

- (ii) any regulations made at any time under the PPS Act;
- (iii) any provision of the PPS Act or regulations referred to in (i) and (ii);
- (iv) any amendment to the above, made at any time; or
- (v) any amendment made at any time to any other legislation as a consequence of a PPS Law.

“Practical Completion” has the meaning set out in clause 26.

“Prime Cost Item” means an amount of money included in the Contract Sum to cover the purchase by the Builder or the Owner of a specified item.

“Provisional Sum” means an amount of money included in the Contract Sum to cover work or materials or both, the extent of which cannot be specifically detailed when entering the Contract.

“Site” means the Site set out in the Particulars of Contract.

“working days” means Monday to Friday excluding public holidays in the area of the Works or throughout Western Australia.

“Works” means the Works described in the Contract Documents to be carried out by the Builder.

- (b) Where the text requires, words in the singular include the plural and vice versa and references to persons include companies, bodies corporate and bodies incorporate.
- (c) This Contract comprising the Contract Documents is the entire agreement between the parties.