

# SPEC BUILDER CONTRACT

## FURTHER TERMS OF SALE

This explanation page does not form part of the Agreement for Sale and Purchase of Real Estate.

These Further Terms of Sale are to be incorporated into the Auckland District Law Society Agreement for Sale and Purchase of Real Estate, Ninth Edition 2012 (5).

### *When to use these terms*

The Further Terms of Sale are to be used in situations where:

- The builder owns the property; and
- The builder intends to sell the property to the purchaser; and
- Building work will occur on the property before settlement of the sale and before the purchaser takes possession; and
- There are to be limited or no variations to the building work.

These terms should NOT be used when:

- The builder intends to sell the land and commence building work after settlement; or
- The builder has completed the building work

### *Notes on use:*

Settlement of the sale will occur fifteen working days after the builder gives notice that the building is completed or a code compliance certificate is obtained, whichever is later.

Variations are not provided for automatically. Any variations to the building work are at the discretion of the builder and a price must be negotiated before the variations occur. The cost of the variations can be incorporated into the purchase price by a signed written amendment to the agreement.

### *Instructions*

#### Describing the Building Work

The Building Work should be described in as much detail as possible to enable both parties to sufficiently understand what the finished building will be, and how it will look and function. The work should be generally described in Schedule A, and more specifically in Appendix 1. Plans and drawings should be attached and labelled 'Appendix 2'. The Specification should be attached and labelled 'Appendix 3'.

#### Inserting a Sunset Date

The terms provide for a 'sunset date'. If the purchase has not been settled by this date, either party may cancel the agreement. You may leave this blank.

## FURTHER TERMS OF SALE

The following clauses form part of the agreement and apply alongside the general terms of sale. Where specified, the following clauses modify, remove or augment the general terms of sale. To the extent they are inconsistent; the further terms of sale modify and override the general terms of sale as well as the front page.

### SCHEDULE TO FURTHER TERMS OF SALE

#### A. THE BUILDING WORK

**Description:**

*(Describe in general terms the type of Building Work to be carried out)*


(Further described in Appendix 1)

Plans and Drawings

sheets numbered

to

Appendix 2

The Specification

Appendix 3

#### B. COMMENCEMENT AND COMPLETION

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 subclause 22.1, whichever is the later

\*\*Subject to subclause 22.3

#### C. SETTLEMENT SUNSET DATE *(See Subclause 28.4 of the Further Terms of Sale for more guidance.)*

Where settlement has not occurred by the sunset date, either of the parties may cancel this agreement.

Sunset Date

(Day)

(Month)

(Year)

## 19 Interpretation

- 19.1 The following definitions are added to subclause 1.1 of the general terms of sale
- 34) "Building Work" means the building services to be provided by the vendor (and/or the vendor's subcontractors and suppliers) as described in the agreement and particularly Appendices 1-3, and (if applicable) the relevant building consent.
  - 35) "NZCB" means New Zealand Certified Builders Association Incorporated.
  - 36) "CCA" means the Construction Contracts Act 2002.
  - 37) "Completion" means the point in time when neither the vendor nor the purchaser can point to any further finishing or remedial work that the vendor is obliged to do under this agreement other than to remediate any latent defects that might later emerge.
  - 38) "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 agreement at the time this agreement is signed by the vendor.

## 20 Vendor's Obligations

- 20.1 In addition to the vendor's obligations in the general terms of sale, the vendor will:
- (1) Carry out and perform the building work to the standard required by the agreement and (if applicable) the relevant building consent.
  - (2) Carry out and perform the building work diligently and conscientiously, and complete the building work as soon as is reasonably practicable.
  - (3) Obtain a code compliance certificate in respect of the building work.
- 20.2 Notwithstanding Subclause 1.1(33)(b) of the general terms of sale:
- (1) The vendor is not liable for any failure to perform its obligations to the extent that that failure is due to some cause or causes beyond the vendor'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.
  - (2) The vendor must use all reasonable endeavours to overcome the relevant obstacle and resume performance of its obligations as soon as reasonably practicable.
- 20.3 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.

## 21 Cost Fluctuations

- 21.1 The purchase price will be adjusted for:
- (1) any increase in the cost of subcontractors or materials; and
  - (2) any increase in the cost of the building work pursuant to a condition of the granting of any building consent or other consent or licence or, as a result of changes to applicable law relating to building, or caused by any regulatory agency either before or after the building work commences.
- 21.2 The purchase price will be adjusted in the circumstances set out in 21.1 provided that the increase could not reasonably have been foreseen by the vendor at the time this agreement is signed by the vendor, and which would otherwise have the effect of eroding the vendor's profit margin. The vendor 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 purchase price, and the increased price of the same item. The vendor 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.

- 21.3 If the subcontractor or supplier pricing that formed the basis of the original purchase price decreases for any reason (other than rebates or discounts provided to the vendor 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 purchase price shall be adjusted downwards accordingly.
- 21.4 The purchase price shall be adjusted to include any increases or decreases in goods and services tax ("GST") that come into effect after this agreement is signed by the vendor, unless the parties have expressly agreed in writing that the purchase price already allows for any such increase or decrease in GST.

## **22 Variations**

- 22.1 No variations to the building work will be undertaken without the vendor's consent. Variations that the vendor consents to are to be priced and agreed to, and a corresponding adjustment to the purchase price will occur. If the parties fail to price the variation in advance and an adjustment to the purchase price is not agreed on, then the vendor will be entitled to a reasonable adjustment as if it was a claim for compensation under Subclause 8.1, and as if the mechanism in subclause 8.1 entitles either party to claim for compensation.

## **23 Commencement and Completion of Work**

- 23.1 The vendor shall commence the building work within a reasonable time after:
- 1) the deposit has been paid; and
  - 2) the agreement becomes unconditional; and
  - 3) any necessary building consent or resource consent or other requisite consents or licences or consent amendments have been issued.
- 23.2 The vendor will obtain all project information memoranda, building consents, resource or other consents or licences, and consent amendments required for the building work.
- 23.3 The expected completion date stated in Part B of the schedule shall be automatically extended by a reasonable time where delays arise due to:
- 1) Agreed variations;
  - 2) Any strike, lockout, or other industrial action;
  - 3) Loss or damage to the building work other than loss or damage caused by the vendor's breach of its obligations under this agreement;
  - 4) Flood, volcanic, or seismic events;
  - 5) Inclement weather;
  - 6) Failure to obtain consent, approval or a code compliance certificate through no fault of the vendor;
  - 7) Unforeseen physical conditions;
  - 8) Unavailability or shortage of materials;
  - 9) Any other event which is beyond the reasonable control of the vendor and for which the vendor is not responsible.

## **24 Document Inconsistencies**

- 24.1 In the event of any conflict or inconsistency between any of the documents relating to the building work, the project-specific documents such as the plans and drawings and any detailed scope or description of the building work will take precedence over standard form or generic documents. Figured dimensions will take precedence over scaled dimensions.

## **25 Purchaser's Right of Access**

- 25.1 Clause 25 replaces subclause 3.2 of the general terms of sale.

- 25.2 The purchaser will be entitled to have access to and inspect the property during normal working hours subject to giving reasonable notice to the vendor, and arrangement of a suitable time with the vendor. The access must be in the presence of the vendor or one of the vendor's employees or contractors who is in charge of the site, unless otherwise agreed.
- 25.3 Whether or not the vendor or one of the vendor's employees or contractors who is in charge of the site is present at the time, the purchaser shall indemnify the vendor against any loss, damage or claim resulting from:
- a) any damage to the building caused by the purchaser, the purchaser's authorised representatives, and any invitees of the purchaser; and
  - b) any breach of the Health and Safety at Work Act 2015 (and all previous iterations of health and safety in the workplace legislation) caused by the purchaser, the purchaser's authorised representatives, and any invitees of the purchaser.

## **26 Insurance**

- 26.1 This subclause augments the provisions in clause 5, in that the vendor is to ensure that there is adequate insurance cover until possession is transferred. The vendor must arrange contract works insurance for the building work. Given that such insurance typically expires on completion of the building work, the vendor must ensure that the building work is insured for full replacement value from that point onwards until settlement.

## **27 Unprocurable Materials**

- 27.1 If any materials specified are not reasonably procurable, the vendor may substitute other materials of a similar nature and quality.
- 27.2 If the substitution requires an amendment to the plans, specifications or the building consent, the vendor shall be responsible for obtaining and paying for the amendment.

## **28 Front Page Dates**

- 28.1 The following dates apply irrespective of whether any date is entered on the front page of the agreement and they override any conflicting dates that may be entered on the front page.
- 28.2 The settlement date will be fifteen working days after the date on which the vendor provides notice to the purchaser that either a code compliance certificate has been issued, or completion has occurred, whichever occurs later.
- 28.3 The finance date will be twenty working days from the date of this agreement, unless an earlier date is entered on the front page of the agreement.
- 28.4 Notwithstanding Subclause 10.6 of the general terms of sale, the Land Act/OIA Date (if applicable) will be the settlement date or forty working days from the date of this agreement, whichever is sooner.
- 28.5 In addition to clause 10.3 of the general terms of sale, where the agreement is conditional on the purchaser obtaining a building report that is satisfactory to the purchaser, the purchaser must advise the vendor whether the report is satisfactory within fifteen working days of the date of this agreement.

## **29 Early Settlement or Possession**

- 29.1 The settlement date determined pursuant to Subclause 28.2 may be brought forward by mutual consent of the parties.
- 29.2 Where the parties agree to settle the sale or grant possession to the purchaser before a code compliance certificate has been issued the parties must enter into a written agreement pursuant to section 362V(2) of the Building Act 2004 in the form prescribed by the Building (Forms) Regulations 2004 (if any).
- 29.3 Where settlement occurs before the issue of a code compliance certificate or before completion, the vendor's obligations in regards to the building work survive settlement and the purchaser will provide unlimited access to the property to the vendor to enable the vendor to complete the building work and discharge its obligations under this agreement.
- 29.4 Where settlement has not occurred by the date specified in part C of the schedule to the further terms of sale, either of the parties to the agreement may cancel the agreement by notice to the other in which case the deposit is to be refunded but without prejudice to any antecedent rights either party may have against the other.

## **30 Vendor's Warranties and Undertakings**

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- 30.1 Subclauses 7.1 and 7.2(8) of the general terms of sale are modified to the extent that they do not apply to notices, demands, requisitions or outstanding requirements that are delivered or that occur in the ordinary course of construction work in accordance with this agreement.
  - 30.2 Subclause 7.2 (1) of the general terms of sale is modified to the extent that the items mentioned are not warranted to be 'in their state of repair as at the date of this agreement (fair wear and tear excepted) but are warranted to be of the standard required by the agreement.

Sample

Appendix 1

**DESCRIPTION OF THE BUILDING WORK** pursuant to Part A of the Schedule to the Further Terms of Sale.

Describe the details of the Building Work below

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

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

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

Sample

**PLANS AND DRAWINGS** pursuant to Part A of the Schedule to the Further Terms of Sale.

Sample

Appendix 3

**THE SPECIFICATION** pursuant to Part A of the Schedule to the Further Terms of Sale.

Sample