

# ISSUE 691 BULLETIN



## RESIDENTIAL BUILDING CONTRACTS

April 2024

- A written building contract is mandatory in almost all residential construction projects. Even when not required, a contract is still a good idea to protect the parties.
- This bulletin sets out what should be in a construction contract between the homeowner and the main contractor (usually the builder) for a new home construction or home renovation.
- The bulletin replaces Bulletin 590 *Contracts in the building industry*.

## 1 INTRODUCTION

**1.0.1** Under the Building Act 2004, a written contract is mandatory for residential building work of \$30,000 (including GST) or more. This legal requirement does not just apply to builders but to any tradesperson who is the main contractor on a project.

**1.0.2** Even when a contract is not legally required (the value is under \$30,000 including GST), it is still a good idea to have one:

- It makes it clear where risks are allocated and where obligations lie.
- It can set out agreed expectations such as start and finish dates and quality of work.
- It typically sets out information about when and how payments must be made.
- If something goes wrong, a written contract may make it easier to determine who is responsible.
- If there is a dispute, contracts usually set out the path to resolve it that both parties must follow.

**1.0.3** Contracts should be used for renovation projects as well as new building construction. MBIE has found that, while overall written contract use is high, they are less likely to be used for renovations.

**1.0.4** There are laws that impact on building contracts to be aware of, and the parties to a building contract cannot contract out of these. Especially important are requirements in the Construction Contracts Act 2002 and the Building Act. Among other things, the Construction Contracts Act sets out requirements around how and when payments are made (if not addressed in the building contract) and how disputes should be handled, and the Building Act sets out implied warranties and limitation dates for making claims. The Fair Trading Act 1986 and Consumer Guarantees Act 1993 also apply to residential building contracts.

**1.0.5** Standard contracts are available for members of industry bodies, including Registered Master Builders Association, New Zealand Certified Builders Association, New Zealand Institute of Architects [NZIA], Architectural Designers New Zealand [ADNZ] and Engineering New Zealand. There are also contracts developed by Standards New Zealand, including NZS 3902:2004 *Housing, alterations and small buildings contract* and NZS 3910:2023 *Conditions of contract for building and civil engineering construction*.

**1.0.6** A contract is an important legal document. Each party to the contract should seek their own independent legal advice before agreeing to it and signing it.

**1.0.7** This bulletin covers the construction contract between the homeowner (also referred to as the client or consumer) and the main contractor. This bulletin does not cover additional contracts involved in a significant project such as building a new house – for example, the homeowner may have a contract with the architect or designer, and there will be separate contracts between the main contractor and subcontractors or between the homeowner and nominated subcontractors.

## 2 CONTRACT BASICS

**2.0.1** A building contract is usually an agreement between two parties – the homeowner and the builder or contractor. The parties are able to enforce obligations through the legal process set out in the building contract and sometimes under legislation or through the courts.

**2.0.2** Under clause 6 of the Building (Residential Consumer Rights and Remedies) Regulations 2014, contracts for residential building work costing \$30,000 (including GST) or more must include:

- each party's name, physical address, postal address, address for service, telephone number(s) and email address
- the address where the work will be carried out
- the date(s) when the contract was signed
- a detailed scope of works and description of the building work to be carried out, including materials and products to be used (if known), who will be carrying out the work, who will be supervising the building work (if applicable) and who will be responsible for obtaining building consents and other approvals required
- expected start and completion dates
- the contract price or how this will be calculated such as using fixed hourly rates
- the number of payments under the contract, the interval between payments, the amount of each payment, the date on which each payment is due and how these are worked out
- how payments will be invoiced, made and receipted
- how notices are to be given under the contract
- how variations to the work will be negotiated and agreed on
- how possible delays (beyond the builder's control) will be dealt with
- how defects will be remedied, including a reference to the existence and application of implied warranties under the Building Act
- dispute resolution procedures
- an acknowledgement that the building contractor has supplied and the client has received the disclosure information and checklist (see 7.2.1).

**2.0.3** Schedule 3 of the Building (Residential Consumer Rights and Remedies) Regulations sets out implied terms. These cover responsibilities in areas such as building consents and Code Compliance Certificates, variations to the work, payments, subcontractors, dispute resolution and notices. All the terms listed in Schedule 3 are implied in an oral residential building contract over \$30,000. A written residential building contract over \$30,000 is deemed to include some of the terms set out in Schedule 3 if the building contract does not expressly cover those topics – clause 6 specifies which terms apply in this scenario. For example, if the contract does not expressly specify which party will obtain the building consent, the default terms state that this is the building contractor's responsibility. However, if the contract does cover those topics, what is set out in the contract is what applies in most cases.

**2.0.4** All residential construction work is covered by implied warranties set out in the Building Act, whether or not these are listed in the contract. These are not the same as the implied terms.

## 3 STANDARD FORM CONTRACTS

**3.0.1** Standard contracts do not have to be accepted exactly as they are – it is possible for the parties to negotiate changes as long as they comply with the law. Both parties should initial amendments or deletions to standard clauses. Clauses are often interrelated, so check the possible effects of any changes on other clauses. Where a contractor requires variations to the terms of a standard contract, the homeowner should seek legal advice. This is especially the case where changes may affect warranties or guarantees.

### 3.1 INDUSTRY ORGANISATIONS

**3.1.1** Standard form contracts have been prepared by several industry organisations, and some have been updated a number of times – make sure you are working with the latest version. Some contracts can only be used by members of the relevant organisation.

**3.1.2** NZIA has several standard form contracts [not all of which are generally used for residential projects]:

- Standard Construction Contract NZIA SCC 2024 is used often for larger projects where a registered architect (and NZIA member) is engaged by the client (the principal) to administer the contract. This is a plain English document with an index.
- Standard Construction Contract Short Form NZIA SCC SF 2018 is suitable for smaller and less-complex projects where the architect administers the contract.
- National Building Contract – General – NBC General 2024 is for use on larger projects where an architect is not involved in contract administration.
- National Building Contract Short Form – NBC SF 2016 is for use on smaller projects where an architect is not involved in contract administration.

**3.1.3** ADNZ offers its members several engagement documents, including an Agreement for Architectural Design Services and Short Form Agreement.

**3.1.4** Master Builders has several standard form contracts. At the start of each document is information about a Master Build Guarantee, but this is not part of the contract and the guarantee is not provided automatically. A separate application for the guarantee must be completed and signed by the builder and homeowner. It must then be accepted and signed by Master Build Services Limited before it is valid. These are the Master Builders standard form contracts:

- Residential Building Contract RBC1 – 2018 (New Build).
- Alterations and Additions Contract RBC1 – 2018 [Alterations and Additions].
- Labour Only Building Contract LOBC – 2019 – typically used where the homeowner is responsible for purchasing materials and appointing and managing subtrades.
- Minor Works Building Contract MW – 2019 – for use on projects with a value below \$30,000 (including GST).

**3.1.5** Certified Builders has several standard form contracts:

- Fixed Price + – where the project involves a fixed quote, noting that the fixed price is still subject to

various potential price adjustments throughout the contract.

- Cost & Mark-Up – where hourly charge-out rates of builders and a margin on materials purchases are agreed.
- Labour Only.
- Renovations.
- Small Works and Alterations – for simple projects valued at under \$30,000 (including GST). It allows for both fixed-price or charge-up pricing.

**3.1.6** Engineering New Zealand has developed two standard contracts:

- Short Form Agreement for Consultancy Engagement.
- Long Form Agreement for Consultancy Engagement.

### 3.2 STANDARDS NEW ZEALAND

**3.2.1** The plain English NZS 3902:2004 *Housing, alterations and small buildings contract* is used for simple residential construction work for homeowners who want to engage a builder to build their house or carry out additions or alterations. It states that it should not be used as a labour-only contract or where the homeowner has engaged a professional to design the work and administer the contract. MBIE has sponsored access to view and print the standard free of charge.

**3.2.2** NZS 3910:2023 *Conditions of contract for building and civil engineering construction* accounts for a large proportion of construction contracts written in New Zealand but is primarily used for large infrastructure and vertical build projects. It is rarely used for residential projects.

## 4 TYPES OF CONTRACT

**4.0.1** Different types of contract reflect different levels of responsibility of the parties. Which type of contract is chosen will often depend on:

- the level of experience of the homeowner and how much responsibility they want to take on – a homeowner with little construction experience would be better with a full contract where the contractor bears more responsibility
- how much time the homeowner has – for example, a labour-only contract will require very large time input from the homeowner unless they employ an administrator
- how well the parties know each other and whether they have worked together before – if a builder and homeowner have worked together before and have good communication and trust, a labour-only or cost reimbursement contract may be appropriate, but these are not easily administered by homeowners who do not have experience in this area.

### 4.1 MORE COMPREHENSIVE CONTRACT

**4.1.1** With a more comprehensive contract, there is typically an agreed price for the construction project in the contract and the main contractor assumes responsibility, including:

- sharing/liasing with the architect/designer
- getting consents
- purchasing materials and labour

- making agreements with subcontractors
- ensuring overall safety on site
- ensuring the work meets Building Code and other requirements
- arranging building consent authority (BCA) inspections
- health and safety.

**4.1.2** In some cases, the homeowner may choose to be represented by a building professional such as an architect who will carry out the administration that the homeowner would otherwise have done.

**4.1.3** While the contract may have a lump sum price, most residential building contracts place price risk on the homeowner. For example, there are clauses that allow the builder to claim a price adjustment if the costs of materials/labour increase during the project or if they encounter unforeseen ground conditions. These are not generally true fixed-price contracts, and homeowners should seek advice as to where cost increases may occur.

## 4.2 LABOUR-ONLY CONTRACT

**4.2.1** With a labour-only contract, the homeowner takes much greater responsibility for managing the overall project. The builder provides only the skills and labour to the project and can be paid by time worked or by an agreed set price. As well as the contract with the builder, the homeowner will need to have separate contracts with subcontractors such as a plumber, electrician, plasterer, painter and so on and also arrange purchase of materials. The homeowner becomes responsible for broader project management issues such as ensuring work happens when it should in the right sequence. The homeowner will also be responsible for complying with the Health and Safety at Work Act 2015 as they will be the main PCBU [person conducting a business or undertaking] and will have the primary responsibilities for people's health and safety at work.

**4.2.2** A successful outcome is more likely where the homeowner has the skills, experience and time available for the work required. It is crucial that the responsibilities of the parties are clearly spelled out and understood. In some cases, a homeowner may employ an administrator.

## 4.3 MANAGED LABOUR CONTRACT

**4.3.1** A managed labour contract is a variation of a labour-only contract in which the homeowner is responsible for purchase of materials and selecting subcontractors but the builder oversees the day-to-day on-site management. The responsibilities and roles of each of the parties must be clearly understood at the start. These contracts also generally require that the homeowner has the necessary skills, experience and time available.

## 4.4 COST REIMBURSEMENT PAYMENT MECHANISM

**4.4.1** Some contracts will operate on a cost reimbursement basis. These are often called cost-plus or charge-up contracts. There is no construction price in the contract. Typically, rates for labour and costs of materials and a margin [often around 5–7%

but sometimes 10% or more] are agreed beforehand. As the job progresses, the main contractor sends the homeowner invoices for the actual costs incurred for materials and labour [including subcontractors] with the margin added. Timesheets for hours worked and copies of suppliers' and subcontractors' accounts should be provided to the homeowner when the payment is claimed.

**4.4.2** This type of payment mechanism has become a lot more common in recent years, partly as a result of the rapid increases in material costs that have caused serious problems for many fixed-price contracts.

**4.4.3** Cost reimbursement payment mechanisms are best for parties who have worked together before and for homeowners with construction knowledge and experience and a realistic idea of the costs likely to be incurred. Good communication between the parties is essential.

# 5 VARIATIONS

**5.0.1** It is critical to be aware of the potential for variations throughout the project. In residential building contracts, variations that are allowed for in the contract will result in the builder being entitled to claim an adjustment to the contract price [if the variation leads to an increase in cost to the builder]. This is especially likely to happen when there is a large element of uncertainty involved in the work such as substantial renovations to an old building or remediation for weathertightness problems. For example, a variation may be required if:

- damage uncovered during renovation or remediation work is more extensive than was expected
- it is found that what has been designed cannot be built exactly the way it was designed
- the specified building materials are no longer available
- the cost of materials or labour increases throughout the project
- there are ground conditions that the builder could not foresee
- the homeowner requests a change.

**5.0.2** It is crucial that the scope of works, plans and/or specifications are detailed so it is clear what is expected to be included in the original contract price. The homeowner should seek legal advice so they understand the elements of the contract that may allow the builder to claim an adjustment to the contract price.

**5.0.3** Where changes to a contract require changes to plans and specifications that have already received building consent, those changes must be discussed with the BCA and amended documentation submitted and approved. Many BCAs have processes where minor variations can be agreed and recorded without the whole consent process being repeated.

# 6 CONSTRUCTION CONTRACTS ACT

**6.0.1** The Construction Contracts Act sets out requirements around payments and dispute resolution. The Act cannot be contracted out of.

**6.0.2** The Act allows a single payment or several

payments by instalment [progress payments]. Conditional payments are unenforceable under the Act – for example, where Person A says they will only pay Person B after Person C pays them [sometimes referred to as ‘pay when paid’]. The requirements around how payments are made between parties apply even when parties are in dispute.

**6.0.3** Contractors can make a payment claim for an amount due under the contract. There are strict requirements that a builder must follow when issuing a payment claim, which includes attaching a notice [called Form 1] with the payment claim [see section 20 of the Act]. The notice sets out the processes for responding to the claim and the consequences of not paying or not responding. If you are served with a payment claim, there are also strict requirements contained in section 21 of the Act that you must follow in responding to the payment claim.

**6.0.4** Anyone who is a party to a construction contract can refer a dispute to adjudication. This includes for work around design, engineering and quantity surveying where it is part of the contract. Adjudication is a cost-effective, relatively fast process that can often obtain an outcome within a few months. The independent adjudicator makes a determination that is binding and enforceable. While a finding can be challenged in court, this only happens in very few cases.

## 7 CONSUMER PROTECTIONS

### 7.1 BUILDING ACT – IMPLIED WARRANTIES

**7.1.1** The Building Act contains implied warranties that cover residential building work and are aimed at protecting the homeowner. These form a mandatory part of the contract and can’t be contracted out of. They apply to the work of the contractor and anyone they are responsible for such as employees and subcontractors.

**7.1.2** Implied warranties are set out in section 362I of the Building Act. They require that:

- the building work will be carried out in a proper and competent manner, in accordance with the plans and specifications set out in the contract and in accordance with the relevant building consent (if any)
- all building products to be supplied for use in the building work will be suitable for the purpose for which they will be used and will be new (unless otherwise stated in the contract)
- the building work will be carried out in accordance and will comply with all laws and legal requirements, including without limitation the Act and the regulations
- the building work will be carried out with reasonable care and skill and be completed by the date [or within the period] specified in the contract or, if no date or period is specified, within a reasonable time
- if the household unit is to be occupied on completion of building work, it will be suitable for occupation on completion of that building work
- if the contract states the particular purpose for which the building work is required or the result that the homeowner wishes the building work to achieve so as to show that the homeowner relies on the skill

and judgement of the other party to the contract, the building work and any building products used in carrying out the building work will be reasonably fit for that purpose or be of such a nature and quality that they might reasonably be expected to achieve that result.

**7.1.3** Section 362J of the Building Act provides that future owners of a building can also take proceedings for a breach of these statutory warranties even though they were not a party to the original contract.

**7.1.4** In the first instance, homeowners who find a problem with building work can make use of the automatic 12-month period when the contractor must remedy within a reasonable timeframe any defects notified by the client in writing. This applies to all building work regardless of value. If building materials turn out to be faulty, the contractor must replace them. If the contractor disputes the defects, it is up to them to prove that the defect wasn’t their fault or the fault of their subcontractors.

**7.1.5** Where there is a dispute over a defect identified after the 12-month period has ended, it is up to the homeowner to prove there is a defect. The homeowner can take action for up to 10 years after building work is completed if implied warranties have not been met. This applies regardless of whether there is a written contract or what the contract says.

**7.1.6** If a breach of an implied warranty can be fixed, the homeowner can ask the contractor to fix it. This includes repairing or replacing defective building materials, including any supplied by the contractor’s subcontractors.

**7.1.7** If a breach can’t be fixed or is substantial, the homeowner can ask the building contractor for a payment of damages that compensates for the reduced value of the building work.

**7.1.8** If a breach during construction meets the Building Act definition of substantial, the homeowner can cancel the contract immediately. A breach of warranty is substantial if:

- a reasonable client fully acquainted with the nature and extent of the breach would not have entered into the contract
- the building work is unfit for the purpose stated in the contract or is of such a nature and quality that it cannot be expected to produce the desired result stated in the contract
- the building work is unsafe.

### 7.2 BUILDING ACT – CONSUMER RIGHTS AND REMEDIES

**7.2.1** Part 4A of the Building Act sets out consumer rights and remedies in relation to residential building work:

- A contractor must provide disclosure information and a checklist before a contract is entered into [section 362D]. The details of the disclosure information are given in Schedule 1 of the Building (Residential Consumer Rights and Remedies) Regulations. They include things such as the legal status of the building



contractor [an individual, partnership or limited liability company], their dispute history, the skills, qualifications and licensing status of the people who will be doing the building work and, if the contractor is a company, the role and business history of each director. The checklist sets out things such as risks and obligations that the client should consider when entering a contract. The details of the checklist are given in Schedule 2 of the regulations.

- Defective building work under a residential building contract must be remedied if notified within 1 year of completion [section 362Q].
- Certain information and documentation is to be provided on completion of building work under a residential building contract [section 362T]. This information includes any guarantee or insurance obtained by the building contractor in relation to the building work and maintenance requirements for products used in the building.

**7.2.2** Even if the value of the work is less than \$30,000 [including GST], a client should still request a disclosure statement and/or the checklist, and it must be provided.

### 7.3 FAIR TRADING ACT AND CONSUMER GUARANTEES ACT

**7.3.1** The Fair Trading Act applies to everyone in business and outlaws deceptive conduct, false representations and unfair contract terms. The section on unfair contract terms relates to clauses in standard form consumer contracts [contracts that consumers have to accept on a take-it-or-leave-it basis]. The Commerce Commission can go to court to challenge clauses that it thinks create a significant imbalance between the rights of companies and consumers. Unfair contract terms could be unenforceable even if the consumer has signed a contract knowing that the terms were there. This relates to contract fine print, not the main subject matter.

**7.3.2** Under the Consumer Guarantees Act, providers must:

- perform their services with reasonable care and skill
- complete work in a reasonable timeframe
- make sure their service is fit for any purpose the client told them about
- charge a reasonable price if no price or pricing formula has been previously agreed.

**7.3.4** If a consumer is unhappy with the job a builder or other service provider has done because it does not meet one or more of the guarantees, they can ask them to fix it at no cost to the consumer. If the service provider refuses or takes an unreasonably long time, the consumer can get someone else to fix it and claim the cost from the original service provider and/or cancel the contract and refuse to pay for work done.

**7.3.5** If a consumer has already paid for work, they can ask for some or all of their money back, depending on how much of the service provided was satisfactory. If work done has caused damage to other property, the client can also claim compensation [known as consequential loss] for that damage.

**7.3.6** The Consumer Guarantees Act does not apply to a whole house as it is not a 'good', but parts of the house are goods, even if they are attached or incorporated into the house.

## 8 AGREEMENTS FOR MINOR WORK

**8.0.1** For very minor work, a full contract may not be necessary but a simple written agreement should still be made. It should be signed and dated by both parties and include:

- the location of the work
- start and finish dates [with allowances for things such as bad weather]
- a description of the work and its extent, the standard expected and materials to be used
- the agreed price [including GST] and terms of payment
- what insurance policies apply while the work is being done.

## 9 FURTHER INFORMATION

### MBIE

[Before building work starts](#)

[Building consumer protection review](#)

[Contractors: Do your homework](#)

[Guide to tolerances, materials and workmanship in new residential construction](#)

[Homeowner rights and obligations](#)

[Prescribed checklist \[Building Act section 362D\]](#)

[Prescribed disclosure information \[Building Act section 362D\]](#)

[Why contracts are valuable](#)

### STANDARDS NEW ZEALAND

[NZS 3902:2004 Housing, alterations and small buildings contract](#)

[NZS 3910:2023 Conditions of contract for building and civil engineering construction](#)

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