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## Protecting RMBs under RBC1 in the COVID-19 Era

1. As New Zealand enters its second year dealing with the COVID-19 pandemic, the construction sector continues to face challenges, including ongoing lockdowns, shifts in Alert Levels, increased costs, and supply chain issues. It is imperative that contractors account for these circumstances when negotiating new contracts, as well as running existing contracts.
2. Fortunately, in our view, the RBC1:2018 Contract (“RBC1”) is already suitable for the COVID-19 era. This is because RBC1 provides several ‘tools’ for Registered Master Builders (“RMBs”) to protect their interests when dealing with unexpected or evolving situations. These tools are broad and tend to focus on the effects of a situation instead of the cause. Therefore, even though COVID-19 continues to present some unique challenges, the effects of COVID-19 on RMBs can generally be managed within the existing RBC1 framework.
3. The first step is for RMBs to understand how and when to use these tools.
4. One of the key tools for RMBs under RBC1 is the ability to claim for cost fluctuations in a fixed price contract, which is found under clause 46. This entitles the RMB to additional payment (in the form of an ‘Adjustment’) where there have been any subsequent increases (after the date the Contract was signed) in prices or additions to the cost of materials and services and plant/equipment hire costs.
5. This is a very broad right and entitles the Builder to claim for these increased costs in a fixed price contract, regardless of the reasons they arose. However, cost fluctuations are not generally relevant in a charge-up contract because the RMB passes on its actual costs as the job progresses.
6. In brief, a claim for cost fluctuations requires the RMB to be able to demonstrate there has been a change in price since the date the Contract was signed, and the extent of the price change.
7. Homeowners frequently request to remove Clause 46 when negotiating RBC1 contracts. However, we strongly advise that RMBs keep this clause in. This is because Clause 46 specifically creates RMBs’ right to claim cost increases in a fixed price contract, and without this clause, there is otherwise no common law right to do so. Therefore, RMBs should keep this clause in RBC1, otherwise the RMB will not have any right to pass on any cost increases to the Homeowner, which will be especially risky in the current market.
8. A second important RBC1 tool for RMBs is the ability to change materials when the RMB cannot get the materials they had contracted to provide. This is an especially significant protection for RMBs in the COVID-19 era, as supply chain issues continue to impact the availability of certain materials.

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9. Like a RMB's right to claim for cost fluctuations, a RMB's right to vary materials due to supply chain issues is also broad. Under Clause 92, if any materials specified in the Contract are not 'reasonably procurable', the RMB may substitute other materials of similar nature and quality. However, the RMB must first consult the Homeowner before making any change to the materials. We advise RMBs maintain open communication with the Homeowner and keep them regularly informed of any issues regarding supply. When the need for a specific substitution arises, the RMB should inform the Homeowner as soon as they know about it.
10. After consultation with the Homeowner, if any materials are substituted, this will be treated as a variation, for which the RMB will be entitled to an Adjustment.
11. A final tool RMBs can use to protect itself in the COVID-19 era is the ability to claim an extension of time (and associated costs) for delays to work. This is an extremely important for protection for RMBs, especially at present, as the ongoing threat of changes in Alert Levels and lockdowns continue to present risks of delay to construction work.
12. Clause 99 gives RMBs broad grounds to claim an Extension of Time. As a starting point, the RMB will not be liable for any delay caused by a wide range of prescribed circumstances. This includes variations or additional work (for example, where the RMB has had to substitute materials due to supply issues, as previously discussed), unforeseen health and safety requirements, and unavailability of materials. Further, the RMB will not be liable for any delay caused by *any other matter outside the RMB's reasonable control*. This is a very broad ground, which we would expect to cover most (if not all) delays caused by COVID-19.
13. To claim an Extension of Time, it is very important RMBs follow the required process, which is set out under clause 100. Once the delay becomes apparent to the RMB, the RMB must issue a notice to the Homeowner within a reasonable time setting out the amended Expected Completion Date of the Contract. In practice, the best way the RMB can achieve this is clearly communicating with the Owner as soon as it realises the works will be delayed, setting out in writing (i.e., an email) the reasons for the delay and the new Expected Completion Date.
14. Where an RMB is entitled to an Extension of Time for a delay, the RMB will also be able to pass on additional costs they have incurred from that delay to the Homeowner. These additional costs are passed on in the form of an Adjustment under the Contract, under clause 102.
15. This broad right to claim additional costs is especially useful for RMBs in the COVID-19 era. For example, where a lockdown has led to an Extension of Time under the Contract, a RMB may face additional costs incurred such as extra equipment hire (like scaffolding or site fencing) and extended Contract works insurance. Relying on clause 102, the RMB can look to pass these additional costs on to the Homeowner.
16. Overall, due to the breadth of 'tools' available to RMBs under the Contract (including claiming for cost fluctuations, the ability to change materials due to supply chain issues,

and extensions of time under the Contract), in our view RBC1 is generally well-equipped as is to protect RMBs' interests throughout the ongoing COVID-19 era.

17. This also means it is not likely necessary to add in any additional clauses to deal with COVID-19. In fact, amending the Contract may risk undermining the existing tools in the Contract.
18. One example of this is a 'force majeure' clause. A force majeure clause is designed to excuse a contracting party from performing its obligations under the contract due to a supervening event, which was unknown at the time of the contract.
19. However, in our view, in addition to being unnecessary, inserting a force majeure is likely to be unhelpful or even risky if inserted in RBC1.
20. Not only is there is a strong argument that COVID-19 is no longer 'unknown', so it would not trigger a force majeure clause in any event, but furthermore inserting a force majeure clause into RBC1 also risks undermining RMBs' existing 'tools' under the Contract (as set out above) and may overall disadvantage RMBs' position under RBC1.