

# **DRAFTING ISSUES IN RESIDENTIAL CONSTRUCTION CONTRACTS**

Written by:

**ROBERT L. RUSSELL BUSH**  
**JAMES W. RUDNICKI**  
THE BUSH FIRM, P.C.  
4025 Woodland Park Blvd., Suite 190  
Arlington, Texas 76013  
817-274-5992; 1-888-211-1791  
rbush@thebushfirm.com  
james@thebushfirm.com

**KATHRYN L. KOONS**  
KOONS REAL ESTATE LAW, P.C.  
3400 Carlisle Street, Suite 400  
Dallas, Texas 75204-1268  
214-954-0067  
kkoons@koonsrealestatelaw.com

Presented by:

**ROBERT L. RUSSELL BUSH**, Arlington

and

**KATHRYN L. KOONS**, Dallas

State Bar of Texas  
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**CHAPTER 3**



# **ROBERT L. RUSSELL BUSH**

THE BUSH FIRM, P.C.  
4025 Woodland Park Blvd., Suite 190  
Arlington, Texas 76013  
817-274-5992; Fax: 817-261-1671  
Website: [www.thebushfirm.com](http://www.thebushfirm.com)  
E-mail address: [rbush@thebushfirm.com](mailto:rbush@thebushfirm.com)

## **Education**

Southern Methodist University, Dallas, Texas -- B.B.A., 1972  
University of Texas, Austin, Texas -- J.D., 1975

## **Employment**

1985-Present      The Bush Firm, P.C. - President, Director and Shareholder  
Mr. Bush's practice is primarily in the areas of construction law, civil litigation,  
real estate, and insurance defense.  
1975-1985        Rohne, Hoodenpyle, Bush & Lobert, P.C. - Attorney and Shareholder

## **Activities**

2007              Speaker, Texas Association of Builders, Sunbelt Builders Show  
2007              Chairman of Planning Committee, State Bar of Texas Residential Real Estate  
Construction Law Course  
2006              Associate Member of the Year, Home Builders Association of Greater Dallas  
2006              Speaker, State Bar of Texas Residential Real Estate Construction Law Course  
2005-Present    Texas Association of Builders, Contracts Committee  
2005              Speaker, University of Texas School of Law, "Residential Development and  
Construction Law Course"  
2001-2007        Speaker, Texas Association of Builders, Sunbelt Builders Show  
2004              Speaker, State Bar of Texas, "The New Residential Real Estate Construction Law  
Rules"  
2002-2004        Speaker, NAHB International Builders Show  
2003              Texas Association of Builders Attorney of the Year Award  
2003              Speaker, State Bar of Texas Construction Law and Consumer Law Sections, "HB730,  
The Brave New World of Residential Construction Litigation"  
2003              Speaker, Comprehensive Consumer Law Seminar for State Bar of Texas, "The New  
Texas Residential Construction Commission Act"  
2001              Speaker, Advanced Real Estate Law Course for State Bar of Texas  
2001              Speaker, National Business Institute Seminar, "Texas Real Estate Law: Problems and  
Solutions"  
1999              Speaker, Second Annual Construction Defect Summit hosted by Great American  
Insurance Companies  
1998-Present    Charter Fellow, Tarrant County Bar Foundation  
1997              Instructor, "Home Warrant/Construction Cases" for the Fourth Annual Blackstone  
Seminar sponsored by the Tarrant County Bar Association  
1996-2001        Member, State Bar of Texas Pattern Jury Charge - Business, Consumer & Employment  
Committee  
1995, 2001-Present    Instructor, Construction Contracts & Law Course for Builder Associations  
1989-Present    Involved in passage of and subsequent amendments to the Texas Residential  
Construction Liability Act and passage of the Texas Residential Construction  
Commission Act  
1994-Present    Fellow, Texas Bar Foundation  
1982-1986        Delegate, District 7A State Bar Grievance Committee  
1980-1981        Instructor, Texas State Bar Practice Skills Course

## **Publications**

- 2005 “Residential Construction Contracts After HB 730,” Presentation for The University of Texas School of Law Residential Development and Construction Law Course
- 2004 “The Why, What and When of the New Texas Residential Construction Commission Act,” Presentation to the State Bar of Texas New Residential Real Estate Construction Law Rules Seminar
- 2002 “Implied Warranties on New Homes in Texas-The Impact of Centex Homes v.Buecher,” Texas Builder Magazine (November/December 2002)
- 2001 “Understanding the Texas Residential Construction Liability Act,” Texas Builder Magazine (November/December 2001)
- 2001 “Residential Construction Litigation in Texas,” Presentation to the State Bar of Texas Advanced Real Estate Law Course (Dallas and Houston)
- 1999 “New RCLA Changes-Effective on September 1, 1999,” Texas Building Trends (July/August 1999)
- 1994 “RCLA: The Builder’s Best Defense,” Texas Builder Magazine (April/May 1994)

## **Admission to Courts**

State Bar of Texas  
U.S. District Courts for the Northern, Eastern, Western and Southern Districts of Texas  
U.S. Court of Appeals, Fifth Circuit

## **Organizations**

State Bar of Texas; Tarrant County Bar Association; Arlington Bar Association; Texas Bar Foundation; Tarrant County Bar Foundation; National Association of Home Builders; Texas Association of Builders; Greater Fort Worth Builders Association (General Counsel for Association); Home Builders Association of Greater Dallas (General Counsel for Association); Greater San Antonio Builders Association; Home Builders Association Greater Austin; Greater New Braunfels Home Builders Association; Corpus Christi Builders Association

## **Mediation Training**

Mr. Bush is trained and qualified as a mediator pursuant to Section 154.052, Texas Civil Practices & Remedies Code.



3400 CARLISLE STREET, SUITE 400  
DALLAS, TEXAS 75204-1268  
TELEPHONE (214) 954-0067  
FACSIMILE (214) 954-0108

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**Kathryn L. Koons (Founding Shareholder, President and Firm Manager)**

**Practice Description:** Kathy has practiced in the area of commercial real estate law since 1983. She is currently representing large and small companies, investors and developers in the acquisition, disposition, development, management, leasing and operation of raw land, residential subdivisions, apartments, office buildings, condominiums, townhomes, retail and power centers and other types of real estate. Kathy also has extensive experience in the structuring and formation of mixed-use developments, negotiation of all types of partnership and asset-protected entities, and preparing and negotiating financing documentation of all types. Recently, she has worked from the initial phase of a mixed-use project to develop a comprehensive high-end master planned community involving retail, multi-family, hotel, office and hospital uses. In addition, she has been legal counsel for the past ten (10) years to the developer of a 2,000 acre mixed-use development in San Antonio, Texas, where she has worked on every aspect of the master plan deed restrictions, infrastructure, build-out, annexation and entitlement issues, owner association issues, golf course negotiations with the golf course developer and related issues. Kathy has focused much of her practice on the fundamentals and efficient creation and operation of deed restricted developments of all types.

**Education:**

- B.A. in Journalism, English minor, Texas Tech University, *Magna Cum Laude*, 1980
- JD, Dedman School of Law, Southern Methodist University, 1983 (where she was an editor on Law Review)

**Prior Experience:**

- Founding Shareholder of Axley & Hargrove, P.C., 1995 (n/k/a Koons Real Estate Law)
- Denton & Axley, 1992-1995
- Associate, then Shareholder of Geary, Glast & Middleton, 1983-1992

**Hometown:** Dallas, Texas

**Personal:** Single, with two daughters, Martha and Claire

**Awards:** Texas Monthly Super Lawyer, October, 2006 and 2007

**Professional Memberships:**

- Dallas Bar Association
- Texas Bar Association

**Other Affiliations:**

- Chairman of the Board of Uptown Public Improvement District
- Member of Uptown Dallas Association, Inc.
- Trustee, Northridge Presbyterian Church

**Hobbies:** Reading, movies, travel, hunting



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## **NEW HOME CONTRACTS FOR RESIDENTIAL CONSTRUCTION: POINT/COUNTERPOINT**

### **I. INTRODUCTION**

House Bill 730 (“HB 730”), which became effective on September 1, 2003, created the Texas Residential Construction Commission Act (“TRCCA”) which is found in Title 16 of the Texas Property Code. HB 730 also significantly amended Chapter 27 of the Texas Property Code known as the Residential Construction Liability Act (“RCLA”). This landmark legislation ushered in major changes in the residential construction industry in Texas that have benefited both home buyers and home builders. Effective September 1, 2007, House Bill 1038 (“HB 1038”) became effective. This legislation made sweeping changes to the TRCCA including a significant increase of the TRCCA’s disciplinary power and the addition of new mandatory language to be included in residential construction contracts in Texas. In response to this legislation, the Texas Association of Builders (“TAB”) formed a Contract Task Force to create a comprehensive set of contract documents designed to be balanced and reasonably easy to understand and use.

### **II. HOW THE TAB CONTRACTS WERE DEVELOPED**

The TAB Contract Task Force, working in conjunction with the TAB Attorney Council, gathered copies of various contract forms that were in use around the state including, of course, the latest version of the contract forms originally promulgated by TAB. These forms covered residential construction on the builder’s lot and construction and remodeling on the customer’s property with related addenda and disclosures. They also included ancillary agreements and documents such as independent contractor agreements and lien waivers. The TAB Contract Task Force reviewed all of these documents to gain an understanding of the types of contract documents that were in use across the State. The Task Force met many times in various locations to discuss what should be included in the contract documents. Drafts were circulated among the Task Force over the course of nearly two years before the original version of the contracts was finalized. After the passage of HB 1038, the committee met again to update and expand all of the forms included in the TAB Contract Package.

### **III. CURRENT FORMS INCLUDED IN THE TAB CONTRACT PACKAGE**

The contracts and forms in the TAB Contract Package include the following:

- A. TAB 1.1 - Residential Construction Contract – Fixed Price (For Use with Custom Construction Jobs on the Owner’s Property)
- TAB 2.1 - Residential Construction Contract – Cost Plus (For Use with Custom Construction Jobs on the Owner’s Property)

With the following addendums:

- TAB A-1 Legal Description
- TAB A-2 Schedule of Estimated Construction Costs (only used with TAB 2.1)
- TAB A-3 Additional Cash Payment Request
- TAB A-4 Notice of Expansive Soils
- TAB A-5 Final Customer Walk-Thru Approval and Punch List
- TAB A-6 Selection Schedule Addendum
- TAB A-7 Change Order
- TAB A-8 Real Estate Broker’s Fee Addendum
- TAB A-9 Builder’s Disclosure Statement for Residential Construction Contracts
- TAB A-10 Waiver of the List of Subcontractors and Suppliers
- TAB A-11 Assignment of Manufactured Product Warranties
- TAB A-12 Special Provisions Addendum

TAB 1.1 and 2.1 are mechanic’s lien contracts for use with construction of a home on the customer’s property. TAB 1.1 provides for a fixed price for the construction while TAB 2.1 provides for the price for

the construction to be a set Builder's Fee plus the costs of the construction (cost-plus). There is an Assignment at the end of the contract. The "Assignee" blank is for the name of the customer's lender. The assignment allows the lender to have a first lien position for all funds paid to the Builder from the construction loan.

TAB A-2 Schedule of Estimated Construction Costs is not included in the addenda for TAB 1.1 since the price for the construction is a fixed price rather than based on the construction costs.

Whichever mechanic's lien contract the Builder uses, it is important that the contract be notarized at the time the Owner signs it so that it can be filed in the property records in accordance with Section 53.254(e) of the Texas Property Code.

**B. TAB 3.1 - Residential Construction Contract (For Use with Homes Constructed on the Builder's Property)**

With the following addendums:

- TAB B-1 Legal Description
- TAB B-2 Special Conditions Addendum
- TAB B-3 Financing Addendum
- TAB B-4 Addendum for Property Subject to Mandatory Membership in an Owners' Association
- TAB B-5 Notice Regarding Coastal Area Property
- TAB B-6 Final Customer Walk-Thru Approval and Punch List
- TAB B-7 Selection Schedule Addendum
- TAB B-8 Change Order
- TAB B-9 Real Estate Broker's Fee Addendum
- TAB B-10 Addendum for Property Located Seaward of the Gulf Intracoastal Waterway
- TAB B-11 Assignment of Manufactured Product Warranties
- TAB B-12 Notice of Expansive Soils

This contract should be used when the Builder owns the lot and will be constructing a home for a customer who will buy both the home and the lot upon completion of the improvements.

**C. TAB 4.1 - Residential Home Contract (For use with Completed Homes Constructed on the Builder's Property) (commonly known as a "spec" home)**

With the following addendums:

- TAB C-1 Legal Description
- TAB C-2 Special Conditions Addendum
- TAB C-3 Financing Addendum
- TAB C-4 Addendum for Property Subject to Mandatory Membership in An Owners' Association
- TAB C-5 Notice Regarding Coastal Area Property
- TAB C-6 Final Customer Walk-Thru Approval and Punch List
- TAB C-7 Change Order
- TAB C-8 Real Estate Broker's Fee Addendum
- TAB C-9 Addendum for Property Located Seaward of the Gulf Intracoastal Waterway
- TAB C-10 Assignment of Manufactured Product Warranties
- TAB C-11 Notice of Expansive Soils

This contract should be used if the home is fully completed at the time the Builder signs a contract with its customer, commonly referred to as a "spec" home.

**D. TAB 11.1 - Residential Partially Completed Home Contract (For Use With Partially Completed Homes Constructed on the Builder's Property)**

With the following addendums:

TAB E-1 Legal Description  
TAB E-2 Special Provisions Addendum  
TAB E-3 Financing Addendum  
TAB E-4 Addendum for Property Subject to Mandatory Membership in An Owners' Association  
TAB E-5 Notice Regarding Coastal Area Property  
TAB E-6 Final Customer Walk-Thru Approval and Punch List  
TAB E-7 Selection Schedule Addendum  
TAB E-8 Change Order  
TAB E-9 Real Estate Broker's Fee Addendum  
TAB E-10 Addendum for Property Located Seaward of the Gulf Intracoastal Waterway  
TAB E-11 Assignment of Manufactured Product Warranties  
TAB E-12 Notice of Expansive Soils

This contract should be used if the home is partially completed at the time the Builder signs a contract with its customer.

- E. TAB 5.1 - Residential Remodeling Contract – Fixed Price (For Use With Custom Remodeling Jobs on the Owner's Property)
- TAB 6.1 - Residential Remodeling Contract – Cost Plus (For Use with Custom Remodeling Jobs on the Owner's Property)

With the following addendums:

TAB D-1 Legal Description  
TAB D-2 Proposal  
TAB D-3 Additional Cash Payment Request  
TAB D-4 Schedule of Estimated Construction Costs (only used with TAB 6.1)  
TAB D-5 Final Customer Walk-Thru Approval and Punch List  
TAB D-6 Selection Schedule Addendum  
TAB D-7 Change Order  
TAB D-8 Builder's Disclosure Statement for Residential Construction Contracts  
TAB D-9 Waiver of List of Subcontractors and Suppliers  
TAB D-10 Addendum for Disclosure of Information on Lead-Based Paint and Lead-Based Paint Hazards as Required by Federal Law  
TAB D-11 Notice of Right of Rescission  
TAB D-12 Assignment of Manufactured Product Warranties  
TAB D-13 Special Provisions Addendum  
TAB D-14 Notice of Expansive Soils

TAB 5.1 and TAB 6.1 are mechanic's lien contracts for use with a remodeling project. TAB 5.1 provides for a fixed price for the construction and TAB 6.1 provides for the price for the construction to be a set Builder's Fee plus the costs of the construction (cost-plus). There is an Assignment at the end of the remodeling mechanic's lien contracts. The "Assignee" blank is for the name of the customer's lender. The assignment allows the lender to have a first lien position for all funds paid to the Builder from the construction loan.

Note that the TAB D-4 Schedule of Estimated Construction Costs is not included in the addenda for TAB 5.1 since the price for the construction is a fixed price rather than based on the construction costs.

Whichever remodeling contract the Builder uses, it is important that the contract be notarized at the time the Owner signs it so that it can be filed in the property records in accordance with Section 53.254(e) of the Texas Property Code.

- F. Limited Warranty (for remodeling projects not subject to the TRCC) (TAB 5.2). This Warranty may be used in conjunction with contracts that are less than \$10,000.00.

## G. TAB 7.1 - Indemnity and Affidavit as to Payment of Bills and Release of Liens

This affidavit is for use when all subcontractors and suppliers have been paid. It states that the Contractor (Builder) has paid each person in full for all labor and materials used in the construction of improvements on the property. It should be signed either at closing or upon substantial completion of the project.

## H. TAB 8.1 - Independent Contractor Base Agreement

TAB 8.2 - Supplier Base Agreement

TAB 8.3 - Independent Design Professional Base Agreement

TAB 8.1 is an agreement between the Builder and a contractor or subcontractor who will be supplying labor or materials for a job. TAB 8.2 is an agreement between the Builder and a supplier who will be supplying materials for a job. TAB 8.3 is an agreement between the Builder and a design professional such as a foundation engineer/designer, architect, etc. There are blanks in each of the forms for insurance coverage which the Builder is requiring from the subcontractor/supplier/design professional. Ideally, a subcontractor/supplier/design professional would carry coverage in the same amount as the Builder; however, a general rule of thumb is that the subcontractor/supplier/design professional should carry at least \$500,000 per occurrence and \$1,000,000 aggregate for both bodily injury and property damage, although the individual circumstances of the job or the contract may make a higher or lower amount appropriate. It is best for the Builder to consult his insurance agent as to the limits that may be appropriate under the circumstances of any particular job.

## I. TAB 9.1 - Authorization to Obtain DPS Criminal History Record

A law (HB705) that became effective September 1, 2003 provides that an in-home service company or residential delivery company within the meaning of Chapter 145 of the Texas Civil Practice and Remedies Code ("TCPRC") can obtain a criminal history record on any employee or agent that will be sent to deliver, place, assemble, repair or install an item at a residence. If an action is subsequently brought against the company alleging negligent hiring of an employee or agent, the company will have the legal defense of being presumed to have not acted negligently if the criminal history record information does NOT show the following: (1) a felony conviction in the 20 years preceding the date the information was obtained or (2) a misdemeanor conviction in the 10 years preceding the date the information was obtained for (a) an offense in this state classified as: (i) an offense against the person or the family; (ii) an offense against property; or (iii) public indecency; or (b) an offense in another jurisdiction that would be classified in a category described in (a) above if the offense had occurred in this state.

Therefore, if the Builder or remodeler has a contract with a customer who is living in the residence where work will be performed or materials such as appliances, HVAC equipment, or plumbing or electrical fixtures will be installed, a criminal history record should be obtained by the Builder or remodeler on all employees, agents, prospective employees, and subcontractors who will be entering a customer's residence. The Builder or remodeler should also request that their subcontractors obtain criminal history records on all of their employees, agents, prospective employees and subcontractors prior to entering a person's residence.

This form can be used to obtain the criminal history record from ALL STATES from the Texas Department of Public Safety or a private vendor approved by the Department of Public Safety.

## J. TAB 10.1 through 10.6 - Down Date Waivers (For Use with Contractors, Subcontractors and Sub-Subcontractors)

Six Down Date Waiver forms are provided in the TAB Contracts package. There are two forms to be signed by a Contractor (Builder), two forms to be signed by a first-tier Subcontractor (Subcontractor), and two forms to be signed by a second-tier subcontractor (Sub-subcontractor). One form for the Contractor, First-tier Subcontractor and Sub-subcontractor has a verification (space for a notary's seal and signature) and one form does not have a verification. The person signing the form is representing three things: 1) that he or she is authorized to sign on behalf of the Contractor/Subcontractor; 2) that, except for retainage, if any, all charges for labor performed and material furnished by the Contractor/Subcontractor related to the work described in the Down Date Waiver on or before the Down Date has been paid in full to the

Contractor/Subcontractor; and 3) that the Contractor/Subcontractor has fully paid all of its subcontractors for labor performed and material furnished in connection with the work on or before the Down Date. Finally, the form releases all claims against the owner or the property (including liens and claims of liens) that the Contractor/Subcontractor has in relation to work completed on or before the Down Date. Work completed after the Down Date is not affected by the Down Date Waiver.

The forms that have acknowledgments can be filed in the property records of the county in which the property is located.

K. TAB 12.1 Agreement for Termination of Contract and Release

This form can be used when the Builder and its customer have agreed, for whatever reason, to terminate a pending contract.

L. Residential Construction Contract Lender Addendum (see attached Appendix A)

This Addendum was developed in conjunction with Michael H. Patterson of the firm of Peirson & Patterson, LLP in Arlington, Texas. It is intended to avoid, or at least minimize, conflicts between the Builder's contract and the standard mechanic's lien documents typically used by residential construction lenders.

#### IV. SPECIFIC PROVISIONS

This paper will focus on TAB Form 1.1 (Residential Construction Contract – Fixed Price (For Use with Custom Construction Jobs on the Owner's Property)) since this form contains most of the primary drafting issues which will be addressed in this paper. There are, of course, a wide variety of issues that are typically negotiated in connection of residential construction contract. The time and space limitations for the presentation do not permit going into an exhaustive list. Instead we have focused on what we feel are some of the most significant issues that typically arise when counsel for a buyer and seller are negotiating a residential construction contract for improvements being erected on the owner's property. These issues tackled in this paper are as follows:

1. **Description of Work** to be provided by Builder v. Owner including the definition of "construction costs".
2. **Payment and Substantial Completion** issues including initial deposits, draw procedures, retainage, down date lien waivers, final payment, definition of substantial completion, right to possession, walkthrough forms, releases, punch list preparation, and timing and affidavits of completion.
3. **Construction Documents; Reliance/Ownership** by Contractor or other design professionals and engineers.
4. **Construction Timetables** including start date, delay issues, and incentive/penalties.
5. **Change Orders** and procedures including builder's fees, right of builder to stop work, production of change order documents, payment in advance and payment in advance of change orders.
6. **Contractual Remedies**, including termination events, events of default by builder and owner and contractual remedies for default.
7. **Dispute Resolution** both during construction and post completion including mediation, arbitration and contractual waiver of jury trial.
8. **Warranties**, including TRCC warranties, third-party warranties and additional negotiated warranties.
9. **Statutory Requirements** imposed by HB 1038.

The format for the following discussion of these contractual topics will include the relevant contract provisions to be discussed along with the authors' commentary.

#### DISCUSSION OF TEXAS ASSOCIATION OF BUILDERS FORM 1.1

##### 1. Description Of Work: What Builder Provides as Part of Contract Price.

- All permits, labor, and materials for the construction.
- Resolution of inconsistencies/conflicts/omissions within the Construction Documents.

- Insurance (Builder's risk, general liability and workers compensation).

Note that Section 16.P. permits the Total Contract Price to be increased if the cost of certain construction materials increases in excess of 25% from the average of similar materials purchased by Builder in the 30-day period preceding execution of the Contract.

- ❖ **Owner may want to be more specific about what he is paying for by reference to specific plans and specifications.**
- ❖ **Owner will want to be involved in resolving inconsistencies.**
- ❖ **Owner will want to address deviations from plans by making sure they not only comply with all codes and laws, but that they also are of the same grade and quality.**
- ❖ **Owner may wish to state generally that if there is a conflict between the Plans and the Specifications, that the Plans control unless Owner otherwise consents.**

*Relevant Contract Provisions* \_\_\_\_\_

3. IMPROVEMENTS:

B. WORK - Builder shall provide all labor and materials for the construction (Work) of the following improvements (Improvements): (check the appropriate box)  a single family residence or  \_\_\_\_\_ substantially in accordance with the Construction Documents. Any inconsistencies or conflicts within the Construction Documents shall be resolved by the Builder in its reasonable discretion. If a detail of the construction is not specified within the Construction Documents, or should an alternative building practice be available in lieu of a specified procedure, the Builder may select a construction procedure that complies with applicable building codes. Unless otherwise specified in writing, materials used by the Builder in the construction of the Improvements shall be as prescribed in the Construction Documents, subject to substitution at Builder's election should an item not be reasonably available or if the procurement of such would cause undue delay in the progress of the Work. Any substitutions shall be of comparable grade and quality and shall be specified in a Change Order (as defined below). The construction of the Improvements is also subject to any changes in the Construction Documents as may be required by federal, state or local governmental authorities. Owner acknowledges that these changes may occur during construction and agrees that so long as the Improvements are substantially in compliance with the Construction Documents, any such deviations will be accepted.

11. INSURANCE: Before beginning the Work, Builder shall obtain: (check the appropriate box(es))

Builder's risk insurance covering all insurable risks, with respect to the Improvements, in an amount equal to or greater than the Total Contract Price.

Comprehensive general liability insurance.

Workers Compensation Insurance or waivers covering all individuals who assist in the Work.

The cost for all required insurance is included in the Total Contract Price.

16.P. ESCALATION OF CERTAIN MATERIALS CATEGORIES – Certain building materials utilized in the construction of new homes can be subject to price variation based on local, regional, and national supply and demand issues and additionally, catastrophic events such as hurricanes, tornadoes, floods, earthquakes, terrorism and wars can dramatically affect the price of delivered materials. Categories of materials most commonly affected by these variations in demand are sheet goods such as drywall, insulated wiring, soffit trim, plywood, OSB, structural members commonly referred to as 2x material, concrete and steel products, and petroleum based roofing materials. In the event that there is a significant price increase in these construction materials categories in excess of 25% from the average of similar materials purchased by Builder in the preceding 30-day period from the execution of this Contract, the excess charges will be passed through to Owner, resulting in an increase in the Total Contract Price. Builder will attempt to keep the Owner informed of cost variations and prior to contracting, will attempt to verify the price of materials in these categories, thus limiting exposure to the Owner for any subsequent price changes.

## 2. Payment AND Substantial Completion

- How will the Fixed Price be calculated?
  - ❖ **Construction Costs are defined in Section 5.B. Owner may want to exclude insurance costs, costs related to Builder's negligence or failure to complete the Plans or comply with the law, and any tort claims or legal expenses related to subcontractors working on the Work.**
- How is the Initial Cash Payment calculated?
- One of the components of the Initial Cash Payment and also each periodic payment price is "compensation to Builder for time and effort expended".
  - ❖ **Builder will want adequate compensation for his time and expertise.**
  - ❖ **Owner will want a predictable, non-arbitrary method of calculation commensurate with the work associated with that payment. Sometimes specific draw schedules are attached.**
  - ❖ **Because Termination Damages (liquidated damages to Builder in event of Contract termination by Owner, to be discussed later) are a portion of the Initial Cash Payment, Builder will necessarily want the Initial Cash Payment to be substantial enough to include appropriate Termination Damages.**
    - Fair solution may be that the Initial Cash Payment to Builder be calculated as a flat percentage of the Fixed Price, but large enough to include the Termination Damages. Thereafter, different percentages may be applied to different stages of construction.
  - ❖ **Lender requirements must be taken into account when preparing the Contract. For instance, the TAB 1.1 provides that a Schedule of Allowances may be prepared to budget for certain components of the construction, but an overall budget is not required by TAB 1.1 to control draw schedule. A lender may require a budget, construction timeline and/or retainage.**
- For periodic draws for payment, the TAB 1.1 form (Sec. 5.B) requires that the Builder include the name and address of each person who subcontracted with the Builder and identity of those who are to be paid from the requested funds. Builder also should identify suppliers of materials since they also have lien rights against the property if they are not timely paid.
- 10% Statutory Retainage is not required by the TAB form. Homebuilders generally reject this requirement and some builders will not even accept a construction job where retainage is required. The purpose of statutory retainage is to ensure timely payment of subcontractors and suppliers and protect the Owner from mechanic's liens.
  - Owner's purposes may be achieved by other means such as requiring partial lien releases for work performed, and by doing same on a bi-weekly basis so that less than 30 days have elapsed since completion of the corresponding work or delivery of the corresponding supplies.
- Final Payment.

The TAB 1.1 requires Final Payment "upon Substantial Completion". Owner and Builder will have differing opinions as to what constitutes "Substantial Completion", since the Owner's walk-through with the Builder and punch list preparation take place AT Substantial Completion. The TAB 1.1 at Section 7 defines Substantial Completion as "when a certificate of occupancy is issued or, if no certificate of occupancy is required, when all electrical, mechanical, and plumbing final inspections have been approved or all approvals for occupancy have been received from any applicable governmental authority or, in the absence of the foregoing, when the Improvements are suitable for occupancy; provided, however, that if Owner moves into the Improvements, the Improvements shall be deemed to be substantially completed."

- ❖ **A certificate of occupancy or other approval does not contain any certification or assurance that the Work has been completed, nor even that it has been completed in accordance with the Construction Documents. The Owner will want to require the walk-through and conduct any**

further inspections by his own professionals, and prepare the punch list with the Builder (punch list should contain a time frame within which the items must be completed) prior to deeming the home to be Substantially Completed.

- ❖ Owner will want the construction site cleaned of debris and surplus materials.
  - ❖ The Owner should require Final Payment to be accompanied by a final certificate of completion and lien waivers from Builder and all subcontractors and suppliers, subject to punch list items. Note that the lender may require this in the loan documents regardless.
  - ❖ Builder will need to file Completion Affidavit of record.
  - ❖ Since the Owner may move in the home prior to completion of punch list items, especially if the punch list items are significant, Owner will want to strike the provision in Section 7 that releases the Builder from maintaining its insurance upon Owner's move-in (except for builder's risk coverage).
  - ❖ Owner will need a remedy if Builder fails to complete Punch List items because the last sentence of Section 7 provides that such failure is not a basis for Owner to withhold any payments from the Builder.
- When does the Contract end and the Warranty begin?
    - ❖ Builder will want the warranty clock to start ticking as soon as possible. The TAB A-5 form of Final Customer Walk-Thru and Approval (pursuant to which the punch list is prepared) releases the Builder from all claims and liabilities except contractual warranty obligations under Builder's express limited warranty, any punch list items and the statutory warranty of habitability.
    - ❖ It is in Owner's best interest to avoid that release and beginning of the warranty until punch list items are complete, otherwise Builder has no incentive to complete punch list items since he will have already received the Final Payment. In addition, Owner will not ever want to release Builder for latent defects.

*Relevant Contract Provisions* \_\_\_\_\_

4. CONTRACT PRICE: Owner agrees to pay Builder the sum of \$ \_\_\_\_\_ (Total Contract Price) as consideration for the construction and completion of the Improvements and the performance of the Work, subject to adjustment as allowed by this Contract.

5. PAYMENTS:

A. INITIAL CASH PAYMENT - Prior to the commencement of the Work, Owner shall pay to Builder \_\_\_\_\_ % of the Total Contract Price or \$ \_\_\_\_\_ as a portion of the Total Contract Price (Initial Cash Payment). Builder may use the Initial Cash Payment in consideration for, among other things, initial construction or pre-construction expenses, and compensation to Builder for time and effort expended in connection with this transaction. Notwithstanding anything herein to the contrary, the sum of \$ \_\_\_\_\_ (Termination Damages) out of the Initial Cash Payment shall be retained by the Builder as liquidated damages if this Contract is terminated for any reason other than a Builder's Event of Default (as defined below) or Builder's Termination Right (as defined below). Builder and Owner agree that it is not possible to calculate the exact amount of damages that Builder will suffer if this Contract is terminated for a reason other than the Builder being in default and this amount is a reasonable approximation of the damages. This amount is not intended by the parties to be a penalty in any way.

B. ADDITIONAL CASH PAYMENTS - During construction, the Builder shall present Owner with requests (Additional Cash Payment Request) for payment (Additional Cash Payment). The Additional Cash Payment Requests shall reflect the Construction Costs (as defined below) and any compensation to Builder for time and effort expended in connection with this transaction incurred up to the date the Additional Cash Payment Request is submitted to Owner and for which Builder is requesting payment. The Additional Cash Payment Request shall include the name and address of each person who subcontracted directly with Builder and who Builder intends to pay from the requested funds. Owner shall cause the Additional Cash Payments to be made to Builder within three (3) business days following the receipt of an Additional Cash Payment Request. In the event of a payment delay, Builder shall have the right to stop Work progress until payment is made. Construction Costs are defined as all costs incurred by the Builder as a result of the

Work, except for the following costs:

- 1) Salaries, wages, and other compensation for the Builder or the Builder's personnel stationed at the Builder's offices or at other sites not related to the Work.
  - 2) Expenses and operating cost of the Builder's offices.
  - 3) General overhead expenses of the Builder.
  - 4) Marketing and promotional expenses of the Builder.
  - 5) Capital and bank expenses of the Builder.
  - 6) Any costs not related to the Work.
- C. FINAL PAYMENT - The Final Payment (that portion of the Total Contract Price not paid by previous payments as well as any Change Orders and Allowances (as defined below)) will be due and payable upon Substantial Completion (as defined below) of the Improvements. Except as provided in Section 5.A, Owner and Builder agree that there will be no retainage of funds.
- D. SOURCE OF PAYMENT (check the appropriate box) –
- If Owner is obtaining interim construction financing from a bona fide third-party lender, Owner shall obtain and pay the loan at Owner's expense and pay all related expenses. In the event of any conflicts between the Construction Documents and any documents promulgated by any third-party lender, the terms of the Construction Documents will control. If Owner is unable to obtain an interim construction loan, with terms reasonably acceptable to Builder, within \_\_\_\_\_ days of the date of this Contract, either Owner or Builder may terminate this Contract by giving the other party written notice of termination.
- If Owner is not obtaining an interim construction loan to pay for construction of the Improvements, upon execution of this Contract and prior to commencement of construction, Owner shall: (check the appropriate box)
- pay the Total Contract Price to Builder and Builder shall deposit same in a construction account (Builder's Construction Account) with a financial institution reasonably approved by Owner; or
- deposit the Total Contract Price in a construction account (Owner's Construction Account) with a financial institution reasonably acceptable to Builder. In such event, Builder shall have the right to monitor Owner's Construction Account to insure the Owner has deposited the required funds into the account. Failure by Owner to establish and maintain Owner's Construction Account as required herein shall be a breach of this Contract and Builder may, at its sole option, elect to treat such breach as an Owner Event of Default (as defined below).
7. **SUBSTANTIAL COMPLETION, INSPECTION, RELEASE AND OCCUPANCY:** The Improvements will be deemed to be substantially completed (Substantial Completion) when a certificate of occupancy is issued or, if no certificate of occupancy is required, when all electrical, mechanical, and plumbing final inspections have been approved or all approvals for occupancy have been received from any applicable governmental authority or, in the absence of the foregoing, when the Improvements are suitable for occupancy; provided, however, that if Owner moves into the Improvements, the Improvements shall be deemed to be substantially completed. At the time of Substantial Completion, Owner will conduct a walk-thru inspection of the Improvements and will execute and deliver to Builder a "Final Customer Walk-Thru Approval and Punch List" in the form attached hereto which confirms Owner's inspection and acceptance of the Improvements, Owner's acknowledgment that all construction Work has been completed in accordance with the Construction Documents, and releases Builder from all claims and liabilities except contractual warranty obligations arising under Builder's express limited warranty, any agreed items of Work to be completed (Punch List Items") and the statutory warranty of habitability. Upon Substantial Completion of the Improvements and payment to the Builder of the Total Contract Price and all payments as set forth herein, Owner will be given possession of the Improvements and the Property; provided, however, that in no event shall Owner be entitled, without the prior written consent of the Builder, to occupy any portion of the Improvements until Builder has been paid the Total Contract Price and all payments as set forth herein. At such time as Owner first occupies the Improvements, Builder shall be released from any further obligation or duty for the maintenance of insurance coverage with respect to the Property and/or the care, repair, maintenance and condition of the Property and the Improvements, except as outlined in the Builder's express limited warranty, if applicable. Builder's failure to complete Punch List Items shall not be a basis for Owner to withhold any payments otherwise due Builder.

**3. Construction Documents; Reliance/Ownership.**

- The Construction Documents may be prepared by architects, engineers and designers commissioned by either Owner or Builder.
  - The provisions weigh in favor of the Builder with regard to reliance, liability and responsibility to report errors in Construction Documents according to whose professionals prepared the Construction Documents.
  - Section 16.C expressly permits the Builder to rely on all Construction Documents as being complete, adequate and correct in all respects, whether prepared by Builder’s Professionals or Owner’s Professionals.
- ❖ **If Builder picks all its professionals, then Owner will want Builder to stand behind its choices.**
- Builder must promptly notify Owner of any errors, conflicts or inconsistencies in data or Construction Documents provided by Owner or Owner’s Professionals (but silent regarding same for Construction Documents provided by Builder’s Professionals).
  - The Construction Documents are not guaranteed by Builder, and Builder is expressly NOT responsible for errors, conflicts or inconsistencies in data the Construction Documents which are provided by Owner or Owner’s Professionals.
- ❖ **Owner will want Builder to report errors, conflicts or inconsistencies in the Construction Documents regardless of who provided them.**
- Builder is released from liability to Owner for damages to the structural components of the Improvements based on substantial construction of same in accordance with Construction Documents prepared by Owner’s Professionals.
- ❖ **Owner will want to own the Construction Documents once the home is built and will not want the Builder to use them again.**
- ❖ **Builder similarly might be concerned about accessing the original Construction Documents if he ever has a need to defend himself with them.**
- ❖ **Owner will want to provide that all Change Orders will not create latent defects, violate the law or any code, create warranty items, affect habitability or made a change to the aesthetics of the home.**
- ❖ **Owner will want Builder to agree to obtain adequate and reasonable warranties for any work he relies on (and obtains).**

*Relevant Contract Provisions* \_\_\_\_\_

**3. IMPROVEMENTS:**

A. CONSTRUCTION DOCUMENTS – The Construction Documents shall consist of the following:

- 1) Complete plans as may be hereafter amended, dated \_\_\_\_\_, prepared by \_\_\_\_\_ (Plans) and provided by or through: (check appropriate box)  Owner  Builder;
- 2) Specifications as may be hereafter amended, dated \_\_\_\_\_, prepared by \_\_\_\_\_ (Specifications) and provided by or through: (check appropriate box)  Owner  Builder;
- 3) This Contract as may be hereafter amended; and
- 4) all attached addenda and exhibits.

**16. OWNER(S)' AND BUILDER'S JOINT AGREEMENTS:**

C. DOCUMENT RELIANCE - Owner is advised that the Builder may have contracted with one or more independent professional architects, engineers, surveyors, designers, or other professional third parties (Builder's Professionals) to perform services and/or prepare certain documents or reports for completion of the Construction Documents and/or use in constructing the Improvements. Owner, at Owner's option, may also elect to obtain soil and sub-soil tests, flood plain maps and any other data or documents which may impact the performance of the completed Improvements from experts knowledgeable of such matters and hired by Owner (Owner's Professionals). If Owner elects to obtain such data and/or documents, Owner shall direct Owner's

Professionals to furnish all such data and/or documents to Builder prior to the design of the foundation and the completion of the Construction Documents. In constructing the Improvements, Builder will rely on documents provided by Builder's Professionals and Owner's Professionals as being complete, adequate and correct in all respects. Builder shall promptly notify Owner of any errors, conflicts, or inconsistencies discovered with respect to the Owner supplied data or Construction Documents. BUILDER DOES NOT WARRANT OR GUARANTEE AND WILL NOT BE RESPONSIBLE FOR ANY ERRORS OR OMISSIONS IN THE REPRESENTATIONS, DOCUMENTS, DATA, PLANS, SPECIFICATIONS, DESIGNS, OR CONSTRUCTION DOCUMENTS WHICH HAVE BEEN PREPARED BY OWNER, OWNER'S PROFESSIONALS OR ANY OTHER THIRD PARTY. Builder's reasonable reliance on the data and Construction Documents compiled and/or provided by Owner's Professionals shall relieve Builder from all responsibility for or liability to the Owner for damages to the structural components of the Improvements caused by raising, shifting, heaving or settling of the soil or any other damage to the Improvements, provided Builder constructs the Improvements in substantial compliance with the Construction Documents. Any supplements to the Construction Documents prepared by Builder shall be the property of Builder and shall not be used by Owner except for construction provided by Builder. Owner acknowledges that changes may occur in the Work and agrees that so long as the construction of the Improvements is substantially in compliance with the Construction Documents, such deviations will be accepted.

#### 4. Construction Timetables

- The TAB 1.1 does not require or provide for a construction schedule or timing of certain stages or percentages of completion. Note that a lender may tie the funding of construction draws to a budget and/or construction schedule, so a Builder should be prepared to cooperate and have backup documentation with regard to same.
- There is a blank in Section A to fill in the time within which Builder must commence work, which is after a list of six (6) requirements have been fulfilled. The last requirement is delivery of a mechanic's lien contract to Builder for recording (more particularly described in Section 16.A). Owner will want to avoid it, but it is a customary practice in order to give the Builder security for Owner's obligation to pay Builder the Purchase Price. The lien is either secondary to the Owner's construction loan or assigned as a first lien to lender, using the lenders collateral assignment documents.
- Note that Section 6.B sets a standard for Builder's pursuit of construction activities "in accordance with Builder's normal construction schedule". Although this gives Builder flexibility in performance of the Work, without a construction schedule being a component of the Construction Documents, this is not a set standard for due diligence in pursuit of the Work and could be easily abused.
- The Projected Completion Date is to be filled in the blank in Section 6.B, and is subject to Permitted Delays. Builder's and Owner's opinions of what constitutes diligent pursuit of the Work may differ. Section 6.C sets forth a list of items which are considered Permitted Delays.
  - ❖ **Owner may want to set an outside time of a certain number of consecutive calendar days during which Work is permitted to stop.**
  - ❖ **Owner (and lender) may want a more definite work and draw schedule.**
  - ❖ **Owner may want the right to terminate without penalty if work does not begin by a date certain.**
  - ❖ **In order to keep the Builder's focus on timely completion, Owner may want to offer Builder a financial incentive for finishing within a certain number of days prior to the Projected Completion Date, or impose penalties for certain delays beyond the Projected Completion Date.**
  - ❖ **Permitted Delays are listed in Section 6.C and Owner may want to:**
    - **Limit the delay to one day only for each day that a Permitted Delay exists;**
    - **Remove item 4 – Other acts or omissions by Owner or Owner's Representatives;**
    - **Limit items 7, 8 and 10 to only "if Builder has used commercially reasonable efforts and diligent pursuit of same in anticipation of the needs of the Work";**
    - **Limit delays for Change Orders to only those "requested by Owner";**
    - **Limit item 10 to Disputes with Owner or Owner's Representatives when Additional Cash Payments have stopped; and**
    - **Require Owner to notify within ten (10) days of Permitted Delay (instead of 30).**

*Relevant Contract Provisions*

## 6. TIME:

- A. COMMENCEMENT OF WORK - Builder shall commence the Work within \_\_\_\_\_ calendar days after:
- 1) The complete Construction Documents have been approved and initialed by both Owner and Builder;
  - 2) Owner has obtained a construction loan or other financing acceptable to the Builder in accordance with this Contract;
  - 3) Owner has obtained necessary approvals;
  - 4) Owner has furnished Builder with a current title commitment or such other evidence of Owner's ownership of the Property satisfactory to Builder in its sole discretion;
  - 5) All appropriate building permits have been issued and/or appropriate regulatory approvals have been obtained; and
  - 6) Owner has executed and delivered to Builder for recording any required mechanic's lien contract pursuant to Section 16.A hereof, and Builder has received written notice from the lien holder and/or the title company insuring lien holder's security interest in the Property that all documents required to be recorded prior to the commencement of construction have been properly recorded.
- B. COMPLETION OF IMPROVEMENTS - After commencement of the Work, construction activities shall thereafter be continued in accordance with Builder's normal construction schedule until the Improvements reach Substantial Completion (as defined below). Builder will make all reasonable efforts to substantially complete the Improvements within \_\_\_\_\_ calendar days from the date hereof (Projected Completion Date), subject to Permitted Delays (as defined below). **Builder does not warrant or guarantee completion of the Improvements on any specific date.**
- C. PERMITTED DELAYS - The Projected Completion Date may be extended for one or more of the following causes, each is a Permitted Delay:
- 1) Changes by Owner or Owner's representatives to the Construction Documents.
  - 2) Failure of Owner to timely make selections as directed below.
  - 3) Failure of Owner to timely make payments when due.
  - 4) Other acts or omissions by Owner or Owner's representatives.
  - 5) Prohibitive inclement weather or acts of God.
  - 6) Fire or casualty loss.
  - 7) Non-availability of labor, services or materials.
  - 8) Delays caused by any applicable governmental entity's change in laws or ordinances or delays in issuing necessary permits or conducting inspections.
  - 9) Delays caused by Change Orders.
  - 10) Disputes with Owner or Owner's representatives (which will allow Builder to suspend Work until resolved).
  - 11) Civil unrest, strikes, lockouts, acts of public authorities, or war.
  - 12) Other events or causes beyond the Builder's reasonable control.
- Builder shall be able to extend the Projected Completion Date by giving Owner written notice within thirty (30) days of a Permitted Delay.
- D. NO WORK PERFORMED - Builder and Owner, by their signatures to this Contract, acknowledge and agree that this Contract has been executed and delivered before Builder has performed any labor and before Builder has furnished any materials in connection with the construction of the Improvements.

## 5. Change Orders

- Although simple conceptually, Change Orders often lead to disputes during the construction project because they represent an increase in the original Contract Price to the Owner. The main source of dispute is the cost of the change order as "agreed" to between the parties, whether or not such change was even requested by Owner, and the "necessity" of any change. These issues are addressed in the Contract via the following cited provisions.
- Allowances are categories of the home's improvements (e.g. light fixtures, flooring, appliances, plumbing fixtures, audio/visual wiring, etc.) with listed budgets. These Allowances are part of the Total Contract Price but are exceeded commonly depending on the price of items selected by the Owner for a particular

category. If the budgeted amount of a specific Allowance is exceeded, i.e. an overage, a Change Order must be executed pursuant to Section 8 of the Contract. Problems can occur when Change Orders are not presented to the Owner timely for consideration and execution as a way to keep the Owner informed of increased costs above the subject Allowance – the sooner Change Orders are presented to Owners when Allowances are exceeded, the better.

- Change Orders are also used frequently when an Owner desires to change the Improvements from the design plans or to add other improvements to the subject property not anticipated originally by the Contract, such as a pool. Any alterations, additions, or deletions from the agreed upon Work, based on the design plans, requires a Change Order. The Change Order procedure as specified by Section 9.A. is straightforward: Owner must request Change Order in writing; Builder will respond to Owner with a written proposal for the requested change, price, and extension of the estimated completion date, if any; and, if this Change Order is accepted by Owner, it must be signed by Owner and the Change Order paid for within three days of this written acceptance.
  - ❖ **Builder should use Change Orders as a way to timely alert Owner of budget overages due to selections made by Owner. This is also true for Change Orders of Necessity as defined by Section 9.B.**
  - ❖ **Owner may not want to agree to either pay for the Change Order as specified in Section 9.A., within three days, or to reimburse the Builder for its hourly time in preparing the Change Order proposal if the proposal is not accepted by the Owner.**
  - ❖ **Regardless, it is best for both parties that all Change Orders are signed before their commencement by Builder.**
- Please note that Builder is not obligated to initiate the “change” until it is paid for as specified and Builder is not required to stop work while Owner considers a change or makes a change request.

*Relevant Contract Provisions* \_\_\_\_\_

8. **ALLOWANCES:** For purposes of this Contract, Allowances include budgets for certain Work components shown in the Construction Documents to be incorporated into the Improvements. The sums allocable to each listed Allowance are **included within and are part of the Total Contract Price**. Unless otherwise noted in the Construction Documents, each Allowance listed includes, without limitation, the component costs of material and labor, any appropriate sales tax, shipping charges, or other costs associated with procurement. Selections of Allowance items will be made at suppliers typically used by Builder to limit the possibility of unusual costs or delays. All overages in expenditures from Allowance amounts will be treated as a Change Order as defined below. The Projected Completion Date, as set forth above, will be automatically extended if Allowance items are not selected  according to the Builder’s selection schedule hereto attached  within ten (10) days of written notice from Builder or  within \_\_\_\_\_ days of this Contract. Owner will verify all selections with the supplier and provide Builder with the proper information for ordering. Owner understands that some materials selected will have a wide variation in color, pattern, and texture. The additional material or labor cost for any waste, spoilage, breakage, or culling shall be applied to the Allowance for that item and a Change Order for any overages will be executed by Owner and Builder.
9. **CHANGES:**
- A. **CHANGE ORDER PROCEDURE** – Except as otherwise stated in this Contract, no alterations, additions or deletions will be made in the Work unless agreed to in writing by Owner and Builder. To approve a proposed change, both Owner and Builder shall sign a written agreement (Change Order) in the form attached hereto. Upon receiving from Owner a written request for any such change that details the nature of the changes to be made, Builder shall present Owner with a proposal for the changes including any additional price of construction, additional Builder’s compensation and any extensions to the Projected Completion Date. If Owner accepts, in writing, Builder’s proposal for changes, the Change Order will become a binding attachment to the Construction Documents, and to the extent a conflict between a Change Order and the Construction Documents exists, the terms of the Change Order shall control. Any Owner party (e.g. husband or wife) may sign the Change Order as agent for the other, and the signature of one Owner shall be binding on the other. Failure of Owner to approve Builder’s proposal for changes within three (3) days after receipt shall constitute a rejection of the proposal. Builder shall be reimbursed at

\$\_\_\_\_\_ per Hr., with a minimum fifty dollars, for all expenses and effort incurred in the production of any Change Order proposal not accepted by the Owner. Unless otherwise specified in agreed upon Change Orders, Owner shall pay for all agreed upon Change Orders including the additional Builder's compensation to Builder in cash or immediately available funds within three (3) business days after Owner's acceptance of the proposal. Builder will not be obliged to proceed with any Work until any such amounts have been paid as agreed. Builder has no obligation to stop Work while Change Orders are being discussed.

- B. CHANGE ORDERS OF NECESSITY - Notwithstanding the provisions of Section 9.A, Owner agrees to execute Change Orders (including any necessary increases to the Total Contract Price) that may be necessary to:
- 1) Comply with applicable governmental requirements.
  - 2) Provide structural integrity to the Improvements.
  - 3) Route electrical, mechanical, or other systems included in the Work.
  - 4) Avoid or correct any conditions which might result in defects or other warranty claims.

## 6 Contractual Remedies

- **Builder's Termination Damages.** Section 5.A. of the TAB 1.1 contains a blank for the parties to specify an amount of the Initial Cash Payment which is to constitute "Termination Damages" due to Builder if the contract is terminated prior to Substantial Completion for any reason other than a Builder default or Builders election to terminate pursuant to Section 16.K.

❖ **Note Owner will be concerned that Initial Cash Payment or portion thereof identified as Termination Damages is not Builder's exclusive remedy, unless language is added to the Contract to make it the exclusive remedy.**

In the event of a Dispute as defined in Section 16.K., the Builder has the unilateral right to elect to: (i) submit the Dispute to mediation and binding arbitration (as further provided in Section 16 and to be covered in detail below), unless the Dispute concerns a construction defect, in which case the Dispute must first be submitted to the Texas Residential Construction Commission; **OR** (ii) terminate the Contract and return the Termination Damages specified in Section 5.A. provided that Owner must pay and/or reimburse Builder for all materials purchased and all Work performed through the date of termination, PLUS an amount representing Builder's proportionate profit or fee.

- ❖ **Builders see the termination right as a necessary mechanism to extract themselves from a situation with an uncooperative Owner without losing money and to compensate Builder for time which could have been spent on another more viable project.**
  - ❖ **An Owner will want to be cautious in selecting the Builder in the first place, since this provision would permit an unscrupulous Builder to create a Dispute and terminate the Agreement and be made whole.**
  - ❖ **Owner may want to require that the Dispute go to mediation or binding arbitration, instead of allowing the Builder to leave the job.**
  - ❖ **Owner will want to try to limit Builder's remedies at each major stage of construction (e.g. before Work begins, as Work progresses, and then upon substantial completion).**
  - ❖ **Owner will want profit/fees of Builder made very specific in attached draw schedules.**
- **Builder Default.** Section 13.A lists the following as Builder Events of Default:
    - 1) Failure to pay materials suppliers, laborers or subcontractors for which Builder has received payment from Owner or Owner's Lender.
    - 2) Breach by Builder of any material provision of the Contract.
    - 3) Voluntary bankruptcy filing, assignment for benefit of a creditor, adjudication as bankrupt or insolvent, or applying for or consenting to the appointment of a receiver, trustee or liquidator of all or a substantial portion of Builder's assets.

- 4) Builder's abandonment of the Work for 15 or more consecutive days for causes other than weather, delays attributable to Owner or other matters beyond Builder's control. *(For some reason, the form does not refer to the defined term "Permitted Delays")*
  - ❖ **Owner will want it to be a Builder Event of Default if Builder fails to construct the Work in accordance with the Contract Documents, or if Builder fails to resolve disputes with a supplier, laborer or subcontractor so as not to delay the Work.**
- Owner's Remedies. If a Builder Event of Default is not cured within 15 days after delivery of written notice from Owner to Builder, Section 13.C provides that Owner may exercise the following remedies:
  - 1) Terminate the Contract and recover monetary damages, but monetary damages are capped at the total of any sums paid to Builder for labor and materials not already incorporated into the Improvements, plus reasonable and necessary attorney fees to pursue mediation and/or arbitration as provided in the Contract.
    - ❖ **Owner may have consequential or other damages for which this remedy does not make Owner whole, especially if the Improvements are partially constructed and not properly secured or weather-proofed.**
    - ❖ **Owner will resist the monetary cap as it may have little bearing to Owner's damages.**
  - 2) If Owner is not in default and Builder refuses to give up possession of the Improvement and Property, Owner is entitled to pursue all remedies "under law".
    - ❖ **Note that specific performance is not an available remedy for any Builder Event of Default, and specific performance is expressly waived by Owner. However, other equitable remedies are not expressly precluded.**
  - 3) If Owner receives a mechanic's lien notice or notice of claim of lien, then Owner has the right to retain out of any Additional Cash Payment an amount sufficient to indemnify the Owner against same; however, Builder has the right to contest in good faith the validity of such lien or claim. If Builder fails to discharge same, "any amounts expended by Owner for payment of any liens or claims" shall be credited against (i.e., deducted from) the total Contract Price.
    - ❖ **Owner will also want to recover any other amounts in connection with enforcement of this remedy, such as attorneys' fees. The attorney fees provision in Section 16.O. only entitles a "prevailing party in any arbitration or legal proceedings" to attorneys' fees.**
- Owner's objections to Work must be timely. Section 14.D. provides that the Owner must promptly object to any portion of the Work not in compliance with the Construction Documents. Failure to timely object constitutes Owner's acceptance of that portion of the Work, subject to Builder's obligations under the TRCC Warranty. If a component is a minor defective condition the Builder has the sole discretion to correct the deficiency in conformance with reasonable building practices or conclude the condition is within acceptable tolerances and take no corrective action.
  - ❖ **It is incumbent upon the Owner to participate in all walk-throughs and inspections in order to properly monitor the phases of construction and timely detect objectionable conditions.**
  - ❖ **Owner will want to except out of its acceptance any latent defects.**
  - ❖ **Owner may not want Builder to have sole discretion in minor deficiencies, since reasonable minds can differ on such matters.**
- Owner Default. Section 15.A lists the following as Owner Events of Default:
  - 1) Failure to make any payments due under the Contract, including payment for any Change Orders.
  - 2) Owner or its agents or representatives unreasonably (a) delay or (b) interfere with Builder in execution of the Work.

- 3) Owner fails to participate in "the walk through inspection as provided in this Contract".
  - 4) Owner or its agents or representatives fail to perform any material agreement in the Contract.
  - 5) With regard to Owner or any person liable for the payment or performance under this Contract on the part of Owner, voluntary bankruptcy filing, assignment for benefit of a creditor, adjudication as bankrupt or insolvent, or applying for or consenting to the appointment of a receiver, trustee or liquidator of all or a substantial portion of Owner's or such other liable person's assets.
- **Builder's Remedies.** If an Owner Event of Default is not cured within 15 days after delivery of written notice from Builder to Owner, Section 15.C provides that Builder may exercise the following remedies:
    - 1) At Builder's option, all amounts owed for Work completed will become immediately due and payable without prejudice to any other remedy of Builder. This means that Builder may ADDITIONALLY exercise the other remedies of Builder in the Contract.
    - 2) Terminate the Contract and retain all money previously paid by Owner to Builder as liquidated damages.
    - 3) Seek recovery of any and all damages of Builder, including without limitation, payment for all materials, labor, profit, overhead and fees.
    - 4) If Owner refuses to accept the completed Improvements and or pay the total Contract Price to Builder, and Builder is not in default, Builder is entitled to pursue all remedies "under Texas law", except for specific performance.
    - 5) Any delinquent payment carries interest at the maximum legal rate until paid.
      - ❖ **Note that specific performance is not an available remedy for any Owner Event of Default, and specific performance is expressly waived by Builder. However, other equitable remedies are not expressly precluded.**
      - ❖ **Owner will want to try to limit Builder's default remedies to certain out of pocket costs incurred and have Builder waive all other damages.**
      - ❖ **If there is an uncured Owner Event of Default, Builder will want the greater of its lost profits or the unspent money previously paid by Owner to Builder, and if the Improvements are complete, his total lost profits.**
      - ❖ **Owner will want delinquent payments to accrue interest at something less than 18% per annum.**
  - **Mutual Limitation of Claims and Remedies.** In addition to each party waiving its right to enforce specific performance, Section 16.M. provides that under no circumstances shall either party be liable for special, indirect or consequential damages, including mental anguish, "except as otherwise specifically set forth in this Contract". Any action or claim arising from or relating to the Contract, Work and/or Improvements must be brought no later than two (2) years and one (1) day "from the date the cause of action accrues".
    - ❖ **Under certain circumstances (e.g., incomplete Improvements not being properly secured or weatherproofed), Owner will want entitlement to pursue consequential damages.**
    - ❖ **Note that the Tab 1.1 form protects Builder for certain "consequentials" by granting Builder its lost profit, but does not similarly grant Owner its consequentials on Owner's cost if Builder defaults, such as the cost to switch to a new builder to complete the home.**
    - ❖ **The parties may disagree as to when the clock starts to tick for when a cause of action accrues.**
      - A compromise provision could be that claims regarding latent defects survive so that same accrue upon discovery or when Owner should have reasonably discovered same, but not to accrue any later than a certain number of years after payment of the Total Contract Price. A further limitation might be that same only extends to Owner and no other future owner of the Property.
    - ❖ **The parties may want to include a mutual waiver of subrogation clause to the extent either party has insurance to cover any loss.**

*Relevant Contract Provisions***13. DEFAULT BY BUILDER:**

- A. EVENTS OF DEFAULT (each is a Builder Event of Default) -
- 1) Builder's failure, without cause, to make payment to any material supplier, laborer or subcontractor for which Builder has received payment from Owner or Owner's lender.
  - 2) A breach by Builder of any material provision contained in this Contract.
  - 3) Builder's filing of a voluntary petition in bankruptcy, making an assignment for the benefit of any creditor, being adjudicated as bankrupt or insolvent, or applying for or consenting to the appointment of a receiver, trustee or liquidator of all or a substantial part of Builder's assets.
  - 4) Abandonment of the Work by Builder for a period of fifteen (15) or more consecutive days provided that the inactivity is not caused, at least in part, by weather, shortage of labor or materials, delays attributable to the conduct of Owner, or other matters beyond the control of Builder.
- B. NOTICE OF DEFAULT TO BUILDER - If Builder commits a Builder Event of Default, prior to exercising any remedy granted by this Contract or by law, Owner shall deliver written notice of such default to Builder. If the Builder Event of Default is not cured within fifteen (15) days after delivery of the written notice (Builder's Cure Period), Owner may exercise any remedy, subject to the terms of this Contract.
- C. REMEDIES OF OWNER - Upon the occurrence of any Builder Event of Default and the expiration of Builder's Cure Period, Owner may (but shall not be obligated to) terminate this Contract and recover monetary damages as specified below. The remedy of specific performance is hereby waived by Owner and shall not be available in any action concerning this Contract. Any monetary damages available to Owner shall not exceed the total of any sums paid to Builder for (i) labor and materials not already incorporated into the Improvements; and (ii) reasonable and necessary attorney's fees and costs incurred to invoke and prosecute mediation and/or arbitration as herein provided. If Builder refuses to give possession of the Improvements and Property to Owner, Owner not being in default, Owner will be entitled to pursue all remedies provided under Texas law, save and except specific performance. If Owner receives notice of any lien or claim for labor or materials furnished to Builder for which, if established, Owner of the Property might become liable, though primarily chargeable to Builder, Owner shall have the right to retain out of any Additional Cash Payment, an amount sufficient to indemnify Owner against such lien or claim. However, Builder shall have the right to contest in good faith the validity of such lien or claim. If Builder fails to discharge any such lien or claim, any amounts expended by Owner for the payment of any liens or claims shall be credited against the Total Contract Price.

**14. OWNER'S RESPONSIBILITIES:** Owner agrees to the following:

- A. PAYMENTS - Owner shall make all payments to Builder as required by this Contract.
- B. TITLE AND POSSESSION - Owner shall protect the title and possession of the Property and pay all taxes and assessments prior to delinquency.
- C. APPROVALS - Owner shall obtain all consents and approvals required from any governmental authority, architectural review committee, homeowners association or similar entity having the right to review and approve plans and specifications for any residence or improvements proposed to be constructed on the Property.
- D. OBJECTIONS TO WORK - Owner agrees to promptly notify Builder of any objections to any Work not in compliance with the Construction Documents. **Failure by Owner to promptly notify Builder of objections to any Work performed within any phase of construction shall constitute an acceptance of that portion of the Work subject to Builder's obligations under the TRCC Warranty.** Owner acknowledges and agrees, however, that it may be inappropriate and/or unreasonably expensive and time-consuming to replace, re-fabricate or repaint a component that exhibits a minor defective condition. In such instances, Builder, in its sole judgment, may (i) employ an alternate remedy to correct the deficiency in conformance with reasonable building practices, or (ii) conclude that the condition is within acceptable tolerances and take no corrective action.
- E. UTILITIES - Owner is solely responsible for providing Builder, prior to commencement of construction, with such water, gas, storm and sanitary sewer and electricity at the lot line as may be required by Builder to effect the construction of the Improvements.
- F. EXISTING ITEMS - Owner shall remove or protect all of Owner's existing items of property, including, without limitation, shrubs and flowers, at the Property that could be affected by the construction contemplated herein. Builder shall not be responsible for damaged driveways, walks, lawns, trees, shrubs and items of personal property or the release of confined pets. **OWNER HEREBY RELEASES BUILDER**

FROM ANY DAMAGES TO THE FOREGOING ITEMS THAT OCCUR ALL OR IN PART AS A RESULT OF BUILDER'S NEGLIGENCE, BUT NOT AS A RESULT OF BUILDER'S GROSS NEGLIGENCE.

- G. SUBCONTRACTORS - Owner agrees not to instruct, direct or otherwise communicate with the subcontractors retained by Builder as to the scheduling of or details about the Work (including additions to or deletions from the Work). Furthermore, Owner shall not do or cause any work to be done, or alter or cause the alteration of any portion of the Improvements, whether complete or incomplete, prior to Owner's occupancy of the Improvements without Builder's express written consent.
- H. OTHER - Owner shall perform all other obligations as provided in this Contract.

**15. DEFAULT BY OWNER:**

- A. EVENTS OF DEFAULT BY OWNER (each is an Owner Event of Default):
  - 1) Owner or Owner's agents or representatives fail to make any payments due under this Contract, including payment for any Change Orders.
  - 2) Owner or Owner's agents or representatives unreasonably delay or unreasonably interfere with the Builder in the execution of the Work.
  - 3) Owner fails to participate in the walk through inspection as provided in this Contract.
  - 4) Owner or Owner's agents or representatives fail to perform any material agreement contained in this Contract.
  - 5) Owner, or any person liable for the payment or performance under this Contract, files a petition in bankruptcy, makes an assignment for the benefit of any creditor, is adjudicated as bankrupt or insolvent, or applies for or consents to the appointment of a receiver, trustee or liquidator of all or a substantial part of their or its assets.
- B. NOTICE OF DEFAULT TO OWNER - If Owner commits an Owner Event of Default, prior to exercising any remedy granted by this Contract or by law, Builder shall deliver written notice of such default to Owner. If the Owner Event of Default is not cured within fifteen (15) days after delivery of such written notice (Owner's Cure Period), Builder may exercise any remedy subject to the terms of this Contract.
- C. REMEDIES OF BUILDER - Upon the occurrence of any Owner Event of Default and the expiration of Owner's Cure Period, all amounts owed for Work completed will, at the option of the Builder, become immediately due and payable without prejudice to any other remedy of the Builder and Builder may (but shall not be obligated to) discontinue performance of this Contract and (i) terminate this Contract and retain all money previously paid by Owner to Builder as liquidated damages thereby releasing both parties from this Contract; or (ii) seek recovery of any and all damages suffered by Builder, including, but not limited to, payment for all materials, labor, profit, overhead and fees with respect to this Contract. The remedy of specific performance is hereby waived by Builder and shall not be available in any action concerning this Contract. If Owner refuses to accept the completed Improvements and/or pay the Total Contract Price to Builder as specified in this Contract, Builder not being in default, Builder will be entitled to pursue all remedies provided under Texas law, save and except specific performance.
- D. DELINQUENT PAYMENT - Should the Owner fail to make payment to the Builder of any portion of the Total Contract Price when payment is due, then the Owner shall pay to the Builder, in addition to the sum shown as due, interest at the maximum rate allowed by applicable federal and state law, which interest shall accrue as of the date payment was first due and shall continue to accrue until the date of payment.

- 16.K. **TERMINATION/STIPULATED DAMAGES PRIOR TO SUBSTANTIAL COMPLETION** – In the event any bona fide dispute or material misunderstanding (Dispute) arises between Builder and Owner prior to Substantial Completion and if such Dispute cannot be resolved to the mutual satisfaction of Builder and Owner, Builder at its election, may either submit the Dispute to mediation and binding arbitration as provided in this Contract or may terminate this Contract by written notice to Owner. In the event of termination of this Contract by the Builder pursuant to this paragraph, Builder shall return the Termination Damages portion of the Initial Cash Payment as defined above, an amount which the parties agree to be a reasonable and foreseeable estimate of the damages that might be experienced by the Owner incident to the cancellation of this Contract (it being difficult if not impossible to ascertain those damages) provided that Owner shall be obligated to pay and/or reimburse Builder for all materials purchased, all Work performed up through the date of termination, and an amount representing Builder's profit or fee which shall be proportionate to the amount of Work performed. Upon such termination of this Contract by Builder and tender of the stipulated liquidated damages, no cause of action against Builder shall accrue to the Owner and Owner shall execute a written release of this Contract and deliver it to the Builder. Builder is not required to apply the provisions of this paragraph to any breach of this Contract by Owner.

**16.M. MUTUAL LIMITATION OF CLAIMS AND REMEDIES** – The parties further desire pragmatic and logical limitations on claims and remedies to ensure effective and realistic dispute resolution. Accordingly,

- 1) Limitation of Claims: Under no circumstances shall either Owner or Builder be liable for any special, indirect, or consequential damages, including claims of mental anguish, except as otherwise specifically set forth in this Contract. Any action or claim, regardless of form, which arises from or relates to this Contract, the Work and/or the Improvements is barred unless it is brought by Owner or Builder not later than two (2) years and one (1) day from the date the cause of action accrues.
- 2) **WAIVER OF SUBROGATION; INDEMNITY:** THE PARTIES AGREE THAT AFTER OCCUPANCY OR SUBSTANTIAL COMPLETION, WHICHEVER COMES FIRST, THE OWNER SHALL SECURE AND MAINTAIN INSURANCE COVERING RISK OF LOSS AND DAMAGE TO THE IMPROVEMENTS. THE PARTIES FURTHER MUTUALLY AGREE THAT WITH RESPECT TO ANY LOSS OR DAMAGE THAT MAY OCCUR TO THE PROPERTY OR IMPROVEMENTS BY REASON OF FIRE, THE ELEMENTS, OR ANY OTHER CAUSE WHICH COULD BE INSURED AGAINST UNDER THE TERMS OF STANDARD FIRE AND EXTENDED COVERAGE INSURANCE POLICIES, REGARDLESS OF THE CAUSE OR ORIGIN, INCLUDING NEGLIGENCE OF THE PARTIES HERETO, THEIR AGENTS, OFFICERS, AND EMPLOYEES, THE PARTY HERETO CARRYING SUCH INSURANCE AND SUFFERING SAID LOSS, HEREBY RELEASES THE OTHER FROM ANY AND ALL CLAIMS WITH RESPECT TO SUCH LOSS. THE PARTIES FURTHER MUTUALLY AGREE THAT THEIR RESPECTIVE INSURANCE COMPANIES SHALL HAVE NO RIGHT OF SUBROGATION AGAINST THE OTHER PARTY HERETO ON ACCOUNT OF ANY SUCH LOSS AND EACH PARTY AGREES THAT IT WILL REQUEST ITS INSURANCE CARRIER TO INCLUDE IN ITS POLICIES SUCH A CLAUSE OR ENDORSEMENT. IF OWNER RECEIVES ANY CONSIDERATION FROM A THIRD PARTY, INCLUDING, BUT NOT LIMITED TO, AN ASSIGNEE OR SUBROGEE, IN SETTLEMENT OR PAYMENT FOR ANY DISPUTE, OWNER SHALL INDEMNIFY BUILDER FOR ANY CLAIMS ASSERTED AGAINST BUILDER BY SUCH THIRD PARTY, REGARDLESS OF ANY ALLEGATION OF BUILDER'S NEGLIGENCE, STRICT LIABILITY, BREACH OF CONTRACT, BREACH OF WARRANTY OR VIOLATIONS OF THE TEXAS DECEPTIVE TRADE PRACTICES-CONSUMER PROTECTION ACT. THE AGREEMENTS IN THIS PARAGRAPH SHALL SURVIVE SUBSTANTIAL COMPLETION AND PAYMENT IN FULL OF THE TOTAL CONTRACT PRICE. NOTHING CONTAINED IN THIS PARAGRAPH SHALL BE DEEMED TO MODIFY OR OTHERWISE AFFECT RELEASES OF EITHER PARTY FROM LIABILITY FOR CLAIMS ELSEWHERE HEREIN CONTAINED.

7. **Dispute Resolution** both during construction and post completion including mediation, arbitration and contractual waiver of jury trial.

- With Section 16.L. of the Contract, both Owner and Builder waive their right to trial by jury; instead, a process of mediation and binding arbitration is established as the vehicle for dispute resolution.
  - This is actually a three (3) stage process, beginning in Section 16.L.1. with submission of a dispute by either party, as an option, to the Texas Residential Construction Commission.
  - Note that this provision extends the Builder additional “protection” by including and its directors, officers, partners, employees and agents in the dispute resolution process. In this manner, an Owner cannot defeat the arbitration provision as to individuals by asserting independent fraud or DTPA based claims. Also, Builder shall have the option to include its subcontractors and suppliers as parties in the alternative dispute resolution procedures as set forth in the Contract. This is a huge benefit to the Builder if, and only if, Builder has its subcontractors and suppliers execute the TAB Independent Contractor Agreement that subjects the particular subcontractor or supplier to binding arbitration with the Owner and Builder.
- ❖ **As with disputes concerning residential homes, Owners and their lawyers typically prefer not to waive a jury trial. If the Owner retains a lawyer to negotiate the Contract, this can be one of the larger points of contention.**
  - ❖ **Builder can highlight the fact that NO arbitration service is specified; thus, either the parties can reach agreement on the individual to serve as the arbitrator or request that a court appoint the arbitrator. In addition, by not using or requiring an arbitration service, both sides can save considerable administrative expenses.**

- As a suggestion, the Parties could name the mediator and arbitrator in the contract prior to its execution so that both sides are comfortable with the appointments should the need arise for dispute resolution.

*Relevant Contract Provisions* \_\_\_\_\_

**16.L. ALTERNATIVE DISPUTE RESOLUTION** - It is the policy of the State of Texas to encourage the peaceable resolution of disputes through alternative dispute resolution procedures.

- 1) **State of Texas Administrative Resolution:** Any dispute involving, relating to or arising out of a construction defect, as that term is defined in Chapter 401 of the Texas Property Code, may be submitted by either party, in its sole discretion, to the Texas Residential Construction Commission or any successor thereto (the Commission) in accordance with the Commission's applicable policies and procedures (Commission Process). If such dispute is not resolved within fifteen (15) days following the conclusion of the Commission Process and applicable procedures under Chapter 27 of the Texas Property Code, then the dispute shall be submitted to mediation and, if not settled during mediation, to binding arbitration as provided by the Federal Arbitration Act (9 U.S.C. §§ 1 et seq.) according to the terms and conditions set forth below.
- 2) **Mediation-Binding Arbitration/Waiver of Jury Trial:** The parties agree that any other dispute (whether arising in contract, warranty, tort, statutory or otherwise), including, but not limited to, (a) any and all controversies, disputes or claims arising under, or relating to, this Contract, and any amendments thereto, the Property, Improvements, or any dealings between the Owner and Builder; (b) any controversy, dispute or claim arising by virtue of any representations, omissions, promises or warranties alleged to have been made by Builder or Builder's representative; and (c) any personal injury or property damage alleged to have been sustained by Owner on the Property or in the subdivision in which the Property is located, shall first be submitted to mediation and, if not settled during mediation, shall thereafter be submitted to binding arbitration as provided by the Federal Arbitration Act (9 U.S.C. §§ 1 et seq.) or, if applicable, by similar state statute, and not by or in a court of law. All decisions respecting the arbitrability of any dispute shall be decided by the arbitrator. In no event shall Owner be initially required to pay arbitration costs and fees in excess of those that would have been incurred in filing suit in a court of law and effecting service of process. The arbitrator may award to the prevailing party, if any, as determined by the arbitrator, all or any portion of its costs and fees. "Costs and fees" may include reasonable expenses of mediation and/or arbitration, including arbitrator's fees, administrative fees, travel expenses and out-of-pocket expenses such as copying and telephone, court costs, witness fees, and reasonable attorney's fees. The mediation and, if necessary, the arbitration shall be conducted pursuant to any procedures set forth in the applicable warranty documents. If there is any conflict between this Contract and such procedures, the provisions of this Contract shall control. Furthermore, if the mediator and/or arbitrator designated in any applicable warranty documents cannot conduct the mediation or arbitration for any reason, or if no mediator and/or arbitrator is designated, the parties agree to work together in good faith to select a mediator and, if all disputes are not resolved by mediation, an arbitrator in the county where the Property is located (to the extent practicable). If the parties are unable to agree on the appointment of a mediator and/or arbitrator, either party may petition a court of general jurisdiction in the subject county to appoint a mediator and/or arbitrator. It is stipulated and agreed that the filing of a petition requesting appointment of a mediator and/or arbitrator shall not constitute a waiver of the right to enforce binding arbitration.

In any arbitration proceeding between the parties:

- a) All applicable Federal and State law (including Chapter 27 of the Texas Property Code) shall apply;
- b) All applicable claims, causes of action, remedies and defenses that would be available in court shall apply;
- c) The proceeding shall be conducted by a single arbitrator selected by a process designed to ensure the neutrality of the arbitrator;
- d) The parties shall be entitled to conduct reasonable and necessary discovery;
- e) The arbitrator shall render a written award and, if requested by any party, a reasoned

award;

- f) The Owner shall not be required to pay any unreasonable costs, expenses or arbitrator's fees and the arbitrator shall have the right to apportion the cost of any such items in an equitable manner in the arbitration award; and
- g) Any award rendered in the proceeding shall be final and binding and judgment upon any such award may be entered in any court having jurisdiction.
- h) If the proceeding pertains to a construction defect, as that term is defined in Chapter 401 of the Texas Property Code, then the arbitration shall be conducted in the same county as the Property.

Owner and Builder agree that notwithstanding anything to the contrary, the rights and obligations set forth in this mediation-arbitration agreement shall survive (1) the termination of this Contract by either party; (2) the default of this Contract by either party; or (3) Substantial Completion and payment in full of the Total Contract Price. The waiver or invalidity of any portion of this mediation-arbitration agreement shall not affect the validity or enforceability of the remaining portions of this mediation-arbitration agreement and/or the Contract. Owner and Builder further agree (1) that any dispute involving Builder's directors, officers, partners, employees and agents shall be resolved as set forth herein and not in a court of law; and (2) that Builder shall have the option to include its subcontractors and suppliers as parties in the alternative dispute resolution procedures set forth in this Contract.

If any party to this Contract files a proceeding in any court to resolve any such controversy, dispute or claim, such action shall not constitute a waiver of the right of such party or a bar to the right of any other party to seek arbitration of that or any other claim, dispute or controversy, and the court shall, upon motion of any party to the proceeding, direct that such controversy, dispute or claim be arbitrated in accordance herewith. Inasmuch as this Contract provides for mandatory arbitration of disputes, if any party commences litigation in violation of this Contract, such party shall reimburse the other parties to the litigation for their costs and expenses including attorneys' fees incurred in seeking abatement of such litigation and enforcement of arbitration.

The requirement that the parties submit any disputes between them to mediation and, if that does not resolve the dispute, binding arbitration is absolute, enforceable and shall survive Substantial Completion and payment in full of the Total Contract Price despite there being no signature by either party on this page of the Contract. The parties, by their signatures at the end of this Contract, agree to arbitration as if their signatures appeared on the page where arbitration is made part of the agreement.

## 8. Warranties

- As you know, with any qualifying construction project (i.e. \$10,000) or more, the Builder is required by the Texas Residential Construction Commission Act to provide the 1-2-10-10 Warranty to the Owner as promulgated by the Texas Residential Construction Commission – i.e. one year workmanship, two year mechanical systems, ten year structural, and ten year habitability warranties. Thus, regardless of whether the Builder wants to provide this warranty or not, it is the warranty that an Owner has under the Contract. The primary question is whether an additional third-party warranty is given/purchased for the Improvements. This election opportunity is reflected in Section 12 of the Contract, entitled Warranty. If this option is selected, a specimen copy of the third-party warranty is to be attached to the Contract.
  - The only third-party warranties allowed by the Texas Residential Construction Commission to be given are those approved by the Commission and listed on its website at [http://www.trcc.state.tx.us/Warranty\\_Companies/listing.asp](http://www.trcc.state.tx.us/Warranty_Companies/listing.asp). These nine companies' products vary greatly as to price, terms, warranty coverage, etc., and, thus, the Parties should investigate carefully before deciding on a particular third-party warranty program.
- ❖ **Put simply, not all of the nine approved third-party warranties are equal. Owner should request and be willing to pay for a third-party warranty as an added layer of protection from future problems with the Improvements constructed by Builder. However, some of the approved warranties are really nothing more than a marketing tool to be used by Builders if desired for a low price.**

- ❖ **As a general rule, you get what you pay for with the third-party warranty programs.**
  - As a suggestion, the Parties should examine their options together and agree on which warranty program is to be used by price and the actual “coverage” provided.
- ❖ **Owner is assigned the applicable manufactured products warranties (i.e. appliances, hot water heaters, etc.). This means that from day one of ownership that should a problem occur with the appliances, even during the one year workmanship warranty period, Owner will have to deal with problem directly with the manufacturer of the appliance. Owner should attempt to make this the Builder’s responsibility, at least during the first year.**

*Relevant Contract Provisions* \_\_\_\_\_

12. **WARRANTY:** Builder will provide warranty coverage on the Improvements to Owner pursuant to the applicable Limited Statutory Warranty and Building and Performance Standards promulgated by the Texas Residential Construction Commission (TRCC Warranty), a copy of which can be found at <http://www.trcc.state.tx.us>. Builder  will  will not also provide an express limited warranty provided through a third-party warranty company, and if Builder has elected to do so, a specimen copy of same is attached hereto and made a part hereof by reference. Owner acknowledges, understands and agrees that the terms of such TRCC Warranty are clear, specific and sufficiently detailed to establish the only standards of construction which Builder is obligated to meet. Applicable warranties on “Manufactured Products,” as defined in the TRCC Warranty will be assigned, without recourse, to Owner upon payment of the Total Contract Price. This assignment shall be evidenced by Builder’s execution and delivery to Owner of the document entitled “Assignment of Manufactured Product Warranties” which is attached hereto as an addendum. Owner understands and agrees that proper maintenance of the Improvements is required to ensure (i) the TRCC Warranty remains in effect and (ii) the proper performance of the Improvements.

16.N. **WARRANTY REQUEST-** Owner and Builder acknowledge and agree that a request for warranty performance shall not be construed as a notice of construction defect under the Texas Residential Construction Liability Act (RCLA), and that any notice under RCLA shall be separately sent to Builder in the manner required by RCLA.

## 9. New Statutory Requirements

With the passage of House Bill 1038 in the recent legislative session, several new disclosure requirements were added that are mandatory in any new residential construction or residential sales contract beginning September 1, 2007. First, Chapter 420 of the Texas Residential Construction Commission Act replaced the previous mandatory disclosure language as contained in the Residential Construction Liability Act if the home or remodeling project is required to be registered with the TRCC. The mandatory language has been incorporated into the Contract and is quoted below as Section 23. Second, for both the new Chapter 420 disclosure AND any arbitration clause to be effective, they must be in all bold type and no smaller than ten-point font. Third, the Contract must contain the Builder’s Texas Residential Construction Commission registration number. A space for the Builder’s registration number is provided under the Builder’s signature line in the contract.

- Although these new requirements are not points of contention between the parties as it is now required by law, **FAILURE to make the new disclosure or to make it conspicuous or to include the Builder’s TRCC registration number renders the Contract “unenforceable” against the Owner.** That is correct, should the Builder not use a contract that incorporates the new required disclosure or the disclosure is not in all bold type with a minimum ten-point font or the TRCC registration number for the Builder is not listed, the Builder cannot enforce the contract against the Owner as a matter of statutory law.

- In addition, if the arbitration clause is not in all bold and with a minimum font size of ten point, the arbitration clause itself is unenforceable even if the remaining contract is valid. These are easy requirements to meet but they are huge pitfalls to be avoided.

*Relevant Contract Provisions* \_\_\_\_\_

23. **IMPORTANT NOTICE:** You and your Contractor are responsible for meeting the terms and conditions of this Contract. If you sign this Contract and you fail to meet the terms and conditions of this Contract, you may lose your legal ownership rights in your home. **KNOW YOUR RIGHTS AND DUTIES UNDER THE LAW.**

STATE LAW REQUIRES THAT A PERSON HOLD A CERTIFICATE OF REGISTRATION FROM THE TEXAS RESIDENTIAL CONSTRUCTION COMMISSION IF THE PERSON CONTRACTS TO CONSTRUCT A NEW HOME OR IF THE PERSON CONTRACTS TO CONSTRUCT A MATERIAL IMPROVEMENT TO AN EXISTING HOME OR CERTAIN IMPROVEMENTS TO THE INTERIOR OF AN EXISTING HOME AND THE TOTAL COST OF THE IMPROVEMENT IS \$10,000 OR MORE (INCLUDING LABOR AND MATERIALS).

YOU MAY CONTACT THE COMMISSION AT 311 E. 14<sup>TH</sup> STREET, P.O. BOX 13144, AUSTIN, TX 78711 OR 877.651.8722 OR [WWW.TRCC.STATE.TX.US](http://WWW.TRCC.STATE.TX.US) TO FIND OUT WHETHER THE BUILDER HAS A VALID CERTIFICATE OF REGISTRATION. THE COMMISSION HAS INFORMATION AVAILABLE ON THE HISTORY OF BUILDERS, INCLUDING SUSPENSIONS, REVOCATIONS, COMPLAINTS, AND RESOLUTION OF COMPLAINTS.

THIS CONTRACT IS SUBJECT TO CHAPTER 426, PROPERTY CODE. THE PROVISIONS OF THAT CHAPTER GOVERN THE PROCESS THAT MUST BE FOLLOWED IN THE EVENT A DISPUTE ARISES OUT OF AN ALLEGED CONSTRUCTION DEFECT. IF YOU HAVE A COMPLAINT CONCERNING A CONSTRUCTION DEFECT YOU MAY CONTACT THE COMMISSION AT THE TOLL-FREE TELEPHONE NUMBER TO LEARN HOW TO PROCEED UNDER THE STATE-SPONSORED INSPECTION AND DISPUTE RESOLUTION PROCESS.

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## APPENDIX “A”

**RESIDENTIAL CONSTRUCTION CONTRACT LENDER ADDENDUM  
(Texas)**

Words used in this Addendum are defined below. Words in the singular mean and include the plural and vice versa.

“Contractor” is \_\_\_\_\_.

“Improvements” are the improvements made to a single-family residence or new construction of a single-family residence.

“Lender” is \_\_\_\_\_.

“Owner” is \_\_\_\_\_.

“Property” is \_\_\_\_\_.

**Conflicts.** Contractor and Owner have executed a Residential Construction Contract (or similar named agreement) detailing the agreement for construction between Contractor and Owner of Improvements on the Property (“Contract”). That agreement is incorporated herein by reference. However, such incorporation is not intended to and shall not amend, supersede or qualify in any way the terms and conditions of this Addendum and to the extent said Contract contains conflicting provisions, the provisions of this Addendum shall control.

**Legal Requirements.** Contractor and Owner do hereby warrant, certify and represent that Contractor and Owner have complied with all legal requirements regarding the execution of the Contract and construction of the Improvements (whether new or existing), including without limitation, Subchapter K of Chapter 53 or the Texas Property Code and Section 50(a)(5), Article XVI of the Texas Constitution. Contractor agrees to comply with any delivery deadlines of notices, disclosures, and other documentation to Owner and Lender as prescribed by law. Contractor and Owner do further hereby represent (to the best of their actual knowledge) that Contractor and Owner are aware of, and have complied with, or will comply with the following legal rights and obligations:

- a. **Joinder of Spouse.** The Contract has been entered into by all owners with the consent of each owner’s spouse, as evidenced by their signatures below.
- b. **No Work Commenced.** Contractor and Owner do hereby affirm that no work of any kind, (including the destruction or removal of any existing improvements, site work, clearing, grubbing, draining or fencing of the Property) has commenced or been performed on the Property, no labor or materials have been ordered or furnished to or on behalf of Owner for use in such construction, and no contracts or agreements (verbal or written) for the furnishing of labor, materials, or services for use in the construction of improvements on the Property have been executed or recorded in the real property records in the county in which the Property is located (except the above referenced Contract or similar named agreement).

- c. Receipt of Disclosure Statement.** Before execution, acknowledgement and delivery of the Contract, Owner received from Contractor the Disclosure Statement required by Section 53.255 of the Texas Property Code.
- d. Receipt of List of Subcontractors.** Unless Owner has waived the right to receive from Contractor a list of the subcontractors and suppliers, or any updated information required to be given, evidenced by a written and signed waiver of rights to this information, included in the Contract or in a separate waiver statement, Contractor provided Owner with a list of subcontractors and suppliers and will provide Owner and Lender with an updated list of subcontractors and suppliers not later than the 15<sup>th</sup> day after the date a subcontractor or supplier is added to or deleted from the list.
- e. Receipt of closing documents.** At least one business day before obtaining the extension of credit for construction of the Improvements, Owner did receive from Lender all documentation relating to the extension of credit, unless Owner waived the right to one business day advance delivery of the disclosure from Lender and the other closing documents because of a bona fide emergency or other good cause.
- f. Disbursement of Funds.** Contractor shall provide Owner and Lender with signed periodic statements that list the bills or expenses for which Contractor is requesting payment. Said requests will be in writing on forms reasonably acceptable to Lender and subject to inspection by Lender or Lender's designee indicating satisfactory progress. No further disbursement will be made by Lender if Contractor or Owner are in default with any term or condition of the Contract or any related document associated therewith.
- g. Final Bills-Paid Affidavit.** At the time of final payment, Contractor shall provide Owner and Lender with a Final Bills-Paid Affidavit.
- h. Alterations and Extras.** It is expressly agreed that the terms of the Contract authorize the making of changes by the Owner and Contractor only upon execution of written change orders by Owner and Contractor. Owner shall notify Lender of any changes agreed to by Owner and Contractor before the changes are made. Lender must approve in writing any changes that decrease the value of the Improvements and/or Property.
- i. Waiting Period.** If applicable, Owner shall not sign the Contract before the 5<sup>th</sup> day after Owner makes written application for any extension of credit for the work and material to repair or renovate existing improvements.
- j. Place of Execution.** If applicable, Owner and Owner's spouse shall execute the Contract only at the office of (i) a third-party lender making an extension of credit for the work and material, (ii) an attorney at law, or (iii) a title company.
- k. Right of Rescission.** IF APPLICABLE, OWNER MAY RESCIND THE CONTRACT (AND ANY OTHER PROPOSALS, AGREEMENTS OR

CONTRACTS WITH CONTRACTOR REGARDING THE REPAIR OR RENOVATION OF EXISTING IMPROVEMENTS), WITHOUT PENALTY OR CHARGE, WITHIN THREE (3) DAYS AFTER THE EXECUTION OF THE CONTRACT BY ALL PARTIES.

IMPORTANT NOTICE: YOU AND YOUR CONTRACTOR ARE RESPONSIBLE FOR MEETING THE TERMS AND CONDITIONS OF THE CONTRACT. IF YOU SIGN THE CONTRACT AND YOU FAIL TO MEET THE TERMS AND CONDITIONS OF THE CONTRACT, YOU MAY LOSE YOUR LEGAL OWNERSHIP IN YOUR HOME. KNOW YOUR RIGHTS AND DUTIES UNDER THE LAW.

EXECUTED this \_\_\_\_ day of \_\_\_\_\_, 20\_\_.

STATE LAW REQUIRES THAT A PERSON HOLD A CERTIFICATE OF REGISTRATION FROM THE TEXAS RESIDENTIAL CONSTRUCTION COMMISSION IF THE PERSON CONTRACTS TO CONSTRUCT A NEW HOME OR IF THE PERSON CONTRACTS TO CONSTRUCT A MATERIAL IMPROVEMENT TO AN EXISTING HOME OR CERTAIN IMPROVEMENTS TO THE INTERIOR OF AN EXISTING HOME AND THE TOTAL COST OF THE IMPROVEMENT IS \$10,000 OR MORE (INCLUDING LABOR AND MATERIALS). YOU MAY CONTACT THE COMMISSION AT 311 E. 14<sup>TH</sup> STREET, P.O. BOX 13144, AUSTIN, TEXAS 78711 OR 877-651-8722 OR [WWW.TRCC.STATE.TX.US](http://www.trcc.state.tx.us) TO FIND OUT WHETHER THE BUILDER HAS A VALID CERTIFICATE OF REGISTRATION. THE COMMISSION HAS INFORMATION AVAILABLE ON THE HISTORY OF BUILDERS, INCLUDING SUSPENSIONS, REVOCATIONS, COMPLAINTS, AND RESOLUTION OF COMPLAINTS.

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OWNER:

\_\_\_\_\_  
\_\_\_\_\_

CONTRACTOR:

By: \_\_\_\_\_

Title: \_\_\_\_\_

TRCC Registration Number: \_\_\_\_\_