

# SAMPLE BOAT PURCHASE AND CONSTRUCTION CONTRACT

by Charles M. Davis

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# SAMPLE BOAT PURCHASE AND CONSTRUCTION CONTRACT <sup>1 2</sup>

Copyright 1999, 2010, Charles M. Davis<sup>3</sup>

This AGREEMENT effective the \_\_\_\_ day of \_\_\_\_\_, between \_\_\_\_\_ - \_\_\_\_\_, herein "Owner"<sup>4</sup>, and \_\_\_\_\_, herein "Contractor"<sup>5</sup>, on the following terms and conditions:

## 1. GENERAL CONDITIONS

1.1 **Description of Vessel.** The Owner agrees to buy and the Contractor agrees to build and perform all the Work required by the Contract Documents to build and deliver to the Owner the Vessel, generally described as:

[DESCRIBE DESIGN, MAIN POWER, ETC.]

and more particularly described in the following enumerated Contract Documents, which are incorporated into this Contract in their entirety:

<u>Drawing/Document #</u>	<u>Title</u>
[Describe drawings and documents] <sup>6</sup>	

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<sup>1</sup> This sample agreement is derived from a number of agreements this author has been involved with for construction of commercial fishing vessels, towing vessels and barges, small passenger vessels and yachts. It may not be appropriate for construction of larger inspected vessels, but many of the issues would remain the same.

<sup>2</sup> There is no "standard contract" for vessel construction. Shipyards often have developed their own form contracts which they may prefer to utilize. Institutional vessel owners may have developed forms they prefer. Independent lawyers may have compiled form contracts from a number of sources, modified by each lawyer's judgement and knowledge of problems which have arisen, or could arise, in the course of ship construction. The general principles are that the parties are free to agree to whatever they want. Irrespective of who provides the basic contract, both parties should review a check list of topics and issues that should be covered in contract negotiations and there either be agreement on how each topic and issue is resolved, or agreement that the topic or issue shall be omitted from the final contract document. This proposed form covers most topics and issues of which I am aware. It is relatively favorable to Owner on some issues, and relatively favorable to the shipbuilder on others. All topics are open to negotiation to incorporate whatever provisions to which the parties agree into a final agreement.

<sup>3</sup> Charles M. Davis has practiced maritime law in the Seattle Washington area since 1973. He can be contacted at 4767 Wharf Street, Bow, WA 98232, telephone (360) 766-3223, email CDavis@DavisMarine.com.

No copyright is claimed relative to text of this Sample Agreement. Copyright applies to all footnoted annotations.

<sup>4</sup> The designation of "Owner" may be changed to "Buyer", especially if title to the Vessel is to remain in the name of the builder until "delivery".

<sup>5</sup> The term "Contractor" can be changed to "Builder" if the contract is for new construction, as opposed to reconstruction or major modification.

<sup>6</sup> List any drawings and specifications for the vessel. It may be that some or all of the drawings and specifications are still in early stages. In such case, a notation such as the following will identify them:

Some of the Contract Documents working or are under development or are in preliminary issue at the time of execution of this agreement. Red-marked documents from similar prior [name of architect] projects have been reviewed, discussed and are agreed to be the basis for this agreement, to be finalized by agreement of the

## 2. SCOPE OF WORK

2.1 **Labor & Materials.** Contractor agrees to furnish all labor and materials for the construction of the Vessel except for those items identified in Section 2.3.

2.2 **Performance of Work.** Contractor shall perform all work under this Agreement in a good and workmanlike manner, in accordance with good marine practices, according to the Contract Documents. As Owner has entered into this Agreement relying upon the individual vessel construction skills of Contractor and its individual employers, Contractor shall not assign any of its responsibilities under this Agreement without the prior consent of Owner, which shall not be unreasonably withheld.

2.3 **Owner-Provided Equipment.** Owner shall purchase and provide to Contractor some of the parts and equipment for installation on the Vessel by Contractor. Upon delivery of such equipment to Contractor, Contractor shall be responsible for the care, custody, and risk of loss of each item of Owner Provided Equipment delivered to it from the time of delivery until the Delivery of the Vessel as defined herein. The following Owner Provided Equipment shall be purchased and provided at the expense of Owner, and shall be installed in accordance with good maritime practices by Contractor, Contractor to provide appropriate supplies of electric or hydraulic power for operation of the equipment and mounts for the provided equipment and related antennas, transducers or ducting:

### Navigation and Electronics

1	_____ Model _____	Radar
1	SSB radio	
2	VHS radios	
1	AM receiver	
1	38 Khz sounder, with transducer	
1	50 Khz sounder, with transducer	
1	Plotter, with GPS interface	
2	GPS receivers with antenna	
1	Helm alarm	
_____	_____	_____

### Galley Equipment

1	Electric range with oven and range hood	
1	Microwave oven	
1	Refrigerator	
1	Washer & dryer, stackable	
_____	_____	_____
_____	_____	_____

### Hydraulic Deck Equipment

1	Pot hauler	
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parties.

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- 1 Long line hauler
  - 1 Pot Launcher
  - 1 Bait chopper
- 
- 

### 3. COMMENCEMENT & COMPLETION

3.1 **Time for Completion.** The Work to be performed under this Contract shall be commenced \_\_\_\_\_ and be Substantially Completed<sup>7</sup> on or before \_\_\_\_\_. For purposes of this Contract, "Substantial Completion" shall mean the construction of the hull and house shall be completed and painted with primer and color-coat as provided in the Specifications, and propulsion, generating and refrigeration machinery, shafting, rudders, steering systems, underdeck tanks, electrical systems, specified galley equipment, hydraulic systems, and specified electronics shall be installed. "Substantial Completion" does not mean that all equipment or systems will have been operated, adjusted or tested, sea trials conducted, that all warranty work will be completed, or that paint or other finishes will be complete with respect to touch up and repainting as may be required due to final adjustments and warranty work.

3.2 **Delivery After Substantial Completion.** In the event Contractor makes delivery more than twenty one days after the date for Substantial Completion, Contractor shall pay liquidated damages as described herein.<sup>8</sup> In the event Contractor makes delivery on or before twenty one days after the date for Substantial Completion, Owner shall pay a contract bonus for early delivery as described herein.<sup>9</sup> Time for completion is exclusive of time required to complete any change orders under Article 12, and further exclusive of Owner Delays and Permissible Delays, as defined herein.<sup>10</sup> Additional time for change orders, Owner Delays, or Permissible Delays will be added to the Substantial Completion date, or to the date for Delivery thereafter, as the case may be, and the calculation and assessment of liquidated damages or early delivery bonus shall be based on the adjusted date for delivery. If the Vessel is ready for Delivery on a weekend or holiday, no liquidated damages will accrue unless the Vessel is not ready and tendered for Delivery on the next business day.

3.3 **Liquidated Damages.** In the event of late Delivery of the Vessel it is agreed that the Owner may suffer damages which are difficult to now ascertain. As Owner's exclusive remedy

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<sup>7</sup> For relatively small construction projects, it could be agreed that the project vessel will be completed and delivered by a specific date. The proposed approach for "substantial completion" provides some leeway for the contractor to remedy punch-list and warranty items, and time to complete sea-trials and testing.

<sup>8</sup> Bonus payments and "liquidated damages" can be negotiated depending on the requirements of the parties. The Contractor will want either a waiver of damages for late delivery (which the Owner normally will oppose), or an agreement for limited liquidated damages, rather than to leave itself exposed to an award for all damages which the Owner may incur as a result of late delivery.

<sup>9</sup> Owner might have no incentive to agree to an early delivery bonus if the vessel will not be put into service at an earlier date than the scheduled delivery date.

<sup>10</sup> This provision essentially excuses the Contractor from delays caused by Owner.

for unexcused Delivery more than 21 days after the date for Substantial Completion, the parties hereby agree that Owner shall be given credit as liquidated damages and not as a penalty, on the final payment on the contract. Liquidated damages for unexcused later Delivery shall accrue at the rate of \$ \_\_\_\_\_ for each and every day Delivery is delayed. Contractor will be relieved of liability for liquidated damages under this Agreement to the extent that such delay in Delivery of the Vessel arises from alterations or change orders under Article 12, or from Owner Delays or Permissible Delays as outline herein.

3.3.1 "Owner Delays" are acts or failure to act by Owner, its employees, agents, subcontractors, suppliers and consultants, and includes delays due to failure of Owner to make payments under this Agreement.

3.3.2 "Permissible Delays" are delays due to events of Force Majeure under Article 10 of this Contract.

3.4 **Contract Bonus.** In the event Contractor makes Delivery of the Vessel on or before \_\_\_\_\_ days after the date for Substantial Completion, Owner shall pay a contract bonus for early delivery at the time of the final payment on the contract in the amount of \$ \_\_\_\_\_ per day for each day of early Delivery.

3.5 **Inspection Before Substantial Completion.** The Contractor agrees that a representative of the Owner<sup>11</sup> may inspect and examine the Vessel on or before the agreed date of Substantial Completion at the location of the Vessel to determine that the Vessel is Substantially Complete. Upon Substantial Completion, Contractor shall thereafter be allowed a reasonable time, not to exceed twenty one days, to complete launching and all final installations, trials, tests, adjustments, and warranty work, and Owner may inspect and examine the Vessel during such work prior to accepting Delivery. Any delay or failure on the part of Contractor to complete all such work shall be subject to the provisions of Article 9 and the liquidated damages provisions of Paragraph 3.2 herein.

#### 4. TITLE AND SECURITY INTERESTS<sup>12</sup>

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<sup>11</sup> This representative typically would be the designing architect. In some cases, it may be a surveyor.

<sup>12</sup> Provisions for a security interest in favor of the Owner in the vessel and materials and equipment identified to the vessel is critical where there are advance payments and/or progress payments. If there are no such provisions, the vessel and all materials may be deemed assets of the builder in the event of insolvency of the builder: though the Owner may have paid for all or a large part of the vessel, the Owner probably might not be able to receive possession of the vessel in its partially completed stage and may have to participate in a bankruptcy action in competition with other creditors of the builder to get any right to receive the vessel and identified materials and equipment, even though they have been "paid for".

It is important for the Owner to obtain a list from the Secretary of State of the state where the Contractor does business of any prior filed Uniform Commercial Code security interests against the Contractor, and if any of the Security Interests might involve vessels under construction by the Contractor, inventory, materials, and equipment in the Contractor's possession, it is critical to obtain written agreements from any secured parties who may have a priority interest (first in time in perfecting a security interest usually determines priority) that their security interests in the vessel, materials and equipment are subordinated to the interests of Owner).

Whether creditors of the builder/contractor have filed Uniform Commercial Code security interests in assets of the builder/contractor is important information for a prospective customer. *National Business Systems, Inc. v. Borg-Warner Acceptance Corp.*, 792 F.2d 710 (9<sup>th</sup> Cir. 1986), recognized the validity of state Uniform Commercial Code security interests in a vessel. Information on UCC filings against the builder/contractor and forms for obtaining searches and for the Owner filing any

#### 4.1 Title to Vessel & Equipment.<sup>13 14</sup> The Contractor warrants and guarantees that title to all

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security interests it may obtain are available in Washington at a government web site, <[www.wa.gov/dol/bpd/uccfront.htm](http://www.wa.gov/dol/bpd/uccfront.htm)>. If the agreement does not provide that title will pass to Owner upon identification of materials and equipment for the vessel, the Owner will want to file its own security interests and obtain written agreements from any other secured creditors that such creditors agree to subordinate their security interests to those of Owner.

The definition of a "vessel" for purposes of a preferred ship mortgage under federal law does not require that construction be completed. 46 USC § 31322(a)(3) defines a "preferred mortgage" as a mortgage which covers a "documented vessel" or a "vessel" for which an application for documentation is filed in accordance with 46 USC Chapter 121. The 46 U.S.C. § 1271 definition of a mortgage is sufficiently broad to include a vessel which is "in existence or under construction" and "which are or will be documented under the laws of the United States." Thus, the builder may issue a builder's certificate and the hull under construction may be issued an official number and be documented at almost any stage of construction. If the construction contract does not provide for title in the hull, machinery, equipment and materials identified the vessel to pass to the customer, the customer's interests in the hull and appurtenances can be at least partially protected by the customer recording a preferred ship mortgage on the hull and appurtenances with the United States Coast Guard Marine Documentation Office.

If the hull and identified materials and equipment do not yet constitute a "vessel", then state-created security interests, including materialmen's and labor liens may attach to the hull, materials and equipment. Statutes of most states provide for liens to persons who provide labor and materials to vessels under construction. See, e.g., RCW 60.36.010. As such liens may continue after launching, delivery and documentation of a new vessel, it is critical that the Owner monitor throughout construction that any materialmen and labor suppliers who otherwise may have liens under the law of the state where the vessel is being constructed are being timely paid and that if they are not fully paid at the time of delivery of the vessel, that sufficient funds be held back by the Owner or placed in some form of escrow to satisfy any debts to suppliers that may be disputed or otherwise are not fully satisfied. Before final payments are made to a builder, it is advisable that the Owner obtain from all major suppliers of labor, materials and equipment used in its construction confirmation of payment of all debts and/or waiver of any claim of lien against the hull. Federal statutory law on ship mortgages and maritime liens expressly supersede any state statute which confers a lien on vessel which can be enforced against the vessel. 46 USC § 31307.

Whether title vests in Owner during construction or whether Owner has a federal preferred ship mortgage interest or state UCC security interest in the vessel until Delivery, there is a risk that the Owner's interest will be subject to maritime liens against the Vessel which can arise after the Vessel is launched. An example is that if during sea trials the vessel is involved in a casualty which results in personal injury or property damage to a third party, or an oil spill, the vessel could be subject to a maritime lien for the amount of the damage claim, and such a maritime lien could have priority over the Owner's preferred ship mortgage or UCC security interest. The only way an owner can protect itself at least partially against this type of claim is to assure that the insurance on the Vessel once it is launched provides coverage for such potential liabilities with adequate limits and sufficiently-low deductibles.

<sup>13</sup> Some agreements do not provide for passing of title to Owner until final payment. There is no inherent problem with title remaining in Contractor, so long as a first-priority security interest in the vessel and identified material and equipment is perfected in favor of the Owner. The problem is that often issues of first priority can be resolved only by a bankruptcy judge or other court, and the delays and expenses of obtaining a determination may be very detrimental to the Owner. A provision for title passing may assist in avoiding or expediting some of the resolution process.

<sup>14</sup> An alternative provision with title to remain in the Contractor could read:

Upon delivery and acceptance of the Vessel and payment to Contractor of all amounts then due under their Agreement, title to the Vessel shall pass to Owner. Until such time as title passes, title shall remain in Contractor and Owner shall have a lien on the Vessel in the amount of progress payments received by Contractor. Title to the whole of the Vessel shall be transferred by appropriate means to Owner, at which time the Vessel shall be, and Contractor shall also warrant, free and clear of all liens, debts, security interests, encumbrances and claims of every nature, including, but not limited to, statutory and maritime lines in favor of workmen, material suppliers, subcontractors, or others arising by, through or under Contract. Contractor hereby creates in favor of Owner, its successors and assigns, a security interest in the following materials, machinery and equipment which are purchase for or identified for use in the construction of the Vessel:

- (a) All items included on those Plans and Specifications identified in \_\_\_\_\_ above, and
- (b) All additional, extra or changed items requested by Owner and agreed upon by Owner and Contracted in writing pursuant to Section \_\_\_\_\_.

Contractor agrees to identify all such materials, machinery and equipment presently owned which shall be used

work, materials and equipment covered by a request for any Payment, whether an Interim Progress or Final Payment, whether then incorporated in the Vessel or which is identified to an to be incorporated in or placed on the Vessel when delivered, will pass to the Owner upon payment of each such Interim Progress or Final Payment, free and clear of all liens, claims, security interests or encumbrances;<sup>15</sup> and that no work, materials or equipment covered by a request for payment will have been acquired by the Contractor or by any other person performing the Work on the Vessel or furnishing materials and equipment for the Vessel subject to an agreement under which an interest therein or an encumbrance thereon is retained by the Contractor or otherwise imposed by the Contractor or such other person. Upon request of Owner, Contractor shall at a reasonable time and place provide documentation of invoices, accounts and proof of payment to establish that suppliers of machinery, equipment and supplies identified to the work to be completed pursuant to this Contract are timely being paid and that no liens are being incurred other than as are being timely satisfied<sup>16</sup> in the ordinary course of business.<sup>17</sup>

**4.2 Security Agreements & Subordination.** Contractor shall execute such documents, including a preferred ship mortgage and/or security agreement and appropriate other documents granting a security interest in the Vessel and equipment for which any payment has been made in favor of Owner and/or Owner's lending institution, as may be requested by either or both. Any person or entity which holds a security interest on property of Contractor which reasonably may be construed as applying to the Vessel (including materials and equipment identified to its construction), during its construction, the secured party shall agree to subordinate its security interest to the interests of Owner to the extent that Owner has made progress payments covering such work, materials and equipment. Contractor agrees to obtain subordination agreements for any other holders of security interests in property to which Contractor has title or possession which might

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in the construction of the Vessel and agrees further to identify all materials, machinery and equipment acquired contemporaneously with this security agreement and acquired at any time subsequent to his security agreement which are to be used in construction when they reach his premises. Additionally, Contractor agrees to execute such further instruments and documents of security as reasonably requested by Owner or Owner's lending institution as to the security interest herein granted by Contractor in favor of Owner including, but not limited to, a financing statement covering the subject materials, machinery and equipment. Contractor further agrees to obtain subordination agreements for any other holders of security interests in property to which Contractor has title or possession which might apply to the Vessel, its materials, machinery and equipment as such become identified to the construction of the Vessel. Contractor agrees to obtain subordination agreements in form satisfactory to Owner and to provide originals of such agreements to Owner within \_\_\_\_ days after notice to Contractor by Owner of the identity of each such secured party.

<sup>15</sup> The contractor's warranty of good title is important in event of any claims of lien or other competing claims against the owner's interest, but is only as good as the contractor's own financial ability to respond to any demand by owner for a defense and indemnity against any such claim.

<sup>16</sup> Admiralty jurisdiction does not govern contracts for new construction or for vessel sales. As there is no admiralty jurisdiction for contracts to supply and build new vessels, maritime liens do not attach to new construction. But because maritime law does not apply to new construction, state law can apply. Most states have statutes which provide liens against new construction in favor of suppliers of labor, materials and equipment to a new vessel. Irrespective of title to the vessel, such liens attach. Such liens may or may not have priority over the Owner's UCC security interest, depending on applicable state law. Especially in states where it is not very clear that the Owner's UCC security interest in the vessel has priority over supplier's liens, it is critical for the Owner to assure that the Contractor is timely paying suppliers.

<sup>17</sup> This clause gives to Owner the right to periodically audit the Contractor to assure that labor, subcontractors, and material and equipment providers are being paid in the ordinary course of business. As state vessel construction liens may have priority over the Owner's interests under state law, this provision may be very important.

apply to the Vessel, its materials, machinery and equipment as such become identified to the construction of the Vessel. Contractor agrees to obtain subordination agreements in form satisfactory to Owner and to provide originals of such agreements to Owner within \_\_\_\_ days after notice to Contractor by Owner of the identity of each such secured party.

## 5. DELIVERY & ACCEPTANCE

5.1 **Substantial Completion and Testing.** Owner shall have a reasonable time, not to exceed 10 days after such expected day of substantial completion, in which to inspect and test the Vessel and its systems, including conducting reasonable dock trials. Any defects which may become apparent during such inspections shall be corrected by the party providing any faulty component. When the Vessel is substantially complete, except for such items as Contractor and Owner may agree to be accomplished at a later date, Contractor shall issue a Certificate of Substantial Completion which shall specify any such discrepancies and the agreed manner of disposition, as determined before Sea Trials.

5.2 **Sea Trials.** Upon Contractor's issuance of a Certificate of Substantial Completion, Contractor shall proceed with Sea Trials as defined in the Contract Documents. Owner and Contractor agree that the Sea Trials or other testing procedures may disclose defects in Contractor's workmanship, equipment, or installation after substantial completion of the Vessel. Any such defects shall be corrected by Contractor at no additional cost to Owner.<sup>18</sup>

5.3 **Delivery Procedures.** After completion of Sea Trials and correction of all noted defects (except such defects as Contractor and Owner agree are Minor Items to be adjusted as provided in Section 5.4), and payment of the sums stated in Section 6 less any amounts deducted pursuant to Section 5.4, Contractor shall deliver the completed Vessel to Owner in the water at Contractor's place of business. Not less than ten days prior to Delivery, Contractor shall provide to Owner the following documents: (1) a Builder's Certificate so the Vessel may be documented;<sup>19</sup> (2) any other forms or documents necessary to obtain documentation of the Vessel with the United States Coast Guard; (3) a warranty and maintenance package that shall include the manufacturers' literature collected as stated in the Contract Documents and/or as otherwise may have been obtained by Contractor for maintenance of the Vessel, its finishes and appurtenant equipment, and any as-built drawings as may be required by the Contract Documents. At the time of payment of Final Payment, the following documents shall be delivered to Owner: (1) a Bill of Sale for Sale for the Vessel, warranting the Vessel free and clear of all liens, claims and encumbrances; or (2) if the Vessel has already been documented with the United States Coast Guard in the name of Owner, a certificate warranting the Vessel free and clear of all liens, claims and encumbrances based on any

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<sup>18</sup> The specifications for construction should define what dock trials and sea trials are to be conducted, and at whose risk and expense.

<sup>19</sup> Present law allows documentation at an early stage in construction. It is recommended that documentation be done at an early stage, which allows recording of the construction lender's preferred ship mortgage.

contracts of Contractor or any acts or nonactions of Contractor.<sup>20</sup> This sale will be closed in the office of Contractor, or such other office as Contractor shall designate. Owner and Contractor will immediately upon demand exchange all instruments and monies necessary to complete the purchase in accordance with this Contract. On Delivery, the Owner shall indicate the acceptance of the Vessel by executing the Delivery and Acceptance Certificate in the form attached hereto as Appendix "A". Owner shall be entitled to possession on closing and execution of the Delivery and Acceptance Certificate.<sup>21</sup>

5.4 **Minor Items.** Owner and Contractor may agree that some of any defects noted in Sea Trials do not substantially effect the intended operation of the Vessel, which defects shall be deemed to be Minor Items. In the event that, at the time of Delivery of the Vessel, minor items exist that have not been corrected or completed, a list of the Minor Items will be made by Owner and Contractor, a value assigned to each such Minor Item, and Owner and Contractor shall both sign such list. The Vessel shall be delivered and the agreed value of such Minor Items withheld from the Final Payment. In the event Owner and Contractor cannot agree as to the value of any such Minor Item, the value shall be determined by arbitration in the manner stated in Section 6.3.

5.5 **Acceptance of Completed Work.** The making of final payment shall constitute a waiver of all claims by the Owner except those arising from (1) unsettled liens or clouds on title; (2) warranty claims under Article 13. Acceptance of final payment by Contractor shall constitute a waiver of all claims of Contractor except such claims as may be disclosed in writing to Owner prior to the time of acceptance of the final payment.<sup>22</sup>

## 6. CONTRACT PRICE & PAYMENTS

6.1 **Contract Price.** The Owner shall pay the Contractor for the performance of the work, subject to additions and deductions by Change Order as provided in the Article 12, in current funds, the Contract Sum of \_\_\_\_\_ DOLLARS (\$ \_\_\_\_\_ .00).

6.2 **Progress Payments Schedule.** The Owner shall make progress payments on account

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<sup>20</sup> If documentation of the vessel in the name of the Owner has been completed earlier in the construction process, a "bill of sale" as such is not necessary, but there should be some document by the builder warranting that all liens which might arise from construction of the vessel so far as materialmen, suppliers, subcontractors and labor contracted for by the builder or arising from actions of the builder have been satisfied.

<sup>21</sup> In at least one case of which I am aware, the issue whether delivery had occurred was a million dollar question. Because of financial problems, a shipyard was unable to complete all of its obligations and proposed to the Owner that if he didn't want to fight with other creditors of the shipyard, that he take possession of the vessel in a less than completed state, and that the shipyard would continue to provide labor until the vessel had to be moved to be loaded on a barge to be transported to its place of intended use. Along with other work, the shipyard provided labor and weights for the required stability testing. As a result of failure of the yard to secure the weights while the vessel was inclined during testing, the weights slid and the vessel capsized, causing more that \$1,000,000 in damage. The builder's risk insurer declined the claim contending that its policy, like most builder's risks policies, terminated on "delivery" of the vessel and that "delivery" had occurred when the Owner took possession, though the shipyard continued to perform work towards finishing the project.

<sup>22</sup> This provision is important from the standpoint of both Owner and Contractor to assure that additional charges and credits for change orders are not made after the final payment. If unresolved disputes are known to either party at the time final payment is to be made, the claims or defenses would have to be disclosed and agreement that they are exempted from application of this waiver, or they would be waived.

of the Contract Sum to the Contractor as follows:

<u>Date</u>	<u>Event</u> <sup>23</sup>	<u>Amount of Payment</u>
_____	Down payment	\$ _____ .00
_____	Ordering of steel	_____ .00
_____	Begin hanging hull plate	_____ .00
_____	Begin engine installation	_____ .00
_____	Start interior work	_____ .00
_____	Begin outfitting	_____ .00
_____	Substantial completion	_____ .00
Final payment	Delivery	_____ .00
Total		_____ .00

Payments and credits for written change orders per Article 12 will be adjusted and paid or credited on the next payment due after agreement to a written change order. Disputed portions of adjustments for change orders which are not resolved at the time of Delivery shall be reserved for resolution as provided in Sections 6.3 and/or 9.<sup>24</sup> Such payments and credits shall be paid to the other party within 30 days of final resolution of each item of adjustment.

**6.3 Notice of Progress Billing.** Owner, or its designated representative, and Owner's lending institution, or its designated representative, shall be entitled to inspect the work to confirm that the required work has been completed. Any dispute as to whether work covered by any progress payment due shall be resolved by binding arbitration by a qualified marine surveyor to be mutually selected by the parties, the fees of such arbitrator/surveyor to be borne equally by the parties. It is intended that such arbitration be done by the arbitrator/surveyor reviewing the work, and making his determination summarily, without the necessity of taking testimony or issuing a written or oral opinion. Owner shall make progress payments properly due within ten days of the due date.

**6.4. Final Payment.** The Owner shall make final payment upon Delivery, provided the Contract be then fully performed.

## 7. OWNER'S RESPONSIBILITIES

**7.1 Approval of Plans, Etc.** The Owner promptly shall provide and approve all Plans, Drawings, Specifications, and Surveys.

**7.2 Governmental Inspection.** The Owner shall be responsible for filing the required documents to secure approval of governmental authorities having jurisdiction over the design and

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<sup>23</sup> The "events" listed in this sample agreement could have vague definitions. The parties may wish to more precisely define events which trigger payments.

If progress payments are to be made on stated dates or stages or percentages of completion rather than defined by construction events, provisions should be made for assurances that construction is progressing in accordance with the planned schedule. It may be important to specify that a representative of Owner trusted by the Contractor, such as a named independent surveyor, survey the project at each payment event and certify that construction is proceeding according to schedule and that the specified event which triggers the payment has occurred.

<sup>24</sup> In some cases, the parties may want an agreement that disputed adjustment additional payments and credits be placed in escrow.

construction of the Vessel, if any such approval is required.

7.3 **Stability Testing.** Any inclining experiment shall be performed by Owner at his expense to prove the initial intact stability of the Vessel to IMCO criteria. In the event other stability testing is required by any inspecting agency, classification society, regulation or condition of insurance (including prospective insurance during operation of the Vessel after Delivery, Contractor shall provide weights, materials and labor to conduct required tests. Owner's Naval Architect or surveyor shall prepare and submit to the Owner and the Contractor a report in the form of a stability booklet which includes the inclining experiment, establishing the light ship weight and center of gravity, and at a minimum two conditions of loading. The test shall be under the supervision of Owner's Naval Architect or surveyor.

7.4 **Owner-Furnished Equipment.** Owner reserves the right to obtain and furnish items of equipment, outfit, and supplies to the Contractor, when in his opinion the nature of the item, supply, or the intended operational use make this method of acquisition feasible. Where such action results in a decreased cost to the Contractor, the cost adjustment shall be made in accordance with the terms of the Contract. Owner-furnished equipment shall be listed in an appendix to this Contract, the list to include agreed date(s) for delivery of each such item of equipment to Contractor. Late delivery to Contractor of Owner-furnished equipment will relieve Contractor from responsibility to complete by the agreed date for Substantial Completion installation of the Owner-furnished equipment or any system of which Owner-furnished equipment is part, to the extent of delays caused or resulting from late Delivery.

## 8. CONTRACTOR'S RESPONSIBILITIES

8.1 **Contractor's Warranties.** All workmanship shall be free from faults and defects and in conformance with the Contract Documents, including any additions and modifications agreed by the parties, and when the Vessel is tendered for Delivery, it shall be in seaworthy condition and fit for the purposes for which it was intended. All material, machinery, equipment, pieces and/or parts specified herein and installed in the completed Vessel shall be new, of recent manufacture and unused, except for the usual acceptance tests required. All Work not so conforming to these standards may be considered defective. The foregoing shall not apply to Owner-supplied equipment. If required by the Owner, the Contractor shall furnish satisfactory evidence as to the kind and quality of materials and equipment. This warranty lapses upon Delivery of the Vessel and is replaced by the Limited Warranty set forth in Article 13.

8.2 **Manufacturers' Warranties.** All warranties on equipment obtained from vendors by Contractor shall pass through to Owner. The warranty shall be effective on the date of Substantial Completion and Vessel Delivery to the Owner and shall extend through the full warranty period stated by the manufacturer for each individual item so covered.

8.3 **Launch.** Contractor shall be responsible for the satisfactory launching of the Vessel at such times as mutually agreed by all parties concerned.

## 9. DISPUTE RESOLUTION

9.1 **Reference to a Surveyor.** The parties shall utilize the procedure set forth in Section

6.3 for arbitration by an agreed surveyor to resolve disputes over contract administration, materials and workmanship. The disputes referable to the agreed surveyor under the procedure outlined in Section 6.3 are: scope of work and specifications under Articles 1 and 2; substantial completion and Delivery under Article 3; Delivery and Acceptance under Article 5; status of work for progress payments under Section 6.3; workmanship, defects and conformance with Contract Documents under Section 8.1; impact of Force Majeure on contract performance under Article 10; impact of change orders under Article 12; and warranty claims and work under Article 13.

9.2 **Arbitration.** As to any dispute which may arise out of this Agreement, the parties shall meet and shall use their best efforts to resolve the dispute by agreement. The parties shall meet to discuss the possibility of a mutually agreed upon procedure to resolve any specific dispute which has arisen. The procedure may be streamlined or simplified in any manner the parties determine. If no mutual agreement of the parties is affected, the dispute resolution will proceed as follows. Any dispute that may be referred to a surveyor as provided in Section 9.1 but cannot be resolved by such reference and good faith efforts of the parties to resolve such dispute, and any other dispute, controversy or claim arising out of or relating to this contract, including any question regarding breach, termination or invalidity thereof, shall be resolved by arbitration at \_\_\_\_\_, in accordance with the \_\_\_\_\_ Rules<sup>25</sup> for the time being in force, which rules are deemed to be incorporated by reference into this clause. The number of arbitrators shall be one. The parties waive, to the extent permitted by law, any rights to appeal or any review of such award by any court or tribunal of competent jurisdiction. The parties agree that any arbitration award may be entered by any court having jurisdiction.

9.3 **Applicable Law.** The Contract shall be governed by the general maritime law of the United States, except to the extent there may be no general maritime law applicable to a particular issue, the law of the state of \_\_\_\_\_ shall govern.<sup>26</sup>

## 10. FORCE MAJEURE

10.1 **Delay or Failure of Performance.** Any delay or failure of performance by either

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<sup>25</sup> Reference may be made to any specific arbitration service. The parties may agree after a dispute arises to another means of resolution, but pre-dispute agreement to arbitration provides for a "default" means for dispute resolution which should provide an alternative to litigation at great savings of time, expense, and damage to the working relationship of the parties.

<sup>26</sup> Some contracts do not mention federal law and provide only that the contract will be governed by the law of a particular state. Except for issues governed by federal preferred ship mortgage statutes, federal law probably does not provide any remedies until the hull is launched and is capable of being placed into service, but after that time may provide protection to the Owner and the Owner's financing institution against liens which might otherwise arise under state law or be liens junior to a perfected federal ship mortgage under federal law. Where the contract in issue provides for application of the law of a designated state, there is a split of authority whether the state law includes otherwise-applicable federal statutory and general maritime law. The traditional view is that federal law is incorporated into state law: "The Constitution laws and treaties of the United States are as much a part of the law of every state as its own local laws and Constitution." *Hauenstein v. Lynham*, 100 U.S. 483, 490 (1880). But *National Enterprises, Inc. v. Smith*, 114 F.3d 561 (6<sup>th</sup> Cir. 1997), interpreted a provision in a yacht lease that the lease would be governed by the laws of the state of Ohio to indicate that both parties intended that federal maritime law not apply.

Even after the vessel is launched and is subject to federal maritime law, legal issues may arise which are not answered by a recognized rule of federal maritime law. In such cases (especially insurance issues), it may be determined that state law should be applied. *Wilburn Boat Co. v. Fireman's Fund Ins.*, 348 U.S. 310, 1955 AMC 467 (1955), a marine insurance case, held that, where there is no established general maritime law rule on a particular issue, and the subject does not require national uniformity, admiralty courts may look to the rule of the state in which the court is sitting.

party pursuant to this Contract shall be excused if, and to the extent, the delay or failure was caused by occurrences beyond the reasonable control of the party affected and not due to its fault or negligence, including but not limited to decrees of a governmental instrumentality, acts of God, floods, work stoppages due to labor disputes or strikes not the fault of either party, fires, explosions, epidemics, riots, war, rebellion, sabotage, non-receipt of any equipment or materials for which orders have been properly expedited, and/or delay resulting from late delivery of supplies or late performance of services to have been furnished by subcontractors or suppliers required to be used pursuant to the Specification or at the direction of the Owner; provided, however, that the foregoing shall not be considered a waiver of either party's obligations under this Contract; and further provided that the party seeking relief under this Section shall be required to use reasonable diligence in seeking to overcome the obstacle, and performance shall have been resumed within a reasonable time after the obstacle has been removed; provided still further that the party seeking relief shall promptly notify the other in writing of the time of commencement and ending of any such occurrence and describe the nature of the occurrence and its anticipated effect on the performance of this Contract. The occurrence specified in this Article 9 shall not, under any circumstances, be a basis for increasing the Contract Price. Contractor shall not charge Owner for any standby, moving, or like costs that may be incurred by Contractor in connection with any work stoppage caused by the above events or like circumstances beyond either party's reasonable control.

## 11. INSURANCE AND LIABILITY

### 11.1 Forms & Amounts of Insurance.<sup>27</sup>

11.1.1 **Builder's Risk Insurance.** The Contractor<sup>28</sup> shall purchase and maintain Builder's Risk insurance with underwriters acceptable to Owner on the American Institute of Marine Underwriters Builder's Risk form upon the entire Work on the Vessel to the full insurable value thereof (including Owner-furnished Equipment), Owner and Owner's lender to be named as additional insureds<sup>29</sup> on all such policies, and as loss payees as their respective interests shall appear. Contractor shall provide evidence of such insurance through Delivery of the Vessel. Such policy or policies must provide that cancellation, termination (other than from Delivery of the Vessel to Owner) or reduction cannot be made without 30 days' written notice to Owner.

11.1.2 **Workers' Compensation Insurance.** The Contractor shall maintain at all

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<sup>27</sup> To protect Owner from the results of insolvency of the shipyard from some potential liabilities to third parties as well as warranty claims which may arise under the contract, it may be appropriate to require that the shipyard maintain Commercial General Liability insurance with appropriate limits. A recommendation is that the contract require that the CGL insurance include coverage for "products of the insured", "completed operations", and "contractual liabilities", and that it be required that the shipyard maintain products and completed operations coverage for at least one year after completion of the agreement (or longer, if the warranties run for longer than one year).

<sup>28</sup> This item, like most other items of expense, can be assigned to either party. In many cases, shipyards have a blanket builder's risk policy in place and can add the specific vessel to the policy at less expense than could the Owner in negotiating a single-vessel policy.

<sup>29</sup> Litigation has occurred where the contract and insurance policy did not name Owner as an "additional assured", but instead named Owner as a "loss payee as his interest appears". "Loss payee" status does not provide some protections relative to the policy, such as notice of cancellation, *etc.*, and coverage for claims against Owner under the liability coverages to which an "additional insured" would be entitled.

times it has any employee engaged in performance of any obligation under this Agreement (1) statutory workers' compensation insurance as may be required by the laws of the state in which work is performed; (2) Longshore & Harbor Workers' Compensation Act coverage as may be required by federal law; (3) Maritime Employer's Liability Coverage for bodily injury to or death of a master or member of the crew of the Vessel. All such insurance shall waive subrogation against Owner to the extent allowed by law.

**11.1.3 Liability Insurance.** The Contractor shall maintain at all times during performance of its obligations under this Agreement Commercial or Comprehensive General Liability insurance, with limits on no less than \$ \_\_\_\_\_, covering Bodily Injury, Property Damage and Personal Injury. Coverage is to include Premises and Operations, Products and Completed Operations and Contractual Liability. Products and Completed Operations coverage shall be maintained for not less than one year after Delivery of the Vessel. All such insurance shall waive subrogation against Owner to the extent allowed by law.

**11.2 Damage to Vessel - Risk of Loss.** Contractor shall bear risk of loss of the Vessel and machinery, materials and equipment obtained or intended for construction of the Vessel stored in premises controlled by Contractor, including Owner Furnished Equipment, until Delivery to Owner as provided herein. In the event of damage to the Vessel prior to Delivery which equals 90% or more of the pre-casualty value of the Vessel at its then state of construction, or damage to substantially all of the machinery, materials and equipment obtained or intended for construction of the Vessel stored in premises controlled by Contractor, Contractor shall proceed with construction of the Vessel unless Owner shall elect to cancel the Agreement as respects such Vessel and shall notify Contractor of such election within thirty calendar days after such loss. If Owner does not elect to cancel the Agreement as aforesaid, proceeds received from any Builder's Risk insurance shall be applied to reconstruction of the Vessel. If Owner does elect to cancel the Agreement as aforesaid, Owner shall be entitled to the portion of the proceeds received from the Builder's Risk insurance equal to the sum of all payments towards the Contract Price made to Contractor plus the value of all Owner Furnished Equipment delivered to Contractor. In the event of partial damage to the Vessel totaling less than 90% of the pre-casualty value of the Vessel at the time of casualty, or total loss of less than substantially all of the machinery, materials and equipment obtained or intended for construction of the Vessel stored in premises controlled by Contractor, Contractor shall continue construction of the Vessel, applying the proceeds of the Builder's Risk Insurance to repair such damage and to purchase substitute equipment and materials.

**11.3 Personal Injuries.** Contract shall be responsible for injury to or death of persons employed by Contractor, or by any subcontractor of Contractor, or in connection with performance of any obligation of Contractor under this Agreement, at all times during construction and to the time of Delivery.

## **12. CHANGES IN THE WORK**

**12.1 Written Change Orders Required.**<sup>30</sup> The Owner without invalidating the Contract

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<sup>30</sup> The most frequent source of disputes in ship construction is whether a particular item of work is a "change" for which the Owner is responsible for additional payment (or entitled to a credit). Requiring that all changes be in writing accepted by the other party provides for the parties acknowledging each item as a change, and, usually, agreeing in advance on its effects on costs

may order Changes in the Work consisting of additions, deletions, or modifications. All such Changes in the Work shall be authorized by written Change Order signed by the Owner stating any agreed adjustments to the Contract Sum and the date for Substantial Completion. The cost or credit to the Owner from a Change in the Work shall be determined by mutual agreement between the Contractor and the Owner, and, in the event agreement cannot be reached, shall be determined by an arbitrator pursuant to the provisions of Section 6.3. Unless otherwise agreed, changes shall be charged or credited on a time and materials basis, net of time and materials saved by not proceeding in accordance with original plans and specifications. For purposes of this section, charges shall be as follows:

Labor, \_\_\_\_ per hour regular time

Labor, \_\_\_\_ per hour overtime

Materials, actual cost to Contractor plus \_\_\_\_ %

Additional compensation of \_\_\_\_ % shall be applied to any change requested by Owner, or which results in a net credit against the Contract Price.<sup>31</sup>

If a change order results in an increase in the contract Sum, payment for the change order increase shall be made at the time of the next payment under the contract payment schedule.

### **13. WARRANTY AND DISCLAIMER OF ADDITIONAL WARRANTIES: LIMITATION OF REMEDIES**

13.1 **Limited Warranty.** Subject to full payment on completion of this Contract or any supplement hereto, Contractor<sup>32</sup> warrants the work performed and all material, machinery and equipment provided hereunder, normal deterioration and reasonable wear and tear excepted and excluding any and all Owner-furnished equipment, to deficiencies noted and notice given to Contractor within a period of twelve months<sup>33</sup> from the date of Delivery of the Vessel or 2000 main engine service meter hours, whichever first occurs. Contractor's sole obligation under this warranty shall be to repair or, at its option, to replace any defective material or workmanship covered by this warranty. Any such repairs or replacement shall be made by Contractor at Contractor's regular place

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and timing of delivery.

<sup>31</sup> This provision is included to mitigate a penalty to the shipyard to agreeing to a change that would reduce the price of the Vessel, and to compensate the shipyard for time of managers and supervisory personnel which may be incurred in planning and supervising the changed work

<sup>32</sup> The financial status of the shipyard should be monitored by the Owner to assure not only that the shipyard has sufficient assets to complete and deliver the vessel at the bid price, irrespective that it may have underbid this project or may have lost money on other projects, but, even after delivery, has sufficient assets to compete warranty work. Warranty obligations usually are excluded from a shipyard's own insurance. There have been several notable examples of shipyards not having sufficient financial ability to make necessary modifications and repairs to comply with warranty obligations, and the owners have had to finance the work and try to recover advances from the builder in litigation.

<sup>33</sup> Twelve months is a proposed time. The parties may agree to any other reasonable time period.

of business:<sup>34</sup> <sup>35</sup> if Owner and Contractor agree that replacement or repairs under warranty cannot be made conveniently to Owner or Contractor at Contractor's usual place of business or by Contractor's employees or subcontractors at another location, then after such agreement, Owner may have such repairs and/or replacements made elsewhere, and Contractor shall reimburse Owner the reasonable cost thereof, Contractor's liability not to exceed Contractor's cost of completing such warranty work at its usual place of business at its usual rates for labor and materials.<sup>36</sup> In all such cases, Contractor shall be given a reasonable opportunity to inspect the condition prior to repairs. This warranty shall terminate twelve months from the date of Delivery or 2000 service meter hours, and Contractor shall not be liable for any defect unless given written notice of the defect prior to such date.

**13.2 Limitation of Remedies.** Contractor, its principals, agents, employees, and/or subcontractors shall in no event be liable to Owner or to any third party for any claims for loss or damage for any reason whatsoever, including for breach of warranty, or for negligence of any kind<sup>37</sup> or strict liability in tort, for any incidental, contingent, special or consequential<sup>38</sup> or commercial damages of Owner (including loss of use and/or loss of profits and/or loss, damage or injury to any person or any other property, wreck removal, fines or damages arising out of spillage or oil or other pollutants) arising from or out of work performed and material, machinery and/or equipment

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<sup>34</sup> If the vessel will not operate near the Contractor's place of business, it may be important for Owner to negotiate that any repairs shall be made at the nearest place to the location of the vessel where repairs may be made.

<sup>35</sup> There are strong reasons for an Owner to request a longer warranty period on new construction than one year/2000 hours. Though the owner carries hull insurance which covers "latent defects" to the hull and machinery, usual insurance does not cover the cost of replacing the "defective part". Typically, there is no insurance for the cost of repairing a defect that requires correction but has not caused damage to other components of the vessel. As to the "resulting damage" that may be insured, a claim is subject to a deductible. Further, a "design defect" might not be considered a "latent defect", and the costs of correcting a design defect might not be insured. So the owner should negotiate for as long a warranty as the Contractor will accept at a cost which is acceptable to the Owner.

<sup>36</sup> This proposed measure of cost may result in disputes as to at what cost Contractor could have completed the work. Another proposal would be for Contractor to be responsible for the actual cost of a suitable substitute repairer who made the repairs.

<sup>37</sup> Some case law has held that a disclaimer of liability for damages which result from gross negligence of a shipyard is not enforceable. *Royal Ins. Co. v. Southwest Marine*, 194 F.3<sup>d</sup> 109, 1999 AMC 2873 (9th Cir. 1999), determined that disclaimers of liability are unenforceable for gross negligence of a ship repairer. *Agip Petroleum Co., Inc. v. Gulf Island Fabrication, Inc.*, 1999 U.S. Dist. LEXIS 11152 (S.D. Tx. 1999), enforced a contractual disclaimer of consequential damages irrespective of allegations of gross negligence where the only physical damage was to the product itself.

<sup>38</sup> The Supreme Court has held that allocation of costs of warranties and risk of future problems arising from a vessel's construction may be resolved by the contract between the parties. Liability of a shipbuilder for damages which result from problems with the ship itself and do not result in damage to property other than the ship itself (including equipment which the parties anticipated would be added to the ship after delivery), are subject to only "contractual remedies", which may be limited by agreement of the shipyard and vessel Owner. *East River S.S. Co. v. Transamerica DeLeval, Inc.*, 476 U.S. 858, 1986 AMC 2027 (1986); *Saratoga Fishing Co. v. J. M. Martinac & Co.*, 520 U.S. 875, 1997 AMC 2113 (1997). Other cases have held that liability and remedies for injury to other property and persons can be limited by appropriate contractual disclaimers of liability and limitations of remedies and damages. See, e.g., *M/V American Queen v. San Diego Marine Construction Corp.*, 708 F.2d 1483 (9th Cir. 1983):

It is well settled that in admiralty law, the parties to a repair contract may validly stipulate that the shipowner is to assume liability for *all* damages occasioned by the negligence of the shipyard.

Other cases have held that to disclaim liability for negligence or other tort, the disclaimer must specifically refer to negligence or tort.

provided by Contractor under this Contract and/or the use or operation of, or in any way connected with, the property on which the work was performed by Contractor, from whatever cause, whether arising from negligence or breach of this contract, or any other person even if the possibility of such damages is or was foreseeable by the parties hereto.

**13.3 Disclaimer of Additional Warranties.** The foregoing limited warranty is in lieu of, and Contractor specifically disclaims any and all other warranties, express or implied, including any warranty as to suitability of the Vessel's design, of merchantability<sup>39</sup> or of fitness for a particular purpose, usage or trade that may be intended by Owner. The limited warranty, limitation of remedies and disclaimers of additional warranties in this Article 13 are in lieu of and supersede any provisions in the Contract Documents as to warranties, limitation of remedies and disclaimers of additional remedies.

**13.4. Application of Limited Warranty, Limitation of Remedies and Disclaimers of Additional Warranties.** The provisions of this Article 13 apply to Work done by Subcontractors as well as to Work done by direct employees of the Contractor. **The Limited Warranty stated in Section 13.1 and the Limitation of Remedies stated in Section 13.2 and the Disclaimer of Additional Warranties stated in Section 13.3 have been negotiated by the parties hereto, and Contractor has relied on Owner's agreement to the Limited Warranty and the Disclaimer of Additional Warranties and Limitation of Remedies in determining its exposures to liabilities and expenses of insurance for purposes of determining the Contract Sum. Owner understands that but for Owner's agreement to this Limited Warranty, the Limitation of Remedies, and the Disclaimer of Additional Warranties Contractor might require a higher Contract Sum for consideration for the agreed products and services.<sup>40</sup> Owner has read, understands and hereby agrees to all of the terms and conditions herein, expressly including the Disclaimer of Warranty and Limitation of Remedies.**

## **14. OWNER'S FAILURE TO MAKE PROMPT PAYMENT**

**14.1 Default & Interest.** In the event of default of Owner to timely make any progress payment required hereunder, and to cure such default within ten business days, Contractor may suspend work on the Vessel and give written notice to Owner of such suspension, and the completion date shall be extended one day for each day that work is suspended from the date of suspension until seven days after payment is made. Any monies not paid when due to either party under this Contract shall bear interest at the rate of 12% per annum.

## **15. INTEGRATED CONTRACT**

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<sup>39</sup> Though contracts for construction of vessels may be deemed contracts for services, in some cases they have been considered contracts for sale of goods, governed by the Uniform Commercial Code. The UCC does not recognize a disclaimer of an implied warranty of "merchantability" (that the goods are suitable for their usual purpose) unless the implied warranty of merchantability is expressly disclaimed in writing. Similarly, a disclaimer of suitability for a particular purpose intended by the buyer for which buyer relies on the expertise of the seller in selecting a suitable product should be expressly disclaimed.

<sup>40</sup> This recitation makes it clear that for a higher contract price, the shipyard might have agreed to additional liabilities (which it could insure).

15.1 **Full Agreement.** This Agreement constituted the full and complete understanding between the parties in regard to the construction and purchase of the Vessel. No statement, oral or written, made prior to or at the signing hereof, shall vary, modify, or be used to interpret the written terms and conditions hereof.<sup>41</sup> Titles and headings are for reference purposes only, and are not to be considered in any construction of this Agreement.

15.2 **Written Modification Only.** Any modification of this Agreement must be in writing, signed by the party to be charged with such modification.<sup>42</sup>

## 16. PERSONAL GUARANTEES

16.1 **Guarantees of Principals.** In the event either Owner or Contractor is a corporation or other legal entity limiting liability of its shareholders, limited partners, or principals, the following individuals personally guarantee performance of Owner and Contractor, respectively, under this Agreement, and by their signatures on this Agreement make such guarantee.<sup>43</sup>

Owner:

Contractor:

[Name]

[Name]

IN WITNESS WHEREOF, the parties hereto have executed this Agreement as of the date first above written or on the dates otherwise shown below.

CONTRACTOR:

By:<sup>44</sup> \_\_\_\_\_

Its President

Date: \_\_\_\_\_

Address for any notice:

\_\_\_\_\_

<sup>41</sup> An "integration clause" is important to limit evidence being introduced in a dispute that prior negotiations, other agreements and the intentions of the parties should be considered in interpreting the contract as to the actual intentions of the parties. *Berg v. Hudseman*, 115 Wn.2d 657 (1990), generally held that parol evidence can be considered as to the actual intentions of the parties, but not to change the clear aspects of an integrated contract.

<sup>42</sup> This makes it clear that subsequent oral agreements may not amend the written contract.

<sup>43</sup> Often, there is resistance by a principal of a corporate shipyard to give a personal guarantee. If there is no personal guarantee of a shipyard's obligations, the vessel Owner takes an additional risk of financial loss from the shipyard not properly completing construction and delivery of the vessel due to financial problems or other reasons, or becomes insolvent subsequent to delivery and will not perform its warranty obligations. If the Owner is a corporation, a personal guarantee is appropriate unless the corporation is a large and well financed.

<sup>44</sup> When a party to a contract (whether the shipyard or owner) is a corporation, limited liability company, limited partnership, or general partnership signs, it should be clear that an individual is signing on behalf of the entity. This is usually done by naming the entity as the party, then having the individual sign for the entity "By: [the individual's name and signature], its [title with the entity]."

\_\_\_\_\_  
\_\_\_\_\_  
Fax (\_\_\_\_) \_\_\_\_\_

OWNER:

\_\_\_\_\_  
Date: \_\_\_\_\_

Address for any notice:

\_\_\_\_\_  
\_\_\_\_\_  
Fax (\_\_\_\_) \_\_\_\_\_

**APPENDIX A**

**DELIVERY AND ACCEPTANCE CERTIFICATE**

\_\_\_\_\_ ("Contractor"), pursuant to that certain Agreement dated \_\_\_\_\_, 20\_\_\_\_, between Contractor and \_\_\_\_\_ ("Owner"), hereby delivers the \_\_\_\_\_, Official No. \_\_\_\_\_ and Owner hereby accepts delivery of said Vessel from Contractor at \_\_\_\_\_ of the date and time hereof, without waiver of any warranties, issues of clouds on title, or other rights of Owner arising under that Agreement and any documents incorporated therein.

Dated: \_\_\_\_\_  
Time: \_\_\_\_\_<sup>45</sup>

OWNER:

By: \_\_\_\_\_  
(Signature)  
Name \_\_\_\_\_  
Title \_\_\_\_\_

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<sup>45</sup> The date and time of delivery and acceptance usually determines which party has risk of any casualty to the vessel. A certificate documents the parties' agreement of when delivery occurred. Under standard builders' risks insurance policies, "delivery" terminates coverage for the vessel under the policy. Accordingly, it is important the Owner have in place hull and machinery insurance and protection and indemnity insurance that is effective before or at the time of delivery of the vessel.