RESIDENTIAL CONSTRUCTION CONTRACTS AND THE TEXAS RESIDENTIAL CONSTRUCTION COMMISSION ACT

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RESIDENTIAL CONSTRUCTION CONTRACTS AND THE TEXAS RESIDENTIAL CONSTRUCTION COMMISSION ACT

INTRODUCTION

This presentation has two main focus points. In Part I of the presentation, I will focus on a brief overview of the Texas Residential Construction Commission Act ("Act") and the functions that the Texas Residential Construction Commission ("Commission") serves. I will then discuss a few definitions and key provisions pertinent to the Act and move into a discussion of the effect that the Act will have on purchase and sale agreements involving new construction and residential contracts.

Since it should not take very long to provide an overview of the Texas Residential Construction Commission Act, Part II of this presentation will focus on the practical concerns relevant to the drafting and negotiation of contracts that attorneys representing Owners should be aware of. I will start the discussion of Part II of the presentation by briefly describing general steps involved in contract preparation, including a brief overview of major types of contracts. Part II of the presentation will close with a summation of the key areas of concern to Owners, from both the Owner's and Contractor's perspective.

PART 1: The Texas Residential Construction Commission Act

I. THE ACT

The Texas Residential Construction Commission Act, which is found in Title 16 of the Texas Property Code, Chapters 401 et. seq., should have a major impact on the resolution of disputes between Builders and Owners relating to construction defects through the neutral dispute resolution process established by the Act, by establishing the new Texas Residential Construction Commission ("Commission").

In the past, disputes between builders and consumers involving construction defects have all too often been resolved in a courtroom. This was unfortunate for both sides because of the time and expense involved. This situation was caused, in large part, by appellate court decisions that: (a) created implied warranties of good and workmanlike construction and habitability, but failed to adequately define what these warranties covered; (b) eliminated or restricted a builder's ability to contractually disclaim these implied warranties; (c) determined that damages arising from a breach of either the implied warranties were not covered under the builder's commercial general liability policy; (d) weakened the original purpose and intent of the Texas Residential Construction Liability Act; and (e) created doubt as to whether mental anguish and punitive damages could be recovered in a construction defect case.

From the builder's perspective, the impact of these decisions on the housing industry was significant. Builders were exposed to undefined and uninsured liability for implied warranties that were difficult, if not impossible, to contractually disclaim. On top of this, most insurance carriers that wrote general liability insurance for builders quit writing builders insurance in Texas, and those that stayed raised their premiums significantly and increased their coverage exclusions.

The education that Owners should receive pursuant to the Act as a result of the dispute resolution process, adoption of limited warranties and building and performance standards and registration of Builders and homes will hopefully improve consumer confidence in the homebuilding industry.

II. THE TEXAS RESIDENTIAL CONSTRUCTION COMMISSION

The Commission has six primary responsibilities: (1) register homes and homebuilders, (2) oversee the state-sponsored inspection process, (3) prepare and adopt new building performance standards, (4) manage three task force groups, (5) provide a voluntary certification of arbitrators, and (6) provide for the filing of arbitration awards. The Commission is composed of nine members appointed by the Governor: four registered builders, three members of the general public, one engineer who practices in the area of residential construction and either one architect or inspector who practices in the area of residential construction. These appointments were made by Governor Perry in early September, 2003. The Commission members serve six-year terms. The initial members are serving staggered terms. Three members' terms expire February 1, 2005, three members' terms expire February 1, 2007 and three members' terms expire February 1, 2009.

The Commission is required to prepare information for the public concerning the function of the Commission, the provisions of the limited statutory warranty and building and performance standards, the state-sponsored inspection and dispute resolution process and the procedures by which complaints or requests are filed with the Commission. This information must be mailed to a homeowner within thirty (30) days following the registration of a home.

III. KEY DEFINITIONS IN THE ACT

A. Section 401.002:

"Applicable building and performance standards" means:

1. building and performance standards adopted under Section 430.001; or
2. for homes constructed before the adoption of building and performance standards under Section 430.001, the building and performance standards under any express warranty provided in writing by the builder or, if there is no express warranty, the usual and customary residential construction practices in effect at the time of the construction.

B. Section 401.002:
"Applicable warranty period" means:

1. a warranty period established under Section 430.001 (1,2 and 10 year warranties); or
2. for construction to which the warranty periods adopted under Section 430.001 do not apply, any other construction warranty period that applies to the construction.

C. Section 401.002(8):
"Limited statutory warranty and building and performance standards" means the limited statutory warranty and building and performance standards adopted by the Commission under Section 430.001 (currently scheduled to be adopted this summer).

D. Section 401.002 (16):
"Warranty of habitability" means a builder's obligation to construct a home or home improvement that is in compliance with the limited statutory warranties and building and performance standards adopted by the Commission under Section 430.001 and that is safe, sanitary and fit for humans to inhabit.

E. Section 401.003:
"Builder" means:

(a) any business entity or individual who, for a fixed price, commission, fee, wage, or other compensation, constructs or supervises or manages the construction of:

(1) a new home;
(2) a material improvement to a home, other than an improvement solely to replace or repair a roof of an existing home; or
(3) an improvement to the interior of an existing home when the costs of the work exceeds $20,000.

(b) The term includes:

(1) an owner, officer, director, shareholder, partner, affiliate, or employee of the builder;
(2) a risk retention group governed by Article 21.54, Insurance Code, that insures all or any part of a builder's liability for the cost to repair a residential construction defect; and
(3) a third-party warranty company and its administrator.

(c) The term does not include any business entity or individual who has been issued a license by this state or an agency or political subdivision of this state to practice a trade or profession related to or affiliated, with residential construction if the work being done by the entity or individual to the home is solely for the purpose for which the license was issued.

Therefore, the Act applies to the person or entity involved in the construction of a new home, a material improvement to a home (other than a roof repair or replacement) or an improvement to the interior of an existing home when the cost exceeds $20,000.00. It also applies to the insurer insuring all or part of a Builder's liability to repair construction defects and the third-party warranty company which agrees to be responsible for repairing construction defects. It would not apply to an architect or engineer not involved in construction.

F. Section 401.004:
"Construction Defect" means:

(a) In this title, "Construction Defect" means:

(1) the failure of the design, construction, or repair of a home, an alteration of or a repair, addition, or improvement to an existing home, or an appurtenance to a home to meet the applicable warranty and building and performance standards during the applicable warranty period; and
(2) any physical damage to the home, an appurtenance to the home, or real property on which the home or appurtenance is affixed that is proximately caused by that failure.

b. The term does not include a defect that arises or any damages that arise wholly or partly from:

(1) the negligence of a person other than the builder or an agent, employee, subcontractor, or supplier of the builder;

(2) failure of a person other than the builder or an agent, employee, subcontractor, or supplier of the builder to:

a. take reasonable action to mitigate any damages that arise from a defect; or
b. take reasonable action to maintain the home;
c. normal wear, tear, or deterioration; or
d. normal shrinkage due to drying or settlement of construction components within the tolerance of building and performance standards.

G. Section 401.005:
Exemptions:

This title does not apply to a homeowner or to a homeowner's real estate broker, agent, or property manager who supervises or arranges for the construction of an improvement to a home owned by the homeowner.

IV. KEY PROVISIONS IN THE ACT

A. Section 426.003: Home Registration

Pursuant to Section 426.003 of the Act, a builder must register each new home no later than the fifteen (15th) day of the month following the month in which the transfer of title occurred. If no transfer of title occurs, then the builder must register by earlier of the date of the agreement between the homeowner and the builder, or the date of the commencement of the work. In the latter instance, a problem, for custom builders who build on the owner's lot or for remodelers is that owners sometimes cancel the contract after it is signed. To address this issue, the Commission allows the builder to submit a form to withdraw the registration, however, the fee is not refunded. In addition to the registration, the builder must remit a fee for each home in an amount to be determined by the Commission. The registration fee is $30 per home. According to John Krugh, as of May, 2004, there were over 29,000 home registrations.

The home registration form contains standard information to include such items as the name and contact information of the builder, where the home is located, when the home was built, and the date of title transfer (if applicable).

If a builder registers with the Commission less than sixty (60) days after the required filing period, the builder may still register the home and pay a late penalty of two times the established fee of $60. If a builder fails to register within those sixty (60) days after the fifteen (15) day period, the builder will be subject to an administrative penalty.

Within thirty (30) days following the registration of a home, the Commission is required by statute to mail to the owner of the registered home information concerning the function of the Commission, the provisions of the limited statutory warranty and building and performance standards, the state-sponsored inspection and dispute resolution process, and the procedures by which complaints or requests are filed with the Commission.

B. Chapter 416: Builder Registration

Pursuant to Chapter 416 of the Act, for the first time in the State of Texas, the Act requires a person who desires to be a builder to hold a certificate of registration. In order to obtain a certificate of registration, a person must submit an application and pay a fee. According to John Krugh, as of May, 2004, there were over 12,000 builder registrations. The Act requires disclosure of whether a person has entered a plea of guilty or nolo contendere or has been convicted of a felony or a misdemeanor involving moral turpitude.

In order to obtain a certificate of registration, a person must be at least eighteen (18) years of age, a citizen of the United States or a lawfully admitted alien and, based on the information supplied in the application, must satisfy the Commission concerning the person's honesty, trustworthiness and integrity. The intention of this provision was that the Commission would look to the criminal background check and whatever other information is on the application. This provision is not intended to create wide latitude to investigate a person applying for a certificate of registration.

John Krugh advised me that several applications have been rejected by the Commission on the basis of falsification of the application. In these instances, applicants have indicated they had no previous convictions and the background check showed that this statement was not true.

In order for a corporation, limited liability company, partnership, limited partnership or limited liability partnership to obtain a certificate of registration, one of its officers must be designated as the agent.

If a registration is denied, the Act provides for an appeal and the right to a hearing before the Commission.

A builder must maintain a fixed office location in the State of Texas, and that location must be shown on the certificate of registration. A builder must disclose on the application any assumed names for the builder.

The certificate of registration is valid for one year.

The Commission will establish rules for a builder to qualify for a special designation as a Texas Star Builder. A builder's participation is voluntary, but,

once a builder satisfies the requirements, a builder can represent to the public that the builder is a "Texas Star Builder." Rules regarding the Texas Star Builder should be available by late summer 2004.

C. Chapters 418 and 419: Prohibited Practices and Disciplinary Action

Pursuant to Chapters 418 and 419, a person is subject to disciplinary action under the Act for the following: (1) fraud or deceit in obtaining a registration or certification under this subtitle; (2) misappropriation of trust funds in the practice of residential construction; (3) naming false consideration in a contract to sell a new home or in a construction contract; (4) discriminating on the basis of race, color, religion, sex, national origin, or ancestry; (5) publishing a false or misleading advertisement; (6) failure to honor, within a reasonable time, a check issued to the Commission after the Commission has sent by certified mail a request for payment to the person's last known business address, according to the Commission records; (7) failure to pay an administrative penalty assessed by the Commission under Chapter 419; (8) nonpayment of a final non-appealable judgment arising from a construction defect or other transaction between the person and a homeowner; (9) failure to register a home as required by Section 426.003; (10) failure to remit the fee for registration of a home under Section 426.003; or (11) failure to reimburse a homeowner the amount ordered by the Commission as provided in Section 428.004(d).

The Commission may revoke or suspend a registration, probate the suspension or formally or informally reprimand a registered person. A person is entitled to a hearing before the Commission. Any decision of the Commission may be appealed to a district court. In a contested case, the Commission may also impose a monetary penalty. In determining the amount of the penalty the following shall be considered (1) the seriousness of the violation, including the nature, circumstances, extent, and gravity of the prohibited acts; (2) the history of previous violations; (3) the amount necessary to deter a future violation; (4) efforts to correct the violation; and (5) any other matter justice may require.

D. Chapter 427: Third Party Independent Inspectors

The Act refers to inspectors in two different capacities. The third-party inspectors are those who conduct the field inspections in response to a Request for the State-Sponsored Inspection And Dispute Resolution Process ("SIRP"). The panel of inspectors will be employees of the Commission who will be the administrators of the SIRP and will serve on the panel of inspectors in the event of an appeal of the recommendation of the third-party inspectors.

A third-party inspector must be approved by the Commission on an annual basis by submitting an application and a fee in the amount of $50.00. A third-party inspector for workmanship and materials only (no structural inspections) must have a minimum of five (5) years experience in the residential construction industry and be certified as a residential construction industry and be certified as a residential combination inspector by the International Code Council. A third-party inspector for structural matters must have a minimum of ten (10) years experience in residential construction. Any third-party inspector must receive initial training regarding the SIRP and annual continuing education in the inspector's area of practice. A third-party inspector may not receive more than ten percent (10%) of the inspector's gross income from providing expert witness services. This is determined by self-disclosure on the application.

If a third-party inspector registered by the Commission is subpoenaed by a party to a dispute between a homeowner and builder to provide testimony by deposition, in court or in any alternative form of dispute resolution proceeding, or to provide other witness services, the party who issues the subpoena must pay to the third-party inspector a reasonable fee and related expenses for the services requested. The Commission will establish reasonable fees for witness services performed by a registered third-party inspector as a result of an inspection undertaken pursuant to the SIRP.

E. Chapter 426: State-sponsored Inspection and Dispute Resolution Process

The State-Sponsored Inspection and Dispute Resolution Process ("SIRP") is covered in Chapter 426 and applies to a dispute between a builder and a homeowner if the dispute arises out of an alleged construction defect. The SIRP is designed to cover disputes for all homes that are less than ten (10) years old in which the dispute results from a cause of action that accrued after September 1, 2003. The SIRP does not apply if the dispute arises solely for personal injury, survival or wrongful death or damages to goods. If the claim is a combination of an alleged construction defect and a personal injury or damage to goods, then the alleged construction defect portion must be submitted to the SIRP.

Further, the SIRP does not apply to a dispute arising out of: (1) an alleged violation of Section 27.01, Texas Business & Commerce Code; (2) a builder's wrongful abandonment of an improvement project before completion; or (3) a violation of Chapter 162.

A request for SIRP ("Request") must be submitted on or before the tenth (10th) anniversary of: (a) the

initial transfer of title to the home from the builder; or (b) if no transfer of title occurred, the date on which the contract for construction of the improvement was entered into.

If the affected home is not registered with the Commission at the time the SIRP request is made, the requesting party must simultaneously register the home with the Commission on a Commission-prescribed form, accompanied with a $30 fee.

A homeowner must submit any alleged construction dispute to the Commission prior to initiating an action for damages or other relief. A subrogee of the homeowner does not have to submit an alleged construction dispute to the Commission.

A person who submits a Request for the SIRP must disclose the name of any person who inspected the home prior to submitting the Request. If a person who inspected the home prior to submitted the Request is later disclosed, then neither the person nor the materials prepared by that person may be used in the SIRP or any subsequent action.

The Commission's proposed rule requires a builder to provide to the third party inspector any documentation or tangible things generated as a result of having received a notice of alleged defects.

The recommendation of the third party inspector or the panel of state inspectors constitutes a rebuttable presumption of the existence or non existence or a construction defect or the reasonable manner of repair of the construction defect. That presumption only applies in an action between the homeowner and the builder.

F. Sections 430.003, 430.004, and 436.004: Task Forces

Pursuant to Sections 430.003, 430.004, and 436.004, the Act creates three task forces to work under the auspices and direction of the Commission. One task force is for mold reduction and remediation, one is for rain harvesting and water recycling, and the other is to study residential arbitrators and arbitration.

The Mold Reduction and Remediation Task Force is designed to advise the Commission on the adoption of standards. The members of the task force must include representatives of public health officers of this state, health and medical experts, mold abatement experts, and representatives of affected consumers and industries. The Commission and the task force shall consider the feasibility of adopting permissible limits for exposure to mold in indoor environments.

The Rain Harvesting and Water Recycling is appointed by the Commission to develop guidelines for residential construction. There is no further direction for this task force.

The Residential Arbitration Task Force will advise the Commission with respect to residential arbitrators and arbitration. The task force must report to the 79th and 80th legislatures on its recommendations and the effect of the implementation of those recommendations. This task force will expire on September 1, 2007.

G. Chapter 417, 436, 437 and 438: Residential Construction Arbitration

Pursuant to Chapter 417 of the Act, there is a voluntary certification of arbitrators. A person may be certified by the Commission if a person has at least five (5) years experience in conducting arbitrations between homeowners and builders and is familiar with the statutory warranties and building and performance standards and the provisions of the Residential Construction Liability Act and meets continuing education requirements set by the Commission. As part of the certification process, there will be a publication of the original application in the Texas Register. Finally, the Commission must find the certification of a person to be in the public interest. The Commission is required to publish a list of the certified arbitrators. This is purely voluntary. A certified arbitrator is not required to conduct residential construction arbitration.

Chapter 437 of the Act concerns the filing of arbitration awards resulting from a dispute between a homeowner and a builder that involves an alleged construction defect. If an arbitration award is filed in a court of competent jurisdiction, then the filer must, not later than thirty (30) days after the date an award is made, file with the Commission a summary of the award. The summary must include the following: (1) the names of the parties to the dispute; (2) the name of each party's attorney, if any; (3) the name of the arbitrator who conducted the arbitration; (4) the name of the arbitration services provider who administered each issue in dispute; (7) the arbitrator's determination, including the party that prevailed on each issue in dispute and the amount of any monetary award; and (8) the date of the arbitrator's award.

In addition, any interested party may file a summary of an award.

Chapter 438 of the Act provides that a court shall vacate an award in a residential construction arbitration upon a showing of manifest disregard for Texas law. This is in addition to grounds for vacating an arbitration award under Section 177.088, Civil Practice and Remedies Code.

H. Section 430.001: Limited Statutory Warranties and Building and Performance Standards

Pursuant to Section 430.001 of the Act, the Commission will be adopting by rule limited statutory warranties and building and performance standards for

residential construction that will provide the following warranty periods:

a. one year for workmanship and materials;
b. two years for plumbing, electrical, heating and air conditioning and delivery systems; and
c. ten years for major structural components of the home.

A working draft of the Limited Statutory Warranty And Building And Performance Standards (the "Warranty Standards") was posted on the Commission's website on June 7, 2004. A second draft, entitled Strawman 2, will be published at the end of July. The Commission will then hold Townhall meetings throughout the state for the purpose of obtaining additional input and then drafting a final set of the Warranty Standards. Currently, the working draft of the Warranty Standards exceeds 100 pages. Like many of the 1-10 warranties currently used by volume builders, the standards describe warranty conditions, performance guidelines, builder responsibility, homeowner responsibility and exclusions. Until the standards are finalized, current warranties under the Act consist of the express warranties given by the Builder and, in the absence of any express warranty, the Builder is required to satisfy good building practices.

The Warranty Standards, at a minimum, must require substantial compliance with the non-electrical standards contained in the applicable version of the International Residential Code for One - and Two-Family Dwellings published by the International Code Council that is applicable under Subsection (d) and the electrical standards contained in the version of the National Electrical Code that is applicable under Subsection (e), as well as contain standards for mold reduction and remediation, establish standards for performance for interior and exterior components of the home and contain standards that satisfy the requirements of HUD for certain FHA programs.

I. Section 430.001(f): Commencement of Warranties

Under Section 430.001 (f) of the Act, it is important to note the following:

1. Except as provided by written agreement between the builder and the initial homeowner, a warranty period adopted under this section for a new home begins on the earlier of the date of:
   (i) occupancy; or
   (ii) transfer of title from a builder to the initial homeowner.

Under Section 430.001(g) of the Act, the warranty period for an improvement other than a new home begins on the date the improvement is substantially completed.

J. Section 430.002: Warranty of Habitability

The construction of each new home or home improvement shall include the warranty of habitability. The statute requires for a construction defect to be actionable as a breach of the warranty of habitability under the statute, the defect must have a direct adverse effect on the habitable areas of the home and must not have been discoverable by reasonable prudent inspection or examination of the home or home improvement within the applicable warranty periods adopted by the Commission.

While it is important to establish a warranty of habitability, it is not likely to effect that many situations involving new construction. It could apply more to situations involving remodeling that are subject to the Act.

K. Section 430.006: Implied Warranties

Pursuant to Section 430.006 of the Act, the warranties established supercede all implied warranties. The only warranties that exist for residential construction or residential improvements are warranties created by the Act or by other statutes expressly referring to residential construction or residential improvements, **or any express, written warranty acknowledged by the Owner and the Builder.**

L. Section 430.007: Waiver by Contract Prohibited

A contract between a Builder and homeowner may not waive the limited statutory warranties and building and performance standards adopted under the Act or the warranty of habitability. However, a Builder and a homeowner may contract for more stringent warranties and building standards than are provided under the Act.

M Sections 430.008 and 430.009: Third-Party Warranty Companies

Pursuant to Section 430.008, the Commission may approve a third-party warranty company for purposes of Section 430.009, if the company has at least five years experience and whose performance is insured by an insurance company authorized to engage in the business of insurance in this State or an insurance

company that insures the warranty obligations of the Builder under the statutory warranty and building and performance standards. All third-party warranty companies must submit annual applications and be approved by the Commission as a third-party warranty company for purposes of the Act.

If a Builder elects to provide a warranty through an approved third-party warranty company, the Builder may transfer warranty liability to the company providing the warranty as long as (i) the third-party warranty company agrees to perform the Builder's obligations and (ii) pays for or corrects any construction defect covered by the warranty provided through such third-party warranty company. In such event, the third party warranty company has all of the obligations and rights of the Builder under the Act regarding performance of repairs to remedy construction defects or payment of money instead of repairs; provided, however, that the third-party warranty company may not assume liability for personal injuries or damage to personal property. A Builder does not avoid liability for personal injuries or damage to personal property for which the Builder would otherwise be liable under law by providing a written warranty from a third-party warranty company.

Subsection (e) of Section 430.009 provides that a company that administers a warranty for a third-party warranty company does not have liability for damages resulting from a construction defect or from repairs covered under the warranty. Presumably, this refers to a company providing administrative services on behalf of the warranty company that does not control whether the warranty company decides to repair an alleged construction defect. If the warranty company decides that a defect is not covered, but it should be covered by the warranty, the third-party warranty company, not the company administering the warranty, would be liable to the homeowner.

V. PRACTICAL TIPS AND APPLICATION OF THE PROVISIONS

The following is a list of practical tips that you should take into consideration when negotiating and drafting Contracts. The Appendix also contains forms which can help you when dealing with these provisions.

1. Waiver By Contract Prohibited – Builder's contracts or construction contracts may not contain provisions limiting the obligations of the Builder under the Act with respect to Builder's registration, home registration, limited statutory warranty and building and performance standards and the state-sponsored inspection and dispute resolution process.

2. No Implied Warranties - Owners may no longer rely on implied warranties. If a Builder represents or warrants the satisfaction of a specific standard, other than the limited statutory warranties and building performance standards, the Owner must obtain an express, written warranty from the Builder.

3. Maintenance Guide - Builders should deliver a home maintenance guide to the Owner at closing to impose clear and unequivocal maintenance and mitigation responsibilities on the Owner.

4. Builder Registration -- Owners should confirm that the Builder is registered and that the home has been registered; otherwise, the Owner may have to pay the registration fee for the home to invoke the inspection and dispute resolution process.

5. Non-applicability to Contract Disputes -- The Act does not apply to contract disputes, including the right to terminate the Contract. Pursuant to Chapter 313 of the Emergency Rules adopted to implement the SIRP, upon receipt of a request for inspection, the Commission reviews the request to determine if the dispute arises from a transaction governed by the Act and the request is complete in all respects. (Section 313.09). This Rule clarifies that the following disputes are not subject to the Act: (i) a Builder that wrongfully abandons an improvement project before completion; (ii) a dispute between an Owner and Builder that does not involve a construction defect; (iii) a violation of the Real Estate Fraud Statute (Section 27.01 Tex. Bus. & Com. Code); or (iv) a violation of Chapter 162 of the Tex. Property Code regarding construction payments, loan receipts and misapplication of trust funds. Owners will want to avoid attempts by Builders to subject such disputes to the procedures established by the Act or similar procedures. Owners possibly will want to include separate alternative dispute resolution procedures for non-construction defect disputes, such as the one found in Paragraph 15 of Appendix Item E.

6. SIRP – Include a summary of the SIRP or attach an exhibit outlining the state-sponsored inspection and dispute resolution process for the Owner.

7. Arbitration – Consider whether to require arbitration of any disputes appealed from the state panel of three inspectors. The Owner and Builder may want to include specific arbitration provisions in the Contract, such as the one found in Paragraph 16 of Appendix Item E. Since the amount is relatively small, consider arbitration by a single, neutral arbitrator. You should also consider whether you want the arbitrator to be a certified residential construction arbitrator. The

Commission will maintain a list of residential construction arbitrators certified under the Act. However, you can use an arbitrator who does not hold a certificate to conduct an arbitration involving a residential construction defect.

8. Take Advantage of Settlement Offers –The SIRP process is designed to facilitate communication between the Builder and Owner and hopefully result in a quick settlement. The parties should take advantage of the process of exchanging information to arrive at a quick settlement. However, if the Owner initiates the SIRP, the Builder is given several opportunities to make a settlement offer, before and after decision of the third-party inspector. I strongly encourage my Builder clients to make a reasonable settlement offer, particularly if the third-party inspector rules against them.

9. Agreements Between Builder and Third-Party Warranty Company – If you are representing a Builder, you should attempt to limit the Builder's continuing liability under the agreement with the warranty company since your client is paying for the coverage. I have reviewed a number of extended warranty program contracts which attempt to impose unlimited indemnification liability on the Builder. If the Builder retains any liability, the Builder should have an opportunity to cure the defect, because it may be cheaper for the Builder to take action rather than be responsible for reimbursing the warranty company for costs incurred to a third party.

Part II: Residential Construction Contracts

The primary purpose of Part II is to advise attorneys representing Owners on the most important issues related to negotiating and drafting Contracts in order to prepare and negotiate what I characterize as a "fair Contract" from the Owner's perspective. Part II also provides the Contractor's perspective on the key areas of concern to Owners.

What is a fair Contract? A fair Contract clearly informs each party what it must do and to what it is entitled. It also informs each party of its rights if the other party does not perform as promised. A fair Contract should anticipate likely problems and resolve them clearly and in a way which both parties believe reflects a proper allocation of risks and responsibilities. A fair Contract, of course, includes well-drafted drawings and specifications which inform the Contractor what it must construct to receive payment and provides a method of determining whether that objective has been reached. A fair Contract also reflects the realities of contract administration and does not require procedures which will not likely be followed by the Contractor and Subcontractors. A fair Contract must necessarily recognize what is required of the Owner and Contractor to obtain draws under the Owner's loan documents, if any. A fair Contract provides a set of working rules for the parties and secondarily addresses judges or arbitrators who may be called upon to interpret it.

I. OVERVIEW OF CONTRACT PREPARATION

Preparation of construction contracts for custom homes has and continues to experience its own form of evolution as the complexity of transactions expands and the parties in the process each seek to impose the benefits of their particular experiences on contractual agreements. The result is a continuing change in the preparation of construction contracts (sometimes herein referred to as the "Contract") to meet new challenges and resolve new problems.

The American Institute of Architects ("AIA") has recently promulgated new editions of the Standard Form of Agreement and General Conditions documents between Owner and Contractor, as well as some of the Abbreviated Form of Agreements between Owner and Contractor. Those of you who practice in Houston are probably also aware that the Custom Builders Council of the Greater Houston Builders Association promulgated forms ("GHBA Forms") in October, 1997, covering residential construction, which forms have been revised in November, 2002 and September, 2003. The September, 2003 revisions contain a few technical refinements, but were revised primarily to incorporate the warranty-related and dispute resolution provisions adopted by the Act. These forms include Residential Construction Contracts for stipulated price and cost-plus projects where the Owner owns the lot and also a Residential Sale & Construction Contract where the Contractor owns the lot and is building a custom home for the Owner and a Residential Sale Contract where the Contractor owns the lot and the home is substantially complete when the Contract is signed. Additionally, many builders have their own contract forms based upon either the AIA documents or forms similar to the GHBA forms. Finally, the 1997 Amendments to Chapter 53 of the Texas Property Code imposing disclosure, affidavit and lien release requirements on Contractors provide protection for Owners on residential construction projects.

The following is a list of items that I generally do, when preparing a Construction Contract:

A. Review the Architect's Agreement, if any, to determine the Architect's role in construction administration;

B. Review the Contractor's proposal and/or Bid Documents, including the Plans and Specifications to obtain an understanding of the scope of the Project and whether any legal provisions (Supplementary Conditions) are contained in the Specifications;
C. Review the loan documents, if any, to determine the draw procedure outlined in the Loan Agreement and any other lender requirements with respect to the Construction Contract, including subordination provisions and consent and assignment provisions;
D. Revise the GHBA Form or other form submitted by the Contractor or prepare your own form, generally using the AIA format; and
E. Prepare a letter to the client summarizing the payment procedures, lien release requirements and completion requirements, as well as outlining any potential problem areas.

If your client retains you to negotiate the Architect's Agreement, you should request the Architect to send you a set of the Supplementary Conditions which the Architect intends to use on this Project. You can then modify or supplement the Supplementary Conditions to be included in the Bid Documents. This will make it much easier to negotiate the Contract with the Contractor, because the Contractor already will have agreed to many of the changes which you would propose to the AIA or GHBA documents.

Although the forms which are attached to this article were drafted from the Owner's standpoint, they are final drafts and reflect negotiated positions on a number of issues. If the Contractor resists making a number of reasonable changes, this is often a sign of future problems. In such event, you should advise your client to check or recheck references to make sure of the Contractor's records of cooperation and performance. **A note of caution: Use the forms attached in the Appendix carefully, making sure that each provision applies to your project. I have been successful in using the forms on various projects, but my success was often based upon provisions contained in the Bid Documents and the bargaining power of my Owner clients. In most cases, the Contractors were also reasonable and willing to accept a number of provisions because they fully intended to comply with the requirements of such provisions, even in the absence of a contractual requirement to do so.**

II. TYPES OF CONTRACTS

A. Stipulated Sum Contract

The most common form of Contract is the stipulated sum contract. This form of Contract may be preferred by an Owner because it permits the Owner to budget for a known amount of money to be spent in exchange for a completed project. On the other hand, the "stipulated sum" is often overrun because of construction changes that increase the scope and cost of the Work. It seems almost inevitable that the Owner of a residence will make changes in the Work in one way or another as the job progresses. This often occurs simply because the Owner could not truly visualize the elements of the project from a study of the drawings and specifications. It may also occur because of changing, or unanticipated, requirements of public agencies, or changes may be required because of omissions or inaccuracies in the Contract Documents prepared by the Architect. Construction changes are so frequent, and so necessary, that one of the most important provisions of the Contract is the change order provision. The Owner needs to reserve the right to require the Contractor to change the Work, and when changes are ordered, a means must be provided for equitably adjusting the Contract Sum.

B. Cost Plus Contract

As may be inferred from its name, the general Contractor under a Cost Plus Contract is reimbursed its costs plus an amount of money to compensate for overhead and profit. The drafter of a Cost Plus Contract will need to pay special attention to the definition of the word "cost". The Contractor is reimbursed for costs periodically, usually monthly. Overhead and profit may be computed as a percentage of cost, or as a stipulated fixed fee. A disadvantage to the Owner of selecting cost, plus a percentage of costs for the fee, as a formula for compensation is that this `type of Contract produces an incentive for the Contractor to spend more to increase the amount of the fee. Consideration of this fact may induce the Owner to select cost plus a fixed fee as the appropriate formula. When the Contract Sum is cost plus a fixed fee, however, a method must be provided for increasing the fee when the scope of the Work is increased, and possibly for decreasing the fee when the scope of the Work is materially reduced.

C. Cost Plus Contract With Guaranteed Maximum Price

A form of Contract that combines, from the Owner's point of view, the advantages of the Stipulated Sum Contract with the advantages of the Cost Plus Contract is a Cost Plus Contract with a Guaranteed Maximum Price. Here, the Contractor's compensation is stated as an overall price, including the Contractor's

costs and the fee. However, provision must be made to increase or decrease the Guaranteed Maximum Price when the scope of the Work is changed by additions to or deletions from the Work required by the Contract Documents. If any savings occur, such savings generally will accrue to the Owner, although the amount of savings which accrue to the Owner is sometimes subject to negotiation.

D. Design-Build Contract

In a design-build contract, the Contractor also takes responsibility for designing the project. Under a design-build contract, however, the Owner holds the Contractor responsible for design regardless of whether the Contractor performs design services with its own employees or through contracts with Architects and engineers.

The design-build formula has two great practical advantages: (1) design-build Contractors and their Subcontractors are usually very familiar with the methods that can be employed to enhance efficiency and economy in construction, and (2) when the Contractor is responsible for design, there can be no complaining about, or claims arising out of, contentions that the drawings are inadequate or allegations that the Architect or engineer delayed or disrupted the Contractor's Work. Because of this feature, the design-build system is by far the most effective strategy that an Owner can follow in order to reduce and eliminate construction disputes.

The disadvantage to design-build is that the Owner loses the protection afforded to the Owner by an independent Architect or engineer who designs and inspects the project with the primary mission of protecting the interests of the Owner. An Architect/engineer employed by a Contractor is compensated by, and reports to, the Contractor rather than the Owner. The Contractor may be tempted to cheapen the job to increase the Contractor's profits by taking short cuts that degrade the quality of the project without being discovered by the Owner. In order to avoid the loss of independent Architect review, I strongly recommend that my clients make arrangements for a licensed Architect to review the drawings and specifications and make periodic inspections of the Work that generally correspond with progress payments. Additionally, a structural engineer should review the foundation plans.

III. KEY AREAS OF CONCERN TO OWNER'S AND CONTRACTOR'S RESPONSES

A. Description of the Work

Paragraph 2 of each of the GHBA Forms and Article 2 of the A101 and A111 and Article 1 of the A107 and A117 provide a large blank space to be completed as necessary to describe the Work that the Contractor is obligated to perform. Although this description is obviously the essence of any Contract, it is often given only routine consideration when preparing a Contract. The Owner must not underestimate the difficulty of describing the Work accurately and comprehensively. Any failure to ensure that the description of the Work is broad enough can frustrate an Owner's reasonable expectations at a later date. Otherwise, if the Owner desires the Contractor to perform certain activities which fall outside the scope of the Work, an adjustment in both cost and time will most likely be required.

If the Contractor will be performing site work in addition to constructing the improvements, the site work should be included in the description of the Work. Since the Work generally will be described by incorporating the Drawings and Specifications by reference, it is important for the Owner's Architect, or a third party Architect or Engineer retained by the Owner if the project is a design build project, to review the sufficiency of the Drawings and Specifications from the standpoint of producing the intended result in compliance with all applicable codes, laws and regulations. The money spent by your client in obtaining a second opinion is generally money well spent.

It is also important to include a provision in the Contract requiring the Contractor to execute the Work described in the Contract Documents "and reasonably inferable by the Contractor as necessary to produce the results intended by the Contract Documents", as well as to provide a hierarchy of the Contract Documents for purposes of resolving conflicts or ambiguities within the Contract Documents.

Since many custom builders have standard features lists or show your client other projects as part of their sales pitch, it is often necessary to include the standard features list as an exhibit to the Contract, as well as to describe the quality and scope of work to be performed under the Contract by reference to work performed by the Contractor at another location.

Finally, if the specifications do not contain provisions resolving discrepancies between drawings and specifications or dimensions, you should refer to such provisions in Appendix Item A. Since the GHBA Forms resolve discrepancies in the drawings and specifications providing that the specifications will control, you need to make sure that the specifications should, in fact, control any discrepancy. At times, the specifications are more general in nature and the drawings are more specific. Additionally, the drawings for many custom homes contain specifications on the drawing sheets, in addition to general specifications.

While the Contractor will argue that the Contractor's qualifications or clarifications should have the highest degree of priority, in many cases the

Construction Contract will amend items in the qualifications and clarifications and, at least as to such items, the A101, A107, A111 and A117 and the Addendum to the GHBA Forms should have the highest degree of priority. Particularly with respect to fast track projects, while the Contractor's qualifications, clarifications and assumptions might appropriately govern the preliminary documents upon which the Contractor has estimated an initial guaranteed maximum contract price and time, the final drawings and specifications, as well as any other final contract documents, deserve priority over planning criteria and assumptions made by the Contractor.

CONTRACTOR'S PERSPECTIVE: It is also important to the Contractor to provide a comprehensive description of the Work to be performed by the Contractor under the Contract Documents by reference to and incorporation of the Drawings and Specifications, as well as by referring to the Contractor's qualifications or clarifications (which exhibit, from the Contractor's perspective, should have the highest degree of priority). Additionally, references to "good and workmanlike" construction or a requirement that the Contractor construct the improvements as reasonably inferred or intended by the parties should be avoided. Instead, the Contractor's obligation should be limited to producing the results "indicated" by the Contract Documents. With respect to subparagraph 1.2.1 of the A201, Contractor should attempt to delete the language that "the intent of the Contract Documents is to include all items necessary for the proper execution and completion of the Work by the Contractor" and the Contract Documents are complimentary in what is required and shall be as binding if required by all; the Contractor's performance should be required only to the extent consistent with the Contract Documents and reasonably inferable from them as being necessary to produce the indicated results, not intended results.

The Contractor also should seek to incorporate a standard of substantial compliance with the Drawings and Specifications, instead of strict compliance, particularly because the usefulness of the building is generally not compromised by minor deviations from the Drawings and Specifications.

If the Project is clearly a fast track job or if the Contractor believes that the drawings and specifications are not sufficiently complete to determine the scope of the Work, a provision indicating that the Stipulated Sum has been arrived at on the basis of incomplete drawings and specifications acknowledging that if the Architect's refinements leading to final drawings and specifications will require additional time and expense to do the Work, Contractor will have the right to submit a Change Order request.

B. Contractor's Cost of the Work; Fee

OWNER'S AND CONTRACTOR'S PERSPECTIVE: In Paragraph 3 of the GHBA Cost Plus Form and in Article 7 of the A111 and Article 5 of the A117, various categories of costs and expenses are listed for which the Contractor is entitled to be reimbursed in the performance of the Work. Collectively, these items are referred to as the "Cost of the Work". This provision is often the focus of intense negotiation between the Owner and the Contractor. The Owner desires to limit the items for which the Contractor can receive reimbursement, and the Contractor typically attempts to expand the definition of Cost of the Work to include a litany of items that can be included in each Application for Payment. The list of costs and excluded costs outlined in Item B of the Appendix is intended to provide a reasonable compromise from the Owner's perspective and avoid the duplication of costs.

The Contractor's fee is usually tied to the amount of reimbursable costs that are incurred. An Owner might wish to limit the extent to which the fee applies to certain costs, such as so called general conditions costs. Although there is no universally accepted definition of general conditions costs, such items are associated typically with the Contractor's field and general office expenses. For large projects, an Owner should identify the categories of reimbursable costs that are part of general conditions costs and segregate them from other portions of the Cost of the Work. The general conditions costs can then be invoiced as incurred in accordance with a negotiated rate schedule, perhaps subject to a cap, or on the basis of a prorata share of a lump sum amount. The fee associated with such general conditions costs, if any, can be negotiated. An alternate approach is to remove general conditions costs from the definition of costs entirely and compensate the Contractor for such costs and expenses as part of the Contractor's fee.

The Owner must also decide whether a contingency will be included in the Guaranteed Maximum Price and, if so, how the Contractor is permitted to access that contingency. Generally, the Guaranteed Maximum Price is not subject to line item guarantees. The Contractor is free to offset cost overruns experienced on one item against savings on another. A significant conflict occurs, however, when the Contractor requests payment in excess of a line item for unforeseen costs that are, in the Owner's opinion, the fault of the Contractor. For example, the Owner and Contractor may disagree as to whether the cost of corrective Work should be reimbursable up to the Guaranteed Maximum Price. Owners find it

fundamentally objectionable to pay a Contractor for errors. Contractors argue that occasional mistakes are unavoidable and acknowledge that a Stipulated Sum Contract always contains a cushion to compensate the Contractor for unanticipated expenses. Contractors also claim that access to savings is earned because the availability of such funds is due to the Contractor's skill and efficiency. The frequency of such disputes can be reduced by use of an agreed contingency. Access to the contingency should have some reasonable controls, however, in order to ensure that the Owner does not end up compensating the Contractor for significant errors and that incentives remain to encourage the Contractor to perform Work carefully.

Some Cost Plus Guaranteed Maximum Price Contracts provide for the savings to be split between the Owner and Contractor. The Contractor may be awarded up to 50% of the savings depending upon the Owner's views as to the effectiveness of this incentive. Any savings payable to the Contractor should not be paid until the Contractor delivers a final accounting of costs and the Owner has performed an audit if desired by the Owner. If there are savings, should the Contractor be entitled to use the savings to perform warranty work? If so, the Owner should require the Contractor to use its share of the savings prior to using any portion of the Owner's savings.

Further, from the Contractor's perspective, the costs to be reimbursed and the costs not to be reimbursed to Contractor should refer to costs to be paid or to costs paid, since the definition of costs refers to incurred costs and not necessarily costs paid by the Contractor. Additionally Contractor may need to make modifications to the description of wages, salaries and other supervisory costs based on the specifics of the transaction and, if the Contractor is self insuring any risks associated with the work, Contractor's cost of insurance should be based upon the lowest guaranteed cost then available to the Contractor under a fully insured program. Since some states impose a gross receipts tax on monies the Contractor receives from the Owner, rather than a sales tax, the definition of reimbursable taxes should include gross receipt taxes.

A final point of negotiation between the Owner and Contractor involves the costs which are subject to the Contractor's fee. Should the Contractor be entitled to receive the fee on overhead or the Contractor's supervisory costs, or should it be limited to the cost of the work?

C. Payment Applications

The Owner should identify in the Contract any supporting documentation which it will require as part of an Application for Payment. Such items generally include lien waivers, sworn statements and affidavits, as well as other draw requirements from the Owner's construction loan documents. For the Contractor to submit current waivers from Subcontractors with an Application for Payment, the Contractor must either pay the Subcontractors out of the Contractor's own funds and finance the Work, or provide a conditional lien waiver which is conditioned on payment. One solution to this predicament is for Subcontractor lien waivers to be submitted one pay period in arrears. The Owner must evaluate this procedure in light of applicable lien law. Title insurers will often issue insurance over the pay period gap if the Contractor is financially strong and will indemnify the title insurer for lien claim losses. A typical supporting documentation provision reads as follows:

In addition to other required items, each Application for Payment shall be accompanied by the following, all in form and substance satisfactory to the Owner and in compliance with applicable state statutes: (1) A current sworn statement from the Contractor setting forth all Subcontractors and suppliers with whom the Contractor has Subcontracted, the amount of such Subcontract, the amount requested for any Subcontractor or suppliers in the application for payment and the amount to be paid to the Contractor from such progress payment, together with a current, duly executed waiver of mechanic's and suppliers' liens from the Contractor establishing receipt of payment or satisfaction of the payment requested by the Contractor in the current application for payment; (2) Commencing with the second application for payment submitted by the Contractor, duly executed so called "after the fact" waivers of mechanic's and suppliers' liens from all Subcontractors, suppliers and, when appropriate, from lower tier Subcontractors, establishing receipt of payment or satisfaction of payment of all amounts requested on behalf of such entities and disbursed prior to submittal by the Contractor of the current application for payment, plus sworn statements from all Subcontractors, suppliers and, where appropriate, from lower tier Subcontractors, covering all amounts described in this subparagraph (2); and (3) Such other information, documentation and materials as the Owner, the Architect, lender or title insurer may reasonably require.

CONTRACTOR'S PERSPECTIVE: The GHBA Forms require no back-up support for progress payments or lien waivers as a condition to payment. A number of changes should be made to the A201 regarding payment to reflect the Contractor's typical procedures, including storage of materials on site and off site. Approval or disapproval of off-site stored materials should be established in the Contract, for example, the A101, A111, A107 or A117. Therefore, "if approved in advance by the Owner" from the

second sentence of subparagraph 9.3.2 and the words "applicable insurance" from the last sentence of such subparagraph should be deleted. The Contractor's insurance required pursuant to subparagraph 11.4.1.4 covers off-site stored materials if the Contractor has complied with his insurance obligations. The Contractor can reassure the Owner and Lender that the off-site stored materials are properly identified and dedicated to that particular project by providing an affidavit from the subcontractor or supplier or its supplier to that effect and a bill of sale from those parties. With respect to paragraph 9.5 of the A201, the Contractor's applications for payment are subject to this approval or partial reduction due to certain enumerated items. With respect to such enumerated items, it should be limited to defective work, third party claims filed (and not covered by a bond) and damage to the Owner or other contractors. Additionally, the Contractor should agree to no changes in subparagraph 9.6.1, because this provision clearly and unambiguously rescinds the Owner's option to withhold payments unilaterally. This paragraph establishes that the Owner shall make payment upon the issuance of certificate of payment by the Architect. Finally, subparagraph 9.6.3 should be deleted because it benefits the Architect and subcontractors, not the Owner or Contractor. It opens grounds for a subcontractor's third party beneficiary claim if the Owner has wrongfully breached a contractual obligation designed for the benefit of the subcontractor and thereby has injured the subcontractor. Subparagraph 9.6.5 should be deleted for the same reason as the deletion of subparagraph 9.6.3. This problem does not exist with respect to the GHBA Forms because the payment procedures are so tilted in favor of the Contractor, including Draw Requests being required to be paid within three (3) business days as submission. Moreover, if the Owner requests the Contractor to provide backup information, the Contractor will have a reasonable time to provide the backup information, but payment of a pending Draw Request is not contingent upon Owner's receipt of such items.

Many Contractors will ask to be released from the obligation to supply partial lien releases for their minor Subcontractors, suppliers and trade vendors. Depending upon the lender's requirements, the Construction Contract might provide that partial lien releases are required to be furnished by all Subcontractors and suppliers furnishing labor and/or materials in excess of more than Five Thousand Dollars ($5,000), in the aggregate, to the project. Final lien releases and waivers should be obtained for all Subcontractors, suppliers and, if possible, trade vendors. If a Contractor's Application for Payment is not approved in whole or part, the Owner or Architect should be obligated to provide the Contractor with notice itemized in reasonable detail of what is required to receive the balance of the payment.

D. Retainage

OWNER'S PERSPECTIVE: The Owner should retain funds from each progress payment to build a reserve from which Subcontractor lien claims may be satisfied and to create an incentive for the Contractor to complete the work. Although the Texas Property Code requires retainage of ten percent (10%) of the contract price of the work to the Owner or ten percent (10%) of the value of the work, measured by the proportion that the work done bears to the work to be done, during the term of the Contract and for thirty (30) days after the Work is completed, plus any amounts required to be retained pursuant to Subchapters C and D of Chapter 53 of the Texas Property Code, in order for Owner to obtain the maximum protection under the mechanic's and materialmen's lien statutes, the amount of retainage is often a function of local custom and negotiation. About half of the contractors I work with on residential projects will agree to the required 10% statutory retainage. Since very few residential projects are bonded today, and most of the residential projects are completed within a 12 month period, Subcontractors generally understand the need for ten percent (10%) retainage and are willing to accept such retainage.

With respect to more expensive custom homes requiring substantially longer than 12 months to complete, the lender and Owner are often willing to permit the release of all or a portion of the retainage for early completing Subcontractors as long as such Subcontractors execute and deliver full lien releases. Otherwise, early completing Subcontractors would be unduly penalized if all retainage is held until the project is complete. Many devices can be used to avoid such harsh results. One common procedure is to withhold no additional retainage once the project is one-half complete. Another alternative is to refund one-half of retainage held at the halfway point of a project and, in connection with subsequent payments, hold retainage at a rate of one-half of the original rate. If the Owner is reluctant to forfeit leverage gained by holding a certain level of retainage, however, it is possible to preserve the right to restore retainage to a specified amount or percentage of the Contract Sum if necessary to protect against claims or if performance of the Work becomes unsatisfactory. The following provision permits the Owner to reduce retainage but not waive any rights in the event of a reduction of retainage:

> Except as hereinafter provided, Owner shall have the option, but not the obligation, to

> reduce the retainage requirements of this agreement or release any portion of retainage prior to the date specified in the Contract Documents. Any reduction or release of retainage, or portion thereof, however, shall not be a waiver of (1) any of the Owner's rights to retainage in connection with other payments to Contractor or (2) any other right or remedy that Owner has under the Contract Documents, at law or in equity.

For the most part, retainage is simply a monetary issue to the Contractor, given the length of time needed to construct the building and the time value of the money being held under a typical retainage arrangement. If materials must be paid for when ordered or when picked up, as opposed to when they are installed, retainage can cause additional cash flow problems for Contractors. As long as the Contract permits the Owner to withhold funding equal to the amount of any threatened or filed liens, and take action to bond around a lien if the Contractor fails to do so within the time frame required by the Contract, the Owner can obtain adequate protection without the necessity of holding 10% retainage from the inception of the project. Additionally, the Lender has a deed of trust lien, which has priority over any construction liens and is not jeopardized by the lien claim of a subcontractor or supplier.

The AIA documents provide for final release of retainage at final payment. Unfortunately, final payment is too often delayed far beyond Substantial Completion due to punch list work generated by the Architect or the Owner. Retainage is meant to provide the Owner security that the Contractor will finish the Work. It is, therefore, reasonable to value the remaining Work reflected in the punch-list and use that as the security for the Owner rather than an arbitrary percentage of the Contract Price. The provision set forth below allows the Owner to withhold 125% of the value attributable to the punch list items:

Upon Substantial Completion of the Work, Contractor will be paid all retainage, less a reasonable estimate of the Work to be completed which shall be 125% of the value attributable to "punch list" Work. As items on the punch list are completed, Contractor will be paid 125% of their value at the next progress payment.

CONTRACTOR'S PERSPECTIVE: The intention and practices of high-end residential work have changed through the years to the point that it is unusual to hold 10% retainage for the life of the project and release such retainage only at the time of final payment. Many of the alternatives suggested above are the routine. Particularly, as the project progresses, the Owner should be sufficiently persuaded that the Contractor is making satisfactory progress. And, if payment bonds are provided, there is even less reason for retainage to be generally withheld from each payment.

E. Conditions to Final Payment

OWNER'S PERSPECTIVE: If not described in the close out section of the Specifications, the Owner should add a list of items to be delivered by the Contractor before making final payment, including, but not limited to, final lien releases; all maintenance and operating manuals; marked sets of field record drawings and specifications reflecting as built conditions; reproducible Mylar drawings reflecting the location of any concealed utilities, mechanical or electrical systems and components; any special guaranties or warranties required by the Contract Documents; assignments of all guaranties and warranties from Subcontractors, vendors, suppliers or manufacturers; and a list of the names, addresses and telephone numbers of all Subcontractors and any other persons providing guarantees or warranties. The final payment provision should also be coordinated with the lender's requirements for the final draw under the Loan. The AIA Forms have blanks for listing the conditions to final payment. Revisions to the payment procedure provisions and final completion provisions of the GHBA Forms that provide the final payment is due upon substantial completion of the Work are required. Final payment also should be conditioned upon receipt of all governmental approvals permitting Owner’s occupancy, Contractor’s delivery of a final lien release (conditioned upon final payment), and final lien releases from Subcontractors and suppliers. Additional consideration should be given for the delivery of as built drawings and an as-built survey among the other items mentioned above.

CONTRACTOR'S PERSPECTIVE: It is important from the Contractor's perspective that all conditions to final payment reflect objective standards to the extent possible, subject to the Architect's approval of final completion. Warranty claims should not hold up final payment, nor should disputes between the Contractor and Subcontractors. The Contractor can protect the Owner against such disputes by recording a Bond To Indemnify Against a Lien that satisfies the requirements of The Texas Property Code or obtaining the surety's consent to final payment if a payment bond has been provided. If, however, the Owner refuses to make final payment due to some failure on the part of the Contractor relating to the Work, the Owner should be obligated to provide the Contractor with notice, itemized in reasonable detail, of what is required to receive final payment.

F. Separate Contractors

OWNER'S PERSPECTIVE: The provisions of Article 12 of the A107, Article 17 of the A117 and Article 6 of the A201 dealing with Work performed by the Owner's own forces or by separate contractors require particular scrutiny when a portion of the Work will be performed by the Owner's separate contractors. Paragraph 9 of the GHBA Cost Plus Contract and Paragraph 10 of the GHBA Fixed Price Contract could be interpreted as precluding Owner's use of separate contractors until the work is complete. When separate contractors are involved in any single project, a significant coordination problem can result. Depending upon the extent to which a construction project involves separate contractors, the AIA documents may not adequately handle all of the Owner's or Contractor's needs and the GHBA Forms require major revisions with respect to separate contractors. The Owner requires the Contractor to accommodate the work of the Owner's separate contractors, and the coordination, cooperation and scheduling provisions of each general contract should be consistent. Each of the general contracts also should provide a workable procedure for adjudicating disputes between separate contractors. Other issues requiring consideration are indemnity claims, property damage, insurance coverage, economic harm and personal injury claims, and specific clean up obligations.

CONTRACTOR'S PERSPECTIVE: If there are separate contractors of the Owner on a project, the work of the separate contractors can substantially impact the work of the Contractor. The rights of the separate contractors with respect to the project should be based on contractual provisions identical or substantially similar to the provisions of the Contract. If the Contractor changes its schedule to accommodate the Owner's separate contractors, any changes in the Contractor's construction schedule should not result in additional costs to the Contractor without compensation from the Owner. The Contractor is generally in a better position to schedule access and prioritize work by having the Owner and Owner's separate contractors rely on the Contractor's schedule. From the Contractor's standpoint, the Contractor should coordinate the Work of all of the separate contractors and the general Contractor which causes delay, damage or other problems should bear the responsibility of such additional costs.

G. Owner-Furnished Items

OWNER'S PERSPECTIVE: In many residential projects, the Owner will furnish certain materials, equipment or systems which are incorporated into the Work. Sometimes, the Owner takes advantage of an opportunity to purchase equipment or fixtures at a discount in advance of the actual need for such items. In such event, the Owner expects the Contractor to install such items. The GHBA Forms provide for Owner's installation of any owner-furnished items. The following provision outlines the Owner's expectations from the Contractor with respect to Owner furnished items in a manner acceptable to most Contractors:

> Contractor shall purchase all materials, equipment and services required for the Work, except for the items described in Exhibit "E" attached hereto ("Owner Items") which will be furnished by Owner from separate Subcontractors and suppliers. All of the items listed in Exhibit "E" shall be installed by the Contractor, except as otherwise provided in the Contract Documents. Contractor agrees to fully cooperate with Owner in order to efficiently incorporate the Owner Items into the Work. Owner shall require its separate contractors to cooperate and coordinate with Contractor. With respect to the Owner Items to be installed by Contractor, Contractor shall remain fully responsible for furnishing the necessary services and other items necessary to install and incorporate such Owner Items into the Work, and the Contractor's installation of such Owner Items shall be covered by the Contractor's warranties contained herein, except as otherwise provided in the Contract Documents. Contractor shall not be obligated to install any Owner Items unless installation instructions are delivered to Contractor with respect to such Owner Items. Provided that Contractor installs such Owner Items in accordance with the instructions furnished by Owner with respect thereto, Contractor shall have no warranty liability with respect to such Owner Items.
>
> Contractor shall be responsible for inspecting any Owner Items to be installed by the Contractor as a part of the Work before incorporating such Owner Items into the Work and shall promptly inform Architect and Owner in writing of any deficiencies observed by Contractor in such Owner Items or any other objections that he has to using such Owner Items in connection with the Work. Notwithstanding the provisions of the preceding grammatical paragraph, the

Contractor's failure to inform the Architect and Owner in writing of any such observed deficiencies or objections shall be deemed to be a waiver by Contractor of any claims or damages based on Owner having furnished the Owner Items instead of Contractor.

CONTRACTOR'S PERSPECTIVE: In many instances, the Contractor should attempt to accept no responsibility for Owner Items and require the Owner to contract directly with separate contractors to install Owner Items. If, however, the Contractor agrees to install Owner Items, limited liability, if any, should apply to the Contractor for failing to reject non-conforming or defective Owner Items. The Owner should be required to look directly to the supplier for any non-conforming or defective Owner Items, unless the Owner Items are damaged by the Contractor during installation or during the Contractor's performance of the Work or the Contractor had actual knowledge of the defects and nevertheless installed the Owner Items.

H. Insurance

OWNER'S PERSPECTIVE: The AIA insurance requirements are expressed mainly in A201, Article 11; A107, Article 16; A117, Article 22, and Paragraphs 11 and 12, respectively, of the Cost Plus and Fixed Price GHBA Forms. The GHBA Forms merely list types of coverage with no specific requirements other than a mutual waiver of subrogation provision. Individualized items, such as scope of coverage and coverage limits, are often contained in Supplementary Conditions or in the Owner's modifications to the Contract. Since the insurance industry terminology is highly specialized, and generalizations about usual coverage, exclusions or what can be obtained by special endorsement with added expense are extremely perilous even in the best of times, it is essential to obtain the advice of the Owner's risk manager or insurance advisor who knows the insurance market, understands the client's needs and can counsel the client on choices that need to be made when claims arise. Today's chaotic insurance market means fewer standardized policies and terms, with each insurer often going its own way. The Owner and Owner's attorney, however, should not delegate the responsibility for review of Article 11 of the A201 solely to the Owner's insurance advisor. Many provisions of Article 11 present significant legal issues, such as the ability of an Owner to recover damages from a Contractor in the event of failure to comply with any portion of the Contract Documents. Revisions to Article 11 may have implication on the Contract Sum. Owner should furnish a sufficiently detailed insurance specification as part of the Contract if not contained in the Bid Documents. Items to consider in reviewing the insurance provisions of a commercial Construction Contracts are: (1) type of insurance policy occurrence policy-ISO form CGO 01 0196, the newer CGO 0000 1001/2001 form (provided that endorsements CG 22 94 and/or CG 22 95 are not attached to the policy), or equivalent; (2) Contractor's general liability coverage providing primary coverage; (3) duration; (4) completed operations coverage for not less than two years following final payment; (5) proof of coverage - certificates of insurance; (6) no cancellation of policies without prior notice; (7) all risk, builder's risk coverage by Owner or Contractor; (8) insurable interest - being named as an additional insured on the other party's policies - obtain an ISO form 2026 1185 additional insured endorsement; (9) scope of coverage; (10) deductible amount; (11) loss adjustment; (12) off-site storage coverage; (13) partial occupancy-is insurer's consent necessary before partial occupancy is taken? (14) waiver of subrogation; and (15) Best's rating of insurers.

Since it is unlikely that the Owner will obtain a project management protective liability insurance policy, the reference to such policy in paragraph 11.3 of the A201 should be deleted.

The Contractor's aggregate limits and whether such aggregate limits shall, by endorsement, apply to this project separately, or if Contractor notifies Owner of any reduction in the collectable limits by a certain amount, the Contractor should promptly procure, at no expense to the Owner, such additional coverage as necessary to restore the valid collectible limits of such insurance to that required in other contract documents.

In conclusion, most Owners will indicate that the provisions set forth in paragraph 11.1 of the A201 are inadequate and not reflective of the Owner's allocation of risk with the Contractor. The waiver of subrogation should be limited to the actual recovery of any insurance proceeds under the insured's policy or the anticipated insurance proceeds had the insured obtained the policy required by the contract. In Texas, with respect to builder's risk coverage, waiver of subrogation provisions are enforceable and, do not require special endorsements. With respect to commercial general liability policies and worker's compensation policies, waiver of subrogation endorsement in favor of the Owner will require an endorsement. Because of a loss of payment under the insurance is the fault of the Contractor, the Contractor should pay the deductible, regardless of whether the Owner is providing the coverage.

CONTRACTOR'S PERSPECTIVE: The Contractor should review the Contract requirements with its insurance advisor to determine the effect that such requirements might have on the Contractor's overall

insurance program. Additionally, any additional costs incurred as a result of coverage required by the Owner that are not customary should be paid for by the Owner. The Contractor should attempt to limit the duration of the Contractor's coverage to the term of the Contract, although the Contractor's "occurrence" commercial general liability policy should cover claims that accrue during the term of the Contract but are prosecuted following the Contractor's completion of the Work. Contractor should attempt to limit completed operations coverage to one year following final payment, but two years is not uncommon. With respect to the Contractor's CGL policy, if a claim is made against such policy after operations have concluded, coverage will not exist unless the completed operations of that portion of the policy is in effect. The Contractor should require the Owner to maintain commercial general liability insurance to cover the acts or omissions of the Owner and Owner's agents and contractors. Liability insurance and builder's risk insurance should also be provided by the Owner's separate contractors, unless the Owner specifically requests the Contractor to provide builder's risk coverage for Work performed by the Owner's separate contractors, at the Owner's cost and expense.

I. Indemnification

The parties should consider indemnity provisions in at least the following areas: (i) work-related losses, (ii) losses due to hazardous substances, and (iii) losses due to copyright or patent infringement. The AIA A201 addresses those topics in sections 3.18, 10.3.3 and 3.17.1, respectively. The AIA A107 contains similar provisions in sections 8.13, 15.2.2 and 8.11, respectively. In the A201, Section 3.18.1 provides that the Contractor shall indemnify the Owner for work-related losses, but it does not include an obligation to defend. The indemnity also is limited to the extent the loss is "caused by the negligent acts or omissions of the Contractor, a Subcontractor, anyone directly or indirectly employed by them or anyone for whose acts they may be liable …" The GHBA Forms impose a simple indemnification obligation on the Contractor limiting Contractor's indemnification of the Owner to liens arising out of the Contractor's Work and death, bodily injury and property damage arising out of the Contractor's Work. The provision does not provide for a defense obligation.

The Owner should consider expanding the Contractor's obligations under A201 Section 3.18.1 to include an obligation to defend, and an indemnification for losses due to the Contractor's violation of laws or failure to obtain required approvals or permits. The Owner should also consider adding a requirement that the Contractor's indemnity obligation include an indemnity for costs and expenses (including reasonable attorney's fees) incurred by an indemnitee in enforcing the Contractor's defense and indemnity obligations. Keep in mind that the AIA paragraphs do not meet the express negligence disclosure requirements in Texas. *See Ethyl Corp. v. Daniel Construction Co.*, 725 S.W.2d 705 (Tex. 1987).

The Contractor needs to be careful that any indemnification obligations he has under the contract are within the scope of his insurance coverage. The Contractor's agent should review the contract before it is signed. Also, the Contractor should attempt to limit the amount of his indemnity obligation to the amount of the Contractor's liability insurance required under the contract. The Contractor should also resist the Owner's attempt to change the indemnification obligation from comparative negligence to express negligence or to cover breaches of the Contract or violations of law, rules, codes and regulations.

J. Warranties

What happens when the Owner discovers defects after acceptance and final payment? Often, an Owner cannot tell whether a project has been built properly until the Owner has used it for a period of time. Once a defect is discovered, the Owner's main problem becomes the unwillingness of the Contractor to take responsibility to correct the defect and to pay for damages caused by the defect. From the Contractor's perspective, the Contractor may argue that the Contractor should not be obligated to correct Work caused by a defective design the Contractor did not create. The Contractor may also cite lack of control over the project after acceptance, as well as the great expense of correcting Work after the Contractor has left the site, particularly if the correction is done by others. The Contractor may also argue that the Owner did not maintain the improvements properly or that the elements may have caused defects for which the Contractor is not responsible for correcting. The Act will result in changes to most warranty provisions, as evidenced by the warranty provisions contained in the GHBA Forms. Ultimately, with the addition of performance standards, the Owner may be better off since there will be more certainty as to what is a warrantable item and what is not a warrantable item. Moreover, the performance standards are based on national warranty standards contained in the International Residential Code and National Electrical Code. It is simply too early to tell what affect that the Act will have on warranties, other than that warranties shall now be limited to a limited express warranty that tracks the performance standards and remedies provided in the Act.

From the Owner's perspective, the primary purposes of warranty clauses are as follows: (1) to create an express warranty of proper workmanship

when this would not be implied; (2) to shift the burden of proving exculpating causes to the Contractor; (3) to shift the risk of defective design to the Contractor when applicable; (4) to provide a remedy for measuring the Contractor's breach; (5) to give the Contractor the first chance to correct the defect; (6) to provide a specific clause that can be the basis for requiring the Contractor to return and correct the defective Work; (7) to give the Owner the right to a court issued decree of specific performance; and (8) to permit the Owner to obtain another Contractor to perform the warranty work and hold the Contractor responsible for the costs thereof.

The provisions in Article 12 of the A201 Paragraph 17.2 in the A107, and Paragraph 23.1 in the A117 deal with post-completion defect claims. These provisions essentially provide for a one (1) year warranty from the date of Substantial Completion of the Work or a designated portion thereof, or after the date for commencement of warranties established under Paragraph 9.9.1 (in the case of the A201), or by the terms of any applicable special warranty required by the Contract Documents, with the Contractor being required to promptly correct any of the Work that is found to not be in accordance with the requirements of the Contract Documents. The Act provides for three warranty periods, one year for workmanship and material; two years for plumbing, electrical, heating and air-conditioning delivery systems; and 10 years for major structural components of the home. Presumably, the Contractor will purchase one of the national warranty/insurance policy to cover warranty, thereby released from such Contractors' warranty obligations, except to the extent continuing obligations pursuant to the Contractor's Agreement with the warrant company/insurer.

It is critical to the Owner that the Contract clearly outlines the Contractor's responsibility to correct defective Work, or remove it from the site and replace it with non-defective Work. If portions of the Work are used by the Contractor or Subcontractor during construction, it is also important for the Contractor to cause such items to be restored to "like new" condition at no expense to the Owner, since the Owner is entitled to receive the finished product in "like new" condition. Additionally, the Contractor should be required to correct any damage caused by defective Work, not just the isolated item of defective Work. Each portion of the Work should function properly for an entire year to demonstrate compliance with the Contract Documents and as a condition precedent to expiration of the Contractor's obligation to correct Work. Therefore, language should be added to the warranty provision so that each time a repair is made under the requirements of the Contract Documents, the one (1) year correction period is renewed and recommenced in connection with the item requiring correction.

In addition to obtaining a one (1) year warranty from the Contractor, either in the body of the Contract or pursuant to a separate agreement, the Owner should seriously consider obtaining a warranty from one of the companies offering an extended warranty program. Many builders offer one of these national warranties, which warranties can prove to be extremely valuable to Owners for dealing with major defects following the expiration of the 1-year warranty period or the insolvency of the Contractor.

CONTRACTOR'S PERSPECTIVE: The Contractor should consider issuing a one year warranty based upon the warranties issued on residential projects, which contain a substantial number of limitations and exclusions. The warranty language in the Contract should provide that the Contractor makes no other warranty, representation or guaranty, either express or implied, and all other such warranties are expressly disclaimed. The Contractor should also attempt to limit its warranty obligations to the repair of non-conforming Work. Excluded from warranty coverage should be defects inherent in the quality required by the Contract Documents; damages or defects caused by abuse; modifications not executed by the Contractor; improper or insufficient maintenance; improper operation or normal wear and tear under normal usage. Finally the Contractor should require that any warranty claims be asserted within two (2) years following Substantial Completion, regardless of when discovered; otherwise they should be barred.

K. The Residential Construction Liability Act

(1) Description of RCLA: The Residential Construction Liability Act ("RCLA"), Chapter 27 of the Property Code, mandates a sequence establishing time periods within which an inspection of defects, offer of settlement, and then acceptance or rejection of an offer shall occur; limited liability for the Contractor; and waiver of Contractor's limited liability protection where the Contractor fails to comply with procedural requirements. The RCLA, if followed by the Contractor, supercedes the DTPA in most situations including construction defects, the Act supersedes the RCLA in the event of any conflict or inconsistencies between such statutes. However, there do not appear to be that many inconsistencies between the Act and RCLA.

The RCLA applies to (i) any action to recover damages resulting from a "construction defect," except a claim for personal injury, survival, or wrongful death or for damage to goods, and (ii) any subsequent purchaser of a residence who files a claim against a

Contractor. A "construction defect" is defined under the RCLA as a matter concerning the design, construction or repair of a new residence, of an alteration of or repair or addition to an existing residence, or of an appurtenance to a residence, on which a person has a complaint against a Contractor. RCLA, Section 27.001(2).

The Contractor's penalty for failing to make a reasonable settlement offer, or failing to make a reasonable attempt to complete the repairs in an accepted offer, or failing to complete, in a good and workmanlike manner, the repairs specified in an accepted offer, is that the limitations on damages provided under the RCLA will not apply in the suit against the Contractor. RCLA, Section 27.004(g).

(2) Practice Tips Under the RCLA:

a. Representing Contractors

1. Arbitration provision should include specific reference to arbitration of claims under RCLA.
2. Upon receipt of RCLA/DTPA/Act or other claim, Contractor should respond that claim is governed by the RCLA and/or the Act and ask for an inspection in writing.
3. Contractor should make reasonable offer to repair, plus agree to reimburse claimant for reasonable attorneys' fees up to date of offer. Contractor can either offer to repair the defects or obtain an independent Contractor to repair the defects.
4. In lieu of repair offer, Contractor can offer cash settlement. If amount of defects is substantial, Contractor should consider offering purchase price or offer to buy back the house. However, by offering purchase price, the damages cap, Contractor is not entitled to receive the house, because the Owner is entitled to use such money to make the necessary repairs.
5. If Contractor offers to make repairs, then the Contractor should commence repairs as promptly as possible following receipt of acceptance of settlement offer from claimant. If the Contractor knows that it will take more than forty five (45) days to make repairs, Contractor should attempt to obtain claimant's agreement for longer period prior to commencement of repairs.
6. Contractor should refer all claims to its insurance carrier to determine whether insurance company will defend.

b. Representing Claimants

1. Determine whether construction defect claim is governed by RCLA and/or by the Act. Even if governed by RCLA and/or by the Act, claimant should still assert action under DTPA and let Contractor invoke RCLA or Act rights. Offer of settlement, inspection and repair rights/obligations of Contractor are substantially similar under the DTPA and RCLA.
2. Once Contractor invokes RCLA, Owner must comply with provisions regarding statement of claim, allowing Contractor to inspect and to make repairs if claimant accepts Contractor's offer. If claimant does not want Contractor to make repairs, claimant should seek a cash settlement offer.
3. If claimant is uncertain whether the Contractor's offer is reasonable, claimant should reject offer, because claimant may still recover reasonable costs for reasonable repairs and attorneys' fees up to date of Contractor's offer.
4. Review of arbitration provisions in standard TREC contracts, because such provisions often refer to arbitration of claims or disputes under the Contract and do not survive the closing.
5. Obtain third party beneficiary rights with respect to subcontractors/suppliers.

L. Changes

OWNER'S PERSPECTIVE: A change clause is essential in construction work. For a variety of reasons, there is almost always a need to change the Work as the job progresses. The Owner may change the design for reasons such as the design proving to be too costly or unsuitable, or subsurface conditions being discovered that necessitate design changes. Another function of the change clause is as a mechanism that operates as a bookkeeping system. Each party will know at any given point in time what it owes or what it is entitled to receive. Changes also invoke a system of authorization (who can order and how much to be ordered) and a pricing mechanism. The GHBA Forms provide a Change Order provision, but do not require the Contractor to implement requested changes.

The Contract should address the change order process, including treating the Owner's right to add or subtract from the scope of the Work or change the Work; the form of change orders; the Contractor's obligation to respond to a request for a change order; the procedure for adjusting the Contract Sum, including the profit and overhead to which the

Contractor is entitled to as a result of changes; whether deductive changes are netted from additive changes; and the Contractor's obligation to perform the Work described in the change orders before agreement is reached on an adjustment to the Contract Sum. The last issue is critical from the Owner's standpoint because the Owner wants to avoid a work stoppage during the pendency of a dispute with respect to the cost of a change order. As long as the Contract provides an equitable procedure for determining an adjustment to the Contract Sum and the Contractor will be paid its out-of-pocket costs attributable to the change order during the pendency of such dispute, the Contractor should not object to continuing the Work. From the Owner's perspective, as long as the Owner is willing to bear the financial responsibility for changes, the Contractor should be willing to accommodate the Owner.

With respect to change orders, the following provision directly meets the problem of waiver from the Owner's standpoint:

> The requirement of written approval of changes is of the essence of the Contract Documents. Accordingly, no course of conduct or dealings between the parties, nor express or implied acceptance of alterations or additions to the Work, and no claim that Owner has been unjustly enriched by any alteration or addition to the Work, whether or not there is in fact any such unjust enrichment, should be the basis for any claim to an increase in the Contract Sum or change in the Contract Time.

Additionally, from the Owner's perspective, agreement on any Change Orders should constitute a final settlement of all matters relating to the change in the Work that is the subject of the Change Order, including, but not limited to, all direct and indirect costs associated with such change and any and all adjustments to the Contract Sum and the Contract Time.

CONTRACTOR'S PERSPECTIVE: From the Contractor's perspective, the Owner must understand the costs attendant to the change order process, including additional costs resulting from the extension of the project and the interference delays may have upon the Contractor's business. In most circumstances, as long as the Owner is willing to bear all of the consequences resulting from the proposed change, including, without limitation, compensating the Contractor for researching and pricing a possible change, the Contractor should be required to implement the requested change. This assumes, of course, that the Contract provides an equitable procedure for determining an adjustment to the Contract Sum. The Contractor should be paid his out-of-pocket costs attributable to the Change Order during the pendency of any dispute involving the adjustment to the Contract Sum, however, if there is a dispute regarding the cost of the proposed Change Order and such amount exceeds a specified amount, for example, $100,000, Contractor should have the right to postpone including such change in the Work until the dispute is resolved. Additionally, the Change Order procedure should not permit the Owner to reduce the Contractor's fee or profit, even in the event of deductive Change Orders.

M. Subcontractors and Subcontracts

OWNER'S PERSPECTIVE: In the traditional situation in which the Contractor agrees by Contract to construct a project for a fixed cost or guaranteed maximum price and bears the financial risk of such guarantee, the Contractor is often reluctant to reveal all of the terms and conditions of his Contracts with his Subcontractors. The Contractor typically provides for a project budget by category, usually called a "Schedule of Values," but not by Subcontractor or by Subcontract. The Contractor also typically calls for progress payments to be made against the Schedule of Values, without regard to the underlying Subcontracts. Funding of progress payments are made on a percentage of completion basis based on inspection of the Work performed and materials either incorporated into or stored at the project or stored off site with the Owner's and Lender's prior consent.

This basic structure can result in substantial exposure to the Owner if the Contractor gets into financial difficulty. This exposure can occur, for example, when the Contractor qualifies for funding based on certain Work having been performed, but fails to pay the Subcontractor who actually performed the Work. The Owner can also face difficulty when the Contractor's Schedule of Values calls for a certain portion of the Work to be done for a certain price, but after execution of the Contract Documents, the Contractor is unable to negotiate a Subcontract for such Work at or less than the amount provided in the Schedule of Values. In other words, the Contractor has a built-in loss on a part of the Work that he has to subsidize from some other line item or some other source. Although it is not unusual for this situation to occur on a project, if this occurs in too many areas, the Contractor's contingency and margin may be exhausted, and the Contractor's guaranteed price may become meaningless.

In view of these possible circumstances, the Owner is advised to require that (1) the Owner have

the right to disapprove any major subcontractors for reasonable cause; (2) the form of Subcontract to be used by the Contractor be subject to approval by the Owner; (3) the Contractor be required to deliver copies of all Subcontracts within a certain (short) period of time after they are executed; and (4) partial release and lien waivers be furnished by the Subcontractors within ten (10) days after each progress payment is made. Since it is also important for the Contractor's written subcontract to conform in all respects to the Construction Contract, I generally require the Contractor's Standard Form of Subcontract to be attached to the Construction Contract and add by addendum special provisions to conform the Subcontract to the Construction Contract with respect to insurance requirements, warranties requirements, indemnity requirements, etc. With respect to Subcontractors involved in larger projects, the Owner may want to consider requiring performance and payment bonds for such Subcontractors or at least requiring financial references for the major Subcontractors. These requirements and precautions should enable the Owner to not only monitor the Subcontractors, but also monitor the Contractor's relationship with the Subcontractors.

CONTRACTOR'S PERSPECTIVE: From the Contractor's perspective, it is imperative that the Contractor remain the only quarterback on the field calling the plays and signals for the Subcontractors and suppliers. An impossible situation can result if the Owner intervenes to direct Subcontractors and suppliers, whether they have been employed by the Contractor or separately employed by the Owner. The following provision protects the right of the Contractor to control a project:

> The Owner agrees not to instruct, direct or otherwise communicate with the subcontractors retained by the Contractor as to the scheduling of or details about the Work (including additions to or deletions therefrom); nor shall Owner do or cause any Work to be done, or alter or cause the alteration of any portion of the Work, whether complete or incomplete, before Final Completion and Final Payment. Owner shall not independently contract for or sublet any portion of the Work without Contractor's express written consent.
>
> If the Owner insists upon receiving copies of Subcontracts and Purchase Orders, such documents should be delivered by the Contractor within 5 days after the later to occur of the (1) Contractor entering into such Subcontracts and Purchase Orders (with the amount of the Subcontract or Purchase Orders deleted at the Contractor's option) or (2) the execution of the Contract.

N. Liquidated Damages

OWNER'S PERSPECTIVE: If completion of the Work by a certain date is important to the Owner, a liquidated damages provision is often used as an incentive to the Contractor to maintain the progress of the Work and to compensate the Owner for monetary losses that result from delayed completion. Depending on scheduling requirements, liquidated damages can also be tied to milestone dates. The per diem amount must be high enough to compensate the Owner for anticipated damages but not so high as to be deemed unenforceable or simply too large a risk for the Contractor to assume. If the Owner includes a liquidated damages provision, the Owner limits the amount that can be recovered for delays to the liquidated damages. Finally, the Owner who desires the right to recover liquidated damages must be prepared to respond to the likely argument of the Contractor that the agreement should also incorporate a bonus provision for early completion.

Since the 1997 editions of the A201, A101, A107 and A111 (but not the 1987 A117 which is actually no longer available) and the GHBA Forms include mutual waiver of consequential damages provision with an exception for "liquidated direct damages", such provision should be modified to enable the Owner to recover liquidated damages even if considered to be consequential damages.

Liquidated damages provisions can be structured in several ways. The amount of liquidated damages referenced can be based on a fixed per diem amount or on a graduated scale with the per diem amount increased with the time of delay. Another approach is to limit the applicability of liquidated damages to a specified period of time, with regular contract damages picking up after completion of the "liquidated" period.

CONTRACTOR'S PERSPECTIVE: It is generally preferable for Contractors to liquidate the Owner's damages for delay when a Contractor fails to reach Substantial Completion by the extended Completion Date. All liquidated damage provisions should provide Contractor with extensions of the Contract Time for permissible delays under the Contract. Obviously, low liquidated damages are to the advantage of the Contractor. If the Owner is unwilling to accept a liquidated damages provision, the Contractor should consider a limitation of the damages provision that states: "The damages for Contractor delay shall not exceed the sum of _____."

O. Defaults and Remedies

OWNER'S PERSPECTIVE: Another area that attracts significant negotiation is the defaults and remedies provisions of the Contract Documents. This can be separated into two fundamental issues: (1) under what circumstances will the Owner or Contractor be in default under the Contract Documents? and (2) what remedies will be available to the non-defaulting party?

From the Owner's perspective, there are three important principles: (1) the Owner must be able to terminate the Contract and take possession and control of the project without lengthy notice and cure periods being available to the Contractor, (2) in the circumstance of a takeover, the Owner must have the option to require performance by the Subcontractors under their Subcontracts with the Contractor; and (3) it is typically and historically not in the Owner's best interest to agree to binding arbitration; rather, the Owner should attempt to retain all remedies for default by the Contractor that may be available to the Owner at law or in equity.

The Owner has a basket of possible remedies under the AIA Documents, such as rejecting defective Work under certain conditions and ordering its removal, stopping the Contractor from performing further Work, requiring the Contractor to correct defective Work, correcting defective Work at the Contractor's expense if the Contractor does not, taking a price reduction or possible termination. The procedures by which these can be done are sometimes cumbersome, involving default notices, opportunity to cure and the Architect's order to correct Work or approval when the Owner exercises a remedy. In order to avoid the circular approach of the AIA documents with respect to the Owner's right to perform corrective Work and the amount of the back charge, the claim procedure involving the Architect should be bypassed. If the Owner and Contractor cannot agree on the price adjustment to the Contract where applicable, the dispute should go directly to mediation, arbitration and/or litigation, whichever is required under the Contract. The Owner also should attempt to delete the requirement of the Architect's approval of Owner's declaration of a Contractor default.

The Owner's ability to take possession and control without substantial delay and under clearly defined circumstances, without exposing himself to the risk of a claim for damages by the Contractor, is a critical remedy for the Owner. The Owner cannot afford to find himself in a position in which he is unable to take action, and must first proceed with an expensive, complex, time-consuming legal or quasi-legal process. Even if the Owner sustains his position in the process, the damage caused by the delay, the Owner's inability to take control of the project, and/or the expense of the process, may be more than the Owner or the project can endure. Without such a clearly defined right, the damage to the project by the Contractor's default may cause rapid deterioration to the project and substantial exposure to the Owner. In the takeover situation, and because of the disparity that may exist between the Schedule of Values and the existing Subcontracts, the Owner will not want to automatically be bound by the existing Subcontracts. Rather, the Owner will want to have the right to continue or terminate Subcontracts as the Owner determines to be in his best interest. This will enable the Owner to regroup and select the Subcontractors that the Owner (or his replacement general Contractor) deems appropriate. Under these circumstances, the Owner simply has to retain maximum flexibility in order to complete the construction of the improvements as close to the cost and time budgets as possible.

CONTRACTOR'S PERSPECTIVE: The GHBA Forms limit the Owner's remedy to termination following an uncured default and permit the Contractor to stop work or terminate following an uncured default by the Owner. The remedies section of the GHBA Forms is not acceptable to Owners for a number of reasons, the most important of which is that the Contract requires the Owner to pay the Contractor for the portion of the Contract Price attributable to the Work completed in accordance with the Plans and Specifications even though the Contractor has defaulted. No further payment should be made to the Contractor until the Owner has retained another Contractor to finish the Project and can ascertain Owner's damages. Although the limitations on special, indirect or consequential damages may be acceptable to Owner, such limitation should not preclude the Owner from recovering damages caused by the delay in completing the construction as a result of Contractor default, such as additional rent, storage costs, moving costs and interest incurred by the Owner. The form contained in the Appendix is a typical remedies provision for the Owner consistent with the concept of the AIA documents.

Moreover, the reference to the Contractor reasonably believing that future payments by Owner are questionable in paragraph 15(b) of the Stipulated Price Contract and paragraph 14(b) of the Cost Plus Contract should be deleted. Finally, the Owner should be entitled to a thirty (30) day notice and cure period with respect to any default by Owner under the Contract entitling the Contractor to terminate the Contract.

Article 14 of the A201 contains three termination provisions: Paragraph 14.1 provides for termination by the Contractor; Paragraph 14.2 provides for termination for cause by the Owner; and Paragraph

14.4 adds a new termination by the Owner for convenience. There are similar provisions in the A-107 and A117. With respect to the Contractor's right to terminate for the events described in Subparagraph 14.1.1, such termination right should not be subject to the argument that there is a scintilla of evidence that the Contractor or a Subcontractor or an agent of the Contractor or Subcontractor is at fault or involved, particularly due to the nature of the termination events. Additionally, the Owner's right to terminate for the Contractor's failure to pay Subcontractors should have a carve out for good faith disputes between the Contractor and Subcontractor and should not be applicable if the project is bonded or the Contractor provides a bond to indemnify against lien as required by the Texas Property Code.

The Contractor must be able to terminate the Contract if the Owner fails to make required payments within a certain time period, or the work is stopped for an extended period of time, regardless of cause, other than due to the Contractor or one of the Contractor's Subcontractors. Additionally, if the Owner persistently fails to fulfill the Owner's obligations under the Contract Documents, the Contractor should have the right to terminate the Contract. If cause exists for the Contractor to terminate the Contract, which cause is not cured by the Owner within the applicable curative period, the Contractor's right to recover from the Owner payment for work executed and for proven loss, including reasonable overhead, profit and damage, should not be limited, except with respect to the exclusion of consequential damages.

The Owner's right to terminate for cause should be conditioned upon the Contractor's failure to cure the default within the applicable curative period. The Contractor should attempt to require the Owner to obtain certification by the Architect that sufficient cause exists to justify the Owner's termination for the Contractor's default prior to termination by the Owner. This requirement in Subparagraph 14.2.2 should be deleted by the Owner. Even if the Owner is entitled to terminate for cause, there is no reason for the Owner to be entitled to retain the Contractor's trailer, tools, materials or equipment. This clause is included in the AIA documents largely as a method to leverage the Contractor. It can cause a number of difficulties for the Contractor and Subcontractors, particularly if the Contractor believes that the Owner's termination of the Contract was wrongful.

P. Consequential Damages

A201 Section 4.3.10 and Paragraph 9.11 in the A107 provide for the mutual waiver of consequential damages. A mutual waiver of consequential damages is also contained in each of the GHBA Forms This may or may not be a good idea for your Owner client in the residential construction context. If your Owner client is delayed in his ability to occupy his new home due to the fault of the Contractor, he may regret having waived a consequential damage claim that included "damages incurred by the Owner for rental expenses . . ." See Section 4.3.10.1. If, as is often the case, the Owner's primary economic loss is the cost of the rent-house while waiting for the Contractor to correctly finish the job, the Owner may be left with little recourse against the Contractor if he has contractually waived the claim for lost rent. A better solution may be for the parties to carefully discuss the specific kinds of damages that should be allowable and those that should not be, and then modify the consequential damage waiver accordingly.

If an Owner permits Section 4.3.10 to remain in the Contract, but fails to specify liquidated damages, the Owner may have waived remedies for delay caused by the Contractor.

Q. Owner's Right to Terminate Without Cause

OWNER'S PERSPECTIVE: Termination without cause or termination for convenience provisions originated in government contracts. The 1997 revisions to several of the AIA Documents now contain termination for convenience provisions. The GHBA Forms do not include a termination without cause provision for the Owner. I often include termination without cause provisions on residential projects, with the precise terms of such clauses dependent upon the negotiating power of the parties. See Item D in the Appendix. From an Owner's standpoint, a termination without cause provision allows an Owner to change his mind. It also reduces the liability exposure of the Owner who terminates for what the Owner believes to be the Contractor's default but is later faced with a judicial ruling that the Owner did not have good cause. Finally, it allows for the termination of a contractual relationship that has produced poor communication, mistrust and/or apparent irreconcilable conflicts between the Owner and Contractor. The key issues in preparing a termination without cause provision involve: (1) the protection and preservation of the Work; (2) the termination or assignment of Subcontracts and purchase orders; (3) the effective date of termination and what additional work, if any, may (or shall) be performed by the Contractor subsequent to termination; (4) the Contractor's mitigation of damages caused by the termination; and (5) compensation payable to the Contractor as a result of the termination (which compensation may include a fair and reasonable profit on the Work contracted for but not performed or may include only payment for Work performed, including profit and overhead with respect to such Work). Subcontracts and purchase orders

should contain an express termination without cause provision or be bound by the cancellation provision contained in the Prime Contract.

CONTRACTOR'S PERSPECTIVE: From the Contractor's perspective, it is not sufficient to receive payment for work performed to the date of termination. Adequate compensation must include more than a nominal percentage of the unpaid fee or profit which the Contractor expected to receive on the project to adequately compensate the Contractor for lost opportunity costs. The Contractor should demand to be released from any further liability under the Contract Documents, including any warranty liability with respect to the Work performed by the Contractor, particularly since a successor Contractor will be performing work behind the terminated Contractor. The Contractor should also require to be indemnified, defended and held harmless by the Owner from any further liability under any subcontracts or purchase orders, provided that the Contractor has made all payments required to be made by Contractor to subcontractors and suppliers (with the funds provided by the Owner).

R. Mediation/Dispute Resolution

OWNER'S AND CONTRACTOR'S PERSPECTIVE: Most of the AIA Documents which were revised in 1997 include mediation provisions as a condition precedent to invoking arbitration of disputes. The GHBA Forms contain mediation/arbitration provisions which incorporate the Act dispute resolution provisions by reference. As indicated in another section in this outline, the Act has established administrative procedures for resolving disputes between Owner and Contractor The debate continues as to whether mediation/arbitration provisions favor the interests of the Owner or Contractor. Counsel representing Owners typically want to retain broad remedial rights and not be bound to limited alternate methods, while the construction industry has consistently pressed for arbitration as a reasonable and functional alternative to litigation or equitable remedies. In negotiating this issue, counsel for the Owner should be sensitive to the time pressures often imposed by alternate dispute resolution, which may detrimentally affect counsel's ability to develop its case, prove its damages or otherwise protect the Owner's interests.

Arbitration clauses are among the clauses most frequently changed or deleted by those who use AIA Documents. The elimination of the arbitration clause can cause several problems with respect to the interpretation of provisions of the Contract Documents or evaluating performance under the Contract Documents, because the Architect's decision can then become final, unless you provide otherwise.

If mediation/arbitration is desired as a general method to resolve disputes, the AIA mediation/arbitration provision is, on the whole, satisfactory, subject to revisions to cover the following issues: (1) specify the place of mediation/arbitration; (2) limit arbitration to claims that do not exceed a specified dollar amount or percentage of the Contract Price; (3) limit disputes to those that occur while the Work is proceeding with an expedited one person panel; (4) allow consolidation of separate arbitrations and allow joining of other parties to an existing arbitration; (5) provide the right to full or limited discovery; (6) provide for one (1) impartial arbitrator only to arbitrate all disputes; (7) limit the award to: (a) the most fair final proposal; (b) an amount between the two final positions of the parties; or (c) make the award non-binding or binding; (8) grant the prevailing party attorney's fees and costs; (9) provide that certain disputes need not to go to the Architect first; (10) exclude certain types of disputes, such as warranty claims, from the arbitration process; and (11) include a specific provision in the bond binding the surety to the arbitration award and allowing the surety to participate.

If the Act is able to maintain neutrality through the statutory dispute resolution framework, the streamlined dispute resolution procedures will benefit Owners and Contractors.

S. Concealed or Unknown Conditions

OWNER'S AND CONTRACTOR'S PERSPECTIVE: When the Contractor considers a project, he must consider his cost of performance. To do so, he must know what he will be expected to do, the conditions under which he will perform, the likelihood of his planned performance not being disrupted, and his cost of performance. His bid or offer to perform depends upon an appraisal of these factors. Although he may bid lower than he predicts his cost to be, either to penetrate a new market, to keep a work force, or to plan to make it up in claims, if he bids low, he must predict his costs. One of the inherent uncertainties in construction is the nature of what will be encountered below the surface or of any existing structures when subject to major renovation.

Since the Owner is involved earlier than the Contractor and also needs soils and existing physical condition information to plan the design and predict probable costs, the Owner generally obtains and pays for such information. The issue then becomes the terms under which the information will be delivered to the Contractor, with or without a disclaimer for any responsibility for its accuracy. There are two primary systems for dealing with concealed or unknown conditions. The first approach is a disclaimer approach or the "put all the risks on the Contractor" approach. It

is usually accomplished by giving soil information or other existing condition information to the Contractor but telling the Contractor that he cannot rely on it, that he must make his own inspections and tests, and that the bidding information that is furnished to him is not part of the Contract Documents. If the Contractor agrees to assume such risk, the Owner should assume that a contingency amount will be included in the Contract Sum to cover such risks. The other system can be characterized as the equitable adjustment system, in which the Contractor may make a claim for an equitable adjustment if conditions are encountered at the site that are subsurface or otherwise concealed physical conditions, which differ materially from those indicated in the Contract Documents, or are unknown physical conditions of an unusual nature, which differ materially from those ordinarily found to exist and generally recognized as inherent in construction activities of the character provided in Contract Documents. The A201, Paragraph 4.3.6 adopts the equitable adjustment approach. The purpose of the disclaimer approach is to have a fixed price upon which an Owner can rely, while the purpose of the equitable adjustment system is to generate a lower bid.

Whichever system is selected, it should be expressed clearly and consistently in the Contract Documents. The GHBA Forms do not really address concealed conditions in the same manner as the AIA documents, but impose all of the risks on the Owner. If any special construction problems or procedures are described in the soils reports or any other reports of the engineers, such reports should be listed as a contract document or attached as an exhibit to the Contract.

T. Cooperation With Lender

OWNER'S PERSPECTIVE: The Contractor should be obligated to cooperate with the Owner's construction lender and/or permanent lender. It is also customary for the Contractor to execute a Consent and Assignment instrument requiring the Contractor to subordinate its liens to the liens of the lender and requiring the Contractor to complete the Work for the lender in accordance with the Construction Contract, following a default by the Owner.

CONTRACTOR'S PERSPECTIVE: While the Contractor understands the need to cooperate with the lender and sign certain documents required by the lender, it is important for such documents to be reviewed well in advance of the loan closing, if possible. Moreover, any documents required to be executed by permanent lenders require more detailed scrutiny since they usually contain representations and warranties by the Contractor which may go beyond the scope of the Contractor's work or expertise, such as compliance with all environmental laws, rules and regulations, zoning laws and deed restrictions. The Contractor's primary concern is the timeliness of the Lender's decisions and payment for all work performed in accordance with the Contract.

CONCLUSION

Today, Contract Documents themselves are extremely technical and detailed. Knowing the requirements and effects of the Texas Residential Construction Commission Act will help you when negotiating and drafting Contracts. The goal of counsel for Owners should be to reach a point where the Contract Documents reflect the requirements of the Project and the respective abilities of all parties involved, the Owner, Architect, Contractor, Subcontractors, and the lender, to reasonably satisfy those requirements and the expectations of the parties. Contract Documents that do not reasonably satisfy the requirements of the construction project and/or the expectations of the parties ultimately result in problems. If the Contract Documents are understandable, provide for each party to assume risk where such party is capable of assuming such risk and promote cooperation and teamwork between the parties and otherwise strike a balance between the rights, remedies, duties and obligations of the parties, the Owner and Contractor are in the best position to achieve their respective goals and minimize problems.

ITEM A

_____ CORPORATION
_____
_____

AGREEMENT FOR CONSTRUCTION

This Agreement For Construction ("Contract") made as of the _____ day of _____, 200__, by and between:

Owner: _____
(Name and address) _____
_____

and

Contractor: _____
(Name and address) _____
_____

The Project is: Construction of Owner's residence at _____
(Name and location) _____
_____(the "Property")

Architect is: _____
(Name and address) _____
_____

ARTICLE 1
THE WORK OF THIS CONTRACT

1.1. Contractor shall execute the entire Work described in the Contract Documents, except to the extent specifically indicated in the Contract Documents to be the responsibility of others. The Contract represents the entire and integrated agreement between the parties hereto and supersedes prior negotiations, representations or agreements, either written or oral. No modification hereof or subsequent agreement relative to the subject matter hereof shall be binding unless reduced to writing signed by the party to be bound.

ARTICLE 2
DATE OF COMMENCEMENT AND SUBSTANTIAL COMPLETION

2.1. The date of commencement is the date from which the Contract Time of Paragraph 2.2 is measured, and shall be the date of this Contract, as first written above, unless a different date is stated below or provision is made for the date to be fixed in a notice to proceed issued by Owner.

Contractor shall commence construction (sometimes herein referred to as the "Commencement Date") within _____ (__) days after Owner delivers a notice to proceed to Contractor, provided that Contractor has obtained the building permit.

2.2. Contractor shall achieve "Substantial Completion" (defined as all construction work required by the City of _____ for final building inspection having been completed and approved and a Certificate of Occupancy has been issued, if applicable, but minor finishing adjustment or completion items may remain to be done by Contractor) of the entire Work not later than

(Insert the calendar date or number of calendar days after the date of commencement. Also insert any requirements for earlier Substantial Completion of certain portions of the Work, if not stated elsewhere in the Contract Documents.)

_____ months after the Commencement Date, subject to adjustments of the Contract Time as provided in the Contract Documents. "Final Completion" (defined herein as the completion, to the Owner's satisfaction, of all punchlist items following Substantial Completion) shall occur not later than _____ (___) days after Substantial Completion, subject to adjustments of the Contract Time as provided for in the Contract Documents.

Time is of the essence of this Contract.

2.3. If the Contractor is delayed at any time in the progress of the Work by changes ordered in the Work, by labor disputes, fire, unusual delays in deliveries, abnormal adverse weather conditions not reasonably anticipatable, unavoidable casualties or any other causes beyond the Contractor's control, including delays caused by the Owner, then the Contract Time shall be extended by change order by such reasonable time as the Architect may determine. Claims by Contractor for an extension of the Contract Time must be made by written notice to Owner and Architect within twenty-one (21) days after an occurrence of the event giving rise to such claim. Contractor's claim shall include an estimate of cost and of probable effect of delay on the progress of the Work. In the case of a continuing delay only one claim is necessary. Any commencement of Work after a delay shall serve to terminate that delay for purposes of notice.

ARTICLE 3
CONTRACT SUM

3.1. Owner shall pay Contractor in current funds for Contractor's performance of the Contract the Contract Sum of U.S. _____(U.S. $_____), including the general conditions and Contractor's overhead and profit, and all allowance items, subject to additions and deductions as provided in the Contract.

3.1.1. The following work ("Owner-furnished items") is to be performed by Owner's contractors outside of Contractor's responsibility and contract. To facilitate this work, Contractor will schedule said contractors. If Owner desires, Contractor will provide payment to these contractors provided the funds are made available to Contractor prior to their scheduled payment date. Proof of insurance for general liability and workman's compensation insurance acceptable to Contractor in the exercise of reasonable judgment must be furnished prior to any payments being made, or a charge of ten percent (10%) of the amount of the Owner-furnished items will be collected from Owner simultaneously with payment.

1. _____: Allowance: $

2. _____: Allowance: $

3 _____: Allowance: $

Total Items Not in Contractor's Proposal: $

3.2. The Owner may order changes in the Work consisting of additions, deletions or modifications. If the cost of any change in the Work cannot be agreed upon by Owner and Contractor, Contractor, provided Contractor receives a written order signed by Owner, shall nevertheless promptly proceed with the Work involved. The cost of such Work shall then be determined by the Architect on the basis of actual cost and savings of those performing the Work attributable to the change, plus _____ percent (___%) for profit and overhead. In such case, Contractor shall keep and present, in such form as Owner may prescribe, an itemized accounting together with appropriate supporting data for inclusion in a Change Order. Pending final determination of cost to Owner, payments shall be made on the Architect's Certificate for Payment. With respect to any additive change involving the purchase of materials, Owner shall pay the additional amount at the time the materials are ordered by Contractor if required by the supplier. Any additional cost involving labor performed by Contractor or a subcontractor shall be paid for in the Contractor's Draw Request following performance of such work. The amount of credit to be allowed by Contractor to Owner for any deletion or change which results in a net decrease in the Cost of the Work will be the amount of the actual net cost as confirmed by the Architect. When both additions and credits are involved in any one change, the allowance for overhead and profit shall be figured on the basis of the net increase or net decrease, as applicable.

ARTICLE 4
PROGRESS PAYMENTS

4.1. Monthly Applications for Payment shall be submitted to Owner by Contractor, based upon the percentage of completion of each portion of the Work, utilizing the Schedule of Values attached hereto as Exhibit "B" and made part hereof for all purposes. Contractor also will be entitled to submit Applications for Payment covering deposits required to be made to Subcontractors and suppliers for materials. All Applications for Payment shall be on AIA Form G702 and G703 and shall provide for retainage of ten percent (10%), but no retainage will be withheld for the Owner-furnished items unless requested by Owner and arrangements satisfactory to Contractor are made with respect to such retainage.

All Applications for Payment submitted by Contractor are subject to the approval of Owner and Applications for Payment received by Owner will be paid not later than ten (10) days following receipt of such Applications for Payment, less any amount that Architect fails to approve due to defective Work or Work otherwise not in compliance with the requirements of the Contract Documents. If Owner fails to approve any portion of the Work, Owner will indicate in writing the reason why such Work is deemed to be defective or otherwise not in compliance with the requirements of the Contract Documents.

Upon Substantial Completion of the Work, Owner shall have paid Contractor a sum sufficient to increase the total payments up to ninety percent (90%) of the Contract Sum, less such amounts as may be withheld pursuant to the provisions of Paragraph 11.2.

4.2. Payments due and unpaid under the Contract shall bear interest from the date payment is due at the lesser of ten percent (10%) per annum or maximum non-usurious rate provided by the laws in the

State of Texas. No interest shall be payable on retainage as long as the retainage is timely paid in accordance with the Contract.

(Usury laws and requirements under the Federal Truth in Lending Act, similar state and local consumer credit laws and other regulations at Owner's and Contractor's principal places of business, the location of the Project and elsewhere may affect the validity of this provision. Legal advice should be obtained with respect to deletions or modifications, and also regarding requirements such as written disclosures or waivers.)

4.3. At the time each progress payment is made to Contractor, Contractor will deliver to Owner Contractor's Partial Release of Lien in the form attached hereto as Exhibit "C" covering such progress payment.

4.4. Not later than the date of each subsequent Application for Payment, the Contractor shall submit to the Owner the Contractor's releases of liens for all subcontractors and suppliers who have performed any services or provided any materials for the Project since the date of the preceding Application for Payment and were paid from such progress payment. Each release of lien shall waive and release all rights of the affiant to claim or assert any lien against the Project either for the period through the last day included in the Application for Payment ("Partial Release of Lien") or for the affiant's completed work on the Project ("Final Release of Lien"), as applicable.

4.5. Provided that Contractor has been paid by Owner all sums (or the applicable portion thereof) due to Contractor pursuant to the Agreement (other than under the circumstances of Paragraph 11.2 hereof), Contractor shall not voluntarily permit any laborer's, materialmen's, mechanic's, or other similar liens to be filed or otherwise imposed on any part of the Work or the property on which the Work is performed. If any laborer's, materialmen's, mechanic's, or other similar lien or claim thereof is filed or otherwise imposed against the Property, Contractor, within thirty (30) days after actual notice to Contractor of the filing of such lien or other imposition thereof, shall cause such lien to be released or otherwise discharged, except as to liens which Contractor is contesting in good faith by appropriate action diligently pursued, provided Contractor has notified Owner of the nature of such lien and informed Owner of the type of action being pursued by Contractor and, if requested by Owner, has provided Owner with a surety bond satisfactory to Owner, sufficient to cover such claim in the event Contractor is unsuccessful in contesting same or has made other arrangements satisfactory to Owner. If, however, Contractor, within the aforesaid thirty (30) day period, does not cause such lien either to be released and discharged forthwith or contests same in the manner provided hereinabove, then Owner shall have the right to pay all sums necessary to obtain such release and discharge and reduce the Contract Sum by the amount of such payments made by Owner. Contractor shall indemnify, defend and hold harmless Owner from all claims, losses, demands, causes of action or suits of whatever nature arising out of any such lien or that part of the Work covered thereby.

4.6. Contractor shall comply with the disclosure statement requirements and all other requirements relating to confirming payment of subcontractors and suppliers contained in Sections 53.255 - 53.260 of the Texas Property Code.

ARTICLE 5
FINAL PAYMENT

5.1. Subject to Article 11, prior to possession by Owner, final payment, constituting the entire unpaid balance of the Contract Sum, shall be made by Owner to Contractor not later than thirty (30) days after the Work has been substantially completed, the Contract fully performed, and a Certificate of Occupancy,

if applicable, or other final occupancy permit has been issued by the _____. At the time of final payment, Contractor will deliver to Owner Contractor's final release of lien in the form attached hereto as Exhibit "D" covering such progress payments. Promptly following Owner's receipt of the final occupancy permit or Certificate of Occupancy, as applicable, Owner will deliver Owner's punchlist to Contractor. Contractor will promptly commence the completion and/or correction of punchlist items within twenty-one (21) days thereafter. Upon the twenty-first (21st) day following delivery of the punchlist, Owner and Contractor will walk-through the Project to review the status of the punchlist items. Within ten (10) days following the walk-through, Contractor will complete or correct all punchlist items not theretofore completed by Contractor and possession of the Property shall be delivered to Owner. If, however, Contractor has not completed or corrected, as applicable, all punchlist items by the expiration of said ten (10) day period, final payment will be made by Owner to Contractor, less one hundred percent (100%) of the value assigned by Owner and Contractor to the punchlist items not yet completed or corrected, and possession of the Property shall be delivered to Owner. Payment with respect to such punchlist items shall be made by Owner on an item-by-item basis within ten (10) days following the completion of such item(s).

ARTICLE 6
ENUMERATION OF CONTRACT DOCUMENTS

6.1. The Contract Documents are listed in this Article 6 and, except for Modifications issued after execution of this Contract, are enumerated as follows:

6.1.1. The Contract is this executed Agreement For Construction.

6.1.2. The Supplementary and other Conditions of the Contract attached hereto as exhibits are as follows:

Document	Title	Pages
Drawings and Specifications	"A"	
Schedule of Values	"B"	
Contractor's Affidavit and Partial Release of Liens	"C"	
Contractor's Affidavit and Final Release of Liens	"D"	

6.1.3. The Specifications are as follows:

(Either list the Specifications here or refer to an exhibit attached to this Contract.)

See Exhibit "A" which has been initialed by the Owner and Contractor.

6.1.4. The Drawings are as follows:

See Exhibit "A" which has been initialed by the Owner and Contractor; duplicate final initialed copies of said Drawings are held by both Owner and Contractor.

6.1.5. The Addenda, if any, are as follows:

The portions of the Addenda relating to bidding requirements are not part of the Contract Documents, unless the bidding requirements are also enumerated in this Article 6.

ARTICLE 7
CONTRACT DOCUMENTS

7.1. The Contract Documents consist of this Contract, Drawings, Specifications, Addenda issued prior to the execution of this Contract, other documents listed in this Contract and Modifications issued after execution of this Contract.

Contractor shall at once report to Architect errors, inconsistencies or omissions in the Contract Documents which should have been reasonably discovered by Contractor. The intent of the Contract Documents is to include all items necessary for the proper execution and completion of the Work for Contractor. The Contract Documents are complementary, and what is required by one shall be as binding as if required by all. Performance by Contractor shall be required only to the extent consistent with the Contract Documents and reasonably inferable from them as being necessary to produce the intended results. All dimensions and clearances necessary to the Work, as indicated on the Drawings and contained in the Specifications, shall be verified by Contractor at the job site before executing the relevant portion of the Work and Contractor shall report any discrepancies to the Architect for adjustment before any Work affected thereby is commenced. Additionally, if sufficient detailed information is lacking, if Work is required in such a manner as to make it impossible to produce first-class Work, or if discrepancies appear among Contract Documents, then Contractor shall request the Architect's clarification or interpretation before proceeding with such Work.

If Contractor performs any Work in conformity with any Contract Document knowing it to be inconsistent with any other Contract Document, without first specifically requesting and obtaining from the Architect written instructions on how to proceed with respect to such inconsistency, the Contractor shall be obligated to correct such Work according to the direction of the Owner (with the Architect's advice) without cost to the Owner.

7.2. The Contract Documents shall not be construed to create a contractual relationship of any kind between Architect and Contractor, between Owner and a Subcontractor or Sub-subcontractor or between any persons or entities other than Owner and Contractor.

7.3. The term "Work", as used herein, means the construction and services required by the Contract Documents, whether completed or partially completed, and includes all other labor, materials, equipment and services provided or to be provided by Contractor to fulfill Contractor's obligations.

7.4. If requested by Owner, Contractor shall update from time to time one record copy of the Drawings (the "Record Drawings"), with color pencils to mark up said set with "record information" in a legible manner to show: (i) material deviations from the Drawings made during construction; (ii) details in the Work not previously shown except that to the extent that Architect should revise the Drawings to show such details; (iii) changes to existing conditions or existing conditions found to differ materially from those shown on any existing drawings; (iv) the actual installed position of equipment, piping, conduits, light switches, electric fixtures, circuiting, ducts, dampers, access panels, control valves, drains, openings, and stub-outs if shown on the original final Drawings and substantially different from the position shown on the original final Drawings; and (v) such other information as either Owner or Architect may reasonably request. Any changes resulting from change orders or other changes requiring Architect to modify the Drawings shall be made by Architect at Owner's expense. At the completion of

the Work, Contractor shall deliver all Record Drawings to Owner. The provisions of this Paragraph 7.4 do not authorize Contractor to deviate from the Contract Documents except as otherwise expressly provided herein.

7.5. The Drawings and Specifications are to be of equal priority. In the event of any internal inconsistency in either the Drawings or Specifications, or with each other, the appropriate method of performing the Work, in the event of the above mentioned inconsistency, shall be determined by Architect. Figures take precedence over physical scale measurements. Large scale details take precedence over smaller scale details. Drawings take precedence in regard to dimensions, when in conflict with Mechanical and Structural Drawings, except for the size of the structural members. Specifically titled drawings and sections of the Specifications take precedence over indication of the item in a collateral way. Existing conditions take precedence over Drawings and Specifications for dimensions.

Where in the Drawings and Specifications, certain products, manufacturer's trade names, or catalog numbers are given, it is done for the express purpose of establishing a standard of function, dimension, appearance, and quality of design, in harmony with the Work, and is not intended for the purpose of limiting competition.

When more than one restriction for a specified material, brand, or construction process is given for an item in the Drawings and Specifications, Contractor shall comply with all restrictions. When more than one optional material, brand or construction process is specified for a particular item of work, the choice shall be the Contractor's. Contractor may use the one Contractor considers to its advantage to use.

7.6. List of "work included" and "work excluded" in the Drawings and Specifications are not intended to enumerate each and every item of work or appurtenance required, and must be used in conjunction with other portions of the Contract Documents.

ARTICLE 8
CONTRACTOR

8.1. Contractor shall supervise and direct the Work using Contractor's best skill and attention. Contractor shall be responsible for and have control over construction means, methods, techniques, sequences and procedures and for coordinating all portions of the Work under the Contract unless the Contract Documents give other specific instructions concerning these matters.

8.2. Unless otherwise provided in the Contract Documents, Contractor shall provide and pay for labor, materials, equipment, tools, construction equipment and machinery, water, heat, utilities, transportation and other facilities and services necessary for the proper execution and completion of the Work, whether temporary or permanent.

8.3. Contractor shall enforce strict discipline and good order among Contractor's employees and other persons carrying out the Contract. Contractor shall not permit employment of unfit persons or persons not skilled in tasks assigned to them.

8.4. Contractor warrants to Owner and Architect that materials and equipment furnished under the Contract will be of good quality and new unless otherwise required or permitted by the Contract Documents, that the Work will be free from defects not inherent in the quality required or permitted and that the Work will conform with the requirements of the Contract Documents. Work not conforming to

these requirements, including substitutions not properly approved and authorized, may be considered defective. Contractor's warranty excludes remedy for damage or defect caused by abuse, modifications not executed by Contractor, improper or insufficient maintenance, improper operation, or normal wear and tear under normal usage. Contractor will provide Owner with a warranty issued to Owner by the _____ _____ and will abide by all provisions of said warranty.

8.5. Unless otherwise provided in the Contract Documents, Contractor shall pay sales, consumer, use and other similar taxes which are legally enacted when bids are received or negotiations concluded, whether or not yet effective or merely scheduled to go into effect, and shall secure and pay for the building permits and other permits and governmental fees, licenses and inspections necessary for proper execution and completion of the Work.

8.6. Contractor shall keep the site of the Project reasonably clean and free from rubbish, excess debris, surplus and waste material and shall remove the same from the site of the Project as the Work progresses, all as and when required by the Contract Documents and applicable laws or deed restrictions. If Contractor fails to do so after seven (7) days' written notice from Owner, Owner may remove same at Contractor's expense. In the event Owner undertakes the removal of same from the site of the Project, such removal will in no way qualify or limit Contractor's obligations under the Contract Documents. At completion of the Work, Contractor shall remove from and about the Project waste materials, rubbish, Contractor's tools, construction equipment, machinery and surplus materials.

8.7. Contractor shall comply with and give notices required by laws, ordinances, rules, regulations and lawful orders of public authorities bearing on performance of the Work; provided, however, that Contractor shall not be responsible for cost of obtaining approvals or certifications from any engineer or Architect as long as such approvals or certifications do not relate to Contractor's defective Work or Work re-executed by Contractor. Requirements of public authorities mentioned in this Paragraph 8.7 apply as minimum requirements only. They do not supersede more stringent requirements stated elsewhere in the Contract Documents. If changes must be made to the Contract Documents because of a change in law or governmental regulations after the effective date hereof, appropriate adjustments will be made in the Contract Sum.

8.8. Contractor shall be responsible to Owner for the acts and omissions of Contractor's employees, Subcontractors and their agents and employees, and other persons performing portions of the Work under a contract with Contractor.

8.9. Contractor shall provide Owner, Architect and the lender's inspector, if any, access to the Work in preparation and progress wherever located.

8.10. To the fullest extent permitted by law, Contractor shall indemnify and hold harmless Owner, and agents and contractors of Owner from and against claims, damages, losses and expenses, including but not limited to reasonable attorneys' fees, arising out of or resulting from performance of the Work by Contractor, provided that such claim, damage, loss or expense is attributable to bodily injury, sickness, disease or death, or to injury to or destruction of tangible property (other than the Work itself except to the extent covered by Contractor's builder's risk insurance) including loss of use resulting therefrom, but only to the extent caused in whole or in part by negligent acts or omissions of Contractor, one of Contractor's Subcontractors or anyone directly or indirectly employed by them or anyone for whose acts they may be liable. Such obligation shall not be construed to negate, abridge, or reduce other rights or obligations of indemnity which would otherwise exist as to a party or person described in this Paragraph 8.10.

To the fullest extent permitted by law, Owner shall indemnify, defend and hold harmless Contractor and Contractor's subcontractors and agents, but not Contractor's employees, from and against claims, damages, losses and expenses, including but not limited to reasonable fees, arising out of or resulting from performance of any Work on the Project by Owner or Owner's contractors, provided that such claim, damage, loss or expense is attributable to bodily injury, sickness, disease or death, or to injury to or destruction of tangible property (other than the Work itself) including loss of use resulting therefrom, but only to the extent caused in whole or in part by negligent acts or omissions of Owner or Owner's contractors, or anyone directly or indirectly employed by them or anyone for whose acts they may be liable. Such obligation shall not be construed to negate, abridge, or reduce other rights or obligations of indemnity which would otherwise exist as to a party or person described in this Paragraph 8.10.

The obligations of Contractor or Owner, as applicable, under this Paragraph 8.10 shall not extend to the liability of Architect, Architect's consultants, and agents and employees of any of them arising out of (1) the preparation or approval of maps, drawings, opinions, reports, surveys, Change Orders, designs or specifications, or (2) the giving of or the failure to give directions or instructions by Architect, Architect's consultants, and agents and employees of any of them provided such giving or failure to give is a cause, in whole or in part, of the injury or damage.

8.11. When any non-conforming work is found or confirmed by Owner, Contractor, at Contractor's expense, shall correct the entire area of Work involved, unless Contractor can completely define the limits of the non-conforming work.

8.12. Notwithstanding anything contained in the Contract Documents to the contrary, if within one (1) year after the date of Final Completion or such longer period of time as may be prescribed by law with respect to latent defects or by the terms of any applicable special guarantee required by the Contract Documents or by any specific provisions of the Contract Documents, Owner discovers any defective work, including that any portion of the Work was not constructed substantially in accordance with the Contract Documents, Contractor shall promptly, without cost to Owner, either correct such defective Work, or, if it is not possible to correct such defective Work, remove it from the site and replace it with non-defective Work. In any emergency where delay would cause serious risk of loss or damage, Owner may have the defective Work corrected or the rejected Work removed and replaced, and all direct costs of such removal and replacement, including reasonable compensation for additional professional services, shall be paid by Contractor. Inability or refusal of a subcontractor responsible for defective Work to correct such Work shall not excuse Contractor from performing under the warranty provided in this Paragraph 8.12. Should Contractor fail to make such warranty corrections required hereby within a reasonable time, not to exceed thirty (30) days after written notice thereof from Owner to Contractor, provided that if the required corrections cannot be made within thirty (30) days, Contractor fails to commence making such warranty corrections within a reasonable period of time, not to exceed thirty (30) days, and diligently continue the prosecution of such warranty corrections until completion, Owner may do so at the expense of and for the account of Contractor. Notwithstanding the foregoing provisions of this Paragraph 8.12, Owner's rights and remedies against Contractor for a default under this Paragraph 8.12 are subject to the terms and conditions of the _____ limited warranty.

At the time of final payment, Contractor also shall assign and transfer to Owner all assignable warranties heretofore or hereafter received by Contractor for "consumer products" to be installed in the "improvements" (as such terms are defined by the Federal Trade Commission), whether issued by the seller, manufacturer or supplier and all other warranties delivered to Contractor by subcontractors or suppliers; provided, however, that Owner and Contractor agree that during the one (1) year warranty period, Contractor shall be obligated to enforce all warranties provided by Contractor's subcontractors and suppliers at no cost or expense to Owner, other than appliance and HVAC warranties.

8.13. Any encroachments made by Contractor or his subcontractors on adjacent properties or easements due to construction as revealed by an improvement survey will be the responsibility of Contractor, and Contractor shall correct these encroachments within fifteen (15) days of the date of the improvement survey at the sole cost and expense of Contractor, either by the removal of the encroachments or satisfactory agreements with the adjacent property owners or the holders of easements allowing the encroachments to remain. Contractor may rely on the survey of the Property furnished by Owner in locating the foundation and other improvements.

8.14. Contractor shall fully acquaint itself with all existing conditions and limitations affecting the Work, including, without limitation, all property lines, utility locations, existing improvements, elevations, and site and local conditions. Claims for additional compensation or extensions of time because of the failure of Contractor to familiarize itself with conditions at the site will not be allowed. It is not intended by this provision to preclude claims for additional compensation or extension of time for conditions that would not reasonably be foreseen from a diligent visual inspection of the site, Contractor's experience in building in the Bellaire area.

If conditions are encountered at the site which are 1. subsurface or otherwise concealed physical conditions which differ materially from those indicated in the Contract Documents or 2. unknown physical conditions of an unusual nature, which differ materially from those ordinarily found to exist and generally recognized as inherent in construction activities of the character provided for in the Contract Documents, then notice by the observing party shall be given to the other party promptly before conditions are disturbed and in no event later than ten (10) days after first observance of the conditions. Architect will promptly investigate such conditions and, if they differ materially and cause an increase or decrease in Contractor's cost of, or time required for, performance of any part of the Work, will recommend an equitable adjustment in the Contract Sum or Contract Time, or both. If Architect determines that the conditions at the site are not materially different from those indicated in the Contract Documents and that no change in the terms of the Contract Documents is justified, Architect shall so notify Owner and Contractor in writing, stating the reasons. Claims by either party in opposition to such determination must be made within twenty-one (21) days after Architect has given notice of the decision.

8.15. Contractor shall have the sole liability and responsibility for connecting onto plumbing lines, sanitary and storm sewer lines, electrical lines and other utilities to be utilized in connection with the completion of the improvements covered by this Contract. Upon completion of the Work by Contractor, all other utilities shall be connected by Contractor and shall be functioning in all respects and in good working order.

ARTICLE 9
ADMINISTRATION OF THE CONTRACT

9.1. Architect will not have control over or change of and will not be responsible for construction means, methods, techniques, sequence or procedures, or for safety precautions and programs in connection with the Work.

9.2. Architect will interpret and decide matters concerning performance under and requirements of the Contract Documents on written request of either Owner or Contractor. Architect's decisions in matters relating to aesthetic effect will be final if consistent with the intent expressed in the Contract Documents. All other decisions of Architect except those which have been waived by making or acceptance of final payment shall be subject to mediation and arbitration, if necessary, upon the written demand of either party, as more particularly described in the Addendum.

9.3. Architect may review and approve or take other appropriate action upon Contractor's submittals such as Shop Drawings, Product Data and Samples, but only for the limited purpose of checking for conformance with information given and the design concept expressed in the Contract Documents, however, such review or approval, if applicable, shall not relieve Contractor from the responsibility of reviewing shop drawings in conformance with the Contract Documents.

9.4. Owner may reject Work which does not conform to the Contract Documents.

9.5. If requested by Owner, Architect will conduct inspections to determine the dates of Substantial Completion and Final Completion, and will issue a final Certificate for Payment upon compliance with the requirements of Article 5.

ARTICLE 10
CONSTRUCTION BY OWNER OR BY SEPARATE SUBCONTRACTORS

10.1. Owner reserves the right to perform construction or operations related to the Project with Owner's own forces and to award separate contracts in connection with other portions of the Project or other construction or operations on the site under conditions of the contract identical or substantially similar to these, including those portions related to insurance and waiver of subrogation. If Contractor claims that delay or additional cost is involved because of such action by Owner, Contractor shall make claims as provided elsewhere in the Contract Documents.

10.2. Contractor shall afford Owner and separate contractors reasonable opportunity for the introduction and storage of their materials and equipment and performance of their activities and shall connect and coordinate Contractor's construction and operations with theirs as required by the Contract Documents.

10.3. Costs caused by delays, improperly timed activities or defective construction shall be borne by the party responsible therefor.

10.4. Contractor will cooperate to a reasonable extent with any other contractors engaged by Owner in connection with completion of the Project. Owner shall require its separate contractors to cooperate and coordinate with Contractor. Owner agrees to cause its separate contractors to furnish Contractor with a Certificate of Insurance showing Contractor as an additional insured. Additionally, Contractor's warranty with respect to the Work shall not cover any work covered by separate contractors; provided, however, that Contractor will be responsible for any damage its forces cause to the Work performed by a separate Contractor. Likewise, Owner and its separate contractors will be liable for any damage that such separate Contractor's forces cause to the Work performed by Contractor.

ARTICLE 11
PAYMENTS AND COMPLETION

11.1. Payments shall be made as provided in Articles 4 and 5 of this Contract.

11.2. Payments may be withheld by Owner on account of (1) defective Work disapproved by Architect, (2) claims filed by third parties, (3) failure of Contractor to make payments properly to Subcontractors or for labor, materials or equipment, (4) reasonable evidence that the Work cannot be completed for the unpaid balance of the Contract Sum, or (5) persistent failure to carry out the Work in accordance with the

Contract Documents. When the above reasons for withholding a portion of a payment are removed, payment shall be promptly made from amounts previously withheld.

11.3. The making of final payment shall constitute a waiver of claims by Owner except those arising from:

1. liens, claims, security interests or encumbrances arising out of the Contract and unsettled;

2. failure of the Work to comply with the requirements of the Contract Documents; or

3. items of special warranties required by the Contract Documents.

ARTICLE 12
PROTECTION OF PERSONS AND PROPERTY

12.1. Contractor shall be responsible for initiating, maintaining and supervising all safety precautions and programs in connection with the performance of the Contract. Contractor shall take reasonable precautions for safety of and shall provide reasonable protection to prevent damage, injury or loss to:

1. employees on the Work and other persons who may be affected thereby;

2. the Work and materials and equipment to be incorporated therein; and

3. other property at the site or adjacent thereto.

Contractor shall give notices and comply with applicable laws, ordinances, rules, regulations and lawful orders of public authorities bearing on safety of persons and property and their protection from damage, injury or loss. Contractor shall promptly remedy damage and loss to property at the site caused in whole or in part by Contractor, except damage or loss attributable to acts or omissions of Owner or Architect or by anyone for whose acts either of them may be liable and not attributable to the fault or negligence of Contractor, subject to the provisions of Paragraph 13.4, below.

12.2. Contractor shall not be required to perform without consent any Work relating to asbestos or polychlorinated biphenyl (PCB).

ARTICLE 13
INSURANCE

13.1. Contractor shall purchase from and maintain in a company or companies lawfully authorized to do business in the State of Texas insurance for protection from claims under workers' or workmen's compensation acts and other employee benefit acts which are applicable (with a waiver of subrogation endorsement in favor of Owner), claims for damages because of bodily injury, including death, and from claims for damages, other than to the Work itself (except to the extent covered by the builder's risk insurance provided by Contractor), which arise out of or result from Contractor's operations under the Contract, whether such operations be by Contractor or by a Subcontractor or anyone directly or indirectly employed by any of them. Certificates of such insurance shall be delivered to Owner and _____ _____ ("Lender") prior to the commencement of the Work. Each policy of insurance obtained by Contractor pursuant to the Contract shall provide (i) that such policy shall not be cancelled, endorsed, altered or reissued to effect a change in coverage for any reason or to any extent whatsoever unless the insured shall have first given Owner and Lender at least fifteen (15) days prior written notice;

(ii) that Owner and/or Lender may, but shall not be obligated to, make premium payments to prevent the cancellation, endorsement, alteration or re-issuance of such policy; and (iii) that all insurance policies shall be payable to Owner and Lender as their interests may appear and be subject to the standard mortgage clause.

13.2. Owner shall be responsible for purchasing and maintaining Owner's usual liability insurance. Optionally, Owner may purchase and maintain other insurance for self-protection against claims which may arise from operations under the Contract. Contractor shall not be responsible for purchasing and maintaining this optional Owner's liability insurance. Notwithstanding the foregoing provisions of this Paragraph 13.2, Contractor's commercial general liability insurance shall be primary as to any act of, by, through or under Contractor at the Project, and Owner's commercial general liability insurance shall be secondary with respect to such acts or omissions.

13.3. Contractor will purchase and provide to Owner prior to commencement of construction builder's risk insurance on the Work at the site to insure against the perils of fire and physical loss in at least the amount of the improvements constituting the Work under this Contract for the real property located at _____. Owner and Lender will be named as an additional insured on this insurance and the commercial general liability insurance of Contractor.

13.4. Owner and Contractor agree that in the event Owner or Contractor ("First Party") sustains a loss by reason of fire, damage or other casualty which is covered by a fire or extended coverage insurance policy or builder's risk policy or other policy required to be carried by the First Party under this Contract, including protection against theft, burglary and vandalism, and such fire, casualty or damage is caused in whole or in part by the acts or omissions of the other party hereto ("Second Party") or the Second Party's agents, servants or employees, then the First Party agrees to look solely to its insurance proceeds (if any); and the First Party shall not be entitled to the recovery of damages against the Second Party or the agents, servants, employees, heirs, legal representatives or assigns of the Second Party; and no third party shall have any right of recovery against the Second Party or the agents, servants, employees, heirs, legal representatives or assigns of the Second Party by way of subrogation or assignment.

13.5. All Subcontractors used by Contractor shall, for the term of this Contract, carry and maintain in full force and effect, their current insurance, if any, insuring such subcontractor for their respective liabilities and interests while they are performing hereunder.

To the extent the provisions of this Contract are incorporated by reference into each subcontract between Contractor and a subcontractor, each subcontractor agrees that in the event subcontractor sustains a loss by reason of fire, damage or other casualty which is covered by a fire or extended coverage insurance policy or builder's risk policy, including protection against theft, burglary and vandalism, and such fire, casualty or damage is caused in whole or in part by the acts or omissions of Owner or Owner's agents, servants, employees, heirs, legal representatives or assigns, or Contractor or Contractor's agents, servants or employees, then subcontractor agrees to look solely to its insurance proceeds (if any); and subcontractor shall not be entitled to the recovery of damages against Owner or Owner's agents, servants, employees, heirs, legal representatives or assigns, or Contractor and Contractor's agents, servants or employees; and no third party shall have any right of recovery against Owner or Owner's agents, servants, employees, heirs, legal representatives or assigns, or Contractor or Contractor's agents, servants or employees by way of subrogation or assignment.

ARTICLE 14
MISCELLANEOUS PROVISIONS

14.1. The Contract shall be governed by the laws of the State of Texas.

14.2. Contractor shall not assign this Contract nor any of the monies due or to become due to it hereunder without the prior written consent of Owner and any attempt to so do shall be void and of no effect. Contractor shall not sublet or subcontract any part of this Contract except in compliance with the provisions hereof. Subject to the foregoing, this Contract shall inure to the benefit of, and shall be binding upon, the parties hereto and their respective successors and assigns.

14.3. Any notice provided or permitted to be given under the Contract Documents must be in writing and may be served by depositing same in the United States mail, addressed to the party to be notified, postage prepaid, by registered or certified mail, with return receipt requested; by delivery of such notice in person to such party; or by facsimile with confirmation of receipt. Notice given in accordance herewith shall be effective upon receipt at the address of the addressee. For purposes of notice, the addresses of the parties shall be as set forth on page one (1) hereof.

14.4. Contractor acknowledges that Owner will borrow certain funds to finance the construction of the Work and, that as a condition to any loans to Owner, Owner will collaterally assign this Agreement to the Lender and Lender may require from time to time certain statements, certificates, and documents from Contractor. Contractor covenants and agrees that any lien, statutory, expressed or implied, right and interest (whether choate or inchoate and including, without limitation, all mechanics' and materialmen's liens under the applicable laws and statutes of the State of Texas) which are owned or claimed by Contractor or shall exist or shall hereafter accrue to the benefit of Contractor for labor performed, materials furnished and Work done on this Project, shall be and remain subordinate, second and inferior to any first and second lien securing the payment of an acquisition, interim construction and/or permanent loan and all advances made thereunder, and to any renewals, extensions or rearrangements thereof. Neither Contractor nor any Subcontractor or other party shall be permitted to remove any improvements or other property constructed or installed or delivered in connection with the Work notwithstanding that such improvements or other property can be removed without material injury to any improvements not sought to be removed by any lien claimant and without such injury to any improvements sought to be removed by any lien claimant. A subordination provision to this effect applicable to liens and lien rights of Subcontractors shall be contained in all Subcontracts entered into by Contractor, and Contractor will indemnify and hold Owner harmless from any failure or refusal of any Subcontractor to comply with this provision, as well as any assertion by such Subcontractor that such Subcontractor's lien is prior to or of equal dignity with the Lender's lien. At the request of Owner, Contractor shall, without delay, execute or cause to be executed, such additional documents as may be required from time to time by the Lender to give effect to the provisions hereof and furnish documents, releases and waivers evidencing payments to Subcontractors and suppliers and such Subcontractors' and suppliers' release of liens arising out of the performance of the Work. Owner will authorize Lender to transfer payments only to Contractor if and when Contractor becomes entitled to such payments pursuant to Article 4, upon approval by Owner.

14.5. In the event of a default by Owner under its interim loan agreement with Lender, the unperformed part of this Contract will be performed by Contractor for the benefit and at the expense of the Lender, should the Lender so elect, provided that there is no material interruption in the prosecution of the Work and that Contractor has been paid for all Work done to date.

14.6. The Architect will interpret and decide matters concerning performance under and requirements of the Contract Documents on written request of either the Owner or Contractor. The Architect will make

initial decisions on all claims, disputes or other matters in question between the Owner and Contractor, but will not be liable for results of any interpretations or decisions rendered in good faith. The Architect's decisions in matters relating to aesthetic effect will be final if consistent with the intent expressed in the Contract Documents. All other decisions of the Architect, except those which have been waived by making or acceptance of final payment or those described in Section 14.7, shall be subject to arbitration upon the written demand of either party.

14.7. All claims or disputes between the Contractor and the Owner arising out of or relating to the Contract Documents, or the breach thereof, shall be decided by arbitration in accordance with the Construction Industry Arbitration Rules of the American Arbitration Association currently in effect unless the parties mutually agree otherwise and subject to an initial presentation of the claim or dispute to the Architect as required under Paragraph 14.6. Notice of the demand for arbitration shall be filed in writing with the other party to this Agreement and with the American Arbitration Association and shall be made within a reasonable time after the dispute as arisen. The arbitration hearings shall be held in the city where the Project is located, unless another location is mutually agreed upon. The decision of the arbitrator(s) must be based on and consistent with the Texas substantive (internal law) without regard to the Texas General Arbitration Act or the Federal Arbitration Act. The award rendered by the arbitrator or arbitrators shall be final, and judgment may be entered upon it in accordance with applicable law in any court having jurisdiction thereof. Except by written consent of the person or entity sought to be joined, no arbitration arising out of or relating to the Contract Documents shall include, by consolidation, joinder or in any other manner, any person or entity not a party to the Agreement under which such arbitration arises, unless it is shown at the time the demand for arbitration is filed that (1) such person or entity is substantially involved in a common question of fact or law, (2) the presence of such person or entity is required if complete relief is to be accorded in the arbitration, (3) the interest or responsibility of such person or entity in the matter is not insubstantial, and (4) such person or entity is not the Architect or any of the Architect's employees or consultants. The agreement herein among the parties to the Agreement and any other written agreements to arbitrate referred to herein shall be specifically enforceable under applicable law in any court having jurisdiction thereof. In no event shall claims in excess of Two Hundred Thousand Dollars ($200,000.00), in the aggregate, or claims with respect to any warranty given by Contractor to Owner under the Contract Documents, be submitted to arbitration by either party to this Agreement without the written consent of the other party. With respect to claims in excess of Two Hundred Thousand Dollars ($200,000.00), in the aggregate, or warranty claims, as to which Owner and Contractor do not agree to submit arbitration, either party shall have the right to prosecute such claims in a court of competent jurisdiction.

During any arbitration proceeding, there shall be a prehearing meeting between the parties at which each party shall present a memorandum disclosing the factual basis of its claim and defenses and disclosing legal issues raised. The memorandum shall also disclose the names of any expert a party shall present as a witness during the proceedings. At the prehearing meeting, the arbitrators shall make rulings and set schedules for hearings consistent with their powers as set forth in this Paragraph 14.7. All hearings shall be held on consecutive weekdays until five (5) hearings have been held and shall be recommenced within seven (7) days of the last prior day of hearings. If requested by either party to this Agreement, any individual or number of sessions shall take place at the site of the Project.

The parties shall be entitled to discover all documents and information reasonably necessary for a full understanding of any legitimate issue raised in the arbitration as permitted under Texas law. The parties may use all methods of discovery available under the Federal Rules of Civil Procedure and shall be governed thereby. Prior to the deposition of any expert witness, the party proposing to call such a witness shall provide a full and complete report by the expert, together with the expert's calculations and other data by which the expert reached any opinions concerning the subject matter of the arbitration. The report shall be provided no less than ten (10) days prior to the date set for the expert witness' deposition. The

Federal Rules of Evidence shall be applied by the arbitrators but liberally construed to allow for the admission of evidence that is helpful in resolving the controversy. All arbitration proceedings shall be conducted by one (1) impartial arbitrator.

Notwithstanding anything contained in this Paragraph 14.7 to the contrary, any claim arising out of or relating to this Agreement shall, if not resolved by Owner and Contractor within ten (10) days after submission of the claim, be subject to mediation as a condition precedent to arbitration or the institution of legal or other equitable proceedings by the parties. The parties shall endeavor to resolve their claims by mediation which, unless the parties mutually agree otherwise, shall be conducted in accordance with the Construction Industry Mediation Rules of the American Arbitration Association currently in effect. Any request for mediation shall be filed in writing with the other party to the Agreement and with the American Arbitration Association. Such request may be made concurrently with the filing of a demand for arbitration but, in such event, mediation shall proceed in advance of arbitration or other legal or equitable proceedings, which shall be stayed during mediation for a period of sixty (60) days from the date of filing, unless stayed for a longer period by agreement of the parties or court order. The parties shall share the mediator's fee and any filing fees equally. The mediation shall be held in the city where the Project is located, unless another location is mutually agreed upon. Agreements reached in mediation shall be enforceable as settlement agreements in any court having jurisdiction thereof.

ARTICLE 15
TERMINATION OF THE CONTRACT

15.1. If Owner fails to make payment for a period of thirty (30) days through no fault of Contractor, or if Owner fails to make payment thereon for a period of thirty (30) days, Contractor may, upon seven (7) additional days' written notice to Owner, terminate the Contract and recover from Owner payment for Work executed and for proven loss with respect to materials, equipment, tools, and construction equipment and machinery, including reasonable overhead, profit, and damages applicable to the Project.

15.2. If Contractor defaults or persistently fails or neglects to carry out the Work in accordance with the Contract Documents or fails to perform a provision of the Contract, Owner after seven (7) days' written notice to Contractor and without prejudice to any other remedy Owner may have, may make good such deficiencies and may deduct the cost thereof, including compensation for Architect's services and expenses made necessary thereby, from the payment then or thereafter due Contractor. Alternatively, at Owner's option, Owner may terminate the Contract and take possession of the site and of all materials, equipment, tools, and construction equipment and machinery thereon owned by Contractor and may finish the Work by whatever method Owner may deem expedient. If the unpaid balance of the Contract Sum exceeds costs of finishing the Work, including compensation for the services and expenses made necessary thereby, such excess shall be paid to Contractor, but if such costs exceed such unpaid balance, then Contractor shall pay the difference to Owner within thirty (30) days following written demand therefor from Owner accompanied by reasonable supporting data.

15.3. Owner shall be deemed to be a third party beneficiary of each subcontract and may, if Owner elects, require (following Contractor's default under this Contract and/or Owner's termination of the Contract pursuant to the other provisions of this Contract permitting termination by Owner) that the Subcontractor perform all of the then unperformed duties and obligations of such Subcontractor thereunder for the benefit of Owner (rather than Contractor); however, in the event that Owner requires any such performance by a Subcontractor for the direct benefit of Owner, then Owner shall be bound and obligated to pay such Subcontractor for all work done by such Subcontractor (i) to date (to-wit: the reasonable value of that portion of the subcontract performed by such Subcontractor) and (ii) subsequent to the date that Owner elects to invoke such rights. Owner's liability in this connection, however, is not

to exceed the amount obtained by subtracting from the subcontract price the total of all sums paid by Contractor to Subcontractor prior to Owner's invoking its rights hereunder with respect to direct performance by Subcontractor for Owner. In the event that Owner elects to invoke such rights, Owner shall give written notice of such election to Contractor and such Subcontractor.

15.4. If Owner determines that an irreconcilable conflict has developed between Owner and Contractor with respect to the performance of the Work, Owner shall have the right to terminate this Contract with or without cause at any time by giving to Contractor seventy-two (72) hours written notice thereof. Upon receipt of such notice, Contractor immediately shall terminate performance of the Work and make every reasonable effort to mitigate its losses and damages hereunder; provided, however, that in connection with such termination, Contractor shall perform such acts as may be necessary to preserve and protect that part of the Work theretofore performed hereunder. Upon such termination without cause, Contractor shall retain all sums of money theretofore paid hereunder to Contractor and (provided [1] that no liens or claims have been filed of record with respect to Work performed hereunder or that all such liens and claims have been satisfied in the manner provided in the Contract Documents, and [2] that Contractor delivers to Owner [a] Contractor's affidavit and final release of lien with respect to the Work performed through the date of termination and paid for by Owner, [b] final Subcontractor and Supplier lien waivers for all subcontracts and supply agreements that have been fully performed on the date of termination, and [c] an assignment to Owner or Owner's designee of all subcontracts and purchase orders which Owner or Owner's designee elects to assume by written notice to Contractor), Owner shall pay to Contractor (i) all retainage, if any, theretofore retained hereunder by Owner in respect of the Work properly performed to the date of such termination (other than the retainage relating to portions of the Work performed by Subcontractors whose subcontracts Owner assumes, which retained amounts will continue to be paid at the time and in the manner specified in Article 4 of the Contract), (ii) payment for the Work properly executed in accordance with the Contract Documents prior to the effective date of termination (the basis for such payment shall be as provided in the Contract Documents), (iii) for the direct costs incurred by Contractor in terminating the Work, including the cost of canceling subcontracts and purchase orders not assumed by Owner, (iv) payment for all other out-of-pocket costs reasonably incurred by Contractor to third parties with respect to termination of this Contract authorized in accordance with the provisions of this Paragraph 15.4, and (v) ten percent (10%) of the unpaid portion of the total Contractor's fee, but Owner shall not otherwise be responsible for damages for lost or anticipated fees and/or profits on Work not performed on account of any termination described in this Paragraph 15.4. Owner also shall not be obligated to reimburse Contractor for any central office overhead in connection with the termination. However, in no event shall the amounts to be paid to Contractor pursuant to the preceding sentence, when combined with the amounts previously paid to Contractor and the costs thereafter required to be paid by Owner to complete the Work, exceed the Contract Sum. The amounts owing by Owner to Contractor pursuant to the two immediately preceding sentences shall be as specified in Contractor's final Application for Payment approved by Owner. If Owner terminates without cause, then Owner (or a replacement Contractor or another designee of Owner), shall, with respect to all subcontracts and purchase orders which Owner does not elect to terminate (or cause Contractor to terminate) assume the obligations of Contractor under such subcontracts and purchase orders covering the unperformed parts of the Work and properly entered into in accordance with the Contract, and Owner (or such replacement Contractor or designee) shall indemnify Contractor from all liabilities thereafter arising thereunder.

Upon receipt of a notice of termination pursuant to this Paragraph 15.4, Contractor shall immediately, according to instructions from Owner, proceed with performance of the following duties regardless of delay in determining or adjusting amounts due under this Paragraph 15.4:

(1) cease operation as specified in this notice;

(2) place no further orders and enter into no further subcontracts for materials, labor, services or facilities except as otherwise specified in writing by Owner;

(3) terminate all subcontracts and purchase orders to the extent that Owner does not elect to assume such subcontracts and purchase orders; and

(4) take actions that may be necessary, or that Owner may direct in writing, for the protection and preservation of the Work.

In addition to payment for the Work performed prior to the effective date of termination and for any work performed following the date of termination pursuant to Owner's written request, Contractor shall be entitled to payment for materials timely fabricated off the Project site and delivered and stored in accordance with the Owner's instructions.

EXECUTED on this the ____ day of _____, 200_.

OWNER:	**CONTRACTOR:**
_____	_____
By:_____	By:_____

ITEM B

COST OF THE WORK

4.2 The term "Cost of the Work" shall mean costs necessarily incurred in the performance of the Work, and paid by the Contractor. Such costs shall be at rates not higher than the standard paid in the locality of the Work, except with prior written consent of the Owner, and shall include the following items:

A. Cost of all materials, supplies, and equipment incorporated in the Work, including costs of transportation thereof, but shall be subject to the limitations and exclusions of this Paragraph 4.2 and Paragraph 4.3 hereof. Costs described in this Paragraph 4.2 shall not include Contractor's office overhead.

B. Payments made by the Contractor to Subcontractors for Work performed pursuant to Subcontracts under this Agreement. With respect to all Subcontracts and purchase orders, Owner shall not be obligated to pay more for the Work covered by such Subcontract or purchase order than approved in writing by Owner prior to or contemporaneously with Contractor entering into such Subcontract or purchase order. No such Subcontract or purchase order shall be entered into by Contractor without the prior approval of Owner, except to the extent that the Subcontract sum (inclusive of materials and labor, if applicable) in such Subcontract or purchase order is equal to or less than the amount listed for such item in the Schedule of Values.

C. Cost, including transportation and maintenance, of all materials, supplies, equipment, temporary facilities and hand tools not owned by the workmen, which are consumed in the performance of the Work, and cost less salvage value on such items used but not consumed which remain the property of the Contractor, subject, however, to the provisions of paragraph B, above.

D. Rental charges of any temporary site construction office, temporary site storage facility, construction fencing, all necessary machinery and equipment exclusive of hand tools, used at the site of the Work, whether rented from the Contractor or others, including installation, minor repairs and replacements, dismantling, removal, transportation and delivery costs thereof, at rental charges consistent with those prevailing in the area.

E. Cost of premiums for all bonds and insurance which the Contractor is required by the Contract Documents to purchase and maintain.

F. Sales, use, or similar taxes related to the Work imposed by any governmental authority and for which the Contractor is liable.

G. Permit fees, royalties, damages for infringement of patent, and costs of defending suits therefore, and deposits lost for causes other than the Contractor's negligence.

H. Cost of repairs to damaged Work, for which the cause or identity of the agent causing the damage cannot be established.

I. Losses and expenses, not compensated by insurance or otherwise, sustained by the Contractor in connection with the Work, provided they have resulted from causes other than the fault or neglect of the Contractor. Such losses shall include settlements made with the written consent and approval of the Owner. No such losses and expenses shall be included in the Cost of the Work for the purpose of determining the Contractor's Fee unless such loss requires reconstruction and the Contractor is placed in

charge thereof, in which case he shall be paid for his services a Contractor's Fee proportionate to that stated in Article 3 above.

J. Minor expenses such as telegrams, long distance telephone calls, telephone service at the site, expressage, and similar petty cash items in connection with the Work.

K. Cost of removal of all debris.

L. Costs incurred due to an emergency affecting the safety of persons and property.

M. Other costs incurred in the performance of the Work if and to the extent approved in advance in writing by the Owner.

4.3 The term "Cost of the Work" shall not include any of the following items:

A. Overhead or general expenses of the Contractor of any kind except as may be expressly included in Article 3 above.

B. Costs due to the negligence of the Contractor, a Subcontractor or anyone directly or indirectly employed by either, or for acts for which either may be liable, including but not limited to the correction of defective Work and the disposal of materials or equipment improperly supplied.

C. Notwithstanding the breakdown or categorization of any costs to be reimbursed in Paragraph 4.2 or elsewhere in the Contract Documents, there shall be no duplication of payment of any particular items for which payment is requested can be characterized as falling into more than one of the types of compensable or reimbursable categories.

D. Any cost or expense incurred under any indemnification obligation of Contractor hereunder.

E. Any repairs to the Work performed by Contractor following Substantial Completion in satisfaction of a warranty of the Work made to Owner in excess of the Warranty Contingency.

F. Losses and expenses sustained by Contractor, Subcontractors or Sub-subcontractors, not compensated by insurance or otherwise, if such losses and expenses are due to infidelity or dishonesty on the part of any employee of Contractor, Subcontractors or Sub-subcontractors, or others to whom their respective property may be entrusted, inventory shortage or unexplained disappearance.

G. Any of the Contractor's income or excess profits, corporation, franchise or similar taxes.

H. Contractor's worker's compensation and commercial general liability insurance.

4.4 All cash discounts shall accrue to the benefit of the Owner. All trade discounts, rebates and refunds and all returns from sale of surplus material and equipment shall accrue to the Owner.

ITEM C

DESIGN/BUILD OBLIGATIONS OF CONTRACTOR

1. Design Build Obligations. Contractor, through its architect and engineers, is responsible for providing a complete design for the construction of the Improvements described in the Drawings and Specifications, including, without limitation, the architectural design and plumbing, mechanical, electrical and structural design. Nothing contained in the Contract Documents shall create a contractual relationship between Owner and any third party; however, it is understood and agreed that Owner is an intended third-party beneficiary of all contracts and agreements for design, architectural or engineering services.

Contractor shall be responsible to Owner for acts or omissions of the architects, engineers, and others acting under Contractor. Contractor agrees to furnish the architectural, engineering and construction services set forth therein and agrees to furnish efficient business administration and superintendence, and to complete the Improvements in a sound, expeditious and economical manner consistent with the interests of Owner.

Contractor, by executing this Contract, represents to Owner the following:

(a) The Drawings and Specifications are sufficiently complete and detailed for Contractor to perform the Work required to produce the results intended by the Contract Documents and comply with all the requirements of the Contract Documents.

(b) The Work required by the Contract Documents, including, without limitation, all construction details, construction means, methods, procedures and techniques necessary to perform the Work, use of materials, selection of equipment and requirements of product manufacturers are consistent with: good and sound practices within the construction industry; generally prevailing and accepted industry standards applicable to Work; requirements of any warranties applicable to the Work; and requirements of all laws, ordinances, regulations, codes, rules and orders which bear upon the Contractor's performance of the Work.

ITEM D

Termination Without Cause by Owner

15.4 If Owner determines that an irreconcilable conflict has developed between Owner and Contractor with respect to the performance of the Work, Owner shall have the right to terminate this Contract with or without cause at any time by giving to Contractor seventy-two (72) hours written notice thereof. Upon receipt of such notice, Contractor immediately shall terminate performance of the Work and make every reasonable effort to mitigate its losses and damages hereunder; provided, however, that in connection with such termination, Contractor shall perform such acts as may be necessary to preserve and protect that part of the Work theretofore performed hereunder. Upon such termination without cause, Contractor shall retain all sums of money theretofore paid hereunder to Contractor and (provided [1] that no liens or claims have been filed of record with respect to Work performed hereunder or that all such liens and claims have been satisfied in the manner provided in the Contract Documents, and [2] that Contractor delivers to Owner [a] Contractor's affidavit and final release of lien with respect to the Work performed through the date of termination and paid for by Owner, [b] final Subcontractor and Supplier lien waivers for all subcontracts and supply agreements that have been fully performed on the date of termination, and [c] an assignment to Owner or Owner's designee of all subcontracts and purchase orders which Owner or Owner's designee elects to assume by written notice to Contractor), Owner shall pay to Contractor (i) all retainage, if any, theretofore retained hereunder by Owner in respect of the Work properly performed to the date of such termination (other than the retainage relating to portions of the Work performed by Subcontractors whose subcontracts Owner assumes, which retained amounts will continue to be paid at the time and in the manner specified in Article 4 of the Contract), (ii) payment for the Work properly executed in accordance with the Contract Documents prior to the effective date of termination (the basis for such payment shall be as provided in the Contract Documents), (iii) for the direct costs incurred by Contractor in terminating the Work, including the cost of canceling subcontracts and purchase orders not assumed by Owner, (iv) payment for all other out-of-pocket costs reasonably incurred by Contractor to third parties with respect to termination of this Contract authorized in accordance with the provisions of this Paragraph 15.4, and (v) ten percent (10%) of the unpaid portion of the total Contractor's fee, but Owner shall not otherwise be responsible for damages for lost or anticipated fees and/or profits on Work not performed on account of any termination described in this Paragraph 15.4. Owner also shall not be obligated to reimburse Contractor for any central office overhead in connection with the termination. However, in no event shall the amounts to be paid to Contractor pursuant to the preceding sentence, when combined with the amounts previously paid to Contractor and the costs thereafter required to be paid by Owner to complete the Work, exceed the Contract Sum. The amounts owing by Owner to Contractor pursuant to the two immediately preceding sentences shall be as specified in Contractor's final Application for Payment approved by Owner. If Owner terminates without cause, then Owner (or a replacement contractor or another designee of Owner), shall, with respect to all subcontracts and purchase orders which Owner does not elect to terminate (or cause Contractor to terminate) assume the obligations of Contractor under such subcontracts and purchase orders covering the unperformed parts of the Work and properly entered into in accordance with the Contract, and Owner (or such replacement contractor or designee) shall indemnify Contractor from all liabilities thereafter arising thereunder.

Upon receipt of a notice of termination pursuant to this Paragraph 15.4, Contractor shall immediately, according to instructions from Owner, proceed with performance of the following duties regardless of delay in determining or adjusting amounts due under this Paragraph 15.4:

(1) cease operation as specified in this notice;

(2) place no further orders and enter into no further subcontracts for materials, labor, services or facilities except as otherwise specified in writing by Owner;

(3) terminate all subcontracts and purchase orders to the extent that Owner does not elect to assume such subcontracts and purchase orders; and

(4) take actions that may be necessary, or that Owner may direct in writing, for the protection and preservation of the Work.

In addition to payment for the Work performed prior to the effective date of termination and for any work performed following the date of termination pursuant to Owner's written request, Contractor shall be entitled to payment for materials timely fabricated off the Project site and delivered and stored in accordance with the Owner's instructions.

ITEM E-1

ADDENDUM TO RESIDENTIAL CONSTRUCTION CONTRACT
(Stipulated Price)

The provisions of this Addendum supplement and modify that certain Residential Construction Contract ("Contract") dated ___ day of _____, 200__, by and between _____, as Builder, and _____, as Owner, pertaining to Lot ___, Block ____, Section ____, out of the _____ Subdivision in Harris County, Texas.

In the event of any inconsistency between the provisions of the Contract, including the Plans and Specifications and all other construction documents (hereinafter collectively referred to as the "Contract Documents"), and the provisions of this Addendum, the provisions of this Addendum shall supercede and control. References within the Contract to Contract shall mean the Contract as modified by this Addendum. All capitalized terms used herein shall have the same respective meaning as set forth in the Contract, except as otherwise defined herein.

1. Paragraph 2 is hereby amended by the addition of the following provisions at the end of such paragraph:

The Contract Documents consist of this Contract, Drawings, Specifications, Addenda issued prior to the execution of this Contract, other documents listed in this Contract and Modifications issued after execution of this Contract.

Builder shall at once report to Architect errors, inconsistencies or omissions in the Contract Documents which have been discovered by Builder. The intent of the Contract Documents is to include all items necessary for the proper execution and completion of the Work for Builder. The Contract Documents are complementary, and what is required by one shall be as binding as if required by all. Performance by Builder shall be required only to the extent consistent with the Contract Documents and reasonably inferable from them as being necessary to produce the intended results. All dimensions and clearances necessary to the Work, as indicated on the Drawings and contained in the Specifications, shall be verified by Builder at the job site before executing the relevant portion of the Work and Builder shall report any discrepancies to the Architect for adjustment before any Work affected thereby is commenced. Additionally, if sufficient detailed information is lacking, if Work is required in such a manner as to make it impossible to produce first-class Work, or if discrepancies appear among Contract Documents, then Builder shall request the Architect's clarification or interpretation before proceeding with such Work. Architect, as used herein, shall refer to _____.

If Builder performs any Work in conformity with any Contract Document knowing it to be inconsistent with any other Contract Document, without first specifically requesting and obtaining from the Architect written instructions on how to proceed with respect to such inconsistency, the Builder shall be obligated to correct such Work according to the direction of the Owner (with the Architect's advice) without cost to the Owner.

If requested by Owner, Builder shall update from time to time one record copy of the Drawings (the "Record Drawings"), with color pencils to mark up said set with "record information" in a legible manner to show: (i) material deviations from the Drawings made during construction; (ii) details in the Work not previously shown except that to the extent that Architect should revise the Drawings to show such details; (iii) changes to existing conditions or existing conditions found to differ materially from those shown on

any existing drawings; (iv) the actual installed position of equipment, piping, conduits, light switches, electric fixtures, circuiting, ducts, dampers, access panels, control valves, drains, openings, and stub-outs if shown on the original final Drawings and substantially different from the position shown on the original final Drawings; and (v) such other information as either Owner or Architect may reasonably request. Any changes resulting from change orders or other changes requiring Architect to modify the Drawings shall be made by Architect at Owner's expense. At the completion of the Work, Builder shall deliver all Record Drawings to Owner. The provisions of this Paragraph 1 do not authorize Builder to deviate from the Contract Documents except as otherwise expressly provided herein.

If Builder elects to employ a standard building practice prevalent in the surrounding locale as an alternative and substantially equivalent building practice available in lieu of the specified procedure, the Owner shall be notified of such election by the Builder prior to Builder commencing such Work and the Owner shall have the right to insist on performance as required by the Contract Documents.

The Drawings and Specifications are to be of equal priority. In the event of any internal inconsistency in either the Drawings or Specifications, or with each other, the appropriate method of performing the Work, in the event of the above mentioned inconsistency, shall be determined by Architect. Figures take precedence over physical scale measurements. Large scale details take precedence over smaller scale details. Drawings take precedence in regard to dimensions, when in conflict with Mechanical and Structural Drawings, except for the size of the structural members. Specifically titled drawings and sections of the Specifications take precedence over indication of the item in a collateral way. Existing conditions take precedence over Drawings and Specifications for dimensions.

Where in the Drawings and Specifications, certain products, manufacturer's trade names, or catalog numbers are given, it is done for the express purpose of establishing a standard of function, dimension, appearance, and quality of design, in harmony with the Work, and is not intended for the purpose of limiting competition.

When more than one restriction for a specified material, brand, or construction process is given for an item in the Drawings and Specifications, Builder shall comply with all restrictions. When more than one optional material, brand or construction process is specified for a particular item of work, the choice shall be the Builder's. Builder may use the one Builder considers to its advantage to use.

List of "work included" and "work excluded" in the Drawings and Specifications are not intended to enumerate each and every item of work or appurtenance required, and must be used in conjunction with other portions of the Contract Documents.

If Builder proposes or installs any substitution of building materials called for in the Contract Documents, Builder represents and warrants that they are equal in quality, function and appearance to the items called for by the Contract Documents and that the substitutions will be as easily maintained and of equal durability as the specified items. If the Owner has specifically selected certain items, including and without limitation, Allowance Items, such items should not be substituted for by Builder without the Owner's prior written approval.

2. With respect to Paragraph 3 of the Contract, in the event that the Builder defaults hereunder and this Contract is terminated, the Commencement Fee shall be refunded as part of Owner's damages, particularly if the Builder has not yet commenced the Work.

3. With respect to Paragraph 3(b), all Applications for Payment shall be on an A1A form G702 and G703 and provide for a retainage of ten percent (10%). No retainage will be withheld for the Owner-furnished items unless requested by Owner and arrangements satisfactory to Builder made with respect to

such retainage. All Applications for Payment submitted by Builder are subject to the approval of the Architect and Owner's Lender, and Applications for Payment received by Owner, Owner's Architect and Lender will be paid not later than five (5) business days following receipt of such Applications for Payment, less any amount that Architect or Lender fails to approve due to defective work or work otherwise not in compliance with the requirements of the Contract Documents. If any portion of an Application for Payment is not approved by the Owner's Architect or Lender, Owner will indicate in writing the reason why such work is deemed to be defective or otherwise not in compliance with the requirements of the Contract Documents.

Upon Substantial Completion of the Work, Owner shall have paid Builder a sum sufficient to increase the total payments up to 90% of the Contract Price, less such amounts as are withheld pursuant to Paragraph 23(a).

At the time each progress payment is made to Builder, Builder will deliver to Owner Builder's Partial Release of Lien in the form attached hereto as Exhibit "C" covering such progress payment.

Not later than the date of each subsequent Application for Payment, the Builder shall submit to the Owner releases of liens for all subcontractors and suppliers who have performed any services or provided any materials for the Home since the date of the preceding Application for Payment and were paid from such progress payment. Each release of lien shall waive and release all rights of the affiant to claim or assert any lien against the Home either for the period through the last day included in the previous Application for Payment ("Partial Release of Lien") or for the affiant's completed work on the Home ("Final Release of Lien"), as applicable.

Builder shall promptly pay all bills for labor and material performed and furnished by others in connection with the construction, furnishing and equipping of the improvements and performance of the Work. Provided that Builder has been paid by Owner all sums (or the applicable portion thereof) due to Builder pursuant to the Contract (other than under the circumstances of Paragraph 23[a] hereof), Builder shall not voluntarily permit any laborer's, materialmen's, mechanic's, or other similar liens to be filed or otherwise imposed on any part of the Work or the property on which the Work is performed. If any laborer's, materialmen's, mechanic's, or other similar lien or claim thereof is filed or otherwise imposed against the Property, Builder, within thirty (30) days after actual notice to Builder of the filing of such lien or other imposition thereof, shall cause such lien to be released or otherwise discharged, except as to liens which Builder is contesting in good faith by appropriate action diligently pursued, provided Builder has notified Owner of the nature of such lien and informed Owner of the type of action being pursued by Builder and, if requested by Owner, has provided Owner with a surety bond satisfactory to Owner, sufficient to cover such claim in the event Builder is unsuccessful in contesting same or has made other arrangements satisfactory to Owner. If, however, Builder, within the aforesaid thirty (30) day period, does not cause such lien either to be released and discharged forthwith or contests same in the manner provided hereinabove, then Owner shall have the right to pay all sums necessary to obtain such release and discharge and reduce the Contract Price by the amount of such payments made by Owner. Builder shall indemnify, defend and hold harmless Owner from all claims, losses, demands, causes of action or suits of whatever nature arising out of any such lien or that part of the Work covered thereby.

4. Paragraph 3(c) of the Contract is hereby deleted and replaced by the following paragraphs:

Subject to Paragraph 23(a), prior to possession by Owner, final payment, constituting the entire unpaid balance of the Contract Price, shall be made by Owner to Builder not later than thirty (30) days after the Work has been substantially completed, the Contract fully performed, and a Certificate of Occupancy, if applicable, or other final occupancy permit has been issued by the (municipal authority) _____. At the time of final payment, Builder will deliver to Owner Builder's final release of lien in the form

attached hereto as Exhibit ”D” covering such progress payments and final release of lien instruments from all subcontractors and suppliers who performed any services or provided any materials for the Home.

Promptly following Owner’s receipt of the final occupancy permit or Certificate of Occupancy, as applicable, Owner will deliver Owner’s punch list to Builder. Builder will promptly commence the completion and/or correction of punch list items within twenty-one (21) days thereafter. Upon the twenty-first (21st) day following delivery of the punch list, Owner and Builder will walk-through the Home to review the status of the punch list items. Within ten (10) days following the walk-through, Builder will complete or correct all punch list items not theretofore completed by Builder and possession of the Property shall be delivered to Owner. If, however, Builder has not completed or corrected, as applicable, all punch list items by the expiration of said ten (10) day period, final payment will be made by Owner to Builder, less one hundred twenty-five percent (125%) of the value assigned by Owner and Builder to the punch list items not yet completed or corrected, and possession of the Property shall be delivered to Owner. Payment with respect to such punch list items shall be made by Owner on an item-by-item basis within ten (10) days following the completion of such item(s).

5. Paragraph 3(d) of the Contract is hereby added to read as follows:

Payments due and unpaid under this Contract shall bear interest from the date payment is due at the lesser of ten percent (10%) per annum or the maximum non-usurious rate of interest permitted by law. No interest shall be payable on retainage as long as the retainage is timely paid in accordance with this Contract.

6. The following is hereby added to Paragraph 6 of the Contract to read as follows:

Builder shall fully acquaint itself with all existing conditions and limitations affecting the Work, including, without limitation, all property lines, utility locations, existing improvements, elevations, and site and local conditions. Claims for additional compensation or extensions of time because of the failure of Builder to familiarize itself with conditions at the site will not be allowed. It is not intended by this provision to preclude claims for additional compensation or extension of time for conditions that would not reasonably be foreseen from a diligent visual inspection of the site, Builder’s review of soils reports furnished by Owner, or Builder’s experience in building in the _____ area.

If conditions are encountered at the site which are subsurface or otherwise concealed physical conditions which differ materially from those indicated in the Contract Documents, including the soils reports furnished by Owner, or unknown physical conditions of an unusual nature, which differ materially from those ordinarily found to exist and generally recognized as inherent in construction activities of the character provided for in the Contract Documents then notice by the observing party shall be given to the other party promptly before conditions are disturbed and in no event later than ten (10) days after first observance of the conditions. Architect will promptly investigate such conditions and, if they differ materially and cause an increase or decrease in Builder’s cost of, or time required for, performance of any part of the Work, will recommend an equitable adjustment in the Contract Price. If Architect determines that the conditions at the site are not materially different from those indicated in the Contract Documents or soils reports delivered to Builder and that no change in the terms of the Contract Documents is justified, Architect shall so notify Owner and Builder in writing, stating the reasons. Claims by either party in opposition to such determination must be made within twenty-one (21) days after Architect has given notice of the decision.

7. The third grammatical sentence of Paragraph 9 of the Contract is hereby deleted and replaced by the following:

The Owner may order changes in the Work consisting of additions, deletions or modifications. If the cost of any change in the Work cannot be agreed upon by Owner and Builder, Builder, provided Builder receives a written order signed by Owner, shall nevertheless promptly proceed with the Work involved. The cost of such Work shall then be determined by the Architect on the basis of actual cost and savings of those performing the Work attributable to the change, plus _____ percent (___%) for profit and overhead. In such case, Builder shall keep and present, in such form as Owner may prescribe, an itemized accounting together with appropriate supporting data for inclusion in a Change Order. Pending final determination of cost to Owner, payments shall be made on the Architect's Certificate for Payment. With respect to any additive change involving the purchase of materials, Owner shall pay the additional amount at the time the materials are ordered by Builder if required by the supplier. Any additional cost involving labor performed by Builder or a subcontractor shall be paid for in the Builder's draw request following performance of such work. The amount of credit to be allowed by Builder to Owner for any deletion or change which results in a net decrease in the cost of the Work will be the amount of the actual net cost as confirmed by the Architect. When both additions and credits are involved in any one change, the allowance for overhead and profit shall be figured on the basis of the net increase or net decrease, as applicable.

8. The first grammatical sentence in the last grammatical paragraph in Paragraph 9 of the Contract is hereby deleted.

9. With respect to Paragraph 10 of the Contract, the Builder shall not unreasonably withhold its approval of the Owner's separate contractors. Notwithstanding the statement in Paragraph 10 that a subcontractor is not an Agent or representative of the Builder, the Builder shall be responsible for such subcontractor's work.

10. The last grammatical sentence of Paragraph 11(a) is amended to read as follows: Owner hereby agrees to indemnify, defend and hold Builder and Builder's agents, subcontractors, successors and assigns (collectively, the "Builder Parties" [excluding, however, any claims asserted by any employees of the Builder Parties]), harmless from and against any and all claims, damages, liabilities, injuries, losses, fees, costs and expenses, including, but not limited to, court costs, reasonable attorney's fees (whether or not litigation is commenced) of whatever nature or type, Contractor and the Contractor Parties may hereafter suffer, incur or be required to pay out by reason of: (a) any injury or damage sustained or purported to have been sustained by any person as a result of the acts or omissions of the Owner or any of the Owner's Parties. The Owner's indemnification obligation hereunder shall be subject to the laws of comparative negligence.

The Builder shall be responsible for initiating, maintaining and supervising all prudent safety precautions and programs in connection with the performance of the Work. Builder shall give notices and comply with all applicable laws, ordinances, rules, regulations and lawful orders of public authorities bearing on the safety of persons and property and protection from damage, injury or loss. The Builder shall promptly remedy damage and loss to property caused in whole or in part by the Builder, subcontractor, a sub-subcontractor or anyone directly or indirectly employed by any of them, or by anyone for whose acts they may be liable and for which the Builder is responsible under this paragraph except for damages and losses attributable by acts or omissions of the Owner or Owner's contractors, agents or employees or by anyone for whose acts any of them may be liable, and not attributable to the fault or negligence of the Builder.

Notwithstanding anything to the contrary contained in the Contract Documents, and notwithstanding any liability insurance maintained or required to be maintained by Owner or Builder under the Contract Documents, Builder hereby agrees to indemnify, defend and hold Owner and Lender, their agents, legal representatives, successors and assigns (collectively, the "Owner Parties"), harmless from and against any and all claims, damages, liabilities, injuries, losses (including, without limitation, any claim for injury to,

loss or use, or destruction of property) fees, costs and expenses, including but not limited to, court costs and reasonable attorney's fees (whether or not litigation is commenced), of whatever nature or type, Owner and the Owner's Parties may hereafter suffer, incur or be required to pay out by reason of: (a) any injury or damage sustained or purported to have been sustained by any person or thing as a result of the construction work contemplated hereby; or (b) any other act or omission of Builder, its agents, representatives or other persons who are at any time during the course of erection and construction of the improvements on the Property, including, but not limited to, subcontractors, laborers, materialmen and suppliers. All of the Builder's indemnification obligations hereunder shall be subject to the laws of comparative negligence.

11. With respect to Paragraph 11(b) of the Contract, the Builder will cause trees and vegetation to be preserved in accordance with the guidelines described in the report ("Report") attached hereto as Exhibit __ and made part hereof for all purposes. If the Builder has any questions with respect to any methods of protection specified in the Report, the Builder shall contact _____ prior to commencing any portion of the Work which effects such trees and vegetation.

12. The following provisions are hereby added to Paragraph 12 to read as follows:

Certificates of such insurance shall be delivered to Owner and _____ _____ ("Lender") prior to the commencement of the Work. Each policy of insurance obtained by Builder pursuant to the Contract shall provide (i) that such policy shall not be cancelled, endorsed, altered or re-issued to effect a change in coverage for any reason or to any extent whatsoever unless the insured shall have first given Owner and Lender at least fifteen (15) days prior written notice; (ii) that Owner and/or Lender may, but shall not be obligated to, make premium payments to prevent the cancellation, endorsement, alteration or re-issuance of such policy; (iii) that the Builder's risk policies shall be payable to Owner and Lender as their interests may appear and be subject to the standard mortgage clause; and (iv) Owner and Lender shall be named as an additional insured on the Builder's commercial general liability policy. The Builder's statutory worker's compensation insurance policy shall be endorsed with a waiver of subrogation in favor of Owner. The Builder's commercial general liability insurance shall be endorsed to be primary as to any act of, by, through or under Builder at the Property.

Owner and Builder agree that in the event Owner or Builder ("First Party") sustains a loss by reason of fire, damage or other casualty which is covered by a fire or extended coverage insurance policy or builder's risk policy or other policy required to be carried by the First Party under this Contract, including protection against theft, burglary and vandalism, and such fire, casualty or damage is caused in whole or in part by the acts or omissions of the other party hereto ("Second Party") or the Second Party's agents, servants or employees, then the First Party agrees to look solely to its insurance proceeds (if any); and the First Party shall not be entitled to the recovery of damages against the Second Party or the agents, servants, employees, heirs, legal representatives or assigns of the Second Party; and no third party shall have any right of recovery against the Second Party or the agents, servants, employees, heirs, legal representatives or assigns of the Second Party by way of subrogation or assignment.

13. With respect to Paragraph 13 of the Contract, Owner's approval of certain items from an aesthetic standpoint shall not be construed as total acceptance of all respects of the Work, particularly those portions of the Work not susceptible to review by Owner's visual observations.

14. The following is hereby added to Paragraph 14:

Builder does hereby assign and transfer to Owner all warranties heretofore or hereafter received by Builder with respect to subcontracts and purchase orders covering materials incorporated into the Work; provided, however, Owner and Builder agree that during the warrant period hereinafter referred to,

Builder shall be obligated to enforce such warranties at no cost or expense to Owner, except for warranties relating to home appliances and other consumer products which shall be enforced directly by Owner.

The Limited Warranty described in Paragraph 14 shall be the _____ edition, subject, however, to those modifications agreed to in writing by Builder and Owner.

15. Paragraph 15(a) is hereby deleted and replaced by the following:

The Owner may terminate the Contract if the Builder:

(i) persistently or repeatedly refuses or fails to supply enough properly skilled workers or proper materials;

(ii) persistently disregards laws, ordinances, or rules, regulations or orders of a public authority having jurisdiction;

(iii) otherwise is guilty of a material breach of the Contract Documents;

(iv) Builder becomes insolvent, or makes a transfer in fraud of creditors, or makes an assignment for the benefit of creditors;

(v) Builder files or has filed against it a petition under any chapter or section of the united States Bankruptcy Code, as amended, or under any similar law or statute of the United States or any state thereof, or shall be adjudged bankruptcy or insolvent in any legal proceeding;

(vi) a receiver or trustee is appointed for all or a significant portion of the assets of Builder;

(vii) Builder actually or constructively abandons, or puts Owner on actual or constructive notice that it intends to abandon, the Home, except where Builder has given Owner written notice that it is stopping Work as authorized by the provisions of the Contract Documents.

If an event of default by Builder specified in this Paragraph 15(a) should occur, then, in addition to all other remedies of Owner under the Contract Documents and available at law or in equity, Owner may, if the Builder fails to cure such default within ten (10) days following written notice thereof from Owner (or in the case of a default which cannot be cured within ten [10] days Builder fails to commence the curing of such default within ten [10] days and continuously prosecutes such curing until completion, which curing shall occur not later than thirty [30] days following written notice of such default from Owner or as soon as reasonably possible thereafter, but in no event beyond the date which Owner has advised Builder that such default must be cured for Owner to avoid a default under its Loan Contract with Owner's Lender), immediately and without further notice terminate the Contract and take possession of the site and of all materials, equipment, tools and construction equipment and machinery thereon owned by Builder, accept an assignment of subcontracts and supply Contracts which Owner elects to assume and may finish the Work by whatever reasonable method Owner and Architect may deem expedient.

After any termination of this Contract by Owner pursuant to this Paragraph 15(a), Builder shall not be entitled to any further payment under this Contract except to the extent of any amount by which Work completed or installed by Builder prior to such termination and not previously paid for by Owner exceeds the amount due by Builder to Owner under this Paragraph 15(a) (including all damages which Owner

would be entitled to recover as a result of the breach of this Contract by Builder), and even then only at such time as the Work is finally completed. It is expressly agreed that pursuit by Owner of any one or more of the remedies provided herein or otherwise available at law or in equity shall not constitute an election of remedies by Owner, nor shall forbearance by Owner to enforce one or more of the remedies provided herein upon an event of default by Builder be deemed or construed to constitute a waiver of such default.

If the unpaid balance of the Contract Price exceeds the cost of finishing the Work, including compensation for the Architect's services and expenses made necessary thereby, such excess shall be paid to the Builder within fifteen (15) days following written demand therefor. If such costs exceed the unpaid balance, the Builder shall pay the difference to the Owner within fifteen (15) days following written demand therefor. The amount to be paid to the Builder or Owner, as the case may be, shall be certified by the Architect, upon application, and its obligation for payment shall survive termination of the Contract.

16. Paragraph 15(b) is hereby deleted and replaced by the following:

If Owner fails or refuses to comply with the Owner's payment obligations under this Contract and Owner fails to cure the same within thirty (30) days following written notice from Builder, then Builder may terminate this Contract and/or stop the Work. The foregoing shall not limit any and all rights and remedies of Builder under applicable law which Builder may pursue at its option upon default by Owner, being in addition to the remedies of Builder as provided for in the Mechanic's and Materialmen's lien Contract (if any) or other instrument executed between the parties hereto which grants to Builder the right to foreclose or exercise other remedies as therein provided.

17. Notwithstanding anything contained in Paragraph 16 to the contrary, Builder represents and warrants that the Builder has no actual knowledge of health hazards or environmental conditions affecting the Property and that Builder has not used and will not in the future use materials constituting hazardous substances in connection with its construction on the Property.

18. With respect to Paragraph 22 of the Contract, Builder shall not assign this Contract or any rights under this Contract, although Owner acknowledges that Builder will enter into subcontracts and purchase orders with respect to the Work.

19. Paragraph 23(a) of the Contract is hereby added to read as follows:

Payments may be withheld by Owner on account of (1) defective Work disapproved by Architect, (2) claims filed by third parties, (3) failure of Builder to make payments properly to Subcontractors or for labor, materials or equipment, (4) reasonable evidence that the Work cannot be completed for the unpaid balance of the Contract Price, or (5) persistent failure to carry out the Work in accordance with the Contract Documents. When the above reasons for withholding a portion of the payment are removed, payment shall promptly be made from amounts previously withheld.

20. Paragraph 23(b) of the Contract is hereby added to read as follows:

Builder shall comply with and give notices required by laws, ordinances, rules, regulations and lawful orders of public authorities bearing on performance of the Work; provided, however, that Builder shall not be responsible for cost of obtaining approvals or certifications from any engineer or Architect as long as such approvals or certifications do not relate to Builder's defective Work or Work re-executed by Builder. Requirements of public authorities mentioned in this Paragraph 23(b) apply as minimum requirements only. They do not supersede more stringent requirements stated elsewhere in the Contract Documents. If changes must be made to the Contract Documents because of a change in law or

governmental regulations after the effective date hereof, appropriate adjustments will be made in the Contract Price.

21. Paragraph 23(c) of the Contract is hereby added to read as follows:

Builder shall keep the site of the Home reasonably clean and free from rubbish, excess debris, surplus and waste material and shall remove the same from the site of the Home as the Work progresses, all as and when required by the Contract Documents and applicable laws or deed restrictions. If Builder fails to do so after seven (7) days' written notice from Owner, Owner may remove same at Builder's expense. In the event Owner undertakes the removal of same from the site of the Home, such removal will in no way qualify or limit Builder's obligations under the Contract Documents. At completion of the Work, Builder shall remove from and about the Home waste materials, rubbish, Builder's tools, construction equipment, machinery and surplus materials.

22. Paragraph 23(d) of the Contract is hereby added to read as follows:

Builder shall provide Owner, Architect and the Lender's inspector, if any, access to the Work in preparation and progress wherever located.

23. Paragraph 23(e) of the Contract is hereby added to read as follows:

To the fullest extent permitted by law, Builder shall indemnify and hold harmless Owner, and agents and separate contractors of Owner from and against claims, damages, losses and expenses, including but not limited to reasonable attorneys' fees, arising out of or resulting from performance of the Work by Builder, provided that such claim, damage, loss or expense is attributable to bodily injury, sickness, disease or death, or to injury to or destruction of tangible property (other than the Work itself except to the extent covered by Builder's risk insurance) including loss of use resulting therefrom, but only to the extent caused in whole or in part by negligent acts or omissions of Builder, one of Builder's Subcontractors or anyone directly or indirectly employed by them or anyone for whose acts they may be liable.

The obligations of Builder under this Paragraph 23(e) shall not extend to the liability of Architect, Architect's consultants, and agents and employees of any of them arising out of (1) the preparation or approval of maps, drawings, opinions, reports, surveys, Change Orders, designs or specifications, or (2) the giving of or the failure to give directions or instructions by Architect, Architect's consultants, and agents and employees of any of them provided such giving or failure to give is a cause, in whole or in part, of the injury or damage.

24. Paragraph 23(f) of the Contract is hereby added to read as follows:

Any encroachments made by Builder or his subcontractors on adjacent properties or easements due to construction as revealed by an improvement survey will be the responsibility of Builder, and Builder shall correct these encroachments within fifteen (15) days of the date of the improvement survey at the sole cost and expense of Builder, either by the removal of the encroachments or satisfactory Contracts with the adjacent property owners or the holders of easements allowing the encroachments to remain. Builder may rely on the survey of the Property furnished by Owner in locating the foundation and other improvements.

25. Paragraph 23(g) of the Contract is hereby added to read as follows:

Owner reserves the right to perform construction or operations related to the Home with Owner's own forces and to award separate contracts in connection with other portions of the Home or other construction or operations on the site under conditions of the contract identical or substantially similar to

these, including those portions related to insurance and waiver of subrogation. If Builder claims that delay or additional cost is involved because of such action by Owner, Builder shall make claims as provided elsewhere in the Contract Documents. Builder shall afford Owner's separate contractors reasonable opportunity for the introduction and storage of their equipment and performances or activities and shall connect and coordinate Builder's construction and operations with separate contractors as required by the Contract Documents. Owner shall require its separate contractors to cooperate and coordinate with Builder.

26. Paragraph 23(h) of the Contract is hereby added to read as follows:

When any non-conforming work is found or confirmed by Owner, Builder, at Builder's expense, shall correct the entire area of Work involved, unless Builder can completely define the limits of the non-conforming work.

27. Paragraph 23(i) of the Contract is hereby added to read as follows:

Builder acknowledges that Owner will borrow certain funds to finance the construction of the Work and, that as a condition to any loans to Owner, Owner will collaterally assign this Contract to the Lender and Lender may require from time to time certain statements, certificates, and documents from Builder. Builder covenants and agrees that any lien, statutory, expressed or implied, right and interest (whether choate or inchoate and including, without limitation, all mechanics' and materialmen's liens under the applicable laws and statutes of the State of Texas) which are owned or claimed by Builder or shall exist or shall hereafter accrue to the benefit of Builder for labor performed, materials furnished and Work done on this Home, shall be and remain subordinate, second and inferior to any first and second lien securing the payment of an acquisition, interim construction and/or permanent loan and all advances made thereunder, and to any renewals, extensions or rearrangements thereof. Neither Builder nor any Subcontractor or other party shall be permitted to remove any improvements or other property constructed or installed or delivered in connection with the Work notwithstanding that such improvements or other property can be removed without material injury to any improvements not sought to be removed by any lien claimant and without such injury to any improvements sought to be removed by any lien claimant. A subordination provision to this effect applicable to liens and lien rights of Subcontractors shall be contained in all Subcontracts entered into by Builder, and Builder will indemnify and hold Owner harmless from any failure or refusal of any Subcontractor to comply with this provision, as well as any assertion by such Subcontractor that such Subcontractor's lien is prior to or of equal dignity with the Lender's lien. At the request of Owner, Builder shall, without delay, execute or cause to be executed, such additional documents as may be required from time to time by the Lender to give effect to the provisions hereof and furnish documents, releases and waivers evidencing payments to Subcontractors and suppliers and such Subcontractors' and suppliers' release of liens arising out of the performance of the Work. Owner will authorize Lender to transfer payments only to Builder if and when Builder becomes entitled to such payments pursuant to Paragraph 3, upon approval by Owner.

In the event of a default by Owner under its interim loan agreement with Lender, the unperformed part of this Contract will be performed by Builder for the benefit and at the expense of the Lender, should the Lender so elect, provided that there is no material interruption in the prosecution of the Work and that Builder has been paid for all Work done to date.

28. Paragraph 23(j) of the Contract is hereby added to read as follows:

The Architect will interpret and decide matters concerning performance under and requirements of the Contract Documents on written request of either the Owner or Builder. The Architect will make initial decisions on all claims, disputes or other matters in question between the Owner and Builder, but will not

be liable for results of any interpretations or decisions rendered in good faith. The Architect's decisions in matters relating to aesthetic effect will be final if consistent with the intent expressed in the Contract Documents. All other decisions of the Architect, except those which have been waived by making or acceptance of final payment except those which have been waived by making an acceptance of final payment - subject to mediation and arbitration in accordance with the provisions of Paragraph 17.

29. Paragraph 23(k) of the Contract is hereby added to read as follows:

Due to the benefit accruing to the Owner as a result of having a unique dwelling, Builder agrees not to use the Plans in connection with any other construction that Builder may be involved with and Builder agrees not to provide the Plans to any other person or entity. This provision shall survive the completion of the Home and the expiration of this Contract.

Except as amended by this Addendum, the Contract Documents remain unchanged and continue in full force and effect.

Signed for identification:

OWNER	BUILDER
By: _____	By: _____
Name: _____	Name: _____
Title: _____	Title: _____

ITEM E-2

ADDENDUM TO RESIDENTIAL CONSTRUCTION AGREEMENT
(Cost Plus)

The provisions of this Addendum supplement and modify that certain Residential Construction Agreement ("Agreement") dated ___ day of _____, 200__, by and between _____, as Builder, and _____, as Owner, pertaining to Lot ___, Block ____, Section ____, out of the _____ Subdivision in Harris County, Texas.

In the event of any inconsistency between the provisions of the Agreement, including the Plans and Specifications and all other construction documents (hereinafter collectively referred to as the "Contract Documents"), and the provisions of this Addendum, the provisions of this Addendum shall supercede and control. References within the Agreement to Agreement shall mean the Agreement as modified by this Addendum. All capitalized terms used herein shall have the same respective meaning as set forth in the Agreement, except as otherwise defined herein.

1. Paragraph 2 is hereby amended by the addition of the following provisions at the end of such paragraph:

The Contract Documents consist of this Agreement, Drawings, Specifications, Addenda issued prior to the execution of this Agreement, other documents listed in this Agreement and Modifications issued after execution of this Agreement.

Builder shall at once report to Architect errors, inconsistencies or omissions in the Contract Documents which have been discovered by Builder. The intent of the Contract Documents is to include all items necessary for the proper execution and completion of the Work for Builder. The Contract Documents are complementary, and what is required by one shall be as binding as if required by all. Performance by Builder shall be required only to the extent consistent with the Contract Documents and reasonably inferable from them as being necessary to produce the intended results. All dimensions and clearances necessary to the Work, as indicated on the Drawings and contained in the Specifications, shall be verified by Builder at the job site before executing the relevant portion of the Work and Builder shall report any discrepancies to the Architect for adjustment before any Work affected thereby is commenced. Additionally, if sufficient detailed information is lacking, if Work is required in such a manner as to make it impossible to produce first-class Work, or if discrepancies appear among Contract Documents, then Builder shall request the Architect's clarification or interpretation before proceeding with such Work. Architect, as used herein, shall refer to _____.

If Builder performs any Work in conformity with any Contract Document knowing it to be inconsistent with any other Contract Document, without first specifically requesting and obtaining from the Architect written instructions on how to proceed with respect to such incon-

sistency, the Builder shall be obligated to correct such Work according to the direction of the Owner (with the Architect's advice) without cost to the Owner.

If requested by Owner, Builder shall update from time to time one record copy of the Drawings (the "Record Drawings"), with color pencils to mark up said set with "record information" in a legible manner to show: (i) material deviations from the Drawings made during construction; (ii) details in the Work not previously shown except that to the extent that Architect should revise the Drawings to show such details; (iii) changes to existing conditions or existing conditions found to differ materially from those shown on any existing drawings; (iv) the actual installed position of equipment, piping, conduits, light switches, electric fixtures, circuiting, ducts, dampers, access panels, control valves, drains, openings, and stub-outs if shown on the original final Drawings and substantially different from the position shown on the original final Drawings; and (v) such other information as either Owner or Architect may reasonably request. Any changes resulting from change orders or other changes requiring Architect to modify the Drawings shall be made by Architect at Owner's expense. At the completion of the Work, Builder shall deliver all Record Drawings to Owner. The provisions of this Paragraph 2 do not authorize Builder to deviate from the Contract Documents except as otherwise expressly provided herein.

If Builder elects to employ a standard building practice prevalent in the surrounding locale as an alternative and substantially equivalent building practice available in lieu of the specified procedure, the Owner shall be notified of such election by the Builder prior to Builder commencing such Work and the Owner shall have the right to insist on performance as required by the Contract Documents.

The Drawings and Specifications are to be of equal priority. In the event of any internal inconsistency in either the Drawings or Specifications, or with each other, the appropriate method of performing the Work, in the event of the above mentioned inconsistency, shall be determined by Architect. Figures take precedence over physical scale measurements. Large scale details take precedence over smaller scale details. Drawings take precedence in regard to dimensions, when in conflict with Mechanical and Structural Drawings, except for the size of the structural members. Specifically titled drawings and sections of the Specifications take precedence over indication of the item in a collateral way. Existing conditions take precedence over Drawings and Specifications for dimensions.

Where in the Drawings and Specifications, certain products, manufacturer's trade names, or catalog numbers are given, it is done for the express purpose of establishing a standard of function, dimension, appearance, and quality of design, in harmony with the Work, and is not intended for the purpose of limiting competition.

When more than one restriction for a specified material, brand, or construction process is given for an item in the Drawings and Specifications, Builder shall comply with all restrictions. When more than one optional material, brand or construction process is specified for a particular item of work, the choice shall be the Builder's. Builder may use the one Builder considers to its advantage to use.

List of "work included" and "work excluded" in the Drawings and Specifications are not intended to enumerate each and every item of work or appurtenance required, and must be used in conjunction with other portions of the Contract Documents.

If Builder proposes or installs any substitution of building materials called for in the Contract Documents, Builder represents and warrants that they are equal in quality, function and appearance to the items called for by the Contract Documents and that the substitutions will be as easily maintained and of equal durability as the specified items. If the Owner has specifically selected certain items, including and without limitation, Allowance Items, such items should not be substituted for by Builder without the Owner's prior written approval.

2. Note: With respect to Paragraph 3, the Builder's Fee should either be a fixed amount or a percentage of the Cost of the Work, but not both. Additionally, if the Owner desires a Guaranteed Maximum Price, Paragraph 3 needs to be amended to establish a Guaranteed Maximum Price.

3. The last grammatical sentence of the first grammatical paragraph of Paragraph 3 shall be deleted and replaced with the following:

The term "Cost of the Work" shall mean the costs necessarily incurred by Contractor in good faith in the proper performance of the Work. Such costs shall be at rates not higher than the standard paid at the place of the Project for work similar to the Work covered by the Contract Documents, except with the prior consent of the Owner. The Contractor shall consult with Owner as to the need to obtain competitive bids with respect to several major components of the Project. The Cost of the Work shall include only the items set forth in this Paragraph 3, but shall be subject to the limitations and exclusions of this Paragraph 3 set forth below:

The term "Cost of the Work" shall not include any of the following items:

(a) Overhead or general expenses of the Contractor of any kind except as may be expressly included in Exhibit "__" as a Project Cost.

(b) Costs due to the negligence of the Contractor a Subcontractor or anyone directly or indirectly employed by either, or for acts for which either may be liable, including but not limited to the correction of defective Work and the disposal of materials or equipment improperly supplied.

(c) Notwithstanding the breakdown or categorization of any costs to be reimbursed in Paragraph 3 or elsewhere in the Contract Documents, there shall be no duplication of payment of any particular items for which payment is requested that can be characterized as falling into more than one of the types of compensable or reimbursable categories.

(d) Any cost or expense incurred under any indemnification obligation of Contractor hereunder.

(e) Any repairs to the Work performed by Contractor following Substantial Completion in satisfaction of a warranty of the Work made to Owner in excess of the warranty contingency.

(f) Losses and expenses sustained by Contractor, Subcontractors or Sub-subcontractors, not compensated by insurance or otherwise, if such losses and expenses are due to infidelity or dishonesty on the part of any employee of Contractor, Subcontractors or Sub-subcontractors, or others to whom their respective property may be entrusted, inventory shortage or unexplained disappearance.

(g) Any of the Contractor's income or excess profits, corporation, franchise or similar taxes.

4. The following provisions are added to Paragraph 3: The provisions of Subparagraph 3(f) are subject to provisions of Paragraph 1 of this Addendum pertaining to Builder notifying Owner of any significant discrepancies in the Plans and Specifications or omissions prior to proceeding with such Work.

Owner and Builder will establish a joint checking account for all draws to be wire transferred to such account. Both Owner and Builder will be signatories on this account with only one signature required on checks. Builder will be responsible for paying all bills out of this account and for providing Owner with a detailed monthly accounting and copy of the check register on a monthly basis not later than the fifteenth (15th) day of each month for the draws received by Builder and the payments made by Builder during the prior month.

All cash discounts shall accrue to the benefit of the Owner. All trade discounts, rebates and refunds and all returns from sale of surplus material and equipment shall accrue to the Owner.

With respect to the Schedule of Values attached hereto as Exhibit "__", the line item amount are estimated for control purposes and will float from time to time based upon the length of the Project. The Builder shall have the right to reallocate line items comprising the Schedule of Values from time to time to cover cost overruns when the Contractor can demonstrate savings in other line items. Such adjustments, if they exceed more than ___ percent (___%) of any line item, shall be subject to the Owner's approval, which approval shall not be unreasonably withheld.

The Builder accepts the relationship of trust and confidence established between it and Owner under this Contract. Builder further agrees to furnish efficient business administration and superintendence and to furnish at all times an adequate supply of workers and materials, and to perform the Work in the best way and in the most expeditious and economical manner consistent with the interests of the Owner.

Owner, at its sole cost and expense, upon reasonable notice to Builder, shall have the right to review, copy and/or audit all of Builder's check register, books, records, subcontracts, purchase orders, statements, invoices, bills, and other documents of any kind relating to the Project. Builder shall cooperate with Owner and its representatives and agents during such review of Builder's books, records, and related documents.

5. With respect to Paragraph 4, all Applications for Payment shall be on an A1A form G702 and G703 and provide for a retainage of ten percent (10%). No retainage will be withheld for the Owner-furnished items unless requested by Owner and arrangements satisfactory to Builder made with respect to such retainage. All Applications for Payment submitted by Builder are subject to the approval of the Architect and Owner's Lender, and Applications for Payment received by Owner, Owner's Architect and Lender will be paid not later than five (5) business days following receipt of such Applications for Payment, less any amount that Architect or Lender fails to approve due to defective work or work otherwise not in compliance with the requirements of the Contract Documents. If any portion of an Application for Payment is not approved by the Owner's Architect or Lender, Owner will indicate in writing the reason why such work is deemed to be defective or otherwise not in compliance with the requirements of the Contract Documents.

Upon Substantial Completion of the Work, Owner shall have paid Builder a sum sufficient to increase the total payments up to 90% of the Contract Price, less such amounts as are withheld pursuant to Paragraph 22(a).

At the time each progress payment is made to Builder, Builder will deliver to Owner Builder's Partial Release of Lien in the form attached hereto as Exhibit "___" covering such progress payment.

Not later than the date of each subsequent Application for Payment, the Builder shall submit to the Owner releases of liens for all subcontractors and suppliers who have performed any services or provided any materials for the Home since the date of the preceding Application for Payment and were paid from such progress payment. Each release of lien shall waive and release all rights of the affiant to claim or assert any lien against the Home either for the period through the last day included in the previous Application for Payment ("Partial Release of Lien") or for the affiant's completed work on the Home ("Final Release of Lien"), as applicable.

Builder shall promptly pay all bills for labor and material performed and furnished by others in connection with the construction, furnishing and equipping of the improvements and performance of the Work. Provided that Builder has been paid by Owner all sums (or the applicable portion thereof) due to Builder pursuant to the Agreement (other than under the circumstances of Paragraph 22[a] hereof), Builder shall not voluntarily permit any laborer's, materialmen's, mechanic's, or other similar liens to be filed or otherwise imposed on any part of the Work or the property on which the Work is performed. If any laborer's, materialmen's, mechanic's, or other similar lien or claim thereof is filed or otherwise imposed against the Property, Builder, within thirty (30) days after actual notice to Builder of the filing of such lien or other imposition thereof, shall cause such lien to be released or otherwise discharged, except as to liens which Builder is contesting in good faith by appropriate action diligently pursued, provided Builder has notified Owner of the nature of such lien and informed Owner of the type of action being pursued by Builder and, if requested by Owner, has provided Owner with a surety bond satisfactory to Owner, sufficient to cover such claim in the event Builder is unsuccessful in contesting same or has made other arrangements satisfactory to Owner. If, however, Builder, within the aforesaid thirty (30) day period, does not cause such lien either to be released and discharged forthwith or contests same in the manner provided hereinabove, then

Owner shall have the right to pay all sums necessary to obtain such release and discharge and reduce the Contract Price by the amount of such payments made by Owner. Builder shall indemnify, defend and hold harmless Owner from all claims, losses, demands, causes of action or suits of whatever nature arising out of any such lien or that part of the Work covered thereby.

6. The following is added to Paragraph 4:

Subject to Paragraph 22(a), prior to possession by Owner, final payment, constituting the entire unpaid balance of the Contract Price, shall be made by Owner to Builder not later than thirty (30) days after the Work has been substantially completed, the Agreement fully performed, and a Certificate of Occupancy, if applicable, or other final occupancy permit has been issued by the (municipal authority) _____. At the time of final payment, Builder will deliver to Owner Builder's final release of lien in the form attached hereto as Exhibit "___" covering such progress payments and final release of lien instruments from all subcontractors and suppliers who performed any services or provided any materials for the Home.

Promptly following Owner's receipt of the final occupancy permit or Certificate of Occupancy, as applicable, Owner will deliver Owner's punch list to Builder. Builder will promptly commence the completion and/or correction of punch list items within twenty-one (21) days thereafter. Upon the twenty-first (21st) day following delivery of the punch list, Owner and Builder will walk-through the Home to review the status of the punch list items. Within ten (10) days following the walk-through, Builder will complete or correct all punch list items not theretofore completed by Builder and possession of the Property shall be delivered to Owner. If, however, Builder has not completed or corrected, as applicable, all punch list items by the expiration of said ten (10) day period, final payment will be made by Owner to Builder, less one hundred twenty-five percent (125%) of the value assigned by Owner and Builder to the punch list items not yet completed or corrected, and possession of the Property shall be delivered to Owner. Payment with respect to such punch list items shall be made by Owner on an item-by-item basis within ten (10) days following the completion of such item(s).

Payments due and unpaid under this Agreement shall bear interest from the date payment is due at the lesser of ten percent (10%) per annum or the maximum non-usurious rate of interest permitted by law. No interest shall be payable on retainage as long as the retainage is timely paid in accordance with this Agreement.

7. The following is hereby added to Paragraph 6 of the Agreement to read as follows:

Builder shall fully acquaint itself with all existing conditions and limitations affecting the Work, including, without limitation, all property lines, utility locations, existing improvements, elevations, and site and local conditions. Claims for additional compensation or extensions of time because of the failure of Builder to familiarize itself with conditions at the site will not be allowed. It is not intended by this provision to preclude claims for additional compensation or extension of time for conditions that would not reasonably be foreseen from a diligent visual inspection of the site, Builder's review of soils reports furnished by Owner, or Builder's experience in building in the _____ area.

If conditions are encountered at the site which are subsurface or otherwise concealed physical conditions which differ materially from those indicated in the Contract Documents, including the soils reports furnished by Owner, or unknown physical conditions of an unusual nature, which differ materially from those ordinarily found to exist and generally recognized as inherent in construction activities of the character provided for in the Contract Documents then notice by the observing party shall be given to the other party promptly before conditions are disturbed and in no event later than ten (10) days after first observance of the conditions. Architect will promptly investigate such conditions and, if they differ materially and cause an increase or decrease in Builder's cost of, or time required for, performance of any part of the Work, will recommend an equitable adjustment in the Contract Price. If Architect determines that the conditions at the site are not materially different from those indicated in the Contract Documents or soils reports delivered to Builder and that no change in the terms of the Contract Documents is justified, Architect shall so notify Owner and Builder in writing, stating the reasons. Claims by either party in opposition to such determination must be made within twenty-one (21) days after Architect has given notice of the decision.

8. The second grammatical sentence of Paragraph 8 of the Agreement is hereby deleted and replaced by the following:

The Owner may order changes in the Work consisting of additions, deletions or modifications. If the cost of any change in the Work cannot be agreed upon by Owner and Builder, Builder, provided Builder receives a written order signed by Owner, shall nevertheless promptly proceed with the Work involved. The cost of such Work shall then be determined by the Architect on the basis of actual cost and savings of those performing the Work attributable to the change, plus _____ percent (___%) for profit and overhead. In such case, Builder shall keep and present, in such form as Owner may prescribe, an itemized accounting together with appropriate supporting data for inclusion in a Change Order. Pending final determination of cost to Owner, payments shall be made on the Architect's Certificate for Payment. With respect to any additive change involving the purchase of materials, Owner shall pay the additional amount at the time the materials are ordered by Builder if required by the supplier. Any additional cost involving labor performed by Builder or a subcontractor shall be paid for in the Builder's draw request following performance of such work. The amount of credit to be allowed by Builder to Owner for any deletion or change which results in a net decrease in the cost of the Work will be the amount of the actual net cost as confirmed by the Architect. When both additions and credits are involved in any one change, the allowance for overhead and profit shall be figured on the basis of the net increase or net decrease, as applicable.

9. With respect to Paragraph 9 of the Agreement, the Builder shall not unreasonably withhold its approval of the Owner's separate contractors. Notwithstanding the statement in Paragraph 9 that a subcontractor is not an Agent or representative of the Builder, the Builder shall be responsible for such subcontractor's work.

10. The last grammatical sentence of Paragraph 10(a) is amended to read as follows: Owner hereby agrees to indemnify, defend and hold Builder and Builder's agents, subcontractors, successors and assigns (collectively, the "Builder Parties" [excluding, however, any claims asserted by any employees of the Builder Parties]), harmless from and against any and all claims

damages, liabilities, injuries, losses, fees, costs and expenses, including, but not limited to, court costs, reasonable attorney's fees (whether or not litigation is commenced) of whatever nature or type, Contractor and the Contractor Parties may hereafter suffer, incur or be required to pay out by reason of: (a) any injury or damage sustained or purported to have been sustained by any person as a result of the acts or omissions of the Owner or any of the Owner's Parties. The Owner's indemnification obligation hereunder shall be subject to the laws of comparative negligence.

The Builder shall be responsible for initiating, maintaining and supervising all prudent safety precautions and programs in connection with the performance of the Work. Builder shall give notices and comply with all applicable laws, ordinances, rules, regulations and lawful orders of public authorities bearing on the safety of persons and property and protection from damage, injury or loss. The Builder shall promptly remedy damage and loss to property caused in whole or in part by the Builder, subcontractor, a sub-Contractor or anyone directly or indirectly employed by any of them, or by anyone for whose acts they may be liable and for which the Builder is responsible under this paragraph except for damages and losses attributable by acts or omissions of the Owner or Owner's contractors, agents or employees or by anyone for whose acts any of them may be liable, and not attributable to the fault or negligence of the Builder.

Notwithstanding anything to the contrary contained in the Contract Documents, and notwithstanding any liability insurance maintained or required to be maintained by Owner or Builder under the Contract Documents, Builder hereby agrees to indemnify, defend and hold Owner and Lender, their agents, legal representatives, successors and assigns (collectively, the "Owner Parties"), harmless from and against any and all claims, damages, liabilities, injuries, losses (including, without limitation, any claim for injury to, loss or use, or destruction of property) fees, costs and expenses, including, but not limited to, court costs and reasonable attorney's fees (whether or not litigation is commenced), of whatever nature or type, Owner and the Owner's Parties may hereafter suffer, incur or be required to pay out by reason of: (a) any injury or damages sustained or purported to have been sustained by any person or thing as a result of the construction work contemplated hereby; or (b) any other act or omission of Builder, its agents, representatives or other persons who are at any time during the course of erection and construction of the improvements on the Property, including, but not limited to, subcontractors, laborers, materialmen and suppliers. All of the Builder's indemnification obligations hereunder shall be subject to the laws of comparative negligence.

11. With respect to Paragraph 10(b) of the Agreement, the Builder will cause trees and vegetation to be preserved in accordance with the guidelines described in the report ("Report") attached hereto as Exhibit __ and made part hereof for all purposes. If the Builder has any questions with respect to any methods of protection specified in the Report, the Builder shall contact _____ prior to commencing any portion of the Work which effects such trees and vegetation.

12. The following provisions are hereby added to Paragraph 11 to read as follows:

Certificates of such insurance shall be delivered to Owner and _____ _____ ("Lender") prior to the commencement of the Work. Each policy of insurance obtained by Builder pursuant to the Agreement shall provide (i) that such policy shall not be cancelled, endorsed, altered or re-issued to effect a change in coverage for any reason or to any extent whatsoever unless the insured shall have first given Owner and Lender at least fifteen (15) days prior written notice; (ii) that Owner and/or Lender may, but shall not be obligated to, make premium payments to prevent the cancellation, endorsement, alteration or re-issuance of such policy; (iii) that the Builder's risk policies shall be payable to Owner and Lender as their interests may appear and be subject to the standard mortgage clause; and (iv) Owner and Lender shall be named as an additional insured on the Builder's commercial general liability policy. The Builder's statutory worker's compensation insurance policy shall be endorsed with a waiver of subrogation in favor of Owner. The Builder's commercial general liability insurance shall be endorsed to be primary as to any act of, by, through or under Builder at the Property.

Owner and Builder agree that in the event Owner or Builder ("First Party") sustains a loss by reason of fire, damage or other casualty which is covered by a fire or extended coverage insurance policy or builder's risk policy or other policy required to be carried by the First Party under this Agreement, including protection against theft, burglary and vandalism, and such fire, casualty or damage is caused in whole or in part by the acts or omissions of the other party hereto ("Second Party") or the Second Party's agents, servants or employees, then the First Party agrees to look solely to its insurance proceeds (if any); and the First Party shall not be entitled to the recovery of damages against the Second Party or the agents, servants, employees, heirs, legal representatives or assigns of the Second Party; and no third party shall have any right of recovery against the Second Party or the agents, servants, employees, heirs, legal representatives or assigns of the Second Party by way of subrogation or assignment.

13. With respect to Paragraph 12 of the Agreement, Owner's approval of certain items from an aesthetic standpoint shall not be construed as total acceptance of all respects of the Work, particularly those portions of the Work not susceptible to review by Owner's visual observations.

14. The following is hereby added to Paragraph 13.

Builder does hereby assign and transfer to Owner all warranties heretofore or hereafter received by Builder with respect to subcontractors and purchase orders covering materials incorporated into the Work; provided, however, Owner and Builder agree that during the warranty period hereinafter referred to, Builder shall be obligated to enforce such warranties at no cost or expense to Owner, except for warranties relating to home appliances and other consumer products which shall be enforced directly by Owner.

The Limited Warranty described in Paragraph 13 shall be the _____ _____ edition, subject, however, to those modifications agreed to in writing by Builder and Owner.

15. Paragraph 14(a) is hereby deleted and replaced by the following:

The Owner may terminate the Agreement if the Builder:

(i) persistently or repeatedly refuses or fails to supply enough properly skilled workers or proper materials;

(ii) persistently disregards laws, ordinances, or rules, regulations or orders of a public authority having jurisdiction;

(iii) otherwise is guilty of a material breach of the Contract Documents;

(iv) Builder becomes insolvent, or makes a transfer in fraud of creditors, or makes an assignment for the benefit of creditors;

(v) Builder files or has filed against it a petition under any chapter or section of the united States Bankruptcy Code, as amended, or under any similar law or statute of the United States or any state thereof, or shall be adjudged bankruptcy or insolvent in any legal proceeding;

(vi) a receiver or trustee is appointed for all or a significant portion of the assets of Builder; and

(vii) Builder actually or constructively abandons, or puts Owner on actual or constructive notice that it intends to abandon, the Home, except where Builder has given Owner written notice that it is stopping Work as authorized by the provisions of the Contract Documents.

If an event of default by Builder specified in this Paragraph 14(a) should occur, then, in addition to all other remedies of Owner under the Contract Documents and available at law or in equity, Owner may, if the Builder fails to cure such default within ten (10) days following written notice thereof from Owner (or in the case of a default which cannot be cured within ten [10] days Builder fails to commence the curing of such default within ten [10] days and continuously prosecutes such curing until completion, which curing shall occur not later than thirty [30] days following written notice of such default from Owner or as soon as reasonably possible thereafter, but in no event beyond the date which Owner has advised Builder that such default must be cured for Owner to avoid a default under its Loan Agreement with Owner's Lender), immediately and without further notice terminate the Agreement and take possession of the site and of all materials, equipment, tools and construction equipment and machinery thereon owned by Builder, accept an assignment of subcontracts and supply agreements which Owner elects to assume and may finish the Work by whatever reasonable method Owner and Architect may deem expedient.

After any termination of this Agreement by Owner pursuant to this Paragraph 14(a), Builder shall not be entitled to any further payment under this Agreement except to the extent of any amount by which Work completed or installed by Builder prior to such termination and not

previously paid for by Owner exceeds the amount due by Builder to Owner under this Paragraph 14(a) (including all damages which Owner would be entitled to recover as a result of the breach of this Agreement by Builder), and even then only at such time as the Work is finally completed. It is expressly agreed that pursuit by Owner of any one or more of the remedies provided herein or otherwise available at law or in equity shall not constitute an election of remedies by Owner, nor shall forbearance by Owner to enforce one or more of the remedies provided herein upon an event of default by Builder be deemed or construed to constitute a waiver of such default.

If the unpaid balance of the Contract Price exceeds the cost of finishing the Work, including compensation for the Architect's services and expenses made necessary thereby, such excess shall be paid to the Builder within fifteen (15) days following written demand therefor. If such costs exceed the unpaid balance, the Builder shall pay the difference to the Owner within fifteen (15) days following written demand therefor. The amount to be paid to the Builder or Owner, as the case may be, shall be certified by the Architect, upon application, and its obligation for payment shall survive termination of the Agreement.

16. Paragraph 14(b) is hereby deleted and replaced by the following:

If Owner fails or refuses to comply with the Owner's payment obligations under this Agreement and Owner fails to cure the same within thirty (30) days following written notice from Builder, then Builder may terminate this Agreement and/or stop the Work. The foregoing shall not limit any and all rights and remedies of Builder under applicable law which Builder may pursue at its option upon default by Owner, being in addition to the remedies of Builder as provided for in the Mechanic's and Materialmen's lien Contract (if any) or other instrument executed between the parties hereto which grants to Builder the right to foreclose or exercise other remedies as therein provided.

17. With respect to Paragraph 21 of the Agreement, Builder shall not assign this Agreement or any rights under this Agreement, although Owner acknowledges that Builder will enter into subcontracts and purchase orders with respect to the Work.

18. Paragraph 22(a) of the Agreement is hereby added to read as follows:

Payments may be withheld by Owner on account of (1) defective Work disapproved by Architect, (2) claims filed by third parties, (3) failure of Builder to make payments properly to Subcontractors or for labor, materials or equipment, (4) reasonable evidence that the Work cannot be completed for the unpaid balance of the Contract Price, or (5) persistent failure to carry out the Work in accordance with the Contract Documents. When the above reasons for withholding a portion of the payment are removed, payment shall promptly be made from amounts previously withheld.

19. Paragraph 22(b) of the Agreement is hereby added to read as follows:

Builder shall comply with and give notices required by laws, ordinances, rules, regulations and lawful orders of public authorities bearing on performance of the Work; provided, however, that Builder shall not be responsible for cost of obtaining approvals or certifications from any

engineer or Architect as long as such approvals or certifications do not relate to Builder's defective Work or Work re-executed by Builder. Requirements of public authorities mentioned in this Paragraph 22(b) apply as minimum requirements only. They do not supersede more stringent requirements stated elsewhere in the Contract Documents. If changes must be made to the Contract Documents because of a change in law or governmental regulations after the effective date hereof, appropriate adjustments will be made in the Contract Price.

20. Paragraph 22(c) of the Agreement is hereby added to read as follows:

Builder shall keep the site of the Home reasonably clean and free from rubbish, excess debris, surplus and waste material and shall remove the same from the site of the Home as the Work progresses, all as and when required by the Contract Documents and applicable laws or deed restrictions. If Builder fails to do so after seven (7) days' written notice from Owner, Owner may remove same at Builder's expense. In the event Owner undertakes the removal of same from the site of the Home, such removal will in no way qualify or limit Builder's obligations under the Contract Documents. At completion of the Work, Builder shall remove from and about the Home waste materials, rubbish, Builder's tools, construction equipment, machinery and surplus materials.

21. Paragraph 22(d) of the Agreement is hereby added to read as follows:

Builder shall provide Owner, Architect and the Lender’s inspector, if any, access to the Work in preparation and progress wherever located.

22. Paragraph 22(e) of the Agreement is hereby added to read as follows:

To the fullest extent permitted by law, Builder shall indemnify and hold harmless Owner, and agents and separate contractors of Owner from and against claims, damages, losses and expenses, including but not limited to reasonable attorneys' fees, arising out of or resulting from performance of the Work by Builder, provided that such claim, damage, loss or expense is attributable to bodily injury, sickness, disease or death, or to injury to or destruction of tangible property (other than the Work itself except to the extent covered by builder's risk insurance) including loss of use resulting therefrom, but only to the extent caused in whole or in part by negligent acts or omissions of Builder, one of Builder's Subcontractors or anyone directly or indirectly employed by them or anyone for whose acts they may be liable.

The obligations of Builder under this Paragraph 22(e) shall not extend to the liability of Architect, Architect's consultants, and agents and employees of any of them arising out of (1) the preparation or approval of maps, drawings, opinions, reports, surveys, Change Orders, designs or specifications, or (2) the giving of or the failure to give directions or instructions by Architect, Architect's consultants, and agents and employees of any of them provided such giving or failure to give is a cause, in whole or in part, of the injury or damage.

23. Paragraph 22(f) of the Agreement is hereby added to read as follows:

Any encroachments made by Builder or his subcontractors on adjacent properties or easements due to construction as revealed by an improvement survey will be the responsibility of Builder, and Builder shall correct these encroachments within fifteen (15) days of the date of the improvement survey at the sole cost and expense of Builder, either by the removal of the encroachments or satisfactory agreements with the adjacent property owners or the holders of easements allowing the encroachments to remain. Builder may rely on the survey of the Property furnished by Owner in locating the foundation and other improvements.

24. Paragraph 22(g) of the Agreement is hereby added to read as follows:

Owner reserves the right to perform construction or operations related to the Home with Owner's own forces and to award separate contracts in connection with other portions of the Home or other construction or operations on the site under conditions of the contract identical or substantially similar to these, including those portions related to insurance and waiver of subrogation. If Builder claims that delay or additional cost is involved because of such action by Owner, Builder shall make claims as provided elsewhere in the Contract Documents. Builder shall afford Owner's separate contractors reasonable opportunity for the introduction and storage of their equipment and performances or activities and shall connect and coordinate Builder's construction and operations with separate contractors as required by the Contract Documents. Owner shall require its separate contractors to cooperate and coordinate with Builder.

25. Paragraph 22(h) of the Agreement is hereby added to read as follows:

When any non-conforming work is found or confirmed by Owner, Builder, at Builder's expense, shall correct the entire area of Work involved, unless Builder can completely define the limits of the non-conforming work.

26. Paragraph 22(i) of the Agreement is hereby added to read as follows:

Builder acknowledges that Owner will borrow certain funds to finance the construction of the Work and, that as a condition to any loans to Owner, Owner will collaterally assign this Agreement to the Lender and Lender may require from time to time certain statements, certificates, and documents from Builder. Builder covenants and agrees that any lien, statutory, expressed or implied, right and interest (whether choate or inchoate and including, without limitation, all mechanics' and materialmen's liens under the applicable laws and statutes of the State of Texas) which are owned or claimed by Builder or shall exist or shall hereafter accrue to the benefit of Builder for labor performed, materials furnished and Work done on this Home, shall be and remain subordinate, second and inferior to any first and second lien securing the payment of an acquisition, interim construction and/or permanent loan and all advances made thereunder, and to any renewals, extensions or rearrangements thereof. Neither Builder nor any Subcontractor or other party shall be permitted to remove any improvements or other property constructed or installed or delivered in connection with the Work notwithstanding that such improvements or other property can be removed without material injury to any improvements not sought to be removed by any lien claimant and without such injury to any improvements

sought to be removed by any lien claimant. A subordination provision to this effect applicable to liens and lien rights of Subcontractors shall be contained in all Subcontracts entered into by Builder, and Builder will indemnify and hold Owner harmless from any failure or refusal of any Subcontractor to comply with this provision, as well as any assertion by such Subcontractor that such Subcontractor's lien is prior to or of equal dignity with the Lender's lien. At the request of Owner, Builder shall, without delay, execute or cause to be executed, such additional documents as may be required from time to time by the Lender to give effect to the provisions hereof and furnish documents, releases and waivers evidencing payments to Subcontractors and suppliers and such Subcontractors' and suppliers' release of liens arising out of the performance of the Work. Owner will authorize Lender to transfer payments only to Builder if and when Builder becomes entitled to such payments pursuant to Paragraph 4, upon approval by Owner.

In the event of a default by Owner under its interim loan agreement with Lender, the unperformed part of this Agreement will be performed by Builder for the benefit and at the expense of the Lender, should the Lender so elect, provided that there is no material interruption in the prosecution of the Work and that Builder has been paid for all Work done to date.

27. Paragraph 22(j) of the Agreement is hereby added to read as follows:

The Architect will interpret and decide matters concerning performance under and requirements of the Contract Documents on written request of either the Owner or Builder. The Architect will make initial decisions on all claims, disputes or other matters in question between the Owner and Builder, but will not be liable for results of any interpretations or decisions rendered in good faith. The Architect's decisions in matters relating to aesthetic effect will be final if consistent with the intent expressed in the Contract Documents. All other decisions of the Architect, except those which have been waived by making or acceptance of final payment except those which have been waived by making an acceptance of final payment - subject to mediation and arbitration in accordance with the provisions of Paragraph 16.

28. Paragraph 22(k) of the Agreement is hereby added to read as follows:

Due to the benefit accruing to the Owner as a result of having a unique dwelling, Builder agrees not to use the Plans in connection with any other construction that Builder may be involved with and Builder agrees not to provide the Plans to any other person or entity. This provision shall survive the completion of the Home and the expiration of this Agreement.

Except as amended by this Addendum, the Contract Documents remain unchanged and continue in full force and effect.

Signed for identification:

OWNER	BUILDER
By: _____	By: _____
Name: _____	Name: _____
Title: _____	Title: _____

ITEM F

ADDENDUM TO RESIDENTIAL SALE & CONSTRUCTION CONTRACT

This Addendum to Residential Sale & Construction Contract ("Addendum") supplements and amends that certain Residential Sale & Construction Contract ("Contract") of even date herewith by and between _____, as Builder and _____, as Purchaser. In the event of any inconsistency between the terms and conditions of this Addendum and the terms and conditions of the Contract and Plans and Specifications or other contract documents (collectively, the "Contract Documents"), the terms and conditions of this Addendum shall control. All initially capitalized terms defined terms in this Addendum shall have the same meaning ascribed to them in the Contract.

1. The last grammatical paragraph in Paragraph 2 of the Contract relating to the Plans and Specifications should be modified by deleting the last sentence therein adding the following to the end of such paragraph:

Design Build Obligations. Builder, through its architect and engineers, is responsible for providing a complete design for the construction of the Home described in the Plans and Specifications, including, without limitation, the architectural design and plumbing, mechanical, electrical and structural design. Nothing contained in the Contract Documents shall create a contractual relationship between Purchaser and any third party; however, it is understood and agreed that Purchaser is an intended third-party beneficiary of all contracts and Contracts for design, architectural or engineering services.

Builder shall be responsible to Purchaser for acts or omissions of the architects, engineers, and others acting under Builder. Builder agrees to furnish the architectural, engineering and construction services set forth therein and agrees to furnish efficient business administration and superintendence, and to complete the Improvements in a sound, expeditious and economical manner consistent with the interests of Purchaser.

Builder, by executing this Contract, represents to Purchaser the following:

(a) The Drawings and Specifications are sufficiently complete and detailed for Builder to perform the Work required to produce the results intended by the Contract Documents and comply with all the requirements of the Contract Documents.

(b) The Work required by the Contract Documents, including, without limitation, all construction details, construction means, methods, procedures and techniques necessary to perform the Work, use of materials, selection of equipment and requirements of product manufacturers are consistent with: good and sound practices within the construction industry; generally prevailing and accepted industry standards applicable to Work; requirements of any warranties applicable to the Work; and requirements of all laws, ordinances, regulations, codes, rules and orders which bear upon the Builder's performance of the Work.

2. With respect to Paragraph 2, if any minor changes occur in the Work, such changes shall be shown in a marked-up set of record drawings which are delivered by Builder to Purchaser on completion of the construction as a condition precedent to Purchaser's obligation to acquire the Property. Builder represents and warrants that any substituted building materials are equal in quality, function and appearance to the items called for by the Plans and Specifications and that substitutions will be as easily maintained and of equal durability as the specified items. With respect to any items specifically selected

by Purchaser, Builder shall make no substitutions without the prior written approval of Purchaser, which approval shall not be unreasonably withheld or delayed.

3. With respect to Paragraph 3, in the event that the Builder defaults hereunder and Purchaser elects to terminate this Contract, the Earnest Money and Construction Fee, together with any other sums paid by Purchaser to Builder, shall be immediately refunded to Purchaser.

4. With respect to Paragraph 3(c), Substantial Completion shall be confirmed by Purchaser's Agent, if any, and Purchaser's lender ("Lender"). Builder agrees to complete all punch list items within thirty (30) days following Substantial Completion and one hundred twenty-five percent (125%) of the value assigned by Purchaser and Builder to the punch list items to be corrected shall be withheld by Purchaser. With respect to such punch list items, payment shall be made by Purchaser on an item-by-item basis within ten (10) days of completion of such item(s).

5. With respect to Paragraph 3(c), the date specified for closing by Builder shall be not less than fifteen (15) days (a) after written notice from Builder and (b) following Substantial Completion of the Home, unless otherwise agreed to by Purchaser.

6. With respect to Paragraph 5, Purchaser shall have not less than thirty (30) days to qualify for necessary financing before the Builder may terminate the Contract.

7. With respect to Paragraph 6, Builder shall furnish Purchaser with a title commitment ("Commitment") from _____ Title Company ("Title Company") not later than ten (10) days after the date of this Contract, together with a copy of a certified survey sufficient to delete the survey exception from the Purchaser's Owner's title policy. Purchaser shall have ten (10) days following receipt of the Commitment and survey to deliver its title objections to Builder. Builder shall notify Purchaser within ten (10) days following receipt of the title objection letter whether Builder will cure any title defects objected to by Purchaser, Builder acknowledging its obligation to cause any mechanic's or materialmen's liens and any other voluntary liens created by Builder to be released at Closing. If Builder fails or refuses to notify Purchaser of Builder's Contract to cure any other title defects, then Purchaser shall have the right, within ten (10) days following the expiration of the aforesaid ten (10) day period, in which to terminate this Contract and receive a refund of the Earnest Money, Construction Fee and all other sums paid by Purchaser to Builder.

8. Paragraph 7 is hereby deleted from the Contract.

9. Notwithstanding anything contained in Paragraph 8 to the contrary, in the event that Builder fails or refuses to commence construction of the Home by _____ __, 200_, as extended by Excused Delays, Purchaser may terminate this Contract by written notice thereof to Builder within ten (10) days thereafter. Additionally, if Builder fails or refuses to achieve Substantial Completion of the Home prior to _____ __, 200_, as extended by Excused Delays, Purchaser may terminate this Contract by written notice thereof to Builder at any time within thirty (30) days thereafter, provided that Builder has not achieved Substantial Completion prior to the effective date of such termination notice. In the event that Purchaser elects to terminate this Contract pursuant to the provisions of this Paragraph 8, Purchaser shall be entitled to a refund of the Earnest Money, Construction Fee and all other sums paid by Purchaser to Builder.

10. Notwithstanding anything contained in Paragraph 9 to the contrary, in the event that any change is required in the Plans and Specifications due to omissions or deficiencies in the Plans and Specifications or any construction defects, the required changes will be the sole responsibility of Builder.

11. With respect to Paragraph 10, if the Purchaser furnishes appliances or other items to be installed by Builder, Builder shall be responsible for installing such items in accordance with manufacturer's instructions, but shall not otherwise be responsible for warranting such items.

12. With respect to Paragraph 11(a), Purchaser's indemnification shall not apply to the gross negligence or willful misconduct of Builder or any of Builder's agents.

13. With respect to Paragraph 11(b), if Purchaser and Builder have agreed that Builder will protect certain trees and vegetation, Builder shall guarantee the continued viability of such trees and vegetation.

14. With respect to Paragraph 12, Purchaser's periodic inspections shall not release Builder from liability for latent defects or any warranty items. If Purchaser shall not certify in writing, when requested by Builder, that a phase of construction has been completed in substantial conformity with the Plans and Specifications and this Contract, Purchaser shall indicate what items are not in substantial conformity with the Plans and Specifications and this Contract. If the corrections are minor, and defective conditions are not economically justifiable and the Purchaser accepts non-conforming work, Purchaser shall be entitled to an equitable reduction in the Contract Price.

15. Notwithstanding anything contained in Paragraph 14(d) to the contrary, Builder represents and warrants that the Builder has no actual knowledge of health hazards or environmental conditions affecting the Property and that Builder has not used materials constituting hazardous substances in connection with the construction of the Home.

16. With respect to Paragraph 15, if the Home is wholly or partially destroyed but can be restored within sixty (60) days, Builder shall be responsible for restoring the Home in accordance with the Plans and Specifications, unless the parties agree otherwise in writing.

17. Paragraph 17(a) is hereby deleted.

18. With respect to Paragraph 20, regardless of when the Purchaser's Agent is designated, Builder agrees not to unreasonably withhold approval of such Purchaser's Agent.

19. Paragraph 25(a) is hereby added to the Contract to read as follows:

In the event of Builder's default in the performance of its obligations under this Contract, Purchaser may exercise any rights or remedies available at law or equity, including, without limitation, the right of specific performance.

20. Paragraph 25(b) is hereby added to the Contract to read as follows:

Builder shall comply with and give notices required by laws, ordinances, rules, regulations and lawful orders of public authorities bearing on performance of the Work. Requirements of public authorities mentioned in this Paragraph 25(b) apply as minimum requirements only. They do not supersede more stringent requirements stated elsewhere in the Contract Documents. If changes must be made to the Contract Documents because of a change in law or governmental regulations after the effective date hereof, appropriate adjustments will be made to the Contract Price.

21. Paragraph 25(c) is hereby added to read as follows:

Builder promptly shall pay all bills for labor and materials performed and furnished by others in connection with the construction, furnishing and equipping of the building improvements and

performance of the Work. Additionally, Builder shall not voluntarily permit any laborer's, materialmen's, mechanic's, or other similar liens to be filed or otherwise imposed on any part of the Work or the property on which the Work is performed. If any laborer's, materialmen's, mechanic's, or other similar lien or claim thereof is filed or otherwise imposed against the Property, Builder, within thirty (30) days of the filing of such lien or other imposition thereof, shall cause such lien to be released or otherwise discharged, except as to liens which Builder is contesting in good faith by appropriate action diligently pursued, provided Builder has notified Purchaser of the nature of such lien and informed Purchaser of the type of action being pursued by Builder and, if requested by Purchaser, has provided Purchaser with a surety bond satisfactory to Purchaser, sufficient to cover such claim in the event Builder is unsuccessful in contesting same or has made other arrangements satisfactory to Purchaser. If, however, Builder, within the aforesaid thirty (30) day period, does not cause such lien either to be released and discharged forthwith or contests same in the manner provided hereinabove, then Purchaser shall have the right to pay all sums necessary to obtain such release and discharge and reduce the Contract Price by the amount of such payments made by Purchaser. Builder shall indemnify, defend and hold harmless Purchaser from all claims, losses, demands, causes of action or suits of whatever nature arising out of any such lien or that part of the Work covered thereby.

Except as amended by this Addendum, the Contract Documents remain unchanged and continue in full force and effect.

_____ _____

BUILDER

_____

PURCHASER

ITEM G

II. MODIFICATIONS TO A107 – CUSTOM HOME

A. INSERTS TO A107 STANDARD FORM OF AGREEMENT

Article 1
The site preparation and construction of the improvements ("Improvements") on the Property will be performed in accordance with the Drawings listed in Paragraph 5.1.4 of this Agreement and the Specifications referred to in Paragraph 5.1.3 of this Agreement.

2.1
The date of commencement shall be the day after the Contractor receives in writing approval from Owner that the Construction Loan has been approved, provided that Contractor has received the building permit.

2.3
215 calendar days following the date of commencement, Contractor agrees and understands that time is of the essence, and Contractor has satisfied itself that the dates of Substantial Completion and Final Completion as set forth above have been determined so as to provide sufficient time for Contractor to substantially complete and then finally complete the Work within such time periods. The Contractor will provide sufficient supervision, labor, equipment and materials to assure the most efficient and expeditious construction process. If the Contractor is behind schedule to such an extent that the Contractor will be unable to meet either of the completion dates set forth above, as such dates may be extended pursuant to the terms of this Agreement, the Contractor shall employ such additional forces, obtain such additional equipment, employ such additional supervision and pay such additional overtime wages as may be required to place the progress of the Work on schedule, as required for timely Substantial Completion and Final Completion.

"Substantial Completion" shall not occur until Contractor has obtained and delivered to Owner all permits and other consents or approvals from all governmental authorities that are required for the Owner's occupancy and use of the Project. The phrase, "the Owner's occupancy and use of the Project", as used in the preceding sentence shall mean the property is available for physical occupancy, use and operation of the Project by the Owner as a residence, it being understood that certain minor finishing items or adjustments may still be required by Contractor.

Final Completion (defined herein as the completion, in accordance with the Contract Documents, of all punchlist items by the Contractor following Substantial Completion) shall occur not later than thirty (30) days following Substantial Completion, subject to adjustments of the Contract Time as provided for in the Contract Documents.

The Contractor acknowledges and recognizes that the Owner is entitled to full and beneficial occupancy and use of the completed Work following expiration of the Contract Time and that the Owner will sustain damages and losses as a result of such failure, the exact amount of which will be extremely difficult to ascertain. Therefore, the Owner and the Contractor agree as set forth below in this Paragraph 2.3.

If the Contractor fails to achieve Substantial Completion of the Work within the Contract Time, the Owner shall be entitled to retain or recover from the Contractor, as liquidated damages and not as a penalty, the following per diem amounts commencing upon the first day following expiration of the Contract Time and continuing until the actual Date of Substantial Completion. Such liquidated damages are hereby agreed to be a reasonable pre-estimate of damages the Owner will incur as a result of delayed completion of the Work:

$200.00 per day

The Owner may deduct liquidated damages described in this Paragraph 2.3 from any unpaid amounts then or thereafter due the Contractor under this Agreement. Any liquidated damages not so deducted from any unpaid amounts due the Contractor shall be payable to the Owner at the demand of the Owner, together with interest from the date of the demand at the "Default Rate" (hereafter defined) until paid.

The initial Project Schedule is attached hereto as Exhibit "A" and made part hereof for all purposes.

4.1.1
Provided that an Application for Payment is received by the Owner not later than the last day of the month, the Owner shall (i) cause the Architect to issue a certificate for payment with respect to the Application for Payment, and (ii) make payment to the Contractor of the approved amount of such Application for Payment, all not later than the 10th day of the succeeding calendar month. If an Application for Payment is received by the Owner after the Application Date fixed above, payment shall be made by the Owner in the amount certified by the Architect not later than ten (10) days after the Owner receives the Application for Payment. The Application for Payment shall be on an AIA Form G702 and G703. Owner and Contractor have agreed to a Schedule of Values of the Work (sometimes herein referred to as the "Job Cost Summary"), attached hereto as Exhibit "I", and made a part hereof for all purposes, and Contractor's Applications for Payment will follow as closely as possible said Schedule of Values. Applications for Payment also shall show the percentage of completion of each portion of the Work as of the end of the period covered by the Application of the Payment. The percentage of Completion shall be the percentage of the Work which has actually been completed. Contractor's Fee shall be shown as a single, separate item.

Owner shall make progress payments on account of the Cost of the Work based upon 90% of the portion of the Cost of the Work properly allocable to labor, materials and supplies incorporated in the Work and 90% of the portion of the Cost of the Work properly allocable to materials and supplies suitably stored at the site, up to the last day of the applicable payment period, less the aggregate of previous payments in each case. It is understood that the retainage as herein described is intended to conform to the statutory ten percent (10%) retainage required by Sections 53.101 to 53.105 of the Texas Property Code.

Together with the Contractor's Application for Payment, the Contractor shall submit an itemized statement certified (and sworn to, if requested by Owner) to be true and correct by a financial officer of the Contractor, showing in complete detail all monies paid or costs incurred by the Contractor on account of the Cost of the Work during the previous month for which the Contractor is to be reimbursed and the amount of the Contractor's Fee due, together with (a) all payrolls for all labor, (b) copies of invoices for all services and materials acquired in connection with such monies paid or costs incurred together with a copy of the checks (other than payroll checks) issued by Contractor in payment of such costs, and (c) such other data supporting the Contractor's right to payment for subcontractors or materials as the Owner or the Architect may reasonably require.

Not later than the date of each subsequent Application for Payment, the Contractor shall submit to the Owner the Contractor's release or lien and releases of liens for all subcontractors, materialmen, and suppliers, who have performed any services or provided any materials for the Project since the date of the preceding Application for Payment and were paid from such progress payment. Each release of lien shall waive and release all rights of the affiant to claim or assert any lien against the Project either for the

period through the last day included in the Application for Payment ("Partial Release of Lien") or for the affiant's completed work on the Project ("Final Release of Lien").

The Owner reserves the right to refuse disbursement of all or any portion of any progress payment until it has received all the releases or liens for the prior progress payment which are satisfactory and acceptable to Owner in the exercise of reasonable judgment. The Owner also reserves and shall have the right to issue joint-payee checks in the names of the Contractor and any unpaid party, or otherwise withhold funds from payments, to assure payment to proper parties and the Owner's receipt of appropriate releases of liens.

Without limitation of the foregoing, the Contract shall provide with each Application for Payment an affidavit executed by an officer of Contractor in form and substance satisfactory to the Owner swearing that the cost of all labor and materials of every kind and character incurred to the date of such affidavit in connection with the Work have been paid in accordance with the payment provisions of each subcontract therefor, except the unpaid items to be paid from the proceeds of the current Application for Payment.

4.1.2

It is expressly provided, however, that each Progress Payment requested under this Article 4 shall be subject to the statutory ten percent (10%) retainage under V.T.C.A. Property Code, Sections 53.101 and 53.105, so that only ninety percent (90%) of the approved draw request shall be paid by Owner. All draw requests shall be sworn to by Contractor. Upon Substantial Completion of the Work, Owner shall have paid Contractor a sum sufficient to increase the total payments to a sum of ninety percent (90%) of the Contract Sum, less such amounts as the Owner shall determine for incomplete and unsettled claims as provided in the Contract Documents, including the value assigned to punchlist items as described below; provided however, that the provisions of this Article 4 are subject to the provisions of Article 20.

Upon the Substantial Completion of the Work, each item on the Owner's punchlist shall be assigned a value by the Owner equal to the actual cost to complete such item, plus 15%. Provided that no lien affidavits have been filed against the Project or lien notice letters delivered to Owner and the aggregate value of the punchlist items, inclusive of the additional 15% ("Punchlist Value") is less than the retainage, no additional amount shall be withheld by the Owner at the time of making the payment following Substantial Completion provided that Owner has paid the undisputed amount of each Contractor invoice. If, however, lien notices or lien affidavits have been filed against the Project and the amount thereof ("Lien Claims"), plus the Punchlist Value, exceeds the retainage, then the amount of the Lien Claims and Punchlist Value in excess of the retainage (the "Excess") also shall be withheld by the Owner at the time of making the payment following Substantial Completion. Upon completion of each punchlist item, as certified by the Owner, Owner shall pay to Contractor the sum assigned to such item.

4.1.3
The JPMorgan Bank prime rate plus two percent (2%), not to exceed the maximum rate permitted by law.

4.1.4
At the time each progress payment is made to Contractor, Contractor will deliver to Owner Contractor's Partial Release of Lien in the form attached hereto as Exhibit "D" and made part hereof for all purposes covering such progress payment.

4.1.5
Not later than the date each Application for Payment is submitted to Owner beginning with the second Application for Payment, the Contractor shall submit to the Owner Subcontractor's Partial Release of

Lien instruments in the form attached hereto as Exhibit "E" and made part hereof for all purposes for all subcontractors and suppliers (who are furnishing more than $2,500, in the aggregate, of labor and/or materials with respect to the construction of the improvements) who performed any services and/or provided any materials for the Project covered by the preceding Application for Payment and were paid (or were supposed to have been paid) from such progress payment. Each release of lien shall waive and release all rights of the affiant to claim or assert any lien against the Project either for the period through the last day included in the preceding Application for Payment ("Partial Release of Lien") in the form attached hereto as Exhibit "E" or for the affiant's completed work on the Project ("Final Release of Lien") in the form attached hereto as Exhibit "F" and made part hereof for all purposes, as applicable.

4.1.6
Provided that Contractor has been paid by Owner all sums (or the applicable portion thereof) due to Contractor pursuant to the Agreement (other than under the circumstances of Paragraph 14.2.3 hereof), Contractor shall not voluntarily permit any laborer's, materialmen's, mechanic's, or other similar liens to be filed or otherwise imposed on any part of the Work or the property on which the Work is performed. If any laborer's, materialmen's, mechanic's, or other similar lien or claim thereof is filed or otherwise imposed against the Property, Contractor, within thirty (30) days after actual notice to Contractor of the filing of such lien or other imposition thereof, shall cause such lien to be released or otherwise discharged, except as to liens which Contractor is contesting in good faith by appropriate action diligently pursued, provided Contractor has notified Owner of the nature of such lien and informed Owner of the type of action being pursued by Contractor and, if requested by Owner, has provided Owner with a surety bond reasonably satisfactory to Owner, sufficient to cover such claim in the event Contractor is unsuccessful in contesting same or has made other arrangements reasonably satisfactory to Owner. If, however, Contractor, within the aforesaid thirty (30) day period, does not cause such lien either to be released and discharged forthwith or contests same in the manner provided hereinabove, then Owner shall have the right to pay all sums necessary to obtain such release and discharge and reduce the Contract Sum by the amount of such payments made by Owner. Contractor shall indemnify, defend and hold harmless Owner from all claims, losses, demands, causes of action or suits of whatever nature arising out of any such lien or that part of the Work covered thereby.

4.2.1
Final Payment, constituting the entire unpaid balance of the Contract Sum, shall be paid by Owner to Contractor thirty (30) days after Completion of the Work, provided that the Work has been finally completed, final inspection approvals have been issued by the City of Houston, the Contract fully performed (excluding any warranty obligations), and a final Certificate for Payment has been issued by the Architect, and receipt by Owner of final lien releases from all contractors, subcontractors, laborers and materialmen employed in furnishing labor or materials in connection with the construction of the improvements performing Work in the form attached hereto as Exhibit "G" and made part hereof for all purposes or such other form acceptable to Owner in the exercise of reasonable judgment and the Contractor's final lien release ("Contractor's Final Release") in the form attached hereto as Exhibit "H" and made part hereof for all purposes.

5.1.2
Supplement to General Conditions attached hereto as Exhibit "F" and made part hereof for all purposes.

5.1.3
The Specifications contained in the Drawings ("Drawing Specs") dated _____, and the Specifications Sheet dated _____ attached hereto as Exhibit "B" and made part hereof for all purposes ("Specifications Sheet").

5.1.4

Exhibit "A"	-	Land
Exhibit "B"	-	Drawings
Exhibit "C"	-	Specifications
Exhibit "D"	-	Subcontractor's Partial Release of Liens
Exhibit "E"	-	Contractor's Partial Release of Liens
Exhibit "F"	-	Supplement to General Conditions
Exhibit "G"	-	Subcontractor's Final Release of Liens
Exhibit "H"	-	Contractor's Final Release of Liens
Exhibit "I"	-	Schedule of Values
Exhibit "J"	-	Affidavit of Completion
Exhibit "K"	-	Affidavit of Commencement
Exhibit "L"	-	Certificate of Insurance
Exhibit "M"	-	List of Subcontractors
Exhibit "N"	-	Allowances
Exhibit "O"	-	Scope of Warranty Obligations

B. ARTICLE 20 – OTHER CONDITIONS OR PROVISIONS

20.1 Notwithstanding the above statement of the Contractor's Fee as fifteen percent (15%), the Contractor shall only be entitled to charge a five percent (5%) fee with respect to the following items ("Special Items"):

The Contractor will coordinate the scheduling of such subcontractors' installation of the Special Items and will process payment requests through this Agreement, however, the Contractor's warranty will not cover the installation of the Special Items or any defects with respect to the Special Items. Owner agrees to look to the subcontractors and manufacturers of the Special Items for warranty responsibility, and Contractor will assign its rights to Owner so that Owner may enforce all warranties with respect to the Special Items.

20.2 No Interest on Retainage. No interest shall be due and payable by Owner to Contractor, any Subcontractor or any other party on any of the sums retained by Owner pursuant to any of the terms or provisions of any of the Contract Documents; however, Owner shall be obligated to pay Contractor interest on payments due and unpaid as described in Article 3 hereof.

20.3 Utilities. Contractor shall have the sole liability and responsibility for connecting onto prior plumbing lines, sanitary and storm sewer lines, electrical lines and other utilities to be utilized in connection with the completion of the completed improvements covered by this Agreement. Upon completion, all such utilities shall be connected by Contractor and in all respects, such utilities shall be functioning and in good working order; provided, however, Contractor shall not be required to pay deposits routinely assessed by utility companies in connection with the providing of permanent utility service. Owner will be responsible for paying for all utilities (water, gas and electric) consumed during the performance of the Work.

20.4 Priority of Documents. In the event of any inconsistency between the provisions of this instrument and the terms and conditions of any of the other Contract Documents, the provisions of this instrument shall control. In connection therewith, the most recently issued document takes precedence over previous issues of the same document. The order of precedence is as follows with highest authority listed as "01":

01 This Agreement (including Article 20)

02 Addendum
03 Supplementary Conditions
04 General Conditions (Articles 6-19, inclusive of this Agreement)
05 Drawings and Specifications

20.5 Inspections. Owner shall have the right to appoint at any time or from time to time one or more engineers, architects or other representatives to inspect the Work on behalf of Owner, in addition to Architect. All costs, expenses and fees of such additional inspections shall be borne and paid by Owner, and Contractor shall have no liability or obligation for the payment thereof.

20.6 Quality of Materials. Notwithstanding anything herein to the contrary, Contractor covenants that all materials utilized by Contractor, its subcontractors, employees, laborers and materialmen and the workmanship of all such persons will be in accordance with the Contract Documents; and Contractor will construct and complete the Work in a good and workmanlike manner, to the best of Contractor's art and skill.

20.7 Drawings and Specifications. The Drawings and Specifications are to be of equal priority. In the event of any internal inconsistency in either the Drawings or Specifications, or with each other, the appropriate method of performing the Work, in the event of the above mentioned inconsistency, shall be determined by Architect. Figures take precedence over physical scale measurements. Large scale details take precedence over smaller scale details. Drawings take precedence in regard to dimensions, when in conflict with Mechanical and Structural Drawings, except for the size of the structural members. Specifically titled drawings and sections of the Specifications take precedence over indication of the item in a collateral way. Existing conditions take precedence over Drawings and Specifications for dimensions.

Where in the Drawings and Specifications, certain products, manufacturer's trade names, or catalog numbers are given, it is done for the express purpose of establishing a standard of function, dimension, appearance, and quality of design, in harmony with the Work, and is not intended for the purpose of limiting competition.

When more than one restriction for a specified material, brand, or construction process is given for an item in the Drawings and Specifications, Contractor shall comply with all restrictions. When more than one optional material, brand or construction process is specified for a particular item of work, the choice shall be the Contractor's. Contractor may use the one Contractor considers to its advantage to use.

20.8 Work Included and Excluded. List of "work included" and "work excluded" in the Drawings and Specifications are not intended to enumerate each and every item of work or appurtenance required, and must be used in conjunction with other portions of the Contract Documents.

20.9 Compliance with Laws. Contractor shall comply with and give notices required by laws, ordinances, rules, regulations and lawful orders of public authorities bearing on performance of the Work; provided, however, that Contractor shall not be responsible for cost of obtaining approvals or certifications from any engineer or the Architect as long as such approvals or certifications do not relate to Contractor's defective Work or Work re-executed by Contractor. Requirements of public authorities mentioned in this Paragraph 20.9 of the General Conditions apply as minimum requirements only. They do not supersede more stringent requirements stated elsewhere in the Contract Documents. If changes must be made to the Contract Documents because of a change in law or governmental regulations after the effective date hereof, appropriate adjustments will be made in the Contract Sum.

20.10 Contractor's Representations. Contractor warrants and represents to Owner that Contractor is financially solvent, able to pay its debts as they mature, and possessed of sufficient working capital to complete this Agreement; that Contractor is able to furnish the plant, tools, materials, supplies, equipment and labor, and is experienced in and competent to perform the Work contemplated by the Contract; that Contractor is qualified to do the work herein and is authorized to do business in the State of Texas; and that Contractor holds a license, permit, or other special license to perform the Work, as required by law.

20.11 Review of Contract Documents by Contractor. Contractor shall at once report to Architect errors, inconsistencies or omissions in the Contract Documents which should have been reasonably discovered by Contractor. The intent of the Contract Documents is to include all items necessary for the proper execution and completion of the Work for Contractor. The Contract Documents are complementary, and what is required by one shall be as binding as if required by all. Performance by Contractor shall be required only to the extent consistent with the Contract Documents and reasonably inferable from them as being necessary to produce the intended results. All dimensions and clearances necessary to the Work, as indicated on the Drawings and contained in the Specifications, shall be verified by Contractor at the job site before executing the relevant portion of the Work and Contractor shall report any discrepancies to the Architect for adjustment before any Work affected thereby is commenced. Additionally, if sufficient detailed information is lacking, if Work is required in such a manner as to make it impossible to produce first-class Work, or if discrepancies appear among Contract Documents, then Contractor shall request the Architect's clarification or interpretation before proceeding with such Work.

If Contractor performs any Work in conformity with any Contract Document knowing it to be inconsistent with any other Contract Document, without first specifically requesting and obtaining from the Architect written instructions on how to proceed with respect to such inconsistency, the Contractor shall be obligated to correct such Work according to the direction of the Owner (with the Architect's advice) without cost to the Owner.

20.12 Non-Conforming Work. When any non-conforming work is found or confirmed by the Architect, the entire area of Work involved shall be corrected unless the Contractor can completely define the limits of the non-conforming work. Additional testing, sampling or inspecting needed to define non-conforming work shall be at the Contractor's expense. Contractor shall employ the Owner's independent testing laboratory, or a mutually satisfactory independent testing laboratory if such services are required. All corrected work shall be re-tested at the Contractor's expense. Extra architectural or engineering services required by Contractor to analyze non-conforming work shall be paid for by Contractor.

20.13 Allowances. Unless otherwise specified below, the allowances described in Exhibit "N" attached hereto and made part hereof for all purposes ("Allowance Items") are included in the Guaranteed Maximum Price for the fixtures, equipment and materials. If the actual cost of any Allowance Item is greater or less than the allowances stated in Exhibit "N" or the Owner deletes the Allowance Items from the scope of the Work and provides such Allowance Item as an "Owner-furnished Item" (hereafter defined), the Guaranteed Maximum Price shall be adjusted appropriately by Change Order. All purchases of Allowance Items shall be subject to Owner's prior written approval as to price if the Allowance Item in question exceeds one hundred ten percent (110%) of the allowance. Owner reserves the right to select alternate suppliers and subcontractors for Allowance Items.

With respect to the selection of Allowance Items and other selections required to be made by Owner, such selection shall be made by Owner as soon as reasonably practicable. Contractor shall deliver to Owner a proposed selection timetable ("Selection Schedule") within fifteen (15) days after the effective date hereof, and the Selection Schedule shall be deemed to be approved by Owner unless objected to in writing within thirty (30) days after receipt of the Selection Schedule. If any item selected by Owner is not available when ordered, Owner shall have a reasonable period of time, not to exceed seven (7) days, to

select a substitution. Contractor agrees to advise Owner whenever Owner's delay in selecting Allowance Items or other items will result in delay in the completion of the Work. Contractor shall be entitled to submit a claim for an extension of time pursuant to Paragraph 13.3 as a result of Owner's delay in selecting Allowance Items or other items following receipt of notice from Contractor that Owner's delay will result in a delay in the completion of the Work.

Unless otherwise provided in the Contract Documents:

1. these allowances shall cover the cost to Contractor, less any applicable trade discount, of the materials and equipment constituting the Allowance Items delivered to the site, and all applicable taxes;

2. the Contractor's cost for unloading and handling on the site, labor, installation costs, overhead, profit and other expenses contemplated for the Allowance Item shall be included in the Guaranteed Maximum Price and not in the allowance, unless otherwise indicated in Exhibit "N"; and

3. as provided above, whenever the cost of an Allowance Item is more than or less than the allowance, the Guaranteed Maximum Price shall be adjusted accordingly by Change Order, the amount of which will recognize changes, if any, in handling costs on the site, labor, installation costs, and other out-of-pocket expenses, plus or minus, as applicable, fifteen percent (15%), unless the Allowance Item is a Special Item and subject to the five percent (5%) mark-up described in Paragraph 20.1, of the cost differential between the final cost of the Allowance Item and the allowance therefor.

20.14 Construction Warranty. Notwithstanding anything contained in the Contract Documents to the contrary, if within one (1) year after the date of Substantial Completion as certified by the Architect or such longer period of time as may be prescribed by law with respect to latent defects or by the terms of any applicable special guarantee required by the Contract Documents or by any specific provisions of the Contract Documents, Owner discovers any defective work, including that any portion of the Work was not constructed in accordance with the Contract Documents, Contractor shall promptly, without cost to Owner and in accordance with Owner's written instructions, either correct such defective Work, or, if it is not possible to correct such defective Work, remove it from the site and replace it with non-defective Work. The scope of Contractor's express warranty obligations is described in Exhibit "O" attached hereto and made part hereof for all purposes. If Contractor does not promptly comply with the terms of such instructions, or in any emergency where delay would cause serious risk of loss or damage, Owner may have the defective Work corrected or the rejected Work removed and replaced, and all direct and indirect costs of such removal and replacement, including compensation for additional professional services, shall be paid by Contractor. Inability or refusal of a subcontractor responsible for defective Work to correct such Work shall not excuse Contractor from performing under the warranty provided in this Paragraph 20.14. Should Contractor fail to make such warranty corrections required hereby within a reasonable time, not to exceed thirty (30) days after written notice thereof from Owner to Contractor, provided that if the required corrections cannot be made within thirty (30) days, Contractor fails to commence making such warranty corrections within a reasonable period of time, not to exceed thirty (30) days, and diligently continue the prosecution of such warranty corrections until completion, Owner may do so at the expense of and for the account of Contractor.

At the time of final payment, Contractor also shall assign and transfer to Owner all warranties heretofore or hereafter received by Contractor for "consumer products" to be installed in the "improvements" (as such terms are defined by the Federal Trade Commission), whether issued by the seller, manufacturer or supplier and all other warranties delivered to Contractor by subcontractors or suppliers; provided,

however, that Owner and Contractor agree that during the one (1) year warranty period, Contractor shall be obligated to enforce all warranties provided by subcontractors and suppliers at no cost or expense to Owner.

20.15 Operating Instructions. Contractor shall deliver to Owner a complete copy in a loose leaf binder of all operating and maintenance data for all equipment installed as a part of the Work, said binder to be delivered on or before Substantial Completion of the Work.

20.16 Title to Work. The title to all Work completed and in the course of construction, on account of which payments have been made, and all materials on account of which any payments have been made, shall be in the name of Owner.

20.17 Concealed Conditions. Claims for additional compensation or extensions of time because of the failure of Contractor to familiarize itself with conditions at the site will not be allowed. It is not intended by this provision to preclude claims for additional compensation or extension of time for conditions that would not reasonably be foreseen from a diligent visual inspection of the site, Contractor's experience in building in _____.

If conditions are encountered at the site which are (1) subsurface or otherwise concealed physical conditions which differ materially from those indicated in the Contract Documents or (2) unknown physical conditions of an unusual nature, which differ materially from those ordinarily found to exist and generally recognized as inherent in construction activities of the character provided for in the Contract Documents, then notice by the observing party shall be given to the other party promptly before conditions are disturbed and in no event later than ten (10) days after first observance of the conditions. The Architect will promptly investigate such conditions and, if they differ materially and cause an increase or decrease in the Contractor's cost of, or time required for, performance of any part of the Work, will recommend an equitable adjustment in the Contract Sum or Contract Time, or both. If the Architect determines that the conditions at the site are not materially different from those indicated in the Contract Documents and that no change in the terms of the Contract Documents is justified, the Architect shall so notify the Owner and Contractor in writing, stating the reasons. Claims by either party in opposition to such determination must be made within twenty-one (21) days after the Architect has given notice of the decision.

No adjustment in the Contract Time or Contract Sum shall be permitted, however, in connection with a concealed or unknown condition which does not differ materially from those conditions disclosed or which reasonably should have been disclosed by Contractor's inspection of the Project.

20.18 Owner's and Contractor's Right To Cure Default. In no event will Contractor be entitled to terminate the Contract if Owner cures the default which provides the basis for such termination prior to the expiration of the applicable curative period specified in the Contract. In no event will Owner be entitled to terminate the Contract if Contractor cures the default which provides the basis for such termination prior to the expiration of the applicable curative period specified in the Contract.

20.19 Subcontractors. Contractor shall not substitute subcontractors for those subcontractors listed in Exhibit "M" attached hereto whose contract amounts are $25,000.00 or more without the prior written approval of Owner, which approval shall not be unreasonably withheld or delayed. Owner may reject substitute subcontractors chosen by Contractor, if in Owner's reasonable opinion, they are not qualified to do the Work or prevent Contractor or Owner's other contractors from satisfactorily performing their respective work, in which case Contractor shall substitute other subcontractors acceptable to Owner. Any additional cost incurred by Contractor in substituting subcontractors as a result of Owner's rejection of a subcontractor shall be borne by Owner, provided that Contractor has advised Owner in writing in advance

of such additional cost and Owner has approved Contractor entering into a subcontract with such substitute subcontractor.

20.20 Subcontracts. Contractor agrees to hold all Subcontractors, including all persons directly or indirectly employed by them, responsible for any damages due to breach of contract or any negligent act and to diligently endeavor to effect recoveries of such damages. Owner shall be deemed to be a third party beneficiary of each subcontract and may, if Owner elects. require (following Contractor's default under this Agreement or Owner's termination of this Agreement), that the Subcontractor perform all of the then unperformed duties and obligations of such Subcontractor thereunder for the benefit of Owner (rather than Contractor); however, in the event that Owner requires any such performance by a Subcontractor for the direct benefit of Owner, then Owner shall be bound and obligated to pay such Subcontractor for all work done by such Subcontractor (1) to date (to-wit: the reasonable value of that portion of the subcontract performed by such Subcontractor) and (ii) subsequent to the date that Owner elects to invoke such rights. Owners' liability in this connection, however, is not to exceed the amount obtained by subtracting from the subcontract price the total of all sums paid by Contractor to Subcontractor prior to Owner's invoking its right hereunder with respect to direct performance by Subcontractor for Owner. In the even that Owner elects to invoke such rights, Owner shall give written notice of such election to Contractor and such Subcontractors.

20.21 Affidavit of Commencement of Construction. Owner shall file an Affidavit of Commencement with the County Clerk in Harris County not later than the 30th day after the date of actual commencement of construction of the improvements or delivery of materials to the Property, such affidavit to be in the form attached hereto as Exhibit "K" and made part hereof for all purposes.

20.22 Contract Requirements. Requirements imposed upon Contractor that are specifically set forth in the General Conditions and Supplementary Conditions comprising part of the Contract Documents should not be construed to supersede more stringent requirements stated elsewhere in the Contract Documents.

20.23 Assignment Rights. Contractor shall not assign this Agreement nor any of the monies due or to become due to it hereunder without the prior written consent of Owner and any attempt to so do shall be void and of no effect. Contractor shall not sublet or subcontract any part of this Agreement except in compliance with the provisions hereof. Subject to the foregoing, this Agreement shall inure to the benefit of, and shall be binding upon, the Contractor and its successors and assigns.

This Contract is for Owner's benefit and the benefit of their heirs, legal representatives and assigns who may, as provided below, directly enforce all rights and warranties, express or implied herein, but subcontractors shall have recourse only against Contractor and not against Owner except as to subcontractor's lien rights, if any, Owner may rely solely upon Contractor for enforcement of all Subcontracts. To enable Owner to directly enforce rights and remedies against subcontractors, Contractor hereby assigns to Owner the right to bring any actions against subcontractors and material vendors without waiver by Owner of his right against Contractor because of defaults, delays and defects for which a subcontractor or material vendor may also be liable; provided that Contractor also retains and reserves the right to enforce all subcontracts against the respective subcontractors; and provided further, however, that Owner shall not have the right to bring such actions directly against such subcontractor unless Contractor has defaulted hereunder (and such default remains uncured after he expiration of the applicable curative period) or Owner has terminated the Contract as a result of such default. Contractor will indemnify, defend and hold Owner harmless from any failure or refusal of any subcontractor to comply with any provision of the Contract Documents.

20.24 Notices. Any notice provided or permitted to be given under the Contract Documents must be in writing and may be served by depositing same in the United States mail, addressed to the party to be

notified, postage prepaid, by registered or certified mail, with return receipt requested; by delivery of such notice in person to such party; or by fax (with confirmation of receipt) or personal delivery service. For purposes of notice, the addresses of the parties shall be as set forth on page one (1) hereof.

20.25 Headings. Headings herein are for Owner's and Contractor's convenience only and neither limit nor amplify the provisions of the Contract Documents.

20.26 Texas Law. The Contract Documents shall be construed and enforced in accordance with the laws of the State of Texas.

20.27 Severability. If any provision of the Contract Documents shall, for any reason, be held violative of any applicable law, and such portion of the Contract Documents is held to be unenforceable, then the invalidity of such specific provision herein shall not be held to invalidate any other provision herein which shall remain in full force and effect.

20.28 Conflicts. In the event there is a conflict between the provisions of this Article 20 and the provisions of the foregoing Articles 1 through 19, the provisions of this Article 20 shall control.

20.29 Entire Agreement; Amendments. The Contract Documents and all prior negotiations or agreements are merged herein. No modification hereof or subsequent agreement relative to the subject matter hereof shall be binding unless reduced to a writing signed by the party to be bound.

20.30 Affidavit of Completion. At any time following "completion" (as such term is defined in the Texas Property Code) of the Work, Owner may file the Affidavit of Completion attached hereto as Exhibit "J" and made part hereof for all purposes in the Real Property Records of Harris County, Texas, without waiving any rights under the Contract Documents with respect to Contractor's punch-list and warranty obligations.

20.31 Owners' Approval Rights; Inspecting Architect. Except for the references to "Architect" in Paragraphs 8.7, 8.12, 8.13, 9.6 and 19.2 (solely with respect to the additional services and expenses of an Architect following the Contractor's default), which references in such paragraphs shall refer either to the person or entity designated in writing by Owner, all references to "Architect" in the Contract Documents shall refer to Owner. However, with respect to all matters subject to the Architect's approval or decision or options which the Architect is entitled to exercise pursuant to Paragraphs 4.1, 4.2, 9.4, 9.5, 9.7, 12.2, 13.3, 14.2, 17.6 and 17.7 of the Agreement, if the Contractor does not agree with the Owner's particular decision or course of action relating to any of such matters (herein referred to as a "Major Decision"), within five (5) working days after a Major Decision is submitted to either party for such party's approval, then such Major Decision shall be submitted to a licensed architect, engineer, or other appropriate, qualified consultant designated by Owner and acceptable to Contractor, in the exercise of the Contractor's reasonable discretion, (which licensed architect, engineer, or other appropriate, qualified consultant designated by Owner and acceptable to Contractor, is herein referred to as the "Inspecting Architect") for resolution. If Owner desires to appoint an Inspecting Architect, Owner shall submit not less than three (3) architects, engineers, or other appropriate, qualified consultants, located in Houston to Contractor for its approval or disapproval. If Contractor fails to approve one of the architects, engineers, or other appropriate, qualified consultants selected by Owner within three (3) days after receipt of such names, then Owner and Architect shall immediately thereafter jointly submit a request for a list of seven potential architects, engineers, or other appropriate, qualified consultants, (located in Houston) to the Dallas office of the Construction Section of the American Arbitration Association ("AAA"). Owner shall have the right to select one architect, engineer or consultant from the list submitted by the AAA, who shall be the "Inspecting Architect" hereunder. Contractor and Owner shall be entitled to rely on (and shall be obligated to comply with) the written certification of the Inspecting Architect as to his resolution of any

such Major Decision, which written certification of the Inspecting Architect as to his resolution of any such Major Decision shall be made as soon as reasonably practicable, but in no event more than twenty (20) days after such Major Decision has been submitted to the Inspecting Architect. If the Inspecting Architect fails or refuses to resolve a Major Decision within said twenty (20) day period, then the Owner may request that such Major Decision be submitted to arbitration in accordance with Paragraph 9.10 of the General Conditions by written notice to the other party at any time after the expiration of the aforesaid twenty (20) day period (provided that the Inspecting Architect has not resolved such Major Decision). The cost of submitting Major Decisions to the Inspecting Architect for his resolution shall be borne by the non-prevailing party. Notwithstanding the foregoing, if prior to the receipt of a written decision from the Inspecting Architect, Contractor and Owner agree in writing on a Major Decision previously submitted to the Inspecting Architect, then Contractor shall go forward in accordance with the decision reached by Contractor and Owner on such Major Decision and shall disregard the Inspecting Architect's decision subsequently received. Contractor agrees to continue the Work, notwithstanding the fact that a Major Decision has been submitted to the Inspecting Architect for his resolution. Contractor further agrees not to take any action (active or passive) affecting the Major Decision submitted to the Inspecting Architect until the Inspecting Architect has issued his decision on such matter.

The decision of the Inspecting Architect shall be final on all such Major Decisions submitted to the Inspecting Architect if the amount in controversy is less than $35,000, and Contractor and Owner hereby agree that the Inspecting Architect's decision with respect to any Major Decision shall not be subject to the arbitration provisions described in Paragraph 9.10 of the General Conditions.

Additionally, Owner and Contractor agree that the Inspecting Architect in carrying out his duties hereunder may act in his reasonable discretion and shall be personally or corporately liable only for fraud or acts or omissions in bad faith.

Notwithstanding anything contained in this Paragraph 20.31 to the contrary, in the event that a Major Decision must be made immediately (in the good faith judgment of Owner or Contractor) to avoid interference with the progress of the Work, damage to the Work or personal injury or property damage (and Owner and Contractor are unsuccessful in resolving such Major Decision among themselves and are also unsuccessful in contacting the Inspecting Architect to obtain his immediate resolution of such matter in a timely manner), then Owner shall have the authority to make such Major Decision, without the necessity of obtaining approval from the Contractor; and, if Owner and Contractor thereafter disagree on the handling of such Major Decision, such Major Decision shall be submitted to the Inspecting Architect for adjudication of the proper handling of such matter. In the event that the Inspecting Architect resolves such Major Decision and favors the Contractor, Owner shall promptly reimburse Contractor for all out-of-pocket expenses and the actual damages incurred by Contractor in proceeding in accordance with the Owner's instructions.

20.32 Public Authorities. Requirements of public authorities mentioned in Paragraph 8.6.2 of the General Conditions apply as minimum requirements only. They do not supersede more stringent requirements stated elsewhere in the Contract Documents. Requirements in effect at time of installation apply. If changes must be made to the Contract Documents because of a change in law or governmental regulations after the effective date hereof, appropriate adjustments will be made in the then current budget.

20.33 Statutory Notice. This Contract is subject to Chapter 27 of the Texas Property Code. The provisions of that Chapter may affect the Owner's right to recover damages arising from the performance of this Contract. If Owner has a complaint concerning a construction defect arising from the performance of this Contract and that defect has not been corrected through normal warranty service, the Owner must provide notice regarding the defect to the Contractor by Certified Mail, Return Receipt Requested, not

later than the 60th day before the date the Owner initiates a claim to recover damages in an arbitration proceeding. The notice must refer to Chapter 27 of the Texas Property Code, and must describe the construction defect. If requested by the Contractor, the Owner must provide the Contractor an opportunity to inspect and cure the defect as provided by Section 27.004 of the Texas Property Code.

Executed in multiple counterparts, each of which shall constitute an original.

"OWNER" "CONTRACTOR"

_____ _____

C. SUPPLEMENT TO GENERAL CONDITIONS OF THE CONTRACT FOR CONSTRUCTION ATTACHED TO A107-1997 ABBREVIATED FORM OF AGREEMENT BETWEEN OWNER AND CONTACTOR

Reference is here made to the General Conditions of the Contract for Construction being AIA Document A107-1997. Owner and Contractor hereby agree that the General Conditions of the Contract for Construction are hereby supplemented and amended as follows:

1. The following provision is hereby added at the end of Paragraph 6.1:

   In the event that there is a conflict between the provisions of Article 20 hereof and the provisions of the foregoing Articles 1 through 19, the provisions of Article 20 shall control.

   Subject to the foregoing provisions of this Paragraph 6.1, in the event of inconsistencies or between the Contract Documents and applicable standards, codes, and ordinances, the Owner shall recover such inconsistency, subject always to Contractor's right to contest such resolution under Paragraph 9.10. The terms and conditions of this Paragraph 6.1, however, shall not relieve the Contractor of any of the obligations set forth in Paragraphs 8.1 and 8.6.

2. In Paragraph 6.3, the sentence "An enumeration of the Contract Documents appears in Article 5." should be added at the end of the paragraph.

3. In Paragraph 6.4, the words "and any special" should be added between the words "local" and "conditions" on the third line.

4. In Paragraph 7.11, the phrase "if requested by Contractor in writing" should be added at the end of the paragraph.

5. The following provision is hereby added at the end of Paragraph 7.2 to read as follows:

   Notwithstanding the foregoing, however, Owner shall not be responsible for, and will not have control or charge of, construction means, methods, techniques, sequences or procedures, or for safety precautions and programs in connection with the Work, and shall not be responsible for the Contractor's failure to carry out the Work in accordance with the Contract Documents. Owner shall not be responsible for or have control or charge over the acts or omissions of Contractor, Contractor's Subcontractors or any of their agents, or employees or any other persons performing any of the Work.

6. The following provision is hereby added to the end of Paragraph 8.1.2 to read as follows:

Contractor shall promptly report to Owner errors, inconsistencies or omissions in the Contract Documents which are discovered by Contractor. The intent of the Contract Documents is to include all items necessary for the proper execution and completion of the Work for Contractor. The Contract Documents are complementary, and what is required by one shall be as binding as if required by all. Performance by Contractor shall be required only to the extent consistent with the Contract Documents and reasonably inferable from them as being necessary to produce the intended results. All dimensions and clearances necessary to the Work, as indicated on the Drawings and contained in the Specifications, shall be verified by Contractor at the job site before commencing the Work affected thereby. Additionally, if sufficient detailed information is lacking, if Work is required in such a manner as to make it impossible to produce first-class Work, or if discrepancies appear among Contract Documents, then Contractor shall request the Owner's clarification or interpretation before proceeding with such Work.

Contractor also shall confirm from bench marks the physical surface characteristics of the site indicated on the Drawings. Report discrepancies discovered to Owner for adjustment before beginning Work. No extra charges or compensation will be allowed for grade variation or discrepancies except by written agreement before construction begins. Initiation of Work shall indicate Contractor's verification of existing grade elevations and acceptance of existing site surface characteristics.

If Contractor performs any Work in conformity with any Contract Document knowing it to be inconsistent with any other Contract Document, or knowing it to be inconsistent with any applicable law, code or regulation, without first specifically requesting and obtaining from the Owner written instructions on how to proceed with respect to such inconsistency, the Contractor shall be obligated to correct such Work according to the direction of the Owner without cost to the Owner.

7. There is hereby added new Paragraphs 8.1.3 and 8.1.4 to read as follows:

8.1.3: If requested by Owner, Contractor shall update from time to time one record copy of the Drawings (the "Record Drawings"), with color pencils to mark up said set with "record information" in a legible manner to show: (i) material deviations from the Drawings made during construction; (ii) details in the Work not previously shown except that to the extent that Architect of Record should revise the Drawings to show such details; (iii) changes to existing conditions or existing conditions found to differ materially from those shown on any existing drawings; and (iv) such other information as either Owner may reasonably request. Any changes resulting from change orders or other changes requiring the Architect of Record to modify the Drawings shall be made by the Architect of Record at Owner's expense. At the completion of the Work, Contractor shall deliver all Record Drawings to Owner. The provisions of this Paragraph 8.1.3 do not authorize Contractor to deviate from the Control Documents except as otherwise expressly provided herein.

8.1.4: The Drawings and Specifications are to be of equal priority. In the event of any internal inconsistency in either the Drawings or Specifications, or with each other, the appropriate method of performing the Work, in the event of the above-mentioned inconsistency, shall be determined by the Owner. Figures take precedence over physical scale measurements. Large scale details take precedence over smaller scale details. Drawings take precedence in regard to dimensions, when in conflict with Mechanical and Structural Drawings, except for the size of the structural members. Specifically titled drawings and sections of the Specifications take precedence over indication of the item in a collateral way. Existing conditions take precedence over Drawings and Specifications for dimensions.

Where in the Drawings and Specifications, certain products, manufacturer's trade names, or catalog numbers are given, it is done for the express purpose of establishing a standard of function, dimension, appearance, and quality of design, in harmony with the Work, and is not intended for the purpose of limiting competition.

When more than one restriction for a special material, brand, or construction process is given for an item in the Drawings and Specifications, Contractor shall comply with all restrictions. When more than one optional material, brand or construction process is specified for a particular item of work, the choice shall be the Contractor's. Contractor may use the one Contractor considers to its advantage to use.

List of "work included" and "work excluded" in the Drawings and Specifications are not intended to enumerate each and every item of work or appurtenance required, and must be used in conjunction with other portions of the Contract Documents.

8. The following provision is hereby added to the end of Paragraph 8.3.4 to read as follows:

If the Contractor desires to submit an alternative product or method in lieu of what has been specified or shown in the Contract Documents, the following provisions apply

.1 The Contractor must submit to the Owner (i) a full explanation of the proposed substitution and submittal of all supporting data, including technical information, catalog cuts, warranties, test results, installation instructions, operating procedures, and other like information necessary for a complete evaluation of the substitution; (ii) a written explanation of the reasons the substitution is advantageous and necessary, including the benefits to the Owner and the Work in the event the substitution is acceptable; (iii) the adjustment, if any, in the Contract Sum, in the event the substitution is acceptable; (iv) the adjustment, if any, in the Contract Time and the construction schedule in the event the substitution is acceptable; and (v) an affidavit stating that (a) the proposed substitution conforms and meets all the requirements of the pertinent Specifications and the requirements shown on the Drawings, and (b) the Contractor accepts the warranty and correction obligations in connection with the proposed substitution as if originally specified by the Architect. Proposals for substitutions shall be submitted in duplicate to the Owner in sufficient time to allow the Owner no less than ten (10) working days for review. No substitutions will be considered or allowed without the Contractor's submittal of complete substantiating data and information as stated hereinbefore.

.2 Substitutions and alternatives may be rejected without explanation and will be considered only under one or more of the following conditions: (i) the proposal is required for compliance with interpretation of code requirements or insurance regulations then existing; (ii) specified products are unavailable, through no fault of the Contractor; (iii) subsequent information discloses inability of specified products to perform properly or to fit in designated space; (iv) the manufacturer/fabricator refused to certify or guarantee performance or specified product as required; and (v) when in the judgment of the Owner, a substitution would be substantially in the Owner's best interests, in terms of cost, time, or other considerations.

.3 Regardless of whether any proposed substitution is accepted by the Owner, the Contractor shall reimburse the Owner for any fees, if any, charged by the Owner's Architect or other Consultant for evaluating each proposed substitution.

9. There is hereby added new Paragraph 8.3.5 to read as follows:

8.3.5 The Contractor shall be responsible to the Owner for the acts and omissions of the Contractor's employees, Subcontractors and their agents and employees, and other persons performing portions of the Work under a contract with the Contractor.

10. The following provision is hereby added to the end of Paragraph 8.4 to read as follows:

The warranty provided in Paragraph 8.4 shall be in addition to and not in limitation of any other warranty or remedy required by law or by the Contract Documents, and such warranty shall be interpreted to require Contractor to replace defective materials and equipment and re-execute defective Work which is disclosed to Contractor by Owner within a period of one (1) year after completion of the entire Work.

11. Paragraph 8.6.2 is hereby amended to read as follows:

Contractor shall, as a Cost of the Work, give all necessary notices and cause all work done and materials and equipment furnished pursuant to the Contract Documents to comply strictly with all applicable local, state and federal laws, ordinances, rules, regulations, codes and orders (hereinafter referred to collectively as "Legal Requirements"). Further, Contractor covenants and warrants that it shall observe and comply strictly with all Legal Requirements in connection with the performance of the Work or otherwise. Contractor shall take and observe all necessary measures and precautions for the safety and protection of all property and persons in connection with the Contractor's performance of the Work.

12. The following provision is hereby added at the end of paragraph 8.7.1 to read as follows:

To the extent practicable, Contractor shall update from time to time one record copy of the Drawings (the "Record Drawings"), with color pencils to mark up said set with "record information" in a legible manner to show: (i) material deviations from the Drawings made during construction; (ii) details in the Work not previously shown except that to the extent that A. J. Tamborello, Architect, AIA, should revise the Drawings to show such details; (iii) changes to existing conditions or existing conditions found to differ materially from those shown on any existing drawings; (iv) the actual installed position of major electrical, mechanical and plumbing equipment if shown on the original final Drawings and substantially different from the position shown on the original final Drawings; and (v) such other information as either Owner or Architect may reasonably request. Any changes resulting from change orders or other changes requiring the Architect to modify the Drawings shall be made by the Architect at Owner's expense. At the completion of the Work, Contractor shall deliver all Record Drawings to Owner. The provisions of this Paragraph 14.8 do not authorize the Contractor to deviate from the Contract Documents except as otherwise expressly provided herein. Submission of the final Record Drawings is required prior to or at the time of submission of Contractor's application for final payment.

13. The following provision is hereby added to the end of Paragraph 8.10 to read as follows:

If Contractor fails to do so after seven (7) days' written notice from Owner, Owner may remove same at the Contractor's expense. In the event Owner undertakes the removal of same from the site of the Project, such removal will in no way qualify or limit Contractor's obligations under the Contract Documents.

14. The following provision is hereby added to the end of Paragraph 8.13.1 to read as follows:

For purposes of this Agreement, the term "Contractor Group" is used as a reference individually and collectively for Contractor and its parent, subsidiary and affiliated companies, Contractor's subcontractors and all other parties with whom Contractor has a contractual relationship (with the exception of Owner) and its and all of their officers, directors, employees, agents, assigns, representatives, contractors, and subcontractors, and the subrogees of said parties. Similarly, the term "Owner Group" is used as a reference individually and collectively for Owner and the Owner's heirs, legal representatives, assigns, its parent, agents, separate contractors, representatives (including, without limitation, Susan Elias) and the subrogees of said parties.

Notwithstanding anything contained in this Paragraph 8.13 to the contrary, Contractor shall be liable in any case of illness, injury or death, suffered by any member of Contractor Group's employees and in any case of loss or damage to any member of Contractor Group's property, either owned or rented and operated by any member of Contractor Group arising out of or relating to the performance of the Work under the Agreement and REGARDLESS OF WHETHER CAUSED OR BROUGHT ABOUT BY ANY MEMBER OF COMPANY GROUP'S NEGLIGENCE (INCLUDING ACTIVE, PASSIVE, SOLE, JOINT OR CONCURRENT NEGLIGENCE), OR ANY OTHER THEORY OF LEGAL LIABILITY, INCLUDING STRICT LIABILITY AND INCLUDING PRE-EXISTING CONDITIONS and Contractor shall release, defend, protect, indemnify and hold harmless all members of Owner Group from and against any loss, cost, claim, obligation to indemnify another, suit, judgment, award or damage (including reasonable attorney's fees) on account of such illness, injury or death, loss or damage.

15. There is hereby added new Paragraph 8.14 to read as follows:

Owner reserves the right to request the removal from the Work of Contractor's superintendent or any Subcontractor or worker, who, in the reasonable discretion of Owner, is not properly performing its duties in accordance with the Contract Documents.

16. The following provisions are hereby added at the end of Paragraph 9.10.7 to read as follows:

In no event shall claims in excess of One Hundred Thousand Dollars ($100,000.00), in the aggregate, or claims with respect to any warranty given by Contractor to Owner under the Contract Documents, be submitted to arbitration by either party to this Agreement without the written consent of the other party. With respect to claims in excess of One Hundred Thousand Dollars ($100,000.00), in the aggregate, or warranty claims, as to which Owner and Contractor do not agree to submit arbitration, either party shall have the right to prosecute such claims in a court of competent jurisdiction.

During any arbitration proceeding, there shall be a prehearing meeting between the parties at which each party shall present a memorandum disclosing the factual basis of its claim and defenses and disclosing legal issues raised. The memorandum shall also disclose the names of any expert a party shall present as a witness during the proceedings. At the prehearing meeting, the arbitrators shall make rulings and set schedules for hearings consistent with their powers as set forth in this Paragraph 9.10.7. All hearings shall be held on consecutive weekdays until five (5) hearings have been held and shall be recommenced within seven (7) days of the last prior day of hearings. If requested by either party to this Agreement, any individual or number of sessions shall take place at the site of the Project.

The parties shall be entitled to discover all documents and information reasonably necessary for a full understanding of any legitimate issue raised in the arbitration. The parties may use all methods of discovery available under the Federal Rules of Civil Procedure and shall be governed thereby. Prior to the deposition of any expert witness, the party proposing to call such a witness shall provide a full and complete report by the expert, together with the expert's calculations and other data by which the expert reached any opinions concerning the subject matter of the arbitration. The report shall be provided no less than ten (10) days prior to the date set for the expert witness' deposition. The Federal Rules of Evidence shall be applied by the arbitrators but liberally construed to allow for the admission of evidence that is helpful in resolving the controversy.

17. There is hereby added new Paragraph 9.9.1 to read as follows:

The Architect will conduct inspections to determine the dates of Substantial Completion and Final Completion, will receive and forward to Owner for the Owner's review written warranties and related documents required by the Contract and assembled by Contractor, and will issue a final Certificate for Payment upon compliance with the requirements of Paragraph 14.5.

18. There is hereby added new Paragraph 9.9.2 to read as follows:

The duties and obligations imposed by the Contract Documents and the rights and remedies available thereunder shall be in addition to and not a limitation of any duties, obligations, rights and remedies otherwise imposed or available by law.

19. There is hereby added new Paragraphs 10.4, 10.5, 10.6 and 10.7 to read as follows:

10.4 All Subcontracts in excess of $10,000 shall be in writing in form and substance substantially similar to Contractor's standard form Subcontract attached to the Contract and made a part hereof as Exhibit "K" and shall specifically provide that Owner is an intended third party beneficiary of such Subcontract. Each Subcontract shall further contain an acknowledgement by the Subcontractor that all claims for non-payment shall be made only against a Bond to indemnify against Lien described in the Texas Property Code (if obtained by Owner or Contractor) and that, according to applicable Texas law, may not be satisfied out of the Project. As provided above, any part of the Work performed for Contractor by a Subcontractor in excess of $10,000 shall be pursuant to a written Subcontract between Contractor and such Subcontractor. Contractor shall deliver copies of all executed Subcontracts and purchase orders to Owner within five (5) days after the effective date hereof with respect to those Subcontracts and purchase orders entered into as of such date. With respect to Subcontracts and purchase orders entered into after the Effective Date hereof, copies shall be delivered to Owner within five (5) days following the execution thereof. Each such Subcontract shall:

(a) require that such Work be performed in accordance with the requirements of the Contract Documents;

(b) waive all rights the contracting parties may have against one another as described in Paragraph 16.5;

(c) require the Subcontractor to carry and maintain such insurance coverage and limits as specified by Contractor and provide that the Owner and Lender shall be additional insureds with respect to the Subcontractor's commercial general liability insurance; and

(d) require the Subcontractor to furnish such certificates and waivers as Owner may reasonable request.

10.5 Each Subcontract (which term shall also refer to purchase orders) for a portion of the Work shall be assigned by the Contractor to the Owner provided that such assignment is effective only after termination of the Contract by the Owner for cause pursuant to Paragraph 19.2 and only for those Subcontracts which the Owner accepts by notifying the Subcontractor in writing.

10.6 If the Work in connection with a Subcontract has been suspended for more than thirty (30) days after termination of the Contract by Owner pursuant to Paragraph 19.2 and Owner accepts assignment of such Subcontract, the Subcontractor's compensation shall be equitably adjusted for any increase in direct costs incurred by such Subcontractor as a result of the suspension.

10.7 Each Subcontract shall specifically provide that Owner shall only be responsible to the Subcontractor for those obligations of Contractor that accrue subsequent to Owner's exercise of any rights under the conditional assignment.

20. The following provision is hereby added to the end of Paragraph 11.3 to read as follows:

If any part of the Work depends upon the proper performance of the work of a separate Contractor, Contractor shall, prior to proceeding with the Work, promptly report to Owner any discrepancies or defects of which Contractor becomes aware in the separate Contractor's work that render it unsuitable and prevent Contractor from proceeding expeditiously with the Work. Failure of Contractor to report such deficiencies or defects upon becoming aware of such shall constitute an acceptance of such separate Contractor's work as fit and proper to receive the Work.

21. There is hereby added new Paragraph 11.4 to read as follows:

11.4 Contractor shall, as part of the Work, use commercially reasonable efforts to provide for the coordination of work to be performed by each separate Contractor engaged by Owner, if any, with the Work to be performed by Contractor or Contractor's Subcontractors of any tier, provided that Contractor shall not be liable for defects in the work of Owner's separate contractors unless caused by Contractor or Contractor's Subcontractors by damaging such work performed by Owner's separate contractors. Contractor shall cooperate with Owner and all separate contractors, their subcontractors and any other entity involved in the performance of the Work. In order to cause the Work and any work to be performed by separate contractors to be completed in an expeditious manner, Contractor agrees that it will use commercially reasonable efforts in order to ensure that such separate contractors have a reasonable opportunity to complete their Work as and when required. Owner shall cause all of its separate contractors, if any, to perform their work in accordance with the provisions of this paragraph, and to maintain (and cause their subcontractors to maintain) commercial general liability insurance in reasonable amounts and workmen's compensation insurance in not less than the minimum required statutory amount. Provided that Contractor has complied with the provisions of this Paragraph 11.4, Contractor shall be granted an extension of time for any period during which Owner's other contractors cause Contractor a delay in the critical path of Contractor's work. For Contractor to be entitled to a delay, Contractor shall submit a delay claim in the manner required by this Agreement.

22. There is hereby added new Paragraph 11.5 to read as follows:

If Contractor wrongfully causes damage to the Work or property of Owner, Contractor shall promptly remedy such damage. If Contractor wrongfully causes damage to a separate Contractor

or property of any separate Contractor, Contractor shall promptly attempt to settle any resulting dispute or claim with such other Contractor.

23. The following provision is hereby added to the end of Paragraph 12.2 to read as follows:

For deletions only to the Contract other than Allowance Items, there shall be deducted the exact cost of the Work. If the cost of any change in the Work cannot be agreed upon, Contractor, provided Contractor receives a written order signed by Owner, shall nevertheless promptly proceed with the Work involved. The cost of such Work shall then be determined by the Architect on the basis of actual cost and savings of those performing the Work attributable to the change, plus fifteen percent (15%) for profit and overhead as provided above. In such case, Contractor shall keep and present, in such form as Owner may prescribe, an itemized accounting together with appropriate supporting data for inclusion in a Change Order. Pending final determination of cost to Owner, payments shall be made on the Architect's Certificate for Payment. With respect to any additive change involving the purchase of materials, Owner shall pay the additional amount at the time the materials are ordered by Contractor. Any additional cost involving labor performed by Contractor or a subcontractor shall be paid for in the Contractor's Draw Request following performance of such work. The amount of credit to be allowed by Contractor to Owner for any deletion or change which results in a net decrease in the Contract Sum will be the amount of the actual net cost as confirmed by the Architect. When both additions and credits are involved in any one change, the allowance for overhead and profit shall be figured on the basis of the net increase or net decrease, as applicable.

24. There are hereby added new Paragraphs 13.4, 13.5 and 13.6 to read as follows:

13.4 Extensions in the Contract Time shall be granted by Owner only to the extent that such delay: (1) warrants an extension in the scheduled completion of the Work, (2) has not been caused by Contractor, (3) is grounds for an extension in the Contract Time under the Contract Documents, and (4) is of a duration not less than one (1) day. Claims by Contractor for an extension of the Contract Time must be made in writing to Owner within twenty-one (21) days after Contractor discovers the event giving rise to such claim; otherwise, Contractor will be deemed to have waived its right to claim an extension in the Contract Time as a result of the occurrence of such event.

13.5 The Contractor shall be permitted an adjustment as outlined below in the Contract Sum if any delays are caused by the Owner or Architect which result in an increase in the Contractor's general condition costs. The increase in the Contract Sum resulting from such delays shall be limited to the increase, if any, of direct costs incurred by the Contractor in performing the Work as a result of any such delays which cause the Contract Time to be increased. For purposes of this Paragraph 13.5, such direct costs are the reasonable increased costs of Contractor incurred for labor, materials, supplies and equipment, rental costs and machinery and equipment, subcontract costs, additional costs of supervision and field office personnel directly attributable to such increased costs, including the Contractor's general condition costs, but excluding any profit or fee. Owner's lawful exercise of any rights or remedies under the Contract Documents, regardless of the extent or frequency, shall not under any circumstances be viewed as a delay caused by the Owner.

13.6 Notwithstanding anything contained to the contrary in the Contract Documents, an extension of time in which to complete the Work shall be the Contractor's sole remedy for delay, any hindrance in performance of the Work, loss in productivity, impact damages or other similar claims unless such delay is caused by acts constituting intentional interference by Owner with

Contractor's performance of the Work, but only to the extent that such acts continue for more than two (2) days after the Contractor's notice to Owner of such interference. Owner's reasonable exercise of any of it rights or remedies under the Contract Documents, regardless of the extent of frequency, shall not under any circumstances be construed as intentional interference with the Contractor's performance of the Work.

25. The following provision is hereby added to the end of Paragraph 14.4.1 to read as follows:

The Work will not be considered suitable for Substantial Completion review until all Project systems are operational as designed and scheduled, all designated or required governmental inspections and certifications have been made and posted, instruction of Owner in the operation of systems has been completed, and all final finishes provided for in the Contract Documents are in place. In general, the only remaining Work shall be punchlist work, so that Owner can occupy the Property on that date subject to the completion of the Work by Contractor which will not materially interfere with or hamper Owner's use of the Property. As a further condition of Substantial Completion acceptance, Contractor shall certify that all remaining Work, the same being solely of a "punchlist" nature, will be completed within thirty (30) consecutive calendar days or as otherwise agreed upon following the date of Substantial Completion or, if such punchlist work cannot be completed within thirty (30) consecutive calendar days, the such punchlist work will be commenced within such thirty (30) day period and diligently prosecuted until completion. Notwithstanding the foregoing, Owner may refuse to make payment on any Certificate of Substantial Completion or a Certificate of Payment (including, without limitation, the Final Certificate of Payment) for any default of Contractor pursuant to the provisions of Subparagraph 14.2.3. Owner shall not be deemed in default by reason of withholding payment as long as such default remains uncured.

26. In Paragraph 14.5.2, the phrase “or obtain the necessary bond (pursuant to the Texas Property Code) to indemnify the Owner against such lien.” Should be added at the end of the Paragraph.

27. There is hereby added new Paragraph 14.5.4 to read as follows:

Contractor shall promptly pay each Subcontractor upon receipt of payment from Owner out of the amount paid to Contractor on account of such Subcontractor’s portion of the Work, the amount to which said Subcontractor is entitled, reflecting percentages actually retained from payments to Contractor on account of such Subcontractor’s portion of the Work. Contractor shall, by appropriate agreement with each Subcontractor, require each Subcontractor to make payments to Sub-subcontractors in a similar manner.

28. In Paragraph 15.1, the phrase “including, but not limited to, the completion of the Work” should be added at the end of the first sentence of the paragraph; the word “all” should be added between the words “take” and “reasonable” on the fourth line, and also between the words “provide” and “reasonable” on the fifth line.

29. The following provision is hereby added to the end of Paragraph 16.1 to read as follows:

Contractor's insurance as required by Article 16 shall include the insurance described in the certificate of insurance attached hereto as Exhibit "J" and made part hereof for all purposes, which insurance shall be maintained by Contractor throughout the term of this Agreement. The commercial general liability insurance shall be on an ISO Form O1 0196 or equivalent providing the coverage described in the certificate of insurance with limits of Contractor's commercial

general liability insurance applying separately to this Project pursuant to ISO Form CG25 03 03 97 endorsement or its equivalent. Each policy of insurance obtained by Contractor pursuant to the Contract shall provide (i) that such policy shall not be canceled, endorsed, altered or re-issued to effect a change in coverage for any reason or to any extent whatsoever unless the insured shall have first given Owner and Lender at least fifteen (15) days prior written notice; (ii) that Owner and/or Lender may, but shall not be obligated to, make premium payments to prevent the cancellation, endorsement, alteration or re-issuance of such policy, and any premium payments paid by Owner and/or Lender shall be credited against the Contract Sum; (iii) that all insurance policies shall be payable to Contractor, Owner and Lender as their respective interests may appear and be subject to the standard mortgage clause; (iv) as to the Contractor's commercial general liability insurance that it is primary as to any commercial general liability insurance carried by the Owner and Owner and Lender are additional insureds pursuant to CG Form 2026 1185 Endorsement with no qualifications, except that the primary status of Contractor's commercial general liability policy and the naming of Owner and Lender as additional insureds shall only be to the extent of Contractor's indemnification obligations under Subparagraph 8.13.1 and (v) the Contractor's worker's compensation coverage and liability coverage shall contain waiver of subrogation endorsements in favor of the Owner.

30. The following sentence is hereby added to the end of Paragraph 16.4.1 as follows:

The Contractor shall effect and maintain similar property insurance on portions of the Work stored of the site or in transit when such portions of the Work are to be included.

31. There is hereby added new Paragraph 17.6 to read as follows:

If Owner prefers to accept defective or nonconforming Work, Owner may do so instead of requiring its removal and correction, in which case a Change Order will be issued to reflect a reduction in the Contract Sum where appropriate and equitable. Such adjustment shall be effected whether or not final payment has been made. If Owner and Contractor are unable to agree upon the amount of the adjustment of the Contract Sum relating to Owner's acceptance of defective or nonconforming Work, Architect shall determine the appropriate adjustment within fifteen (15) days after either Owner or Contractor request the Architect to make such determination.

32. There is hereby added new Paragraph 17.7 to read as follows:

If a portion of the Work is covered contrary to the Architect's request or to requirements specifically expressed in the Contract Documents, it must, if required in writing by the Architect, be uncovered for the Architect's observation and be replaced at Contractor's expense without change in the Contract Time.

33. There is hereby added a new Paragraph 17.8 to read as follows:

If a portion of the Work has been covered which the Architect has not specifically requested to observe prior to its being covered, the Architect may request to see such Work and it shall be uncovered by Contractor. If such Work is in accordance with the Contract Documents, costs of uncovering and replacement shall, by appropriate Change Order, be charged to Owner. If such Work is not in accordance with the Contract Documents, Contractor shall cause its Subcontract to re-execute the Work as required by the Contract Documents, at no expense to Owner, unless the condition was caused by Owner or a separate Contractor in which event Owner shall be responsible for payment of such costs.

34. There is hereby added new Paragraph 18.5 to read as follows:

Contractor shall be responsible for damaged or broken glass, and at completion of the Work shall replace such damaged or broken glass. Contractor shall perform the following final cleaning as a condition precedent to final completion of the Work:

a. Remove all temporary protections;

b. Remove marks, stains, fingerprints and other soil or dirt from all surfaces and other work;

c. Remove spots, mortar, plaster, soil and paint from ceramic tile, marble, and other finish materials from all surfaces and other Work;

d. Clean fixtures, cabinet work and equipment, removing stains, paint, dirt, and dust and leave in an undamaged and new condition; and

e. Clean all surfaces and other Work in accordance with recommendations of the manufacturer.

35. There is hereby added new Paragraph 18.6 to read as follows:

No action or failure to act by Owner or Contractor shall constitute a waiver of any right or duty afforded any of them under the Contract, nor shall any such action or failure to act constitute an approval of or acquiescence in any breach thereunder, except as may be specifically agreed to in writing.

36. There is hereby added new Paragraph 18.7 to read as follows:

If the Contract Documents, laws, ordinances, rules, regulations or orders of any public authority having jurisdiction require any portion of the Work to be inspected, tested or approved, Contractor shall give the Architect timely notice of its readiness so the Architect may observe such inspection, testing or approval. Except as otherwise provided in this Agreement, Owner shall bear all costs of other inspections, tests or approvals.

37. There is hereby added new Paragraph 18.8 to read as follows:

In performing its obligations hereunder, Contractor shall be deemed an independent Contractor and not an agent or employee of Owner. Contractor shall have exclusive authority to manage, direct and control the Work. Owner is interested in only the results obtained and not in the methods used in achieving the results.

38. There is hereby added new Paragraph 18.9 to read as follows:

Provided that Contractor has been paid by Owner all sums (or the applicable portion thereof) due to Contractor pursuant to the Agreement (other than under the circumstances of Paragraph 20.2 of the General Conditions), Contractor shall not voluntarily permit any laborer's, materialmen's, mechanic's, or other similar liens to be filed or otherwise imposed on any part of the Work or the property on which the Work is performed. If any laborer's, materialmen's, mechanic's, or other similar lien or claim thereof is filed or otherwise imposed against the Property, Contractor, within thirty (30) days after actual notice to Contractor of the filing of such lien or other imposition

thereof, shall cause such lien to be released or otherwise discharged, except as to liens which Contractor is contesting in good faith by appropriate action diligently pursued, provided Contractor has notified Owner of the nature of such lien and informed Owner of the type of action being pursued by Contractor and, if requested by Owner, has provided Owner with a surety bond satisfactory to Owner, sufficient to cover such claim in the event Contractor is unsuccessful in contesting same or has made other arrangements satisfactory to Owner. If, however, Contractor, within the aforesaid thirty (30) day period, does not cause such lien either to be released and discharged forthwith or contests same in the manner provided hereinabove, then Owner shall have the right to pay all sums necessary to obtain such release and discharge and reduce the Contract Sum by the amount of such payments made by Owner. Contractor shall indemnify, defend and hold harmless Owner from all claims, losses, demands, causes of action or suits of whatever nature arising out of any such lien or that part of the Work covered thereby.

39. There is hereby added new Paragraph 18.10 to read as follows:

Except for Owner's express approval or acceptance of certain portions of the Work by written notice thereof to Contractor, no inspection performed or failed to be performed by Owner hereunder shall constitute a waiver of any of Contractor's obligations hereunder or be construed as an approval or acceptance of the Work or any part thereof.

40. Paragraphs 19.2.5 through 19.2.8 are hereby added to read as follows:

19.2.5 If the cost of finishing the Work, including compensation for the additional Architect's services made necessary thereby, exceeds the unpaid balance of the Contract Sum, the Contractor shall pay such difference to the Owner promptly upon demand by the Owner. The amount to be paid by the Contractor to the Owner shall be certified by the Architect, upon application, in the manner provided in Paragraph 14.5. The Contractor's obligation for payment of excess costs to complete the Work shall survive the termination of the Agreement.

19.2.6 In addition to the circumstances outlined in Paragraph 19.2 entitling Owner to perform Work on behalf of Contractor or terminate the Contract, if (i) Contractor becomes insolvent, or makes a transfer in fraud of creditors, or makes an assignment for the benefit of creditors; (ii) Contractor files or has filed against it a petition under any chapter or section of the United States Bankruptcy Code, as amended, or under any similar law or statute of the United States or any state thereof, or shall be adjudged bankrupt or insolvent in any legal proceeding; (iii) a receiver or trustee is appointed for all or a significant portion of the assets of Contractor; and (iv) Contractor actually or constructively abandons, or puts Owner on actual or constructive notice that it intends to abandon, the Project, Owner may exercise the remedies provided in Subparagraphs 19.2.2 and 19.2.4.

19.2.7 After any termination of this Agreement by Owner pursuant to Paragraph 19.2, Contractor shall not be entitled to any further payment under this Agreement except to the extent of any amount by which Work completed or installed by Contractor prior to such termination and not previously paid for by Owner exceeds the amount due by Contractor to Owner under Paragraph 19.2 (including all damages which Owner would be entitled to recover at law from Contractor by reason of Contractor's breach), and even then only at such time as the Work is finally completed. Any sums payable by Contractor to Owner pursuant to Article 20 shall be payable upon demand and shall bear interest at the rate described in Paragraph 4.1.3 of the Agreement from the date of demand until paid.

19.2.8 It is recognized that: (1) if an order for relief is entered on behalf of Contractor pursuant to Title 11 of the United States Code, (2) if any other similar order is entered under any other debtor relief laws, (3) if Contractor makes a general assignment for the benefit of its creditors, (4) if a receiver is appointed for the benefit of its creditors, or (5) if a receiver is appointed on account of its insolvency, any such event could impair or frustrate Contractor's performance of the Contract Documents. Accordingly, it is agreed that upon the occurrence of any such event, Owner shall be entitled to request of Contractor or its successor in interest adequate assurance of future performance in accordance with the terms and conditions of the Contract Documents. Failure to comply with such request within ten (10) days of delivery of the request shall entitle Owner to terminate the Contract Documents and to the accompanying rights set forth above in Paragraph 19.2.6 hereof. In all events pending receipt of adequate assurance of performance and actual performance in accordance therewith, Owner shall be entitled to proceed with the Work with its own forces or with other contractors on a time and material or other appropriate basis, the cost of which will be backcharged against the Contract Sum.

SIGN FOR IDENTIFICATION:

"OWNER"	"CONTRACTOR"
_____	_____

ITEM H

AGREEMENT (Contractor's Form with Owner's Provisions Blacklined)*

Cost of the Work Plus
Fee (No Guaranteed Max)

This Agreement ("Contract") is entered into by _____, hereinafter referred to as "Contractor", and _____ hereinafter referred to as "Owner".

Article 1

The Work

Contractor agrees to perform on behalf of the Owner, and Owner hereby requests Contractor to perform the following described Work:

Construct residence on real property known as _____, Lot __, Block __ in the _____ Subdivision, _____, Harris County, Texas. Such construction shall be in accordance with drawings ~~<and>~~**,** engineering plans **and specifications** (Exhibit A) prepared by _____, _____ _____, _____, and _____ **(the "Contract Documents").**

The term "Work", as used herein, means the construction and services required by the Contract Documents, and includes all other labor, materials, equipment and services provided or to be provided by Contractor to fulfill Contractor's obligations.

Contractor shall supervise and direct the Work using Contractor's best skill and attention, including enforcing strict discipline and good order among Contractor's employees and other persons carrying out the Contract. Contractor shall be responsible for and have control over construction means, methods, techniques, sequences and procedures and for coordinating all portions of the Work under the Contract unless the Contract Documents give other specific instructions concerning these matters.

Contractor warrants to Owner and Architect that materials and equipment furnished under the Contract will be of good quality and new unless otherwise required or permitted by the Contract Documents, that the Work will be free from defects not inherent in the quality required or permitted and that the Work will conform with the requirements of the Contract Documents. Work not conforming to these requirements, including substitutions not properly approved and authorized, may be considered defective. Contractor's warranty, however, excludes remedy for damage or defect caused by abuse, modifications not executed by Contractor, improper or insufficient maintenance, improper operation, or normal wear and tear under normal usage.

Contractor shall keep the site of the Project reasonably clean and free from rubbish, excess debris, surplus and waste material and shall remove the same from the site of the Project as the Work progresses, all as and when required by the Contract Documents and applicable laws or deed restrictions. If Contractor fails to do so after seven (7) days' written notice from Owner, Owner may remove same at Contractor's expense. In the event Owner undertakes the removal of same from the site of the Project, such removal will in no way qualify or limit Contractor's obligations under the Contract Documents. At completion of the Work, Contractor shall remove from and about the Project waste materials, rubbish, Contractor's tools, construction equipment, machinery and surplus materials.

***Articles 13 & 14 were added, not blacklined.**

Contractor shall comply with and give notices required by laws, ordinances, rules, regulations and lawful orders of public authorities bearing on performance of the Work; provided, however, that Contractor shall not be responsible for cost of obtaining approvals or certifications from any engineer or Architect as long as

such approvals or certifications do not relate to Contractor's defective Work or Work re-executed by Contractor. Requirements of public authorities mentioned in this Article 1 apply as minimum requirements only. They do not supersede more stringent requirements stated elsewhere in the Contract Documents. If changes must be made to the Contract Documents because of a change in law or governmental regulations after the effective date hereof, appropriate adjustments will be made in the Cost of the Work.

Contractor shall have the sole liability and responsibility for connecting onto plumbing lines, sanitary and storm sewer lines, electrical lines and other utilities to be utilized in connection with the completion of the improvements covered by this Contract. Upon completion of the Work by Contractor, all other utilities shall be connected by Contractor and shall be functioning in all respects and in good working order.

Article 2

Time of Commencement and Completion

The Work to be performed under this Contract shall be commenced on:

within ~~<XX>~~ **five (5)** days of receipt of Bunker Hill Village building permits.

The Work shall be substantially completed ~~<_____>~~**three hundred (300)** days after commencement, provided that should the Work be hindered or delayed due to inclement weather, strikes, boycotts or other events outside the control of the Contractor including, but not limited to the failure of the Owner and/or his agents to make timely decisions and selections as defined in Article 8, the date of **substantial** completion shall be extended in an amount of time equal to the delays caused by the matters referred to herein**, provided that the Contractor submits a claim for delay in writing to Owner not later than ten (10) days following the inception of each delay**. Substantial completion shall be defined as all construction work required by the City of ~~<Houston>~~ **Bunker Hill** for final building inspections having been completed and approved **and a Certificate of Occupancy has been issued**, but minor finishing adjustment or completion items may remain to be done by Contractor. ~~<If Contractor fails to substantially complete the residence on or before _____ days after commencement then the Contractor shall pay to Owner, as damages, $_____ per day from the _____ day until the house is substantially complete>~~ **Final completion shall occur no later than twenty-one (21) days following substantial completion**.

Article 3

Cost Paid by Owner

The Owner agrees to pay for the **"**Cost of the Work**"** as defined herein. The term "Cost of the Work" shall mean cost necessarily incurred in the performance of the Work, and paid by the Contractor. Such costs shall be at rates not higher than the standard paid in the locality of the Work, except with prior **written** consent of the Owner, and shall include the following items:

A. COST OF ALL MATERIALS, supplies, and equipment incorporated in the Work, including costs of transportation thereof**, but shall be subject to the limitations and exclusions of this Article 3 and Article 4 hereof. Costs described in this Article 3 shall not include Contractor's office overhead**.

B. PAYMENTS made by the Contractor to Subcontractors for Work performed pursuant to Subcontracts under this Agreement. **With respect to all Subcontracts and purchase orders, Owner shall not be obligated to pay more for the Work covered by such Subcontract or purchase order than approved in writing by Owner prior to or contemporaneously with Contractor entering into such Subcontract or purchase order. No such Subcontract or purchase order shall be entered into by Contractor without the prior approval of Owner, except to the extent that the Subcontract Sum (inclusive of materials and labor, if applicable) in such Subcontract or purchase order is equal to or less than the amount listed for such item in the Schedule of Values.**

C. COST, INCLUDING TRANSPORTATION AND MAINTENANCE, of all materials, supplies, equipment, temporary facilities and hand tools not owned by the workmen, which are consumed in the performance of the Work, and cost less salvage value on such items used but not consumed which remain the property of the Contractor**, subject, however, to the provisions of paragraph B, above**.

D. RENTAL CHARGES of any temporary site construction office, temporary site storage facility, construction fencing, all necessary machinery and equipment exclusive of hand tools, used at the site of the Work, whether rented from the Contractor or others, including installation, minor repairs and replacements, dismantling, removal, transportation and delivery costs thereof, at rental charges consistent with those prevailing in the area.

E. COST OF PREMIUMS for all bonds and insurance which the Contractor is required by the Contract Documents to purchase and maintain.

F. SALES, use, or similar taxes related to the Work imposed by any governmental authority and for which the Contractor is liable.

G. PERMIT FEES, real estate commissions, royalties, damages for infringement of patent, and costs of defending suits therefore, and deposits lost for causes other than the Contractor's negligence.

H. COST OF REPAIRS to damaged Work, for which the cause or identity of agent causing the damage cannot be established.

I. LOSSES AND EXPENSES, not compensated by insurance or otherwise, sustained by the Contractor in connection with the Work, provided they have resulted from causes other than the fault or neglect of the Contractor. Such losses shall include settlements made with the written consent and approval of the Owner. No such losses and expenses shall be included in the Cost of the Work for the purpose of determining the Contractor's Fee unless such Loss requires reconstruction and the Contractor is placed in charge thereof, in which case he shall be paid for his services a Contractor's Fee proportionate to that stated in Article 7.

J. MINOR EXPENSES such as telegrams, long distance telephone calls, telephone service at the site, expressage, and similar petty cash items in connection with the Work.

K. COST OF REMOVAL of all debris.

L. COSTS INCURRED DUE TO AN EMERGENCY affecting the safety of persons and property.

M. OTHER COSTS incurred in the performance of the Work if and to the extent approved in advance in writing by the Owner.

Article 4

Cost ~~<not>~~ **Not** Paid ~~<by>~~ **By** Owner

The term "Cost of the Work" shall not include any of the following items:

A. ~~<A.>~~ Overhead or general expenses of the Contractor of any kind except as may be expressly included in Article 3 above.

B. ~~<B.>~~ Cost due to the negligence of the Contractor, a Subcontractor or anyone directly or indirectly employed by either, or for acts for which either may be liable, including but not limited to the correction of defective Work and the disposal of materials or equipment improperly supplied.

C. **Notwithstanding the breakdown or categorization of any costs to be reimbursed in Article 3 or elsewhere in the Contract Documents, there shall be no duplication of payment of any particular**

items for which payment is requested can be characterized as falling into more than one of the types of compensable or reimbursable categories.

D. Any cost or expense incurred under Paragraph 14.20 hereof.

E. Any repairs to the Work performed by Contractor following substantial Completion in satisfaction of a warranty of the Work made to Owner, other than the cost of punch-list work.

F. Losses and expenses sustained by Contractor, Subcontractors or Sub-subcontractors, not compensated by insurance or otherwise, if such losses and expenses are due to infidelity or dishonesty on the part of any employee of Contractor, Subcontractors or Sub-subcontractors, or others to whom their respective property may be entrusted, inventory shortage or unexplained disappearance.

G. Any of the Contractor's income or excess profits, corporation, franchise or similar taxes.

H. Contractor's worker's compensation and commercial general liability insurance.

Article 5

Discounts, Rebates and Refunds

All cash discounts shall accrue to the benefit of the Owner. All trade discounts, rebates and refunds and all returns from sale of surplus material and equipment shall accrue to the Owner.

Article 6

Changes in the Work

The Owner may order Changes in the Work consisting of additions, deletions or modifications. The Cost of Changes in the Work shall be in accordance with and as defined in Article 3. The Contractor shall be paid a Contractor's Fee for Changes in the Work on the basis of the Cost of Work in accordance with and as defined in Article 7 only to the extent that such Changes in the Work extends the construction time.

If the cost of any change in the Work cannot be agreed upon by Owner and Contractor, Contractor, provided Contractor receives a written order signed by Owner, shall nevertheless promptly proceed with the Work involved. The cost of such Work shall then be determined by the Architect on the basis of actual cost and savings of those performing the Work attributable to the change, plus fifteen percent (15%) for profit and overhead. In such case, Contractor shall keep and present, in such form as Owner may prescribe, an itemized accounting together with appropriate supporting data for inclusion in a Change Order. Pending final determination of cost to Owner, payments shall be made on the Architect's Certificate for Payment. With respect to any additive change involving the purchase of materials, Owner shall pay the additional amount at the time the materials are ordered by Contractor. Any additional cost involving labor performed by Contractor or a subcontractor shall be paid for in the Contractor's Draw Request following performance of such work. The amount of credit to be allowed by Contractor to Owner for any deletion or change which results in a net decrease in the Cost of the Work will be the amount of the actual net cost as confirmed by the Architect. When both additions and credits are involved in any one change, the allowance for overhead and profit shall be figured on the basis of the net increase or net decrease, as applicable.

Article 7

Contractor's Fee

In consideration of the performance of this Agreement, the Owner agrees to pay the Contractor for the Work described as compensation for his services, the total Cost of the Work plus a Contractor's Fee of:

_____
_____
_____
_____

This Contractor's Fee is based on there being a part-time superintendent assigned to this job whose time shall be split as necessary between the jobsite, picking up and returning small materials when feasible, at the Contractor's office, etc. The Contractor's Fee shall be prorated for the first month in which Work is commenced and the last month in which Work is completed, and shall be payable to the Contractor by the third-to-last business day of each month during which this Agreement is in effect.

Article 8

Owner's Responsibilities

The Owner agrees to obtain and furnish to Contractor the geotechnical (soil) reports and foundation and structural engineering designs referred to in Article 1. Contractor will follow these designs but will not be held responsible for the contents of the soil report or the foundation and/or structural designs. Contractor recommends that Owner have Owner's engineers inspect and test the work as these engineers deem necessary throughout the construction process, and that these inspections and testing be documented with compliance reports.

The Owner acknowledges Owner's responsibility to ensure that they and/or their agents provide the Contractor with timely decisions and selections, that these selections need to be available at the jobsite when needed for installation, and that failure to do so could result in delays as defined in Article 2.

The Owner acknowledges Owner's responsibility to make available to the Contractor the funds required to cover invoices and amounts for work performed and materials ordered or delivered, even if unbilled and not covered by an invoice, for the Cost of the Work and the Contractor's Fee.

Article 9

Maintenance of Cost Accounting Records

The Contractor shall check all materials, equipment and labor entering into the Work and shall keep such full and detailed accounts as may be necessary for proper financial management under this Agreement, and the system shall be specified by Contractor. The Owner shall be afforded access at the Contractor's office during normal business hours to all Contractor's records, books, correspondence, instructions, drawings, receipts, vouchers, memoranda and similar data relating to this Agreement. The Contractor shall preserve such records for a period of ~~<one year>~~ **three (3) years** from completion of the job.

Article 10

Disbursement of Construction Cost

All funds drawn (whether directly from the Owner or from the construction loan at _____) shall be placed in the Contractor's checking account no. _____ at

_____ Bank (the "Distribution Account"), or any checking account subsequently designated by Contractor as the Distribution Account. It shall be the responsibility of the Owner to provide funds for deposit in a timely manner following receipt ~~<of a draw request>~~ **by Application for Payment, as described below,** to allow the Contractor to cover amounts owed and pay invoices ~~<(as defined in Article 8 above) >~~from Subcontractors and Materialmen as they become due. The Contractor agrees to attempt to minimize the balance carried in the Distribution Account. All payments from this account shall be limited to the Cost of the Work and the Contractor's Fee related to the residence covered by this Agreement. Owner shall have the right to **review, copy and/or** audit the account and all the books and records pertaining to this Agreement at the Contractor's office during normal business hours.

A. **Provided that an Application for Payment is received by the Owner not later than the last day of the month, the Owner shall (i) cause the Architect to issue a certificate for payment with respect to the Application for Payment, and (ii) make payment to the Contractor of the approved amount of such Application for Payment, all not later than the 10th day of the succeeding calendar month. If an Application for Payment is received by the Owner after the Application Date fixed above, payment shall be made by the Owner in the amount certified by the Architect not later than ten (10) days after the Owner receives the Application for Payment. The Application for Payment shall be on an AIA Form G702 and G703. Owner and Contractor have agreed to a Schedule of Values of the Work attached hereto as Exhibit "A", and made a part hereof for all purposes, and Contractor's Applications for Payment will follow as closely as possible said Schedule of Values. Applications for Payment also shall show the percentage of completion of each portion of the Work as of the end of the period covered by the Application of the Payment. The percentage of Completion shall be the percentage of the Work which has actually been completed. Contractor's Fee shall be shown as a single, separate item.**

Owner shall make progress payments on account of the Cost of the Work based upon 90% of the portion of the Cost of the Work properly allocable to labor, materials and supplies incorporated in the Work and 90% of the portion of the Cost of the Work properly allocable to materials and supplies suitably stored at the site, up to the last day of the applicable payment period, less the aggregate of previous payments in each case. It is understood that the retainage as herein described is intended to conform to the statutory ten percent (10%) retainage required by Sections 53.101 to 53.105 of the Texas Property Code.

Together with the Contractor's Application for Payment, the Contractor shall submit an itemized statement certified (and sworn to, if requested by Owner) to be true and correct by a financial officer of the Contractor, showing in complete detail all monies paid or costs incurred by the Contractor on account of the Cost of the Work during the previous month for which the Contractor is to be reimbursed and the amount of the Contractor's Fee due, together with (a) all payrolls for all labor, (b) copies of invoices for all services and materials acquired in connection with such monies paid or costs incurred together with a copy of the checks (other than payroll checks) issued by Contractor in payment of such costs, and (c) such other data supporting the Contractor's right to payment for subcontractors or materials as the Owner or the Architect may reasonably require.

Not later than the date of each subsequent Application for Payment, the Contractor shall submit to the Owner the Contractor's release of lien and releases of liens for all subcontractors, materialmen, and suppliers, who have performed any services or provided any materials for the Project since the date of the preceding Application for Payment and were paid from such progress payment. Each release of lien shall waive and release all rights of the affiant to claim or assert any lien against the Project either for the period through the last day included in the Application for Payment ("Partial Release of Lien") or for the affiant's completed work on the Project ("Final Release of Lien").

The Owner reserves the right to refuse disbursement of all or any portion of any progress payment until it has received all the releases of liens for the prior progress payment which are satisfactory and acceptable to Owner in the exercise of reasonable judgment. The Owner also reserves and shall have the right to issue joint-payee checks in the names of the Contractor and any unpaid party, or otherwise withhold funds from payments, to assure payment to proper parties and the Owner's receipt of appropriate releases of liens.

Without limitation of the foregoing, the Contractor shall provide with each Application for Payment an affidavit executed by an officer of Contractor in form and substance satisfactory to the Owner swearing that the cost of all labor and materials of every kind and character incurred to the date of such affidavit in connection with the Work have been paid in accordance with the payment provisions of each subcontract therefor, except the unpaid items to be paid from the proceeds of the current Application for Payment.

B. Final Payment, constituting the entire unpaid balance of the Contract Sum, shall be paid by Owner to Contractor thirty (30) days after Completion of the Work, provided that the Work has been finally completed, final inspection approvals have been issued by the City of Bunker Hill, the Contract fully performed (excluding any warranty obligations), and a final Certificate for Payment has been issued by the Architect, and receipt by Owner of final lien releases from all contractors, subcontractors, laborers and materialmen employed in furnishing labor or materials in connection with the construction of the improvements performing Work in a form approved by Owner and Owner's lender ("Lender") in the exercise of reasonable judgment and Contractor's final lien release in a form approved by Owner and Lender in the exercise of reasonable judgment.

C. Payments due and unpaid under the Contract shall bear interest from the date payment is due at the lesser of twelve percent (12%) per annum or maximum non-usurious rate provided by the laws in the State of Texas. No interest shall be payable on retainage as long as the retainage is timely paid in accordance with the Contract.

D. Payments may be withheld by Owner on account of (a) defective Work determined by Architect if not remedied, (b) claims filed by third parties, (c) failure of Contractor to make payments properly to Subcontractors or for labor, materials or equipment or (d) persistent failure of the Contractor to carry out the Work in accordance with the Contract Documents.

E. The making of final payments shall constitute a waiver of claims by Owner except those arising from:

1. liens, claims, security interests or encumbrances arising out of the Contract and unsettled;

2. failure of the Work to comply with the requirements of the Contract Documents; or

3. items of special warranties required by the Contract Documents.

Article 11

Insurance

Contractor shall arrange to have provided (and the cost thereof shall be included in the Cost of the Work) the following insurance coverage by a mutually agreed upon insurance company licensed to do business in the State of Texas, prior to commencement of the Work, in the manner and in the amounts set forth below:

A. ~~<A.>~~ Builders Risk Insurance Policy (including Fire, Extended Coverage and Vandalism Insurance) in an amount of $_____.

B. ~~<B.>~~ Statutory Workmen's Compensation Insurance including Employer's Liability with a limit of not less than Five Hundred Thousand Dollars ($500,000.00) covering Contractor, Contractor's employees, Subcontractors, Subcontractors' employees, agents and subagents. Owner may elect to allow Subcontractors to sign a "Texas Workers' Compensation Commission Joint Agreement To Affirm Independent Relationship" (hereinafter referred to as "Waiver") as long as such Waiver remains a legal option under Texas law, but in so doing acknowledges that he may be incurring possible additional future liability.

C. ~~<C. Comprehensive>~~ **Commercial** General Liability Insurance with a ~~<limit of $_____ per occurrence for personal injuries and property damage>~~ **combined single limit coverage of not less than $1,000,000.00** resulting from Contractor's operations and completed operations.

D. **Certificates of such insurance shall be delivered to Owner and Lender prior to the commencement of the Work. Each policy of insurance obtained by Contractor pursuant to the Contract shall provide (i) that such policy shall not be canceled, endorsed, altered or re-issued to effect a change in coverage for any reason or to any extent whatsoever unless the insured shall have first given Owner and Lender at least fifteen (15) days prior written notice; (ii) that Owner and/or Lender may, but shall not be obligated to, make premium payments to prevent the cancellation, endorsement, alteration or re-issuance of such policy; and (iii) that all insurance policies shall be payable to Owner and Lender as their interests may appear and be subject to the standard mortgage clause.**

E. Owner shall be responsible for purchasing and maintaining Owner's usual liability insurance. Optionally, Owner may purchase and maintain other insurance for self-protection against claims which may arise from operations under the Contract. Contractor shall not be responsible for purchasing and maintaining this optional Owner's liability insurance. Notwithstanding the foregoing provisions of this Paragraph E, Contractor's commercial general liability insurance shall be primary as to any act of, by, through or under Contractor at the Project, and Owner's commercial general liability insurance shall be secondary with respect to such acts or omissions.

F. Owner and Lender will be named as an additional insured on the Builder's Risk insurance and the commercial general liability insurance of Contractor.

G. Owner and Contractor agree that in the event Owner or Contractor ("First Party") sustains a loss by reason of fire, damage or other casualty which is covered by a fire or extended coverage insurance policy or builder's risk policy or other policy required to be carried by the First Party under this Contract, including protection against theft, burglary and vandalism, and such fire, casualty or damage is caused in whole or in part by the acts or omissions of the other party hereto ("Second Party") or the Second Party's agents, servants or employees, then the First Party agrees to look solely to its insurance proceeds (if any); and the First Party shall not be entitled to the recovery of damages against the Second Party or the agents, servants, employees, heirs, legal representatives or assigns of the Second Party; and no third party shall have any right of recovery against the Second Party or the agents, servants, employees, heirs, legal representatives or assigns of the Second Party by way of subrogation or assignment.

H. All Subcontractors used by Contractor shall, for the term of this Contract, carry and maintain in full force and effect, their current insurance, if any, insuring such subcontractor for their respective liabilities and interests while they are performing hereunder.

Article 12

Termination of the Agreement

A. ~~<The Owner may terminate this Agreement if Contractor defaults in performance of the Work, and remedy of such default is not commenced within fifteen days after written notice to the Contractor by the Owner. If the Owner terminates the Agreement as provided herein, Owner shall become liable for the unpaid cost of completed Work to the date of termination. In case of Termination of the Contract, the Owner shall further assume and become liable for the obligations, commitments and unsettled claims that the Contractor has previously undertaken or incurred in good faith in connection with said Work. The Contractor shall execute and deliver all such papers and take all such steps, including the legal assignment of his contractual rights, as the Owner may require for the purpose of fully vesting in him the rights and benefits of the Contractor under such obligations or commitments.~~

~~If Owner fails to pay Contractor's Fee or provide sufficient funds as defined in Article 10 within seven (7) days after receipt of request, Contractor may terminate the Agreement upon written notice to the Owner and recover from the Owner payment for all work executed and for any proven loss.~~

~~Article 13~~

~~Warranty~~

~~Contractor guarantees to repair or replace any defects in workmanship or material, appearing in the Work during the year after the date of completion without any additional Contractor's Fee. All costs of such repairs or replacement shall be paid by Owner unless covered under the terms of a warranty from the manufacturer or distributor. Contractor shall furnish to Owner all written warranties provided by the manufacturers or distributors of any equipment or materials furnished or installed under this Agreement. See Exhibit _____.~~

~~IMPORTANT NOTICE: You and your Contractor are responsible for meeting the terms and conditions of this >~~If Owner fails to make payment for a period of thirty (30) days through no fault of Contractor, Contractor may, upon seven (7) additional days' written notice to Owner, terminate the Contract and recover from Owner payment for Work executed and for proven loss with respect to materials, equipment, tools, and construction equipment and machinery, including reasonable overhead, profit, and damages applicable to the Project.

B. If Contractor defaults or persistently fails or neglects to carry out the Work in accordance with the Contract Documents or fails to perform a provision of this Agreement, Owner after seven (7) days' written notice to Contractor and without prejudice to any other remedy Owner may have (provided that Contractor has not cured such default), may make good such deficiencies and may deduct the cost thereof, including compensation for Architect's services and expenses made necessary thereby, from the payment then or thereafter due Contractor. Alternatively, at Owner's option, and upon certification by Architect that sufficient cause exists to justify such action, Owner may terminate the Contract and take possession of the site and of all materials, equipment, tools, and construction equipment and machinery thereon owned by Contractor and may finish the Work by whatever method Owner may deem expedient. If the unpaid balance of the estimated Cost of the Work, plus Contractor's Fee, exceeds costs of finishing the Work, including compensation for the services and expenses made necessary thereby, such excess shall be paid to Contractor, but if such costs exceed such unpaid balance, then Contractor shall pay the difference to Owner.

After any termination of this Agreement by Owner pursuant to Article 12, Contractor shall not be entitled to any further payment under this Agreement except to the extent of any amount by which Work completed or installed by Contractor prior to such termination and not previously paid for by Owner exceeds the amount due by Contractor to Owner under Article 12 (including all damages which Owner would be entitled to recover at law from Contractor by reason of Contractor's breach), and even then only at such time as the Work is finally completed. Any sums payable by Contractor to Owner pursuant to Article 12 shall be payable upon demand and shall bear interest at the rate described in Paragraph 10 C. of the Agreement from the date of demand until paid.

C. Owner shall be deemed to be a third party beneficiary of each Subcontract and purchase order (herein collectively referred to as the "Subcontract") and may, if Owner elects, require (following Contractor's default under this Contract and/or Owner's termination of the Contract pursuant to the other provisions of this Contract permitting termination by Owner) that the Subcontractor (which term shall include suppliers) perform all of the then unperformed duties and obligations of such Subcontractor thereunder for the benefit of Owner (rather than Contractor); however, in the event that Owner requires any such performance by a Subcontractor for the direct benefit of Owner, then Owner shall be bound and obligated to pay such Subcontractor for all work done by such Subcontractor (i) to date (to-wit: the reasonable value of that portion of the subcontract performed by such Subcontractor) and (ii) subsequent to the date that Owner elects to invoke such rights. Owner's liability in this connection, however, is not to exceed the amount obtained by subtracting from the subcontract price the total of all sums paid by Contractor to Subcontractor prior to Owner's invoking its rights hereunder with respect to direct performance by Subcontractor for Owner. In the event that Owner elects to invoke such rights, Owner shall give written notice of such election to Contractor and such Subcontractor.

Article 13

Warranty

Notwithstanding anything contained in the Contract Documents to the contrary, if within one (1) year after the date of Final Completion or such longer period of time as may be prescribed by law with respect to latent defects or by the terms of any applicable special guarantee required by the Contract Documents or by any specific provisions of the Contract Documents, Owner discovers any defective work, including that any portion of the Work was not constructed substantially in accordance with the Contract Documents, Contractor shall promptly, without cost to Owner, either correct such defective Work, or, if it is not possible to correct such defective Work, remove it from the site and replace it with non-defective Work. In any emergency where delay would cause serious risk of loss or damage, Owner may have the defective Work corrected or the rejected Work removed and replaced, and all direct costs of such removal and replacement, including reasonable compensation for additional professional services, shall be paid by Contractor. Inability or refusal of a subcontractor responsible for defective Work to correct such Work shall not excuse Contractor from performing under the warranty provided in this Article 13. Should Contractor fail to make such warranty corrections required hereby within a reasonable time, not to exceed thirty (30) days after written notice thereof from Owner to Contractor, provided that if the required corrections cannot be made within thirty (30) days, Contractor fails to commence making such warranty corrections within a reasonable period of time, not to exceed thirty (30) days, and diligently continue the prosecution of such warranty corrections until completion, Owner may do so at the expense of and for the account of Contractor.

At the time of final payment, Contractor also shall assign and transfer to Owner all assignable warranties heretofore or hereafter received by Contractor for "consumer products" to be installed in the "improvements" (as such terms are defined by the Federal Trade Commission), whether issued by the seller, manufacturer or supplier and all other warranties delivered to Contractor by subcontractors or suppliers; provided, however, that Owner and Contractor agree that during the one (1) year warranty period, Contractor shall be obligated to enforce all warranties provided by Contractor's subcontractors and suppliers at no cost or expense to Owner, other than appliance and HVAC warranties.

Article 14

Other Conditions or Provisions

14.1 No Interest on Retainage. No interest shall be due and payable by Owner to Contractor, any Subcontractor or any other party on any of the sums retained by Owner pursuant to any of the terms or provisions of any of the Contract Documents; however, Owner shall be obligated to pay Contractor interest on payments due and unpaid as described in Article 4 hereof.

14.2 Inspections. Owner shall have the right to appoint at any time or from time to time one or more engineers, architects or other representatives to inspect the Work on behalf of Owner, in addition to Architect. All costs, expenses and fees of such additional inspections shall be borne and paid by Owner, and Contractor shall have no liability or obligation for the payment thereof.

14.3 Drawings and Specifications. The Drawings and Specifications are to be of equal priority. In the event of any internal inconsistency in either the Drawings or Specifications, or with each other, the appropriate method of performing the Work, in the event of the above mentioned inconsistency, shall be determined by Architect. Figures take precedence over physical scale measurements. Large scale details take precedence over smaller scale details. Drawings take precedence in regard to dimensions, when in conflict with Mechanical and Structural Drawings, except for the size of the structural members. Specifically titled drawings and sections of the Specifications take precedence over indication of the item in a collateral way. Existing conditions take precedence over Drawings and Specifications for dimensions.

Where in the Drawings and Specifications, certain products, manufacturer's trade names, or catalog numbers are given, it is done for the express purpose of establishing a standard of function, dimension, appearance, and quality of design, in harmony with the Work, and is not intended for the purpose of limiting competition.

When more than one restriction for a specified material, brand, or construction process is given for an item in the Drawings and Specifications, Contractor shall comply with all restrictions. When more than one optional material, brand or construction process is specified for a particular item of work, the choice shall be the Contractor's. Contractor may use the one Contractor considers to its advantage to use.

14.4 Work Included and Excluded. List of "work included" and "work excluded" in the Drawings and Specifications are not intended to enumerate each and every item of work or appurtenance required, and must be used in conjunction with other portions of the Contract Documents.

14.5 Compliance with Laws. Contractor shall comply with and give notices required by laws, ordinances, rules, regulations and lawful orders of public authorities bearing on performance of the Work; provided, however, that Contractor shall not be responsible for cost of obtaining approvals or certifications from any engineer or the Architect as long as such approvals or certifications do not relate to Contractor's defective Work or Work re-executed by Contractor.

14.6 Review of Contract Documents by Contractor. Contractor shall at once report to Architect errors, inconsistencies or omissions in the Contract Documents which should have been reasonably discovered by Contractor. The intent of the Contract Documents is to include all items necessary for the proper execution and completion of the Work for Contractor. The Contract Documents are complementary, and what is required by one shall be as binding as if required by all. Performance by Contractor shall be required only to the extent consistent with the Contract Documents and reasonably inferable from them as being necessary to produce the intended results. All dimensions and clearances necessary to the Work, as indicated on the Drawings and contained in the Specifications, shall be verified by Contractor at the job site before executing the relevant portion of the Work and Contractor shall report any discrepancies to the Architect for adjustment before any Work affected thereby is commenced. Additionally, if sufficient detailed information is lacking, if Work is required in such a manner as to make it impossible to produce first-class Work, or if discrepancies appear among Contract Documents, then Contractor shall request the Architect's clarification or interpretation before proceeding with such Work.

If Contractor performs any Work in conformity with any Contract Document knowing it to be inconsistent with any other Contract Document, without first specifically requesting and obtaining from the Architect written instructions on how to proceed with respect to such inconsistency, the Contractor shall be obligated to correct such Work according to the direction of the Owner (with the Architect's advice) without cost to the Owner.

14.7 Subcontracts. Contractor agrees to hold all Subcontractors, including all persons directly or indirectly employed by them, responsible for any damages due to breach of contract or any negligent act and to diligently endeavor to effect recoveries of such damages.

14.8 Notices. Any notice provided or permitted to be given under the Contract Documents must be in writing and may be served by depositing same in the United States mail, addressed to the party to be notified, postage prepaid, by registered or certified mail, with return receipt requested; by delivery of such notice in person to such party; or by fax (with confirmation of receipt) or personal delivery service. For purposes of notice, the addresses of the parties shall be as set forth on page one (1) hereof.

14.9 Texas Law. The Contract Documents shall be construed and enforced in accordance with the laws of the State of Texas.

14.10 Entire Agreement; Amendments. The Contract Documents and all prior negotiations or agreements are merged herein. No modification hereof or subsequent agreement relative to the subject matter hereof shall be binding unless reduced to a writing signed by the party to be bound.

14.11 Owners' Approval Rights; Inspecting Architect. Except for the references to "Architect" in Article 1, Article 6, Paragraph 12 B (solely with respect to the additional services and expenses of an Architect following the

Contractor's default), Paragraphs 14.3, 14.6, 14.12, 14.20, 14.24 and 14.29, which references in such paragraphs shall refer either to the licensed architect designated in writing by Owner, all references to "Architect" in the Contract Documents shall refer to Owner. However, with respect to all matters subject to the Architect's approval or decision or options which the Architect is entitled to exercise pursuant to Article 10, Paragraphs 14.13, 14.24 and 14.31 of the Agreement, if the Contractor does not agree with the Owner's particular decision or course of action relating to any of such matters (herein referred to as a "Major Decision"), within five (5) working days after a Major Decision is submitted to either party for such party's approval, then such Major Decision shall be submitted to _____ or other licensed architect, engineer, or other appropriate, qualified consultant designated by Owner and acceptable to Contractor, in the exercise of the Contractor's reasonable discretion, (which licensed architect, engineer, or other appropriate, qualified consultant designated by Owner and acceptable to Contractor, is herein referred to as the "Inspecting Architect") for resolution. If Owner desires to appoint an Inspecting Architect other than _____, Owner shall submit not less than three (3) architects, engineers, or other appropriate, qualified consultants, located in Houston to Contractor for its approval or disapproval. If Contractor fails to approve one of the architects, engineers, or other appropriate, qualified consultants selected by Owner within three (3) days after receipt of such names, then Owner and Architect shall immediately thereafter jointly submit a request for a list of seven potential architects, engineers, or other appropriate, qualified consultants, (located in Houston) to the Dallas office of the Construction Section of the American Arbitration Association ("AAA"). Owner shall have the right to select one architect, engineer or consultant from the list submitted by the AAA, who shall be the "Inspecting Architect" hereunder. Contractor and Owner shall be entitled to rely on (and shall be obligated to comply with) the written certification of the Inspecting Architect as to his resolution of any such Major Decision, which written certification of the Inspecting Architect as to his resolution of any such Major Decision shall be made as soon as reasonably practicable, but in no event more than twenty (20) days after such Major Decision has been submitted to the Inspecting Architect. If the Inspecting Architect fails or refuses to resolve a Major Decision within said twenty (20) day period, then the Owner may request that such Major Decision be submitted to arbitration in accordance with Paragraph 14.30 hereof by written notice to the other party at any time after the expiration of the aforesaid twenty (20) day period (provided that the Inspecting Architect has not resolved such Major Decision). The cost of submitting Major Decisions to the Inspecting Architect for his resolution shall be borne by the non-prevailing party. Notwithstanding the foregoing, if prior to the receipt of a written decision from the Inspecting Architect, Contractor and Owner agree in writing on a Major Decision previously submitted to the Inspecting Architect, then Contractor shall go forward in accordance with the decision reached by Contractor and Owner on such Major Decision and shall disregard the Inspecting Architect's decision subsequently received. Contractor agrees to continue the Work, notwithstanding the fact that a Major Decision has been submitted to the Inspecting Architect for his resolution. Contractor further agrees not to take any action (active or passive) affecting the Major Decision submitted to the Inspecting Architect until the Inspecting Architect has issued his decision on such matter.

The decision of the Inspecting Architect shall be final on all such Major Decisions submitted to the Inspecting Architect if the amount in controversy is less than $25,000, and Contractor and Owner hereby agree that the Inspecting Architect's decision with respect to any Major Decision shall be binding on the parties and not subject to Paragraph 14.30 hereof.

Additionally, Owner and Contractor agree that the Inspecting Architect in carrying out his duties hereunder may act in his reasonable discretion and shall be personally or corporately liable only for fraud or acts or omissions in bad faith.

Notwithstanding anything contained in this Paragraph 14.11 to the contrary, in the event that a Major Decision must be made immediately (in the good faith judgment of Owner or Contractor) to avoid interference with the progress of the Work, damage to the Work or personal injury or property damage (and Owner and Contractor are unsuccessful in resolving such Major Decision among themselves and are also unsuccessful in contacting the Inspecting Architect to obtain his immediate resolution of such matter in a timely manner), then Owner shall have the authority to make such Major Decision, without the necessity of obtaining approval from the Contractor; and, if Owner and Contractor thereafter disagree on the handling of such Major Decision, such Major Decision shall be submitted to the Inspecting Architect for adjudication of the proper handling of such matter. In the event that the Inspecting Architect resolves such Major Decision and favors the Contractor, Owner shall promptly reimburse Contractor for all out-of-pocket expenses and the actual damages incurred by Contractor in proceeding in accordance with the Owner's instructions.

14.12 Record Drawings. To the extent practicable, Contractor shall update from time to time one record copy of the Drawings (the "Record Drawings"), with color pencils to mark up said set with "record information" in a legible manner to show: (i) material deviations from the Drawings made during construction; (ii) details in the Work not previously shown except that to the extent that _____ should revise the Drawings to show such details; (iii) changes to existing conditions or existing conditions found to differ materially from those shown on any existing drawings; (iv) the actual installed position of major electrical, mechanical and plumbing equipment if shown on the original final Drawings and substantially different from the position shown on the original final Drawings; and (v) such other information as either Owner or Architect may reasonably request. Any changes resulting from change orders or other changes requiring the Architect to modify the Drawings shall be made by the Architect at Owner's expense. At the completion of the Work, Contractor shall deliver all Record Drawings to Owner. The provisions of this Paragraph 14.12 do not authorize the Contractor to deviate from the Contract Documents except as otherwise expressly provided herein. Submission of the final Record Drawings is required prior to or at the time of submission of Contractor's application for final payment.

14.13 Inspections. The Architect will conduct inspections to determine the dates of Substantial Completion and Final Completion, will receive and forward to Owner for the Owner's review written warranties and related documents required by the Contract and assembled by Contractor, and will issue a final Certificate for Payment upon compliance with the requirements of Article 10.

14.14 Damage to Work or Property of Owner. If Contractor wrongfully causes damage to the Work or property of Owner, Contractor shall promptly remedy such damage. If Contractor wrongfully causes damage to a separate Contractor or property of any separate Contractor, Contractor shall promptly attempt to settle any resulting dispute or claim with such other Contractor. Owner shall use all reasonable efforts to cause its separate contractors to cooperate with Contractor in connection with the portion of the Work requiring coordination and cooperation between Contractor and Owner's separate contractors. If Owner, by or through Owner's separate contractors, wrongfully causes damage to the Work or property of Contractor, Owner shall promptly remedy such damage. Additionally, if one of Owner's separate contractors wrongfully causes damage to Contractor and/or a Subcontractor of Contractor, Owner shall attempt to settle any resulting dispute or claim with Contractor and/or one of Contractor's Subcontractors, as applicable.

14.15 Final Cleanup. Contractor shall be responsible for damaged or broken glass, and at completion of the Work shall replace such damaged or broken glass. Contractor shall perform the following final cleaning as a condition precedent to final completion of the Work:

(i) Remove all temporary protections;

(ii) Remove marks, stains, fingerprints and other soil or dirt from all surfaces and other work;

(iii) Remove spots, mortar, plaster, soil and paint from ceramic tile, marble, and other finish materials from all surfaces and other Work;

(iv) Clean fixtures, cabinet work and equipment, removing stains, paint, dirt, and dust and leave in an undamaged and new condition; and

(v) Clean all surfaces and other Work in accordance with recommendations of the manufacturer.

14.16 Independent Contractor. In performing its obligations hereunder, Contractor shall be deemed an independent Contractor and not an agent or employee of Owner. Contractor shall have exclusive authority to manage, direct and control the Work. Owner is interested in only the results obtained and not in the methods used in achieving the results.

14.17 Lien Claims. Provided that Contractor has been paid by Owner all sums (or the applicable portion thereof) due to Contractor pursuant to the Agreement (other than under the circumstances of Paragraph 10 D. hereof, Contractor shall not voluntarily permit any laborer's, materialmen's, mechanic's, or other similar liens to be filed or

otherwise imposed on any part of the Work or the property on which the Work is performed. If any laborer's, materialmen's, mechanic's, or other similar lien or claim thereof is filed or otherwise imposed against the Property, Contractor, within thirty (30) days after actual notice to Contractor of the filing of such lien or other imposition thereof, shall cause such lien to be released or otherwise discharged, except as to liens which Contractor is contesting in good faith by appropriate action diligently pursued, provided Contractor has notified Owner of the nature of such lien and informed Owner of the type of action being pursued by Contractor and, if requested by Owner, has provided Owner with a surety bond satisfactory to Owner, sufficient to cover such claim in the event Contractor is unsuccessful in contesting same or has made other arrangements satisfactory to Owner. If, however, Contractor, within the aforesaid thirty (30) day period, does not cause such lien either to be released and discharged forthwith or contests same in the manner provided hereinabove, then Owner shall have the right to pay all sums necessary to obtain such release and discharge and reduce the Contract Sum by the amount of such payments made by Owner. Contractor shall indemnify, defend and hold harmless Owner from all claims, losses, demands, causes of action or suits of whatever nature arising out of any such lien or that part of the Work covered thereby.

14.18 Contractor's Responsibility. Contractor shall be responsible to Owner for the acts and omissions of Contractor's employees, Subcontractors and their agents and employees, and other persons performing portions of the Work under a contract with Contractor.

14.19 Access. Contractor shall provide Owner and Architect access to the Work in preparation and progress wherever located.

14.20 Indemnity. To the fullest extent permitted by law, Contractor shall indemnify and hold harmless Owner, and agents and contractors of Owner from and against claims, damages, losses and expenses, including but not limited to reasonable attorneys' fees, arising out of or resulting from performance of the Work by Contractor, provided that such claim, damage, loss or expense is attributable to bodily injury, sickness, disease or death, or to injury to or destruction of tangible property (other than the Work itself except to the extent covered by Contractor's builder's risk insurance) including loss of use resulting therefrom, but only to the extent caused in whole or in part by negligent acts or omissions of Contractor, one of Contractor's Subcontractors or anyone directly or indirectly employed by them or anyone for whose acts they may be liable. Such obligation shall not be construed to negate, abridge, or reduce other rights or obligations of indemnity which would otherwise exist as to a party or person described in this Paragraph 14.20.

To the fullest extent permitted by law, Owner shall indemnify, defend and hold harmless Contractor and Contractor's subcontractors and agents, but not Contractor's employees, from and against claims, damages, losses and expenses, including but not limited to reasonable fees, arising out of or resulting from performance of any Work on the Project by Owner or Owner's contractors, provided that such claim, damage, loss or expense is attributable to bodily injury, sickness, disease or death, or to injury to or destruction of tangible property (other than the Work itself) including loss of use resulting therefrom, but only to the extent caused in whole or in part by negligent acts or omissions of Owner or Owner's contractors, or anyone directly or indirectly employed by them or anyone for whose acts they may be liable. Such obligation shall not be construed to negate, abridge, or reduce other rights or obligations of indemnity which would otherwise exist as to a party or person described in this Paragraph 14.20.

The obligations of Contractor or Owner, as applicable, under this Paragraph 14.20 shall not extend to the liability of Architect, Architect's consultants, and agents and employees of any of them arising out of (a) the preparation or approval of maps, drawings, opinions, reports, surveys, Change Orders, designs or specifications, or (b) the giving of or the failure to give directions or instructions by Architect, Architect's consultants, and agents and employees of any of them provided such giving or failure to give is a cause, in whole or in part, of the injury or damage.

14.21 Non-conforming Work. When any non-conforming work is found or confirmed by Owner, Contractor, at Contractor's expense, shall correct the entire area of Work involved, unless Contractor can completely define the limits of the non-conforming work.

14.22 Encroachments. Any encroachments made by Contractor or his subcontractors on adjacent properties or easements due to construction as revealed by an improvement survey will be the responsibility of Contractor, and Contractor shall correct these encroachments within fifteen (15) days of the date of the improvement survey at the sole cost and expense of Contractor, either by the removal of the encroachments or satisfactory agreements with the

adjacent property owners or the holders of easements allowing the encroachments to remain. Contractor may rely on the survey of the Property furnished by Owner in locating the foundation and other improvements.

14.23 Concealed Conditions. Contractor shall fully acquaint itself with all existing conditions and limitations affecting the Work, including, without limitation, all property lines, utility locations, existing improvements, elevations, and site and local conditions. Claims for additional compensation or extensions of time because of the failure of Contractor to familiarize itself with conditions at the site will not be allowed. It is not intended by this provision to preclude claims for additional compensation or extension of time for conditions that would not reasonably be foreseen from a diligent visual inspection of the site, Contractor's experience in building in the Bellaire area.

If conditions are encountered at the site which are (2) subsurface or otherwise concealed physical conditions which differ materially from those indicated in the Contract Documents or (3) unknown physical conditions of an unusual nature, which differ materially from those ordinarily found to exist and generally recognized as inherent in construction activities of the character provided for in the Contract Documents, then notice by the observing party shall be given to the other party promptly before conditions are disturbed and in no event later than ten (10) days after first observance of the conditions. Architect will promptly investigate such conditions and, if they differ materially and cause an increase or decrease in Contractor's cost of, or time required for, performance of any part of the Work, will recommend an equitable adjustment in the Contract Sum or Contract Time, or both. If Architect determines that the conditions at the site are not materially different from those indicated in the Contract Documents and that no change in the terms of the Contract Documents is justified, Architect shall so notify Owner and Contractor in writing, stating the reasons. Claims by either party in opposition to such determination must be made within twenty-one (21) days after Architect has given notice of the decision.

14.24 A. Separate Contractors. Owner reserves the right to perform construction or operations related to the Project with Owner's own forces and to award separate contracts in connection with other portions of the Project or other construction or operations on the site under conditions of the contract identical or substantially similar to these, including those portions related to insurance and waiver of subrogation. If Contractor claims that delay or additional cost is involved because of such action by Owner, Contractor shall submit a written claim to Architect within ten (10) days following the inception of the delay or interference for determination by the Architect.

B. Contractor shall afford Owner and separate contractors reasonable opportunity for the introduction and storage of their materials and equipment and performance of their activities and shall connect and coordinate Contractor's construction and operations with theirs as required by the Contract Documents.

C. Costs caused by delays, improperly timed activities or defective construction shall be borne by the party responsible therefor.

D. Contractor will cooperate to a reasonable extent with any other contractors engaged by Owner in connection with completion of the Project. Owner shall require its separate contractors to cooperate and coordinate with Contractor. Owner agrees to cause its separate contractors to furnish Contractor with a Certificate of Insurance showing Contractor as an additional insured. Additionally, Contractor's warranty with respect to the Work shall not cover any work covered by separate contractors; provided, however, that Contractor will be responsible for any damage its forces cause to the Work performed by a separate Contractor. Likewise, Owner and its separate contractors will be liable for any damage that such separate Contractor's forces cause to the Work performed by Contractor.

14.25 No Assignment. Contractor shall not assign this Contract nor any of the monies due or to become due to it hereunder without the prior written consent of Owner and any attempt to so do shall be void and of no effect. Contractor shall not sublet or subcontract any part of this Contract except in compliance with the provisions hereof. Subject to the foregoing, this Contract shall inure to the benefit of, and shall be binding upon, the parties hereto and their respective successors and assigns.

14.26 Contractor's Subordination. Contractor acknowledges that Owner will borrow certain funds to finance the construction of the Work and, that as a condition to any loans to Owner, Owner will collaterally assign this Agreement to the Lender and Lender may require from time to time certain statements, certificates, and documents

from Contractor. Contractor covenants and agrees that any lien, statutory, expressed or implied, right and interest (whether choate or inchoate and including, without limitation, all mechanics' and materialmen's liens under the applicable laws and statutes of the State of Texas) which are owned or claimed by Contractor or shall exist or shall hereafter accrue to the benefit of Contractor for labor performed, materials furnished and Work done on this Project, shall be and remain subordinate, second and inferior to any first and second lien securing the payment of an acquisition, interim construction and/or permanent loan and all advances made thereunder, and to any renewals, extensions or rearrangements thereof. Neither Contractor nor any Subcontractor or other party shall be permitted to remove any improvements or other property constructed or installed or delivered in connection with the Work notwithstanding that such improvements or other property can be removed without material injury to any improvements not sought to be removed by any lien claimant and without such injury to any improvements sought to be removed by any lien claimant. A subordination provision to this effect applicable to liens and lien rights of Subcontractors shall be contained in all Subcontracts entered into by Contractor, and Contractor will indemnify and hold Owner harmless from any failure or refusal of any Subcontractor to comply with this provision, as well as any assertion by such Subcontractor that such Subcontractor's lien is prior to or of equal dignity with the Lender's lien. At the request of Owner, Contractor shall, without delay, execute or cause to be executed, such additional documents as may be required from time to time by the Lender to give effect to the provisions hereof and furnish documents, releases and waivers evidencing payments to Subcontractors and suppliers and such Subcontractors' and suppliers' release of liens arising out of the performance of the Work. Owner will authorize Lender to transfer payments only to Contractor if and when Contractor becomes entitled to such payments pursuant to Article 10, upon approval by Owner.

14.27 Completion for Lender . In the event of a default by Owner under its interim loan agreement with Lender, the unperformed part of this Contract will be performed by Contractor for the benefit and at the expense of the Lender, should the Lender so elect, provided that there is no material interruption in the prosecution of the Work and that Contractor has been paid for all Work done to date.

14.28 Lender's Right to Inspect Premises. Contractor will permit Lender and its representatives and agents to enter the Property and inspect the improvements and all materials to be used in the construction thereof and all plans and specifications, shop drawings and lien waivers relating to the construction of the improvements; and shall cooperate with Lender and its representatives and agents during such inspection period.

14.29 Architect's Interpretation. The Architect will interpret and decide matters concerning performance under and requirements of the Contract Documents on written request of either the Owner or Contractor. The Architect will make initial decisions on all claims, disputes or other matters in question between the Owner and Contractor, but will not be liable for results of any interpretations or decisions rendered in good faith. The Architect's decisions in matters relating to aesthetic effect will be final if consistent with the intent expressed in the Contract Documents. All other decisions of the Architect, except those which have been waived by making or acceptance of final payment or those described in Section 14.21, shall be subject to arbitration upon the written demand of either party.

14.30 Arbitration. All claims or disputes between the Contractor and the Owner arising out of or relating to the Contract Documents, or the breach thereof, shall be decided by arbitration in accordance with the Construction Industry Arbitration Rules of the American Arbitration Association currently in effect unless the parties mutually agree otherwise and subject to an initial presentation of the claim or dispute to the Architect as required under Paragraph 14.29. Notice of the demand for arbitration shall be filed in writing with the other party to this Agreement and with the American Arbitration Association and shall be made within a reasonable time after the dispute as arisen. The award rendered by the arbitrator or arbitrators shall be final, and judgment may be entered upon it in accordance with applicable law in any court having jurisdiction thereof. Except by written consent of the person or entity sought to be joined, no arbitration arising out of or relating to the Contract Documents shall include, by consolidation, joinder or in any other manner, any person or entity not a party to the Agreement under which such arbitration arises, unless it is shown at the time the demand for arbitration is filed that (1) such person or entity is substantially involved in a common question of fact or law, (2) the presence of such person or entity is required if complete relief is to be accorded in the arbitration, (3) the interest or responsibility of such person or entity in the matter is not insubstantial, and (4) such person or entity is not the Architect or any of the Architect's employees or consultants. The agreement herein among the parties to the Agreement and any other written agreements to arbitrate referred to herein shall be specifically enforceable under applicable law in any court having jurisdiction thereof. In no event shall claims in excess of One Hundred Thousand Dollars ($100,000.00), in the aggregate, or claims with

respect to any warranty given by Contractor to Owner under the Contract Documents, be submitted to arbitration by either party to this Agreement without the written consent of the other party. With respect to claims in excess of One Hundred Thousand Dollars ($100,000.00), in the aggregate, or warranty claims, as to which Owner and Contractor do not agree to submit arbitration, either party shall have the right to prosecute such claims in a court of competent jurisdiction.

During any arbitration proceeding, there shall be a prehearing meeting between the parties at which each party shall present a memorandum disclosing the factual basis of its claim and defenses and disclosing legal issues raised. The memorandum shall also disclose the names of any expert a party shall present as a witness during the proceedings. At the prehearing meeting, the arbitrators shall make rulings and set schedules for hearings consistent with their powers as set forth in this Paragraph 15.8. All hearings shall be held on consecutive weekdays until five (5) hearings have been held and shall be recommenced within seven (7) days of the last prior day of hearings. If requested by either party to this Agreement, any individual or number of sessions shall take place at the site of the Project.

The parties shall be entitled to discover all documents and information reasonably necessary for a full understanding of any legitimate issue raised in the arbitration. The parties may use all methods of discovery available under the Federal Rules of Civil Procedure and shall be governed thereby. Prior to the deposition of any expert witness, the party proposing to call such a witness shall provide a full and complete report by the expert, together with the expert's calculations and other data by which the expert reached any opinions concerning the subject matter of the arbitration. The report shall be provided no less than ten (10) days prior to the date set for the expert witness' deposition. The Federal Rules of Evidence shall be applied by the arbitrators but liberally construed to allow for the admission of evidence that is helpful in resolving the controversy.

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.

Executed this the _____ day of_____, 19___.

OWNER: CONTRACTOR:

_____ _____

Item I
DISCLOSURE STATEMENT REQUIRED FOR
RESIDENTIAL CONSTRUCTION CONTRACT

Owner(s):_____

Project Description/Address: _____

Contractor:_____

Lender: _____

KNOW YOUR RIGHTS AND RESPONSIBILITIES UNDER THE LAW. You are about to enter into a transaction to build a new home or remodel existing residential property. Texas law requires your Contractor to provide you with this brief overview of some of your rights, responsibilities, and risks in this transaction.

CONVEYANCE TO CONTRACTOR NOT REQUIRED. Your Contractor may not require you to convey your real property to your Contractor as a condition to the agreement for the construction of improvements on your property.

KNOW YOUR CONTRACTOR. Before you enter into your agreement for the construction of improvements to your real property, make sure that you have investigated your Contractor. Obtain and verify references from other people who have used the Contractor for the type and size of construction project on your property.

GET IT IN WRITING. Make sure that you have a written agreement with your Contractor that includes: (1) a description of the work the Contractor is to perform; (2) the required or estimated time for completion of the work; (3) the cost of the work or how the cost will be determined; and (4) the procedure and method of payment, including provisions for statutory retainage and conditions for final payment. If your Contractor made a promise, warranty, or representation to you concerning the work the Contractor is to perform, make sure that promise, warranty, or representation is specified in the written agreement. An oral promise that is not included in the written agreement may not be enforceable under Texas law.

READ BEFORE YOU SIGN. Do not sign any document before you have read and understood it. NEVER SIGN A DOCUMENT THAT INCLUDES AN UNTRUE STATEMENT. Take your time in reviewing documents. If you borrow money from a lender to pay for the improvements, you are entitled to have the loan closing documents furnished to you for review at least 1 business day before the closing. Do no waive this requirement unless a bona fide emergency or another good cause exists, and make sure you understand the documents before you sign them. If you fail to comply with the terms of the documents, you could lose your property. You are entitled to have your own attorney review any documents. If you have any question about the meaning of a document, consult an attorney.

GET A LIST OF SUBCONTRACTORS AND SUPPLIERS. Before construction commences, your Contractor is required to provide you with a list of the subcontractors and suppliers the Contractor intends to use on your project. Your Contractor is required to supply updated information on any subcontractors and suppliers added after the list is provided. Your Contractor is not required to required to supply this information if you sign a written waiver of your rights to receive this information.

MONITOR THE WORK. Lenders and governmental authorities may inspect the work in progress from time to time for their own purposes. These inspections are not intended as quality control inspections. Quality control is a matter for you and your Contractor. To ensure that your home is being constructed in accordance with your wishes and specifications, you should inspect the work yourself or have your own independent inspector review the work in progress.

MONITOR PAYMENTS. If you use a lender, your lender is required to provide you with a periodic statement showing the money disbursed by the lender from the proceeds of your loan. Each time your Contractor requests payment from you or your lender for work performed, your Contractor is also required to furnish you with a disbursement statement that lists the name and address of each subcontractor or supplier that the Contractor intends to pay from the requested funds. Review these statements and make sure that the money is being properly disbursed.

CLAIMS BY SUBCONTRACTORS AND SUPPLIERS. Under Texas law, if a subcontractor or supplier who furnishes labor or materials for the construction of improvements on your property is not paid, you may become liable and your property may be subject to a lien for the unpaid amount, even if you have not contracted directly with the subcontractor or supplier. To avoid liability, you should take the following actions:

(1) If you receive a written notice from a subcontractor or supplier, you should withhold payment from your Contractor for the amount of the claim stated in the notice until the dispute between your Contractor and the subcontractor or supplier is resolved. If your lender is disbursing money directly to your Contractor, you should immediately provide a copy of the notice to your lender and instruct the lender to withhold payment in the amount of the claim stated in the notice. If you continue to pay the Contractor after receiving the written notice without withholding the amount of the claim, you may be liable and your property may be subject to a lien for the amount you failed to withhold.

(2) During construction and for 30 days after completion, termination, or abandonment of the contract by the Contractor, you should withhold or cause your lender to withhold ten percent (10%) of the amount of payments made for the work performed by your Contractor. This is sometimes referred to as "Statutory Retainage." If you choose not to withhold the ten percent (10%) for at least 30 days after final completion, termination, or abandonment of the contract by the Contractor and if a valid claim is timely made by a claimant and your Contractor fails to pay the claim, you may be personally liable and your property may be subject to a lien up to the amount that you failed to withhold.

If a claim is not paid within a certain time period, the claimant is required to file a mechanic's lien affidavit in the real property records in the county where the property is located. A mechanic's lien affidavit is not a lien on your property, but the filing of the affidavit could result in a court imposing a lien on your property if the claimant is successful in litigation to enforce the lien claim.

SOME CLAIMS MAY NOT BE VALID. When you receive a written notice of a claim or when a mechanic's lien affidavit is filed on your property, you should know your legal rights and responsibilities regarding the claim. Not all claims are valid. A notice of a claim by a subcontractor or supplier is required to be sent, and the mechanic's lien affidavit is required to be filed, within strict time periods. The notice and the affidavit must contain certain information. All claimants may not fully comply with the legal requirements to collect on a claim. If you have paid the Contractor in full before receiving a notice of a claim and have fully complied with the law regarding statutory retainage, you may not be liable for that claim. Accordingly, you should consult your attorney when you receive a written notice of a claim to determine the true extent of your liability or potential liability for that claim.

OBTAIN A LIEN RELEASE AND A BILLS PAID AFFIDAVIT. When you receive a notice of claim, do not release withheld funds without obtaining a signed and notarized release of lien and claim from the claimant. You can also reduce the risk of having a claim filed by a subcontractor or supplier by requiring as a condition of each payment made by you or your lender that your Contractor furnish you with an affidavit stating that all bills have been paid. Under Texas law, on final completion of the work and before final payment, the Contractor is required to furnish you with an affidavit stating that all bills have been paid. If the Contractor discloses any unpaid bill in the affidavit, you should withhold payment in the amount of the unpaid bill until you receive a waiver of lien or release from that subcontractor or supplier.

OBTAIN TITLE INSURANCE PROTECTION. You may be able to obtain a title insurance policy to insure that the title to your property and the existing improvements on your property are free from liens claimed by subcontractors and suppliers. If your policy is issued before the improvements are completed and covers the value of the improvements to be completed, you should obtain, on the completion of the improvements and as a condition of your final payment, a "completion of improvements" policy endorsement. This endorsement will protect your property from liens claimed by subcontractors and suppliers that may arise from the date the original title policy is issued to the date of the endorsement.

THIS IS TO VERIFY THAT I (WE) HAVE RECEIVED A COPY OF THIS CONTRACTOR'S DISCLOSURE STATEMENT.

THIS IS ALSO TO VERIFY THAT I (WE) HAVE RECEIVED A COPY OF THE ATTACHED LIST OF SUBCONTRACTORS AND SUPPLIERS.

SIGNED this the _____ day of _____, 2003.

OWNER(S)

_____

_____

WITNESS:

ITEM “J”

RESIDENTIAL CONSTRUCTION CONTRACT

For Construction Projects on a Homeowner's Property - Revised 09/01/03

THIS DOCUMENT CREATES IMPORTANT LEGAL OBLIGATIONS THAT YOU SHOULD UNDERSTAND PRIOR TO SIGNING. IF YOU ARE UNCERTAIN ABOUT YOUR RIGHTS OR OBLIGATIONS UNDER THIS AGREEMENT, YOU MAY WISH TO CONSULT AN ATTORNEY.

1. PARTIES. _____ (the "Builder") who is a member in good standing with the Custom Builders Council of the Greater Houston Builders Association and _____ (the "Owner") (the Owner and Builder together will be referred to as the "Parties") are entering into this Residential Construction Contract (called the "Contract"). The purpose of this Contract is (i) to establish and define the construction activities that the Builder will perform, and (ii) to delineate the general obligations and responsibilities of the Parties.

2. LOCATION AND GENERAL SCOPE OF WORK TO BE PERFORMED. Owner agrees and promises to pay Builder the specified "Contract Price" as defined below, plus any additional authorized expenditures. In consideration of such payments, the Builder agrees to furnish certain labor, services, equipment, materials, and other related activities (herein collectively referred to as the "Work") for the construction of certain improvements, generally described as a single-family residence (the "Home"), on Lot(s) _____, Block _____, Section _____, out of the _____ Subdivision in _____ County, Texas and having the following Street Address: _____ (the "Property").

The Home will be constructed in substantial compliance with certain schematic drawings that have been prepared by _____, dated _____, _____, and consisting of _____ pages, which have been initialed by the parties for purposes of identification and which by this reference are incorporated into this Contract (the "Plans"). In addition to the Plans, construction of the Home shall incorporate certain materials and equipment, and comply with certain standards, procedures and requirements (collectively referred to as the "Specifications") which are detailed in the attached Exhibit "A". In the event of a conflict between the Plans and the Specifications, the Specifications shall control. Should a detail of the construction not be provided within the Plans and/or Specifications, 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.

The Plans and Specifications may be modified, limited or negated as the Parties may subsequently agree in writing through "Change Orders" as defined in Paragraph 9 of this Contract. It is specifically understood and agreed by the Parties that Builder is not responsible for and in no way endorses the accuracy or completeness of the Plans and Specifications to the extent they have been prepared by an independent architect, designer or other third party. ***Any extra Work or related costs incurred because of deficiencies in the Plans and Specifications shall be the Owner's responsibility. The compliance of the Plans and Specifications with all applicable building codes, regulations, restrictive covenants or other conditions affecting the Property (including easements and zoning requirements) shall also be the Owner's responsibility.***

This contract form has been developed and promulgated by the Custom Builders Council of the Greater Houston Builders Association (the "GHBA") and each page of the original contract to be signed by the parties should reflect the GHBA's logo as a blue watermark. This copyrighted form is solely for use by Council members, and its use, or the reproduction of contract provisions, by non-members is strictly prohibited. The Owner should verify the Builder's membership status in the Council.

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Unless otherwise specified, materials used by the Builder in performing the Work shall be as prescribed in the Plans and Specifications, subject to substitution at Builder's election should an item not be reasonably available or if the procurement of such item 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. Nevertheless, construction of the Home is also subject to any changes in the Plans and Specifications as may be required by federal, state or local governmental authorities. Owner further acknowledges that these changes (which do not affect the market value of the Home) may occur in the Work and agrees that so long as the construction of the Home is substantially in compliance with the Plans and Specifications, any such minor deviations will be accepted.

3. **CONTRACT PRICE/PAYMENT PROCEDURE**. The "Contract Price," as that term is used in this Contract, is $_____. The Owner agrees to pay this sum to Builder as follows:

(a) The sum of $_____ (the "Commencement Fee") shall be due and payable upon execution of this Contract, and shall be applied against the Contract Price due to Builder under this Contract. The Commencement Fee is ***not refundable*** under any circumstances and is paid as consideration for the Builder's efforts to prepare this contract, to formulate a construction budget, to perform research related to specially fabricated items, and to fund any materials deposits, if any.

(b) The remainder of the Contract Price shall be payable in accordance with a series of written requests for payment (each to be referred to as a "Draw Request") submitted to Owner by Builder on the basis of the "Payment Schedule" set forth in the attached Exhibit "B". As the Builder contracts for or purchases materials, and as Work is performed within the various categories referenced in the Payment Schedule, Builder periodically shall submit to Owner a Draw Request to cover the cost of the materials ordered/purchased, amounts payable to subcontractors for that portion of the Work performed, and Builder's overhead and profit associated with various components of the Work. The actual draw amount will be calculated by multiplying the percentage of Work completed and materials purchased for the various categories of the Work listed on the Payment Schedule by the specified value ("Assigned Value") shown in the Payment Schedule for those categories. Owner shall pay to Builder, within three (3) business days of submission of the Draw Request, the amount then requested under the Payment Schedule. Draw Requests not timely paid shall begin to accrue interest at the rate of twelve percent (12%) per annum on the 10th day after receipt. ***The Parties acknowledge and understand that in view of the negotiations that preceded agreement on the Contract Price, no Draw Requests will be subject to withholding or retainage as provided in the Texas Property Code.***

(c) Owner shall pay the remaining balance of the unpaid portion of the Contract Price upon Final Completion of the Work. The term "Final Completion" is defined as and will be evidenced by: (i) the Work called for under this Contract has been substantially completed in accordance with the terms of this Contract; (ii) all required governmental and regulatory agencies shall have approved of the completed Work and authorized Owner's occupancy of the Property; and (iii) Builder has furnished to Owner the Builder's Affidavit of Waiver of Liens (conditioned upon receipt of final payment). The existence of minor cosmetic repairs and adjustments shall not delay Final Completion and the payments due to Builder at that time. Under no circumstances shall the Owner be permitted to occupy the Home until the Contract Price (as modified by any Change Orders) has been paid in full.

Sums to be paid by the Owner that are not part of the Contract Price (*e.g.*, loan fees, surveys, engineer fees, soils and foundation testing, utility hook-ups) shall be paid directly by the Owner, who will provide the Builder with proof of payment upon request.

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4. <u>ALLOWANCES</u>. The Parties have agreed to specific budgets ("Allowances") for certain amenities and materials to be incorporated into the Home, all of which are detailed in the attached Exhibit "C." The sums allocable to each listed Allowance ***are included within and are part of the Contract Price***. Each Allowance listed includes the component costs of material and labor (if any), plus any appropriate sales tax, delivery and other costs associated with procurement. These Allowances are also premised on the understanding that purchases will be made from suppliers who are typically used by the Builder, and do not contemplate the payment of deposits, service fees, or the delays that may be encountered when other suppliers are used. As Builder incurs material and labor costs with respect to a specific Allowance, those costs shall be applied against the applicable Allowance. In the event an Allowance for an item is exceeded, the overage shall constitute an increase in the Contract Price and shall be set forth in a Change Order as prescribed in Paragraph 9 of this Contract. Any savings resulting from reduced expenditures for Allowance items shall result in a decrease in the Contract Price to be credited against the payment due on Final Completion of the Work. ***Owner is solely responsible for the adequacy of the Allowance amounts on appliances, fixtures, floor coverings, etc. since the sums to be spent are determined ultimately by the Owner's subjective considerations of quality, style and functionality***. Owner shall make all selections applicable to the Allowances within five (5) days from date of request by Builder. If Owner fails to timely make such selections, then Builder shall be authorized to make the selection and proceed with the construction of the Home. Copies of invoices and receipts for expenditures related to Allowances will be available from the Builder on reasonable notice.

5. <u>ACQUISITION OF PROPERTY AND FINANCING OF WORK</u>. Owner represents that the Owner presently owns or has contracted for and will purchase the Property in fee simple, free and clear of any liens or encumbrances (recorded or unrecorded), except for purchase money liens. Owner further represents that there are no restrictions, regulations, rules, proceedings or lawsuits pending which would interfere with the Work contemplated by this Contract. Except for the non-refundable Commencement Fee provided for in Section 3(a) above, neither Party assumes any duty or liability under this Contract until (a) Owner acquires the Property, (b) Builder receives and approves title documentation and a survey provided at Owner's expense in a form acceptable to Builder, and (c) the Owner provides the Builder with written evidence of the availability of funds to pay the Contract Price in full. These actions are to be concluded and information provided within thirty (30) days after the signing of this Contract. If within that time the Owner cannot qualify for the necessary financing, or Builder is not reasonably satisfied that the financing condition has been met, Builder may terminate this Contract and retain the Commencement Fee.

The Builder agrees to accommodate the reasonable requests of Owner's third party lender. Owner acknowledges and agrees, however, that the loan documents that Builder is asked to sign must be in a form reasonably acceptable to Builder and that such documents will not alter the rights and obligations of the Parties under this Contract. ***Insofar as the relationship between Owner and Builder is concerned, the terms and conditions of this Contract shall not be superseded or modified by the Owner's construction financing documentation unless the superseded or modified provision in this Contract is identified, annotated and initialed by the Parties. Owner further agrees that it shall pay for any loan closing fees, survey costs and any reasonable and necessary attorneys fees incurred by Builder incident to Owner's securing construction financing and effecting draws or the funding of any such loan.***

6. <u>SUITABILITY OF BUILDING SITE/FOUNDATION</u>. Owner shall have the sole responsibility of designating the location of the Home on the Property and securing any necessary encroachment agreements with adjacent landowners or easement owners. Owner, after consulting with Builder, shall secure one or more independent professional engineers (the "Engineer") to conduct soils testing and prepare an engineered foundation plan and a structural framing plan that will supplement and be part of the Plans and Specifications. The cost of soils testing, preparation of an engineered foundation and structural framing plan, any pad compaction testing, and foundation and framing inspections, as deemed necessary by the Engineer and/or requested by Builder, shall be borne by Owner (irrespective of whether these sums are included within the Contract Price and/or paid directly to the

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Engineer by Builder or Owner). Evaluation of the soils on the Property, the adequacy of the building pad, the foundation and the structural plan shall be the responsibility of the Owner and the Engineer, and the Builder therefore does not warrant and is not responsible for such tests, reports or plans. The Builder's reliance on the Engineer for soils testing, the suitability of the design and the specification of components for the foundation and framing of the Home shall relieve the Builder from responsibility for or liability to the Owner for the raising, shifting, heaving or settling of the soil or the Home, and any consequential damage to the Home or its contents, ***provided*** the Builder has constructed the Home in substantial compliance with the foundation and structural plans.

7. **AVAILABILITY OF UTILITIES AT PROPERTY**. The Builder will coordinate and secure sufficient utilities for Builder's equipment, machinery and activities involved in constructing the Home. The Owner, however, shall contract for and pay for the cost of permanent utility hook-ups and tap fees, impact fees and similar charges.

8. **INITIATION AND COMPLETION OF THE WORK**. Builder shall commence the Work within fifteen (15) working days following the later of (i) the filing of record of the Mechanic's Lien Contract associated with Owner's construction financing, or (ii) the Builder's receipt of all required permits, licenses and other necessary approvals for commencement of the Work. The Work shall thereafter be continued in accordance with the Builder's normal construction schedule until the Work reaches "Substantial Completion," which shall occur when construction of the Home is sufficiently complete to allow the Owner to occupy and use the Home for its intended purpose. Substantial Completion shall also be deemed to have occurred when the Home is occupied by the Owner, or evidenced by a final building inspection and/or approval of the Home for occupancy by any applicable municipal authority. The **ESTIMATED** date for Substantial Completion of the Home is _____. This date is estimated since completion of the Home is subject to delays caused by conditions beyond the control of Builder. Such causes (referred to as "Excused Delays") include, but are not limited to, the availability of required materials, labor and services from subcontractors, as well as by interference by or disputes with Owner or other subcontractors employed by Owner (for which Builder is permitted to suspend construction until resolved), Change Orders that expand the scope of the Work, civil unrest, strikes, lockouts, fire, or other casualty, acts of God, inclement weather which interferes with normal scheduling of the Work, or failure of Owner to promptly fund Draw Requests or to timely make decisions or selections of allowance items, colors, or materials. **THE BUILDER THEREFORE DOES NOT GUARANTEE SUBSTANTIAL COMPLETION OF THE HOME ON ANY SPECIFIC DATE.**

9. **CHANGE ORDERS**. In addition to the Contract Price stated in Paragraph 3, Builder shall be entitled to and shall receive additional sums for the labor and/or materials and other charges that are attributable to a Change Order. A "Change Order" is a written agreement between the Owner and Builder to make changes, additions or deletions in the Work. If Builder agrees to perform the extra Work required by a Change Order (and it has no obligation to do so), the increase in the Contract Price as a result of the Change Order, plus the Builder's Change Order fee in the amount of _____% of the Change Order shall be paid in full when the Change Order is signed by the Parties. Change Orders deleting Work or materials will reduce the Contract Price by the Builder's true cost savings for the deleted items, but Builder may also request a Change Order fee for Builder's administration of the Change Order. If the increase in the Contract Price for a Change Order cannot be ascertained before commencement of the extra Work, an allowance shall be created for the Change Order with the increase being estimated, and that amount deposited with the Builder. ***The Builder shall not be required to commence the Work called for in the Change Order until payment of the specified or estimated increase in the Contract Price and the accompanying Change Order Fee.***

Should concealed or previously unknown conditions be encountered which are at variance with the conditions contemplated by the Plans and Specifications, the Contract Price shall be equitably adjusted by a Change Order to accommodate the modified scope of Work. Additionally, if Owner requests Builder to perform research on and/or

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provide estimates for extra Work to be incorporated into a proposed Change Order, Builder will be reimbursed for the time expended for such activities at the rate of $_____ per hour. These hourly charges shall be paid promptly to Builder, irrespective of Owner's decision to proceed with the execution of a Change Order for the additional Work.

10. INDEPENDENT BUILDER STATUS. Builder, in the performance of the Work does so as an independent contractor, and the Builder (not the Owner) shall have the sole control over the scheduling and progress of the Work, including the superior right to select and arrange for all labor in any way related to the Work. The Builder shall exercise exclusive control over the selection of the subcontractors, and shall not be obligated to employ subcontractors solely on the basis of cost savings that might be achieved. All subcontractors shall perform their functions independently, and not as an agent or employee, servant or representative of the Builder or the Owner. ***The Owner agrees not to instruct, direct or otherwise communicate with the subcontractors retained by the Builder as to the scheduling of or details about the Work (including additions to or deletions therefrom) nor shall Owner do or cause any Work to be done, or alter or cause the alteration of any portion of the Home, whether complete or incomplete, before Final Completion and Final Payment.*** Owner shall not contract with third parties for any portion of the Work without Builder's express written consent. If Owner employs a third party to fabricate an element, feature or appliance to be incorporated into the Home, the Owner shall be responsible for the installation of that fabricated item. **ACTS OF, OMISSIONS BY, OR LOSSES, DAMAGES OR DELAYS CAUSED BY, ANYONE RETAINED BY OWNER SHALL BE THE RESPONSIBILITY OF OWNER, NOT BUILDER. THE BUILDER SHALL NOT WARRANT IN ANY WAY THE WORK OR MATERIALS PROVIDED BY PERSONS THAT OWNER HAS EMPLOYED.**

11. RELEASE OF/INDEMNIFICATION FOR LOSSES DURING CONSTRUCTION. Because of potential safety and health hazards present during construction of the Home, as well as the practical limitations on the Builder's ability to control the activities of all persons involved in the construction process and thereby limit the risk of personal injury that may arise from construction activities, the Parties agree as follows:

(a) Personal Safety. To ensure and to protect the personal health and safety of Owner and Owner's licensees and invitees, Owner shall restrict entry by the Owner and Owner's licensees and invitees onto the Property or into the Home to a minimum. When Owner chooses to enter the Property, and irrespective of Builder's presence on the Property at such time, **OWNER AGREES TO RELEASE AND/OR INDEMNIFY AND HOLD BUILDER HARMLESS FROM AND AGAINST ANY AND ALL CLAIMS, DEMANDS OR CAUSES OF ACTION ARISING IN FAVOR OF OWNER OR OWNER'S LICENSEES AND INVITEES ON ACCOUNT OF BODILY INJURY, DEATH OR DAMAGE TO OR LOSS OF PROPERTY IN ANY WAY OCCURRING OR INCIDENT TO THE CONDITION OF THE PROPERTY AND/OR THE HOME. THIS RELEASE AND INDEMNITY IS GIVEN TO BUILDER REGARDLESS OF WHETHER THE BUILDER OR ITS AGENTS OR EMPLOYEES ARE NEGLIGENT IN WHOLE OR IN PART AND EVEN WHEN THE INJURY, DEATH OR DAMAGE TO OWNER OR OWNER'S LICENSEES AND INVITEES IS CAUSED BY THE SOLE NEGLIGENCE OF BUILDER OR ATTRIBUTABLE TO BUILDER'S NEGLIGENCE PER SE OR IMPOSED BY STRICT LIABILITY.**

(b) Risks to Vegetation. Owner also acknowledges that the contemplated construction imposes an inherent risk to the health of the trees and vegetation situated on the Property, and Owner understands that Builder cannot guarantee the viability of those trees and vegetation. **OWNER ACKNOWLEDGES THE AFOREMENTIONED RISK AND HEREBY RELEASES THE BUILDER FROM ANY CLAIMS FOR DAMAGES TO OR LOSS OF TREES AND VEGETATION RESULTING FROM CONSTRUCTION ACTIVITIES.**

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(c) Losses and Damage Related to the Work. Without minimizing in any way the foregoing indemnification by the Owner, during the construction of the Home, and as between Owner and Builder only, Builder shall be responsible for losses due to personal injury or property damage that may occur incident to or affect the Work, **BUT NOT** as to any such loss or damage caused in whole or in part by the negligence of those employed by or contracting with the Owner. **BUILDER AGREES, DURING THE PROGRESS OF THE WORK, TO PROTECT OWNER AND TO INDEMNIFY AND SAVE OWNER HARMLESS FROM (i) ANY AND ALL LIENS, CONTRACT DAMAGES, SUITS, CLAIMS AND CAUSES OF ACTION RELATED TO THE CONSTRUCTION OF THE HOME, AND (ii) ANY SUITS, CLAIMS AND CAUSES OF ACTION FOR DAMAGES TO PROPERTY OR PERSONAL INJURY TO OR DEATH OF BUILDER'S EMPLOYEES, AGENTS, REPRESENTATIVES AND INDEPENDENT CONTRACTORS (AND THEIR EMPLOYEES) ASSOCIATED WITH PERFORMANCE OF THE WORK BY BUILDER.**

12. INSURANCE/WAIVER OF SUBROGATION. Builder shall keep in force during progress of the Work, and shall furnish to Owner, upon Owner's request, copies of the following insurance policies:

(a) Builders Risk Insurance in the amount of the Contract Price (plus any Change Orders), naming Owner as an additional insured;

(b) Statutory Worker's Compensation Insurance for Builder's employees; and

(c) Comprehensive General Liability Insurance with limits of $_____ per person, per occurrence for personal injury, ($_____ aggregate), with $_____ coverage for completed operations.

Supplemental to the Builder's obligation to carry insurance fully protecting the Home during construction, after occupancy the Owner shall secure and maintain insurance covering risk of loss and damage to the Home, however caused. The Parties agree to waive the rights that each may have against the other for such insured losses or damage to the Home, its contents, or the Property during construction and after occupancy of the Home, including any such loss or damage arising from the negligence or other fault of either Party.

13. INSPECTION AND APPROVAL OF HOME. Owner shall conduct periodic walk-through inspections of the Home (with due consideration being given to safety concerns) and agrees to promptly apprize the Builder in writing if any aspect of construction has not been completed in substantial conformity with the Plans and Specifications and this Contract. ***Failure by the Owner to reasonably object to the Work performed within any phase of construction shall constitute an acceptance of that Work.*** Any exceptions to the Plans and Specifications that are noted by Owner shall be remedied by Builder as soon as practicable. 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, the 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.

14. LIMITED WARRANTY ON HOME. Builder warrants the Home against defects in workmanship and materials but only in accordance with, and as limited by, the new home warranty document provided by Builder (the "Limited Warranty") which shall be delivered to Owner upon payment in full of the Contract Price, as adjusted by any Change Orders. (A copy of the Limited Warranty is included with this Contract). **IT IS UNDERSTOOD AND AGREED THAT BUILDER'S LIABILITY UNDER THIS CONTRACT FOR THE CONSTRUCTION OF THE HOME IS CONFINED TO THE STATUTORY WARRANTY OF HABITABILITY (TEXAS PROPERTY CODE §430.002) AND THE PERFORMANCE STANDARDS AND REMEDIES PROVIDED**

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IN THE LIMITED WARRANTY. BUILDER, HOWEVER, SHALL NOT BE REQUIRED TO FULFILL ANY WARRANTY OBLIGATIONS UNTIL OWNER HAS PAID IN FULL ALL SUMS OWED TO BUILDER UNDER THIS CONTRACT. As to items not of Builder's manufacture, such as any air conditioner, water heater, refrigerator, range, dishwasher and other appliances, equipment or "consumer products," as defined by the Federal Trade Commission, Builder agrees to assign Owner the manufacturer's warranty, without recourse. Owner acknowledges and realizes that Builder itself is making no warranty on such items. **TO THE EXTENT ALLOWED BY LAW, ALL OTHER WARRANTIES, EXPRESS OR IMPLIED, WHETHER ARISING UNDER STATE OR FEDERAL LAW, INCLUDING BUT NOT LIMITED TO THE IMPLIED WARRANTIES OF FITNESS AND GOOD AND WORKMANLIKE CONSTRUCTION, ARE DISCLAIMED AND EXCLUDED.**

15. **REMEDIES FOR BREACH OF CONTRACT/LIMITATION OF CLAIMS**. The following sub-paragraphs detail acts/omissions by the Owner or Builder that constitute sufficient basis for the aggrieved Party to terminate this Contract and employ the remedies outlined below:

(a) If Builder materially breaches this Contract or abandons all activities on the Property for a period of ten (10) consecutive days by work stoppage, bankruptcy, insolvency or any other reason except Excused Delays, and Builder fails to cure the breach or resume work within seven (7) days after receipt of written notice from Owner (time being of the essence in this regard) specifying the Owner's intention to terminate this Contract by reason of the Builder's breach or abandonment as detailed in such notice, Owner shall have the right to terminate this Contract and to have the Work completed by another contractor selected by Owner. In the event of a termination of this Contract by Owner, Builder shall be entitled to be paid that portion of the Contract Price fairly attributable to the Work performed in accordance with the Plans and Specifications and any Change Orders.

(b) If Owner fails or refuses to comply with the Owner's payment obligations under this Contract, or Builder reasonably believes that future payments by Owner are questionable, and Owner fails to cure same or provide reasonable assurances that are acceptable to Builder within three (3) work days following written notice from Builder (time being of the essence in this regard), then Builder may terminate this Contract and/or stop the Work. The foregoing shall not limit any and all rights and remedies of Builder under applicable law which Builder may pursue at its option upon default by Owner, being in addition to the remedies of Builder as provided for in the Mechanic's Lien Contract (if any) or other instrument executed between the parties hereto which grants to Builder the right to foreclose or exercise other remedies as therein provided.

Under no Circumstances shall Builder or Owner be Liable for any special indirect or consequential damages, including claims of mental anguish. Any action or claim, regardless of form, which arises from or relates to this Contract, the Work and/or the Home 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.

16. **ENVIRONMENTAL RISK**. **THE BUILDER MAKES NO WARRANTIES, EXPRESS OR IMPLIED, ABOUT EXISTING OR FUTURE HEALTH HAZARDS OR ENVIRONMENTAL CONDITIONS ON THE PROPERTY, IN THE HOME, OR FROM ADJACENT SOURCES, INCLUDING, BUT NOT LIMITED TO, EXPOSURE TO RADON GAS, ELECTRIC AND MAGNETIC FIELDS, SHIFTING OR INSTABILITY OF SOIL CONDITIONS AND CONTAMINATION OF THE HOME OR THE SURROUNDING AIR, WATER OR SOIL FROM ANY SOURCES OR IN ANY MANNER.**

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OWNER IS ADVISED THAT THE CONTINUED PRESENCE OF MOISTURE ON COMPONENTS OF THE HOME (FROM LEAKS, CONDENSATION, SPILLS, ETC.) CAN CAUSE THE PROPAGATION OF MOLD, WHICH MAY CAUSE ALLERGENIC REACTIONS AND OTHER HEALTH PROBLEMS IN SOME INDIVIDUALS. UPON OCCUPYING THE HOME, THE OWNER IS RESPONSIBLE FOR IMPLEMENTING AN INSPECTION AND MAINTENANCE PROGRAM FOR THE IDENTIFICATION AND ELIMINATION OF MOISTURE IN THE HOME THAT COULD GIVE RISE TO THE GROWTH OF MOLD OR OTHER CONDITIONS DETRIMENTAL TO FUNCTIONING OF THE HOME OR THE HEALTH OF ITS OCCUPANTS. ANY LEAK OR THE PRESENCE OF MOISTURE THAT IS COVERED BY THE BUILDER'S LIMITED WARRANTY WILL BE CORRECTED PURSUANT TO THAT WARRANTY, BUT THE OWNER'S FAILURE TO IMPLEMENT AN EFFECTIVE MAINTENANCE PROGRAM OR THE FAILURE TO PROMPTLY NOTIFY THE BUILDER OF WARRANTY CLAIMS WILL NEGATE THE BUILDER'S RESPONSIBILITY (IF ANY) FOR ANY PROPERTY DAMAGE, PERSONAL INJURY, OR OTHER LOSS, DAMAGE OR LIABILITY RESULTING DIRECTLY OR INDIRECTLY FROM THE PRESENCE OF MOLD OR OTHER HARMFUL ORGANISMS.

17. **RESOLUTION OF DISPUTES**. The Parties desire prompt, inexpensive and efficient dispute resolution procedures and therefore agree that their disputes shall be governed by the following:

(a) State of Texas Administrative Resolution. Construction defect claims, if any, will be addressed through the administrative procedures established by the Texas Residential Construction Commission Act, and the Parties agree to cooperate and to fully participate in the dispute resolution process that is prescribed by that Act prior to initiating any arbitration or other formal dispute resolution process.

(b) Mediation-Binding Arbitration/Waiver of Jury Trial. The Owner and Builder agree that all controversies, claims or matters in question arising out of or relating to (i) this Contract, (ii) any breach or termination this Contract, (iii) the construction of the Home, (iv) any acts or omissions by the Builder (and its officers, directors or agents), and/or (v) any actual or purported representations or warranties, express or implied, relating to the Property and/or the Home (herein referred to collectively as a "Dispute") shall be subject to binding arbitration. The Parties will attempt to resolve any Dispute through informal discussions, and the Dispute may be submitted to non-binding mediation under the Construction Industry Mediation Rules of the American Arbitration Association ("AAA") where the Parties will endeavor to settle the Dispute in an amicable manner. In the event that one or both Parties do not desire to mediate, or the Dispute is not resolved by direct discussions and/or mediation, the Dispute shall be submitted to the AAA for binding arbitration in accordance with the Construction Industry Arbitration Rules of the AAA and the Supplementary Procedures for Residential Disputes. The Parties will share equally all filing fees and administrative costs of the arbitration, however, any Award rendered may equitably reallocate those costs. The arbitration shall be governed by Texas law and the U.S. Arbitration Act, 9 U.S.C. §§ 1-16, to the exclusion of any provisions of state law that are inconsistent with the application of the Federal Act.

The Award of the arbitrator shall be rendered in accordance with the AAA Rules then in effect. In rendering the Award, the arbitrator shall state the reasons therefor, including any computations of actual damages or offsets, if applicable. The Parties agree to abide by and fully perform in accordance with any Award rendered by the arbitrator. If the non-prevailing Party fails to comply with all aspects of the Award within thirty (30) days following issuance of the Award, then the prevailing Party shall be entitled to seek enforcement of the Award in any court of competent jurisdiction. If such enforcement becomes necessary, the prevailing Party in such proceeding shall recover its necessary and reasonable attorney's fees, in addition to any other relief to which that Party is entitled.

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18. BROKERAGE COMMISSION. Builder and Owner represent to each other that, unless specified in an attached addendum, there will be no claims for payment from any real estate broker, finder or other party in connection with this Contract. EACH PARTY HEREBY INDEMNIFIES AND AGREES TO HOLD THE OTHER HARMLESS FROM ANY LOSS, LIABILITY, DAMAGE, COST, OR EXPENSE (INCLUDING REASONABLE ATTORNEY'S FEES) RESULTING FROM A BREACH OF THIS REPRESENTATION.

19. OWNER REPRESENTATIVE. Owner may employ a third party professional (*e.g.*, architect, engineer, construction consultant) to inspect or monitor the Work (the "Owner's Agent"). That person, however, must be identified, and that designation communicated to Builder in writing, prior to the execution of this Contract to permit Builder to review the Plans and Specifications, Payment Schedule and Allowances with Owner's Agent prior to these Exhibits becoming part of this Contract. After execution of this Contract, the appointment of an Owner's Agent shall require approval of Builder, which approval may be reasonably withheld. The Builder may rely on any representations, statements, or approvals made by Owner's Agent concerning performance of the Work.

20. ATTORNEYS' FEES. If either Party employs an attorney to enforce, contest or construe the terms of this Contract, either by arbitration, litigation or negotiation, the losing party agrees to reimburse the prevailing party for necessary and reasonable attorneys' fees, arbitration fees, court costs, expert witness fees and related expenses.

21. NOTICES. Any notice, demand or request permitted, required, or desired to be given in connection with this Contract shall be in writing and shall be deemed effective if and when received by the addressee (whether faxed, delivered or mailed). If mailed, the notice should be addressed as follows:

IF TO BUILDER:	IF TO OWNER:
_____	_____
_____	_____
_____	_____
Tel: (___) _____ Fax: (___) _____	_____

22. NOTICE OF RELIANCE ON WRITTEN INFORMATION FROM THIRD PARTIES AND GOVERNMENT AGENCIES. ***OWNER IS ADVISED THAT BUILDER HAS RELIED UPON WRITTEN INFORMATION FROM VARIOUS THIRD PARTIES AND GOVERNMENTAL AGENCIES CONCERNING THE PROPERTY AND THE MATERIALS AND COMPONENTS INCORPORATED INTO THE HOME. THIS INFORMATION CONCERNS MATTERS ABOUT WHICH THESE THIRD PARTIES AND AGENCIES HAVE SPECIAL KNOWLEDGE NOT POSSESSED BY BUILDER, OR WHICH INFORMATION HAS BEEN PROVIDED TO BUILDER OR DISSEMINATED TO THE PUBLIC PURSUANT TO SPECIFIC STATUTORY OR REGULATORY REQUIREMENTS. THIS WRITTEN INFORMATION RELATES TO FLOOD ZONES, DEVELOPMENT OF ADJACENT LAND, THE SUITABILITY OF THE PROPERTY AND THE SURROUNDING SUBDIVISION FOR RESIDENTIAL USE, AND THE APPROPRIATENESS OF MATERIALS AND COMPONENTS INCORPORATED INTO THE HOME.***

23. MISCELLANEOUS. Time is of the essence of this Contract and all specified time limits must be met. No waiver of a right provided by this Contract shall be effective unless in writing and signed by the party against whom enforcement of the waiver is sought. No waiver by a party of any breach of any provision of this Contract shall be construed as a waiver of any later breach. All representations, agreements, indemnities and disclaimers of Builder and Owner that are contained in this Contract shall remain in full effect after Final Completion, and shall not be replaced or limited by any other document or agreement.

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24. PROPRIETARY INFORMATION. The Owner is advised that photographs of the Home may be taken by the Builder during and subsequent to performance of the Work. Owner agrees that Builder's use of the photographs in furtherance of Builder's business shall not be limited. Builder may place one of Builder's signs on the Property during construction of the Home. Owner acknowledges and agrees that the business practices and associated information disclosed and to be disclosed by Builder incident to the formation and implementation of this Contract (*e.g.*, Builder's subcontractor/supplier relationships; Builder's margins and pricing procedures) constitute proprietary information that is to be protected and not divulged to third parties. Owner's failure to protect the confidentiality of this information will constitute a material breach of this Contract.

25. ENTIRE AGREEMENT. This Contract, together with all attachments, contains the entire understanding between Builder and Owner with respect to the construction of the Home, and replaces all prior agreements or understandings, if any. BUILDER IS NOT BOUND BY ANY STATEMENT, PROMISE, CONDITION OR STIPULATION NOT SPECIFICALLY SET FORTH IN THIS CONTRACT. No representative of Builder has authority to make any oral statements that modify or change the terms and conditions of this Contract.

OWNER REPRESENTS THAT OWNER HAS READ AND UNDERSTANDS THIS ENTIRE CONTRACT, INCLUDING THE AGREEMENT FOR BINDING ARBITRATION OF DISPUTES RELATED TO THIS CONTRACT. OWNER ALSO REPRESENTS THAT NO VERBAL STATEMENT, PROMISE OR CONDITION NOT SPECIFICALLY SET FORTH IN THIS CONTRACT IS BEING RELIED UPON BY OWNER. IT IS ACKNOWLEDGED THAT BUILDER IS RELYING ON THESE REPRESENTATIONS AND WOULD NOT ENTER INTO THIS CONTRACT WITHOUT THIS UNDERSTANDING.

26. STATUTORY NOTICES. **THIS CONTRACT IS SUBJECT TO CHAPTER 27 OF THE TEXAS PROPERTY CODE. THE PROVISIONS OF THAT CHAPTER MAY AFFECT THE OWNER'S RIGHT TO RECOVER DAMAGES ARISING FROM THE PERFORMANCE OF THIS CONTRACT. IF OWNER HAS A COMPLAINT CONCERNING A CONSTRUCTION DEFECT ARISING FROM THE PERFORMANCE OF THIS CONTRACT AND THAT DEFECT HAS NOT BEEN CORRECTED THROUGH NORMAL WARRANTY SERVICE, THE OWNER MUST PROVIDE NOTICE REQUIRED BY CHAPTER 27 OF THE TEXAS PROPERTY CODE TO THE BUILDER BY CERTIFIED MAIL, RETURN RECEIPT REQUESTED, NOT LATER THAN THE 60th DAY BEFORE THE DATE THE OWNER INITIATES A CLAIM TO RECOVER DAMAGES IN AN ARBITRATION PROCEEDING. THE NOTICE MUST REFER TO CHAPTER 27 OF THE TEXAS PROPERTY CODE, AND MUST DESCRIBE THE CONSTRUCTION DEFECT. IF REQUESTED BY THE BUILDER, THE OWNER MUST PROVIDE THE BUILDER AN OPPORTUNITY TO INSPECT AND CURE THE DEFECT AS PROVIDED BY SECTION 27.004 OF THE TEXAS PROPERTY CODE.**

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.

EXECUTED in multiple copies this _____ day of _____, 20___.

OWNER:

_____

_____

BUILDER: _____

By: _____

Name/Title: _____

SCHEDULE OF EXHIBITS

A - Specifications
B - Payment Schedule
C - Allowances
D - Warranty Sample
E - Insulation Addendum
F - Brokerage Addendum

ACKNOWLEDGMENTS

THE STATE OF TEXAS §
§
COUNTY OF _____ §

This instrument was acknowledged before me on this ____ day of _____, 20___, by _____, _____ of _____.

_____
NOTARY PUBLIC, STATE OF TEXAS

THE STATE OF TEXAS §
§
COUNTY OF _____ §

This instrument was acknowledged before me on this _____ of _____, 20___, by _____ and _____.

_____
NOTARY PUBLIC, STATE OF TEXAS

This contract form was prepared by the Custom Builders Council of the GHBA as a service to its members and the public. No representation is made by the Council or the GHBA as to the adequacy of the form for any specific transaction. Use of this form by the Builder does not constitute an endorsement or sponsorship of the Builder or any other aspect of the contract by the GHBA.

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ITEM "K"

RESIDENTIAL CONSTRUCTION CONTRACT - COST PLUS

For Construction Projects on a Homeowner's Property - Revised 09/01/03

THIS DOCUMENT CREATES IMPORTANT LEGAL OBLIGATIONS THAT YOU SHOULD UNDERSTAND PRIOR TO SIGNING. IF YOU ARE UNCERTAIN ABOUT YOUR RIGHTS OR OBLIGATIONS UNDER THIS AGREEMENT, YOU MAY WISH TO CONSULT AN ATTORNEY.

1. **PARTIES**. _____ (the "Builder") who is a member in good standing with the Custom Builders Council of the Greater Houston Builders Association and _____ (the "Owner") (the Owner and Builder together will be referred to as the "Parties") are entering into this Residential Construction Contract (called the "Contract"). The purpose of this Contract is (i) to establish and define the construction activities that the Builder will perform, and (ii) to delineate the general obligations and responsibilities of the Parties.

2. **LOCATION AND GENERAL SCOPE OF WORK TO BE PERFORMED**. Owner agrees and promises to pay Builder the "Cost of the Work," a "Builder's Fee" and a "Builder's Percentage" as specified in Paragraph 3 of this Contract, plus any additional authorized expenditures. In consideration of such payments, the Builder hereby agrees to furnish certain labor, services, equipment, materials, and other related activities (collectively referred to as the "Work") for the construction of certain improvements, generally described as a single-family residence (the "Home"), on Lot(s) _____, Block ____, Section _____, out of the _____ Subdivision that is located in _____ County, Texas, and having the following street address: _____ (the "Property").

The Home will be constructed in substantial compliance with certain schematic drawings that have been/will be prepared by _____, dated _____, _____, and consisting of _____ pages, that have been initialed by the parties for purposes of identification and which by this reference are incorporated into this Contract (the "Plans"). In addition to the Plans, construction of the Home shall incorporate certain materials and equipment, and comply with certain procedures and requirements (collectively referred to as the "Specifications") which are detailed in the attached Exhibit "A". In the event of a conflict between the Plans and the Specifications, the Specifications shall control. Should a detail of the construction not be provided within the Plans and/or Specifications, 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.

The Plans and Specifications may be modified, limited or negated as the Parties may subsequently agree in writing through "Change Orders" as defined in Paragraph 8 of this Contract. It is specifically understood and agreed by the Parties that Builder is not responsible for and in no way endorses the accuracy or completeness of the Plans and Specifications to the extent they have been prepared by an independent architect, designer or other third party. ***The compliance of the Plans and Specifications with all applicable building codes, regulations, restrictive covenants or other conditions affecting the Property (including easements and zoning requirements) shall also be the Owner's responsibility.***

This contract form has been developed and promulgated by the Custom Builders Council of the Greater Houston Builders Association (the "GHBA") and each page of the original contract to be signed by the parties should reflect the GHBA's logo as a blue watermark. This copyrighted form is solely for use by Council members, and its use, or the reproduction of contract provisions, by non-members is strictly prohibited. The Owner should verify the Builder's membership status in the Council.

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_____ _____ _____

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Unless otherwise specified, materials used by the Builder in the performance of the Work shall be as prescribed in the Plans and Specifications, subject to substitution at Builder's election should an item not be reasonably available or if the procurement of such item 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. The construction of the Home is also subject to any changes in the Plans and Specifications as may be required by federal, state or local governmental authorities. Owner acknowledges that these changes (which do not affect the market value of the Home) may occur in the Work and agrees that so long as the construction of the Home is substantially in compliance with the Plans and Specifications, any such minor deviations will be accepted.

3. **COST OF THE WORK/BUILDER'S FEE**. The Owner agrees to pay the Builder the "Cost of the Work" as defined below, in addition to a "Builder's Fee." The Builder's Fee shall be a fixed sum of $_____ ***plus*** _____ percent (__%) of the Cost of the Work. If the scope of the Work performed expands to the degree that the Cost of the Work exceeds the estimated sum below, the Builder shall be paid _____ percent (__%) on all amounts above that sum (collectively these percentages are called the "Builder's Percentage"). The term "Cost of the Work" shall mean the actual costs incurred by the Builder in the performance of the following activities:

(a) Wages of construction workers directly employed by the Builder to perform Work, including welfare, unemployment compensation, social security and other standard benefits;

(b) Payments made by the Builder to subcontractors for labor performed and the cost of all materials, temporary facilities, equipment and hand tools not customarily owned by subcontractors, which are provided by the Builder at the Property and substantially consumed in the performance of the Work, as well as the reasonable rental costs for such items;

(c) Cost of transportation, including delivery, handling and storage charges for materials and equipment that is incorporated into the Home (discounts for cash or prompt payment accrue to the Owner);

(d) Engineer's fees and related expenses for the preparation of an engineered foundation and structural plan, as well as any testing of the soil and pad compaction, and inspections of these structural elements;

(e) Costs associated with the preparation and revision of Plans and/or Specifications, as well as survey fees, and charges for copies of any survey plats and construction plans;

(f) Any costs related to extra Work incurred because of deficiencies in the Plans and/or Specifications prepared by others, or due to circumstances that were not reasonably foreseeable;

(g) Expenses for insurance and bond premiums directly attributable to the construction of the Home;

(h) Losses and expenses (including theft and vandalism), not compensated by insurance (including Builder's insurance deductible), that arise from errors or omissions by subcontractors or suppliers in connection with the Work; provided that Builder's purposeful act or omission did not give rise to those losses;

(i) Sums paid by the Builder for tap charges, standby fees, impact fees, permits, utility hook-up fees, and gas, electricity, water and local telephone service to the Property and Home during construction;

(j) Sales, use or similar taxes related to the Work and which are imposed on Builder;

(k) Cost of clean-up and removal of debris from the Property; and

(l) Costs incurred in taking action to prevent threatened damage, injury or loss in case of an emergency.

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Although the Cost of the Work is premised on the Builder's actual costs, the Owner acknowledges that the Builder is not representing or agreeing that actual costs will be the least expensive alternative available to the Builder. The actual costs that Builder will be submitting for reimbursement, will however, represent typical costs the Builder would incur if it were performing the Work for itself.

In light of the information presently available to the Builder with respect to the proposed scope of the construction (including any Plans and Specifications produced by others), and taking into account specific budgets or "Allowances" that have been established for certain elements of the Work which remain undetermined at this time, the Builder can only provide an **ESTIMATE** of the Cost of the Work, that sum being: $_____. Builder is not able to specify the precise Cost of the Work because of the foregoing limitations and because existing prices for commodities to be incorporated into the Home (*e.g.*, lumber, cement, sheetrock) could change during the progress of the Work along with the cost of labor and equipment. ***Additionally, the adequacy of the Allowance amounts for appliances, fixtures, floor coverings, etc. are determined ultimately by the Owner's subjective considerations of quality, style and functionality.***

4. **PAYMENT PROCEDURE**. The Owner agrees that the Builder's Fee, will be paid by Owner to Builder at Builder's office in _____ County, Texas in _____ installments, the first such installment in the amount of $_____ shall be payable at execution of this Contract and followed by _____ subsequent monthly installments of $_____ each, and payable on the first day of each succeeding month until the entire Builder's Fee has been paid. This initial installment of the Builder's Fee is ***not refundable*** under any circumstances and is paid as consideration for the Builder's costs of contract preparation, budget formulation, research on specially fabricated items, materials deposits, *etc.*

The Cost of the Work and the Builder's Percentage shall be payable through a series of written requests from the Builder for payment (each to be referred to as a "Draw Request") submitted to Owner as the Builder contracts for or purchases materials, and as Work is performed. The Draw Request shall specify in reasonable detail the materials ordered/purchased and that portion of the Work performed, based on the actual costs incurred or to be incurred by the Builder in purchasing materials and performing the Work. The portion of the Builder's Percentage then due shall be calculated on the Cost of the Work shown in the Draw Request. The first Draw Request, in the amount of $_____ will fund Builder's initial construction costs and is payable prior to commencement of construction. Owner shall pay subsequent Draw Requests to Builder within three (3) business days of submission of the Draw Request. Draw Requests not timely paid shall begin to accrue interest at the rate of twelve percent (12%) per annum on the 10th day after receipt. Upon Owner's request, Builder will have a reasonable time to provide copies of all invoices, proposals, contracts and canceled checks which support the Builder's Draw Requests, although payment of a pending Draw Request is not contingent upon receipt of such records. ***The Parties acknowledge and understand that in view of the negotiations that preceded agreement on the Builder's Fee, no Draw Requests will be subject to withholding or retainage as provided under Section 53.101 et seq. of the Texas Property Code.***

The Owner shall pay any portion of the Cost of the Work, the applicable Builder's Percentage, and the Builder's Fee that have not been previously paid upon Final Completion of the Work. "Final Completion" is defined as and will be evidenced by: (i) Substantial Completion of the Work, (ii) all required governmental and regulatory agencies shall have approved the completed Work and have authorized Owner's occupancy of the Property, and (iii) Builder has furnished to Owner the Builder's Affidavit of Waiver of Liens (conditioned upon receipt of final payment). The existence of minor cosmetic repairs and adjustments shall not delay Final Completion and the payments due to Builder at that time. Under no circumstances shall the Owner be permitted to occupy the Home without paying in full the Cost of the Work, the Builder's Fee and the Builder's Percentage.

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5. **ACQUISITION OF PROPERTY AND FINANCING OF WORK**. Owner represents and warrants that the Owner presently owns or has contracted for and will purchase the Property in fee simple, free and clear of any liens or encumbrances (recorded or unrecorded), except for purchase money liens and such other matters that are common to the platted subdivision in which the Property is located. Owner further represents that there are no restrictions, regulations, rules, proceedings or lawsuits pending which would interfere with the Work contemplated by this Contract. Except for the non-refundable installment of the Builder's Fee, neither Party assumes any duty or liability under this Contract until (a) Owner has acquired the Property, (b) Builder receives and approves title documentation and a survey to be provided at Owner's expense in a form acceptable to Builder, and (c) the Owner provides the Builder with written evidence of the availability of funds to pay the Cost of the Work and the Builder's Fee and Builder's Percentage (if applicable) in full. The foregoing activities are to be accomplished and information provided within thirty (30) days after the signing of this Contract. If within that time the Owner cannot qualify for the necessary financing, or Builder is not reasonably satisfied that the financing condition has been met, Builder may terminate this Contract and retain the initial installment of the Builder's Fee.

The Builder agrees to accommodate the reasonable requests of Owner's third party lender. Owner acknowledges and agrees, however, that the loan documents that Builder is asked to sign must be in a form reasonably acceptable to Builder and that such documents will not alter the rights and obligations of the Parties under this Contract. ***Insofar as the relationship between Owner and Builder is concerned, the terms and conditions of this Contract shall not be superseded or modified by the Owner's construction financing documentation unless the superseded or modified provision in this Contract is identified, annotated and initialed by the Parties. Owner further agrees that it shall pay for any loan closing fees, survey costs and any reasonable and necessary attorneys' fees incurred by Builder incident to Owner's securing construction financing and effecting draws or the funding of any such loan.***

6. **SUITABILITY OF BUILDING SITE/FOUNDATION**. Owner shall have the sole responsibility of designating the location of the Home on the Property and securing any necessary encroachment agreements with adjacent landowners or easement owners. The Owner, with Builder's help, shall secure one or more independent professional engineers (the "Engineer") to conduct soils testing and prepare an engineered foundation plan and a structural framing plan that will supplement and be a part of the Plans and Specifications. The cost of soils testing, preparation of an engineered foundation and structural framing plan, and any pad compaction testing, and foundation and framing inspections, as deemed necessary by the Engineer and/or requested by Builder, shall be borne by Owner (irrespective of whether payment is made directly to the Engineer by Builder or Owner). Evaluation of the soils on the Property, the adequacy of the building pad, the foundation and the structural plan shall be the responsibility of the Owner and the Engineer, and the Builder therefore does not warrant and is not responsible for such tests, reports or plans. Builder's reliance on third parties for siting and suitability of the design and specification of components of the foundation shall relieve the Builder from all responsibility for or liability to the Owner for the raising, shifting, heaving or settling of the foundation and structural elements or any consequential damage to the Home, ***provided*** that the Builder constructs the Home in substantial compliance with the foundation and structural plans.

7. **INITIATION AND COMPLETION OF THE WORK**. Builder shall commence the Work within fifteen (15) working days following the later of (i) the filing of the Mechanic's Lien Contract associated with Owner's construction financing, or (ii) the Builder's receipt of all required permits, licenses and other necessary approvals for commencement of the Work. The Work shall thereafter be continued in accordance with the Builder's normal construction schedule until the Work reaches "Substantial Completion," which shall occur when the Home is sufficiently complete to allow the Owner to occupy and use the Home for its intended purpose. Substantial Completion will also be deemed to have occurred when the Home is occupied by the Owner, or any applicable municipal authority approves the Home for occupancy. Builder **ESTIMATES** that Substantial Completion of the Home will occur on or about _____. This date is estimated since completion of the Home is subject

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_____ _____ _____

to delays caused by conditions beyond the control of Builder. Such causes (referred to as "Excused Delays") include, but are not limited to, the availability of required materials, labor and services from subcontractors, as well as by interference by or disputes with the Owner or other subcontractors employed by Owner (for which Builder is permitted to suspend construction until such disputes are resolved), Change Orders that expand the scope of the Work, civil unrest, strikes, lockouts, fire, or other casualty, acts of God, inclement weather which interferes with normal scheduling of the Work, or failure of Owner to promptly fund Draw Requests, or to timely make decisions or selections of allowance items, colors, or materials. **BUILDER THEREFORE DOES NOT GUARANTEE SUBSTANTIAL COMPLETION OF THE HOME ON ANY SPECIFIC DATE.**

8. **CHANGE ORDERS**. A "Change Order" is a written agreement between the Owner and Builder to make changes, additions or deletions in the Work. If Builder agrees to implement a Change Order (and it has no obligation to do so), any additional costs incurred by the Builder as a result of the Change Order, plus the Builder's Percentage shall be paid in full when the Change Order is signed by the Parties. Change Orders deleting Work or materials will reduce the Cost of the Work by the Builder's true cost savings for the deleted items, but Builder may also request a Change Order fee equal to the applicable Builder's Percentage for administration of the Change Order. If the exact cost to be encountered in performing a Change Order cannot be ascertained before Owner requests the extra Work to be performed, an allowance shall be created for the Change Order with the cost of the extra Work being estimated, and that amount deposited with the Builder. ***The Builder shall not be required to commence the Work called for in the Change Order until payment of the specified or estimated cost and the accompanying Builder's Percentage has been paid to Builder.***

Should concealed or previously unknown conditions be encountered which are at variance with the conditions contemplated in the Plans and Specifications, a Change Order shall be prepared to accommodate the increase in cost to perform the Work called for in the Plans and Specifications. Additionally, if Owner requests Builder to perform research on and/or provide cost estimates for extra Work to be incorporated into a proposed Change Order, Builder will be reimbursed for the time expended for such activity at the rate of $_____ per hour. Upon request, these hourly fees shall be paid to Builder, irrespective of Owner's decision to proceed with the implementation of a Change Order for the additional Work.

9. **INDEPENDENT BUILDER STATUS**. Builder, in the performance of the Work does so as an independent contractor, and the Builder (not the Owner) shall have the sole control over the scheduling and progress of the Work, including the superior right to select and arrange for all labor in any way related to the Work. The Builder shall exercise exclusive control over the selection of the subcontractors, and shall not be obligated to employ subcontractors solely on the basis of cost savings that might be achieved. All subcontractors shall perform their functions independently, and not as an agent or employee, servant or representative of the Builder or the Owner. ***The Owner agrees not to instruct, direct or otherwise communicate with the subcontractors retained by the Builder as to the scheduling of or details about the Work (including additions to or deletions therefrom) nor shall Owner do or cause any work to be done, or alter or cause the alteration of any portion of the Home, whether complete or incomplete, before Final Completion and Final Payment.*** Owner shall not independently contract for any portion of the Work without Builder's express written consent. If Owner employs a third party to fabricate an element, feature or appliance to be incorporated into the Home, the Owner shall be responsible for the installation of that fabricated item. **ACTS OR OMISSIONS OF, OR LOSSES, DAMAGES OR DELAYS CAUSED BY, ANYONE RETAINED BY OWNER SHALL BE THE RESPONSIBILITY OF OWNER, NOT BUILDER. THE BUILDER SHALL NOT WARRANT IN ANY WAY THE WORK OR MATERIALS PROVIDED BY PERSONS THAT OWNER HAS EMPLOYED OR WITH WHOM OWNER HAS CONTRACTED.**

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10. **RELEASE OF AND/OR INDEMNIFICATION FOR LOSSES DURING CONSTRUCTION**. Because of potential safety and health hazards present during construction of the Home, as well as the practical limitations on the Builder's ability to control the activities of all persons involved in the construction process and thereby limit the risk of personal injury that may arise from construction activities, the Parties agree as follows:

(a) Personal Safety. To ensure and to protect the personal health and safety of Owner and Owner's licensees and invitees, Owner shall restrict entry by the Owner and Owner's licensees and invitees onto the Property or into the Home to a minimum. When Owner chooses to enter the Property, and irrespective of Builder's presence on the Property at such time, **OWNER AGREES TO RELEASE AND INDEMNIFY AND HOLD BUILDER HARMLESS FROM AND AGAINST ANY AND ALL CLAIMS, DEMANDS OR CAUSES OF ACTION ARISING IN FAVOR OF OWNER OR OWNER'S LICENSEES AND INVITEES ON ACCOUNT OF BODILY INJURY, DEATH OR DAMAGE TO OR LOSS OF PROPERTY IN ANY WAY OCCURRING OR INCIDENT TO THE CONDITION OF THE PROPERTY AND/OR THE HOME. THIS RELEASE AND INDEMNITY IS GIVEN TO BUILDER REGARDLESS OF WHETHER THE BUILDER OR ITS AGENTS OR EMPLOYEES ARE NEGLIGENT IN WHOLE OR IN PART AND EVEN WHEN THE INJURY, DEATH OR DAMAGE TO OWNER OR OWNER'S LICENSEES AND INVITEES IS CAUSED BY THE SOLE NEGLIGENCE OF BUILDER OR ATTRIBUTABLE TO BUILDER'S NEGLIGENCE PER SE OR IMPOSED BY STRICT LIABILITY.**

(b) Risks to Vegetation. Owner also acknowledges that the contemplated construction imposes an inherent risk to the health of the trees and vegetation situated on the Property, and Owner understands that Builder cannot guarantee the viability of those trees and vegetation. **OWNER ACKNOWLEDGES THE AFOREMENTIONED RISK AND HEREBY RELEASES THE BUILDER FROM ANY CLAIMS FOR DAMAGES TO OR LOSS OF TREES AND VEGETATION RESULTING FROM CONSTRUCTION ACTIVITIES.**

(c) Losses and Damage Related to the Work. Without minimizing in any way the foregoing indemnification by the Owner, during the construction of the Home, and as between Owner and Builder only, Builder shall be responsible for losses due to personal injury or property damage that may occur incident to or affect the Work, **BUT NOT** as to any such loss or damage caused in whole or in part by the negligence of those employed by or who have contracted with Owner. **BUILDER AGREES, DURING THE PROGRESS OF THE WORK, TO PROTECT OWNER AND TO INDEMNIFY AND SAVE OWNER HARMLESS FROM (i) ANY AND ALL LIENS, CONTRACT DAMAGES, SUITS, CLAIMS AND CAUSES OF ACTION RELATED TO THE CONSTRUCTION OF THE HOME, AND (ii) ANY SUITS, CLAIMS AND CAUSES OF ACTION FOR DAMAGES TO PROPERTY OR PERSONAL INJURY TO OR DEATH OF BUILDER'S EMPLOYEES, AGENTS, REPRESENTATIVES AND INDEPENDENT CONTRACTORS (AND THEIR EMPLOYEES) ASSOCIATED WITH PERFORMANCE OF THE WORK BY THE BUILDER.**

11. **INSURANCE/WAIVER OF SUBROGATION**. Builder shall keep in force during progress of the Work, and shall furnish to Owner, upon Owner's request, the opportunity to review the following insurance policies:

(a) Builders Risk Insurance in the amount of the estimated Cost of the Work (plus any Change Orders), naming Owner as an additional insured;

(b) Statutory Worker's Compensation Insurance for Builder's employees; and

(c) Comprehensive General Liability Insurance with limits of $_____ per person, per occurrence for personal injury, ($_____ aggregate), with $_____ coverage for completed operations.

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Supplemental to the Builder's obligation to carry insurance fully protecting the Home during construction, after occupancy the Owner shall secure and maintain insurance covering risk of loss and damage to the Home, however caused. The Parties agree to waive the rights that each may have against the other for such insured losses or damage to the Home, its contents, or the Property during construction and after occupancy of the Home, including any such loss or damage arising from the negligence or other fault of either Party.

12. **INSPECTION AND APPROVAL OF HOME**. During construction of the Home, Owner shall conduct periodic walk-through inspections (with due consideration being given to safety concerns) and agrees to promptly apprize the Builder in writing if any aspect of construction has not been completed in substantial conformity with the Plans and Specifications and this Contract. ***Failure by the Owner to reasonably object to the Work performed within any phase of construction shall constitute an acceptance of that Work***. Any exceptions to the Plans and Specifications that are noted by Owner shall be remedied by Builder as soon as practicable. 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, the 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.

13. **LIMITED WARRANTY ON HOME**. Builder warrants the Home against defects in workmanship and materials, but only in accordance with, and as limited by, the new home warranty document provided by Builder (the "Limited Warranty") which shall be delivered to Owner with full payment of all sums due Builder. (A copy of the Limited Warranty is included with this Contract). **IT IS UNDERSTOOD AND AGREED THAT BUILDER'S LIABILITY UNDER THIS CONTRACT FOR THE CONSTRUCTION OF THE HOME IS CONFINED TO THE STATUTORY WARRANTY OF HABITABILITY (TEXAS PROPERTY CODE §430.002) AND THE PERFORMANCE STANDARDS AND REMEDIES PROVIDED IN THE LIMITED WARRANTY. BUILDER SHALL NOT BE REQUIRED TO FULFILL ANY WARRANTY OBLIGATIONS UNTIL THERE HAS BEEN FULL PAYMENT OF SUMS OWED TO BUILDER UNDER THIS CONTRACT.** As to items not of Builder's manufacture, such as any air conditioner, water heater, refrigerator, range, dishwasher and other appliances, equipment or "consumer products," as defined by the Federal Trade Commission, Builder agrees to assign Owner the manufacturer's warranty, without recourse. Owner acknowledges and that Builder itself is making no warranty on such items. **TO THE EXTENT ALLOWED BY LAW, ALL OTHER WARRANTIES, EXPRESS OR IMPLIED, WHETHER ARISING UNDER STATE OR FEDERAL LAW, INCLUDING BUT NOT LIMITED TO THE IMPLIED WARRANTIES OF FITNESS, MERCHANTABILITY, OR GOOD AND WORKMANLIKE CONSTRUCTION ARE DISCLAIMED AND EXCLUDED.**

14. **REMEDIES FOR BREACH OF CONTRACT/LIMITATION OF CLAIMS**. The following sub-paragraphs detail acts/omissions by the Owner or Builder that constitute sufficient basis for the aggrieved Party to terminate this Contract and employ the remedies outlined below:

(a) If Builder materially breaches this Contract or abandons all activities on the Property for a period of ten (10) consecutive business days by work stoppage, bankruptcy, insolvency or any other reason except Excused Delays, and Builder fails to cure the breach or resume work within seven (7) days after receipt of written notice from Owner (time being of the essence in this regard) specifying the Owner's intention to terminate this Contract by reason of the Builder's breach or abandonment as detailed in such notice, Owner shall have the right to terminate this Contract and to have the Work completed by another contractor selected by Owner. In the event of a termination of this Contract by Owner, Builder shall be entitled to be paid that portion of the Cost of the Work, the Builder's Fee and the Builder's Percentage fairly attributable to the Work completed in accordance with the Plans and Specifications and pursuant to the agreements of the Parties.

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_____ _____ _____

(b) If Owner fails or refuses to comply with the terms of this Contract, or Builder reasonably believes that future payments by Owner are questionable, and Owner fails to cure same or provide reasonable assurances that are acceptable to Builder of Owner's ability to comply with this Contract within three (3) work days following written notice from Builder (time being of the essence in this regard), then Builder may terminate this Contract and/or stop the Work. The foregoing shall not limit any and all rights and remedies of Builder under applicable law which Builder may pursue at its option upon default by Owner, being in addition to the remedies of Builder as provided for in the Mechanic's Lien Contract (if any) or such other instrument executed by the Parties.

Under no circumstances shall Builder or Owner be liable for any special, indirect, or consequential damages, including claims for Mental anguish. Any action or claim, regardless of form, which arises from or relates to this Contract, the Work and/or the Home 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.

15. ENVIRONMENTAL RISK. THE BUILDER MAKES NO WARRANTIES, EXPRESS OR IMPLIED, ABOUT EXISTING OR FUTURE HEALTH HAZARDS OR ENVIRONMENTAL CONDITIONS ON THE PROPERTY, IN THE HOME, OR FROM ADJACENT SOURCES, INCLUDING, BUT NOT LIMITED TO, EXPOSURE TO RADON GAS, ELECTRIC AND MAGNETIC FIELDS, SHIFTING OR INSTABILITY OF SOIL CONDITIONS AND CONTAMINATION OF THE HOME OR THE SURROUNDING AIR, WATER OR SOIL FROM ANY SOURCES OR IN ANY MANNER.

OWNER IS ADVISED THAT THE CONTINUED PRESENCE OF MOISTURE ON COMPONENTS OF THE HOME (FROM LEAKS, CONDENSATION, SPILLS, ETC.) CAN CAUSE THE PROPAGATION OF MOLD, WHICH MAY CAUSE ALLERGENIC REACTIONS AND OTHER HEALTH PROBLEMS IN SOME INDIVIDUALS. UPON OCCUPANCY OF THE HOME, THE OWNER IS RESPONSIBLE FOR IMPLEMENTING AN INSPECTION AND MAINTENANCE PROGRAM FOR THE IDENTIFICATION AND ELIMINATION OF MOISTURE IN THE HOME THAT COULD GIVE RISE TO THE GROWTH OF MOLD OR OTHER CONDITIONS DETRIMENTAL TO FUNCTIONING OF THE HOME OR THE HEALTH OF ITS OCCUPANTS. ANY LEAK OR THE PRESENCE OF MOISTURE THAT IS COVERED BY THE BUILDER'S LIMITED WARRANTY WILL BE CORRECTED PURSUANT TO THAT WARRANTY, BUT THE OWNER'S FAILURE TO IMPLEMENT AN EFFECTIVE MAINTENANCE PROGRAM OR THE FAILURE TO PROMPTLY NOTIFY THE BUILDER OF WARRANTY CLAIMS WILL NEGATE THE BUILDER'S RESPONSIBILITY (IF ANY) FOR ANY PROPERTY DAMAGE, PERSONAL INJURY, OR OTHER LOSS, DAMAGE OR LIABILITY RESULTING DIRECTLY OR INDIRECTLY FROM THE PRESENCE OF MOLD OR OTHER HARMFUL ORGANISMS.

16. RESOLUTION OF DISPUTES. The Parties desire prompt, inexpensive and efficient dispute resolution procedures and therefore agree that their disputes shall be governed by the following:

(a) State of Texas Administrative Resolution. Construction defect claims, if any, will be addressed through the administrative procedures established by the Texas Residential Construction Commission Act, and the Parties agree to cooperate and to fully participate in the dispute resolution process that is prescribed by that Act prior to initiating any arbitration or other formal dispute resolution process.

(b) Mediation-Binding Arbitration/Waiver of Jury Trial. The Owner and Builder agree that all controversies, claims or matters in question arising out of or relating to (i) this Contract, (ii) any breach or termination this Contract, (iii) the construction of the Home, (iv) any acts or omissions by the Builder (and its officers, directors or agents), and/or (v) any actual or purported representations or warranties, express or implied, relating to the Property and/or

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the Home (herein referred to collectively as a "Dispute") shall be subject to binding arbitration. The Parties will attempt to resolve any Dispute through informal discussions, and the Dispute may be submitted to non-binding mediation under the Construction Industry Mediation Rules of the American Arbitration Association ("AAA") where the Parties will endeavor to settle the Dispute in an amicable manner. In the event that one or both Parties do not desire to mediate, or the Dispute is not resolved by direct discussions and/or mediation, the Dispute shall be submitted to the AAA for binding arbitration in accordance with the Construction Industry Arbitration Rules of the AAA and the Supplementary Procedures for Residential Disputes. The Parties will share equally all filing fees and administrative costs of the arbitration, however, any Award rendered may equitably reallocate those costs. The arbitration shall be governed by Texas law and the U.S. Arbitration Act, 9 U.S.C. §§ 1-16, to the exclusion of any provisions of state law that are inconsistent with the application of the Federal Act.

The Award of the arbitrator shall be rendered in accordance with the AAA Rules then in effect. In rendering the Award, the arbitrator shall state the reasons therefor, including any computations of actual damages or offsets, if applicable. The Parties agree to abide by and fully perform in accordance with any Award rendered by the arbitrator. If the non-prevailing Party fails to comply with all aspects of the Award within thirty (30) days following issuance of the Award, then the prevailing Party shall be entitled to seek enforcement of the Award in any court of competent jurisdiction. If such enforcement becomes necessary, the prevailing Party in such proceeding shall recover its necessary and reasonable attorney's fees, in addition to any other relief to which that Party is entitled.

17. **BROKERAGE COMMISSION**. Builder and Owner represent to each other that, unless specified in an attached addendum, there will be no claims for payment from any real estate broker, finder or other party in connection with this Contract. EACH PARTY HEREBY INDEMNIFIES AND AGREES TO HOLD THE OTHER HARMLESS FROM ANY LOSS, LIABILITY, DAMAGE, COST, OR EXPENSE (INCLUDING REASONABLE ATTORNEY'S FEES) RESULTING FROM BREACH OF THIS REPRESENTATION.

18. **OWNER REPRESENTATIVE**. Owner may employ a third party professional (*e.g.*, architect, engineer, construction consultant) to inspect or monitor the Work (the "Owner's Agent"). That person, however, must be identified, and that designation communicated to Builder in writing, prior to the execution of this Contract to permit Builder to review the Plans and Specifications, Payment Schedule and Allowances with Owner's Agent prior to these Exhibits becoming part of this Contract. After execution of this Contract, the appointment of an Owner's Agent shall require approval of Builder, which approval may be reasonably withheld by Builder. Builder may rely on any directives, statements, or approvals made by Owner's Agent concerning performance of the Work.

19. **NOTICES**. Any notice, demand or request permitted, required, or desired to be given in connection with this Contract shall be in writing and shall be deemed effective if and when received by the addressee (whether faxed, delivered or mailed). If mailed, the notice should be addressed as follows:

IF TO OWNER:	IF TO BUILDER:
_____	_____
_____	_____
_____	_____
Tel: _____ Fax: _____	Tel: _____ Fax: _____

20. **ATTORNEYS' FEES**. If either Party employs an attorney to enforce, contest or construe the terms of this Contract, either by arbitration, litigation or negotiation, the losing party agrees to reimburse the prevailing party for necessary and reasonable attorneys' fees, arbitration fees, court costs, expert witness fees and related expenses.

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21. NOTICE OF RELIANCE ON WRITTEN INFORMATION FROM THIRD PARTIES AND GOVERNMENT AGENCIES. ***BUILDER ADVISES OWNER THAT BUILDER HAS RELIED UPON WRITTEN INFORMATION FROM VARIOUS THIRD PARTIES AND GOVERNMENTAL AGENCIES CONCERNING THE PROPERTY AND THE MATERIALS AND COMPONENTS INCORPORATED INTO THE HOME. THIS WRITTEN INFORMATION CONCERNS MATTERS ABOUT WHICH THESE THIRD PARTIES HAVE SPECIAL KNOWLEDGE NOT POSSESSED BY BUILDER, OR WHICH INFORMATION HAS BEEN PROVIDED TO THE BUILDER OR DISSEMINATED TO THE PUBLIC PURSUANT TO SPECIFIC STATUTORY OR REGULATORY REQUIREMENTS. THIS WRITTEN INFORMATION PERTAINS TO THE FLOOD ZONES, DEVELOPMENT OF ADJACENT LAND, THE SUITABILITY OF THE PROPERTY AND THE SURROUNDING SUBDIVISION FOR RESIDENTIAL USE, AND THE APPROPRIATENESS OF THE MATERIALS AND COMPONENTS INCORPORATED INTO THE HOME.***

22. MISCELLANEOUS. Time is of the essence of this Contract and all specified time limits must be met. No waiver of a right provided by this Contract shall be effective unless in writing and signed by the party against whom enforcement of the waiver is sought. No waiver by a party of any breach of any provision of this Contract shall be construed as a waiver of any later breach. All representations, agreements, indemnities and disclaimers of the Builder and the Owner that are contained in this contract shall remain in full effect after the Final Completion of the Home, and shall not be replaced or limited by any other document or agreement except as explicitly provided in this Contract. This Contract is binding upon the heirs, executors, administrators, successors and assigns of the Parties, and those persons who would have a claim by, through or under the Parties.

23. PROPRIETARY INFORMATION. The Owner is also advised that photographs of the Home may be taken by the Builder during and subsequent to performance of the Work. Owner agrees that Builder's use of the photographs in furtherance of Builder's business shall not be limited. Builder may place one of Builder's signs on the Property during construction of the Home. Owner acknowledges and agrees that the business practices and associated information disclosed and to be disclosed by Builder incident to the formation and implementation of this Contract (*e.g.*, Builder's subcontractor/supplier relationships; Builder's margins and pricing procedures) constitute proprietary information that is to be protected and not divulged to third parties. Owner's failure to protect the confidentiality of this information will constitute a material breach of this Contract.

24. ENTIRE AGREEMENT. This Contract, together with all attachments, contains the entire understanding between Builder and Owner with respect to the construction of the Home, and replaces all prior agreements or understandings, if any. BUILDER IS NOT BOUND BY ANY STATEMENT, PROMISE, CONDITION OR STIPULATION NOT SPECIFICALLY SET FORTH IN THIS CONTRACT. No representative of Builder has authority to make any oral or written statements that modify or change the terms and conditions of this Contract.

OWNER REPRESENTS THAT OWNER HAS READ AND UNDERSTANDS THIS ENTIRE CONTRACT, INCLUDING THE AGREEMENT FOR BINDING ARBITRATION OF DISPUTES RELATED TO THIS CONTRACT. OWNER ALSO REPRESENTS THAT NO VERBAL STATEMENT, PROMISE OR CONDITION NOT SPECIFICALLY SET FORTH IN THIS CONTRACT IS BEING RELIED UPON BY OWNER. IT IS ACKNOWLEDGED THAT BUILDER IS RELYING ON THESE REPRESENTATIONS AND WOULD NOT ENTER INTO THIS CONTRACT WITHOUT THIS UNDERSTANDING.

25. STATUTORY NOTICES. **THIS CONTRACT IS SUBJECT TO CHAPTER 27 OF THE TEXAS PROPERTY CODE. THE PROVISIONS OF THAT CHAPTER MAY AFFECT THE OWNER'S RIGHT TO RECOVER DAMAGES ARISING FROM THE PERFORMANCE OF THIS CONTRACT. IF OWNER HAS A COMPLAINT CONCERNING A CONSTRUCTION DEFECT ARISING FROM THE PERFORMANCE OF THIS CONTRACT AND THAT DEFECT HAS NOT BEEN CORRECTED**

THROUGH NORMAL WARRANTY SERVICE, THE OWNER MUST PROVIDE NOTICE REQUIRED BY CHAPTER 27 OF THE TEXAS PROPERTY CODE TO THE BUILDER BY CERTIFIED MAIL, RETURN RECEIPT REQUESTED, NOT LATER THAN THE 60th DAY BEFORE THE DATE THE OWNER INITIATES A CLAIM TO RECOVER DAMAGES IN AN ARBITRATION PROCEEDING. THE NOTICE MUST REFER TO CHAPTER 27 OF THE TEXAS PROPERTY CODE, AND MUST DESCRIBE THE CONSTRUCTION DEFECT. IF REQUESTED BY THE BUILDER, THE OWNER MUST PROVIDE THE BUILDER AN OPPORTUNITY TO INSPECT AND CURE THE DEFECT AS PROVIDED BY SECTION 27.004 OF THE TEXAS PROPERTY CODE.

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.

EXECUTED in multiple copies this _____ day of _____, 20___.

OWNER:

_____

_____

BUILDER: _____

By: _____

Name/Title: _____

This contract form was prepared by the Custom Builders Council of the GHBA as a service to its members and the public. No representation is made by the Council or the GHBA as to the adequacy of the form for any specific transaction. Use of this form by the Builder does not constitute an endorsement or sponsorship of the Builder or any other aspect of the contract by the GHBA.

Schedule of Exhibits

A - Specifications
B - Warranty Sample
C - Insulation Addendum
D - Brokerage Addendum

Acknowledgments

THE STATE OF TEXAS §
§
COUNTY OF _____ §

This instrument was acknowledged before me on this ____ day of _____, 20___, by _____, _____ of _____.

_____
NOTARY PUBLIC, STATE OF TEXAS

THE STATE OF TEXAS §
§
COUNTY OF _____ §

This instrument was acknowledged before me on this _____ of _____, 20___, by _____ and _____.

_____
NOTARY PUBLIC, STATE OF TEXAS

ITEM “L”

RESIDENTIAL SALE & CONSTRUCTION CONTRACT

For Construction of a Residence on the Builder's Lot - Revised 09/01/03

THIS DOCUMENT CREATES IMPORTANT LEGAL OBLIGATIONS THAT YOU SHOULD UNDERSTAND PRIOR TO SIGNING. IF YOU ARE UNCERTAIN ABOUT YOUR RIGHTS OR OBLIGATIONS UNDER THIS CONTRACT, YOU MAY WISH TO CONSULT AN ATTORNEY.

1. **PARTIES.** _____ (the "Builder"), who is a member currently in good standing with the Custom Builders Council of the Greater Houston Builders Association, and _____ (the "Purchaser") (the Purchaser and Builder together will be referred to as the "Parties") are entering into this Residential Sale & Construction Contract (called the "Contract"). The purpose of this Contract is (i) to establish and define the construction activities that the Builder will perform (the "Work"), and (ii) to delineate the general obligations and responsibilities of the Parties incident to this transaction.

2. **LOCATION AND GENERAL SCOPE OF WORK TO BE PERFORMED.** Purchaser agrees and promises to pay Builder the specified "Purchase Price" as defined below, plus any additional authorized expenditures. In consideration of such payments, the Builder agrees to construct and convey to Purchaser certain improvements generally described as a single-family residence (the "Home"), on Lot(s) _____, Block _____, Section _____, and located within the _____ Subdivision in _____ County, Texas and having the following street address: _____ (the "Property").

Except as noted below, the Home has been or will be constructed in substantial compliance with certain schematic drawings that have been prepared by _____, dated _____, _____, and consisting of _____ pages, that have been initialed by the parties for purposes of identification and which by this reference are incorporated into this Contract (the "Plans"). In addition to the Plans, construction of the Home shall incorporate certain materials and equipment, and comply with certain procedures and special requirements of the Purchaser (collectively referred to as the "Specifications") which are detailed in the attached Exhibit "A". In the event of a conflict between the Plans and the Specifications, the Specifications shall control. If a detail of the construction is not specified within the Plans and/or Specifications, 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.

The Purchaser understands and acknowledges that while the Builder used the Plans and Specifications in constructing the Home, variances from those plans and/or specifications exist and are specifically noted as follows:

_____

_____. The Purchaser acknowledges that the decision to purchase the Home is not premised on, and the Purchaser has not relied upon the Builder's prior strict adherence to the Plans and Specifications. Instead, the Purchaser is relying prior inspections of the Home performed by or on behalf of the Purchaser. Future changes in the Plans and Specifications, however, must be reflected in writing through a "Change Order" under Paragraph 9 of this Contract.

This contract form has been developed and promulgated by the Custom Builders Council of the Greater Houston Builders Association (the "GHBA") and each page of the original contract to be signed by the parties should reflect the GHBA's logo as a blue watermark. This copyrighted form is solely for use by Council members, and its use, or the reproduction of contract provisions, by non-members is strictly prohibited. The Purchaser should verify the Builder's membership status in the Council.

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Unless otherwise specified, materials used by the Builder in the construction of the Home shall be as prescribed in the Plans and Specifications, 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. The construction of the Home is also subject to any changes in the Plans and Specifications as may be required by federal, state or local governmental authorities. Purchaser acknowledges that these changes may occur during construction and agrees that so long as the Home is substantially in compliance with the Plans and Specifications, any such minor deviations will be accepted.

3. **PURCHASE PRICE AND PAYMENT PROCEDURE**. The "Purchase Price," as that term is used in this Contract, is $_____. The Purchaser agrees that the components of the Purchase Price listed below shall be payable to Builder as follows:

(a) An initial sum in the amount of $_____ (the "Earnest Money") shall be payable upon execution of this Contract, and shall be credited against the Purchase Price.

(b) The sum of $_____ (the "Construction Fee") shall be payable upon the Purchaser's securing any necessary financing and approval of title as provided in Paragraphs 5 and 6 of this Contract, and prior to the initiation of new construction activities on behalf of the Purchaser. The Construction Fee includes in part payments for changes to be made to existing construction and special additions selected by Purchaser, and shall ***not be refundable*** under any circumstances except as provided in Paragraphs 6, 15 and 17(a) of this Contract. The Construction Fee is paid as consideration for the Builder's costs of contract preparation, budget formulation, research related to specially fabricated items, construction and materials deposits, related overhead, etc.

(c) The Purchaser shall pay the remaining unpaid portion of the Purchase Price (the "Final Payment") upon "Substantial Completion" (as later defined) of the Home and Builder's transfer to Purchaser of title to the Property (the event of transferring title to be referred to as the "Closing"). Purchaser desires that the Closing occur at the offices of _____ (the "Title Company"). The Purchaser will attend the Closing on the date specified by Builder (with at least five (5) days advance written notice) following Substantial Completion of the Home. The existence of minor cosmetic repairs and adjustments shall not delay the Closing if the Home has reached the stage of Substantial Completion. If Purchaser fails or refuses to attend the scheduled Closing, Builder may at its sole option treat such as a breach of this Contract (and retain all deposits), or enforce this Contract with the Purchaser to pay the additional ad valorem taxes and interest costs incurred by Builder because of the delay, which are hereby agreed to be $200.00 per day until paid at the rescheduled Closing.

4. **ALLOWANCES**. The Parties have agreed to specific budgets ("Allowances") for certain amenities and materials to be incorporated into the Home, all of which are detailed in the attached Exhibit "B." The sums allocable to each listed Allowance ***are included within and are part of the Purchase Price***. Each Allowance listed includes the component costs of material and labor (if any), plus any appropriate sales tax, delivery or other costs associated with procurement. These Allowances are also premised on the understanding that purchases will be made from suppliers who are typically used by the Builder, and do not contemplate the payment of deposits, service fees, or the delays that may be encountered when other suppliers are used. As Builder incurs material and labor costs with respect to a specific Allowance, those costs shall be applied against the applicable Allowance. In the event an Allowance for an item or category is exceeded, the overage shall constitute an increase in the Purchase Price and shall be set forth in a Change Order as prescribed in Paragraph 9 of this Contract. Any savings resulting from

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reduced expenditures for Allowance items shall result in a decrease in the Purchase Price and shall be credited against the Purchase Price at Closing. ***Purchaser is solely responsible for the adequacy of the Allowance amounts on appliances, fixtures, floor coverings, etc. since the sums to be spent are determined ultimately by the Purchaser's subjective considerations of quality, style and functionality.*** Purchaser shall make all selections applicable to the Allowances within five (5) days from date of request by Builder; and if selections are not timely made, then Builder shall be authorized to make the selection and proceed with the construction of the Home. Copies of invoices and receipts for expenditures related to Allowances will be available from the Builder on reasonable notice.

5. **FINANCING**. Purchaser has arranged or will arrange for financing, or otherwise has available sufficient funds, to pay the Purchase Price in full, and agrees to provide Builder written evidence of the availability of such funds or financing within _____ days after executing this Contract. If within that time the Purchaser cannot qualify for the necessary financing, or the Builder is not satisfied that the financing condition has been met, either party may terminate this Contract and Builder will refund the Earnest Money Deposit. Absent notification within the specified time regarding the availability (or absence) of necessary funds, the financing contingency is **WAIVED** by Purchaser, and Purchaser shall remit the Construction Fee to Builder.

6. **MATTERS AFFECTING TITLE TO THE PROPERTY**. Purchaser is encouraged to secure and review a title report on the Property from the Title Company. Any title exceptions beyond those set forth in Paragraph 16 of this Contract are **WAIVED** unless within thirty (30) days after executing this Contract, Purchaser shall request in writing that any such exception(s) to title be corrected. The Builder shall not, however, be required to incur any expense incident to its curative efforts. If the defects in title cannot be corrected, or the Builder is required, but chooses not to incur any expense to cure the title defect, the Earnest Money and the Construction Fee shall be returned promptly and this Contract canceled. The return of the Earnest Money and the Construction Fee shall be the Purchaser's sole remedy for title defects.

7. **SUITABILITY OF BUILDING SITE/FOUNDATION**. Purchaser is advised that the Builder may have contracted with one or more independent professional engineers (the "Engineer") to (i) conduct soils testing, (ii) prepare an engineered foundation plan, and/or (iii) prepare a framing plan for use in constructing the Home. The Builder is not a professional engineer, and has relied on the Engineer's professional judgment as to the soils on the Property, the adequacy of the building pad, the foundation design and the framing plan. The Builder does not warrant and hereby disclaims any responsibility for such tests, reports or plans. The Builder's reliance on the Engineer for such tests, reports or plans shall relieve the Builder from responsibility for or liability to the Purchaser for the raising, shifting, heaving or settling of the soil or the Home, and any consequential damage to the Home or its contents, ***provided*** the Builder has constructed the Home in substantial compliance with those tests, reports and plans.

8. **INITIATION AND COMPLETION OF CONSTRUCTION**. Prior to satisfaction of the financing and title contingencies and Purchaser's payment of the Construction Fee, Builder may (but is not required) proceed with construction of elements of the Home that are unaffected by Purchaser's Specifications. Once the Builder has received sufficient assurances regarding the Purchaser's financing, and Purchaser has accepted the status of title to the Property, Builder shall commence the construction of the Home consistent with Purchaser's specifications within fifteen (15) working days following the later of (i) the receipt of the Construction Fee, or (ii) the Builder's receipt of all required permits, licenses and other necessary approvals for construction of the Home. The construction activities shall thereafter be continued in accordance with the Builder's normal construction schedule until the Home reaches "Substantial Completion," which shall occur when construction of the Home is sufficiently complete so that the Purchaser can occupy and use the Home for its intended purpose. Substantial Completion shall also be deemed to have occurred once any applicable municipal authority conducts its final building inspection or approves the Home for occupancy. Builder **ESTIMATES** that on or about _____, the Home will reach Substantial

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Completion. This date is estimated since construction activities are subject to delays caused by conditions beyond the control of Builder. Such causes (referred to as "Excused Delays") include, but are not limited to, the unavailability of required materials, labor and services from subcontractors who are under contract, as well as delays from acts by or disputes with Purchaser or others employed by Purchaser (any of which will allow Builder to suspend construction until resolved), Change Orders, civil unrest, strikes, lockouts, fire, or other casualty, acts of God, inclement weather which interferes with normal scheduling of construction, or failure of Purchaser to make decisions or make selections of allowance items, colors, or materials. **BUILDER THEREFORE DOES NOT GUARANTEE COMPLETION OF THE HOME ON ANY SPECIFIC DATE.**

9. CHANGE ORDERS. In addition to the Contract Price stated in Paragraph 3, Builder shall be entitled to and shall receive an additional sum for labor, materials and other charges that are attributable to a Change Order. A "Change Order" is a written agreement between the Purchaser and Builder to make changes, additions or deletions in the Work. If Builder agrees to perform the extra Work required by a Change Order (and it has no obligation to do so), the price of the Change Order will be treated as an increase in the Contract Price, and the Builder will be entitled to receive a Change Order fee in the amount of _____% of the Change Order. These sums shall be paid in full when the Change Order is signed by the Parties. If the increase in the Contract Price for a Change Order cannot be ascertained before commencement of the extra Work, an allowance shall be created for the Change Order with the increase being estimated, and that amount deposited with the Builder. ***The Builder shall not be required to commence the Work called for in a Change Order until the specified or estimated increase in the Contract Price and the accompanying Change Order Fee are paid in full.*** Additionally, if Purchaser requests Builder to perform research on and/or provide estimates for extra Work to be incorporated into a proposed Change Order, Builder will be reimbursed for the time expended for such activities at the rate of $____ per hour. These hourly charges shall be paid promptly to Builder, irrespective of Purchaser's decision to proceed with execution of a Change Order for the additional Work.

Change Orders deleting Work or materials will reduce the Contract Price by the Builder's true cost savings for the deleted items. In such instances, the Builder may nevertheless request a Change Order fee for the Builder's administration of the Change Order. Deletion of Work by the Purchaser that is included in a Change Order shall be credited against the Purchase Price at Closing.

10. INDEPENDENT BUILDER STATUS. Builder, in the performance of the Work does so as an independent contractor, and the Builder (not the Purchaser) shall have the sole control over the scheduling and progress of the construction, including the superior right to select and arrange for all labor in any way related to the construction. The Builder shall exercise exclusive control over the selection of the subcontractors, and shall not be obligated to employ subcontractors solely on the basis of cost savings that might be achieved. All subcontractors shall perform their work independently, and not as an agent or employee, servant or representative of the Builder. ***The Purchaser agrees not to instruct, direct or otherwise communicate with the subcontractors retained by the Builder as to the scheduling of or details about the construction (including additions to or deletions therefrom) nor shall Purchaser do or cause any work to be done, or alter or cause the alteration of any portion of the Home, whether complete or incomplete, prior to Purchaser's occupancy of the Home.*** If, with Builder's express written consent, Purchaser employs a third party to fabricate an element, feature or appliance to be incorporated into the Home, the Purchaser shall be responsible for the installation of that fabricated item. **ACTS OF, OMISSIONS BY, OR LOSSES, DAMAGES OR DELAYS CAUSED BY ANYONE RETAINED BY THE PURCHASER SHALL BE THE RESPONSIBILITY OF THE PURCHASER, NOT THE BUILDER. FURTHERMORE, THE BUILDER DOES NOT WARRANT THE WORK PERFORMED OR MATERIALS PROVIDED BY PERSONS OR ENTITIES EMPLOYED BY, OR WHO HAVE CONTRACTED WITH, THE PURCHASER.**

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11. **RELEASE OF/INDEMNIFICATION FOR LOSSES SUSTAINED DURING CONSTRUCTION**. Because of potential safety and health hazards present during construction of the Home, as well as the practical limitations on the Builder's ability to control the activities of all persons involved in the construction process and thereby limit the risk of personal injury that may arise from construction activities, the Parties agree as follows:

(a) Personal Safety. To ensure and to protect the personal health and safety of Purchaser and Purchaser's licensees and invitees, Purchaser shall restrict entry by the Purchaser and Purchaser's licensees and invitees onto the Property or into the Home to a minimum. When Purchaser chooses to enter the Property, and irrespective of Builder's presence on the Property at such time, **PURCHASER AGREES TO RELEASE AND/OR INDEMNIFY AND HOLD BUILDER HARMLESS FROM AND AGAINST ANY AND ALL CLAIMS, DEMANDS OR CAUSES OF ACTION ARISING IN FAVOR OF PURCHASER OR PURCHASER'S AGENTS, LICENSEES AND INVITEES ON ACCOUNT OF BODILY INJURY, DEATH OR DAMAGE TO OR LOSS OF PROPERTY IN ANY WAY OCCURRING OR INCIDENT TO THE CONDITION OF THE PROPERTY AND/OR THE HOME. THIS RELEASE AND INDEMNITY IS GIVEN TO BUILDER REGARDLESS OF WHETHER THE BUILDER OR ITS AGENTS OR EMPLOYEES ARE NEGLIGENT IN WHOLE OR IN PART AND EVEN WHEN THE INJURY, DEATH OR DAMAGE TO PURCHASER OR PURCHASER'S AGENTS, LICENSEES AND INVITEES IS CAUSED BY THE SOLE NEGLIGENCE OF BUILDER OR ATTRIBUTABLE TO BUILDER'S NEGLIGENCE PER SE OR IMPOSED BY STRICT LIABILITY.**

(b) Risks to Vegetation. Purchaser also acknowledges that the contemplated construction imposes an inherent risk to the health of the trees and vegetation situated on the Property, and Purchaser understands that Builder cannot guarantee the viability of those trees and vegetation. **PURCHASER ACKNOWLEDGES THIS RISK AND AGREES TO RELEASE THE BUILDER FROM ANY CLAIMS FOR DAMAGES TO OR LOSS OF TREES OR VEGETATION RESULTING FROM CONSTRUCTION ACTIVITIES.**

12. **INSPECTION AND APPROVAL OF HOME**. To the extent that portions of the Home have been completed at the time this Contract is executed, Purchaser acknowledges that Purchaser has inspected, noted changes from the Plans and Specifications, and hereby accepts those portions of the Home as built. As construction of the Home proceeds, Purchaser shall conduct an initial and periodic walk-through inspections of the Home (with due consideration being given to safety concerns). Purchaser agrees to immediately apprize the Builder in writing if any aspect of construction has not been completed in substantial conformity with the Plans and Specifications and this Contract. ***Failure by the Purchaser to reasonably object to the Work performed within any phase of construction shall constitute an acceptance of that Work.*** Any exceptions to the Plans and Specifications that are noted in writing by the Purchaser shall be remedied by Builder as soon as practicable. Purchaser 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, the 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.

13. **LIMITED WARRANTY ON HOME**. Builder warrants the Home against defects in workmanship and materials, but only in accordance with, and as limited by, the new home warranty document provided by Builder (the "Limited Warranty") and to be delivered to Purchaser at the Closing. (A copy of the Limited Warranty is included with this Contract). **IT IS UNDERSTOOD AND AGREED THAT BUILDER'S RESPONSIBILITY FOR THE CONSTRUCTION OF THE HOME IS CONFINED TO THE STATUTORY WARRANTY OF HABITABILITY (TEXAS PROPERTY CODE §430.002) AND THE PERFORMANCE STANDARDS AND REMEDIES PROVIDED IN THE LIMITED WARRANTY.** As to items not of Builder's manufacture, such as any air conditioner, water heater, refrigerator, range, dishwasher and other appliances, equipment or "consumer

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products," as defined by the Federal Trade Commission, Builder agrees to assign Purchaser the manufacturer's warranty, without recourse. Purchaser acknowledges and realizes that Builder itself is making no warranty on such items. **TO THE EXTENT ALLOWED BY LAW, ALL OTHER WARRANTIES, EXPRESS OR IMPLIED, WHETHER ARISING UNDER STATE OR FEDERAL LAW, INCLUDING BUT NOT LIMITED TO IMPLIED WARRANTIES OF FITNESS, MERCHANTABILITY, OR GOOD AND WORKMANLIKE CONSTRUCTION, ARE DISCLAIMED AND EXCLUDED.**

14. LAND USE AND ENVIRONMENTAL DISCLAIMERS. The Builder has informed the Purchaser and Purchaser acknowledges the following:

(a) Adjacent Land Usage. The Builder is neither responsible for nor has control of the use of the land adjacent to or in the vicinity of the Property, and Purchaser acknowledges receipt of a copy of the declarations for any applicable homeowners' association. The Builder also has no control over and is not responsible for any easements on, adjacent to, or in the vicinity of the Property. Purchaser understands that individuals, corporations, and/or utilities may have specific rights granted by those easements, if any, including but not limited to access to and use of the land described by the easements, even though the use of any easement may not be evident at the present time.

(b) Membership in Property Owners' Association. As a purchaser of property in the residential community in which the Property is located, the Purchaser is obligated to be a member of a property owners' association. Restrictive covenants governing the use and occupancy of the Property and the Home and a dedicatory instrument governing the establishment, maintenance, and operation of this residential community have been or will be recorded in the Real Property Records of the county in which the Property is located. Copies of the restrictive covenants and dedicatory instrument can be obtained from the county clerk. The Purchaser is obligated to pay assessments to the property owners' association. The amount of the assessments is subject to change. The Purchaser's failure to pay the assessments could result in a lien on, and the foreclosure of, the Property.

(c) Possible Annexation. If the Property is located outside the limits of a municipality, the Property may now or later be included in the extraterritorial jurisdiction of a municipality and may now or later be subject to annexation by the municipality. Each municipality maintains a map that depicts its boundaries and extraterritorial jurisdiction. To determine if the Property is located within a municipality's extraterritorial jurisdiction, or is likely to be located within a municipality's extraterritorial jurisdiction, the Purchaser should contact all municipalities located in the general proximity of the Property for further information.

(D) ENVIRONMENTAL RISK. **THE BUILDER MAKES NO WARRANTIES, EXPRESS OR IMPLIED, ABOUT EXISTING OR FUTURE HEALTH HAZARDS OR ENVIRONMENTAL CONDITIONS ON THE PROPERTY, IN THE HOME, OR FROM ADJACENT SOURCES, INCLUDING, BUT NOT LIMITED TO, EXPOSURE TO RADON GAS, ELECTRIC AND MAGNETIC FIELDS, SHIFTING OR INSTABILITY OF THE SOIL AND CONTAMINATION OF THE HOME OR THE SURROUNDING AIR, WATER OR SOIL FROM ANY SOURCES OR IN ANY MANNER.**

PURCHASER IS ADVISED THAT THE CONTINUED PRESENCE OF MOISTURE ON COMPONENTS OF THE HOME (FROM LEAKS, CONDENSATION, SPILLS, ETC.) CAN CAUSE THE PROPAGATION OF MOLD, WHICH MAY CAUSE ALLERGENIC REACTIONS AND OTHER HEALTH PROBLEMS IN SOME INDIVIDUALS. UPON ASSUMING POSSESSION OF THE HOME, THE PURCHASER IS RESPONSIBLE FOR IMPLEMENTING AN INSPECTION AND MAINTENANCE PROGRAM FOR THE IDENTIFICATION AND ELIMINATION OF MOISTURE IN THE HOME THAT COULD GIVE RISE TO THE GROWTH OF MOLD OR OTHER CONDITIONS DETRIMENTAL TO

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FUNCTIONING OF THE HOME OR THE HEALTH OF ITS OCCUPANTS. ANY LEAK OR THE PRESENCE OF MOISTURE THAT IS COVERED BY THE BUILDER'S LIMITED WARRANTY WILL BE CORRECTED PURSUANT TO THAT WARRANTY, BUT THE PURCHASER'S FAILURE TO IMPLEMENT AN EFFECTIVE MAINTENANCE PROGRAM OR THE FAILURE TO PROMPTLY NOTIFY THE BUILDER OF WARRANTY CLAIMS WILL NEGATE THE BUILDER'S RESPONSIBILITY (IF ANY) FOR ANY PROPERTY DAMAGE, PERSONAL INJURY, OR OTHER LOSS, DAMAGE OR LIABILITY RESULTING DIRECTLY OR INDIRECTLY FROM THE PRESENCE OF MOLD OR OTHER HARMFUL ORGANISMS.

15. RISK OF LOSS. Should the Home be substantially or wholly destroyed by fire, windstorm, or other casualty prior to Closing, the Builder will have the option of repairing any damage or canceling this Contract and returning all sums paid to the Builder by the Purchaser. The Builder's decision to rebuild the Home or cancel this Contract shall be communicated to Purchaser in writing within twenty (20) days of the loss. Purchaser agrees that it shall have no claim to or interest in any insurance proceeds attributable to the loss.

16. CLOSING. At Closing, the Builder will convey the Property to Purchaser by special warranty deed containing a reference to the limited warranty on the Home as set forth in Paragraph 13 of this Contract. The Property shall be conveyed free and clear of all liens except those created incident to the funding of the Purchaser's purchase money loan (if any) and free of all other limitations except those covenants and restrictions, easements, and other matters of record which affect the Property and are common to the subdivision within which the Property is located (collectively referred to as the "Permitted Exceptions"). Current year's ad valorem taxes will be prorated to the date of Closing. The special warranty deed shall be prepared and filed at the Builder's expense, and Builder shall pay the brokerage commission, if applicable, upon the funding of the Closing. Purchaser shall be responsible for all remaining Closing costs, including but not limited to, the premium for the Owner's and/or Mortgagee's Policy of Title Insurance, any appraisal fees, discount points, prepaid expenses and reserves.

17. RESOLUTION OF DISPUTES. The Parties desire prompt, inexpensive and efficient dispute resolution procedures and therefore agree that their disputes shall be governed by the following:

(a) Pre-Closing Default/Stipulated Damages. In the event that any bona fide misunderstanding shall arise between Builder and Purchaser prior to Closing concerning construction of the Home or any other matter relating to the interpretation or implementation of this Contract, then Builder shall have the right, upon written notice to the Purchaser, to terminate the Contract. In the event of termination of this Contract by the Builder pursuant to this Paragraph, Builder shall return all sums paid by the Purchaser to Builder, plus an additional sum of $450.00, an amount which the parties agree to be a reasonable and foreseeable estimate of the damages that might be experienced by the Purchaser incident to the cancellation of this Contract (it being difficult if not impossible to ascertain those damages). Upon such termination of this Contract by Builder and payment of the stipulated damages, no cause of action against Builder shall accrue to the Purchaser. Additionally, the Builder shall have no further obligation to complete and sell the Home, and Purchaser shall not be obligated to acquire the Home. Builder is not required to apply the provisions of this Subparagraph (a) to any breach of this Contract by Purchaser.

(b) Re-Purchase Option. Should the Purchaser discover, during the first five (5) years after Closing, one or more defects in the construction of the Home that exceed in the aggregate _____ percent (___%) of the fair market value of the Home, upon receipt of written notice and an opportunity to inspect the defects, the Builder may elect to re-purchase the Home. If the Builder elects this option, the Purchaser shall be reimbursed the Purchase Price and all Closing costs incurred by the Purchaser, plus reimbursement of the cost of any permanent improvements made by the Purchaser to the Home and the Property, reasonable moving expenses to vacate the Home, and

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reasonable and necessary attorney's fees and inspection costs incurred by the Purchaser to discover, identify and present the construction defects to the Builder. In return, the Purchaser will deliver a Special Warranty Deed conveying the Home and the Property to the Builder, free and clear of all liens and claims and deliver possession of the Home free of any casualty or damage caused by the Purchaser, normal wear and tear excepted.

(c) State of Texas Administrative Resolution. Construction defect claims, if any, will be addressed through the administrative procedures established by the Texas Residential Construction Commission Act, and the Parties agree to cooperate and to fully participate in the dispute resolution process that is prescribed by that Act prior to initiating any arbitration or other formal dispute resolution process.

(d) Mediation-Binding Arbitration/Waiver of Jury Trial. The Purchaser and Builder agree that all controversies, claims or matters in question arising out of or relating to (i) this Contract, (ii) any breach or termination this Contract, (iii) the construction of the Home, (iv) any acts or omissions by the Builder (and its officers, directors or agents), and/or (v) any actual or purported representations or warranties, express or implied, relating to the Property and/or the Home (herein referred to collectively as a "Dispute") shall be subject to binding arbitration. The Parties will attempt to resolve any Dispute through informal discussions, and the Dispute may be submitted to non-binding mediation under the Construction Industry Mediation Rules of the American Arbitration Association ("AAA") where the Parties will endeavor to settle the Dispute in an amicable manner. In the event that one or both Parties do not desire to mediate, or the Dispute is not resolved by direct discussions and/or mediation, the Dispute shall be submitted to the AAA for binding arbitration in accordance with the Construction Industry Arbitration Rules of the AAA and the Supplementary Procedures for Residential Disputes. The Parties will share equally all filing fees and administrative costs of the arbitration, however, any Award rendered may equitably reallocate those costs. The arbitration shall be governed by Texas law and the U.S. Arbitration Act, 9 U.S.C. §§ 1-16, to the exclusion of any provisions of state law that are inconsistent with the application of the Federal Act.

The Award of the arbitrator shall be rendered in accordance with the AAA Rules then in effect. In rendering the Award, the arbitrator shall state the reasons therefor, including any computations of actual damages or offsets, if applicable. The Parties agree to abide by and fully perform in accordance with any Award rendered by the arbitrator. If the non-prevailing Party fails to comply with all aspects of the Award within thirty (30) days following issuance of the Award, then the prevailing Party shall be entitled to seek enforcement of the Award in any court of competent jurisdiction. If such enforcement becomes necessary, the prevailing Party in such proceeding shall recover its necessary and reasonable attorney's fees, in addition to any other relief to which that Party is entitled.

18. 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:

(a) Limitation of Claims. Under no circumstances shall either Purchaser 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 Home is barred unless it is brought by Purchaser or Builder not later than two (2) years and one (1) day from the date the cause of action accrues.

(b) Waiver of Subrogation. The Parties agree that the Builder shall carry insurance fully protecting the Home during construction and that after occupancy, the Purchaser shall secure and maintain insurance covering risk of loss and damage to the Home, however caused. The Parties further agree to waive the rights that each may have against the other for such insured losses or damage to the Home, its contents, or the Property, including any such loss or damage arising from the negligence or other fault of either Party.

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19. BROKERAGE COMMISSION. Builder and Purchaser represent to each other that, unless specified in an attached addendum, there will be no claims for payment from any real estate broker, finder or other party in connection with this Contract. EACH PARTY HEREBY INDEMNIFIES AND AGREES TO HOLD THE OTHER HARMLESS FROM ANY LOSS, LIABILITY, DAMAGE, COST, OR EXPENSE (INCLUDING REASONABLE ATTORNEY'S FEES) RESULTING FROM A BREACH OF THIS REPRESENTATION.

20. PURCHASER REPRESENTATIVE. Purchaser may employ a third party professional (*e.g.*, architect, engineer, construction consultant) to inspect or monitor the Work (the "Purchaser's Agent"). That person, however, must be identified, and that designation communicated to Builder in writing, prior to the execution of this Contract to permit Builder to review the Plans and Specifications and Allowances with Purchaser's Agent prior to these Exhibits becoming part of this Contract. After execution of this Contract, the appointment of a Purchaser's Agent shall require approval of Builder, which approval may be reasonably withheld by Builder. If a Purchaser's Agent is designated, Builder may rely on any representations, statements, or approvals made by Purchaser's Agent concerning construction of the Home.

21. ATTORNEYS' FEES. If either Party employs an attorney to enforce, contest or construe the terms of this Contract, either by arbitration, litigation or negotiation, the losing party agrees to reimburse the prevailing party for necessary and reasonable attorneys' fees, arbitration costs, court costs, expert witness fees and related expenses.

22. NOTICES. Any notice or demand permitted, required, or desired to be given concerning this Contract shall be in writing and shall be deemed effective if and when received by the addressee (whether faxed, delivered or mailed). If deposited in United States Mail, the notice should be addressed as follows:

IF TO BUILDER:	IF TO PURCHASER:
_____	_____
_____	_____
_____	_____
Tel: (___) _____ Fax: (___) _____	_____

23. NOTICE OF RELIANCE ON WRITTEN INFORMATION FROM THIRD PARTIES. ***BUILDER ADVISES PURCHASER THAT BUILDER HAS RELIED UPON WRITTEN INFORMATION FROM VARIOUS THIRD PARTIES AND GOVERNMENTAL AGENCIES CONCERNING THE PROPERTY AND THE MATERIALS AND COMPONENTS INCORPORATED INTO THE HOME. THIS WRITTEN INFORMATION CONCERNS MATTERS ABOUT WHICH THESE OTHER PARTIES HAVE SPECIAL KNOWLEDGE NOT POSSESSED BY BUILDER, OR WHICH INFORMATION HAS BEEN PROVIDED TO BUILDER OR DISSEMINATED TO THE PUBLIC PURSUANT TO SPECIFIC STATUTORY OR REGULATORY REQUIREMENTS. THIS WRITTEN INFORMATION PERTAINS TO THE FLOOD ZONES, DEVELOPMENT OF ADJACENT LAND, THE SUITABILITY OF THE PROPERTY AND THE SURROUNDING SUBDIVISION FOR RESIDENTIAL USE, AND THE APPROPRIATENESS OF THE MATERIALS AND COMPONENTS INCORPORATED INTO THE HOME.***

24. MISCELLANEOUS. Time is of the essence of this Contract and all specified time limits must be met. No waiver of a right provided by this Contract shall be effective unless in writing and signed by the party against whom enforcement of the waiver is sought. No waiver by a party of any breach of any provision of this Contract shall be construed as a waiver of any later breach.

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25. ENTIRE CONTRACT/CONTINUING AGREEMENT. This Contract, together with all attachments, contains the entire understanding between Builder and Purchaser with respect to the construction of the Home, and replaces all prior agreements or understandings, if any. BUILDER IS NOT BOUND BY ANY STATEMENT, PROMISE, CONDITION OR STIPULATION NOT SPECIFICALLY SET FORTH IN THIS CONTRACT. No representative of Builder has any authority to make any oral or written statements that modify, add to or change the terms and conditions of this Contract.

PURCHASER REPRESENTS THAT PURCHASER HAS READ AND UNDERSTANDS THIS ENTIRE CONTRACT, INCLUDING THE AGREEMENT FOR BINDING ARBITRATION OF DISPUTES RELATED TO THIS CONTRACT. PURCHASER ALSO REPRESENTS THAT NO VERBAL STATEMENT, PROMISE OR CONDITION NOT SPECIFICALLY SET FORTH IN THIS CONTRACT IS BEING RELIED UPON BY PURCHASER. IT IS ACKNOWLEDGED THAT BUILDER IS RELYING ON THESE REPRESENTATIONS AND WOULD NOT ENTER INTO THIS CONTRACT WITHOUT THIS UNDERSTANDING.

All representations, agreements, indemnities and disclaimers of Builder and Purchaser that are contained in this Contract shall remain in full effect after the Closing, and shall not be replaced or limited by any other document or agreement. This Contract is binding upon the heirs, executors, administrators, successors and assigns of the respective parties, and those persons who would have a claim by, through or under the parties.

26. STATUTORY NOTICE. THIS CONTRACT IS SUBJECT TO CHAPTER 27 OF THE TEXAS PROPERTY CODE. THE PROVISIONS OF THAT CHAPTER MAY AFFECT THE PURCHASER'S RIGHT TO RECOVER DAMAGES ARISING FROM THE PERFORMANCE OF THIS CONTRACT. IF PURCHASER HAS A COMPLAINT CONCERNING A CONSTRUCTION DEFECT ARISING FROM THE PERFORMANCE OF THIS CONTRACT AND THAT DEFECT HAS NOT BEEN CORRECTED THROUGH NORMAL WARRANTY SERVICE, THE PURCHASER MUST PROVIDE NOTICE REQUIRED BY CHAPTER 27 OF THE TEXAS PROPERTY CODE TO THE BUILDER BY CERTIFIED MAIL, RETURN RECEIPT REQUESTED, NOT LATER THAN THE 60th DAY BEFORE THE DATE THE PURCHASER INITIATES A CLAIM TO RECOVER DAMAGES IN AN ARBITRATION PROCEEDING. THE NOTICE MUST REFER TO CHAPTER 27 OF THE TEXAS PROPERTY CODE, AND MUST DESCRIBE THE CONSTRUCTION DEFECT. IF REQUESTED BY THE BUILDER, THE PURCHASER MUST PROVIDE THE BUILDER AN OPPORTUNITY TO INSPECT AND CURE THE DEFECT AS PROVIDED BY SECTION 27.004 OF THE TEXAS PROPERTY CODE.

EXECUTED in multiple copies this _____ day of _____, 20___.

PURCHASER:

_____

_____

BUILDER: _____

By: _____

Name/Title: _____

This contract form was prepared by the Custom Builders Council of the GHBA as a service to its members and the public. No representation is made by the Council or the GHBA as to the adequacy of the form for any specific transaction. Use of this form by the Builder does not constitute an endorsement or sponsorship of the Builder or any other aspect of the contract by the GHBA.

SCHEDULE OF EXHIBITS

A - Specifications
B - Allowances
C - Warranty Sample
D - Insulation Addendum
E - Brokerage Addendum

ITEM "M"

Cost Of The Work Plus Fee With Guaranteed Maximum Price Contract

This Cost Of The Work Plus Fee With Guaranteed Maximum Price Contract ("Contract") is entered into by _____, Houston, Texas 77092, hereinafter referred to as "Contractor", and _____, Houston, Texas _____, hereinafter referred to as "Owner".

Article 1

The Work

Contractor agrees to perform on behalf of the Owner, and Owner hereby requests Contractor to perform the following described Work:

Construct residence on real property commonly known as _____ _____, Houston, Harris County, Texas. Such construction shall be in accordance with the drawings ("Drawings") and specifications ("Specifications") described in Exhibit "A" prepared by Lucian Hood Architect ("Architect"), Summary Specifications (Exhibit "B" prepared by Contractor ["Summary Specifications"] and the Project Schedule (Exhibit "C"), all of which instruments, together with any other exhibits attached hereto, are hereinafter collectively referred to as the "Contract Documents". The Architect is the architect of record and has authority to make the decisions within the prerogative of the Architect hereunder, subject, however, to the provisions of Paragraph 17.8. Such provision gives the Owner certain rights to make decisions which are originally stated to be the prerogative of the Architect.

The term "Work", as used herein, means the construction and services required by the Contract Documents, and includes all other labor, materials, equipment and services provided or to be provided by Contractor to fulfill Contractor's obligations.

The Contract Documents are complementary, and what is required by one shall be as binding as if required by all. Performance by Contractor shall be required only to the extent consistent with the Contract Documents and reasonably inferable from them as being necessary to produce the intended results. All dimensions and clearances necessary to the Work, as indicated on the Drawings and contained in the Specifications, shall be verified by Contractor at the job site before commencing the Work affected thereby. Additionally, if sufficient detailed information is lacking, if Work is required in such a manner as to make it impossible to produce first-class Work, or if discrepancies appear among Contract Documents, then Contractor shall request the Owner's clarification or interpretation before proceeding with such Work.

Contractor also shall confirm from benchmarks the physical surface characteristics of the site indicated on the Drawings. Report discrepancies discovered to Owner for adjustment before beginning Work. No extra charges or compensation will be allowed for grade variation or

discrepancies except by written agreement before construction begins. Initiation of Work shall indicate Contractor's verification of existing grade elevations and acceptance of existing site surface characteristics.

If Contractor performs any Work in conformity with any Contract Document knowing it to be inconsistent with any other Contract Document, or knowing it to be inconsistent with any applicable law, code or regulation, without first specifically requesting and obtaining from the Owner written instructions on how to proceed with respect to such inconsistency, the Contractor shall be obligated to correct such Work according to the direction of the Owner without cost to the Owner.

Contractor shall supervise and direct the Work using Contractor's best skill and attention, including enforcing strict discipline and good order among Contractor's employees and other persons carrying out the Contract. Contractor shall be responsible for and have control over construction means, methods, techniques, sequences and procedures and for coordinating all portions of the Work under the Contract unless the Contract Documents give other specific instructions concerning these matters.

Contractor warrants to Owner that materials and equipment furnished under the Contract will be of good quality and new unless otherwise required or permitted by the Contract Documents, that the Work will be free from defects not inherent in the quality required or permitted and that the Work will conform with the requirements of the Contract Documents. Work not conforming to these requirements, including substitutions not properly approved and authorized, may be considered defective. Contractor's warranty, however, excludes remedy for damage or defect caused by abuse, modifications not executed by Contractor, improper or insufficient maintenance, improper operation, or normal wear and tear under normal usage.

Contractor shall keep the site of the Project reasonably clean and free from rubbish, excess debris, surplus and waste material and shall remove the same from the site of the Project as the Work progresses, all as and when required by the Contract Documents and applicable laws or deed restrictions. If Contractor fails to do so after seven (7) days' written notice from Owner, Owner may remove same at Contractor's expense. In the event Owner undertakes the removal of same from the site of the Project, such removal will in no way qualify or limit Contractor's obligations under the Contract Documents. At completion of the Work, Contractor shall remove from and about the Project waste materials, rubbish, Contractor's tools, construction equipment, machinery and surplus materials.

Contractor shall comply with and give notices required by all laws, ordinances, rules, regulations and lawful orders of public authorities bearing on performance of the Work; provided, however, that Contractor shall not be responsible for cost of obtaining approvals or certifications from any engineer or Architect as long as such approvals or certifications do not relate to Contractor's defective Work or Work re-executed by Contractor. Requirements of public authorities mentioned in this Article 1 apply as minimum requirements only. They do not supersede more stringent requirements stated elsewhere in the Contract Documents. If changes must be made to the Contract Documents because of a change in law or governmental regulations after the

effective date hereof, appropriate adjustments will be made in the GMP (hereafter defined) once the Cost of the Work exceeds $_____.

Contractor shall have the sole liability and responsibility for connecting onto plumbing lines, sanitary and storm sewer lines, electrical lines and other utilities to be utilized in connection with the completion of the improvements covered by this Contract. Upon completion of the Work by Contractor, all other utilities shall be connected by Contractor and shall be functioning in all respects and in good working order.

Article 2

Time of Commencement and Completion

The Work to be performed under this Contract shall be commenced within five (5) days of receipt of City of Houston building permit. The Work shall be substantially completed three hundred (300) days after commencement, provided that should the Work be hindered or delayed due to inclement weather, strikes, boycotts or other events outside the control of the Contractor including, but not limited to the failure of the Owner and/or his agents to make timely decisions and selections as defined in Article 10, the date of substantial completion shall be extended in an amount of time equal to the delays caused by the matters referred to herein, provided that the Contractor submits a claim for delay in writing to Owner not later than fourteen (14) days following the inception of each delay. Substantial completion shall be defined as all construction work required by the City of Houston for final building inspections having been completed and approved and completion to the state that Owner may occupy the Project for the intended purpose, but minor finishing adjustment or completion items may remain to be done by Contractor. Final completion shall occur no later than twenty-one (21) days following substantial completion. Time is of the essence of this Contract.

Article 3

Relationship Of The Parties

The Contractor accepts the relationship of trust and confidence established by this Contract and covenants with the Owner to cooperate with the Architect and exercise the Contractor's skill and judgment in furthering the interests of the Owner; to furnish efficient business administration and supervision; to furnish at all times an adequate supply of workers and materials; and to perform the Work in the most expeditious and economical manner consistent with the Owner's interests and the representations and warranties set forth in the Contract Documents. The Owner agrees to furnish and approve, in a timely manner, information required by the Contractor and to make payments to the Contractor in accordance with the requirements of the Contract Documents.

Article 4

Basis For Payment

41 CONTRACT SUM

4.1.1 The Owner shall pay the Contractor the Contract Sum in current funds for the Contractor's performance of the Contract, in accordance with the Contract Documents. The Contract Sum is the Cost of the Work as defined in Article 5 plus the Contractor's Fee. An initial payment of $_____ shall be payable by Owner to Contractor as an advance of the Cost of the Work to be used solely in connection with the Cost of the Work.

4.1.2 The Contractor's Fee, except as limited by the GMP, shall be $_____. The Contractor's Fee shall be Contractor's complete fee compensation (which includes Contractor's profit and indirect overhead) and, together with the payment for the Cost of the Work for those costs which are expressly set forth in Article 5 of this Contract, shall constitute Contractor's sole reimbursement for indirect and direct costs and expenses, general conditions, and profit arising from or attributable to the performance of the Work.

4.2 GUARANTEED MAXIMUM PRICE

4.2.1 The sum of the Cost of the Work and the Contractor's Fee is guaranteed by the Contractor not to exceed _____, subject to additions and deductions by Change Order as provided in the Contract Documents. Such maximum sum is referred to in the Contract Documents as the "Guaranteed Maximum Price" or "GMP". Costs, other than net increases in the cost of allowances and additive Change Orders, which would cause the GMP to be exceeded shall be paid by the Contractor without reimbursement by the Owner.

4.2.2 Allowances, if any, are as described in Exhibit "D" attached hereto and made part hereof for all purposes:

Notwithstanding anything contained in this Paragraph 4.2.2 to the contrary, net increases in the allowances will be paid initially by Contractor and reimbursed by Owner as part of the GMP. If, however, any excess in the Cost of the Work over $_____ is due to a net increase in the allowances or Change Orders, the GMP shall be appropriately increased and the increase shall be payable by Owner.

Article 5

Cost Paid by Owner

The Owner agrees to pay for the "Cost of the Work" as defined herein. The term "Cost of the Work" shall mean reasonable costs necessarily incurred in the performance of the Work, and paid by the Contractor. Such costs shall be at rates not higher than the standard paid in the locality of the Work, except with prior written consent of the Owner, and shall include the following items:

A. WAGES OF CONSTRUCTION WORKERS directly employed by the Contractor to perform the construction of the Work at the site or, with the Owner's approval, at off-site workshops, including customary benefits, such as health insurance and vacations.

B. COST OF ALL MATERIALS, supplies, and equipment incorporated in the Work, including costs of transportation thereof, but shall be subject to the limitations and exclusions of this Article 5 and Article 6 hereof. Costs described in this Article 5 shall not include Contractor's office overhead.

C. PAYMENTS made by the Contractor to Subcontractors for Work performed pursuant to Subcontracts under this Contract.

D. COST, INCLUDING TRANSPORTATION AND MAINTENANCE, of all materials, supplies, equipment, temporary facilities and hand tools not owned by the workmen, which are consumed in the performance of the Work, and cost less salvage value on such items used but not consumed which remain the property of the Contractor.

E. RENTAL CHARGES of any temporary site construction office, temporary site storage facility, construction fencing, all necessary machinery and equipment exclusive of hand tools, used at the site of the Work, whether rented from the Contractor or others, including installation, minor repairs and replacements, dismantling, removal, transportation and delivery costs thereof, at rental charges consistent with those prevailing in the area.

F. COST OF PREMIUMS for all bonds and insurance which the Contractor is required by the Contract Documents to purchase and maintain attributable solely to this Project.

G. SALES, use, or similar taxes related to the Work imposed by any governmental authority and for which the Contractor is liable.

H. PERMIT FEES, royalties, damages for infringement of patent, and costs of defending suits therefore, and deposits lost for causes other than the Contractor's negligence.

I. COST OF REPAIRS to damaged Work, for which the cause or identity of agent causing the damage cannot be established.

J. LOSSES AND EXPENSES, not compensated by insurance or otherwise, sustained by the Contractor in connection with the Work, provided they have resulted from causes other than the fault or neglect of the Contractor. Such losses shall include settlements made with the written consent and approval of the Owner. No such losses and expenses shall be

included in the Cost of the Work for the purpose of determining the Contractor's Fee unless such loss requires reconstruction and the Contractor is placed in charge thereof, in which case he shall be paid for his services a Contractor's Fee proportionate to that stated in Article 7.

K. MINOR EXPENSES such as telegrams, long distance telephone calls, telephone service at the site, expressage, and similar petty cash items in connection with the Work.

L. COST OF REMOVAL of all debris.

M. COSTS INCURRED DUE TO AN EMERGENCY affecting the safety of persons and property.

N. OTHER COSTS incurred in the performance of the Work if and to the extent approved in advance in writing by the Owner.

Article 6

Cost Not Paid By Owner

The term "Cost of the Work" shall not include any of the following items:

A. Overhead or general expenses of the Contractor of any kind except as may be expressly included in Article 5 above.

B. Costs due to the negligence or failure of Contractor, any Subcontractors or suppliers to comply with the requirements of the Contract Documents or failure to fulfill a specific responsibility of the Contractor, Subcontractors and suppliers or anyone directly or indirectly employed by any of them or for whose acts any of them may be liable, including without limitation, costs for the correction of damage, defective or non-conforming work, disposal and replacement of materials and equipment incorrectly ordered or supplied, and making good damage to property not forming part of the Work..

C. Notwithstanding the breakdown or categorization of any costs to be reimbursed in Article 5 or elsewhere in the Contract Documents, there shall be no duplication of payment of any particular items for which payment is requested can be characterized as falling into more than one of the types of compensable or reimbursable categories.

D. Any cost or expense incurred under Paragraph 17.17 hereof.

E. Any repairs to the Work performed by Contractor following Substantial Completion in satisfaction of a warranty of the Work made to Owner, other than the cost of punch-list work.

F. Losses and expenses sustained by Contractor, Subcontractors or Sub-subcontractors, not compensated by insurance or otherwise, if such losses and expenses are due to infidelity

or dishonesty on the part of any employee of Contractor, Subcontractors or Sub-subcontractors, or others to whom their respective property may be entrusted, inventory shortage or unexplained disappearance.

G. Any of the Contractor's income or excess profits, corporation, franchise or similar taxes.

H. Contractor's worker's compensation and commercial general liability insurance.

I. Costs, other than costs included in Change Orders approved by the Owner and net increases in allowance items, that would cause the GMP to be exceeded.

Article 7

Discounts, Rebates and Refunds

All cash discounts shall accrue to the benefit of the Owner. All trade discounts, rebates and refunds and all returns from sale of surplus material and equipment shall accrue to the Owner.

Article 8

Changes in the Work

The Owner may order Changes in the Work consisting of additions, deletions or modifications. The Cost of Changes in the Work shall be in accordance with and as defined in Article 5.

If the cost of any change in the Work cannot be agreed upon by Owner and Contractor, Contractor, provided Contractor receives a written order signed by Owner, shall nevertheless promptly proceed with the Work involved. The cost of such Work shall then be determined by the Architect on the basis of actual cost and savings of those performing the Work attributable to the change, without any increase in the Contractor's Fee. In such case, Contractor shall keep and present, in such form as Owner may prescribe, an itemized accounting together with appropriate supporting data for inclusion in a Change Order. Pending final determination of cost to Owner, payments shall be made on the Application for Payment covering such Work as a Cost of the Work. Until such time as the Cost of the Work exceeds $_____ due to the increases in allowance items and/or net increases from Change Orders, the increased costs comprising the Cost of the Work shall be paid for by the Contractor and reimbursed by the Owner as a Cost of the Work subject to the GMP. The amount of credit to be allowed by Contractor to Owner for any deletion or change which results in a net decrease in the Cost of the Work will be the amount of the actual net cost as confirmed by the Architect.

Article 9

Contractor's Fee

The Contractor's Fee shall be paid as follows: $_____ upon the execution of this Contract, followed by ten (10) monthly payments of $_____ each, payable during the first five (5) days of each month, commencing July, 2004 and ending in April, 2005, with the final $_____ payable after the Work is finally complete (including punchlist items). This payment schedule is predicated on continuous progress with respect to the Work in accordance with the Project Schedule. Therefore, if the Contractor falls behind the Project Schedule, the Owner shall be entitled to deduct a reasonable amount from the Contractor's Fee until the Contractor catches up with the progress of the Work.

This Contractor's Fee is based on there being a part-time superintendent assigned to this job whose time shall be allocated to this Project as necessary between the jobsite, picking up and returning small materials when feasible, at the Contractor's office and Contractor's other projects.

Article 10

Owner's Responsibilities

The Owner agrees to obtain and furnish to Contractor the geotechnical (soil) reports and foundation and structural engineering designs referred to in Article 17. Contractor will follow these designs but will not be held responsible for the contents of the soil report or the foundation and/or structural designs. Contractor recommends that Owner have Owner's engineers inspect and test the Work as these engineers deem necessary throughout the construction process, and that these inspections and testing be documented with compliance reports.

The Owner acknowledges Owner's responsibility to ensure that they and/or their agents provide the Contractor with timely decisions and selections, that these selections need to be available at the jobsite when needed for installation, and that failure to do so could result in delays as defined in Article 2.

Article 11

Maintenance of Cost Accounting Records; Builder's Club

The Contractor shall check all materials, equipment and labor entering into the Work and shall keep such full and detailed accounts as may be necessary for proper financial management under this Contract, and the system shall be specified by Contractor. The Owner shall be afforded access at the Contractor's office during normal business hours to all Contractor's records, books, correspondence, instructions, drawings, receipts, vouchers, memoranda and similar data relating

to this Contract. The Contractor shall preserve such records for a period of three (3) years from completion of the job.

Owner and Contractor have agreed to use the services of "Builder's Club" for accounts payable and other accounting functions. Owner shall pay the Builder's Club directly for these services, up to a maximum of $5,000.00. Any additional costs shall be paid for by Contractor as a Cost of the Work. If Owner pays less than $5,000.00 to the Builder's Club for such accounting-related services, the difference between $5,000.00 and the amount actually paid shall be paid by Owner to Contractor after final payment is made to the Builder's Club.

Article 12

Disbursement of Construction Cost

All funds drawn (whether directly from the Owner or from the construction loan at _____) shall be placed in the Contractor's checking account no. _____ at _____ Bank (the "Distribution Account"), or any checking account subsequently designated by Contractor as the Distribution Account. It shall be the responsibility of the Owner to provide funds for deposit in a timely manner following receipt by Application for Payment, as described below, to allow the Contractor to cover amounts owed and pay invoices from Subcontractors and Materialmen as they become due. All payments from this account shall be limited to the Cost of the Work and the Contractor's Fee related to the residence covered by this Contract. Owner shall have the right to review, copy and/or audit the account and all the books and records pertaining to the Distribution Account at the Contractor's office during normal business hours.

A. Provided that an Application for Payment is received by the Owner not later than the last day of the month, the Owner shall (i) cause the Architect to issue a certificate for payment with respect to the Application for Payment, and (ii) make payment to the Contractor of the approved amount of such Application for Payment, all not later than the 10th day of the succeeding calendar month. If an Application for Payment is received by the Owner after the Application Date fixed above, payment shall be made by the Owner in the amount certified by the Architect not later than ten (10) days after the Owner receives the Application for Payment. The Application for Payment shall be on an AIA Form G702 and G703 or similar form. Owner and Contractor have agreed to a Schedule of Values of the Work attached hereto as Exhibit "E", and made a part hereof for all purposes, and Contractor's Applications for Payment will follow as closely as possible said Schedule of Values. Applications for Payment also shall show the percentage of completion of each portion of the Work as of the end of the period covered by the Application of the Payment. The percentage of Completion shall be the percentage of the Work which has actually been completed. Contractor's Fee shall be shown as a single, separate item. It is contemplated that progress payments will be made in accordance with the Draw Schedule attached hereto as Exhibit "F" and made part hereof for all purposes.

   Owner shall make progress payments on account of the Cost of the Work based upon the Cost of the Work properly allocable to labor, materials and supplies incorporated in the Work the Cost of the Work properly allocable to materials and supplies suitably stored at

the site, up to the last day of the applicable payment period, less the aggregate of previous payments in each case.

Together with the Contractor's Application for Payment, the Contractor shall submit an itemized statement certified (and sworn to, if requested by Owner) to be true and correct by a financial officer of the Contractor, showing in complete detail all monies paid or costs incurred by the Contractor on account of the Cost of the Work during the previous month for which the Contractor is to be reimbursed and the amount of the Contractor's Fee due, together with (a) all payrolls for all labor, (b) copies of invoices for all services and materials acquired in connection with such monies paid or costs incurred together with a copy of the checks (other than payroll checks) issued by Contractor in payment of such costs, and (c) such other data supporting the Contractor's right to payment for subcontractors or materials as the Owner or the Architect may reasonably require.

Not later than the date of each subsequent Application for Payment, the Contractor shall submit to the Owner the Contractor's release of lien and releases of liens for all subcontractors, materialmen, and suppliers, who have performed any services or provided any materials for the Project since the date of the preceding Application for Payment and were paid from such progress payment. Each release of lien shall waive and release all rights of the affiant to claim or assert any lien against the Project either for the period through the last day included in the Application for Payment ("Partial Release of Lien") or for the affiant's completed work on the Project ("Final Release of Lien").

The Owner reserves the right to refuse disbursement of all or any portion of any progress payment until it has received all the releases of liens for the prior progress payment which are satisfactory and acceptable to Owner in the exercise of reasonable judgment. The Owner also reserves and shall have the right to issue joint-payee checks in the names of the Contractor and any unpaid party, or otherwise withhold funds from payments, to assure payment to proper parties and the Owner's receipt of appropriate releases of liens.

Without limitation of the foregoing, the Contractor shall provide with each Application for Payment an affidavit executed by an officer of Contractor in form and substance satisfactory to the Owner swearing that the cost of all labor and materials of every kind and character incurred to the date of such affidavit in connection with the Work have been paid in accordance with the payment provisions of each subcontract therefor, except the unpaid items to be paid from the proceeds of the current Application for Payment.

B. Upon Substantial Completion of the Work, Owner shall have paid Contractor a sum sufficient to increase the total payments to 100% of the Cost of the Work, less such amounts as the Owner shall determine for incomplete and unsettled claims as provided in the Contract Documents, including the value assigned to punchlist items as described below.

Upon the Substantial Completion of the Work, each item on the Owner's punchlist shall be assigned a value by the Owner equal to the actual cost to complete such item, plus 15%. Provided that no lien affidavits have been filed against the Project or lien notice

letters delivered to Owner and the aggregate value of the punchlist items, inclusive of the additional 15% ("Punchlist Value") is less than any amount Owner is entitled to withhold pursuant to the provisions of this Contract ("Withheld Amount"), no additional amount shall be withheld by the Owner at the time of making the payment following Substantial Completion provided that Owner has paid the undisputed amount of each Contractor invoice. If, however, lien notices or lien affidavits have been filed against the Project and the amount thereof ("Lien Claims"), plus the Punchlist Value, exceeds the Withheld Amount, then the amount of the Lien Claims and Punchlist Value in excess of the Withheld Amount (the "Excess") also shall be withheld by the Owner at the time of making the payment following Substantial Completion. Upon completion of each punchlist item, as certified by the Owner, Owner shall pay to Contractor the sum assigned to such item.

C. Final payment, constituting the entire unpaid balance of the Contract Sum, shall be made by the Owner to the Contractor when:

.1 The Contractor has fully performed the Contract, except for the Contractor's responsibility to correct Work as provided in Article 16, and to satisfy other requirements, if any, which extend beyond final payment, but not more than thirty-five (35) days after Substantial Completion of the Work;

.2 a final Certificate for Payment has been issued by the Owner and Lender;

.3 issuance of final inspection approvals by the City of Houston and satisfaction of all requirements of the Specifications;

.4 Contractor delivers its final lien release ("Contractor's Final Lien Release") in the form attached hereto as Exhibit "G" and made part hereof for all purposes.

.5 Contractor delivers final lien releases from all subcontractors and suppliers providing services, labor and/or materials to the Project;

.6 Receipt by the Owner of As-Built Drawings consisting of one set of the final drawings redlined with changes made during the performance of the Work with Owner's approval.

D. Payments due and unpaid under the Contract shall bear interest from the date payment is due at the lesser of ten percent (10%) per annum or maximum non-usurious rate provided by the laws in the State of Texas. No interest shall be payable on retainage as long as the retainage is timely paid in accordance with the Contract.

E. Payments may be withheld by Owner on account of (a) defective Work determined by Architect if not remedied, (b) claims filed by third parties, (c) failure of Contractor to make payments properly to Subcontractors or for labor, materials or equipment or (d) persistent failure of the Contractor to carry out the Work in accordance with the Contract Documents. When the grounds for withholding payment have been removed or

otherwise satisfied by Contractor, Owner shall make payment in the required amount to Contractor at the time of the next progress payment.

F. The making of final payments shall constitute a waiver of claims by Owner except those arising from:

1. liens, claims, security interests or encumbrances arising out of the Contract and unsettled;

2. failure of the Work to comply with the requirements of the Contract Documents; or

3. items of special warranties required by the Contract Documents.

Article 13

Insurance

Contractor shall arrange to have provided (and the cost thereof shall be included in the Cost of the Work) the following insurance coverage by a mutually agreed upon insurance company licensed to do business in the State of Texas, prior to commencement of the Work, in the manner and in the amounts set forth below:

A. Builders Risk Insurance Policy (including Fire, Extended Coverage and Vandalism Insurance) in an amount of $_____.

B. Statutory Workmen's Compensation Insurance including Employer's Liability with a limit of not less than Five Hundred Thousand Dollars ($500,000.00) covering Contractor, Contractor's employees, Subcontractors, Subcontractors' employees, agents and subagents. Owner may elect to allow Subcontractors to sign a "Texas Workers' Compensation Commission Joint Contract To Affirm Independent Relationship" (hereinafter referred to as "Waiver") as long as such Waiver remains a legal option under Texas law, but in so doing acknowledges that he may be incurring possible additional future liability.

C. Commercial General Liability Insurance with a combined single limit coverage of not less than $1,000,000.00 resulting from Contractor's operations and completed operations.

D. Certificates of such insurance shall be delivered to Owner and Lender prior to the commencement of the Work. Each policy of insurance obtained by Contractor pursuant to the Contract shall provide (i) that such policy shall not be canceled, endorsed, altered or re-issued to effect a change in coverage for any reason or to any extent whatsoever unless the insured shall have first given Owner and Lender at least fifteen (15) days prior written notice; (ii) that Owner and/or Lender may, but shall not be obligated to, make premium payments to prevent the cancellation, endorsement, alteration or re-issuance of

such policy; and (iii) that all insurance policies shall be payable to Owner and Lender as their interests may appear and be subject to the standard mortgage clause.

E. Owner shall be responsible for purchasing and maintaining Owner's usual liability insurance. Optionally, Owner may purchase and maintain other insurance for self-protection against claims which may arise from operations under the Contract. Contractor shall not be responsible for purchasing and maintaining this optional Owner's liability insurance. Notwithstanding the foregoing provisions of this Paragraph E, Contractor's commercial general liability insurance shall be primary as to any act of, by, through or under Contractor at the Project, and Owner's commercial general liability insurance shall be secondary with respect to such acts or omissions.

F. Owner and Lender will be named as an additional insured on the Builder's Risk insurance and the commercial general liability insurance of Contractor. The Contractor's general liability insurance and worker's compensation insurance shall contain waiver of subrogation endorsements in favor of Owner.

G. Owner and Contractor agree that in the event Owner or Contractor ("First Party") sustains a loss by reason of fire, damage or other casualty which is covered by a fire or extended coverage insurance policy or builder's risk policy or other policy required to be carried by the First Party under this Contract, including protection against theft, burglary and vandalism, and such fire, casualty or damage is caused in whole or in part by the acts or omissions of the other party hereto ("Second Party") or the Second Party's agents, servants or employees, then the First Party agrees to look solely to its insurance proceeds (if any); and the First Party shall not be entitled to the recovery of damages against the Second Party or the agents, servants, employees, heirs, legal representatives or assigns of the Second Party; and no third party shall have any right of recovery against the Second Party or the agents, servants, employees, heirs, legal representatives or assigns of the Second Party by way of subrogation or assignment.

H. All Subcontractors used by Contractor shall, for the term of this Contract, carry and maintain in full force and effect, their current insurance, if any, insuring such subcontractor for their respective liabilities and interests while they are performing hereunder.

Article 14

Owner's Right to Stop the Work

If the Contractor fails to correct Work which is not in accordance with the requirements of the Contract Documents, or persistently fails to carry out the Work in accordance with the Contract Documents, the Owner may, if the failure or other breach is not cured within seven (7) days following written notice from Owner, issue a written order to the Contractor to stop the Work, or any portion thereof, until the cause for such order is eliminated; however, the right of the Owner to stop the Work shall not give rise to a duty on the part of the Owner to exercise the right for the benefit of the Contractor or any other person or entity.

Article 15

Termination of the Contract

A. If Owner fails to make payment for a period of thirty (30) days through no fault of Contractor, Contractor may, upon seven (7) additional days' written notice to Owner, terminate the Contract and recover from Owner payment for Work executed and for proven loss with respect to materials, equipment, tools, and construction equipment and machinery, including reasonable overhead, profit, and damages applicable to the Project.

B. If Contractor defaults or persistently fails or neglects to carry out the Work in accordance with the Contract Documents or fails to perform a provision of this Contract, Owner after seven (7) days' written notice to Contractor and without prejudice to any other remedy Owner may have (provided that Contractor has not cured such default), may make good such deficiencies and may deduct the cost thereof, including compensation for Architect's services and expenses made necessary thereby, from the payment then or thereafter due Contractor. Alternatively, at Owner's option, Owner may terminate the Contract and take possession of the site and of all materials, equipment, tools, and construction equipment and machinery thereon owned by Contractor and may finish the Work by whatever method Owner may deem expedient. If the unpaid balance of the GMP exceeds the cost of finishing the Work, including compensation for the Architect's services and expenses made necessary thereby, the balance of any unpaid sums owed the Contractor shall be paid to Contractor; however, if the cost of completing the Work exceeds the GMP, then Contractor shall pay the difference to Owner within thirty (30) days following written demand, provided that Owner submits an invoice itemized in reasonable detail.

After any termination of this Contract by Owner pursuant to Article 15, Contractor shall not be entitled to any further payment under this Contract except to the extent of any amount by which Work completed or installed by Contractor prior to such termination and not previously paid for by Owner exceeds the amount due by Contractor to Owner under Article 15 (including all damages which Owner would be entitled to recover at law from Contractor by reason of Contractor's breach), and even then only at such time as the Work is finally completed. Any sums payable by Contractor to Owner pursuant to Article 15 shall be payable upon demand and shall bear interest at the rate described in Paragraph 12 D. of the Contract from the date of demand until paid.

C. Owner shall be deemed to be a third party beneficiary of each Subcontract and purchase order (herein collectively referred to as the "Subcontract") and may, if Owner elects, require (following Contractor's default under this Contract and/or Owner's termination of the Contract pursuant to the other provisions of this Contract permitting termination by Owner) that the Subcontractor (which term shall include suppliers) perform all of the then unperformed duties and obligations of such Subcontractor thereunder for the benefit of Owner (rather than Contractor); however, in the event that Owner requires any such performance by a Subcontractor for the direct benefit of Owner, then Owner shall be bound and obligated to pay such Subcontractor for all work done by such Subcontractor (i) to date (to-wit: the reasonable value of that portion of the subcontract performed by such Subcontractor) and (ii) subsequent to the date

that Owner elects to invoke such rights. Owner's liability in this connection, however, is not to exceed the amount obtained by subtracting from the subcontract price the total of all sums paid by Contractor to Subcontractor prior to Owner's invoking its rights hereunder with respect to direct performance by Subcontractor for Owner. In the event that Owner elects to invoke such rights, Owner shall give written notice of such election to Contractor and such Subcontractor.

Article 16

Warranty

Notwithstanding anything contained in the Contract Documents to the contrary, if within one (1) year after the date of Final Completion or such longer period of time as may be prescribed by law with respect to latent defects or by the terms of any applicable special guarantee required by any specific provisions of the Contract Documents, Owner discovers any defective work, including that any portion of the Work was not constructed substantially in accordance with the Contract Documents, Contractor shall promptly, without cost to Owner, either correct such defective Work, or, if it is not possible to correct such defective Work, remove it from the site and replace it with non-defective Work. The one (1) year warranty from the date of Final Completion described above shall be extended to two (2) years following Final Completion with respect to the mechanical, electrical and plumbing systems and equipment incorporated into the Project. Contractor shall have the responsibility, at Contractor's expense, for making warranty repairs to the mechanical, electrical, plumbing systems and equipment during such two (2) year period. In any emergency where delay would cause serious risk of loss or damage, Owner may have the defective Work corrected or the rejected Work removed and replaced, and all direct costs of such removal and replacement, including reasonable compensation for additional professional services, shall be paid by Contractor. Inability or refusal of a subcontractor responsible for defective Work to correct such Work shall not excuse Contractor from performing under the warranty provided in this Article 16. Should Contractor fail to make such warranty corrections required hereby within a reasonable time, not to exceed thirty (30) days after written notice thereof from Owner to Contractor, provided that if the required corrections cannot be made within thirty (30) days, Contractor fails to commence making such warranty corrections within a reasonable period of time, not to exceed thirty (30) days, and diligently continue the prosecution of such warranty corrections until completion, Owner may do so at the expense of and for the account of Contractor.

Contractor, at Owner's expense, agrees to purchase a ten (10) year warranty against structural defects in the Project from one of the national warranty companies, which warranty shall be subject to Owner's approval, which approval shall not be unreasonably withheld. Contractor, as a Cost of the Work, shall take all necessary steps and procedures to qualify for such warranty. If any of the Work covered by the one (1) or two (2) year warranties described above is covered by the ten (10) year extended warranty, Owner agrees to process its warranty claims through such extended warranty, but Contractor shall not be released from any liability for making warranty repairs required by this Article 16 during the respective one (1) and two (2) year warranty periods described above.

At the time of final payment, Contractor also shall assign and transfer to Owner all assignable warranties heretofore or hereafter received by Contractor for "consumer products" to be installed in the "improvements" (as such terms are defined by the Federal Trade Commission), whether issued by the seller, manufacturer or supplier and all other warranties delivered to Contractor by subcontractors or suppliers; provided, however, that Owner and Contractor agree that during the one (1) year warranty period, Contractor shall be obligated to enforce all warranties provided by Contractor's subcontractors and suppliers at no cost or expense to Owner, other than appliance and HVAC warranties.

Article 17

Other Conditions or Provisions

17.1 Inspections. Owner shall have the right to appoint at any time or from time to time one or more engineers, architects or other representatives to inspect the Work on behalf of Owner, in addition to Architect. All costs, expenses and fees of such additional inspections shall be borne and paid by Owner, and Contractor shall have no liability or obligation for the payment thereof.

17.2 Drawings and Specifications. The Drawings and Specifications are to be of equal priority. In the event of any internal inconsistency in either the Drawings or Specifications, or with each other, the appropriate method of performing the Work, in the event of the above mentioned inconsistency, shall be determined by Architect. Figures take precedence over physical scale measurements. Large scale details take precedence over smaller scale details. Drawings take precedence in regard to dimensions, when in conflict with Mechanical and Structural Drawings, except for the size of the structural members. Specifically titled drawings and sections of the Specifications take precedence over indication of the item in a collateral way. Existing conditions take precedence over Drawings and Specifications for dimensions.

Where in the Drawings and Specifications, certain products, manufacturer's trade names, or catalog numbers are given, it is done for the express purpose of establishing a standard of function, dimension, appearance, and quality of design, in harmony with the Work, and is not intended for the purpose of limiting competition.

When more than one restriction for a specified material, brand, or construction process is given for an item in the Drawings and Specifications, Contractor shall comply with all restrictions. When more than one optional material, brand or construction process is specified for a particular item of work, the choice shall be the Contractor's. Contractor may use the one Contractor considers to its advantage to use.

17.3 Work Included and Excluded. List of "work included" and "work excluded" in the Drawings and Specifications are not intended to enumerate each and every item of work or appurtenance required, and must be used in conjunction with other portions of the Contract Documents.

17.4 Subcontracts. Contractor agrees to hold all Subcontractors, including all persons directly or indirectly employed by them, responsible for any damages due to breach of contract or any negligent act and to diligently endeavor to effect recoveries of such damages.

17.5 Notices. Any notice provided or permitted to be given under the Contract Documents must be in writing and may be served by depositing same in the United States mail, addressed to the party to be notified, postage prepaid, by registered or certified mail, with return receipt requested; by delivery of such notice in person to such party; or by fax (with confirmation of receipt) or personal delivery service. For purposes of notice, the addresses of the parties shall be as set forth on page one (1) hereof.

17.6 Texas Law. The Contract Documents shall be construed and enforced in accordance with the laws of the State of Texas.

17.7 Entire Contract; Amendments. The Contract Documents and all prior negotiations or agreements are merged herein. No modification hereof or subsequent agreement relative to the subject matter hereof shall be binding unless reduced to a writing signed by the party to be bound.

17.8 Owners' Approval Rights; Inspecting Architect. Except for the references to "Architect" in Article 1, Article 3, Article 6, Paragraph 12 B (solely with respect to the additional services and expenses of an Architect following the Contractor's default), Paragraph 17.9 and Paragraph 17.16, which references in such paragraphs shall refer either to Lucian Hood Architect or other licensed architect designated in writing by Owner, all references to "Architect" in the Contract Documents shall refer to Owner. However, with respect to all matters subject to the Architect's approval or decision or options which the Architect is entitled to exercise pursuant to Article 8, Article 10, Paragraphs 17.2, 17.10, 17.20, and 17.26 of the Contract, if the Contractor does not agree with the Owner's particular decision or course of action relating to any of such matters (herein referred to as a "Major Decision"), within five (5) working days after a Major Decision is submitted to either party for such party's approval, then such Major Decision shall be submitted to _____ or other licensed architect, engineer, or other appropriate, qualified consultant designated by Owner and acceptable to Contractor, in the exercise of the Contractor's reasonable discretion, (which licensed architect, engineer, or other appropriate, qualified consultant designated by Owner and acceptable to Contractor, is herein referred to as the "Inspecting Architect") for resolution. If Owner desires to appoint an Inspecting Architect other than Lucian Hood, Owner shall submit not less than three (3) architects, engineers, or other appropriate, qualified consultants, located in Houston to Contractor for its approval or disapproval. If Contractor fails to approve one of the architects, engineers, or other appropriate, qualified consultants selected by Owner within three (3) days after receipt of such names, then Owner and Architect shall immediately thereafter jointly submit a request for a list of seven potential architects, engineers, or other appropriate, qualified consultants, (located in Houston) to the Dallas office of the Construction Section of the American Arbitration Association ("AAA"). Owner shall have the right to select one architect, engineer or consultant from the list submitted by the AAA, who shall be the "Inspecting Architect" hereunder. Contractor and Owner shall be entitled to rely on (and shall be obligated to comply with) the written certification of the Inspecting Architect as to his resolution of any such Major Decision, which written certification

of the Inspecting Architect as to his resolution of any such Major Decision shall be made as soon as reasonably practicable, but in no event more than twenty (20) days after such Major Decision has been submitted to the Inspecting Architect. If the Inspecting Architect fails or refuses to resolve a Major Decision within said twenty (20) day period, then the Owner may request that such Major Decision be submitted to arbitration in accordance with Paragraph 17.8 hereof by written notice to the other party at any time after the expiration of the aforesaid twenty (20) day period (provided that the Inspecting Architect has not resolved such Major Decision). The cost of submitting Major Decisions to the Inspecting Architect for his resolution shall be borne by the non-prevailing party. Notwithstanding the foregoing, if prior to the receipt of a written decision from the Inspecting Architect, Contractor and Owner agree in writing on a Major Decision previously submitted to the Inspecting Architect, then Contractor shall go forward in accordance with the decision reached by Contractor and Owner on such Major Decision and shall disregard the Inspecting Architect's decision subsequently received. Contractor agrees to continue the Work, notwithstanding the fact that a Major Decision has been submitted to the Inspecting Architect for his resolution. Contractor further agrees not to take any action (active or passive) affecting the Major Decision submitted to the Inspecting Architect until the Inspecting Architect has issued his decision on such matter.

The decision of the Inspecting Architect shall be final on all such Major Decisions submitted to the Inspecting Architect if the amount in controversy is less than $25,000, and Contractor and Owner hereby agree that the Inspecting Architect's decision with respect to any Major Decision shall be binding on the parties and not subject to Paragraph 17.8 hereof.

Additionally, Owner and Contractor agree that the Inspecting Architect in carrying out his duties hereunder may act in his reasonable discretion and shall be personally or corporately liable only for fraud or acts or omissions in bad faith.

Notwithstanding anything contained in this Paragraph 17.8 to the contrary, in the event that a Major Decision must be made immediately (in the good faith judgment of Owner or Contractor) to avoid interference with the progress of the Work, damage to the Work or personal injury or property damage (and Owner and Contractor are unsuccessful in resolving such Major Decision among themselves and are also unsuccessful in contacting the Inspecting Architect to obtain his immediate resolution of such matter in a timely manner), then Owner shall have the authority to make such Major Decision, without the necessity of obtaining approval from the Contractor; and, if Owner and Contractor thereafter disagree on the handling of such Major Decision, such Major Decision shall be submitted to the Inspecting Architect for adjudication of the proper handling of such matter. In the event that the Inspecting Architect resolves such Major Decision and favors the Contractor, Owner shall promptly reimburse Contractor for all out-of-pocket expenses and the actual damages incurred by Contractor in proceeding in accordance with the Owner's instructions.

17.9 Record Drawings. To the extent practicable, Contractor shall update from time to time one record copy of the Drawings (the "Record Drawings"), with color pencils to mark up said set with "record information" in a legible manner to show: (i) material deviations from the Drawings made during construction; (ii) details in the Work not previously shown except that to the extent that _____ should revise the Drawings to show such details; (iii) changes to

existing conditions or existing conditions found to differ materially from those shown on any existing drawings; (iv) the actual installed position of major electrical, mechanical and plumbing equipment if shown on the original final Drawings and substantially different from the position shown on the original final Drawings; and (v) such other information as either Owner or Architect may reasonably request. Any changes resulting from change orders or other changes requiring the Architect to modify the Drawings shall be made by the Architect at Owner's expense. At the completion of the Work, Contractor shall deliver all Record Drawings to Owner. The provisions of this Paragraph 17.9 do not authorize the Contractor to deviate from the Contract Documents except as otherwise expressly provided herein. Submission of the final Record Drawings is required prior to or at the time of submission of Contractor's application for final payment.

17.10 Inspections. The Architect will conduct inspections to determine the dates of Substantial Completion and Final Completion, will receive and forward to Owner for the Owner's review written warranties and related documents required by the Contract and assembled by Contractor, and will issue a final Certificate for Payment upon compliance with the requirements of Article 10.

17.11 Damage to Work or Property of Owner. If Contractor wrongfully causes damage to the Work or property of Owner, Contractor shall promptly remedy such damage. If Contractor wrongfully causes damage to a separate Contractor or property of any separate Contractor, Contractor shall promptly attempt to settle any resulting dispute or claim with such other Contractor. Owner shall use all reasonable efforts to cause its separate contractors to cooperate with Contractor in connection with the portion of the Work requiring coordination and cooperation between Contractor and Owner's separate contractors. If Owner, by or through Owner's separate contractors, wrongfully causes damage to the Work or property of Contractor, Owner shall promptly remedy such damage. Additionally, if one of Owner's separate contractors wrongfully causes damage to Contractor and/or a Subcontractor of Contractor, Owner shall attempt to settle any resulting dispute or claim with Contractor and/or one of Contractor's Subcontractors, as applicable.

17.12 Final Cleanup. Contractor shall be responsible for damaged or broken glass, and at completion of the Work shall replace such damaged or broken glass. Contractor shall perform the following final cleaning as a condition precedent to final completion of the Work:

(i) Remove all temporary protections;

(ii) Remove marks, stains, fingerprints and other soil or dirt from all surfaces and other work;

(iii) Remove spots, mortar, plaster, soil and paint from ceramic tile, marble, and other finish materials from all surfaces and other Work;

(iv) Clean fixtures, cabinet work and equipment, removing stains, paint, dirt, and dust and leave in an undamaged and new condition; and

(v) Clean all surfaces and other Work in accordance with recommendations of the manufacturer.

17.13 Independent Contractor. In performing its obligations hereunder, Contractor shall be deemed an independent Contractor and not an agent or employee of Owner. Contractor shall have exclusive authority to manage, direct and control the Work. Owner is interested in only the results obtained and not in the methods used in achieving the results.

17.14 Lien Claims. Provided that Contractor has been paid by Owner all sums (or the applicable portion thereof) due to Contractor pursuant to the Contract (other than under the circumstances of Paragraph 12E. hereof, Contractor shall not voluntarily permit any laborer's, materialmen's, mechanic's, or other similar liens to be filed or otherwise imposed on any part of the Work or the property on which the Work is performed. If any laborer's, materialmen's, mechanic's, or other similar lien or claim thereof is filed or otherwise imposed against the Property, Contractor, within thirty (30) days after actual notice to Contractor of the filing of such lien or other imposition thereof, shall cause such lien to be released or otherwise discharged, except as to liens which Contractor is contesting in good faith by appropriate action diligently pursued, provided Contractor has notified Owner of the nature of such lien and informed Owner of the type of action being pursued by Contractor and, if requested by Owner, has provided Owner with a surety bond satisfactory to Owner, sufficient to cover such claim in the event Contractor is unsuccessful in contesting same or has made other arrangements satisfactory to Owner. If, however, Contractor, within the aforesaid thirty (30) day period, does not cause such lien either to be released and discharged forthwith or contests same in the manner provided hereinabove, then Owner shall have the right to pay all sums necessary to obtain such release and discharge and reduce the Contract Sum by the amount of such payments made by Owner. Contractor shall indemnify, defend and hold harmless Owner from all claims, losses, demands, causes of action or suits of whatever nature arising out of any such lien or that part of the Work covered thereby.

17.15 Contractor's Responsibility. Contractor shall be responsible to Owner for the acts and omissions of Contractor's employees, Subcontractors and their agents and employees, and other persons performing portions of the Work under a contract with Contractor.

17.16 Access. Contractor shall provide Owner and Architect access to the Work in preparation and progress wherever located.

17.17 Indemnity. To the fullest extent permitted by law, Contractor shall indemnify and hold harmless Owner, and agents and contractors of Owner from and against claims, damages, losses and expenses, including but not limited to reasonable attorneys' fees, arising out of or resulting from performance of the Work by Contractor, provided that such claim, damage, loss or expense is attributable to bodily injury, sickness, disease or death, or to injury to or destruction of tangible property (other than the Work itself except to the extent covered by Contractor's builder's risk insurance) including loss of use resulting therefrom, but only to the extent caused in whole or in part by negligent acts or omissions of Contractor, one of Contractor's Subcontractors or anyone directly or indirectly employed by them or anyone for whose acts they may be liable. Such obligation shall not be construed to negate, abridge, or reduce other rights or

obligations of indemnity which would otherwise exist as to a party or person described in this Paragraph 17.17.

To the fullest extent permitted by law, Owner shall indemnify, defend and hold harmless Contractor and Contractor's subcontractors and agents, but not Contractor's employees, from and against claims, damages, losses and expenses, including but not limited to reasonable fees, arising out of or resulting from performance of any Work on the Project by Owner or Owner's contractors, provided that such claim, damage, loss or expense is attributable to bodily injury, sickness, disease or death, or to injury to or destruction of tangible property (other than the Work itself) including loss of use resulting therefrom, but only to the extent caused in whole or in part by negligent acts or omissions of Owner or Owner's contractors, or anyone directly or indirectly employed by them or anyone for whose acts they may be liable. Such obligation shall not be construed to negate, abridge, or reduce other rights or obligations of indemnity which would otherwise exist as to a party or person described in this Paragraph 17.17.

The obligations of Contractor or Owner, as applicable, under this Paragraph 17.17_ shall not extend to the liability of Architect, Architect's consultants, and agents and employees of any of them arising out of (a) the preparation or approval of maps, drawings, opinions, reports, surveys, Change Orders, designs or specifications, or (b) the giving of or the failure to give directions or instructions by Architect, Architect's consultants, and agents and employees of any of them provided such giving or failure to give is a cause, in whole or in part, of the injury or damage.

17.18 Non-conforming Work. When any non-conforming work is found or confirmed by Owner, Contractor, at Contractor's expense, shall correct the entire area of Work involved, unless Contractor can completely define the limits of the non-conforming work.

17.19 Encroachments. Any encroachments made by Contractor or his subcontractors on adjacent properties or easements due to construction as revealed by an improvement survey will be the responsibility of Contractor, and Contractor shall correct these encroachments within fifteen (15) days of the date of the improvement survey at the sole cost and expense of Contractor, either by the removal of the encroachments or satisfactory agreements with the adjacent property owners or the holders of easements allowing the encroachments to remain. Contractor may rely on the survey of the Property furnished by Owner in locating the foundation and other improvements.

17.20 Concealed Conditions. Contractor shall fully acquaint itself with all existing conditions and limitations affecting the Work, including, without limitation, all property lines, utility locations, existing improvements, elevations, and site and local conditions. Claims for additional compensation or extensions of time because of the failure of Contractor to familiarize itself with conditions at the site will not be allowed. It is not intended by this provision to preclude claims for additional compensation or extension of time for conditions that would not reasonably be foreseen from a diligent visual inspection of the site, Contractor's review of the geotechnical investigation or soil reports ("Reports") provided by Owner and Contractor's experience in building in the Tanglewood area.

If conditions are encountered at the site which are (2) subsurface or otherwise concealed physical conditions which differ materially from those indicated in the Contract Documents or Reports or (3) unknown physical conditions of an unusual nature, which differ materially from those ordinarily found to exist and generally recognized as inherent in construction activities of the character provided for in the Contract Documents and Reports, then notice by the observing party shall be given to the other party promptly before conditions are disturbed and in no event later than ten (10) days after first observance of the conditions. Architect will promptly investigate such conditions and, if they differ materially and cause an increase or decrease in Contractor's cost of, or time required for, performance of any part of the Work, will recommend an equitable adjustment in the GMP or Contract Time, or both. If Architect determines that the conditions at the site are not materially different from those indicated in the Contract Documents and that no change in the terms of the Contract Documents is justified, Architect shall so notify Owner and Contractor in writing, stating the reasons. Claims by either party in opposition to such determination must be made within twenty-one (21) days after Architect has given notice of the decision.

17.21 A. Separate Contractors. Owner reserves the right to perform construction or operations related to the Project with Owner's own forces and to award separate contracts in connection with other portions of the Project or other construction or operations on the site under conditions of the contract identical or substantially similar to these, including those portions related to insurance and waiver of subrogation. If Contractor claims that delay or additional cost is involved because of such action by Owner, Contractor shall submit a written claim to Architect within ten (10) days following the inception of the delay or interference for determination by the Architect.

B. Contractor shall afford Owner and separate contractors reasonable opportunity for the introduction and storage of their materials and equipment and performance of their activities and shall connect and coordinate Contractor's construction and operations with theirs as required by the Contract Documents.

C. Costs caused by delays, improperly timed activities or defective construction shall be borne by the party responsible therefor.

D. Contractor will cooperate to a reasonable extent with any other contractors engaged by Owner in connection with completion of the Project. Owner shall require its separate contractors to cooperate and coordinate with Contractor. Owner agrees to cause its separate contractors to furnish Contractor with a Certificate of Insurance showing Contractor as an additional insured. Additionally, Contractor's warranty with respect to the Work shall not cover any work covered by separate contractors; provided, however, that Contractor will be responsible for any damage its forces cause to the Work performed by a separate Contractor. Likewise, Owner and its separate contractors will be liable for any damage that such separate Contractor's forces cause to the Work performed by Contractor.

17.22 No Assignment. Contractor shall not assign this Contract nor any of the monies due or to become due to it hereunder without the prior written consent of Owner and any attempt to so do shall be void and of no effect. Contractor shall not sublet or subcontract any part of this Contract

except in compliance with the provisions hereof. Subject to the foregoing, this Contract shall inure to the benefit of, and shall be binding upon, the parties hereto and their respective successors and assigns.

17.23 Contractor's Subordination. Contractor acknowledges that Owner will borrow certain funds to finance the construction of the Work and, that as a condition to any loans to Owner, Owner will collaterally assign this Contract to the Lender and Lender may require from time to time certain statements, certificates, and documents from Contractor. Contractor covenants and agrees that any lien, statutory, expressed or implied, right and interest (whether choate or inchoate and including, without limitation, all mechanics' and materialmen's liens under the applicable laws and statutes of the State of Texas) which are owned or claimed by Contractor or shall exist or shall hereafter accrue to the benefit of Contractor for labor performed, materials furnished and Work done on this Project, shall be and remain subordinate, second and inferior to any first and second lien securing the payment of an acquisition, interim construction and/or permanent loan and all advances made thereunder, and to any renewals, extensions or rearrangements thereof. Neither Contractor nor any Subcontractor or other party shall be permitted to remove any improvements or other property constructed or installed or delivered in connection with the Work notwithstanding that such improvements or other property can be removed without material injury to any improvements not sought to be removed by any lien claimant and without such injury to any improvements sought to be removed by any lien claimant. A subordination provision to this effect applicable to liens and lien rights of Subcontractors shall be contained in all Subcontracts entered into by Contractor, and Contractor will indemnify and hold Owner harmless from any failure or refusal of any Subcontractor to comply with this provision, as well as any assertion by such Subcontractor that such Subcontractor's lien is prior to or of equal dignity with the Lender's lien. At the request of Owner, Contractor shall, without delay, execute or cause to be executed, such additional documents as may be required from time to time by the Lender to give effect to the provisions hereof and furnish documents, releases and waivers evidencing payments to Subcontractors and suppliers and such Subcontractors' and suppliers' release of liens arising out of the performance of the Work. Owner will authorize Lender to transfer payments only to Contractor if and when Contractor becomes entitled to such payments pursuant to Article 12, upon approval by Owner.

17.24 Completion for Lender . In the event of a default by Owner under its interim loan agreement with Lender, the unperformed part of this Contract will be performed by Contractor for the benefit and at the expense of the Lender, should the Lender so elect, provided that there is no material interruption in the prosecution of the Work and that Contractor has been paid for all Work done to date.

17.25 Lender's Right to Inspect Premises. Contractor will permit Lender and its representatives and agents to enter the Property and inspect the improvements and all materials to be used in the construction thereof and all plans and specifications, shop drawings and lien waivers relating to the construction of the improvements; and shall cooperate with Lender and its representatives and agents during such inspection period.

17.26 Architect's Interpretation. The Architect will interpret and decide matters concerning performance under and requirements of the Contract Documents on written request of either the

Owner or Contractor. The Architect will make initial decisions on all claims, disputes or other matters in question between the Owner and Contractor, but will not be liable for results of any interpretations or decisions rendered in good faith. The Architect's decisions in matters relating to aesthetic effect will be final if consistent with the intent expressed in the Contract Documents. All other decisions of the Architect, except those which have been waived by making or acceptance of final payment, shall be subject to resolution pursuant to the provisions of Paragraph 17.8 and/or 17.27 upon the written demand of either party.

17.27 Arbitration. Subject to the provisions of Paragraph 17.8, all claims or disputes between the Contractor and the Owner arising out of or relating to the Contract Documents, or the breach thereof, shall be decided by arbitration in accordance with the Construction Industry Arbitration Rules of the American Arbitration Association currently in effect unless the parties mutually agree otherwise and subject to an initial presentation of the claim or dispute to the Architect as required under Paragraph 17.27. Notice of the demand for arbitration shall be filed in writing with the other party to this Contract and with the American Arbitration Association and shall be made within a reasonable time after the dispute as arisen. The award rendered by the arbitrator or arbitrators shall be final, and judgment may be entered upon it in accordance with applicable law in any court having jurisdiction thereof. Except by written consent of the person or entity sought to be joined, no arbitration arising out of or relating to the Contract Documents shall include, by consolidation, joinder or in any other manner, any person or entity not a party to the Contract under which such arbitration arises, unless it is shown at the time the demand for arbitration is filed that (1) such person or entity is substantially involved in a common question of fact or law, (2) the presence of such person or entity is required if complete relief is to be accorded in the arbitration, (3) the interest or responsibility of such person or entity in the matter is not insubstantial, and (4) such person or entity is not the Architect or any of the Architect's employees or consultants. The agreement herein among the parties to the Contract and any other written agreements to arbitrate referred to herein shall be specifically enforceable under applicable law in any court having jurisdiction thereof.

During any arbitration proceeding, there shall be a prehearing meeting between the parties at which each party shall present a memorandum disclosing the factual basis of its claim and defenses and disclosing legal issues raised. The memorandum shall also disclose the names of any expert a party shall present as a witness during the proceedings. At the prehearing meeting, the arbitrators shall make rulings and set schedules for hearings consistent with their powers as set forth in this Paragraph 17.27. All hearings shall be held on consecutive weekdays until five (5) hearings have been held and shall be recommenced within seven (7) days of the last prior day of hearings. If requested by either party to this Contract, any individual or number of sessions shall take place at the site of the Project.

The parties shall be entitled to discover all documents and information reasonably necessary for a full understanding of any legitimate issue raised in the arbitration. The parties may use all methods of discovery available under the Federal Rules of Civil Procedure and shall be governed thereby. Prior to the deposition of any expert witness, the party proposing to call such a witness shall provide a full and complete report by the expert, together with the expert's calculations and other data by which the expert reached any opinions concerning the subject matter of the arbitration. The report shall be provided no less than ten (10) days prior to the date set for the

expert witness' deposition. The Federal Rules of Evidence shall be applied by the arbitrators but liberally construed to allow for the admission of evidence that is helpful in resolving the controversy.

17.28 Statutory Notice. This Contract is subject to Chapter 27 of the Texas Property Code. The provisions of that Chapter may affect the Owner's right to recover damages arising from the performance of this Contract. If Owner has a complaint concerning a construction defect arising from the performance of this Contract and that defect has not been corrected through normal warranty service, the Owner must provide notice regarding the defect to the Contractor by Certified Mail, Return Receipt Requested, not later than the 60th day before the date the Owner initiates a claim to recover damages in an arbitration proceeding. The notice must refer to Chapter 27 of the Texas Property Code, and must describe the construction defect. If requested by the Contractor, the Owner must provide the Contractor an opportunity to inspect and cure the defect as provided by Section 27.004 of the Texas Property Code.

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.

Executed this the _____ day of _____.

OWNER:	CONTRACTOR:
_____	_____
_____	_____
_____	By: _____
_____	_____