CONSTRUCTION RISK MANAGEMENT

Suggestions for Managing Residential Construction Defect Risk after the Texas Residential Construction Commission Act

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# TABLE OF CONTENTS

I. INTRODUCTION................................................................................................................... ................................ 1

II. LIFE WITH THE TEXAS RESIDENTIAL CONSTRUCTION COMMISSION. ............................... 1
A. Basic Compliance equals Basic Competence........................................................................... 1
B. The State Sponsored Inspection and Dispute Resolution Process v. Substantial Completion of Improvements................................................................. 2
   1. Warranty Effective Date for New Homes. .................................................................................................................. 2
   2. Warranty Effective Date for a Repair, Remodel, or Partially Built Home ................................................................. 3
C. Finished Floor Elevations................................................................................................. 4

III. CONTRACT DEVELOPMENTS – SALES CONTRACTS AND INDEPENDENT CONTRACTOR AGREEMENTS ............................................................................................................................................... 4
A. Introduction ................................................................................................................................................... 4
B. Tab Contract Task Force ................................................................................................................................. 5
C. How The Tab Contracts Were Developed........................................................................................... 5
D. What Forms Are Included In The Tab Contract Package ................................................................. 5
E. Additional Documents contained with the TAB Contracts ................................................................. 5
   1. Addenda ......................................................................................................................................................... 5
   2. Assignment ................................................................................................................................................... 6
   3. Indemnity and Affidavit as to Payment of Bills and Release of Liens ................................................................. 6
   4. Independent Contractor/Supplier Base Agreement and Authorization to Obtain DPS Criminal History Record ................................................................................................................................................... 6
   5. Down Date Waivers–Lien Waivers (For Use with Contractors, Subcontractors and Sub-Subcontractors) ................................................................................................................................................... 6

IV. SPECIFIC PROVISIONS IN THE TAB CONTRACTS................................................................................................. 7
A. Warranties on Residential Construction ................................................................................................. 7
   1. What the Commission has Done ......................................................................................................................... 7
   2. Specific Clauses in the TAB Contracts Regarding Warranties ................................................................. 7
B. Third-Party Warranty Programs .................................................................................................................. 8
   1. What the TRCCA Requires ............................................................................................................................... 8
   2. Registered Third-Party Warranty Companies that have been Approved by the TRCC: ................................................................. 8
C. State-Sponsored Inspection and Dispute Resolution Process (“SIRP”) ................................................ 8
   1. What the TRCCA Requires ............................................................................................................................... 8
   2. What the Commission has Done ....................................................................................................................... 10
   3. Specific Clause in the TAB Contracts Regarding SIRP .................................................................................. 10
D. Arbitration ................................................................................................................................................... 10
   1. What the TRCCA Requires ............................................................................................................................... 10
   2. Specific Clause in the TAB Contracts Regarding Arbitration ........................................................................ 10
E. Conditional Sale to Builder Provision under the Residential Construction Liability Act (“RCLA”) .............. 12
   1. What the RCLA Contains ............................................................................................................................... 12
   2. Specific clause in the TAB Contracts Regarding Conditional Sale to Builder ...................................................... 12
F. Builder’s Right to Termination .................................................................................................................. 12
   1. Specific clause in the TAB Contracts Regarding Builder’s Right of Termination .................................................... 12
   2. Explanation of Builder’s Right of Termination ..................................................................................................... 13
G. Waiver of Subrogation ............................................................................................................................ 13
   1. Specific clause in the TAB Contracts Regarding Waiver of Subrogation ............................................................. 13
   2. Explanation of Waiver of Subrogation .................................................................................................................. 13
H. How to Get The Tab Contract Package .................................................................................................. 14

V. INDEPENDENT CONTRACTORS.................................................................................................................. 14
A. Introduction ................................................................................................................................................... 14
B. Contracts ....................................................................................................................................................... 14
   1. Arbitration ....................................................................................................................................................... 14
   2. Indemnity ....................................................................................................................................................... 16
3. Liens ................................................................................................................................................................. 16

VI. COMMERCIAL GENERAL LIABILITY INSURANCE.......................................................................................... 19

I. INTRODUCTION

The focus of this paper is to examine effective tools and methods for minimizing risks that are available to residential general contractors whose primary business is the construction and sale of single family homes (hereinafter referred to as “Builder” or “Builders”). This paper is not intended as a survey of all products available or manners in which to reduce a Builder’s liability. Instead, it will discuss numerous methods to reduce liability while engaging in detailed discussions of those suggestions with specific examples and explanations. The primary discussion points in this paper, as they relate to construction risk management, are methods employed by my firm to help its clients avoid future litigation and undue exposure to liability. This is a proactive approach that subscribes to the theory that “an ounce of prevention is worth a pound of cure.” For a more complete list of topical suggestions used to manage residential construction risks, to be discussed with Builders, please refer to Appendix A.

The obvious intent of employing the tools and methods to be discussed in this paper is to reduce liability of the Builder, but the tension for the employment of these suggestions by a Builder or its counsel is that it can be administratively burdensome, expensive, and opportunity limiting (i.e. result in lost business or lost sales). In other words, the residential construction business in Texas is highly competitive. Thus, Builders are often focused on the construction and sale of their product to the detriment of sound risk management. This concern for profitability and administrative ease may increase monetary gains but it often comes with the expense of generating more litigation or increasing the Builder’s legal exposure to claims. Consequently, this paper advocates a proactive dialogue between Builder and its legal counsel in an effort to sustain long-term financial health.

II. LIFE WITH THE TEXAS RESIDENTIAL CONSTRUCTION COMMISSION.

A. Basic Compliance equals Basic Competence.

With passage of Title 16 of the Texas Property Code (i.e. §401.001 to §438.001), the Texas Residential Construction Commission Act (the “TRCCA”), a discussion of construction-risk management for Builders should began with TRCCA compliance. In short, the TRCCA defines a Builder as a business or person that, for a fee, constructs a new home, remolds a home for $20,000 or more, or serves as a risk retention group or third-party warranty company. See TEX. PROP. CODE §401.003. At a minimum, compliance for “Builders” as defined by the TRCCA requires that Builders apply for and register with the Texas Residential Construction Commission (the “Commission”), renewing their registration on a biennial basis. See TEX. PROP. CODE §§416.001-416.004. For a complete list of fees for Builders, please see Appendix B, which is a copy of the Commission’s published fee schedule for the fiscal 2006-2007 year.

The TRCCA also requires that Builders register the projects upon completion, whether a new home or a qualifying job (i.e. $20,000 or more). TEX. PROP. CODE §426.003. Compliance with the TRCCA is important for many reasons, but the most immediate reason may be that the Commission is charged with disciplinary powers and the ability to levy administrative penalties. See TEX. PROP. CODE §418.001 et seq. & §419.001 et seq. Pursuant to these sections of the Property Code, upon finding that a Builder has committed a prohibited act under the TRCCA or Commission rule, the Commission can reprimand the Builder, revoke or suspend registration or certification, assess an administrative penalty, or initiate an action to enjoin further action in violation of the Act or Commission rule.

The financial impact on a Builder can be substantial as fines can reach $5,000 for each violation. See TEX. ADMIN. CODE §305.22(b)(2). The Commission considers each day that a violation occurs to be a separate violation of the TRCCA. See TEX. ADMIN. CODE §305.22(b)(1). Consequently, should the violation merit it, the Commission could fine a Builder $5,000 per day per violation. It appears that the Commission has recently increased its activities related to enforcement actions against Builders for violations of the TRCCA. This is demonstrated by Appendix C in which the Commission penalized twenty-four (24) Builders for a total of $23,000 as of December 1, 2006. Out of these twenty-four (24) Builders, three (3) had their registration with the Commission revoked and five Builders were fined $2,500 each. According to the Commission, with revocation of registration a Builder can no longer operate in Texas legally.

From a litigation standpoint, the impacts of a Builder’s failure to comply with the TRCCA go well beyond the concern of administrative action from the Commission. If a Builder fails to register as a Builder with the Commission, fails to renew its registration as required, or fails to register homes or projects timely, it provides the appearance of a company or person in the residential–building industry that is either ignorant of the TRCCA and its requirements or indifferent to complying with them. This non-compliance picture of
incompetence is obviously not the image a Builder
wants painted by a homeowner or their attorney when
faced with defending a defect claim; especially when
over 26,000 Builders have registered with the
Commission as of January 2007, registering over
416,000 new homes. See “On The Level,” 1st Quarter
2007, published by the Texas Residential Construction
Commission (www.trcc.state.tx.us). To state the
obvious, Builders should comply with the TRCCA and
the registration related rules promulgated by the
Commission.

B. The State Sponsored Inspection and Dispute
Resolution Process v. Substantial Completion
of Improvements.

Two of the primary purposes of the TRCCA were
(1) the creation of the statutory warranties and building
and performance standards, and (2) the attempted
resolution of homeowner complaints via the State
Sponsored Inspection and Dispute Resolution Process
(“SIRP”). The TRCCA requires the following
warranties: one year workmanship and materials; two
year systems; ten year structural; and ten year
habitability (collectively known as the “Warranties”).
TEX PROP. CODE §430.001(b) & §430.002(a) and T EX.
ADMIN. CODE §304.3(a). This is no surprise, but the
important question for the homeowner and Builder, is
when do these warranties begin to run?

1. Warranty Effective Date for New Homes.

As of June 1, 2005, the Commission has defined
the effective date of the Warranties for a new home
as the earlier of the date of occupancy or transfer of
title from the Builder to the initial homeowner.
TEX. ADMIN. CODE §304.3(g)(1). On its face this is a
logical and objective effective date for the Warranties.
However, this definition of effective date has several
pitfalls.

The TRCCA provides a mechanism for
homeowners, or Builders, to circumvent the TRCCA
by claiming that a Builder abandoned the project
before completion. See TEX. PROP. CODE §426.001(b)(2). This provision states specifically that the
entirety of Subtitle D of Title 16 of the Texas
Property Code, dealing with SIRP and the Warranties,
“does not apply to a dispute out of ... a Builder’s
wrongful abandonment of an improvement project
before completion.” Id. This is an attractive prospect
for many homeowners and their counsel as it provides
an opportunity to circumvent the Commission
altogether by claiming abandonment, whether true or
not.

If this allegation is made by either homeowner or
Builder – i.e. that the project was abandoned before
completion and thus the TRCCA does not apply – the
Commission must make a factual determination as to
the accuracy of this claim. This often results in an
exchange of letters between counsel for the
homeowner and Builder with attached evidence as to
the “completion” status of the subject improvement.
The Commission may or may not make a
determination in your client’s favor, and it may even
choose to make no ruling at all. Regardless, the end
result is that this abandonment claim can result in no
SIRP inspection, the loss of the opportunity to resolve
the dispute, and the premature onset of litigation.
Unfortunately, if your goal is to actually resolve a
dispute via a SIRP prior to any litigation or suit, this
 provision of the TRCCA can be and is used to argue
out of Commission jurisdiction and the related SIRP
inspection.

A proper reaction may be to argue that the project
was not abandoned by the Builder as it is “substantially
complete” as defined by TEX. ADMIN. CODE
§304.1(c)(16). Substantial Completion is defined by
this rule as

The later of the stage of construction when
a new home, addition, improvement, or
alteration to an existing home is
sufficiently complete that the home,
addition, improvement or alteration can be
occupied or used for its intended purpose
or, if required, the issuance of a final
certificate of inspection or occupancy by
the applicable governmental authority. Id.

Again, the problem is that the first portion of this
definition requires the Commission to make a factual
determination as to whether the subject improvement
“can be occupied or used for its intended purpose.” Id.
However, neither the TRCCA nor related
administrative rules charge the Commission with
making such a determination. As a result, the
Commission may not make any such determination,
allowing the parties to bypass the TRCCA altogether.

Consequently, a Builder should consider
contractually modifying the effective date of the
Warranties to avoid this problem. This effective date
modification is contemplated specifically by the
Commission’s rules. See TEX. ADMIN. CODE
§304.3(g)(1). With contractual modification, each
major phase of construction could be subject to an
effective warranty with progression of the construction
project. For example, a provision in the construction
contract could read

SUBSTANTIAL COMPLETION: The
parties to this Contract agree that the
construction of the subject improvements
will take place in phases; by example,
these completed phases include, but are
not limited to, lot preparation and grade,
rough plumb, foundation, framing,
roofing, rough electrical, plumbing top-out, brick/exterior, sheetrock and texture, finish out, trim, paint, fixtures, flatwork, yard/landscaping, etc. The parties hereby recognize all separate phases of construction and agree that each phase of the construction will be considered substantially complete, with an effective warranty and subject to the terms and rules of the TRCCA, with the completion of each industry recognized phase of construction (e.g. the foundation is deemed substantially complete, with an effective structural warranty, once poured and tensioned). Regardless of the phased substantial completion, for determining the expiration date of each statutory warranty under the TRCCA, such expiration date will be determined from the transfer of title to homeowner, occupancy of homeowner, or issuance of final inspection or certificate of occupancy, whichever occurs first.

In this manner, a claim by a homeowner or Builder of abandonment could not defeat the applicability of the TRCCA to the allegedly defective portion of the subject improvement but for portions of the improvements that remain incomplete.

Such a provision would also protect against unhappy homeowners that decide to stop construction prior to moving in or transfer of title because even though the improvements may be at or near completion, the Commission would not perform a SIRP because the home would not be considered substantially complete by administrative definition. Thus, modification of the effective dates of the Warranties and the definition of substantial completion becomes attractive if one desires the assistance of the Commission and a SIRP.

2. Warranty Effective Date for a Repair, Remodel, or Partially Built Home.

The definition of Effective Date of Warranties differs for remodels/qualifying projects from that for a new home. The Commission defines the effective date of warranties for improvements other than new homes as “the date the improvement is substantially completed or the terms of the construction contract are substantially fulfilled.” TEX. ADMIN. CODE §304.3(g)(2). This definition can be disastrous if you are seeking a SIRP as no objective date of completion is apparent from the definition itself. In other words, no substantial completion equals no effective Warranties, which in turn results in no SIRP or other involvement from the Commission. See TEX. PROP. CODE §430.001(g) (stating that the Warranties begin on the date of substantial completion). It seems that the definitions of substantial completion can defeat one of the TRCCA’s primary goals – dispute resolution between homeowner and Builder.

As already discussed, the Commission does define substantial completion in TEX. ADMIN. CODE §304.1(c)(16) as

The later of the stage of construction when a new home, addition, improvement, or alteration to an existing home is sufficiently complete that the home, addition, improvement or alteration can be occupied or used for its intended purpose or, if required, the issuance of a final certificate of inspection or occupancy by the applicable governmental authority. Id.

Again, this definition requires the Commission to make a factual determination as to whether the subject improvement “can be occupied or used for its intended purpose.” The Commission may not make any such determination. The second portion of the definition is also not particularly helpful as many projects are not located within a municipality, and, thus, no inspection is required, which would meet the definition of substantial completion for projects other than a new home. Or, the homeowner has moved back in but an inspection was required but not obtained – what then? Again, this highlights the need for a Builder to consider contractually modifying the contract between the parties to address this potential issue. A provision to address this problem could be worded like the following

SUBSTANTIAL COMPLETION

Substantial completion is defined as any of the following: 1) the date of final inspection, 2) when Contractor notifies Owner that the work has been substantially completed in accordance with the estimate[s] and plans, or 3) whenever Owner moves back into the Property, whichever occurs first. Punch-list items (e.g. adjustments, paint touch-up, minor repairs, omissions, cleaning, etc.), or disputes as to the completeness of the project or contract shall not be a basis for withholding any payment or any portion thereof, nor is it a basis for claiming that the project is not substantially complete.

Contract provisions like the examples above would go a long way to keeping any claim under the Commission’s jurisdiction, which in turn could promote resolution via the State-Sponsored Inspection
C. Finished Floor Elevations.

The passage of the Texas Residential Construction Commission Act has necessitated some changes in residential-building procedures. One such change is the need to always record original construction elevations prior to substantial completion. If no actual floor elevations are taken by the Builder, “then the foundation for the habitable areas of the home are presumed to be level +/- 0.75 inch (three-quarters of an inch) over the length of the foundation.” TEX. ADMIN. CODE §304.1(c)(13). The presumption of a level floor because no elevations were taken can result in a finding of a structural defect of the home’s foundation when none actually exist.

The applicable performance standard for slab foundations adopted by the Commission can be found in TEX. ADMIN. CODE §304.100(a) and is as follows:

1. Slab foundations should not move differentially after they are constructed, such that a tilt or deflection in the slab in excess of the standards defined below arises from post-construction movement. The protocol and standards for evaluating slab foundations shall follow the "Guidelines for the Evaluation and Repair of Residential Foundations" as published by the Texas Section of the American Society of Civil Engineers (2002), hereinafter referred to as the "ASCE Guidelines" with the following modifications:

   A. Overall deflection from the original construction elevations shall be no greater than the overall length over which the deflection occurs divided by 360 (L/360) and must not have more than one associated symptom of distress, as described in Section 5 of the ASCE Guidelines, that results in actual observable physical damage to the home. 

   B. The slab shall not deflect after construction in a tilting mode in excess of one percent from the original construction elevations resulting in actual observable physical damage to the components of the home.

2. If measurements and associated symptoms of distress show that a slab foundation does not meet the deflection or tilt standards stated in paragraph (1) of this subsection, a third-party inspector's recommendation shall be based on the appropriate remedial measures as described in Section 7 of the ASCE Guidelines.

Based on these criteria for deflection and tilt in a home’s foundation, a structural defect could be found to exist even though much or all of the tilt or deflection were original to the construction. To be sure, the performance standards do require “symptoms of distress” or observable physical damage” to the home, but it is common for homes to experience cosmetic distress over time that may not be related to or an indication of significant foundation movement.

So, it follows that if no original floor elevations were taken by the Builder and some cosmetic distress is present in the home, a Builder could be required to undertake expensive repairs when none are actually needed or much more modest remedial measures may be appropriate. The Builder should take floor elevations near construction completion so there will be objective data to compare to the elevations taken by a third-part inspector during a SIRP; these elevations can also be used to refute the inspector’s findings on appeal if a finding was rendered that the foundation has failed the applicable performance standard. If you then couple elevations taking during a SIRP that exceed either the enumerated deflection or tilt performance standards with cosmetic distress, foundation repairs will be required – not a bright prospect for Builder or homeowner if the measured deflection or tilt are, in reality, original to the foundation pour during construction.

Floor elevations should be taken at a rate of approximately one elevation per one-hundred (100) square feet showing a reference point, and each elevation taken should describe the floor or floor covering present. See TEX. ADMIN. CODE §304.1(c)(13). These elevations should be preserved in the construction file and a Builder should consider providing a copy to the homeowners. In this manner, if any claim is made in the future concerning foundation movement, the SIRP inspector will have an excellent reference point for the inspection.

III. CONTRACT DEVELOPMENTS – SALES CONTRACTS AND INDEPENDENT CONTRACTOR AGREEMENTS

A. Introduction

Perhaps the most effective way to manage risk is the use of good contracts. Unfortunately, it is common for Builder’s to use their own sale contract, contracts that are outdated, or simply use poorly drafted agreements. For Builders, that excuse is no longer valid as the Texas Association of Builders (“TAB”) has published a comprehensive set of construction contracts and related documents that can be purchased for a nominal fee. These documents are updated with each legislative session that results in changes to the Residential Construction Liability Act, Texas Residential Construction Commission Act, or related construction law.
With the creation of the TRCCA and amendments to Chapter 27 of the Texas Property Code, known as the Residential Construction Liability Act (“RCLA”), a need arose for significant contractual changes in the residential-construction industry. To adapt to the passage of the TRCCA and the RCLA amendments, as well as other changes in the legal environment affecting residential construction, TAB recognized the need for a set of comprehensive and uniform documents. Because this can be a complex and time-consuming job, TAB formed a Contract Task Force to create a comprehensive set of contract documents that are fair and reasonably easy to understand and use.

B. Tab Contract Task Force

The Task Force consisted of individuals from the construction, real estate, and legal communities. The members included: Chuck Dennis, Chairman – Dennis Custom Homes; Robert L. Russell Bush – Attorney with Bush & Motes, P.C.; Jay Dyer – Regulatory and Legislative Counsel, Texas Association of Builders; David Fair – Chairman of the Board, Hexter-Fair Title Company; Henry “Hank” W. Fielder – Attorney with Sheehy, Lovelace & Mayfield, PC; Greg Harwell – Attorney with Gardere Wynne Sewell, LLP; George Lewis – George Lewis, Inc.; Chuck Pignuolo – Attorney with Devlin & Pignuolo, PC; Bill Slease – Builder and Remodeler; Kristi Sutterfield – Executive Director, Texas Association of Builders; Ray Tonjes – Ray Tonjes Builder, Inc., Austin, Texas; Don Westfall – Vice President and General Counsel, Centex Homes. The Task Force met many times over the course of nearly two years before the current version of the contracts was finalized.

C. How The Tab Contracts Were Developed

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

D. What Forms Are Included In The Tab Contract Package

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

1. Contracts for Custom Construction Jobs on the Owner’s Property, both fixed price and cost plus, and all associated Addenda. These contracts are mechanic’s lien contracts for use with construction of a home on the customer’s property. Whichever contract the Builder uses, it is important that the contract be notarized at the time the Owner signs it so that it can be filed in the property records in accordance with Section 53.254(e) of the Texas Property Code.

2. Contract for Homes Constructed on the Builder’s Property and related Addenda. This contract should be used when the Builder owns the lot and will be constructing a home for a customer who will buy both the home and the lot upon completion of the improvements. If the home is partially completed or completed at the time of signing a contract with a customer, the Builder should use the contract discussed in the following paragraph.

3. Contract for Partially Completed or Completed Home (commonly known as a “spec” home) and all associated Addenda. This contract should be used if the home is partially completed or fully completed at the time the Builder signs a contract with its customer, commonly referred to as a “spec” home.

4. Contracts for Custom Remodeling Jobs on the Owner’s Property whether fixed price or cost plus. These contracts are mechanic’s lien contracts for use with a remodeling project. Again, whichever contract the Builder uses, it is important that the contract be notarized at the time the homeowner signs it so that it can be filed in the property records in accordance with Section 53.254(e) of the Texas Property Code.

E. Additional Documents contained with the TAB Contracts

1. Addenda

Each Contract type comes with its own set of Addenda that are specifically tailored for use with that contract. So, when a Builder selects which contract to use, no mixing or matching of addenda is required by the Builder. Instead, with selection of the contract, all addenda needed for that contract are attached. This is true whether for sale or construction of a new home or a remodel job. Some of the types of addenda included in the TAB Contracts package include: Legal Description; Special Conditions Addendum; Financing Addendum; Addendum for Property Subject to Mandatory Membership in An Owners’ Association;
Notice Regarding Coastal Area Property; Final Customer Walk-Thru Approval and Punch List; Selection Schedule Addendum; Change Order Form; Real Estate Broker’s Fee Addendum; Addendum for Property Located Seaward of the Gulf Intracoastal Waterway; Assignment of Manufactured Product Warranties; Waiver of List of Subcontractors and Suppliers; Addendum for Disclosure of Information on Lead-Based Paint and Lead-Based Paint Hazards as Required by Federal Law; and Affidavit of Completion.

2. Assignment
All Contracts in the TAB Contracts package that are mechanic’s lien contracts include an Assignment at the end of the contract. The “Assignee” blank is for the name of the homeowner’s lender. The assignment allows the lender to have a first lien position for all funds paid to the Builder from the construction loan. This form is often required by lenders for issuance of a construction loan to a homeowner for mechanic’s lien jobs. In addition, it is typically preferable that a Builder execute the assignment form provided with the TAB Contracts than executing one provided by a lender.

3. Indemnity and Affidavit as to Payment of Bills and Release of Liens
This affidavit is for use and execution by the Builder when all subcontractors and suppliers have been paid. It states that the Builder has paid each person in full for all labor and materials used in the construction of improvements on the property. This form is often required by lenders for issuance of a construction loan to a homeowner for mechanic’s lien jobs. In addition, it is typically preferable that a Builder execute the assignment form provided with the TAB Contracts than executing one provided by a lender.

4. Independent Contractor/Supplier Base Agreement and Authorization to Obtain DPS Criminal History Record
This agreement is for use as a contract between the Builder and a contractor, subcontractor or supplier who will be supplying labor or materials for a job. There are blanks in the form for insurance coverage which the Builder is requiring from the subcontractor/supplier. Ideally, a subcontractor would carry coverage in the same amount as the Builder; however, a general rule of thumb is that the subcontractor/supplier should carry at least $500,000 per occurrence and $1,000,000 aggregate for both bodily injury and property damage, although the individual circumstances of the job or the contract may make a higher or lower amount appropriate. It is best for the Builder to consult his insurance agent as to the limits that may be appropriate under the circumstances of any particular job.

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

Therefore, if the Builder or remodeler has a contract with a customer who is living in the residence where work will be performed or materials such as appliances, HVAC equipment, or electrical fixtures will be installed, a criminal history record should be obtained by the Builder or remodeler on all employees, agents, prospective employees, and subcontractors who will be entering a customer’s residence. The Builder or remodeler should also request that their subcontractors obtain criminal history records on all of their employees, agents, prospective employees and subcontractors prior to entering a person’s residence. This form can be used to obtain the criminal history record from ALL STATES from the Texas Department of Public Safety or a private vendor approved by the Department of Public Safety.

5. Down Date Waivers–Lien Waivers (For Use with Contractors, Subcontractors and Sub-Subcontractors)
Six Down Date Waiver forms are provided in the TAB Contracts package. There are two forms to be signed by the Builder, two forms to be signed by a first-tier Subcontractor (Subcontractor), and two forms to be signed by a second-tier subcontractor (Sub-subcontractor). Any person signing the form is representing three things: 1) that he or she is authorized to sign on behalf of the Builder/Subcontractor; 2) that, except for retainage, if any, all charges for labor performed and material furnished by the Builder/Subcontractor related to the work described in the Down Date Waiver on or before the Down Date has been paid in full to the Builder/Subcontractor; and 3) that the Builder/Subcontractor has fully paid all of its subcontractors for labor performed and material furnished in connection with the work on or before the Down Date. Finally, the form releases all claims
against the homeowner or the property (including liens and claims of liens) that the Builder/Subcontractor has in relation to work completed on or before the Down Date. Work completed after the Down Date is not affected by the Down Date Waiver. The forms that have acknowledgments can be filed in the property records of the county in which the property is located.

IV. SPECIFIC PROVISIONS IN THE TAB CONTRACTS

The TRCCA, the RCLA, and several recent appellate court decisions require Builders and their legal counsel to understand and address a number of legal issues. This paper does not attempt to list or discuss all of these issues, especially as it relates to the previously discussed need for Builder compliance with the TRCCA and the statutory warranties. However, some of the remaining issues include the following:

A. Warranties on Residential Construction

1. What the Commission has Done

The Warranty and Standards were adopted by the Commission on January 12, 2005 and apply to projects commenced on or after June 1, 2005. The Commission has stated that “construction commences” on the earlier of the date that the parties enter into an agreement for a transaction governed by the TRCCA or the date that work commences.

For homes that were commenced before June 1, 2005, Section 401.002 of the TRCCA provides that the construction should comply with the standards under any express warranty provided 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.

2. Specific Clauses in the TAB Contracts Regarding Warranties

a. The following clause is found in TAB 1.1 and 2.1 and a similar clause is found in the other contracts:

“WARRANTY - Owner acknowledges, understands and agrees that the only warranty or warranties (Limited Warranty) given by Builder to Owner relating to the Improvements are described in: (check one or both of the following)

- 1) the applicable limited statutory warranty promulgated by the Texas Residential Construction Commission (TRCC);
- 2) the express limited warranty provided through a third-party warranty company, a specimen copy of which is attached hereto and made a part hereof by reference.

Owner acknowledges that the terms of such Limited Warranty are clear, specific and sufficiently detailed to establish the only standards of construction which Builder is obligated to meet. Applicable warranties on “Manufactured Products,” as defined in §304.1(c)(12) of the TRCC Limited Statutory Warranty and Building and Performance Standards (TRCC Warranty) will be assigned, without recourse, to Owner upon payment of the Total Contract Price pursuant to §304.3(b) of the TRCC Warranty. This assignment shall be evidenced by Builder’s execution and delivery to Owner of the document entitled “Assignment of Manufactured Product Warranties” which is attached hereto as an addendum. Owner understands and agrees that proper maintenance of the Improvements is required to ensure (i) the Limited Warranty remains in effect and (ii) the proper performance of the Improvements.”

b. The following clause is found in TAB 5.1 and 6.1:

“WARRANTY - Owner acknowledges, understands and agrees that the only warranty or warranties (Limited Warranty) given by Builder to Owner relating to the Improvements are described in: (check the applicable items)

- 1) the applicable limited statutory warranty promulgated by the Texas Residential Construction Commission (TRCC), a copy of which can be found at http://www.trcc.state.tx.us/links/warranties.htm;
- 2) the express limited warranty provided through a third-party warranty company, a specimen copy of which is attached hereto and made a part hereof by reference;
- 3) the express limited warranty, a specimen copy of which is attached hereto and made a part hereof by reference (if the Improvements are to the interior of an existing home and the Total Contract Price is less than $20,000.00 or the Improvements are not a material improvement to the home as
defined by the TRCC in Title 10, Texas Administrative Code §301.1).

Owner acknowledges that the terms of such Limited Warranty are clear, specific and sufficiently detailed to establish the only standards of construction which Builder is obligated to meet. Applicable warranties on “Manufactured Products,” as defined in §304.1(c)(12) of the TRCC Limited Statutory Warranty and Building and Performance Standards (TRCC Warranty) will be assigned, without recourse, to Owner upon payment of the Total Contract Price pursuant to §304.3(b) of the TRCC Warranty. This assignment shall be evidenced by Builder’s execution and delivery to Owner of the document entitled “Assignment of Manufactured Product Warranties” which is attached hereto as an addendum. Owner understands and agrees that proper maintenance of the Improvements is required to ensure (i) the Limited Warranty remains in effect and (ii) the proper performance of the Improvements. Builder shall not be obligated under any warranty given to Owner until the Total Contract Price and all Additional Cash Payments have been paid in full.”

B. Third-Party Warranty Programs

1. What the TRCCA Requires

The TRCCA specifically addresses the role of third-party warranty companies in Texas and states that the Commission may approve as a third-party warranty company: 1) an entity that has operated warranty programs in Texas for at least five years; 2) a company whose performance is insured by an insurance company authorized to engage in the business of insurance in Texas; or 3) an insurance company that insures the warranty obligations of a Builder under the statutory warranty and building and performance standards.

A third-party warranty company wishing to operate in Texas must submit to the Commission an annual application and fee in the form and in the amount required by the Commission by its rules. The Commission has not yet promulgated an application form or set the fee to be paid with the application.

With respect to third-party warranty companies, the TRCCA specifically provides: 1) a Builder may elect to provide a warranty through a third-party warranty company approved by the Commission; and 2) a Builder may transfer his contractual warranty liability to the third-party warranty company if the company agrees to perform the Builder’s warranty obligations under the TRCCA that are covered by the warranty provided through the third-party warranty company and actually pays for or corrects any construction defect covered by the warranty provided through the third-party warranty company.

Since a third-party warranty company approved by the Commission has all of the rights of the Builder under the TRCCA regarding performance of repairs to remedy construction defects or payment of money in lieu of repairs, a homeowner who has a complaint against a third-party warranty company is required to go through the State-sponsored administrative process discussed below. If, after the administrative process is concluded, the homeowner elects to bring a cause of action or a legal claim against a third-party warranty company for breach of the limited statutory warranty, the only damages that a successful homeowner can recover are those provided in amended Section 27.004 of the RCLA. As stated above, the TRCCA also provides that a breach of a limited statutory warranty shall not, by itself, constitute a violation of the Texas Deceptive Trade Practices-Consumer Protection Act (“DTPA”). This is a significant change from prior Texas law which provided that any breach of a warranty, express or implied, was an automatic violation of the DTPA.

2. Registered Third-Party Warranty Companies that have been Approved by the TRCC:

a. ACES Builder’s Warranty
b. American eWarranty L.L.C. d/b/a American eBuilder
c. Bonded Builders Home Warranty Association of Texas, Inc.
d. Home Buyers Warranty Corporation d/b/a 2-10 Home Warranty
e. Home Owners Management Enterprises, Inc.
f. Professional Warranty Service Company
g. Residential Warranty Corporation
h. StrucSure Home Warranty L.L.C.

C. State-Sponsored Inspection and Dispute Resolution Process (“SIRP”)

1. What the TRCCA Requires

The TRCCA contains a mandatory administrative process designed to facilitate resolution of disputes relating to alleged residential construction defects. This administrative process does not apply to the following types of claims: 1) claims solely for personal injury, survival or wrongful death, 2) damage to goods, 3) violations of Section 27.01 of the Texas Business & Commerce Code (statutory fraud claims), 4) a Builder’s wrongful abandonment of an improvement project before completion, or 5) a Builder’s misappropriation of construction trust funds in violation of Chapter 162 of the Texas Property Code.
If a dispute between a homeowner and Builder arises out of an alleged construction defect, the homeowner must first provide the Builder with written notice of each construction defect the homeowner claims to exist. This written notice must be given at least thirty (30) days before the homeowner contacts the Commission to initiate the statutory dispute resolution process. After this notice is provided, the Builder and the Builder’s designated consultants, if any, must be given a reasonable opportunity to inspect the home. If the homeowner and the Builder are unable to resolve the dispute within the aforesaid thirty-day time period, the homeowner or the Builder may submit to the Commission a written request for state-sponsored inspection and dispute resolution. This request must: 1) specify in reasonable detail the alleged construction defects, 2) state the amount of any known out of pocket expenses and engineering or consulting fees incurred by the filing party in connection with each alleged construction defect, 3) include any evidence that depicts the nature and cause of each alleged construction defect and the nature and extent of repairs necessary to remedy the construction defect, including, if available, expert reports, photographs and videotapes, 4) be accompanied by the fees required in the TRCCA, which at this time for homeowners are $250.00 for all types of claims, whether for workmanship and materials claims, structural claims, or for a combined structural and unrelated workmanship and materials claim, and 5) state the name of any person who has, on behalf of the requesting party, inspected the home in connection with the alleged construction defects. See Appendix B – Fee Schedule.

The TRCCA expressly states that a homeowner must comply with the state-sponsored inspection and dispute resolution process before initiating an action for damages or other relief arising from an alleged construction defect. Furthermore, this state-sponsored inspection and dispute resolution process must be requested on or before the second anniversary of the date of discovery of the conditions claimed to be evidence of the construction defects, but not later than the 30th day after the date the applicable warranty period expires.

A person who submits a request to the Commission for administrative review must send by certified mail, return receipt requested, a copy of the request, including all evidence submitted with the request, to each other party involved in the dispute.

On or before the 15th day after the date the Commission receives a request, the Commission must appoint the next available third-party inspector from the applicable list of third-party inspectors maintained by the Commission. For workmanship issues, the inspector must have at least five years experience in residential construction and be certified by the International Code Council as a “residential combination” inspector. For structural issues, the inspector must be a state licensed professional engineer or architect with at least ten years experience in residential construction.

If the dispute involves workmanship and materials in a home of a nonstructural matter, the third-party inspector must issue a recommendation not later than the 15th day after the date the third-party inspector receives the appointment from the Commission.

If the dispute involves a structural matter in the home, the Commission must appoint an approved engineer to be the third-party inspector. This third-party inspector must inspect the home not later than the 30th day after the date that the request is submitted and issue a recommendation not later than the 60th day after the date the third-party inspector receives the assignment from the Commission, unless additional time is requested by the third-party inspector or a party to the dispute.

The third-party inspector’s recommendation must address only the construction defects, based on the applicable warranty, building and performance standards, and warranty exclusions, cite the code/standard(s) violated, if applicable, and designate a range of repair or remediation options, if any. The third-party inspector’s recommendation may not include a recommendation for payment of any monetary consideration, the price of repair, or value of any loss suffered by the homeowner or include remarks other than those related to the disputed issues.

A homeowner or Builder may appeal a third-party inspector’s recommendation on or before the 15th day after the date the recommendation is issued. If there is an appeal, the Executive Director of the Commission must appoint three state inspectors to a panel to review the recommendation. This panel must review the recommendation and can approve, reject, or modify the recommendation of the third-party inspector or remand the dispute back to the third-party inspector for further action.

In any legal action involving a construction defect brought after a recommendation by a third-party inspector or a ruling by the panel of state inspectors on the existence of a construction defect or its appropriate repair, the recommendation or ruling shall constitute a rebuttal presumption of the existence or non-existence of a construction defect and the reasonable manner of repair of the construction defect. A party seeking to dispute, vacate, or overcome that presumption must establish by a preponderance of the evidence that the recommendation or ruling is inconsistent with the applicable warranty and building and performance standards.
2. What the Commission has Done
   The Commission adopted Rules for SIRP which comply with the requirements of the TRCCA, forms for filing a SIRP request and instructions on how to file a SIRP request. Flowcharts and a suggested Timetable for Responding to Residential Construction Defect Claims is included in the materials.

3. Specific Clause in the TAB Contracts Regarding SIRP
   a. The following clause is found in all the TAB contracts:
      
      “State of Texas Administrative Resolution: Any dispute involving, relating to or arising out of a construction defect, as that term is defined in Chapter 401 of the Texas Property Code, may be submitted by either party, in its sole discretion, to the Texas Residential Construction Commission or any successor thereto (the Commission) in accordance with the Commission’s applicable policies and procedures (Commission Process). If such dispute is not resolved within fifteen (15) days following the conclusion of the Commission Process and applicable procedures under Chapter 27 of the Texas Property Code, then the dispute shall be submitted to mediation and, if not settled during mediation, to binding arbitration as provided by the Federal Arbitration Act (9 U.S.C. §§ 1 et seq.) according to the terms and conditions set forth below.”

D. Arbitration
   1. What the TRCCA Requires
      The TRCCA does not contain any prohibitions against or restrictions on arbitration of construction defect disputes pursuant to a contractual agreement to arbitrate. Builders who wish to include a binding arbitration clause in their contracts can and should do so, although the language of such provisions needs to be carefully considered in light of recent appellate cases. “Arbitration” is defined in the TRCCA as “the procedure for dispute resolution described by Section 154.027, Civil Practice and Remedies Code.” This particular section references both binding and non-binding arbitration and states that “if the parties do not stipulate in advance that the award is binding, the award is not binding and serves only as a basis for the parties’ further settlement negotiations.” Although arbitration is, by definition, a binding procedure, it is probably best to expressly state in the contractual arbitration clause that the arbitrator’s award will be binding on both parties.

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

In any arbitration proceeding between the parties:

a) All applicable Federal and State law (including Chapter 27 of the Texas Property Code) shall apply;

b) All applicable claims, causes of action, remedies and defenses that would be available in court shall apply;

c) The proceeding shall be conducted by a single arbitrator selected by a process designed to ensure the neutrality of the arbitrator;

d) The parties shall be entitled to conduct reasonable and necessary discovery;

e) The arbitrator shall render a written award and, if requested by any party, a reasoned award;

f) The Owner shall not be required to pay any unreasonable costs, expenses or arbitrator’s fees and the arbitrator shall have the right to apportion the cost of any such items in an equitable manner in the arbitration award; and

h) Any award rendered in the proceeding shall be final and binding and judgment upon any such award may be entered in any court having jurisdiction.

Owner and Builder agree that notwithstanding anything to the contrary, the rights and obligations set forth in this mediation-arbitration agreement shall survive (1) the termination of this Contract by either party; (2) the default of this Contract by either party; or (3) Substantial Completion and payment in full of the Total Contract Price. The waiver or invalidity of any portion of this mediation-arbitration agreement shall not affect the validity or enforceability of the remaining portions of this mediation-arbitration agreement and/or the Contract.

Owner and Builder further agree (1) that any dispute involving Builder’s directors, officers, partners, employees and agents shall be resolved as set forth herein and not in a court of law; and (2) that Builder shall have the option to include its subcontractors and suppliers as parties in the alternative dispute resolution procedures set forth in this Contract.

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

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

E. Conditional Sale to Builder Provision under the Residential Construction Liability Act (“RCLA”)

1. What the RCLA Contains

Section 27.0042 of the RCLA, added by HB 730, contains a provision for the conditional sale of a home to the Builder if the cost of repairs for construction defects exceeds an agreed percentage of the fair market value of the home, as determined without reference to the construction defects. For this provision to be operative, it must be contained in a written agreement between the Builder and the homeowner and be exercisable only if the home is less than five (5) years old. If a Builder elects to purchase a home under this contract provision, the Builder must pay the original purchase price and closing costs incurred by the homeowner and the cost of transferring title to the Builder. The homeowner may also recover reimbursement for permanent improvements made to the home after the date the homeowner originally purchased the residence from the Builder, as well as reasonable and necessary attorney’s fees and moving costs. An offer to repurchase under this provision is considered a reasonable offer under the RCLA absent clear and convincing evidence to the contrary.

2. Specific clause in the TAB Contracts Regarding Conditional Sale to Builder

a. The following clause is found in TAB 3.1 and TAB 4.1:

“Re-Purchase Option: Pursuant to § 27.0042 of the Texas Property Code, should the Buyer discover, during the first five (5) years after Closing, one or more defects in the construction of the Improvements that exceed in the aggregate twenty percent (20%) of the fair market value of the Improvements, upon receipt of written notice and an opportunity to inspect the defects, the Builder may elect to repurchase the Improvements and Property. If the Builder elects this option, the Buyer shall be reimbursed the Total Sales Price and all closing costs incurred by the Buyer, plus reimbursement of the cost of any permanent improvements made by the Buyer to the Improvements and the Property, reasonable moving expenses to vacate the Improvements, and reasonable and necessary attorney’s fees and inspection costs incurred by the Buyer to discover, identify and present the construction defects to the Builder. In return, the Buyer will deliver a Special Warranty Deed conveying the Improvements and Property to the Builder, free and clear of all liens and claims and deliver possession of the Improvements and Property free of any casualty or damage caused by the Buyer, normal wear and tear excepted.”

F. Builder’s Right to Termination

1. Specific clause in the TAB Contracts Regarding Builder’s Right of Termination

a. The following clause is found in TAB 1.1 and 2.1 with a similar clause in all of the other contracts:

“Termination/Stipulated Damages Prior To Substantial Completion: In the event any bona fide and material misunderstanding involving an amount equal to or greater than three (3%) percent of the Total Contract Price shall arise between Builder and Owner prior to Substantial Completion concerning the design or construction of the Improvements or any other matter relating to the interpretation or implementation of this Contract, then Builder shall have the right (Builder’s Termination Right), upon written notice to the Owner, to terminate the Contract. In the event of termination of this Contract by the Builder pursuant to this
paragraph, Builder shall return the Termination Damages portion of the Initial Cash Payment as defined above, plus an additional sum of $1,000.00, an amount which the parties agree to be a reasonable and foreseeable estimate of the damages that might be experienced by the Owner incident to the cancellation of this Contract (it being difficult if not impossible to ascertain those damages). Upon such termination of this Contract by Builder and tender of the stipulated damages, no cause of action against Builder shall accrue to the Owner and Owner shall execute a written release of this Contract and deliver it to the Builder or the Title Company. Builder is not required to apply the provisions of this paragraph to any breach of this Contract by Owner.”

2. **Explanation of Builder’s Right of Termination**

The construction process often strains after the initial excitement of planning and contracting. That strain sometimes snaps the Builder/client relationship, with each party blaming the other for the break. Upon termination of the relationship, the Builder might first believe that the Builder can simply walk away from the client without any further obligations or dealings. However, legally, whenever one party terminates a contract, the other party may claim “wrongful termination”, i.e. “You had no right to terminate; your wrongful termination caused me to incur extra costs; and you must pay those costs.” Then, lawyers are consulted and paid to sift through months of construction activities, communications and recollections to determine who was responsible for the first “material breach” of the contract.

The “Builder’s Right to Terminate” clause gives the Builder that express right, including the right to walk away “[I]n the event any bona fide and material misunderstanding involving an amount equal to or greater than three (3%) percent of the Total Contract Price shall arise between Builder and Owner prior to Substantial Completion…” In those situations when the Builder realizes a worsening strain of the Builder/client relationship, the Builder need not wait for the “snap.” The Builder pays the “Termination Damages” plus $1,000.00 and “no cause of action against Builder shall accrue to the Owner.” The Builder walks away and should not be obligated for the Owner’s further costs to complete their requested construction.

G. **Waiver of Subrogation**

1. **Specific clause in the TAB Contracts Regarding Waiver of Subrogation**

a. The following clause is found in all of the TAB Contracts:

   “Waiver of Subrogation: The parties agree that the Builder shall carry insurance fully protecting the Improvements during construction and that after occupancy or Substantial Completion, whichever comes first, the Owner shall secure and maintain insurance covering risk of loss and damage to the Improvements. The parties further agree to waive all subrogation rights that each may have against the other for such insured losses or damage to the Improvements, its contents, or the Property, including any such loss or damage arising from the negligence or other fault of either party. If Owner receives any consideration from a third party, including, but not limited to, an assignee or subrogee, in settlement or payment for any dispute, Owner shall indemnify Builder for any claims asserted against Builder by such third party, regardless of any allegation of Builder’s negligence, strict liability, breach of contract, breach of warranty or violations of the Texas Deceptive Trade Practices-Consumer Protection Act. The agreements in this paragraph shall survive Substantial Completion and payment in full of the Total Contract Price.”

2. **Explanation of Waiver of Subrogation**

   This clause is intended to shift the risk of payment for damages covered by a homeowner’s insurance policy to the insurer, and protect the Builder from the insurer’s subrogation claim. The object of subrogation is to prevent the insured homeowner from receiving a double recovery, i.e. payment from the insurer for covered damage as well as a claim for payment from the Builder for the same damage. Often, when a homeowner’s insurer pays on a homeowner’s claim, the insurer looks to get its money back from the Builder via subrogation, i.e. a claim or lawsuit brought by the insurer in the homeowner’s name against the Builder. But, if insurers charge and receive premiums to cover certain losses, why should they “get their money back” from the Builder? The insurers end up with the double recovery.

   Also, the TRCCA expressly exempted insurers from complying with SIRP before filing a lawsuit. See TRCCA Section 426.005(d). Thus, homeowners and insurers may accomplish an “end around” to bypass the TRCC and SIRP and file suit against a Builder.
Assume the homeowners make a claim on their homeowners’ policy for damage to their home, without notifying the Builder or the TRCC. If the insurer pays the claim, the insurer may file a lawsuit against the Builder to get its money back via subrogation without any prior notice to the TRCC or the Builder of any defect or damage and/or without any opportunity for the Builder to perform repair(s).

Since an insurer’s right to subrogation derives from the rights of the insured and is limited to those rights, the homeowner’s waiver of “all subrogation rights” in this clause attempts to eliminate the insurer’s subrogation rights before they arise.

H. How to Get The Tab Contract Package

The Contract Package is being sold to Builder and associate members of any of the 31 local home Builder associations throughout the state and/or the Texas Association of Builders. The contracts are provided on a CD-Rom in two formats. The Word format allows the user to fill-in the blanks and the PDF format is for those who prefer to print the contracts and complete the forms in writing. The price for the Package is $199.99 for a two-year subscription that includes any updates that may be provided throughout the subscription period. To obtain an order form for the Contract Package or locate a home Builder association in your area, contact the Texas Association of Builders at 1-800-252-3625 or at www.texasbuilders.org.

V. INDEPENDENT CONTRACTORS

A. Introduction

As the general contractor, a Builder typically never participates in the physical construction of the home or improvement. Instead, as we all know, the Builder hires a series of independent contractors to perform the required tasks, for example: foundation pour; framing, electrical wiring, roofing, sheetrock, trim, painting, etc. Thus, many, if not all, of the claims concerning defects with a specific property stem from work performed by an independent contractor. As a result, this following text discusses methods to minimize a Builder’s risk in hiring independent contractors.

B. Contracts

At a minimum, Builders should have contracts between themselves and all of their independent contractors. This sounds simple enough but it is not uncommon in the industry for Builders, particularly for smaller production builders and custom builders, not to have written-formal contracts with their independent contractors. This creates a variety of problems when litigation erupts with a homeowner or liens are filed on a property by a subcontractor or supplier.

1. Arbitration

In today’s residential construction environment, it is the general rule that all sales contracts between the Builder and homeowner have a binding arbitration clause. Thus, seldom is there a problem in compelling a homeowner into arbitration. However, the problem that follows after the parties either agree to arbitration of the dispute or arbitration is compelled by court order, is that independent contractors often cannot be forced to participate in the arbitration with the Builder and homeowner because of no written contract with the Builder, or if a contract has been executed by the independent contractor it does not contain a binding arbitration provision. This is frustrating for a Builder in arbitration with a homeowner because typically, the independent contractor that actually performed the allegedly defective work will elect not to participate in the arbitration with the homeowner. This is true even when there is a lawsuit pending by the homeowner and the potentially responsible independent contractors were joined in the suit.

The easy way to remedy this problem from the perspective of the Builder is to include a provision in its sales contract that anticipates this problem and to have its independent contractors sign a contract with Builder containing a binding arbitration agreement. The provision is the sales contract with the homeowner should include the following language

Owner and Builder further agree 1) that any dispute involving Builder’s directors, officers, partners, employees and agents shall be resolved as set forth herein and not in a court of law; and 2) that Builder shall have the option to include its independent contractors, subcontractors, and suppliers as parties in the alternative dispute resolution procedures set forth in this Contract, which include mediation and binding arbitration.

This example has the added benefit of including any owners, employees, and agents of the Builder that may be sued by a homeowner individually in the arbitration proceeding.

As with the sales contract, the independent contractor agreement should contain a detailed arbitration provision that reads similar to this example

The parties to this Agreement specifically agree that the transactions contemplated herein involve interstate commerce.

A. MEDIATION: The parties agree that any dispute (whether contract, warranty, tort, statutory, or otherwise) shall first be submitted to
mediation and, if not settled during mediation, shall be submitted to binding arbitration as provided by the Federal Arbitration Act (9 U.S.C. §§ 1 et. seq.) or, if applicable, by similar state statute, and not by or in a court of law. All decisions respecting the arbitrability of any dispute shall be decided by the arbitrator. The arbitrator shall have the right to award reasonable attorneys’ fees and expenses, including those incurred in mediation and arbitration. The mediation, and if applicable, the arbitration, shall be conducted before the mediator or arbitrator named in the warranty documents given by Builder to the homeowner, if any. If no mediator or arbitrator has been so designated, or if the named mediator or arbitrator is unable or unwilling to conduct the mediation and/or the binding arbitration proceedings specified above, the parties agree to work together in good faith to select a mediator and, if all disputes are not resolved by mediation, an arbitrator in the county where the subject property is located. If the parties are unable to agree on the appointment of a mediator and/or arbitrator, either party may petition a court of general jurisdiction in the subject county to appoint a mediator and/or arbitrator. It is stipulated and agreed that the filing of a petition requesting appointment of a mediator and/or arbitrator shall not constitute a waiver of the right to enforce binding arbitration.

B. ARBITRATION: In any arbitration proceeding between the parties:

1) All applicable Federal and State law shall apply;
2) All applicable claims, causes of action, remedies and defenses that would be available in court shall apply;
3) The proceeding shall be conducted by a single arbitrator selected by a process designed to ensure the neutrality of the arbitrator;
4) The parties shall be entitled to conduct reasonable and necessary discovery;
5) The arbitrator shall render a written award and, if requested by any party, a reasoned award;
6) Any award rendered in the proceeding shall be final and binding and judgment upon any such award may be entered in any court having jurisdiction.

SURVIVAL: Builder and Contractor agree that notwithstanding anything to the contrary contained herein, the rights and obligations set forth in this paragraph shall survive (1) the termination of this Agreement by either party; or (2) the breach of this Agreement by either party. The waiver or invalidity of any portion of this paragraph shall not affect the validity or enforceability of the remaining portions of this paragraph and/or this Agreement. Builder and Contractor further agree (1) that any dispute involving the directors, officers, employees and agents of either Builder or Contractor shall be resolved as set forth herein and not in a court of law; and (2) that Builder shall have the option to include Contractor as a party in any mediation and arbitration between Builder and any customer or client of Builder and, if Builder does opt to include Contractor in such mediation and arbitration, Contractor shall fully participate therein pursuant to the terms of this paragraph. If any party to this Agreement files a proceeding in any court to resolve any such controversy, dispute or claim, such action shall not constitute a waiver of the right of such party or a bar to the right of any other party to seek arbitration of that or any other claim, dispute or controversy, and the court shall, upon motion of any party to the proceeding, direct that such controversy, dispute or claim be arbitrated in accordance herewith.

Inclusion of an arbitration provision, similar to the one above, in contracts between Builders and independent contractors makes it relatively easy to have an arbitration in which all of the key parties participate.

2. Indemnity
Because it is the independent contractor that performs the work of constructing the home, a Builder’s contract with its independent contractors should necessarily include an indemnity provision similar to the following
INDEMNITY AGREEMENT:
CONTRACTOR AGREES TO DEFEND, HOLD HARMLESS AND UNCONDITIONALLY INDEMNIFY BUILDER, ITS AGENTS AND EMPLOYEES, AGAINST AND FOR ALL LIABILITY, COSTS, EXPENSES (INCLUDING ATTORNEYS' FEES), CLAIMS AND DAMAGES (INCLUDING LOSS OF USE), WHICH BUILDER MAY AT ANY TIME SUFFER OR SUSTAIN OR BECOME LIABLE FOR BY REASON OF ANY ACCIDENTS, DAMAGES OR INJURIES EITHER TO THE PERSONS, PROPERTY AND/OR WORKMEN OF CONTRACTOR, BUILDER AND/OR ANY OTHER PARTIES, IN ANY MANNER, ARISING FROM THE WORK PERFORMED HEREUNDER, INCLUDING BUT NOT LIMITED TO, ANY NEGLIGENCE (INCLUDING BUT NOT LIMITED TO NEGLIGENT HIRING), ANY GROSS NEGLIGENCE, STRICT LIABILITY OR BREACH OF EXPRESS OR IMPLIED WARRANTY BY BUILDER, ITS AGENTS OR EMPLOYEES.

Because this provision relieves a Builder of its own liability in advance, it was designed to meet the 1) fair notice requirement of conspicuousness and 2) the express negligence doctrine. See Tex. Bus. & Com. Code §1.201(b)(10); see also, Dresser Industries, Inc. v. Page Petroleum, Inc., 853 S.W.2d 505, 506-507 (Tex. 1993). As to meeting the conspicuousness requirement, make sure that any indemnity provision used "stands out" from the other terms of the contract so that on the face of the contract that a reasonable person would notice the indemnity provision when looking at the contract as a whole. See American Home Shield Corp. v. Lahorgue, 201 S.W.3d 181, 184 (Tex.App.—Dallas 2006, pet. for review filed) This can be accomplished by entitling the provision "INDEMNITY AGREEMENT," enlarging the font of the entire section, using all capital letters, bold font, etc. – just make sure it is really noticeable as compared to the other terms of the contract. Overkill is the name of the conspicuousness game.

If the independent contractor reads the contract, this indemnity provision has proven to be very unpopular. A Builder’s ability to retain this term in the contract often hinges on its size (i.e. numbers of homes built) and the independent contractor’s dependence on the Builder’s continued business. Should a Builder not be able to convince some of its independent contractors to sign a contract containing a similar indemnity provision, at the least, make sure that the contract contains an enforceable arbitration provision so that the independent contractor can be forced to participate in arbitration proceedings.

3. Liens
Some independent contractors have the habit of not paying their material suppliers or subcontractors, or both, after receiving payment from the Builder; yes, even after the independent contractors execute downdate waivers. This can result in liens being filed against a Builder’s construction project. Whether the Builder or homeowner owns the subject property, this can prove troublesome and expensive for the Builder. If liens are filed by a material supplier or subcontractor to the independent contractor, Builders often have little choice but to retain legal counsel and reach some form of settlement with the lien filing materialman or subcontractor. More often than not, this lien settlement takes the form of an additional cash payment beyond the amount already paid to the offending independent contractor for the job.

For example, Builder pays independent contractor in full for installation of the home’s plumbing system, which included rough in, top out, and fixtures. Payment to the independent contractor for these three phases of the plumbing job totaled $7,000 for the one home and the independent contractor executed the prerequisite lien release. Of this amount, $3,500 was incurred by the independent contractor itself as labor expense and overhead, and the other half was for the purchase of material supplies from a plumbing supplier. Well, hard times befall the independent contractor and so it decides to keep all $7,000 and not pay its plumbing supplier the $3,500 for the purchased supplies. This results in lien notice and filing by the plumbing supplier against the Builder’s project for $3,500 plus the costs of filing the lien. If the lien is valid and “perfected,” the Builder must negotiate a settlement prior to transfer of the property’s title on which the lien is filed or prior to the homeowner converting its construction loan into a permanent loan. There are several ways to reduce the occurrence of this ongoing problem for Builders.

a. Supplier/Subcontractor Disclosure
Consider including a supplier/subcontractor disclosure in the contract between Builder and independent contractor. In this manner, Builder will know of the subcontractors and suppliers being used by its independent contractors, as well as be allowed to
pay such subcontractors and suppliers directly if needed. An example of such a provision follows:

SUPPLIER DISCLOSURE:

(a) Subcontractor agrees to provide Builder with the names, addresses, phone numbers, and email addresses of all of independent contractor’s suppliers and subcontractors by completing the form attached hereto as Addendum 1. Independent contractor shall update its list of suppliers to Builder within 15 days of any change in suppliers and subcontractors. Failure to do so is a material breach of this contract.

(b) Builder may, at its sole discretion, request written verification directly from Independent contractor’s suppliers that it has paid all bills currently due for materials and/or labor related to Work performed under this Agreement. In the event independent contractor’s accounts with its suppliers or subcontractors are delinquent beyond the supplier’s due date, Builder may, at its sole discretion, elect to withhold payment from independent contractor and pay its subcontractors or suppliers, or both, directly to bring its accounts current. Any residual amount due independent contractor after outstanding bills with its suppliers and subcontractors have been satisfied will then be paid to independent contractor.

(c) Builder may also, in its sole discretion, elect to make payment jointly to independent contractor and any supplier or subcontractor of independent contractor by joint check pursuant to the agreement attached hereto as Addendum 2, which shall be executed by all parties within three (3) days of Builder’s request.

b. Retainage and Personal Guarantee

The Texas Property Code specifically allows Builders (i.e. “owners”) to retain ten percent (10%) of the amount owed to its independent contractors for thirty (30) or more days after the work is completed by the independent contractor. See TEX. PROP. CODE § 53.101 et seq. In an oversimplification of lien and retainage law, if a Builder retains these funds for at least thirty (30) after the independent contractor’s work is done but then pays the balance of the retained funds as owed, the Builder and homeowner are NOT liable for unpaid amounts to the independent contractor’s subcontractors or suppliers beyond the 10% of retained funds – even if a “valid” lien is filed against the property. See TEX. PROP. CODE § 56.160 et seq.

This retainage right is commonly ignored and unused by Builders because it can create an added administrative burden and expense. However, if a Builder desires to use retainage as a defense to liens from subcontractors and material suppliers, the following provision might prove helpful to include in its contracts with independent contractors:

PAYMENT:

(a) Builder shall pay independent contractor [weekly] [biweekly] [monthly] so long as independent contractor is not in default, upon written certification by Builder that the portion of the Work for which payment has been requested has been completed satisfactorily. Builder will retain 10% of the Payment for 35 days after the Work is completed. For example, upon completion of the Work by independent contractor, independent contractor will be paid 90% of the Price for same based on request for payment; then, 35 days after completion of the Work, the remaining 10% of the requested amount will be paid to independent contractor by Builder. This retainage amount is being withheld pursuant to §53.101 et seq. of the Texas Property Code. Payment shall be in accordance with the Price set forth in the Documents, and with each request for payment, independent contractor shall submit a list identifying all agents, independent contractors, and suppliers to be paid out of the requested Payment or no Payment will be issued.

(b) Independent contractor agrees to provide notice of price increases to Builder and any such requests are not valid without written approval of Builder. In addition, payment for additions or extra work will be made only pursuant to advance written change orders, which may include purchase orders, signed by Builder.

(c) Builder, in its sole discretion, may retain any payment or portion thereof
and/or offset against future payments due to independent contractor to assure satisfactory completion of the Work and all service work arising therefrom or to compensate Builder for any damages Builder suffers as a result of independent contractor’s default of this Agreement. Any retained amounts shall be paid to the independent contractor upon satisfactory final completion of any Work and/or service work applicable for the warranty period.

(d) In consideration of Builder entering into this Agreement, independent contractor agrees that no liens shall be filed or maintained by independent contractor or independent contractor’s Agents (as defined below) AND the Owner(s) of independent contractor shall personally guarantee the full and prompt payment to all employees, agents, subcontractor, suppliers, and contractors of independent contractor as well as all material suppliers and labor suppliers to independent contractor. This guarantee is to be further memorialized by execution of the attached Addendum. If any of independent contractor’s Agents files or maintains any such lien or claim after payment by Builder to independent contractor, independent contractor agrees to cause such lien and claim to be satisfied, removed or discharged at its own expense by bond, payment or otherwise within ten (10) days from the day of filing thereof. Upon independent contractor’s failure to satisfy, remove or discharge the lien or claim, Builder shall have the right, in addition to all other rights and remedies provided under the Agreement or by law, to cause such lien or claim to be satisfied, removed or discharged by whatever means Builder chooses, at the entire cost and expense of the independent contractor, including without limitation, legal fees.

INDEMNIFICATION – TO THE MAXIMUM EXTENT PERMITTED BY LAW, INDEPENDENT CONTRACTOR AGREES TO INDEMNIFY, PROTECT AND SAVE HARMLESS BUILDER FROM AND AGAINST ANY AND ALL SUCH LIENS AND CLAIMS AND ACTIONS BROUGHT OR JUDGMENTS RENDERED THEREON, AND FROM AND AGAINST ANY AND ALL LOSS, DAMAGES, LIABILITY, COSTS AND EXPENSES, INCLUDING LEGAL FEES, WHICH BUILDER MAY SUSTAIN OR INCUR IN CONNECTION THEREWITH.

(e) Independent contractor shall submit to Builder along with Independent contractor’s request for payment, executed down-date lien waivers from independent contractor and in the form attached [insert appropriate Addendum] from all persons and entities furnishing any labor, equipment, materials or services on the Project in any way concerning or relating to independent contractor’s Work, including, without limitation independent contractor’s suppliers, independent contractors, agents and officers (“independent contractor’s Agents”). Upon completion of the Work on any Project, independent contractor shall execute and deliver to Builder a Final Waiver and Release of Liens executed by independent contractor and each of independent contractor’s Agents.

(f) Independent contractor acknowledges that all payments to it from Builder for the Work are trust funds as defined and governed by §162.001 et seq. of the Texas Property Code, and as such that independent contractor’s agents, independent contractors, and suppliers are direct beneficiaries. Independent contractor represents that with receipt of payment from Builder for the Work that it will cause all of independent contractor’s Agents to be fully and promptly paid.

(g) Independent contractor shall be in default if any demand is made on Builder for amounts due to independent contractor’s Agents, and Builder shall have the right to withhold such amounts claimed out of any payments due to the independent contractor.
To be sure, this payment and retainage provision is a bit extreme, but it is the direct result of ever increasing lien challenges in the residential-construction industry caused by independent contractor’s non-payment of subcontractors and suppliers. Please also note that the above example requires that the owners of the independent contractor personally guarantee the payment of their subcontractors and suppliers. This personal guarantee only extends to debts not paid to its subcontractors and suppliers after receipt of payment from Builder by the independent contractor.

The personal guarantee portion of this payment provision should be backed by a detailed personal guarantee to be signed as an addendum to the independent contractor agreement. Although the owners may not want to sign this personal guarantee, it would be difficult to decline if it was limited to only a personal guarantee of amounts paid to the independent contractor by the Builder but not conveyed to the independent contractor’s subcontractors and suppliers as needed.

VI. COMMERCIAL GENERAL LIABILITY INSURANCE

As always, commercial general liability (“CGL”) insurance is an interesting and controversial topic for Builders. Ideally, CGL policies would be an excellent way to manage construction risks, or more specifically, construction defect claims. However, CGL coverage for construction defects is unresolved at best and the case law discussion in this arena could fill volumes of notebooks. For a comprehensive legal discussion and case study of this area of the law, please see a recent article written by Lee H. Shidlofsky entitled “CGL Coverage for Defective Construction: A Case Study of Lamar Homes v. Mid-Continent Casualty Company,” and published in the JOURNAL OF TEXAS INSURANCE LAW in the Summer 2006, Volume 7, Number 2.

The primary issue for Builders considering the purchase of CGL insurance should be value – how much is paid for the coverage received. Many Builders still believe that the purchase of CGL insurance offers them “protection” or “coverage” from construction defect claims. As we all know, this is often not the case. The typical culprit to “coverage” of construction defect claims under a Builder’s CGL policy is the completed operations clause that, as of roughly 2003, removed the exception to “your work,” whereby work performed by a subcontractor on a Builder’s behalf was covered by the CGL policy. No longer, as the exception to the completed operations clause for a Builder’s independent contractor’s or subcontractor’s work is missing from many CGL policies issued today, which essentially means that a construction defect is never covered by a current CGL policy.

This lack of coverage has been further complicated by the fact that many insurers have stopped writing coverage for certain categories of residential construction or charge such high rates that the offered policies are unaffordable to many Builders. In response to 1) this detrimental change in the completed operations clause of Builder’s CGL policies, 2) the reduction in the products offered by insurers, and 3) increasing rates with decreasing coverage, some companies have introduced new insurance products in the market designed to integrate insurance policies with quality control conditions, customer satisfaction management systems, required third-party home warranties, and documentation management software. While, at the same time, these new CGL policies include a completed operations clause without removing the exception to “your work,” whereby work performed by an independent contractor or subcontractor on the Builder’s behalf is covered. In addition, these newer CGL programs do not contain the now typical exclusions for: 1) prior work; 2) subsidence; 3) defense inside or burning limits; 4) property damage limitations; 5) Care, Custody and Control that exclude coverage for model and show homes. Insurance products as described above are being offered by at least two major insurance carriers in the Texas market. Obviously, these policies are more expensive than many of the current CGL policies offered to Builders, but for those Builders interested in purchasing a CGL policy that actually provides for construction defect coverage, they are now available for consideration.

* Please be advised that neither the author of this paper nor his firm have benefited in any way from the mention of RCLA, TRCCA, the Commission, TAB, the TAB contracts, or the new CGL products available to Builders and we do not endorse any referenced product – nor does the author or his firm represent any of the referenced Insurers that offer such new insurance products.
Suggestions for Managing Residential Construction Defect Risk

1. Use the appropriate contract forms and addenda and make sure that they are properly integrated.

2. Select the appropriate business entity for your operations and be sure that it is properly formed and maintained.

3. Timely and fully comply with all TRCC rules and requirements, including those pertaining to builder registration and home registration.

4. Establish and maintain a construction account pursuant to Chapter 162 of the Texas Property Code for handling all construction trust funds.

5. Be careful about the content of all advertising and marketing materials. Fraud in the inducement, negligent misrepresentation and related tort claims can be an exception to the economic loss rule and are generally not subject to the RCLA or the TRCCA.

6. Be sure that all your key independent contractors, subcontractors, and design professionals have and maintain adequate liability insurance with your building entity listed as an additional insured. Have clear, written agreements with these persons or entities that have indemnity clauses in your favor and binding arbitration provisions.

7. Obtain and review all available site information before construction begins and share this information with the appropriate independent contractors, subcontractors and/or design professionals. This information could include soil reports, aerial photos, subdivision grading plans, easement locations, etc.


9. Always do original construction elevations prior to substantial completion. These elevations should be taken at a rate of approximately one elevation per 100 square feet showing a reference point. Each elevation should also describe the floor.

10. Obtain and maintain adequate builder’s risk insurance and consider whether or not your company should maintain liability insurance.

11. Consider transferring your warranty liability for major structural components to a third-party warranty company approved by the TRCC. Remember that your warranty liability
for these major structural components extends for ten (10) years from the effective date of the warranty.

12. Strongly consider including a binding arbitration clause in your contract and warranty documents.

13. In contracts with customers for construction on your property, consider excluding specific performance as a default remedy. Otherwise, if your customer becomes dissatisfied before title transfers and files suit for specific performance, he can cloud the title to your property by filing a notice of *lis pendens* and thereby prevent or significantly impair a sale to another buyer.

14. Always document changes in the work with written and signed change orders.

15. Avoid selling to “high risk” clients that may be hard to please or overly demanding.

16. Consider using a walk-thru and acceptance form to be executed at closing that acknowledges inspection, adequacy of construction and, for a stated consideration, releases all claims except those arising under the express limited warranty you are giving on the house. Be sure to show the release consideration on the closing statement as a credit against the sales price.

17. Give your customers a copy of the applicable express, limited warranty prior to contract execution and take the time to go over it with them so that they have an understanding of what is covered and what is not covered and also their maintenance responsibilities after closing.

18. Respond promptly and politely to all warranty requests and keep a record of all warranty requests, responses and service.

19. Respond immediately to any demand letters and remember to put your independent contractors, subcontractors and design professionals on notice as applicable. In this regard, see the Timetable for Responding to Residential Construction Defect Claims.

20. Always make reasonable efforts to compromise and resolve construction defect claims. Most of the time these offers should be communicated in writing to evidence your good faith efforts to resolve the issues and to set up a possible failure to mitigate defense.
APPENDIX “B”
### TEXAS RESIDENTIAL CONSTRUCTION COMMISSION

Fee Schedule for Fiscal Year 2006-2007

**Description** | CPA Code | Texas Property Code *(Section 408.002 &…)* | Fee Amount
--- | --- | --- | ---
Initial Application Fee – Builder | 3175 | 416.004(a)(1) | $500.00
Biennial Renewal Fee – Builder | 3175 | 416.004(a)(1) | 300.00
Late Registration Fee – Builder *(paid in addition to the application fee)* | 3175 | 416.004(a)(1) & 419.001 et seq. | 1,000.00
Late Renewal Fee – Builder *(paid in addition to the renewal fee)* | 3175 | 416.004(a)(1) & 419.001 et seq. | 300.00
Star Builder Annual Application Fee *(July 1 – June 30 each year)* | 3175 | 416.011 | 100.00
Initial Application Fee – Agent *(1st Agent Application is Free)* | 3175 | 416.004(b) | 25.00
Biennial Renewal Fee – Agent *(1st Agent is Free)* | 3175 | 416.004(b) | 0.00
Initial Application Fee – Arbitrator | 3846 | 417.003(1) | 50.00
Biennial Renewal Fee – Active Arbitrator | 3846 | 417.003(2) | 50.00
Late Renewal Fee – Active Arbitrator *(paid in addition to the renewal fee)* | 3846 | 417.003(2) & 419.001 et seq. | 50.00
Penalties *(Not to Exceed Amount – Case by Case)* | 3846 | 419.002(a) | 5,000.00
Home Registration *($25 for online registrations beginning January 1, 2005)* | 3846 | 426.003(c) & 426.004(c) | 30.00
Late Home Registration *(paid in addition to the home registration fee)* | 3846 | 426.003(d) | 30.00
Initial Application Fee – 3rd Party Inspector | 3846 | 427.001(a)(2) | 50.00
Annual Renewal Fee – Active 3rd Party Inspector | 3846 | 427.001(a)(2) | 50.00
Late Renewal Fee – Active 3rd Party Inspector *(paid in addition to the renewal fee)* | 3846 | 427.001(a)(2) & 419.001 et seq. | 50.00
Initial Application Fee – 3rd Party Warranty Company | 3846 | 430.008(b) | 50.00
Annual Renewal Fee – 3rd Party Warranty Company | 3846 | 430.008(b) | 300.00
Late Renewal Fee – 3rd Party Warranty Company *(paid in addition to the renewal fee)* | 3846 | 430.008(b) & 419.001 et seq. | 300.00
Timely Filing of Arbitration Award Notification | 3846 | 437.001 | 0.00
Late Filing of Arbitration Award Notification | 3846 | 437.002(a) | 100.00
Change of Information Fee – Builder | 3175 | 416.004(a)(1) | 25.00
Change of Information Fee – Agent | 3175 | 416.004(a)(1) | 25.00
Change of Information Fee – Arbitrator | 3846 | 417.003(1) | 25.00
Change of Information Fee – 3rd Party Inspector | 3846 | 427.001(a)(2) | 25.00
Change of Information Fee – 3rd Party Warranty Company | 3846 | 430.008(b) | 25.00
Duplicate Certificates – Builder | 3175 | 416.004(a)(1) | 25.00
Duplicate Certificates – Arbitrator | 3846 | 417.003(1) | 25.00
Duplicate Certificates – 3rd Party Inspector | 3846 | 427.001(a)(2) | 25.00
Duplicate Certificates – 3rd Party Warranty Company | 3846 | 430.008(b) | 25.00

**THE FEES LISTED ABOVE ARE NOT REFUNDABLE**

### State-sponsored Inspection and Dispute Resolution (SIRP) Fee Table

<table>
<thead>
<tr>
<th>Description</th>
<th>CPA Code</th>
<th>Texas Property Code <em>(Section 408.002 &amp;…)</em></th>
<th>Fee Amount</th>
</tr>
</thead>
<tbody>
<tr>
<td>Homeowner Requested SIRP – All Inspection Types*</td>
<td>3846</td>
<td>426.004</td>
<td>250.00</td>
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<tr>
<td>Builder/Remodeler Requested SIRP – Workmanship and Materials Inspection Fee Remitted to the 3rd Party Inspector</td>
<td>3846</td>
<td>426.004 &amp; 428.004(d)</td>
<td>450.00</td>
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<tr>
<td>Builder/Remodeler Requested SIRP – Structural Inspection Fee Remitted to the 3rd Party Inspector</td>
<td>3846</td>
<td>426.004 &amp; 428.004(d)</td>
<td>450.00</td>
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<tr>
<td>Additional Inspection Fee to the 3rd Party Inspector – Structural Defect Found <em>(Additional amount due from the builder/remodeler paid in addition to the structural fee to the 3rd Party Inspector to obtain a recommendation of repair)</em></td>
<td>3846</td>
<td>426.004 &amp; 428.004(d)</td>
<td>550.00</td>
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<tr>
<td>Builder/Remodeler SIRP – Structural w/Unrelated Workmanship and Materials Inspection Fee Remitted to the 3rd Party Inspector</td>
<td>3846</td>
<td>426.004 &amp; 428.004(d)</td>
<td>800.00</td>
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* Will be refunded when a defect is found.

### Expert Witness Fees for 3rd Party Inspectors

<table>
<thead>
<tr>
<th>Type of Inspector</th>
<th>Fee</th>
</tr>
</thead>
<tbody>
<tr>
<td>Structural and Joint 3rd Party Inspectors</td>
<td>$135 per hour for testimony and $65 per hour for other time, plus actual, reasonable expenses incurred.</td>
</tr>
<tr>
<td>Materials and Workmanship 3rd Party Inspectors</td>
<td>$75 per hour for testimony and $35 per hour for other time, plus actual, reasonable expenses incurred.</td>
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Last updated 11/8/06
Effective 11/9/06
APPENDIX “C”
<table>
<thead>
<tr>
<th>Respondent Party’s Name</th>
<th>City</th>
<th>Penalty</th>
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<tbody>
<tr>
<td>Carefree Home II LP</td>
<td>El Paso</td>
<td>$1,700</td>
</tr>
<tr>
<td>Robert Nimmo</td>
<td>San Leon</td>
<td>$500</td>
</tr>
<tr>
<td>Robson Denton Development LP</td>
<td>Argyle</td>
<td>$2,500</td>
</tr>
<tr>
<td>Adrian E. Garcia</td>
<td>San Antonio</td>
<td>$500</td>
</tr>
<tr>
<td>Nouvel Development LP</td>
<td>Houston</td>
<td>Surrender of registration</td>
</tr>
<tr>
<td>David Norvelle dba Bentley Luxury Homes</td>
<td>Grapevine</td>
<td>$1,000</td>
</tr>
<tr>
<td>Bodine Leland Builder, Inc.</td>
<td>Corpus Christi</td>
<td>$500</td>
</tr>
<tr>
<td>Joe A. Alarcon dba Alarcon Construction</td>
<td>Amarillo</td>
<td>$500</td>
</tr>
<tr>
<td>Steve DeGrote dba Steve DeGrote Custom Homes</td>
<td>Granbury</td>
<td>Revocation of registration</td>
</tr>
<tr>
<td>Martin R. Mejia</td>
<td>McAllen</td>
<td>$1,000</td>
</tr>
<tr>
<td>Continental Homes of Texas LP</td>
<td>Fort Worth</td>
<td>$500</td>
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<tr>
<td>Debner Investment Corporation</td>
<td>San Antonio</td>
<td>$500</td>
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<tr>
<td>Buchar Management, Inc.</td>
<td>Wylie</td>
<td>Revocation of registration</td>
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<td>D.R. Horton – Texas, Ltd.</td>
<td>Fort Worth</td>
<td>$500</td>
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<td>Kenneth Jeffcoat dba Kenneth Jeffcoat Custom Homes</td>
<td>Canton</td>
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<td>Newmark Homes LP</td>
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<tr>
<td>P&amp;G Development LP</td>
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<td>$2,500</td>
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<td>Willowick Partners Ltd.</td>
<td>Houston</td>
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<tr>
<td>Lighthouse Homes LLC</td>
<td>Beaumont</td>
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<tr>
<td>Hershel Prysock dba Total Quality Maintenance</td>
<td>Fort Worth</td>
<td>$600</td>
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<td>Story Book Homes Ltd.</td>
<td>San Antonio</td>
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<td>Gal Homes, Inc.</td>
<td>Dallas</td>
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<tr>
<td>Paisano Home Builders, Inc.</td>
<td>Laredo</td>
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<tr>
<td>Ornelas Builders, Inc.</td>
<td>Mission</td>
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