

2018 GHBA EXPO

James Rudnicki
Bush Rudnicki Shelton, P.C.
817-714-8994 (mobile)
james@brstexas.com

Ian P. Faria
Bradley Arant Boult
Cummings LLP
281-755-3781 (mobile)
ifaria@bradley.com

TAB Contracts Package

■ The Package

- 27 forms and 16+ addenda
- Build Job, Spec, Remodel, ICAs, Lot Purchase, Termination Agreement, BSA, Lot Purchase Addendum, Design Build Contract, Architect Addendum

■ The Updates

- The Committee Focused on further minimizing common sources of Builder liability by modifying both the Primary Contracts and the Warranty
- The Latest and Worst Trend in Residential Litigation
- Code Compliance
- Attorney's Fees recovery for Builders
- HB 890, Military Installation Notice

Contracts

- **TAB 1.1** Residential Construction Contract – Fixed Price
- **TAB 2.1** Residential Construction Contract – Cost Plus
- **TAB 3.1** Residential Construction Contract (Builder's Property)
- **TAB 4.1** Residential Completed Home Contract (Builder's Property)
- **TAB 5.1** Residential Remodeling Contract (Fixed Price)
- **TAB 6.1** Residential Remodeling Contract (Cost Plus)
- **TAB 7.1** Residential Remodeling Contract (Short Form)

Addenda

- Legal Description (TAB A-1)
- Schedule of Estimated Construction Costs (TAB A-2)
- Draw Request Form (TAB A-3)
- Notice Regarding Expansive Soils (TAB A-4)
- Final Customer Walk-Thru Approval and Punch List (TAB A-5)
- Selection / Allowance Schedule (TAB A-6)
- Change Order (TAB A-7)
- Real Estate Broker's Fee Addendum (TAB A-8)
- **Builder's Disclosure Statement (TAB A-9)**
- Waiver of the List of Subcontractors and Suppliers (TAB A-10)
- Assignment of Manufactured Product Warranties (TAB A-11)
- Special Provisions Addendum (TAB A-12)
- Green Building Disclosure (TAB A-13)
- **Express Limited Home Warranty (TAB A-14)**

10.1 Builder Services Agreement

- Project Planning
- Schematic Design
- Construction Documents
 - Includes pricing and budgeting as desired.
- Negotiate and Sign TAB Contract

10.2 Builder Design Agreement

- Conceptual Design
- Preliminary Pricing
- Final Design
 - Includes pricing and budgeting as desired.
- Construction Budget
- License Fee if they do NOT build with you
- Fixed price for each phase with Hourly \$ option

Lot Purchase Agreement Addendum

- REPRESENTATION TO SELLER BY BUYER / TAB CONTRACT EXECUTION: The Buyer acknowledges, warrants and represents to Seller that Buyer intends to execute a Texas Association of Builders (TAB) mechanic's lien contract with Seller and if terms and conditions to the TAB contract cannot be agreed to within forty-five (45) days of execution of the Contract, Seller has an unrestricted right to repurchase the Property on the same terms and conditions if the Property has closed or cancel the Contract if the Property has not closed, and upon such cancellation, the Earnest Money shall be retained by Seller

Independent Contractor Agreements

3 “Sub” Contracts

- **TAB 8.1 Independent Contractor Base Agreement**
- **TAB 8.2** Supplier Base Agreement
- **TAB 8.3** Independent Design Professional Base Agreement

- **TAB 8.4** Authorization to Obtain Department of Public Safety Criminal History Record
- **TAB 9.1** Indemnity and Affidavit as to Payment of Bills and Release of Liens

How long is the Contract valid?

FOREVER – we recommend you sign a new Independent Contractor Agreement with your subs every 2 years, i.e. after the new TAB Contract Package comes out on September 1st of each Legislative Year (odd years).

Big Brother

6. INDEPENDENT CONTRACTOR: Contractor certifies that Contractor is an “independent contractor” and not an employee of Builder and as such, certifies that Contractor is solely responsible for all applicable taxes and charges including, but not limited to, withholding taxes, social security taxes and unemployment taxes on Contractor and Contractor’s employees. Contractor certifies that, as an independent contractor, Contractor is not under the direction and control of Builder and certifies that Contractor may be employed by or contract with other companies in the trade.

Warranty

13. LABOR AND MATERIALS: Contractor represents and warrants to Builder that all equipment and materials provided by Contractor and used or installed in connection with the Work will be new unless otherwise specified in the Contract Documents, of good quality, free of defects, and in conformity with the Contract Documents. It is understood between the parties hereto that all equipment and materials not so in conformity are defective. Contractor further warrants that all labor and materials furnished by Contractor will be free of defects for a period commensurate with the applicable time periods specified in the Express Limited Home Warranty given by Builder to any homeowner where Work is supplied by Contractor or the manufacturer of materials from the date of completion of Contractor's Work hereunder.

Critical for Owners' and Subs' Contracts to have Mediation and Arbitration

The key is Binding Arbitration Provisions with **BOTH** the Homeowners and Subcontractors.

If you have binding arbitration with your homeowners, then why do you need it with the subs?

Payment

4.A. TIMELY PERFORMANCE

No payments shall be due under this Agreement unless and until Contractor has timely performed and delivered all Work requested by Builder. No payments will be disbursed until Builder has had a *reasonable opportunity to inspect the Work performed and/or delivered, has *received an invoice identifying the subject Work and has *received valid lien waivers executed by Contractor.

When Can you Withhold and can you withhold if no contract?

4.C. PAYMENTS WITHHELD - Payments may be withheld and all costs incurred by Builder shall be charged against all monies due Contractor under this Agreement if:

1. Work is found defective and not remedied by Contractor.
3. Contractor does not make prompt and proper payments for labor, materials or equipment . . .
4. Another contractor is damaged by an act for which Contractor is responsible.
5. Claims or liens are filed on the job . . .
8. Contractor fails to perform warranty service . . .
9. Builder is fined by any governmental agency on account of or arising out of Contractor's violation of any law.

I am not a crook . . .

- PERSONAL GUARANTY – In consideration of Builder entering into this Agreement, Contractor agrees the undersigned principal owner(s) of Contractor shall personally guarantee the full and prompt payment of all sums due to all employees, agents, subcontractors, material suppliers and labor suppliers of Contractor who furnish labor or materials pursuant to this Agreement.

INDEMNIFICATION

16. INDEMNITY AGREEMENT: CONTRACTOR AGREES TO DEFEND, HOLD HARMLESS AND UNCONDITIONALLY INDEMNIFY BUILDER, ITS AGENTS AND EMPLOYEES, AGAINST AND FOR ALL LIABILITY, COSTS, EXPENSES (INCLUDING ATTORNEY'S FEES), FINES, PENALTIES, LOSSES, CLAIMS AND DAMAGES (INCLUDING LOSS OF USE) THAT BUILDER MAY AT ANY TIME SUFFER OR SUSTAIN OR BECOME LIABLE FOR .

....

The
Express Limited Home Warranty
and Recent Improvements

Implied Warranties

- Without proper disclaimer, builder provides a 10 year:
 - **Implied Warranty of Good and Workmanlike Construction**
 - Implied Warranty of **Habitability** (“suitable for human habitation”) – cannot be disclaimed
 - **Implied Warranty of Repair may also now be disclaimed.**

Express Limited Home Warranty

12. WARRANTY: Builder will provide warranty coverage on the Improvements to Owner pursuant to the attached and incorporated Express Limited Home Warranty. BUILDER AGREES TO COMPLY WITH THE EXPRESS LIMITED HOME WARRANTY AS ITS EXPRESS CONTRACTUAL WARRANTY. UNLESS BUILDER HAS ALSO ELECTED TO PROVIDE A THIRD-PARTY WARRANTY In short, the Express Limited Home Warranty provides warranty coverage on the Improvements for one (1) year for workmanship and materials, two (2) years for plumbing, electrical, heating, and air-conditioning delivery systems, and ten (10) years for major structural components.

Foreclosure

Foreclosure. Notwithstanding any other term or condition herein, this Express Limited Home Warranty **does not apply to Property and/or Improvements that have been subject to a foreclosure** under Texas law, such Property and Improvements are taken “AS IS, with all faults.”

Commercial Purpose

Notwithstanding any other term or condition herein, this Express Limited Home Warranty **does not apply to Property and/or Improvements that have been used at any time for a commercial, for profit, rental (short or long term), leasing or occupancy by any person other than the named owners** on the deed recorded in the public records, such Property and Improvements are taken “AS IS, with all faults” and/or this Express Limited Home Warranty is cancelled upon the first or any use in violation of this provision.

Green Building

Any and all green building requirements, standards, certifications or otherwise are controlled by those written standards applicable to and agreed upon between the Builder and the initial owner(s), if any, after which there is no warranty or guarantee related to or concerning any such green building requirements, standards, certifications or otherwise to any subsequent owner of the Property and/or Improvements.

RCLA and Contract

As a condition precedent to the applicability of this Express Limited Home Warranty, the owner must follow each term and condition in the contract associated with this Express Limited Home Warranty, the requirements of the RCLA, all other legal requirements, and any and all other requirements in any instrument related to the Property and/or the Improvements, including but not limited to any third-party warranty.

Other Insurance or Warranty

As a condition precedent to the applicability of this Express Limited Home Warranty, **the Owner must make a claim with the owner's homeowner's insurance carrier and third-party warranty company, as applicable**; there is no Builder Responsibility for any loss paid, covered claim, repair or the like if same is available through any insurance or third-party warranty.

Access for Repairs

In order to carry out the Builder Responsibilities, the Builder will require access to the home, the Property and Improvements. Builder and Builder designees **shall be allowed full access in Builder's normal business operations for testing, inspection and repairs.** Refusal or delay of more than three business days upon verbal or written request of the Builder will waive and void any Builder Responsibility.

The Contract's Heart

- Getting You Paid
- Initial Cash Payment & Termination Right
- Draws
- Change Orders
- Allowances
- Substantial Completion
- Punch List

- 5.A. INITIAL CASH PAYMENT - Prior to the commencement of the Work, Owner shall pay to Builder _____% of the Total Contract Price **OR** \$_____ as a portion of the Total Contract Price (Initial Cash Payment). **Builder may use the Initial Cash Payment in consideration for initial construction or pre-construction expenses, and a portion of the Builder's Fee.** The Initial Cash Payment shall be retained by the Builder as liquidated damages if this Contract is terminated for any reason other than a Builder's Event of Default (as defined below)

- 16.L. TERMINATION/STIPULATED DAMAGES PRIOR TO SUBSTANTIAL COMPLETION – In the event a bona fide dispute or material misunderstanding (Dispute) arises between Builder and Owner prior to Substantial Completion and if such Dispute cannot be resolved to the mutual satisfaction of Builder and Owner, Builder at its sole election, may either . . . or may terminate this Contract by written notice to Owner. In the event of termination of this Contract by the Builder pursuant to this paragraph, Builder shall elect to pay Owner one of the following, as stipulated damages: (1) _____% of the Initial Cash Payment as defined above in 5.A., or (2) \$_____ .

5.C. Draw Requests

- During construction, the Builder shall present Owner with requests (Draw Request) for payment (Draw Payment(s)) by Owner. **Each Draw Request shall reflect the Construction Costs and Builder's Fee incurred up to the date the Draw Request is submitted to Owner.** The Draw Request shall include the name and address of each person who subcontracted directly with Builder and who Builder intends to pay from the requested funds. Owner shall cause the Draw Payments to be made to Builder within three (3) business days following the receipt of a Draw Request. In the event of a Draw Payment delay, **Builder shall have the right to suspend Work.**

No Payment . . . Now What?

- Do I send notice of breach?
 - Notice of Breach
- Do I stop work on the job?
- Do I pay my subs and suppliers?

5.D. Final Payment

- **FINAL PAYMENT** - The Final Payment (the portion of the Total Contract Price, Change Orders, and Allowances, as defined below, not paid by previous payments) shall be due and payable upon Substantial Completion (as defined below). Final Payment shall also include all costs projected or anticipated by the Builder for invoices not yet received. Owner agrees to pay any additional costs incurred by Builder after Substantial Completion, promptly upon Builder's request; this includes, but is not limited to, any additional costs due to a delayed closing. Except as provided in Section 5.A., Owner and Builder agree that there will be no retainage of funds.

7. SUBSTANTIAL COMPLETION

- The Improvements are substantially completed (Substantial Completion) when: 1) **a certificate of occupancy** is issued or, 2) if no certificate of occupancy is required, when all electrical, mechanical, and plumbing final inspections, or all other required inspections, have been approved or all approvals for occupancy have been received from any applicable governmental authority or, 3) in the absence of the foregoing, when the Improvements are suitable for occupancy; provided, however, that if Owner moves into the Improvements, ***by occupying or placing any personal property in any of the Improvements***, the Improvements shall be deemed to be **substantially complete**.

- Upon Substantial Completion of the Improvements and payment to the Builder of the Total Contract Price and all payments as set forth herein, Owner will be given possession of the Improvements and the Property
- **Builder's failure to complete Punch List Items shall not be a basis for Owner to withhold any payments** otherwise due Builder and, although the Warranty will be in effect at Substantial Completion, **no work is required to be performed by Builder pursuant to the Warranty** until the Total Contract Price and all payments have been paid to Builder by Owner in full.

9.A. CHANGE ORDER PROCEDURE

CHANGE ORDER PROCEDURE – Except as otherwise stated in this Contract, no alterations, additions or deletions will be made in the Work unless agreed to in writing by Owner and Builder. To approve a proposed change, both Owner and Builder shall sign a written agreement (Change Order) in the form attached. In lieu of the form, a written Change Order may also constitute an **email** exchange between Owner and Builder in which the Changes are discussed and acknowledged by the Parties.

Change Orders continued . . .

- Unless otherwise specified in agreed upon Change Orders, Owner shall pay for all agreed upon Change Orders including the additional Builder's Fee to Builder in cash or immediately available funds within three (3) business days after Owner's acceptance of the proposal. **Builder will not be obliged to proceed with any Work until all amounts have been paid** as agreed and Builder has no obligation to stop Work while Change Orders are being discussed.

What are Allowance Overages?

- A Change Order!
- **ALLOWANCES:** The sums allocable to each listed Allowance are included in the Total Contract Price. . . . All overages in expenditures from Allowance amounts will be treated as a Change Order . . .
- So, if the selections exceed an Allowance category, you must execute a Change Order.
- What will the Customer claim if you do not do so?

ASSIGNMENT ?

Builder hereby assigns its rights to receive payment under the foregoing Contract, together with the liens above created, to _____ (Assignee), provided this assignment shall be effective only with respect to the amount of Total Contract Price paid to Builder under the foregoing Contract, with Builder retaining its right to receive payment of any portion of the Total Contract Price not then paid to Builder and further retaining the lien securing same, which retained lien shall be subordinate to the portion of the lien assigned to Assignee. This Assignment is made without recourse, representation or warranty.

Contract Improvements

Can we Recover our Attorney's Fees?

- **ATTORNEY'S FEES:** If Builder or Owner is the prevailing party in any legal proceeding or arbitration, brought in connection with or relating to this Contract or the Improvements in any way, then, in addition to any other relief sought, such party **shall be entitled to recover its attorney's fees, court/arbitration costs, and any other litigation expenses from the non-prevailing party.**

The “Winner” (continued)

- The “prevailing party” shall be deemed to be the party whose last written offer to settle the dispute (or the fair market value of the offer), before the initiation of the proceeding/arbitration, **most closely approximates the final award**

CODE VIOLATION LITIGATION

- UR R I#DVVHP EO\
- Z HDWKHU QHVVIVWDQW#EDUUIHUV
- H [WHUIR U#YHQHHUV
 - EUIFN#VHV/#P R UWDU/#WXFFR
- IHQHVVUDWIR QV#GR R UV/#Z IQGR Z V/#YHQWV/#IWF 1,
- HJ UHVV#VWDIUV/#Z DONZ D\V/#IWF 1,
- VIWH#JUDGIQJ

New Warranty-Code Disclaimer

- **Builder shall construct the Improvements in a manner that passes all applicable municipal or county inspections; passage of such inspections indicates compliance with applicable codes and standards. Failure to meet an applicable code or standard by itself for any element of the Improvements does not give rise to strict liability and it is not negligence *per se*, breach of contract or breach of warranty and does not create a cause of action or warranty claim against Builder.**

Warranty-Code Disclaimer, cont'd.

- A claim or allegation that there is a failure to meet applicable code must be accompanied by **(1) actual physical damage resulting from that failure or violation of code to the Property or Improvements, or (2) an immediate threat to the health and safety for the occupants or invitees.** Builder shall not be required to utilize any repair method that would result in economic waste or be required to repair items or areas that are not damaged.

Warranty and Repair Method

For items in need of repair under the Express Limited Home Warranty, the Parties agree that **Builder shall have the sole right to determine the means, method, and manner of repair** to be implemented.

Time and Price Adjustment

If Owner completion of the prerequisites in 6.A. above are delayed more than thirty (30) days from the execution of this Contract or Owner further delays Work commencement in any manner, Builder shall have the right to increase the Total Contract Price by an amount equal to any actual labor or material price increases that occur after the execution date.

Substantial Completion

- provided, however, that if Owner moves into the Improvements, *by occupying or placing any personal property in any of the Improvements*, the Improvements shall be deemed to be substantially complete.

Allowances and Change Orders

Failure or refusal of Owner to execute a Change Order for Allowance overages **does not relieve Owner of requirement to pay** for all Allowance overages resulting from Owner selections.

Document Reliance

If Owner elects not to obtain a Geotechnical Report for use in the design of the foundation system by a professional engineer, **Owner hereby releases Builder from any and all foundation movement or foundation failure based claims** under this Contract or any applicable warranty.

PRIVACY AND TECHNOLOGY – Owner may elect for the installation of or the Improvements may have various technologies installed that in some form document, photograph, record, or otherwise capture data, images, video, or voice, of the Owner, occupants, or invitees. All such information may be transmitted, sold or used without Owner's knowledge or consent. As a result, Owner waives any claims against Builder regarding these various incorporated technologies and all claims of how any data captured by said technologies is published, distributed, sold, used, or misused.

Trust Funds and The Property Code

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

- **requires minimum of 2 accounts**
- must pay those listed on draw request
- cannot use money from one job to pay bills on another
- Criminal Liability, State Jail Felony