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TEXAS RESIDENTIAL CONSTRUCTION CONTRACTS:

Homeowner Guide to Reviewing, Modifying, and Understanding New Home Construction Contracts and Remodel Contracts.

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About This Guide

This document is intended to provide a brief overview of key concepts and the material terms of a typical Texas residential new home construction contract or home remodeling contract for Texas homeowners entering into or currently bound by a residential construction or remodeling contract. Our goal is to help owners avoid financial surprises, unfair contract terms, and legal disputes by understanding and negotiating key provisions typically found in builder-drafted agreements—including the Texas Association of Builders (TAB) standard forms. Drawing upon our extensive litigation and transactional experience, we provide homeowners with the knowledge and tools to protect their rights and ensure that their construction contract reflects a fair allocation of risk and responsibility between the parties.

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1. Overview: Builder Contracts in Texas

Builder-drafted contracts, especially those based on TAB forms, are heavily slanted to favor the builder. They often waive statutory protections, disclaim warranties, and shift financial risk to the homeowner. Signing without legal review can lead to significant liability, change order disputes, open-ended pricing, and loss of leverage if problems arise during construction.

Many residential construction agreements are drafted without input from the owner and contain vague or overly broad provisions that allow the builder to impose unilateral changes, delay completion without consequence, or increase the contract price through allowances, escalation clauses, or unforeseen condition claims. In our experience, these risks can be greatly reduced by reviewing and negotiating the agreement before construction begins. At Lovein Ribman, we review and negotiate contracts before you sign and help interpret or enforce contracts that have already been signed. As the co-author of *Texas Construction Law And Practice* and board-certified in Construction Law, I strive to ensure our firm brings unmatched authority to protecting homeowners.

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2. Choosing the Right Delivery Method

Before a builder is selected and a contract type is determined, the owner must decide upon a project delivery method. A project delivery method is the framework that defines how a construction project is organized and executed, including the roles, responsibilities, and relationships among

the stakeholders. The chosen delivery method significantly influences the project's schedule, cost, risk allocation, and the level of collaboration between the owner, design professionals, and builder. On residential projects, the most common delivery methods include design-bid-build and design-build.

Design-Bid-Build is the traditional approach, where the homeowner hires a design professional (typically an architect) to create plans and specifications. Once the design is complete, the owner solicits bids from home builders and selects one to perform the work. The builder is responsible for contracting directly with all subcontractors/suppliers and delivering a completed project. This method allows the homeowner greater control over the design and facilitates competitive bidding. However, it can increase the total project duration and often leads to a more adversarial relationship between the architect and builder, especially when disputes over constructability or cost arise during the build.

In contrast, the Design-Build method streamlines the process by combining design and construction services under one contract, typically with a builder who has design professionals in-house or under contract. This method encourages collaboration, reduces delivery time, and may lower costs by aligning design decisions with budget and schedule realities. On the downside, the homeowner may lose some design control, and the absence of an independent architect can leave the owner without a neutral advocate. Builders may also prioritize profit or efficiency over quality or aesthetics unless the agreement clearly defines expectations.

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3. Choosing the Right Payment Structure

Once the delivery method is determined, the next step is to select the financial structure of the construction contract, referred to as the "basis for payment." Choosing the appropriate payment structure is crucial for managing project costs, risks, and responsibilities. Whether the contract is based on a fixed-price, cost-plus, or another payment arrangement, this decision directly impacts how expenses are calculated, how risks are distributed between the parties, and the degree of flexibility allowed during the construction process. Each structure offers specific advantages and disadvantages, making some more appropriate for particular projects or circumstances. A clear understanding of these payment structures is essential for determining the most suitable contract type for a project and ensuring that payment terms align with the owner's financial and project objectives. In residential construction, the two primary payment structures are Stipulated Sum (Fixed Price) and Cost Plus a Fee. A less common but more owner-protective option is a Cost Plus a Fee with a Guaranteed Maximum Price (GMP). These three payment structures are discussed below.

Fixed-Price (Stipulated Sum): A stipulated sum contract, also referred to as a fixed-price or lump sum contract, is one of the most commonly used agreements in construction projects. Under this arrangement, the owner and contractor agree on a specific price for completing a clearly defined

scope of work. This predetermined price provides the owner with a high level of cost certainty and shields them from risks associated with price fluctuations during the project. For the contractor, a fixed-price contract reduces administrative burdens, as there is no need to track or justify costs throughout the project, unlike in a "cost-plus-fee" contract. While fixed-price contracts are ideal for projects with well-defined plans and specifications, they also come with potential downsides for both parties.

For contractors, fixed-price contracts present a calculated risk, requiring careful management of costs and time to maintain profitability. If actual costs are lower than expected, contractors can increase their profit margins. Conversely, if costs exceed projections, contractors must absorb the financial loss. This risk can incentivize contractors to cut corners or implement cost-saving measures that might compromise quality to protect profit margins or minimize losses. To mitigate these risks, most builder drafted fixed-price contracts include provisions designed to shield contractors from unforeseen financial burdens. Examples of such provisions include material cost escalation clauses, which permit contractors to pass on material cost increases exceeding an agreed-upon threshold; unforeseen site conditions clauses, which allow contractors to recover additional labor and material costs arising from unexpected site conditions; and specified allowances for defined scopes of work where actual costs cannot be accurately determined at the time the contract is executed. For homeowners entering into a fixed price contract, review and modification of these provisions is essential to ensuring the fixed price cannot be effectively undermined through broad exceptions, vague allowances, or open-ended escalation clauses that shift the risk of increased costs back onto the homeowner. Without careful negotiation, these carve-outs can convert a seemingly firm price into a cost-plus contract, exposing the homeowner to unanticipated expenses and potential disputes during construction.

An example of a fixed-price form contract commonly used in the construction industry for residential new construction projects, is the Texas Association of Builders (TAB) *Residential Construction Contract—Fixed Price Contract*—Form (TAB 1.1)

Cost-Plus Fee: A cost-plus contract is a common alternative to the fixed-price contract, used in new residential construction. Under this arrangement, the owner reimburses the contractor for actual costs incurred during the project—such as labor, materials, and equipment—along with a contractor fee. This fee, which compensates the contractor for overhead and profit, is typically structured as either a fixed amount or a percentage of total project costs. Unlike a fixed-price contract, the total cost of a cost-plus contract is determined by actual expenses. The homeowner typically provides a budget, but there is no guarantee that the final cost will remain within that budget.

Cost-plus contracts are well-suited for projects where changes to plans and specifications are expected, as they do not rely on a fixed price. This structure can also promote higher-quality work, as contractors have less incentive to cut corners, given that their fee is not tied to cost reductions. However, this type of contract shifts more financial risk to the owner. Unless a guaranteed

maximum price is negotiated (discussed below), the total project cost remains uncertain, and the owner bears the burden of any increased expenses. Contractors, on the other hand, face minimal risk, as they are reimbursed for all costs, and their fee—whether fixed or percentage-based—remains stable.

While active cost monitoring by the owner can help manage expenses and potentially achieve savings, this approach requires significant owner involvement. Although owners technically have input in labor and material costs, such participation is uncommon in practice. For contractors, cost-plus contracts come with higher administrative burdens. They must maintain detailed accounting records and provide transparency for audits, which adds time and complexity. Additionally, while a fixed fee structure may discourage contractors from cutting corners, a percentage-based fee can reduce their incentive to control costs and complete the project on time, as higher costs may result in higher compensation. To mitigate these risks, owners may include a "guaranteed maximum price" clause with a savings-sharing arrangement, which incentivizes contractors to control costs while maintaining flexibility. For homeowners entering into a cost-plus fee contract, it is essential to include a provision requiring the builder to submit all supporting documentation—such as subcontractor invoices, supplier receipts, timecards, and material delivery tickets—with each draw request. Equally important is a provision granting the homeowner the right to audit all project-related records at any time during construction and for a period of at least two years following final completion. These provisions help ensure transparency, prevent overbilling, and provide the homeowner with a mechanism to verify that all charges are legitimate and within the scope of the contract.

An example of a cost-plus form contract used for residential new construction projects, is the Texas Association of Builders (TAB) *Residential Construction Contract—Cost Plus Contract*—Form (TAB-2.1)

Cost-Plus with Guaranteed Maximum Price (GMP): A guaranteed maximum price (GMP) is a provision used in conjunction with a cost-plus contract to cap the total project costs. Under this arrangement, the contractor is reimbursed for actual costs incurred—such as labor, materials, and equipment—plus a contractor fee, up to the agreed maximum price. If project costs exceed the GMP, the contractor absorbs the overrun unless the GMP is formally increased through a change order. This structure incentivizes the contractor to estimate costs accurately before the contract is executed and to manage expenses diligently throughout the project.

For the owner, a GMP reduces financial risk by capping total costs while ensuring any savings from cost underruns are returned to the owner. This differs from a fixed-price contract, where cost savings typically increase the contractor's profit. To encourage cost efficiency, a savings clause can be included, allowing the owner and contractor to share any savings under the GMP, often with 70% allocated to the owner and 30% to the contractor. This clause provides an additional incentive for the contractor to control costs while earning a share of the savings as additional profit.

Because a GMP requires precise cost management and planning, it works best when the project's plans and specifications are well-defined. This arrangement offers a balance of flexibility, cost control, and shared accountability, benefiting both the owner and the contractor.

We help homeowners choose and negotiate the payment structure that best aligns with their project goals, risk tolerance, and financing strategy.

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4. Commonly Negotiated Provisions & Pitfalls

The following provisions are among the most common builder-friendly clauses found in Texas residential construction and remodeling contracts—each of which should be carefully reviewed and negotiated by homeowners before signing.

<u>Completion Date Provisions in Texas Residential Construction Contracts</u>

Most residential construction contracts—including the Texas Association of Builders (TAB) Fixed Price Contract and Cost-Plus a Fee Contract—include a projected or "estimated" completion date, often expressed in general terms such as "approximately 300 days from commencement of construction." However, these same contracts almost always disclaim responsibility for delay, expressly stating that no completion date is guaranteed and that the schedule is subject to change for a wide range of broadly defined reasons, including inclement weather, material shortages, labor issues, or changes in the scope of work. In effect, this language renders the stated completion date unenforceable and places the entire risk of delay on the homeowner. The Texas Association of Builders (TAB) form contracts also contain a provision requiring both parties to waive any claims for indirect or consequential damages arising from delayed completion.

Further, failure to establish a firm completion date, presents serious risks for property owners, especially those relying on interim housing, selling an existing home, or using a construction loan tied to a maturity date. Extended or open-ended construction timelines can result in mounting financial losses—such as temporary housing costs, interest rate increases, loan extension fees, and potential loan defaults—none of which are typically recoverable unless the contract includes enforceable timing provisions. Without a binding completion deadline, the builder has little contractual incentive to stay on schedule, and the homeowner may be left in limbo for months or longer.

To avoid these risks, the contract should include a specific date for substantial completion, or at the very least, a firm number of calendar days from commencement within which the work must be completed. That date should only be extendable under limited and clearly defined conditions, and the contractor should be required to provide written justification and obtain approval for any delay claims. In addition, the contract should include a "time is of the essence" provision, which confirms that adherence to the project schedule is a material contractual obligation. This provision

helps preserve the homeowner's legal remedies for delay, especially when paired with liquidated damages or defined termination rights. Finally, the waiver of consequential and indirect damage provision should be stricken or modified to provide a remedy in the event of builder delays.

Liquidated Damages in Residential Construction Contracts

Following the inclusion of a firm completion date, a liquidated damages provision serves as an important enforcement mechanism to hold the contractor accountable for delays. It specifies a fixed daily amount the builder must pay for each day the project exceeds the agreed-upon completion date. Unlike general claims for breach of contract, which require the homeowner to prove actual damages, liquidated damages allow for pre-agreed compensation—streamlining recovery and reducing disputes.

This is especially critical in residential construction, where delays can have real financial consequences. Homeowners are often operating under the terms of a construction loan with a maturity date or an interest rate lock that depends on timely completion. A properly drafted liquidated damages clause reinforces that time is a material obligation—not a flexible target—and creates a tangible incentive for the contractor to stay on schedule.

Because builders often resist these provisions or attempt to negotiate lower daily rates or broad grace periods, owners should ensure that the amount reflects the real-world financial impact of delay. Texas law requires that liquidated damages be compensatory, not punitive. To be enforceable, the provision must meet two tests: first, the harm caused by the delay must have been difficult to estimate at the time of contracting; and second, the amount specified must be a reasonable forecast of the anticipated loss. Courts will not enforce provisions that operate as a penalty, regardless of how they are labeled.

When paired with a clear completion deadline and a time-is-of-the-essence clause, a well-drafted liquidated damages provision becomes one of the most effective tools an owner has for protecting the project timeline and minimizing the financial risks associated with construction delays.

Allowance Provisions in Residential Construction Contracts

Allowance provisions are commonly used in residential construction contracts to account for items such as flooring, fixtures, and appliances when the exact specifications or costs are not yet finalized. They function as placeholders in the budget, enabling work to begin without delay while allowing the owner time to make selections. However, these provisions often lead to confusion or disputes when they are vaguely drafted or misunderstood.

In fixed-price contracts, the allowance amount is included in the total contract price. If actual costs exceed the allowance, the owner must pay the difference—usually through a change order. If costs fall below the allowance, the contract should clarify whether the savings are returned to the owner or retained by the builder. In cost-plus contracts, allowances act as budgeting tools, but the owner

typically pays the full actual cost, whether or not it exceeds the estimate. Disputes often arise from underfunded allowances that fail to reflect realistic pricing, or from the use of allowances for essential materials like lumber, which shifts risk back to the owner.

To avoid misunderstandings, allowance provisions should clearly define what is included (materials, labor, taxes), how overages and savings are handled, and the deadlines for final selections. Without clear terms and accurate baseline pricing, allowances can become a hidden cost center and a source of significant conflict between homeowner and builder.

Change Orders in Residential Construction Contracts

Change orders are a common—and often contentious—aspect of residential construction projects. These formal written modifications document changes to the original scope of work and adjust the contract price and timeline accordingly. They may result from owner-directed upgrades, unforeseen site conditions, material substitutions, or code compliance requirements. Without a clearly defined and fair change order provision, disputes frequently arise over whether the change was properly authorized, how much it should cost, and whether it impacts the project schedule.

Most builder-drafted contracts, including the standard form agreements promulgated by the Texas Association of Builders (TAB), favor the contractor when it comes to change orders. The TAB provision allows changes to be authorized in writing or via email, but only becomes binding once accepted by the builder. The builder may require full payment within days of approval and is not obligated to proceed until payment is received. In addition, the builder has the discretion to reject reductions in scope unless compensated for lost profit, and may unilaterally impose additional charges for work it deems necessary to address structural concerns, regulatory compliance, or homeowner association demands—even if those changes were not requested or approved by the owner.

These provisions often leave homeowners vulnerable to unanticipated charges or project delays. For example, a builder may assert that certain work was required for code compliance and demand immediate payment, or refuse to complete owner-requested upgrades unless the full cost is paid upfront. Similarly, a verbal agreement or email exchange may later be disputed, leaving the parties at odds over whether a change was actually approved or enforceable.

To avoid these outcomes, it is essential for homeowners to negotiate more balanced change order terms before signing the contract. The agreement should require written, mutual approval before any change in the work is performed or billed, with exceptions limited to genuine emergencies. Advance payment should not be required unless both parties agree on the scope, price, and timeline impact of the change. Any provision granting the builder unilateral discretion to reject reductions or impose "necessary" changes should be narrowed to prevent abuse, and must include documentation requirements to support the need for the additional work. Disputes over scope or price should be subject to a clear resolution mechanism to prevent delays.

When carefully negotiated and clearly drafted, a change order provision provides flexibility while minimizing financial surprises. It ensures that all modifications are properly documented, priced, and agreed upon, giving both parties clarity and preventing costly disputes down the road.

Escalation of Material Cost Provisions in Residential Construction Contracts

When negotiating a fixed-price contract for new home construction, homeowners often assume that the total contract price is locked in, offering cost certainty throughout the project. However, many builder-drafted contracts—particularly those using the Texas Association of Builders (TAB) form—include material cost escalation clauses that can significantly alter the final price. These provisions allow builders to increase the contract amount if material costs rise by more than a certain percentage, commonly 10%. While contractors cite this clause as a way to protect against market volatility, it exposes homeowners to substantial financial risk and undermines the very concept of a fixed-price agreement.

The material escalation provision in the 2023 – 2025 Texas Association of Builders (TAB) Residential Construction Contract – Fixed Price (For Use with Homes Constructed on the Owner's Property) (TAB 1.1), is especially contractor-favorable. It applies broadly to nearly all construction materials and building products and imposes no cost-sharing or mitigation obligations on the builder. If material costs rise by more than 10%, the entire increase is passed to the homeowner, who must sign a Change Order acknowledging the price hike. Refusal to sign is deemed a material breach of contract, potentially allowing the builder to terminate the agreement and retain deposits. Unlike more balanced provisions used in commercial contracts or AIA standard forms, the TAB clause contains no limits, no duty to seek alternatives, and no protection against excessive or unverifiable increases.

Homeowners financing their build through construction loans or mortgages may find themselves in an especially precarious position. These loans are typically approved based on the original contract price, and escalation charges must be paid out-of-pocket if they exceed the approved loan amount. In some cases, the cost increases can be substantial enough to jeopardize the completion of the project. Moreover, because the clause does not require prior homeowner approval, builders can invoke the provision unilaterally, leaving owners with limited options to contest or control the added expense.

To protect against these risks, homeowners should negotiate meaningful modifications to any material escalation clause. This can include limiting the scope of materials subject to escalation, requiring written notice and justification before any increase, imposing cost-sharing thresholds, capping allowable increases, or eliminating the provision altogether in favor of a true fixed-price contract. Homeowners should also insist on transparency—such as documentation of actual material costs and verification of price increases using third-party market data—before agreeing to any adjustment.

Ultimately, without clear and balanced revisions, the escalation provision in most builder contracts—especially the TAB form—places an unmanageable burden on homeowners and can turn a stable fixed-price agreement into an unpredictable financial liability. Before signing, homeowners should have all escalation-related language reviewed and modified by legal counsel to ensure adequate protections are in place.

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5. Analysis of the Texas Association of Builders (TAB) Residential Construction Contract—Fixed Price—TAB 1.1

In the context of residential new home construction and major remodeling projects, TAB form contracts have emerged as the industry standard in Texas. Promulgated by the Texas Association of Builders, these contracts are exceptionally comprehensive, addressing nearly every issue that could arise during and after a residential construction project. For builders, these forms typically require minimal, if any, modifications, as they are already tailored to protect the builder's interests. However, is the TAB contract fair to Texas homeowners? No it is not. For homeowners, substantial revisions are often necessary if the builder insists on using a TAB form contract. For example, the *Residential Construction Contract – Fixed Price* form TAB 1.1 agreement contains several provisions that solely protect the builder's interests, many of which should be omitted or revised to balance the rights and responsibilities of both parties. Below is an analysis of these key provisions:

> **Provision 5.D, "Final Payment"** This provision requires the Owner to expressly waive the statutory requirement to reserve 10% of the Contract Price during the progress of the work and for 30 days from substantial completion as required under Texas Property Code, Chapter 53, Section 53.101. A failure to withhold reserved funds can expose the Owner to paying derivative lien claims for work already paid to the contractor, thereby paying twice.
>
> Further, this provision requires Final Payment to the Builder upon Substantial Completion and as a condition precedent that must be satisfied prior to a final walk-thru of the Improvement, performing any Punch List items, or warranty work. These conditions ignore the Owner's right to withhold payment for incomplete work, Punch List items, or defective work under Texas Property Code, Chapter 28, "The Prompt Payment Act."
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> **Provision 6.C, "Completion of Improvements"** This provision provides for an estimated Completion Date and expressly states that the "Builder does not warrant or guarantee completion of the Improvements by any specific date" and requires the Owner to

waive delay damages. However, since most new home construction projects are funded through a construction loan with a fixed maturity date, this provision fails to account for the Owner's potential liability to the lender if the project is not completed by the loan's maturity date. The project's completion date should be clearly defined and aligned with the loan maturity date to avoid such risks.

Provision 7, "Substantial Completion, Inspection, Release, and Occupancy" This provision requires the Owner's written acceptance of the Improvements and acknowledgment that the work complies with Construction Documents after performing a single walk-through inspection. This provision further requires the Owner's to release the Builder from liability for all claims except the Punch List and Express Warranty obligations.

The provision also requires the Owner to waive the right to withhold 110% from the Builder's payment for a "Good Faith Dispute" under Texas Property Code, Chapter 28, Section 28.003(a) Texas Prompt Payment Act.

Additionally, the provision prohibits the Owner from taking occupancy of the Improvements upon obtaining Substantial Completion, without written consent from the Builder, until the Builder is paid the Total Contract Price, even when there is a "good faith dispute" over Final Payment or when the Owner holds title to the Improvements.

Provision 13.C, "Remedies of Owner" This provision limits the Owner's remedies for a Builder default that occurs prior to Substantial Completion to: (i) sums paid to Builder for labor and materials not already incorporated into the Improvements; and (ii) reasonable attorney's fees and costs "incurred to invoke" mediation or arbitration. These limitations fail to account for potential actual damages resulting from significant project delays, increased costs to complete the Improvements with a replacement contractor, or defective workmanship.

Provision 14.D, "Objections to Work" This provision requires the Owner to promptly notify Builder of objections to any Work not in compliance with the Construction Documents. The Owner's failure to promptly notify Builder of objections to any Work performed

within any phase of construction shall constitute an acceptance of the Work, subject to any Builder obligation under the Express Limited Home Warranty.

Further, this provision allows the Builder, in its sole judgment, to deem that a reported error is "within acceptable tolerances and take no corrective action."

Provision 16.N, "Termination/Stipulated Damages Prior to Substantial Completion" This provision allows the Builder to unilaterally terminate the contract for convenience in the event of a bona fide dispute if the dispute cannot be resolved to the mutual satisfaction of both parties.

Provision 16.Q, "Mutual Limitation of Claims and Remedies" This provision waives the Owner's right to recover special, indirect, or consequential damages, including mental anguish.

Further, this provision reduces the statute of limitations to two years and one day, shortening the time frame for Owners to assert valid claims.

Provision 16.T, "Escalation of Certain Materials Categories" This provision allows the Builder to transfer increased material costs to the Owner if those costs exceed a specified percentage (typically 10% to 25%) of the material prices paid by the Builder within 30 days prior to contract execution, without requiring mandatory written notice or prior Owner approval. This provision effectively shifts the risk associated with material price fluctuations from the Builder to the Owner, undermining the fundamental nature of a fixed-price contract and creating uncertainty in the payment structure.

These provisions collectively prioritize the builder's interests while exposing the owner to significant legal and financial risks. Revisions or omissions are necessary to create a more equitable agreement that protects the owner's rights.

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6. Legal Remedies & How We Help

If you are a homeowner preparing to enter into a new home construction or remodel contract, contact us before signing. We can review, explain, and modify the contract to ensure your rights

are protected, the terms are clear, and that you are not exposed to unnecessary financial or legal risks. If you have already signed a construction contract and have concerns about your rights, change orders, pricing, delays, or the builder's obligations, we can still help. Our attorneys can review your agreement, explain your legal position, and advise you on how to enforce the contract or address any issues that have arisen during the project.

Our attorneys are trusted by judges, arbitrators, and construction professionals statewide. We've written the leading legal manual on Texas construction law, and we're ready to help you protect your rights.

Call us at **(888) 368-2483** or visit www.loveinribman.com or www.loveinribmanconstruction.com to learn more about our services or to request a consultation.

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