# § 24
# Contracts

## 24.1 Understand the main goals of a contract.

(a) *Creating a legal relationship.* A contract, the most general type of transactional document, creates reciprocal duties between the parties. It may be anything from a lease to a license to a land sale to a settlement. A lawyer drafting a contract or advising a client about a contract must remember the simple truth that whenever someone asks someone else to sign a document, the signer may someday regret having signed. The contractual terms matter most if that day ever comes. While a contract may begin a relationship that all the parties are pleased with or close a deal that they are optimistic about, the drafter must look toward the chance that the satisfaction and optimism may fade. The document must serve well in that future day as well as in the present.

(b) *Making terms clear.* On the one hand, a contract should be readable so that the parties will understand their rights and duties. On the other hand, it must be unmistakable in its meaning, since whenever a disagreement arises each party will have a conscious or unconscious incentive to interpret the contract in its own favor. Unlike most other documents, contracts can be subjected to willful perversions of meaning. So the wordings must be so clear that they foreclose frivolous positions about what they mean.

## 24.2 Think about the specific goals of your contract.

(a) *Accuracy, completeness, and precision.* As a drafter, you must understand exactly what the parties wish to accomplish. This means that you must truly understand the practical character of the business transaction. You must express this accurately, completely, and precisely.

(b) *Protecting the client.* You must foresee situations that your client has not necessarily thought about. If the relationship sours, or if goods turn out not to be as represented, or if one of the parties goes bankrupt, what happens then? The central question is always the same: How can you protect the interests of your client in advance? The answers to this question (there will always be more than one answer) will vary from contract to contract, but it is precisely the question that you will have to pose again and again. In a publishing agreement in which you represent the author, what happens if the publisher goes out of business? What happens with later editions if the author dies? Are the heirs protected, and for how long? Can you retain the copyright in your client's name (as opposed to granting it to the publisher)? Can you have escalating royalties after the sale of a few thousand copies? Can you negotiate a commitment from the publisher to promote the book and related computer products? Depending on the type of contract you work on, the provisions that you need to think about require great creativity and insight.

(c) *Getting the deal done.* Although you want to protect your client's interests, you'll never be able to reduce your client's risk to zero. Undertaking contractual obligations always entails some element of risk. After offering your advice, you must let your client make business judgments about what level of legal risk is acceptable. If you draft an agreement that is so lopsided that the other party scoffs at it or (worse) gets offended by it, you have failed in an essential element of good drafting. Even though your draft will invariably protect your client more than the other party, you should always approach the deal with an eye toward reasonableness and the type of business relationship that your client hopes to cultivate. It is an inexperienced transactional drafter who always begins with the most extreme positions. The best deal is good for both parties at the inception; the contract fixes the deal so that if the context changes, the parties' interests are defined. The contract must be fair.

## 24.3 Avoid the common faults of contracts.

(a) *Patchwork style.* Contracts are often the product of many generations of drafters, each of whom had a slightly different style. Duties are often inconsistently stated (*shall, shall have the duty to, agrees to, is required to, must, will, understands that it is her sole responsibility to, is to, promises to,* etc.). Sometimes as many as four ways of stating a duty will appear on a single page. The modern drafter must reconcile these inconsistencies, preferably using ordinary English (preferably *will* or possibly *agrees to*).

(b) *Ambiguous "shall."* Although every drafter seems to have heard that *shall* is a mandatory word, contracts often use the word in as many as four or five different senses. Sometimes its sense is indeed mandatory (*the employee shall send notice*); sometimes it means "may," especially after a negative (*neither party shall disclose*); sometimes it means "is entitled to" (*the corporate secretary shall be reimbursed for all expenses*); sometimes it is merely a future-tense verb (*if any partner shall become bankrupt*); and courts have often held that it means "should." Where a mandatory word is needed, use *must.*

(c) *Overreaching.* A contract that demands too much from the other party can defeat the very purpose of the contract. Even if you have a legitimate protection or right at stake, a provision that's unfair to the other party gives the contract an unpleasant odor and makes negotiations more difficult. It may even break the deal. And if an overreaching clause leads to litigation, it could jeopardize any claim asserted under that clause and might be struck altogether.

(d) *Density.* Wall-to-wall type can put off any reader—lawyer and client alike. Yet it's all too common among legal drafters. Use headings to divide the contract into related terms (see 4.20–4.22). Set out lists in subparts so readers can find and understand the terms easily. Use a numbering system so anyone can cite any provision in the document (see 24.3(e)). Cut the verbiage, especially the doublets and triplets that don't add meaning (see 11.2(f)): then you'll be able to use a larger, more reader-friendly font (see 4.5), more generous page margins (see 4.7), white space with headings (see 4.6), and hanging indents (see 4.9).

(e) *Awkward numbering.* One possible reason for density is that the drafter has not adopted a workable numbering system. Some documents are sprinkled with Roman numerals and these make for awkward tabs once they are set out in separate subparts. For maximal readability and consistency, the following system is recommended:

**1. Compensation**

1.1 Salary. ------------------------------------------------------------
------------------------------------------------------:
(A) ------------------------------------------------------------
------------------------------------------------------------:
(1) ------------------------------------------------------------
------------------------------------------------------; or
(2) ------------------------------------------------------------
------------------------------------------------------------:
(a) --------------------------; and
(b) ------------------------------------------------------
--------------------------; and
(B) ------------------------------------------------------------
------------------------------------------------:
(1) --------------------------------;
(2) ---------------------------; or
(3) ---------------------------------.

1.2 Signing Bonus. --------------------------------------------------
---------------------------:
(A) ------------------------------------------------------------
----------------------------------------:
(1) -------------------------------------; and
(2) ------------------------------------------------------------
------------------------------:
(a) ---------------------------------; or
(b) --------------------------------; or
(B) ------------------------------------------------------------
-------------------------------------------------.

Imposing this kind of numbering system on an old form will typically lay bare both stylistic and substantive problems.

(f) *Uncritical use of forms.* Experienced lawyers know that forms are a better guide to content than they are to form. They will help you think through the kinds of issues that you will need to address, but they will probably be of minimal value in wording the provisions. Inexperienced lawyers sometimes slavishly follow forms (commercial or in-house) and end up not thinking through the issues as penetratingly as they should. Or the lawyers don't stop to think through how a particular boilerplate provision might affect a client with specific requirements and needs.

(g) *Legalese.* Many forms are so stuffed with legalisms—such as *witnesseth* (a worthless flourish), *the aforesaid* (as a replacement of *the*), *said* (as another replacement of *the*), and *such* (as yet another replacement of *the*)—that lawyers are afraid to change the forms because they seem to enshrine an untouchable dialect. Lawyers occasionally argue that clients demand forms filled with this archaic jargon, but actual sightings of these clients have never been verified. The better modern forms dispense with the legalese; the provisions are worded more comprehensibly both for lawyers and for clients, and well-drafted plain-English forms more accurately bring about the desired legal relationship than do the old-style forms.

(h) *Emphasis.* Unless it's specified by law, do not use all caps for emphasis. If a provision must be prominently displayed, use boldfaced type instead, set in usual sentence style of caps and lowercase. For the arguments against using all caps in text, see 2.19.

## 24.4 Study effective contracts.

(a) *Models.* It is useful to consult a formbook to develop an outline of a "deal," to ensure that you've covered all the bases. But then draft the contract yourself, in plain English. Although it is impossible to endorse any formbook because the forms almost invariably need further stylistic work, many useful ideas appear in Peter Siviglia, *Commercial Agreements* (1997–1998) and Robert A. Feldman, *Drafting Effective Contracts* (1996). For a full contract that consistently uses plain-language principles, see Bryan A. Garner, *Legal Writing in Plain English* 196–206 (2001).

(b) *Guidance.* For sound advice on particular elements of contractual drafting, see *Drafting Contracts and Commercial Instruments* (Research and Document Corp. ed, 1971); Carl Felsenfeld & Alan Siegel, *Writing Contracts in Plain English* (1981); Scott J. Burnham, *The Contract Drafting Guidebook* (rev. ed. 1992); Peter Butt & Richard Castle, *Modern Legal Drafting* (2001); and Bryan A. Garner, *A Dictionary of Modern Legal Usage* (2d ed. 1995).

(c) *Examples.* The first example that follows is a stock-repurchase agreement. The second is a construction contract. Both reflect the clean, modern style of contract-drafting.

# Stock-Repurchase Agreement

This Stock-Repurchase Agreement (the "Agreement"), dated May 12, 2006, is between Fortell Corporation (the "Company") and Jill F. Perlison.

## Background

A. Perlison owns 30,000 shares of Common Stock of the Company. She is a party to the shareholders' agreement dated June 11, 1999 between the Company, Joel F. Messerschmidt, individually, and Perlison, and the individual shareholders whose names are set forth on Exhibit A and Exhibit B to that agreement.

B. Perlison is a Severed Stockholder, as defined in the shareholders' agreement. As a result, Perlison is obligated to offer the shares to the Company for repurchase in accordance with § 7 of that agreement.

C. The Company has decided to accept the offer to repurchase the shares from Perlison.

D. The parties wish to enter into this Agreement to effect the repurchase by the Company of Perlison's shares.

## Terms and Conditions

### 1. Sale and Purchase of Shares

**1.1 Repurchase.** Effective immediately upon the signing of this Agreement, the Company will purchase from Perlison, and Perlison will sell to the Company, all her shares for an aggregate purchase price of $1,500, under the shareholders' agreement and the certificate of value issued in connection with that agreement. Perlison acknowledges receipt of a check for $1,500.

**1.2 Certificates.** In consideration of the purchase price of $1,500, Perlison will, upon the signing of this Agreement, surrender to the Company for cancellation a certificate representing her shares, together with a duly executed stock power.

**1.3 Shareholders' Agreement.** Performance of this Agreement fully satisfies all obligations under the shareholders agreement.

2. **Representations and Warranties.**

2.1 **Perlison's Representations and Warranties.** Perlison represents and warrants to the Company as follows:

(A) **Ownership.** Perlison is the beneficial and record owner of the shares, the shares constitute all her shares of capital stock in the Company, and she owns no securities convertible or exercisable for or other rights to acquire capital stock of the Company.

(B) **No Liens.** Perlison has not created any encumbrances or granted any rights in the shares. Upon the Company's repurchase of the shares, Perlison will transfer and deliver to the Company record and beneficial ownership of the shares, free of all encumbrances or restrictions of any kind.

(C) **No Conflicts.** Neither Perlison's signing and delivery of this Agreement nor her consummation of the transactions contemplated by the Agreement conflicts with or violates:

(1) the Company's charter;

(2) any agreement applicable to Perlison; or

(3) any law, rule, regulation, order, judgment, or decree applicable to Perlison or by which any of her property or assets might be affected.

2.2 **Company's Representations and Warranties.** The Company represents and warrants to the Company as follows:

(A) **No Conflicts.** Neither the Company's signing and delivery of this Agreement nor its consummation of the transactions contemplated by the Agreement conflicts with or violates:

(1) the Company's articles of organization;

(2) any agreement applicable to the Company; or

(3) any law, rule, regulation, order, judgment, or decree applicable to the Company or by which any of its property or assets might be affected.

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(B) **Authority.** The Company has all necessary power and authority under its articles of organization to sign and deliver this Agreement, to perform its obligations under it, and to consummate the transactions contemplated by it. The signing, delivery, and consummation have been duly and validly authorized by the Company's board of directors. No other corporate proceedings are necessary to authorize this Agreement or to consummate the transactions. The Agreement has been duly and validly signed and delivered by the Company and constitutes a legal, valid, and binding obligation of the Company, enforceable against it by its terms.

3. **Release.** In consideration of the purchase and sale of the shares under this Agreement, Perlison and the Company each release the other (and all related parties, including successors in interest) from all claims, liabilities, and damages of any kind, whether known or unknown, that the releasing party now has or might have against the released party for any reason at all. But this release does not apply to claims that either party may have against the other in connection with this Agreement.

4. **Notices.** Any notice or other communication required by this Agreement must be in writing and must be delivered personally or sent by certified or registered mail, or by overnight courier, postage prepaid, to the following addresses:

| If to the Company: | If to Perlison: |
|---|---|
| Fortell Corporation<br>Attn: General Counsel<br>555 N. Grand, Suite 1700<br>Los Angeles, CA 94105 | Jill F. Perlison<br>598 Battery St., Suite 1588<br>San Francisco, CA 94111 |

A notice is considered as having been given (1) on the day of personal delivery, or (2) two days after the date of mailing.

5. **Miscellaneous.**

5.1 **Choice of Law.** This Agreement is governed by the internal laws of California, without regard to its conflict-of-laws provisions.

5.2 **Entire Agreement; Modification.** This Agreement, together with the documents and agreements delivered by its terms and referred to in it, constitutes the entire agreement between the parties pertaining to the

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repurchase of shares and supersedes all prior and contemporaneous agreements, representations, and undertakings. No supplement, modification, or amendment of this Agreement will be binding unless it is in writing and signed by both parties.

5.3 **Waiver.** No waiver of any term of this Agreement constitutes a waiver of any other provision, whether similar or dissimilar. No waiver of any term constitutes a continuing waiver of that term. No waiver is binding unless signed in writing by the waiving party.

5.4 **Severability.** If any term of this Agreement is for any reason invalid or unenforceable, the rest of the Agreement remains fully valid and enforceable.

5.5 **Binding Effect; Assignment.** This Agreement binds and inures to the benefit of both the parties and their successors and assigns. But the Agreement cannot be assigned without the prior written consent of the other party.

5.6 **Headings.** The headings in this Agreement are for convenience of reference only and do not constitute a part of it. The headings do not affect its interpretation.

5.7 **Counterparts.** This Agreement may be signed in counterparts, each one of which is considered an original, but all of which constitute one and the same instrument.

Signed: May 12, 2006.



FORTELL CORPORATION

By: ______________________________

Title: ______________________________

______________________________

JILL F. PERLISON

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# Residential Construction Agreement

This Residential Construction Agreement (the "Agreement") is entered into between TRIPOD LLC, a Texas Limited Liability Company, d/b/a/ Hershey Custom Homes ("Contractor"), and Bertrand A. Reyrag and Tosca A. Reyrag ("Owners"). Contractor and Owners are collectively referred to as the "Parties."

## Background

A. Owners own 6472 Highland Road ("the Property"), Dallas, Texas, also known as Lot 22, Block 5673, Highland Estates, Dallas County, Texas.

B. Owners want Contractor to construct a single-family residence and other improvements for Owners on the Property in accordance with the construction-cost estimate attached as Schedule A.

C. Contractor has agreed to construct the residence and other improvements on the Property in accordance with this Agreement.

## Terms and Conditions

1. **The Work**

1.1 **Building the House.** Contractor will construct a residence and other improvements on the Property using the construction practices set forth in the building code adopted by the City of Dallas, Texas, in substantial conformity with the plans prepared by Overton Shelmire, FAIA, of Beran and Shelmire Architects, and in a professional and workmanlike manner. "Work" consists of all Contractor's services to be performed under this Agreement. The improvements will be considered substantially complete upon final inspection and approval by the City of Dallas and preliminary acceptance by Owner. Substantial completion does not include typical "punch-list" items, which will be completed in a timely manner after substantial completion occurs.

1.2 **Legal and Regulatory Prerequisites.** Contractor will pay all sales, consumer, use, and other similar taxes that are legally enacted at the time bids are received, and will secure and pay for the building permit and for all other permits and government fees, licenses,-and inspections necessary for the proper execution and completion of Work. Contractor will obtain all project permits and will coordinate the connection and commencement of all sewer and utility services for the improvements. Contractor will help secure, and Owners will pay for, all other necessary approvals, easements, assessments, and charges required for the construction, use, or occupancy of the improvements, including approvals or variances required to comply with applicable zoning laws, land-use laws, and restrictive covenants affecting the Property.

1.3 **Timeliness.** Contractor will commence the Work within 10 days after the date of this Agreement and will continue the Work diligently until the Work is complete. The estimated completion date is December 20, 2007. Although subject to change, the attached Schedule B is the Contractor's estimated construction schedule for the project. Contractor is not liable to Owners for any delay in the Work occasioned by change orders, by acts of the Owners, or by any other cause for which Contractor's responsibility is reasonably excused by any provision of this Agreement. Contractor must promptly notify Owners in writing of any delays that Owners cause. If the work extends beyond January 31, 2007, Contractor's fee will be reduced at the rate of $6,000 per month (the estimated amount of monthly interest for which the Owner's are liable to their lender), prorated until the Owners agree that substantial completion has occurred.

1.4 **Change Orders.** During the progress of the project, the Parties may agree on changes to the Work itemized in the plans and specifications. Any such changes must be submitted to Owners in writing, showing the resultant changes in costs and construction schedule.

1.5 **Use of Site.** Contractor will confine operations at the site to areas permitted by law, ordinances, and permits and will not unreasonably encumber the site with materials or equipment.

1.6 **Site Visits.** Contractor will provide Owners and their designees access to the Work in progress. Owners may at any time authorize any persons to be on the Property without the prior written consent of Contractor.

1.7 **Cleanup.** Within 10 days after substantial completion, Contractor will remove all tools, construction equipment, machinery, surplus materials, waste materials, and rubbish from the Property.

1.8 **Detailed Records.** Contractor will keep full and detailed records and exercise whatever controls may be necessary for proper financial management under

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this Agreement. The accounting and control systems must be satisfactory to Owners. Owners and their accountants will have full access to audit and copy the Contractor's records, books, correspondence, instructions, drawings, receipts, subcontracts, purchase orders, vouchers, memoranda, and other data relating to this Agreement. Contractor will retain these documents for three years after final payment, or longer if required by law.

2. Compensation

2.1 **Amount.** Owners will pay Contractor the Actual Cost (see 2.2) of all materials and labor, plus a Contractor's fee of 18% for the first $500,000 of Actual Costs and thereafter 13%. As an advance against the Contractor's fee, Owners have paid Contractor $50,000 upon the commencement of this Agreement, and will pay $5,000 per month through substantial completion. In no event may Contractor's total fee exceed $250,000. The Contractor's fee is not due until substantial completion of the Work.

2.2 **"Actual Costs" Defined.** The term "Actual Costs" means the costs necessarily incurred in properly completing the improvements, excluding Contractor's overhead (such as salaries and other compensation paid to persons in the direct employ of Contractor) and the correction of defective work or disposal of materials and equipment wrongly supplied, unless the expenses are approved by Owner. Actual Costs include, at rates no higher than the standard rates paid in Dallas, the following:

(A) the cost of all materials, supplies, and equipment incorporated in the Work, including costs of transporting supplies and equipment to and from the Property;

(B) payments made by Contractor to subcontractors for work performed;

(C) the cost of all materials and supplies that are consumed in the performance of the Work;

(D) rental charges that Contractor considers necessary in its discretion;

(E) sales, use, or similar taxes imposed by any governmental authority and related to the Work, the Property, or the improvements and for which Contractor is assessed or liable;

(F) permit fees;

(G) the costs for long-distance telephone calls, express-delivery charges, and similar petty-cash items incurred in connection with the Work;

(H) the cost of removing all debris; and

(I) any and all other costs incurred in performing the Work if and to the extent approved in advance by Owners.

2.3 Contractor's Draws

(A) **Form of Draws.** Owners will make progress payments on the basis of applications for payment presented by Contractor as the work progresses. Contractor will submit all invoices to Owners' construction lender, State Bank & Trust, in a form acceptable to the Bank or its construction representative, for each draw against the Owners' account. Each application must be approved both by the Bank or its construction representative and by Owners to verify that all work has been satisfactorily completed.

(B) **Certification.** In each application for payment, Contractor will certify that the application represents the actual cost reimbursable to the Contractor under § 2.2. For any cost relating to labor, Contractor will certify that the labor has already been satisfactorily performed. Each application must also contain the following certification:

> "There are no known mechanic's or materialman's liens outstanding at the date of this requisition. All due and payable bills with respect to the Work have been paid to date or are included in the amount requested in the current application. Except for bills not paid but so included, there is no known basis for the filing of any mechanic's or materialman's lien on the Work. Waivers from all subcontractors and materialmen have been obtained in a form that constitutes an effective waiver of liens under the laws of Texas."

(C) **Waivers of Liens.** With each application for payment, Contractor will furnish waivers of liens for itself and, beginning with the second application for payment, for each of its subcontractors, together with any other forms required by Owners' lender to ensure an effective waiver of mechanic's and materialman's liens in compliance with Texas law.

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(D) **Retainages.** Contractor will withhold 10% retainage on all subcontractor line items for labor (but not for materials supplied). Contractor may request a release of retainage upon the expiration of 30 days after a subcontractor's work has been completed and approved.

(E) **Final Payment.** In accordance with § 53.101 of the Texas Property Code, Owners will make the final payment to Contractor within 31 days after the work is completed, as long as the Bank's construction representative has approved.

2.4 **Lien Security.** Owners' obligation to pay Contractor and to perform their other obligations under this Agreement will be secured by an express mechanic's, artisan's, and materialman's lien on the Property in favor of Contractor, but only for the work for which the Contractor has not yet been paid.

3. **Subcontractors**

3.1 **Generally.** Any or all of the Work may be performed by subcontractors chosen by Contractor, unless the Owners disapprove of any particular subcontractor. Contractor will choose a suitable person or entity to do any portion of the Work that is required under applicable law to be performed by or under the direction of an appropriately licensed person or entity.

3.2 **No Advances to Subcontractors.** Unless Owners agree otherwise in writing, Contractor will not make an advance payment to a supplier for materials or equipment that has not been delivered and stored at the site.

3.3 **Removal or Bonding of Liens.** Within 15 days after receiving notice of the existence of a lien against the Property by any subcontractor, supplier, or person claiming to be a creditor of Contractor, Contractor will promptly cause the lien to be removed as of record or bonded, at Contractor's sole cost and expense.

3.4 **Assignment to Owners.** Contractor hereby assigns to Owners all its interest in any subcontracts and purchase orders entered into by Contractor for performance of any part of the Work. This assignment is effective upon acceptance by Owners in writing and only as to those subcontracts and purchase orders that Owners designate in writing. Owners may accept this assignment at any time during the construction before substantial completion. All subcontracts and purchase orders must provide that they are freely assignable by Contractor to Owners. This assignment is part of the consideration to Owners for entering into this Agreement with Contractor and may not be withdrawn before substantial completion.

4. **Contractor's Default**

4.1 **Conditions of Default.** If Contractor persistently fails or neglects to carry out the Work in accordance with this Agreement, or does anything that might physically endanger a person or result in damage to property, or otherwise defaults on this Agreement, Owners may, on 3 days' written notice to Contractor:

(A) cure the default at Owners' expense and deduct the cost (which will include all direct and reasonable indirect costs, such as attorney's fees) of curing the default from the payment then or thereafter due to Contractor under this Agreement;

(B) terminate this Agreement, take possession of the site and all materials, and finish the Work by whatever reasonable method Owners may deem expedient, in which event Owners will have no further obligations under this Agreement, including the payment to Contractor of any additional unpaid fees, except for the payment by Owners of amounts owed by Contractor for subcontractors' work performed or materials delivered before the Agreement was terminated.

4.2 **Contractor's Bankruptcy.** Contractor's performance of this Agreement could be impaired or frustrated if Contractor becomes insolvent or bankrupt, makes a general assignment for the benefit of its creditors, or has a receiver appointed for the benefit of its creditors. Upon the occurrence of any such event, Owners may ask Contractor (or its successor in interest) for adequate assurance of future performance. If Contractor fails to comply with this request within 10 days of the date of the request, Owners may terminate the Agreement. Owners may proceed with the Work with their own forces or with other contractors as they in their discretion consider commercially reasonable, with the cost being backcharged against any unearned sums that have been advanced to Contractor.

4.3 **Nonexclusivity of Remedies.** No action taken by Owners under this § 4 will affect any other rights or remedies that Owners may have either under this Agreement or by law.

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5. Owners' Default

5.1 **Conditions of Default.** Owners will be in default if they (1) fail to make a contractually required payment within 10 days after the payment is due; or (2) fail to perform any of their other obligations or breach any warranty or covenant to Contractor under this Agreement, and the failure or breach is not cured by Owners within 30 days after written notice from Contractor to Owners.

5.2 **Remedies.** If Owners default, Contractor may, in addition to any other remedies available to Contractor by agreement, by law, or otherwise, terminate this Agreement and recover from Owners payment for all Work performed up to that point by Contractor.

6. Termination

6.1 **Material Damage or Destruction.** If all or any material part of the improvements is damaged or destroyed before substantial completion, either party, at its option, may terminate this Agreement upon notice to the other party. In the event of such a termination, Contractor will be paid in full for all Work performed through the date of termination, including the portion of the fee that Contractor has earned up to that point. If this Agreement is terminated under this paragraph and if Contractor receives any insurance proceeds directly related to the damage or destruction of the improvements, then Contractor will reimburse Owners to the extent that the insurance proceeds are for the decrease in the value of the improvements caused by the damage or destruction as of the time of the damage or destruction. Contractor may offset any payment due Owners under this paragraph by any outstanding amounts owed to Contractor with respect to any Work performed by Contractor through the date of termination. All insurance proceeds that Owners receive for the damage will belong to Owners, and Contractor will have no claim to those proceeds.

6.2 **Termination for Convenience.** Owners may terminate this Agreement without regard to fault or breach upon written notice to Contractor, effective immediately unless otherwise provided for in the notice. In the event of a termination for convenience, the Owners will pay, as the sole amount due to Contractor in connection with this project, sums due for Work performed to date (except that retainage sums will not be paid until at least 30 days after the date of termination). If a court decides that the termination of Contractor was wrongful, the termination must be deemed a termination for convenience as set forth in this paragraph, and Contractor's remedy for wrongful termination will be limited to the recovery of its out-of-pocket costs that remain unreimbursed.

7. **Risks and Warranties**

7.1 **Insurance.** Contractor will purchase and maintain, at its sole expense, both general liability insurance and builders'-risk insurance.

7.2 **Force Majeure.** Contractor is not liable or responsible for any delay due to an event that is beyond the Contractor's reasonable control, including a strike, riot, act of God, fire (regardless of cause), sabotage, shortage of labor or material (unless the shortage is caused by Contractor's negligence), inclement weather, war, the act of a third party hired by Owners, the installation of exterior landscaping, governmental approval, law, regulation, or restriction.

7.3 **Contractor's Representations and Warranties.** Contractor represents and warrants that:

(A) Contractor has obtained all licenses and permissions necessary to do the work under Texas and federal law;

(B) Contractor will comply with and give notices as required by laws, ordinances, rules, regulations, and public-authority orders applicable to performing the Work;

(C) all materials and equipment furnished under this Agreement will be new and of good quality;

(D) the Work will be free from all defects not inherent in the quality required or permitted; and

(E) the work will conform to requirements of the Agreement, all work not conforming to these requirements (including substitutions not properly approved and authorized) being considered defective.

7.4 **Contractor's Guarantee.** Contractor guarantees that all the improvements will be good and workmanlike to the reasonable satisfaction of Owners. The warranty of all work and materials used in connection with the Work will survive for 5 years after the Work has been substantially completed and the

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Owners have acknowledged in writing that the Work is substantially complete.

7.5 **Contractor's Indemnity.** To the fullest extent permitted by law and to the extent that claims, damages, losses, or expenses are not covered by Contractor's builder's-risk insurance, Contractor will fully indemnify and defend Owners against all claims, damages, losses, and expenses by subcontractors and their agents, representatives, and family members, as well as by anyone that Contractor invites onto the property.

7.6 **Owners' Joint and Several Liability.** Each person signing this Agreement as an Owner is responsible for all Owner obligations under the Agreement. Their liability is joint and several.

**8. Miscellaneous Provisions**

8.1 **Entire Agreement.** This Agreement constitutes the sole agreement of the Parties with respect to its subject matter. It supersedes any prior written or oral agreements or communications between the Parties. It may not be modified except in a writing signed by the Parties.

8.2 **No Assignment.** Neither party may assign this Agreement without the prior written consent of the other party, which consent may be withheld with or without cause. An assignment will not relieve either party of any contractual obligations. Contractor's entering into contracts with subcontractors is not considered an assignment for purposes of this Agreement.

8.3 **Successors and Representatives.** This Agreement binds and inures to the benefit of the Parties and their respective heirs, personal representatives, successors, and (where permitted) assignees.

8.4 **Notices.** All notices and other communications required or permitted under this Agreement must be in writing and must be sent to the respective party at the party's address set forth below or at whatever other address the party specifies in writing.

8.5 **Severability.** If any part of this Agreement is for any reason held to be invalid, the rest of it remains fully valid.

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8.6 **Interpretation.** Unless the context requires otherwise:

(A) the term "including" contemplates "including but not limited to";

(B) when referring to any party, the plural includes the singular (and vice versa).

8.7 **Applicable Law.** Texas law applies to this Agreement without regard to the state's choice-of-law rules.

Signed this __th day of July, 2005.

CONTRACTOR:

TRIPOD LLC, d/b/a Hershey Custom Homes

By: ______________________________
Bruce Hershey
Managing Member

OWNERS:

______________________________
Bertrand A. Reyrag

______________________________
Tosca A. Reyrag

**IMPORTANT NOTICE: You and your contractor are responsible for meeting the terms and conditions of this contract. If you sign this contract and you fail to meet the terms and conditions of this Agreement, you may lose your legal ownership rights in your home. Know your rights and duties under the law.**

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