

No. 02-13-00469-CV

IN THE

Court of Appeals

FOR THE SECOND COURT OF APPEALS
FORT WORTH, TEXAS

KEITH B. ALEXANDER,

Appellant,

v.

EDDIE KENT,

Appellee.

ON APPEAL FROM THE 141ST DISTRICT COURT OF
TARRANT COUNTY, TEXAS
THE HONORABLE JOHN P. CHUPP PRESIDING

Brief of Appellant, Keith B. Alexander

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Oral Argument Requested

Identity of the Parties and Counsel

The undersigned counsel of record certifies that the following listed persons and entities have an interest in the outcome of the case. These representations are made so that this Court's judges may evaluate possible disqualification or recusal.

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Recommendation on Oral Argument

Appellant has asserted several issues. The arguments contesting the trial court's award of attorneys' fees in this fraud action are straightforward. No oral argument is needed for them. The points contesting the fraud and individual liability findings merit oral argument because it will assist the Court in evaluating appellee's existing but unenforced contractual rights versus Keith Alexander's alleged misrepresentations.

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Statement of the Case

Nature of the Case: Eddie Kent sued Keith Alexander, individually, for fraud in connection with statements made within pay applications propounded pursuant to a construction contract. Alexander was the president of the construction company, and had signed the pay applications.

Trial Court: 141st Judicial District Court of Tarrant County, Texas. The Honorable John P. Chupp presiding.

Trial Court's Disposition: After a bench trial, the trial court awarded Kent \$20,061.32 in actual damages. The trial court also awarded Kent \$22,249.97 in attorneys' fees, and \$3,000 in special bankruptcy fees.

Record: The record consists of four volumes. The record citations are as follows:

CR ____	Clerk's Record
TR ____	Volume 2 – Bench Trial
TR 2 ____	Volume 3 – Bench Trial
Ex. ____	Volume 4 – Trial Exhibits

Issues Presented

Issue No. 1

The pay applications' verbiage didn't constitute a false representation.

Issue No. 2

Kent's equal access to the subcontractor information is fatal to his fraud claim.

Issue No. 3

Kent did not justifiably rely on the pay applications because of his existing contract rights.

Issue No. 4

Kent adduced no evidence of Alexander's intention at the outset of the contract not to perform

Issue No. 5

No individual liability for fraud arises because the pay applications weren't Keith Alexander's own statements.

Issue No. 6

The evidence supporting the trial court's award of attorneys' fees is both factually and legally insufficient.

Issue No. 7

The evidence supporting the amount of Kent's actual damages award is factually insufficient.

The issues contest the trial court's findings of fact numbers 3–10, 12–17, and 21–25.

The issues contest the trial court's conclusions of law numbers 27, 28, 29, and 30.

Statement of Facts

Eddie Kent entered into a contract with K.B. Alexander Co. of Texas, Inc. (KBA) for the construction of a new car lot and office building on North Freeway in Fort Worth, Texas.¹ The contract was integrated—it superseded all prior representations of the parties and exclusively governed their relationship.² KBA agreed that it would act as the general contractor on the project.³ It would provide all the labor, materials, equipment, and services necessary to complete the Work.⁴ Whatever work it didn't perform with its own forces would be performed with subcontractors.⁵

The lump sum price for the project was \$383,871.00.⁶ The parties agreed that this sum would be paid through a series of progress payments.⁷ Initially, KBA would provide Kent a schedule of values apportioned to the various divisions or phases of the Work.⁸ The schedule would contain line items, which would be assigned a value

¹ TR 16:22–17:11; Ex. 7.

² Ex. 7, ¶ 2.2.

³ Ex. 7, ¶ 3.1.1.

⁴ Ex. 7, ¶ 3.1.1. “Work” was defined as “the construction and services necessary or incidental to fulfill K.B. Alexander Co. of Texas, Inc.’s obligations for the Project in conformance with this Agreement and the other Contract Documents. . . .” (See Ex. 7, ¶ 2.1.19)

⁵ Ex. 7, ¶ 3.5.1. Subcontractors were defined as “a person or entity retained by the K.B. Alexander Co. of Texas, Inc. as an independent contracto to provide the labor, materials, equipment and/or services necessary to complete a specific portion of the Work.” (See Ex. 7, ¶ 2.1.16)

⁶ Ex. 7, ¶ 7.1.

⁷ Ex. 7, ¶ 9. Progress payments denoted the amount of progress KBA had accomplished during the monthly as opposed to installment payments which would be equal payments over the span of a certain period.

⁸ Ex. 7, ¶ 9.1.

such that the total of all the items would equal the contract or lump sum price.⁹ KBA would send Kent a payment application each month supported by the schedule of values and any other substantiating data required under the contract.¹⁰ Kent agreed to pay the amount due on the pay application within 10 days of receipt,¹¹ and he was allowed to deduct retainage from the amount due.¹²

Kent also possessed other rights with respect to the payment applications. He had the right to require partial lien and claim waivers from KBA in the amount of the pay applications, and affidavits from its Subcontractors and Material Suppliers for the completed Work as a prerequisite for payment.¹³ He also had the right to adjust or reject a payment application or nullify a previously approved pay application, in whole or in part, to protect himself from loss for KBA's failure to properly pay subcontractors or material suppliers after having paid KBA himself.¹⁴

The parties also contemplated KBA's failure to pay subcontractors in terms of liens. If Kent had made timely payments, but a subcontractor filed a lien on the project's property, KBA would have 30 days to remove that lien.¹⁵ If it failed to do so,

⁹ Ex. 7, ¶ 9.1.

¹⁰ Ex. 7, ¶ 9.2.1.

¹¹ Ex. 7, ¶ 9.2.1.

¹² Ex. 7, ¶ 9.2.1.

¹³ Ex. 7, ¶ 9.2.3.1.

¹⁴ Ex. 7, ¶ 9.3.2.

¹⁵ Ex. 7, ¶ 9.2.3.2.

Kent could remove the lien himself and then recover his costs and expenses directly from KBA.¹⁶

KBA created pay applications during the course of the project pursuant to the contract and sent them to Kent.¹⁷ Generally, to create pay applications, Shari Riddle, KBA's project coordinator, would receive information about the work completed to date on different projects from various sources and verify that information with the project manager.¹⁸ She would then input the information and create a pay application for a project.¹⁹ During this process, she didn't review whether KBA's subcontractors had been paid or review previous applications either.²⁰ Once she created the application, she would give it to Keith Alexander for final review.²¹

Keith Alexander was president of KBA, and its sole shareholder.²² He was also KBA's authorized representative for the project.²³ He would sometimes make

¹⁶ Ex. 7, ¶ 9.2.3.2.

¹⁷ See Exs. 87 and 88.

¹⁸ TR 212:11–20; 215:15–19.

¹⁹ TR 212:11–20.

²⁰ TR 209:2–19.

²¹ TR 25:21 to 26:2.

²² TR 16:16–18; 16:13–15; 68:4–6.

²³ Ex. 7, ¶ 3.4.4.

changes to pay applications,²⁴ sign KBA's partial lien waiver,²⁵ and they'd be sent off to the owners for payment.²⁶

Kent received his pay applications via fax.²⁷ Upon receipt, he took them to KBA's offices and reviewed them with Shari Riddle.²⁸ He testified that he asked her if the subcontractors had been paid, and she informed him they had been.²⁹ According to his testimony, he tendered payments to KBA based on both her statements and the pay applications themselves.³⁰ His checks, made out to "K.B. Alexander,"³¹ were paid pursuant to the contract,³² and deposited into KBA's account.³³

Kent was ultimately satisfied with KBA's work on the project.³⁴ He had no complaints about the building,³⁵ and admitted that KBA and its subcontractors had

²⁴ TR 216:9–22. The trial evidence doesn't show he made changes to Ed Kent's pay applications specifically.

²⁵ See Ex. 7, ¶ 9.2.3.1.

²⁶ TR 208:10 to 209:1; 20:7–17.

²⁷ TR 175:17–23.

²⁸ TR 175:17 to 176:5.

²⁹ TR 176:6–13.

³⁰ TR 176:6–13; 194:13–22.

³¹ The trial court's findings in numbers 6, 9, 10, and 13 are inconsistent. The trial court found that Kent had made checks to "K.B. Alexander," meaning Keith Alexander, but the uncontroverted evidence was that they were paid to KBA and deposited into KBA's corporate bank account. See, e.g., TR 69:20–24.

³² TR 175:1–4.

³³ TR 205:21 to 206:1; 190:7–10.

³⁴ TR 190:3–6.

³⁵ TR 195:9–14.

successfully completed everything except a few punch-list items.³⁶ Kent did fail to pay the last pay application of \$6,637.00.³⁷

A few subcontractors filed liens against Kent's property at the end of the project.³⁸ KBA was aware of these liens,³⁹ and was responsible to remove them,⁴⁰ but it didn't.⁴¹ Kent paid settlements to remove them.⁴²

Kent sued Keith Alexander for fraud over the subcontractor liens he paid to have removed. He alleged that the pay applications Alexander signed were false and he relied on them to his detriment on paying them when KBA had failed to pay its subcontractors in full.

Kent's action and evidence are legally and factually insufficient to support the trial court's finding of fraud and award of \$20,061.32 in actual damages and \$25,249.97 in attorneys' fees.⁴³

³⁶ TR 89:20 to 90:11; 90:2–8.

³⁷ TR 203:1–9. Kent didn't offer the pay application into evidence. *Compare* TR 24:14 to 35:2 with Exs. 87 and 88 and Findings of Fact #3.

³⁸ TR 19:1–3; 32:25 to 33:2. *See also* Exs. 6, 19, and 22.

³⁹ TR 19:4–6.

⁴⁰ TR 18:115–25.

⁴¹ TR 19:7–10.

⁴² TR 183:2–12.

⁴³ This includes the trial court's award of \$3,000 in additional bankruptcy counsel fees.

Lower Court Proceedings

Eddie Kent filed an Original Petition for Suit on Written Contract and Fraud against K.B. Alexander Co. of Texas, Inc. (KBA) and Keith Alexander, individually, on 8 August 2007.⁴⁴ He sued KBA for breach of contract, and alleged common-law fraud against both KBA and Keith Alexander, individually.⁴⁵ He claimed actual damages of \$130,000.00.⁴⁶

Both defendants filed general denials.⁴⁷ KBA later filed a suggestion of bankruptcy.⁴⁸ Kent nonsuited that defendant, and chose to proceed against Keith Alexander alone on just an allegation of fraud.⁴⁹

The trial court conducted a bench trial on 5 August 2013.⁵⁰ It awarded Kent actual damages of \$20,061.32 and \$22,249.97 in attorneys' fees.⁵¹ It also awarded him \$3,000 in additional bankruptcy counsel fees.⁵² It overruled Alexander's motion

⁴⁴ CR 5.

⁴⁵ CR 6.

⁴⁶ CR 7.

⁴⁷ CR 49–54.

⁴⁸ CR 55–58.

⁴⁹ CR 59–61; TR 10:11–14.

⁵⁰ CR 82.

⁵¹ CR 82.

⁵² CR 82.

for new trial, and issued findings of fact and conclusions of law in support of the judgment.⁵³ Alexander thereafter initiated this appeal.⁵⁴

⁵³ CR 88–89.

⁵⁴ CR 91.

Summary of the Argument

The pay applications' language that [t]he undersigned Contractor certifies that to the best of the Contractor's knowledge, belief, and information . . . that all amounts have been paid by the Contractor for Work for which previous Certificates of Payment were issued" isn't the kind of positive assertion that is actionable for fraud. And, even if it was, Kent had equal access to the subcontractor information and even the contractual right to demand partial lien waivers as a prerequisite to payment. With those rights in hand, Kent cannot say Keith Alexander misrepresented facts to him or that he justifiably relied on the pay application language to make payments on the construction project. Kent also failed to adduce evidence that Keith Alexander intended not to pay subcontractors when he entered the contract on behalf of K.B. Alexander Co. of Texas, Inc. Finally, the pay applications, by their very language, were the statements of the company—compilations from various people within the company—so the trial court erred in finding the statements to be those of Keith Alexander, individually.

Kent failed to adduce any evidence of attorneys' fees incurred, and even if he had, such fees aren't recoverable in a fraud claim. The trial court's award of \$20,061.32 isn't supported by the evidence because Kent admitted he failed to pay the last pay application of the project which totaled \$6,637.00.

Argument

Kent contended at trial that Alexander committed fraud “when he signed the Pay Applications and submitted the Pay Applications to Eddie Kent for payment.”⁵⁵ To secure a judgment of fraud, a plaintiff must prove the following elements:

- A material representation was made to a person
- The material representation was false
- When the material representation was made
- The speaker
 - knew that the material representation was false, or
 - made the material representation recklessly without any knowledge of its truth and as a positive assertion
- The speaker made the material representation with the intent it should be acted upon by the person to whom the speaker made the representation
- The person to whom the material representation was made acted in reliance upon the representation, and
- The person to whom the material representation was made suffered injury or damage.⁵⁶

Kent’s evidence—the pay applications—are factually and legally insufficient to support a judgment of fraud against Keith Alexander. In addition, a plaintiff cannot recover attorneys’ fees in a fraud action.

⁵⁵ CR 63.

⁵⁶ *Stone v. Lawyers Title Insurance*, 554 S.W.2d 183, 185 (Tex. 1977).

Standard of Review

Findings of fact in a case tried to the court have the same force and effect as jury findings.⁵⁷ Unchallenged findings are binding unless the contrary is established as a matter of law or there is no evidence to support the finding.⁵⁸ When an appellant challenges a trial court's findings of fact, however, this Court reviews those fact findings with the same standards its used to review the sufficiency of the evidence to support a jury's findings.⁵⁹

Legal Sufficiency

When an appellant attacks the legal sufficiency of an adverse finding on an issue for which he didn't have the burden of proof, he must demonstrate there is no evidence to support the adverse finding.⁶⁰ A legal sufficiency review of a no-evidence point must credit the favorable evidence if a reasonable fact-finder could and did disregard the contrary evidence unless a reasonable fact-finder could not. This Court will sustain a no-evidence point when:

- the record discloses a complete absence of evidence of a vital fact
- the court is barred by rules of law or of evidence from giving weight to the only evidence offered to prove a vital fact
- the evidence offered to prove a vital fact is no more than a mere scintilla

⁵⁷ See *Pulley v. Milberger*, 198 S.W.3d 418, 426 (Tex. App. – Dallas 2006, pet. denied).

⁵⁸ See *McGalliard v. Kuhlmann*, 722 S.W.2d 694, 696 (Tex. 1986).

⁵⁹ See *Pulley*, 198 S.W.3d at 426.

⁶⁰ See *Croucher v. Croucher*, 660 S.W.2d 55, 58 (Tex. 1983).

- the evidence establishes conclusively the opposite of the vital fact⁶¹

Anything more than a scintilla of evidence is legally sufficient to support a trial court's finding.⁶² A challenge to the legal sufficiency of the evidence will be sustained when the evidence offered to establish a vital fact doesn't exceed a scintilla.⁶³ Evidence doesn't exceed a scintilla if it is so weak as to do no more than create a mere surmise or suspicion that the fact exists.⁶⁴

Factual Sufficiency

When an appellant challenges the factual sufficiency of the evidence to support an adverse finding on which he didn't have the burden of proof, he must demonstrate there is insufficient evidence to support the finding. When reviewing a factual sufficiency challenge, this Court considers and weighs all of the evidence in support of and contrary to the trial court's finding and will set aside the verdict only if it is so contrary to the overwhelming weight of the evidence as to be clearly wrong and unjust.⁶⁵ When conducting a factual sufficiency review of a trial court's findings, this Court is not to pass judgment on the credibility of the witnesses or substitute its

⁶¹ *Marathon Corp. v. Pitzner*, 106 S.W.3d 724, 727 (Tex. 2003).

⁶² *See Marathon*, 106 S.W.3d at 727.

⁶³ *See Kroger Tex. Ltd. v. Suberu*, 216 S.W.3d 788, 793 (Tex. 2006).

⁶⁴ *See id.*

⁶⁵ *See Ortiz v. Jones*, 917 S.W.2d 770, 772 (Tex. 1996).

judgment for the trier of fact.⁶⁶ The amount of evidence necessary to affirm a judgment is far less than that necessary to reverse a judgment.⁶⁷

Conclusions of Law

This Court conducts a *de novo* review of the trial court's legal conclusions.⁶⁸ A trial court's conclusions of law are independently evaluated to determine whether the trial court correctly drew the legal conclusions from the facts.⁶⁹

⁶⁶ See *Pulley*, 198 S.W.3d at 427.

⁶⁷ *Id.*

⁶⁸ *Hackenjios v. Hackenjios*, 204 S.W.3d 906, 908 (Tex. App. – Dallas 2006, no pet.).

⁶⁹ *Id.*

Issue No. 1

The pay applications’ verbiage didn’t constitute a false representation.

The pay applications KBA submitted to Kent contained the following language:

The undersigned Contractor certifies that to the best of the Contractor’s knowledge, information, and belief the Work covered by this Application For Payment has been completed in accordance with the Contract Documents, that all amounts have been paid by the Contractor for Work for which previous Certificates of Payment were issued and payments received from Owner, and that current payment shown herein is now due.⁷⁰

Kent contended this language constituted an actionable misrepresentation upon which he relied, that it constituted an affirmative statement that KBA had paid all of its subcontractors to date.⁷¹

It doesn’t reach that far. It isn’t the kind of positive assertion that is actionable for fraud.⁷² KBA certifies “to the best of [its] knowledge, information, and belief ... that all amounts have been paid by [it] for Work for which previous Certificates of Payment were issued and received from Owner” states no positive fact whatsoever.

In *Calyon v. State*, the Texas Court of Criminal Appeals considered an affidavit containing the same language—“to the best of my knowledge, information, and

⁷⁰ Exs. 87, 88.

⁷¹ TR 175:5–12. Kent’s testimony as to the meaning of columns A & B of the applications’ second page violates the parole evidence rule. *See also* TR 181:3–19.

⁷² *See Jeffcoat v. Phillips*, 534 S.W.2d 168, 171 (Tex. App. – Houston [14th Dist.] 1976, writ ref’d n.r.e.) (“To be actionable fraud the misrepresentation complained of must concern a material fact as distinguished from a mere matter of opinion, judgment, probability, or expectation.”).

belief” —filed by one of the defendant’s attorneys.⁷³ The Court opined that this kind of affirmation wasn’t an affirmation at all. It stated no positive material fact whatsoever,⁷⁴ and in no way stated that the affiant had any knowledge on the subject matter.⁷⁵ It also observed that it didn’t state a material fact of information, what information the affiant had or what information the affiant had relied on.⁷⁶ In sum, it was an affirmation devoid of substance.

KBA’s certification is devoid of substance in the same way. It didn’t assert KBA had any knowledge on the subject. It stated no material fact of information, nor did it state what its information was. It didn’t state that KBA had conducted an inquiry, reviewed documents, or completed an audit. It didn’t even provide a context from which Kent could deduce KBA’s knowledge or information.⁷⁷ Although the trial court as fact-finder called it an affidavit,⁷⁸ it doesn’t meet the criteria of an affidavit.⁷⁹

⁷³ 174 S.W. 591, 600 (Tex. Crim. App. 1915), *overruled on other grounds by Means v. State*, 271 S.W. 613 (Tex. Crim. App. 1925).

⁷⁴ *See id.*

⁷⁵ *Id.*

⁷⁶ *Id.*

⁷⁷ *See New Hampshire Ins. Co. v. Magellan Reinsurance Co., Ltd.*, No. 02-11-00335-CV, 2013 Tex. App. LEXIS 194, at *34 (Tex. App. – Fort Worth, January 10, 2013) (affidavit based on “knowledge and belief” provided context of facts known).

⁷⁸ *See* TR 85:3–5.

⁷⁹ *See Slater v. Metro Nissan*, 801 S.W.2d 253, 254 (Tex. App. – Fort Worth 1990, writ denied) (an affidavit can’t be based on “knowledge and belief” unless authorized by statute); *see, e.g., Noriega v. Mireles*, 925 S.W.2d 261, 263–64 (Tex. App. – Corpus Christi 1996, writ denied) (expert’s affidavit made on his “best knowledge and belief” was not fatally defective because TRE 702 and 703 contemplates that experts bring more to court than their personal knowledge of the facts).

In sum, it, like the affidavit in *Calyon*, is an empty statement, devoid of any material facts.⁸⁰ As such, it doesn't constitute an actionable statement for fraud.

Kent's action fails, too, because the certification fails to identify which subcontractors, if any, the pay applications applied to. At trial, Kent offered two payment applications into evidence, one dated 20 November 2006 and the other dated 20 December 2006,⁸¹ although the project lasted through 20 January 2007.⁸² He testified he paid settlements to Jerry's Cabinetry, Ajax Glass & Mirror, and Business Flooring Specialists to remove their liens from the property.⁸³ But he paid these settlements well after the project had been completed.⁸⁴

He did not establish, however, that the work of those subcontractors had been completed by 20 November 2006 or 20 December 2006, and were the object of the payment applications.⁸⁵ The 20 November 2006 pay application reflected that KBA had completed just \$226,563 of the Work or approximately 60% of the overall

⁸⁰ See *Calyon*, 174 S.W. at 600 ("This states no positive fact whatever.").

⁸¹ Exs. 87 and 88. Kent also offered page 1 of a 3-paged application in Ex. 63 that was not signed. Kent's theory of individual liability for fraud involved Keith Alexander's signing of the applications. (TR 19:21 to 21:25; 25:15-17)

⁸² See TR 66:14-24. Kent did not offer the last pay application of the project into evidence. See TR 38:7-11. Ex. 89 was not offered or admitted. Compare Findings of Fact numbers 4 and 5.

⁸³ TR 7-12.

⁸⁴ Kent settled after the subcontractors had finished their work and had filed liens. (TR 183:2-12; 184:15-22)

⁸⁵ See Ex. 81 - Audit Update. The update didn't establish when any of the subcontractors' work had been completed.

project.⁸⁶ Jerry's Cabinetry testified in its affidavit for mechanics and material men's lien that it completed its work in January 2007 and February 2007.⁸⁷ Ajax Mirror & Glass's lien doesn't state when it performed its work, but its lien is dated 20 April 2007, which is well after the date of the pay applications.⁸⁸ And Kent failed to offer any evidence of when Business Flooring Specialists completed its work.⁸⁹

Lastly, Kent failed to adduce sufficient evidence that the statement was in fact false. The statement, after all, was based on the "best of Contractor's knowledge, information, and belief." Kent failed to demonstrate that the Contractor—KBA—didn't know or didn't believe that the amounts hadn't been paid when the respective pay applications were sent to him.

The pay applications' verbiage is so obtuse that it cannot anchor a claim of fraud. And even if the language were actionable, Kent failed to adduce a scintilla of evidence that the pay applications admitted at trial were tied to any of his actual damages—the settlement monies he paid to Jerry's Cabinetry, Business Flooring Specialists, or Ajax Mirror & Glass. The evidence, therefore, supporting the

⁸⁶ TR 20:18–22.

⁸⁷ Ex. 6.

⁸⁸ Ex. 19.

⁸⁹ See Exhibit List generally.

misrepresentation is both legally and factually insufficient to support his claim.⁹⁰ So his claim must fail.

⁹⁰ This argument contests the trial court's finding of a misrepresentation in the findings of fact numbers 4, 7, 8, 9, 13, 14, 15, and 22.

Issue No. 2

Kent's equal access to the subcontractor information is fatal to his fraud claim.

Kent possessed equal access to KBA's payments to its subcontractors via the Standard Form of Agreement and General Conditions Between Owner and Contractor.⁹¹ His equal access is fatal to his fraud claim.

In *Paull v. Capital Resource Management, Inc.*,⁹² the plaintiffs sued an oil and gas development corporation (Capital Resource) over their purchase of a working interest in an oil and gas waterflood project.⁹³ The plaintiffs were interested in investing, and had requested information regarding water flooding the Southwest Lisbon Field Unit (the "Unit").⁹⁴ Capital Resource provided the information, and also prepared a field summary which analyzed the projected productivity, revenues, and profits from the project.⁹⁵ The projections were based on economic forecasts concerning costs and price of oil, and on the analysis of oil quality and production of

⁹¹ Ex. 7.

⁹² 987 S.W.2d 214 (Tex. App. – Austin 1999, pet. denied).

⁹³ *Id.* at 215.

⁹⁴ *Id.* at 216.

⁹⁵ *Id.*

an analogous field.⁹⁶ The plaintiffs had access to and visited the company's offices to review the materials.⁹⁷ They decided to invest in the project.⁹⁸

Although oil production increased dramatically during the initial phases of the project, it declined over the next two years, and the Unit became unprofitable.⁹⁹ The plaintiffs sued the oil and gas company after the Unit failed to produce the amounts predicted.¹⁰⁰ They alleged the field summary was fraudulent, and sued the company for common-law fraud.¹⁰¹

The *Paull* court observed that Capital Resource had given the plaintiffs information regarding the Unit and the plaintiffs had had access to all the underlying data, including public information, of the field summary.¹⁰² Because the plaintiffs had equal access to the information, the court said, they were prevented from claiming they were defrauded by the company's statements or opinions.¹⁰³

Kent is likewise prohibited from claiming Alexander misrepresented facts because he had equal access to the subcontractor information. Indeed, under the contract

⁹⁶ *Id.*

⁹⁷ *Id.*

⁹⁸ *Id.*

⁹⁹ *Id.*

¹⁰⁰ *Id.*

¹⁰¹ *Id.* at 217.

¹⁰² *Id.* at 219, 220.

¹⁰³ *Id.* at 220, 221.

Kent was entitled to lien waivers, claim waivers, and affidavits from the subcontractors upon demand, even as a prerequisite for payment.¹⁰⁴

9.2.3.1 Partial Lien Waivers and Affidavits. If required by the Eddie Kent, as a prerequisite for payment, the K.B. Alexander Co. of Texas, Inc. shall provide partial lien and claim waivers in the amount of the application for payment and affidavits from its Subcontractors, and Material Suppliers for the completed Work. Such waivers shall be conditional upon payment. In no event shall the K.B. Alexander Co. of Texas, Inc. be required to sign an unconditional waiver of lien or claim, either partial or final, prior to receiving payment or in an amount of excess of what it has been paid.¹⁰⁵

Kent also had the right to adjust or reject payment applications or even nullify previously approved applications, in whole or in part, if KBA had failed to properly pay subcontractors following receipt of payment from him.¹⁰⁶ Kent failed to adduce any evidence that he adjusted, rejected, or nullified a payment application, thereby impliedly approving all of them.

Kent's contractual rights, giving him equal access to knowledge and information about the subcontractors' work (liens and/or affidavits), which even granted him retroactive remedies, vitiates the essential element of misrepresentation.¹⁰⁷ Kent's claim fails without a misrepresentation present.

¹⁰⁴ Ex. 7, ¶ 9.2.3.1.

¹⁰⁵ Ex. 7.

¹⁰⁶ Ex. 7, ¶ 9.3.3. *See also* TR 84:6–18.

¹⁰⁷ *See id.* at 220 (“The fact remains, however, that [the parties] had equal access to the knowledge. Thus, the information forming the basis for Durkee’s opinions was equally available to both Durkee and Paul; therefore, Durkee’s statements are not actionable misrepresentations.”).

Issue No. 3

Kent did not justifiably rely on the pay applications because of his existing rights under the contract.

One element of a fraud claim is reliance.¹⁰⁸ And reliance must not just be actual; it must also be justifiable.¹⁰⁹

A plaintiff doesn't normally have a duty to use due diligence to discover whether the representation is fraudulent.¹¹⁰ But a party to an arm's length transaction must exercise ordinary care and reasonable diligence to protect his own interests, and a failure to do so isn't excused by mere confidence in the honesty and integrity of the other party.¹¹¹

In this case Kent was aware of the risk of subcontractors not being paid by KBA.¹¹² The parties' contract spoke about subcontractors and how they would be retained by KBA to provide the labor, materials, and services necessary to complete a specific portion of the Work.¹¹³ The contract allowed Kent to adjust or reject

¹⁰⁸ *Ernst & Young, L.L.P. v. Pac. Mut. Life Ins. Co.*, 51 S.W.3d 573, 577 (Tex. 2001).

¹⁰⁹ *Grant Thornton, L.L.P. v. Prospect High Income Fund*, 314 S.W.3d 913, 923 (Tex. 2010); *DeClaire v. G&B McIntosh Family Ltd. Partnership*, 260 S.W.3d 34, 46 (Tex. App. – Houston [1st Dist.] 2008, no pet.).

¹¹⁰ *Koral Indus. v. Security-Conn. Life Ins. Co.*, 802 S.W.2d 650, 651 (Tex. 1990); *Summers v. Welltech, Inc.*, 935 S.W.2d 228, 234 (Tex. App. – Houston [1st Dist.] 1996, no writ).

¹¹¹ *DeClaire*, 260 S.W.3d at 46; *Thigpen v. Locke*, 363 S.W.2d 247, 251 (Tex. 1962).

¹¹² *See Town Nother Nat. Bank v. Broaddus*, 569 S.W.2d 489, 492 (Tex. 1978) (“a party to a written agreement is charged as a matter of law with knowledge of its provisions . . . unless he can demonstrate that he was tricked into its execution”).

¹¹³ *See* Ex. 7, ¶¶ 5.1–5.5.

payment applications, or even nullify them, in whole or in part, if KBA had failed to properly pay the subcontractors and material suppliers following receipt of his payments.¹¹⁴ It also gave Kent the absolute right to protect his own interests by requiring KBA to furnish partial lien and claim waivers in the amount of the pay applications as a prerequisite for payment.¹¹⁵ The contract also expressly provided Kent a cause of action against KBA if he had made payments to KBA, but the subcontractors filed liens on the property.¹¹⁶

In light of these notices and rights, Kent cannot claim he justifiably relied on the pay applications or KBA's honesty or integrity regarding the payment or non-payment of subcontractors. He had negotiated valuable contract rights which protected his interests. His failure to exercise his contract rights doesn't transmogrify into justifiable reliance or turn KBA's failure to perform into a fraud.¹¹⁷ Because the evidence is factually insufficient that Kent's reliance was justifiable in light of his contractual rights, his claim for fraud must fail.

¹¹⁴ Ex. 7, ¶ 9.3.3.

¹¹⁵ Ex. 7, ¶ 9.2.3.1.

¹¹⁶ Ex. 7, ¶ 9.2.3.2.

¹¹⁷ A party commits fraud when it enters into a contract that it does not intend to perform; a party merely breaches a contract when it entered into a contract and later decides not to perform it. *See Tony Gullo Motors*, 212 S.W.3d at 304–05; *Crim Truck & Tractor Co. v. Navistar Int'l Transp.*, 823 S.W.2d 591, 597 (Tex. 1992); *Sudan v. Sudan*, 145 S.W.3d 280, 290 (Tex. App. – Houston [14th Dist.] 2004), *rev'd on other grounds*, 199 S.W.3d 291 (Tex. 2006); *Oliver v. Rogers*, 976 S.W.2d 792, 805 (Tex. App. – Houston [1st Dist.] 1998, *pet. denied*). Otherwise, every breach-of-contract case would involve fraud. *See Oliver*, 976 S.W.2d at 805.

Issue No. 4

Kent adduced no evidence of Keith Alexander's intent at the outset of the contract not to perform.

Kent didn't offer any evidence showing KBA or Keith Alexander had no intention of paying the subcontractors before the contract was executed.

A plaintiff must show that a defendant had no intention of performing when it made the promise or entered the contract to support a claim of fraud.¹¹⁸ Although intent may be inferred from the acts of the party after the representation is made, proof that the defendant breached the agreement is not sufficient by itself.¹¹⁹ Partial performance of the promise or contract can negate an intent not to perform.¹²⁰

Kent entered into a contract with KBA on 25 August 2006.¹²¹ The contract contemplated progress payments—Kent would receive payment applications for work that KBA that month.¹²² These pay applications were not stand-alone documents, but part and parcel of the contract.¹²³ The parties contemplated that KBA would pay subcontractors as the work progressed, and the contract provided

¹¹⁸ *Aquaplex, Inc. v. Rancho La Valencia, Inc.*, 297 S.W.3d 768, 774 (Tex. 2009).

¹¹⁹ *Id.* at 775; *Tony Gullo Motors*, 212 S.W.3d at 305.

¹²⁰ *IKON Office Solutions, Inc. v. Eifert*, 125 S.W.3d 113, 124 (Tex. App. – Houston [14th Dist.] 2003, pet. denied).

¹²¹ Ex. ¶ 7.

¹²² Ex. 7, ¶¶ 9.2.3.1 and 9.2.3.2.

¹²³ Ex. 7, ¶ 9.2.1.

Kent redress if KBA didn't perform this part of the bargain.¹²⁴ KBA finished the work, and Kent was happy with the result.¹²⁵ The audit update Kent offered at trial also demonstrated that the subcontractors had been paid some of Kent's funds during the course of the project.¹²⁶ So there was full performance of completing the project, and partial performance of paying subcontractors. KBA's failure to pay the subcontractors therefore was a breach of contract, and not a fraud, certainly not a fraud perpetrated by Keith Alexander.¹²⁷

In *Schindler v. Austwell Farmers Co-Op.*,¹²⁸ the Texas Supreme Court considered the case of a cotton and gin farmer which had an agreement to buy agricultural products on account.¹²⁹ The farmer failed to pay the balance due, and the cooperative sued him for breach of contract and fraud.¹³⁰ The cooperative's fraud claim was based on its manager's testimony that he had confronted the farmer twice, and that both times the farmer acknowledged the debit and promised to pay.¹³¹ The

¹²⁴ Ex. 7, ¶¶ 9.2.3.2 and 9.3.3.

¹²⁵ TR 140:15–23; 190:3–6; 195:9–14.

¹²⁶ See Ex. 81; TR 59:5–25; 67:4–22.

¹²⁷ KBA was the party responsible to pay the subcontractors per its contract with Kent and the subcontractor agreements. See Ex. 7, ¶¶ 5.1, 5.2, and Ex. 10.

¹²⁸ 841 S.W.2d 853 (Tex. 1992).

¹²⁹ *Id.* at 854.

¹³⁰ *Id.*

¹³¹ *Id.*

cooperative contended the promise was fraudulent.¹³² The Court dismissed the fraud claim, holding that a failure to perform, standing alone, was no evidence of the farmer's intent not to perform when the promise was made.¹³³

The fact that KBA didn't pay some subcontractors as contemplated by the agreement, was no evidence of KBA's or Keith Alexander's intent not to perform when the contract was made on 26 August 2006.¹³⁴ Thus, Kent's fraud claim fails the same way Austwell Farmers Co-Op's did.

¹³² *Id.*

¹³³ *Id.*

¹³⁴ Kent's evidence concerning other projects is factually insufficient to show fraudulent intent as to his project. *Compare* TR 109:10 to 112:10; 116:6 to 118:3; TR2 4:17 to 7:17 *with* Findings of Fact numbers 16, 17, and 18.

Issue No. 5

No individual liability arises because Keith Alexander didn't make the representation.

Generally, a corporate officer's acts on the corporation's behalf are deemed corporate acts.¹³⁵ A corporate officer may not be held liable for inducing the corporation to violate a contractual obligation as long as he acts in good faith.¹³⁶ A corporate officer's potential personal gain is not determinative.¹³⁷ To succeed on a claim holding a corporate officer liable individually, the plaintiff must show that the officer acted in a manner so contrary to the corporation's best interest that his actions could only have been motivated by personal interest.¹³⁸

The Contractor of the project was K.B. Alexander Co. of Texas, Inc. (KBA) as demonstrated in the contract documents.¹³⁹ KBA, not Keith Alexander, was a party to the contract.¹⁴⁰ And the contract was integrated, exclusively benefitting only the parties, KBA and Kent.¹⁴¹ KBA was solely responsible for performance.¹⁴² Keith

¹³⁵ *Leitch v. Hornsby*, 935 S.W.2d 114, 117–18 (Tex. 1996); *Holloway v. Skinner*, 898 S.W.2d 793, 795 (Tex. 1995).

¹³⁶ See *Holloway*, 898 S.W.2d at 795.

¹³⁷ *Id.* at 796.

¹³⁸ *Id.*

¹³⁹ Ex. 7, ¶ 1.

¹⁴⁰ Ex. 7, ¶ 2.1.

¹⁴¹ Ex. 7, ¶ 2.2.

¹⁴² Ex. 7, art. 3 generally.

Alexander was designated as KBA's authorized representative,¹⁴³ and signed the contract in his corporate capacity as president of KBA.¹⁴⁴

The contract required KBA to submit monthly applications to Kent for payment.¹⁴⁵ Kent was required to pay the applications within ten days of receipt unless he exercised certain reserved rights under the contract.¹⁴⁶ KBA, as the Contractor, sent Kent pay applications that contained the following verbiage:

The undersigned Contractor certifies that to the best of the Contractor's knowledge, information, and belief the Work covered by this Application For Payment has been completed in accordance with the Contract Documents, that all amounts have been paid by the Contractor for Work for which previous Certificates of Payment were issued and payments received from Owner, and that current payment shown herein is now due.¹⁴⁷

As shown by "Contractor," the pay applications were compilations of corporate information, not the statement or admission of any one individual. Riddle, KBA's project coordinator, would receive information concerning percentage completion from various people about different ongoing projects.¹⁴⁸ KBA's project manager would verify the information, and Riddle would then input all the information into a

¹⁴³ Ex. 7, ¶¶ 2.3.7 and 3.4.4.

¹⁴⁴ Ex. 7, pg. 31.

¹⁴⁵ Ex. 7, ¶ 9.2.1.

¹⁴⁶ Ex. 7, ¶¶ 9.2.1, 9.2.3, 9.3.

¹⁴⁷ Exs. 87, 89.

¹⁴⁸ TR 212:11-20; 215:15-19.

program to create a pay application.¹⁴⁹ Keith Alexander would receive the pay application for review, sometimes make changes,¹⁵⁰ and then sign it. The plain language shows his signature was to authorize a lien waiver under the contract.¹⁵¹

Waiver & Release of Lien

Whereas the undersigned Contractor has provided labor, services, materials, or equipment for the above project, under an agreement with the Owner.

The Undersigned does hereby waive and release all bond claims, liens, claims or right of claim or right of lien, statutory or otherwise, against the property, project, Owner, or any other person or entity who is or may be claimed to be liable, or any sureties, for labor, services, materials, or equipment, as provided by the Undersigned, to the extent of payment received, as indicated herein, together with any previous payments(s) already received but excluding any retainage or any labor, services, materials, or equipment provided after the application period date stated above. The Undersigned agrees that in exchange for receipt of the above amount for labor, services, materials, or equipment as described herein, he does hereby grant this release unconditionally.

The person signing below does hereby certify that he/she is fully authorized and empowered to execute this instrument and to bind the Undersigned hereto, and does in fact so execute this instrument.

K.B. Alexander Co. of Texas, Inc.

Signed: _____

Name, Title: Keith B. Alexander, President

Dated: December 20, 2006

¹⁴⁹ TR 212:11–20.

¹⁵⁰ See TR 47:12 to 48:16 (Alexander would receive and verify information from different sources about the pay applications).

¹⁵¹ See Ex. 7, ¶ 9.2.3.1.

The document doesn't lend his signature for any other purpose.

Kent's claim, therefore, fails for two reasons. First, he failed to adduce any evidence that Keith Alexander individually made the representation that "that all amounts have been paid by the Contractor for Work for which previous Certificates of Payment were issued and payments received from Owner."¹⁵² The statement itself shows that it is the statement of the corporation, not any single individual. Second, Kent failed to adduce any evidence that Alexander acted in a manner so contrary to KBA's best interests that his actions could only have been motivated by personal interest, and he should therefore be held personally liable for his acts.

¹⁵² See *Karl and Kelly Company, Inc. v. McLerran*, 646 S.W.2d 174, 175 (Tex. 1983) (no evidence that the defendants had acted in their individual capacities). See also *Menetti v. Chavers*, 974 S.W.2d 168, 172 (Tex. App. – San Antonio 1998, no pet.) (individual liability is impossible without some piercing of the corporate veil).

Issue No. 6

The evidence supporting the trial court’s award of attorneys’ fees is both legally and factually insufficient.

The trial court’s award of \$22,249.67 in attorneys’ fees and \$3,000 in additional bankruptcy counsel fees isn’t supported by the law or by the evidence.¹⁵³

Attorneys’ fees must be proved up by offering expert testimony that the fees are reasonable and necessary.¹⁵⁴ In certain cases involving mixed actions—those that allow the recovery of attorneys’ fees and those that don’t—a plaintiff may recover attorneys’ fees on the claim that allows for their recovery.¹⁵⁵ In that case, he must present time records for both types of claims and prove at trial the time spent on the recoverable claim, excluding time on the non-recoverable claim.¹⁵⁶ Or he can prove time spent on both claims and subtract a percentage of time spent on the non-recoverable claim.¹⁵⁷

¹⁵³ Alexander contests the trial court’s Findings of Fact numbers 24 and 25.

¹⁵⁴ *Twin City Fire Ins. Co. v. Vega–Garcia*, 223 S.W.3d 762, 770 (Tex. App. – Dallas 2007, pet. denied); *Woollett v. Matyastik*, 23 S.W.3d 48, 52 (Tex. App. – Austin 2000, pet. denied); see e.g., *Brown v. Traylor*, 210 S.W.3d 648, 657–58 (Tex. App. – Houston [1st Dist.] 2006, no pet.) (fee statements alone were not sufficient proof).

¹⁵⁵ *Tony Gullo Motors, LLP v. Chapa*, 272 S.W.3d 299, 314 (Tex. 2006).

¹⁵⁶ *Id.*

¹⁵⁷ *Id.*

Kent's evidence of fees is legally and factually insufficient for at least three reasons. First, a plaintiff cannot recover attorneys' fees in a common-law fraud action.¹⁵⁸ Kent's action against Alexander was based on fraud alone, so he is not entitled to recover any fees.¹⁵⁹ Second, while Kent testified he has incurred attorneys' fees in prosecuting the action,¹⁶⁰ he offered no expert testimony that the fees he incurred were reasonable and necessary.¹⁶¹ Third, he initiated the lawsuit with both breach of contract and fraud claims.¹⁶² Even if he had presented evidence of billing on both kinds of claims, he nonsuited KBA prior to trial, which vitiated any basis for recovery of fees.¹⁶³

The same arguments apply to the additional bankruptcy counsel fees. Kent testified he retained legal counsel to attempt to drive KBA into an involuntary bankruptcy.¹⁶⁴ He did this to try to collect against KBA.¹⁶⁵ These fees, then, weren't reliance damages, nor were they proven up by expert testimony.¹⁶⁶

¹⁵⁸ *New Amsterdam Cas. Co. v. Texas Indus.*, 414 S.W.2d 914, 915 (Tex. 1967); *Tony Gullo Motors, LLP*, 272 S.W.3d at 304. Compare trial court's Conclusions of Law number 27. (CR 89)

¹⁵⁹ CR 5; TR10:10–14.

¹⁶⁰ TR 197:6–18.

¹⁶¹ See record generally.

¹⁶² CR 5.

¹⁶³ See *Tony Gullo Motors, LLP*, 272 S.W.3d at 304.

¹⁶⁴ TR 190:11–18.

¹⁶⁵ TR 191:17–24.

¹⁶⁶ See TR 192:13–25. Kent testified to a general amount paid, but presented no other evidence proving the amount of the fees incurred or that they were reasonable and necessary.

This Court should reverse the trial court's judgment regarding attorneys' fees, including the additional bankruptcy counsel fees, and render judgment for Alexander.

Issue No. 7

The evidence supporting Kent's actual damages is factually insufficient.

The trial court found that Kent discovered all subcontractors on the project had not been paid after Kent had made final payment.¹⁶⁷ The court also found that Kent sustained actual damages of \$20,061.32.¹⁶⁸ The evidence supporting this award is factually insufficient.

In a case of fraud, a plaintiff may recover his reliance or out-of-pocket damages.¹⁶⁹ Out-of-pocket damages are the difference between the value of what the defrauded party parted with and the value he actually received.¹⁷⁰

A plaintiff may recover benefit-of-the-bargain damages.¹⁷¹ These are the difference between the value as represented and the value received.¹⁷²

Kent testified that he settled with three subcontractors who had filed liens on his property. He paid these three subcontractors the following amounts in exchange for an assignment of their liens:¹⁷³

¹⁶⁷ Findings of Fact #10.

¹⁶⁸ Findings of Fact #5.

¹⁶⁹ *Aquaplex, Inc. v. Rancho La Valencia, Inc.*, 297 S.W.3d 768, 775 (Tex. 2009).

¹⁷⁰ *Id.*; *Baylor Univ. v. Sonnechsen*, 221 S.W.3d 632, 636 (Tex. 2007).

¹⁷¹ *Aquaplex, Inc.*, 297 S.W.3d at 775.

¹⁷² *Id.*

¹⁷³ TR 183:7–12; 184:15 to 185:22.

- Business Flooring Specialists – \$6,271.67
- Ajax Mirror & Glass – \$9,413.65
- Jerry’s Cabinetry – \$4,376.00

The total of these payouts is \$20,061.32. Kent admitted, however, he didn’t pay the total amount of the contract. He admitted that he didn’t pay the last pay application, which totaled \$6,637.¹⁷⁴

Kent admitted that the project was successfully completed,¹⁷⁵ and that he was satisfied with the work.¹⁷⁶ His actual damages, whether out-of-pocket damages or benefit-of-the-bargain damages, therefore, were not more than \$13,424.32.¹⁷⁷

¹⁷⁴ TR 203: 1–9. *But compare* TR 190:7–10 (Kent testified on direct examination he paid the contract in full).

¹⁷⁵ TR 140:15–23; 89:20 to 90:1.

¹⁷⁶ TR 195:9–14 (Kent had no complaints about the building).

¹⁷⁷ \$20,061.32 – \$6,637.00 = \$13,424.32.

Prayer

Alexander prays that this Court reverse the trial court's judgment and render judgment that Kent take nothing.

Dated: 15 March 2014

Respectfully submitted,

Peter Smythe

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By: /s/ Peter Smythe

Peter Smythe

State Bar No. 00788442

Attorneys for the Appellant

Certificate of Service

I, Peter Smythe, certify that today, 15 March 2014, I served a copy of this brief upon opposing counsel via facsimile, to-wit:

Mr. David L. Pritchard
Law Office of David L. Pritchard
1244 Southridge Court, Suite 102
Hurst, Texas 76053
Fax: (817) 285-0224

/s/ Peter Smythe
Peter Smythe

No. 02-13-00469-CV

IN THE

Court of Appeals

FOR THE SECOND COURT OF APPEALS
FORT WORTH, TEXAS

KEITH B. ALEXANDER,

Appellant,

v.

EDDIE KENT,

Appellee.

ON APPEAL FROM THE 141ST DISTRICT COURT OF
TARRANT COUNTY, TEXAS
THE HONORABLE JOHN P. CHUPP PRESIDING

Appendix

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Attorneys for the Appellant

1. Trial Court's Judgment Tab 1
2. Findings of Fact and Conclusions of Law Tab 2
3. Exhibit 7 – Standard Form of Agreement and
General Conditions Between Owner and Contractor Tab 3

CAUSE NO. 141-225394-07

EDDIE KENT

Plaintiff,

VS

KB ALEXANDER CO. OF TEXAS,
INC. AND KEITH B. ALEXANDER

Defendant.

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IN THE DISTRICT COURT

141ST JUDICIAL DISTRICT

TARRANT COUNTY, TEXAS

JUDGMENT

On the 5th day of August 2013, this case was brought to trial. All parties announced ready. Eddie Kent, Plaintiff, appeared with David Pritchard, counsel. Keith B. Alexander, Defendant appeared with Grant S. Goens, counsel.

After hearing all testimony, reviewing all evidence admitted, and reviewing the closing briefs and replies to closing briefs, this Honorable Court finds that

IT IS THEREFORE ORDERED, ADJUDGED and DECREED that Plaintiff have and recover from Defendants actual damages in the amount of \$20,061.32.

IT IS FURTHER ORDERED, ADJUDGED and DECREED that Plaintiff have and recover from Defendants their reasonable attorney's fees in the amount of \$22,249.97 and an additional \$3,000.00 in special bankruptcy counsel fees.

IT IS FURTHER ORDERED, ADJUGED and DECREED that Plaintiff have and recover from Defendant, pre judgment interest on said amount from the date of this Judgment at the rate of 5% per annum until paid, and costs of Court.

IT IS FURTHER ORDERED, ADJUDGED and DECREED that Plaintiff is awarded post judgment interest calculated at the highest amount provided by law.

All relief requested in this case and not expressly granted is denied. This judgment finally disposes of all parties and claims and is appealable.

SIGNED this 25th day of October, 2013.


JUDGE PRESIDING

ON 10-28-13, ALL SERVED VIA:

HAND DELIVERY

JUDGMENT

FAX

David Pritchard, WHO IS TO
SERVE COPIES ON ALL OTHERS

SOLO PAGE

COURT'S MINUTES
TRANSACTION#

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EDDIE KENT
Plaintiff,

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IN THE DISTRICT COURT

V.

141 ST JUDICIAL DISTRICT

K.B. ALEXANDER CO. OF TEXAS,
INC and KEITH B. ALEXANDER
Defendant

TARRANT COUNTY, TEXAS

FINDINGS OF FACT and CONCLUSIONS OF LAW

The Court enters the following:

Eddie Kent entered into a contract with K.B. Alexander Co. of Texas, Inc. to build a car lot, including a building on the car lot on property owned by Plaintiff.

1. Keith Alexander is the President of K.B. Alexander Co. of Texas, Inc.
2. K. B. Alexander Co. of Texas, Inc. built the car lot and the building of the property of the Plaintiff using subcontractors to do the actual work.
3. The subcontractors completed the work on the project and a final draw was presented to Plaintiff on or about January 19, 2007.
4. The final draw certified all subcontractors were paid in full and was signed by Keith Alexander and certified by Keith Alexander.
5. Plaintiff paid all amounts due under the contract and as provided in the draw applications.
6. All checks were paid to Keith Alexander.
7. All subcontractors were not paid as represented by Keith Alexander.
8. The representations that all subcontractors were paid were a false statements made by Keith Alexander.
9. Based on the false statements Plaintiff Eddie Kent paid K.B. Alexander Co. of Texas, Inc. all sums due and owing under the contract.
10. Plaintiff after final payment was made to Keith Alexander discovered all subcontractors on his project were not paid as represented by Keith Alexander.
11. Subcontractors on the Plaintiff's project filed mechanic's liens and/or sued the Plaintiff as a result of not being paid by K.B. Alexander Co. of Texas, Inc.
12. The representations made to Plaintiff by Keith Alexander were material and relied upon by Plaintiff.
13. Keith Alexander knew the representations about subcontractors being paid in full were false when made to plaintiff.
14. Plaintiff was damaged by Keith Alexander's false statements.
15. Plaintiff was required to defend lawsuits, settle lawsuits, pay mechanic's liens and incur legal expenses that but for Keith Alexander's false statements would not have been expenses the Plaintiff would have incurred.

SK

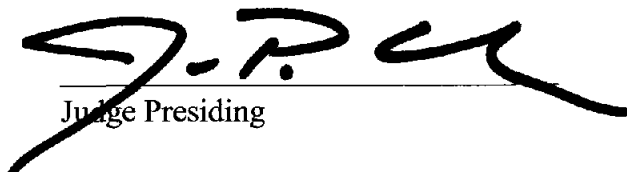
ON 12-11-13, ALL SERVED VIA:
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 SERVE COPIES ON ALL OTHERS **88**

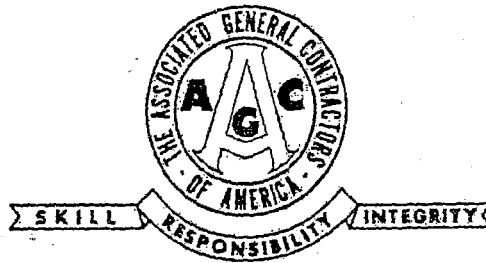
16. Keith Alexander has been involved in a number of projects where project funds were not properly applied to the projects expenses. Keith Alexander has been involved in a number of lawsuits and had mechanics filed on his company's building projects in the past.
17. In other building projects the land owners were subject to paying mechanic's liens and involved in lawsuits over payment of subcontractors by Keith Alexander or a company he controlled.
18. K.B. Alexander Co. of Texas, Inc. filed for bankruptcy and listed claims from subcontractors who had not been paid on the Plaintiff project and other building projects. In addition, land owners were listed in the bankruptcy schedules of K. B. Alexander Co. of Texas, Inc.
19. Keith Alexander filed a mechanic's lien against the Plaintiff's property in May of 2009, attaching an unsigned application for payment from July 5, 2007.
20. Keith Alexander's mechanic's lien was outside the statutory period to file a mechanic's lien.
21. Keith Alexander's actions in filing a mechanic's lien were done to harm the Plaintiff.
22. Keith Alexander's failure to pay subcontractors on the Plaintiff's project were a part of planned way of doing business by Keith Alexander and were done to defraud the Plaintiff.
23. Plaintiff has incurred actual damages in the amount of \$20,061.32.
24. Plaintiff has incurred legal fees and expenses with the office of David L. Pritchard as of August 1, 2013 in the amount \$22,249.97.
25. Plaintiff was incurred legal fees with special bankruptcy counsel in the amount of \$3000.00
26. Plaintiff is entitled to recover prejudgment and post judgment interest at the rate of 5% per annum.

CONCLUSIONS OF LAW

27. Keith Alexander committed fraud by representing to Plaintiffs subcontractors had been paid, when Keith Alexander knew all of said subcontractors had not been paid.
28. Plaintiff's reliance on said fraudulent representations resulted in the Plaintiff being damaged.
29. Keith Alexander lien claim was done with the intent to harm the Plaintiff.
30. Keith Alexander actions were done knowingly with the intent to harm the Plaintiff and subject Keith Alexander to exemplary damages.

Signed this 10 day of December, 2013.


Judge Presiding



ORIGINAL

AGC DOCUMENT NO. 200

**STANDARD FORM OF AGREEMENT AND GENERAL
CONDITIONS BETWEEN OWNER AND CONTRACTOR**

(Where the Contract Price is a Lump Sum)

TABLE OF ARTICLES

1. AGREEMENT
2. GENERAL PROVISIONS
3. CONTRACTOR'S RESPONSIBILITIES
4. OWNER'S RESPONSIBILITIES
5. SUBCONTRACTS
6. CONTRACT TIME
7. CONTRACT PRICE
8. CHANGES
9. PAYMENT
10. INDEMNITY, INSURANCE, WAIVERS AND BONDS
11. SUSPENSION, NOTICE TO CURE AND TERMINATION OF THE AGREEMENT
12. DISPUTE RESOLUTION
13. MISCELLANEOUS PROVISIONS
14. CONTRACT DOCUMENTS

This Agreement has important legal and insurance consequences. Consultation with an attorney and insurance consultant is encouraged with respect to its completion or modification. Notes indicate where information is to be inserted to complete this Agreement.

ARTICLE 1

AGREEMENT

This Agreement is made this 25th day of August in the year 2006,

by and between the

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OWNER

(Name and Address)

Eddie Kent

C/O: Easy Ed's Autos

2004 E. Division Street

Arlington, Texas 76011

and the

CONTRACTOR

(Name and Address)

K.B. Alexander Co. of Texas, Inc.

4709 Old Denton Rd.

Ft. Worth, Texas 76117

for services in connection with the following

PROJECT

(Name, location and brief description)

New Car Lot / Office Building

Easy Ed's Autos

3269 N. Freeway

Ft. Worth, Texas

Notice to the parties shall be given at the above addresses.

ARTICLE 2

GENERAL PROVISIONS

2.1 RELATIONSHIP OF PARTIES The Eddie Kent and the K.B. Alexander Co. of Texas, Inc. agree to proceed with the Project on the basis of mutual trust, good faith and fair dealing.

2.1.1 The K.B. Alexander Co. of Texas, Inc. shall furnish construction administration and management services and use the K.B. Alexander Co. of Texas, Inc.'s best efforts to perform the Work in an expeditious manner consistent with the Contract Documents. The Eddie Kent and K.B. Alexander Co. of Texas, Inc. shall endeavor to promote harmony and cooperation among all Project participants.

2.1.2 The K.B. Alexander Co. of Texas, Inc. represents that it is an independent contractor and that in its performance of the Work it shall act as an independent contractor.

2.1.3 Neither K.B. Alexander Co. of Texas, Inc. nor any of its agents or employees shall act on behalf of or in the name of Eddie Kent except as provided in this Agreement or unless authorized in writing by Eddie Kent's Representative.

2.2 EXTENT OF AGREEMENT This Agreement is solely for the benefit of the parties, represents the entire and integrated agreement between the parties, and supersedes all prior negotiations,

representations or agreements, either written or oral. This Agreement and each and every provision is for the exclusive benefit of the Eddie Kent and K.B. Alexander Co. of Texas, Inc. and not for the benefit of any third party except to the extent expressly provided in this Agreement.

2.3 DEFINITIONS

- .1 Agreement means this AGC Document No. 200 Standard Form of Agreement and General Conditions Between Eddie Kent and K.B. Alexander Co. of Texas, Inc. (Where the Contract Price is a Lump Sum), as modified by the parties, and Exhibits and Attachments made part of this Agreement upon its execution.
- .2 CMA Architects means the licensed Architect, Architect/Engineer or Engineer and its consultants, retained by Eddie Kent to perform design services for the Project. The Eddie Kent's CMA Architects for the Project is CMA, P. 200 Bailey Ave, Suite 310, Ft. Worth, Texas.
- .3 A Change Order is a written order signed by the Eddie Kent and the K.B. Alexander Co. of Texas, Inc. after execution of this Agreement, indicating changes in the scope of the Work, the Contract Price and/or Contract Time, including substitutions proposed by the K.B. Alexander Co. of Texas, Inc. and accepted by the Eddie Kent.
- .4 The Contract Documents consist of this Agreement, the drawings, specifications, addenda issued prior to execution of this Agreement, approved submittals, information furnished by the Eddie Kent under Paragraph 4.3, other documents listed in this Agreement and any modifications issued after execution.
- .5 The Contract Price is the amount indicated in Paragraph 7.1 of this Agreement.
- .6 The Contract Time is the period between the Date of Commencement and Final Completion. See Article 6.
- .7 The K.B. Alexander Co. of Texas, Inc. is the person or entity identified in Article 1 and includes the K.B. Alexander Co. of Texas, Inc.'s Representative.
- .8 The term Day shall mean calendar day unless otherwise specifically defined.
- .9 Fee means salaries and other mandatory or customary compensation of the K.B. Alexander Co. of Texas, Inc.'s employees at its principal and branch offices; general and administrative expenses of the K.B. Alexander Co. of Texas, Inc.'s principal and branch offices other than the field office; and the K.B. Alexander Co. of Texas, Inc.'s capital expenses, including interest on the K.B. Alexander Co. of Texas, Inc.'s capital employed for the Work; and profit.
- .10 Final Completion occurs on the date when the K.B. Alexander Co. of Texas, Inc.'s obligations under this Agreement are complete and accepted by the Eddie Kent and final payment becomes due and payable, as established in Article 6. This date shall be confirmed by a Certificate of Final Completion signed by the Eddie Kent and the K.B. Alexander Co. of Texas, Inc..
- .11 A Material Supplier is a person or entity retained by the K.B. Alexander Co. of Texas, Inc. to provide material and/or equipment for the Work.
- .12 Others means other contractors, material suppliers and persons at the Worksite who are not employed by the K.B. Alexander Co. of Texas, Inc. or Subcontractors.
- .13 Eddie Kent is the person or entity identified in Article 1, and includes the Eddie Kent's Representative.
- .14 The Project, as identified in Article 1, is the building, facility and/or other improvements for which the K.B. Alexander Co. of Texas, Inc. is to perform Work under this Agreement. It may also include construction by the Eddie Kent or Others.

.15 The Schedule of the Work is the document prepared by the K.B. Alexander Co. of Texas, Inc. that specifies the dates on which the K.B. Alexander Co. of Texas, Inc. plans to begin and complete various parts of the Work, including dates on which information and approvals are required from the Eddie Kent.

.16 A Subcontractor is a person or entity retained by the K.B. Alexander Co. of Texas, Inc. as an independent contractor to provide the labor, materials, equipment and/or services necessary to complete a specific portion of the Work. The term Subcontractor does not include the CMA Architects or Others.

.17 Substantial Completion of the Work, or of a designated portion, occurs on the date when the Work is sufficiently complete in accordance with the Contract Documents so that the Eddie Kent may occupy or utilize the Project, or a designated portion, for the use for which it is intended. The issuance of a certificate of occupancy is not a prerequisite for Substantial Completion if the certificate of occupancy cannot be obtained due to factors beyond the K.B. Alexander Co. of Texas, Inc.'s control. This date shall be confirmed by a Certificate of Substantial Completion signed by the Eddie Kent and K.B. Alexander Co. of Texas, Inc..

.18 A Subsubcontractor is a person or entity who has an agreement with a Subcontractor to perform any portion of the Subcontractor's Work.

.19 Work means the construction and services necessary or incidental to fulfill the K.B. Alexander Co. of Texas, Inc.'s obligations for the Project in conformance with this Agreement and the other Contract Documents. The Work may refer to the whole Project or only a part of the Project if work is also being performed by the Eddie Kent or Others.

.1 Changed Work means work that is different from the original scope of Work; or work that changes the Contract Price or Contract Time.

.2 Defective Work is any portion of the Work that is not in conformance with the Contract Documents, as more fully described in Paragraphs 3.5 and 3.8.

.20 Worksite means the geographical area at the location of the Project as identified in Article 1 where the Work is to be performed.

ARTICLE 3

CONTRACTOR'S RESPONSIBILITIES

3.1 GENERAL RESPONSIBILITIES

3.1.1 The K.B. Alexander Co. of Texas, Inc. shall provide all labor, materials, equipment and services necessary to complete the Work, all of which shall be provided in full accord with and reasonably inferable from the Contract Documents as being necessary to produce the indicated results.

3.1.2 The K.B. Alexander Co. of Texas, Inc. shall be responsible for the supervision and coordination of the Work, including the construction means, methods, techniques, sequences and procedures utilized, unless the Contract Documents give other specific instructions. In such case, the K.B. Alexander Co. of Texas, Inc. shall not be liable to the Eddie Kent for damages resulting from compliance with such instructions unless the K.B. Alexander Co. of Texas, Inc. recognized and failed to timely report to the Eddie Kent any error, inconsistency, omission or unsafe practice that it discovered in the specified construction means, methods, techniques, sequences or procedures.

3.1.3 The K.B. Alexander Co. of Texas, Inc. shall perform Work only within locations allowed by the Contract Documents, applicable permits and applicable local law.

3.2 COOPERATION WITH WORK OF OWNER AND OTHERS

3.2.1 The Eddie Kent may perform work at the Worksite directly or by Others. Any agreements with Others to perform construction or operations related to the Project shall include provisions pertaining to insurance, indemnification, waiver of subrogation, coordination, interference, clean up and safety which are substantively the same as the corresponding provisions of this Agreement.

3.2.2 In the event that the Eddie Kent elects to perform work at the Worksite directly or by Others, the K.B. Alexander Co. of Texas, Inc. and the Eddie Kent shall coordinate the activities of all forces at the Worksite and agree upon fair and reasonable schedules and operational procedures for Worksite activities. The Eddie Kent shall require each separate contractor to cooperate with the K.B. Alexander Co. of Texas, Inc. and assist with the coordination of activities and the review of construction schedules and operations. The Contract Price and Contract Time shall be equitably adjusted, as mutually agreed by the parties, for changes made necessary by the coordination of construction activities, and the Schedule of the Work shall be revised accordingly. The K.B. Alexander Co. of Texas, Inc., Eddie Kent and Others shall adhere to the revised construction schedule until it may subsequently be revised.

3.2.3 With regard to the work of the Eddie Kent and Others, the K.B. Alexander Co. of Texas, Inc. shall (a) proceed with the Work in a manner which does not hinder, delay or interfere with the work of the Eddie Kent or Others or cause the work of the Eddie Kent or Others to become defective, (b) afford the Eddie Kent or Others reasonable access for introduction and storage of their materials and equipment and performance of their activities, and (c) coordinate the K.B. Alexander Co. of Texas, Inc.'s construction and operations with theirs as required by this Paragraph 3.2.

3.2.4 Before proceeding with any portion of the Work affected by the construction or operations of the Eddie Kent or Others, the K.B. Alexander Co. of Texas, Inc. shall give the Eddie Kent prompt written notification of any defects the K.B. Alexander Co. of Texas, Inc. discovers in their work which will prevent the proper execution of the Work. The K.B. Alexander Co. of Texas, Inc.'s obligations in this Paragraph do not create a responsibility for the work of the Eddie Kent or Others, but are for the purpose of facilitating the Work. If the K.B. Alexander Co. of Texas, Inc. does not notify the Eddie Kent of patent defects interfering with the performance of the Work, the K.B. Alexander Co. of Texas, Inc. acknowledges that the work of the Eddie Kent or Others is not defective and is acceptable for the proper execution of the Work. Following receipt of written notice from the K.B. Alexander Co. of Texas, Inc. of defects, the Eddie Kent shall promptly inform the K.B. Alexander Co. of Texas, Inc. what action, if any, the K.B. Alexander Co. of Texas, Inc. shall take with regard to the defects.

3.3 RESPONSIBILITY FOR PERFORMANCE

3.3.1 In order to facilitate its responsibilities for completion of the Work in accordance with and as reasonably inferable from the Contract Documents, prior to commencing the Work the K.B. Alexander Co. of Texas, Inc. shall examine and compare the drawings and specifications with information furnished by the Eddie Kent pursuant to Paragraph 4.3, relevant field measurements made by the K.B. Alexander Co. of Texas, Inc. and any visible conditions at the Worksite affecting the Work.

3.3.2 If in the course of the performance of the obligations in Subparagraph 3.3.1 the K.B. Alexander Co. of Texas, Inc. discovers any errors, omissions or inconsistencies in the Contract Documents, the K.B. Alexander Co. of Texas, Inc. shall promptly report them to the Eddie Kent. It is recognized, however, that the K.B. Alexander Co. of Texas, Inc. is not acting in the capacity of a licensed design professional, and that the K.B. Alexander Co. of Texas, Inc.'s examination is to facilitate construction and does not create an affirmative responsibility to detect errors, omissions or inconsistencies or to ascertain compliance with applicable laws, building codes or regulations.

Following receipt of written notice from the K.B. Alexander Co. of Texas, Inc. of defects, the Eddie Kent shall promptly inform the K.B. Alexander Co. of Texas, Inc. what action, if any, the K.B. Alexander Co. of Texas, Inc. shall take with regard to the defects.

3.3.3 The K.B. Alexander Co. of Texas, Inc. shall have no liability for errors, omissions or inconsistencies discovered under Subparagraphs 3.3.1 and 3.3.2 unless the K.B. Alexander Co. of Texas, Inc. knowingly fails to report a recognized problem to the Eddie Kent.

3.3.4 The K.B. Alexander Co. of Texas, Inc. may be entitled to additional costs and/or time because of clarifications or instructions arising out of the K.B. Alexander Co. of Texas, Inc.'s reports described in the three preceding Subparagraphs.

3.4 CONSTRUCTION PERSONNEL AND SUPERVISION

3.4.1 The K.B. Alexander Co. of Texas, Inc. shall provide competent supervision for the performance of the Work. Before commencing the Work, K.B. Alexander Co. of Texas, Inc. shall notify Eddie Kent in writing of the name and qualifications of its proposed superintendent(s) and project manager so Eddie Kent may review the individual's qualifications. If, for reasonable cause, the Eddie Kent refuses to approve the individual, or withdraws its approval after once giving it, K.B. Alexander Co. of Texas, Inc. shall name a different superintendent or project manager for Eddie Kent's review. Any disapproved superintendent shall not perform in that capacity thereafter at the Worksite.

3.4.2 The K.B. Alexander Co. of Texas, Inc. shall be responsible to the Eddie Kent for acts or omissions of parties or entities performing portions of the Work for or on behalf of the K.B. Alexander Co. of Texas, Inc. or any of its Subcontractors.

3.4.3 The K.B. Alexander Co. of Texas, Inc. shall permit only skilled persons to perform the Work. The K.B. Alexander Co. of Texas, Inc. shall enforce safety procedures, strict discipline and good order among persons performing the Work. If the Eddie Kent determines that a particular person does not follow safety procedures, or is unfit or unskilled for the assigned work, the K.B. Alexander Co. of Texas, Inc. shall immediately reassign the person on receipt of the Eddie Kent's written notice to do so.

3.4.4 **CONTRACTOR'S REPRESENTATIVE** The K.B. Alexander Co. of Texas, Inc.'s authorized representative is Keith B. Alexander. The K.B. Alexander Co. of Texas, Inc.'s Representative shall possess full authority to receive instructions from the Eddie Kent and to act on those instructions. The K.B. Alexander Co. of Texas, Inc. shall notify the Eddie Kent in writing of a change in the designation of the K.B. Alexander Co. of Texas, Inc.'s Representative.

3.5 **WORKMANSHIP** The Work shall be executed in accordance with the Contract Documents in a workmanlike manner. All materials used in the Work shall be furnished in sufficient quantities to facilitate the proper and expeditious execution of the Work and shall be new except such materials as may be expressly provided in the Contract Documents to be otherwise.

3.6 **MATERIALS FURNISHED BY THE OWNER OR OTHERS** In the event the Work includes installation of materials or equipment furnished by the Eddie Kent or Others, it shall be the responsibility of the K.B. Alexander Co. of Texas, Inc. to examine the items so provided and thereupon handle, store and install the items, unless otherwise provided in the Contract Documents, with such skill and care as to provide a satisfactory and proper installation. Loss or damage due to acts or omissions of the K.B. Alexander Co. of Texas, Inc. shall be the responsibility of the K.B. Alexander Co. of Texas, Inc. and may be deducted from any amounts due or to become due the K.B. Alexander Co. of Texas, Inc.. Any defects discovered in such materials or equipment shall be reported at once to the Eddie Kent. Following receipt of written notice from the K.B. Alexander Co. of Texas, Inc. of defects, the Eddie Kent shall promptly inform the K.B. Alexander Co. of Texas, Inc. what action, if any, the K.B. Alexander Co. of Texas, Inc.

shall take with regard to the defects.

3.7 TESTS AND INSPECTIONS

3.7.1 The K.B. Alexander Co. of Texas, Inc. shall schedule all required tests, approvals and inspections of the Work or portions thereof at appropriate times so as not to delay the progress of the Work or other work related to the Project. The K.B. Alexander Co. of Texas, Inc. shall give proper notice to all required parties of such tests, approvals and inspections. If feasible, the Eddie Kent and Others may timely observe the tests at the normal place of testing. The Eddie Kent shall bear all expenses associated with tests, inspections and approvals required by the Contract Documents, except as provided in Subparagraph 3.7.3, and which, unless otherwise agreed to, shall be conducted by an independent testing laboratory or entity retained by the Eddie Kent. Unless otherwise required by the Contract Documents, required certificates of testing, approval or inspection shall be secured by the K.B. Alexander Co. of Texas, Inc. and promptly delivered to the Eddie Kent.

3.7.2 If the Eddie Kent or appropriate authorities determine that tests, inspections or approvals in addition to those required by the Contract Documents will be necessary, the K.B. Alexander Co. of Texas, Inc. shall arrange for the procedures and give timely notice to the Eddie Kent and Others who may observe the procedures. Costs of the additional tests, inspections or approvals are at the Eddie Kent's expense except as provided in Subparagraph 3.7.3.

3.7.3 If the procedures described in Subparagraphs 3.7.1 and 3.7.2 indicate that portions of the Work fail to comply with the Contract Documents, the K.B. Alexander Co. of Texas, Inc. shall be responsible for costs of correction and retesting.

3.8 WARRANTY

3.8.1 The K.B. Alexander Co. of Texas, Inc. warrants that all materials and equipment shall be new unless otherwise specified, of good quality, in conformance with the Contract Documents, and free from defective workmanship and materials. At the Eddie Kent's request, the K.B. Alexander Co. of Texas, Inc. shall furnish satisfactory evidence of the quality and type of materials and equipment furnished. The K.B. Alexander Co. of Texas, Inc. further warrants that the Work shall be free from material defects not intrinsic in the design or materials required in the Contract Documents. The K.B. Alexander Co. of Texas, Inc.'s warranty does not include remedies for defects or damages caused by normal wear and tear during normal usage, use for a purpose for which the Project was not intended, improper or insufficient maintenance, modifications performed by the Eddie Kent or Others, or abuse. The contractor's warranty pursuant to this Paragraph 3.8 shall commence on the Date of Substantial Completion.

3.8.2 With respect to any portion of Work first performed after Substantial Completion, the K.B. Alexander Co. of Texas, Inc.'s warranty obligation shall be extended by the period of time between Substantial Completion and the actual performance of the later Work.

3.8.3 The K.B. Alexander Co. of Texas, Inc. shall obtain from its Subcontractors and Material Suppliers any special or extended warranties required by the Contract Documents. All such warranties shall be listed in an attached Exhibit to this Agreement. K.B. Alexander Co. of Texas, Inc.'s liability for such warranties shall be limited to the one-year correction period referred to in Paragraph 3.9. After that period K.B. Alexander Co. of Texas, Inc. shall assign them to the Eddie Kent and provide reasonable assistance to the Eddie Kent in enforcing the obligations of Subcontractors or Material Suppliers.

3.9 CORRECTION OF WORK WITHIN ONE YEAR

3.9.1 If, prior to Substantial Completion and within one year after the date of Substantial Completion

of the Work, any Defective Work is found, the Eddie Kent shall promptly notify the K.B. Alexander Co. of Texas, Inc. in writing. Unless the Eddie Kent provides written acceptance of the condition, the K.B. Alexander Co. of Texas, Inc. shall promptly correct the Defective Work at its own cost and time and bear the expense of additional services required for correction of any Defective Work for which it is responsible. If within the one-year correction period the Eddie Kent discovers and does not promptly notify the K.B. Alexander Co. of Texas, Inc. or give the K.B. Alexander Co. of Texas, Inc. an opportunity to test and/or correct Defective Work as reasonably requested by the K.B. Alexander Co. of Texas, Inc., the Eddie Kent waives the K.B. Alexander Co. of Texas, Inc.'s obligation to correct that Defective Work as well as the Eddie Kent's right to claim a breach of the warranty with respect to that Defective Work.

3.9.2 With respect to any portion of Work first performed after Substantial Completion, the one-year correction period shall be extended by the period of time between Substantial Completion and the actual performance of the later Work. Correction periods shall not be extended by corrective work performed by the K.B. Alexander Co. of Texas, Inc..

3.9.3 If the K.B. Alexander Co. of Texas, Inc. fails to correct Defective Work within a reasonable time after receipt of written notice from the Eddie Kent prior to final payment, the Eddie Kent may correct it in accordance with the Eddie Kent's right to carry out the Work in Paragraph 11.2. In such case, an appropriate Change Order shall be issued deducting the cost of correcting such deficiencies from payments then or thereafter due the K.B. Alexander Co. of Texas, Inc.. If payments then or thereafter due K.B. Alexander Co. of Texas, Inc. are not sufficient to cover such amounts, the K.B. Alexander Co. of Texas, Inc. shall pay the difference to the Eddie Kent.

3.9.4 If after the one-year correction period but before the applicable limitation period the Eddie Kent discovers any Defective Work, the Eddie Kent shall, unless the Defective Work requires emergency correction, promptly notify the K.B. Alexander Co. of Texas, Inc.. If the K.B. Alexander Co. of Texas, Inc. elects to correct the Work, it shall provide written notice of such intent within fourteen (14) days of its receipt of notice from the Eddie Kent. The K.B. Alexander Co. of Texas, Inc. shall complete the correction of Work within a mutually agreed time frame. If the K.B. Alexander Co. of Texas, Inc. does not elect to correct the Work, the Eddie Kent may have the Work corrected by itself or Others and charge the K.B. Alexander Co. of Texas, Inc. for the reasonable cost of the correction. Eddie Kent shall provide K.B. Alexander Co. of Texas, Inc. with an accounting of correction costs it incurs.

3.9.5 If the K.B. Alexander Co. of Texas, Inc.'s correction or removal of Defective Work causes damage to or destroys other completed or partially completed construction, the K.B. Alexander Co. of Texas, Inc. shall be responsible for the cost of correcting the destroyed or damaged construction.

3.9.6 The one-year period for correction of Defective Work does not constitute a limitation period with respect to the enforcement of the K.B. Alexander Co. of Texas, Inc.'s other obligations under the Contract Documents.

3.9.7 Prior to final payment, at the Eddie Kent's option and with the K.B. Alexander Co. of Texas, Inc.'s agreement, the Eddie Kent may elect to accept Defective Work rather than require its removal and correction. In such case the Contract Price shall be equitably adjusted.

3.10 CORRECTION OF COVERED WORK

3.10.1 On request of the Eddie Kent, Work that has been covered without a requirement that it be inspected prior to being covered may be uncovered for the Eddie Kent's inspection. The Eddie Kent shall pay for the costs of uncovering and replacement if the Work proves to be in conformance with the Contract Documents, or if the defective condition was caused by the Eddie Kent or Others. If the uncovered Work proves to be defective, the K.B. Alexander Co. of Texas, Inc. shall pay the costs of uncovering and replacement.

3.10.2 If contrary to specific requirements in the Contract Documents or contrary to a specific request from the Eddie Kent, a portion of the Work is covered, the Eddie Kent, by written request, may require the K.B. Alexander Co. of Texas, Inc. to uncover the Work for the Eddie Kent's observation. In this circumstance the Work shall be replaced at the K.B. Alexander Co. of Texas, Inc.'s expense and with no adjustment to the Contract Time.

3.11 SAFETY OF PERSONS AND PROPERTY

3.11.1 SAFETY PRECAUTIONS AND PROGRAMS The K.B. Alexander Co. of Texas, Inc. shall have overall responsibility for safety precautions and programs in the performance of the Work. While this Paragraph 3.11 establishes the responsibility for safety between the Eddie Kent and K.B. Alexander Co. of Texas, Inc., it does not relieve Subcontractors of their responsibility for the safety of persons or property in the performance of their work, nor for compliance with the provisions of applicable laws and regulations.

3.11.2 The K.B. Alexander Co. of Texas, Inc. shall seek to avoid injury, loss or damage to persons or property by taking reasonable steps to protect:

- .1 its employees and other persons at the Worksite;
- .2 materials and equipment stored at on-site or off-site locations for use in the Work; and
- .3 property located at the site and adjacent to Work areas, whether or not the property is part of the Work.

3.11.3 CONTRACTOR'S SAFETY REPRESENTATIVE The K.B. Alexander Co. of Texas, Inc.'s Worksite Safety Representative is Ray Taylor, who shall act as the K.B. Alexander Co. of Texas, Inc.'s authorized safety representative with a duty to prevent accidents in accordance with Subparagraph 3.11.2. If no individual is identified in this Paragraph 3.11, the authorized safety representative shall be the K.B. Alexander Co. of Texas, Inc.'s Representative. The K.B. Alexander Co. of Texas, Inc. shall report immediately in writing to the Eddie Kent all recordable accidents and injuries occurring at the Worksite. When the K.B. Alexander Co. of Texas, Inc. is required to file an accident report with a public authority, the K.B. Alexander Co. of Texas, Inc. shall furnish a copy of the report to the Eddie Kent.

3.11.4 The K.B. Alexander Co. of Texas, Inc. shall provide the Eddie Kent with copies of all notices required of the K.B. Alexander Co. of Texas, Inc. by law or regulation. The K.B. Alexander Co. of Texas, Inc.'s safety program shall comply with the requirements of governmental and quasi-governmental authorities having jurisdiction.

3.11.5 Damage or loss not insured under property insurance which may arise from the Work, to the extent of the negligence attributed to acts or omissions of the K.B. Alexander Co. of Texas, Inc., or anyone for whose acts the K.B. Alexander Co. of Texas, Inc. may be liable, shall be promptly remedied by the K.B. Alexander Co. of Texas, Inc..

3.11.6 If the Eddie Kent deems any part of the Work or Worksite unsafe, the Eddie Kent, without assuming responsibility for the K.B. Alexander Co. of Texas, Inc.'s safety program, may require the K.B. Alexander Co. of Texas, Inc. to stop performance of the Work or take corrective measures satisfactory to the Eddie Kent, or both. If the K.B. Alexander Co. of Texas, Inc. does not adopt corrective measures, the Eddie Kent may perform them and deduct their cost from the Contract Price. The K.B. Alexander Co. of Texas, Inc. agrees to make no claim for damages, for an increase in the Contract Price or for a change in the Contract Time based on the K.B. Alexander Co. of Texas, Inc.'s compliance with the Eddie Kent's reasonable request.

3.12 EMERGENCIES

3.12.1 In an emergency, the K.B. Alexander Co. of Texas, Inc. shall act in a reasonable manner to prevent personal injury or property damage. Any change in the Contract Price and/or Contract Time resulting from the actions of the K.B. Alexander Co. of Texas, Inc. in an emergency situation shall be determined as provided in Article 8.

3.13 HAZARDOUS MATERIALS

3.13.1 A Hazardous Material is any substance or material identified now or in the future as hazardous under any federal, state or local law or regulation, or any other substance or material that may be considered hazardous or otherwise subject to statutory or regulatory requirement governing handling, disposal and/or cleanup. The K.B. Alexander Co. of Texas, Inc. shall not be obligated to commence or continue work until any Hazardous Material discovered at the Worksite has been removed, rendered or determined to be harmless by the Eddie Kent as certified by an independent testing laboratory and approved by the appropriate government agency.

3.13.2 If after the commencement of the Work Hazardous Material is discovered at the Worksite, the K.B. Alexander Co. of Texas, Inc. shall be entitled to immediately stop Work in the affected area. The K.B. Alexander Co. of Texas, Inc. shall report the condition to the Eddie Kent, the CMA Architects, and, if required, the government agency with jurisdiction.

3.13.3 The K.B. Alexander Co. of Texas, Inc. shall not be required to perform any Work relating to or in the area of Hazardous Material without written mutual agreement.

3.13.4 The Eddie Kent shall be responsible for retaining an independent testing laboratory to determine the nature of the material encountered and whether the material requires corrective measures and/or remedial action. Such measures shall be the sole responsibility of the Eddie Kent, and shall be performed in a manner minimizing any adverse effects upon the Work. The K.B. Alexander Co. of Texas, Inc. shall resume Work in the area affected by any Hazardous Material only upon written agreement between the parties after the Hazardous Material has been removed or rendered harmless and only after approval, if necessary, of the governmental agency with jurisdiction.

3.13.5 If the K.B. Alexander Co. of Texas, Inc. incurs additional costs and/or is delayed due to the presence or remediation of Hazardous Material, the K.B. Alexander Co. of Texas, Inc. shall be entitled to an equitable adjustment in the Contract Price and/or the Contract Time.

3.13.6 To the extent not caused by the negligent acts or omissions of the K.B. Alexander Co. of Texas, Inc., its Subcontractors and Subsubcontractors, and the agents, officers, directors and employees of each of them, the Eddie Kent shall defend, indemnify and hold harmless the K.B. Alexander Co. of Texas, Inc., its Subcontractors and Subsubcontractors, and the agents, officers, directors and employees of each of them, from and against any and all direct claims, damages, losses, costs and expenses, including but not limited to attorney's fees, costs and expenses incurred in connection with any dispute resolution process, arising out of or relating to the performance of the Work in any area affected by Hazardous Material. To the fullest extent permitted by law, such indemnification shall apply regardless of the fault, negligence, breach of warranty or contract, or strict liability of the Eddie Kent.

3.13.7 MATERIALS BROUGHT TO THE WORKSITE

3.13.7.1 Material Safety Data (MSD) sheets as required by law and pertaining to materials or substances used or consumed in the performance of the Work, whether obtained by the K.B. Alexander Co. of Texas, Inc., Subcontractors, the Eddie Kent or Others, shall be maintained at the Worksite by the K.B. Alexander Co. of Texas, Inc. and made available to the Eddie Kent, Subcontractors and Others.

3.13.7.2 The K.B. Alexander Co. of Texas, Inc. shall be responsible for the proper delivery, handling, application, storage, removal and disposal of all materials and substances brought to the Worksite by the K.B. Alexander Co. of Texas, Inc. in accordance with the Contract Documents and used or consumed in the performance of the Work.

3.13.7.3 To the extent not caused by the negligent acts or omissions of the Eddie Kent, its agents, officers, directors and employees, the K.B. Alexander Co. of Texas, Inc. shall defend, indemnify and hold harmless the Eddie Kent, its agents, officers, directors and employees, from and against any and all direct claims, damages, losses, costs and expenses, including but not limited to attorney's fees, costs and expenses incurred in connection with any dispute resolution procedure, arising out of or relating to the delivery, handling, application, storage, removal and disposal of all materials and substances brought to the Worksite by the K.B. Alexander Co. of Texas, Inc. in accordance with the Contract Documents. To the fullest extent permitted by law, such indemnification shall apply regardless of the fault, negligence, breach of warranty or contract, or strict liability of the K.B. Alexander Co. of Texas, Inc..

3.13.8 The terms of this Paragraph 3.13 shall survive the completion of the Work and/or any termination of this Agreement.

3.14 SUBMITTALS

3.14.1 The K.B. Alexander Co. of Texas, Inc. shall submit to the Eddie Kent, and, if directed, to its CMA Architects, for review and approval all shop drawings, samples, product data and similar submittals required by the Contract Documents. The K.B. Alexander Co. of Texas, Inc. shall be responsible to the Eddie Kent for the accuracy and conformity of its submittals to the Contract Documents. The K.B. Alexander Co. of Texas, Inc. shall prepare and deliver its submittals to the Eddie Kent in a manner consistent with the Schedule of the Work and in such time and sequence so as not to delay the performance of the Work or the work of the Eddie Kent and Others. When the K.B. Alexander Co. of Texas, Inc. delivers its submittals to the Eddie Kent, the K.B. Alexander Co. of Texas, Inc. shall identify in writing for each submittal all changes, deviations or substitutions from the requirements of the Contract Documents. The review and approval of any K.B. Alexander Co. of Texas, Inc. submittal shall not be deemed to authorize changes, deviations or substitutions from the requirements of the Contract Documents unless express written approval is obtained from the Eddie Kent specifically authorizing such deviation, substitution or change. Further, the Eddie Kent shall not make any change, deviation or substitution through the submittal process without specifically identifying and authorizing such deviation to the K.B. Alexander Co. of Texas, Inc.. In the event that the Contract Documents do not contain submittal requirements pertaining to the Work, the K.B. Alexander Co. of Texas, Inc. agrees upon request to submit in a timely fashion to the Eddie Kent for review and approval any shop drawings, samples, product data, manufacturers' literature or similar submittals as may reasonably be required by the Eddie Kent.

3.14.2 The Eddie Kent shall be responsible for review and approval of submittals with reasonable promptness to avoid causing delay.

3.14.3 The K.B. Alexander Co. of Texas, Inc. shall perform all Work strictly in accordance with approved submittals. Approval of shop drawings is not authorization to K.B. Alexander Co. of Texas, Inc. to perform Changed Work, unless the procedures of Article 8 are followed. Approval does not relieve the K.B. Alexander Co. of Texas, Inc. from responsibility for Defective Work resulting from errors or omissions of any kind on the approved Shop Drawings.

3.14.4 Record copies of the following, incorporating field changes and selections made during construction, shall be maintained at the Project site and available to the Eddie Kent upon request: drawings, specifications, addenda, Change Order and other modifications, and required submittals including product data, samples and shop drawings.

3.14.5 No substitutions shall be made in the Work unless permitted in the Contract Documents and then only after the K.B. Alexander Co. of Texas, Inc. obtains approvals required under the Contract Documents for substitutions.

3.14.6 The K.B. Alexander Co. of Texas, Inc. shall prepare and submit to the Eddie Kent

(Select one only)

1 Set final marked up as-built drawings,

or

~~_____ updated electronic data~~

or

~~_____ such documentation as defined by the parties by attachment to this Agreement,~~

in general documenting how the various elements of the Work were actually constructed or installed.

3.15 PROFESSIONAL SERVICES The Eddie Kent, through its CMA Architects, shall provide all professional services required for the completion of the Work, except the following: None. The K.B. Alexander Co. of Texas, Inc. shall not be required to provide professional services which constitute the practice of architecture or engineering unless the K.B. Alexander Co. of Texas, Inc. needs to provide such services in order to carry out its responsibilities for construction means, methods, techniques, sequences and procedures, or unless such services are specifically called for by the Contract Documents. If professional services are required of the K.B. Alexander Co. of Texas, Inc., the Eddie Kent shall indicate all performance and design criteria to be satisfied. The K.B. Alexander Co. of Texas, Inc. shall not be responsible for the adequacy of such performance and design criteria. The K.B. Alexander Co. of Texas, Inc. shall obtain professional services and any design certifications required from licensed design professionals. All drawings, specifications, calculations, certifications and submittals prepared by such design professionals shall bear the signature and seal of such design professionals and the Eddie Kent and the CMA Architects shall be entitled to rely upon the adequacy, accuracy and completeness of such design services. The K.B. Alexander Co. of Texas, Inc. shall not be required to provide such services in violation of existing laws, rules and regulations in the jurisdiction where the Project is located.

3.16 WORKSITE CONDITIONS

3.16.1 WORKSITE VISIT The K.B. Alexander Co. of Texas, Inc. acknowledges that it has visited, or has had the opportunity to visit, the Worksite to visually inspect the general and local conditions which could affect the Work.

3.16.2 CONCEALED OR UNKNOWN SITE CONDITIONS If the conditions at the Worksite are (a) subsurface or other physical conditions which are materially different from those indicated in the Contract Documents, or (b) unusual or unknown physical conditions which are materially different from conditions ordinarily encountered and generally recognized as inherent in Work provided for in the Contract Documents, the K.B. Alexander Co. of Texas, Inc. shall stop Work and give immediate written notice of the condition to the Eddie Kent and the CMA Architects. The K.B. Alexander Co. of Texas, Inc. shall not be required to perform any work relating to the unknown condition without the written mutual agreement of the parties. Any change in the Contract Price and/or the Contract Time as a result of the unknown condition shall be determined as provided in this Article. The K.B. Alexander Co. of Texas, Inc. shall provide the Eddie Kent with written notice of any claim as a result of unknown conditions within the time period set forth in Paragraph 8.4.

3.17 PERMITS AND TAXES

3.17.1 K.B. Alexander Co. of Texas, Inc. shall give public authorities all notices required by law

and, except for permits and fees which are the responsibility of the Eddie Kent pursuant to Paragraph 4.4, shall obtain and pay for all necessary permits, licenses and renewals pertaining to the Work. K.B. Alexander Co. of Texas, Inc. shall provide to Eddie Kent copies of all notices, permits, licenses and renewals required under this Agreement.

3.17.2 K.B. Alexander Co. of Texas, Inc. shall pay all applicable taxes legally enacted when bids are received or negotiations concluded for the Work provided by the K.B. Alexander Co. of Texas, Inc..

3.17.3 The Contract Price and/or Contract Time shall be equitably adjusted by Change Order for additional costs resulting from any changes in laws, ordinances, rules and regulations enacted after the date of this Agreement, including increased taxes.

3.17.4 If in accordance with the Eddie Kent's direction, the K.B. Alexander Co. of Texas, Inc. claims an exemption for taxes, the Eddie Kent shall defend, indemnify and hold the K.B. Alexander Co. of Texas, Inc. harmless from any liability, penalty, interest, fine, tax assessment, attorneys fees or other expense or cost incurred by the K.B. Alexander Co. of Texas, Inc. as a result of any such action.

3.18 CUTTING, FITTING AND PATCHING

3.18.1 The K.B. Alexander Co. of Texas, Inc. shall perform cutting, fitting and patching necessary to coordinate the various parts of the Work and to prepare its Work for the work of the Eddie Kent or Others.

3.18.2 Cutting, patching or altering the work of the Eddie Kent or Others shall be done with the prior written approval of the Eddie Kent. Such approval shall not be unreasonably withheld.

3.19 CLEANING UP

3.19.1 The K.B. Alexander Co. of Texas, Inc. shall regularly remove debris and waste materials at the Worksite resulting from the Work. Prior to discontinuing Work in an area, the K.B. Alexander Co. of Texas, Inc. shall clean the area and remove all rubbish and its construction equipment, tools, machinery, waste and surplus materials. The K.B. Alexander Co. of Texas, Inc. shall minimize and confine dust and debris resulting from construction activities. At the completion of the Work, the K.B. Alexander Co. of Texas, Inc. shall remove from the Worksite all construction equipment, tools, surplus materials, waste materials and debris.

3.19.2 If the K.B. Alexander Co. of Texas, Inc. fails to commence compliance with cleanup duties within forty-eight (48) hours after written notification from the Eddie Kent of non-compliance, the Eddie Kent may implement appropriate cleanup measures without further notice and the cost shall be deducted from any amounts due or to become due the K.B. Alexander Co. of Texas, Inc..

3.20 ACCESS TO WORK The K.B. Alexander Co. of Texas, Inc. shall facilitate the access of the Eddie Kent, CMA Architects and Others to Work in progress.

3.21 CONFIDENTIALITY The K.B. Alexander Co. of Texas, Inc. shall treat as confidential and not disclose to third persons, except Subcontractors, Subsubcontractors and Material Suppliers as is necessary for the performance of the Work, or use for its own benefit, any of the Eddie Kent's confidential information, know-how, discoveries, production methods and the like that may be disclosed to the K.B. Alexander Co. of Texas, Inc. or which the K.B. Alexander Co. of Texas, Inc. may acquire in connection with the Work. The Eddie Kent shall treat as confidential information all of the K.B. Alexander Co. of Texas, Inc.'s estimating systems and historical and parameter cost data that may be disclosed to the Eddie Kent in connection with the performance of this Agreement.

ARTICLE 4

OWNER'S RESPONSIBILITIES

4.1 INFORMATION AND SERVICES Any information or services to be provided by the Eddie Kent shall be provided in a timely manner so as not to delay the Work.

4.2 FINANCIAL INFORMATION Prior to commencement of the Work and thereafter at the written request of the K.B. Alexander Co. of Texas, Inc., the Eddie Kent shall provide the K.B. Alexander Co. of Texas, Inc. with evidence of Project financing. Evidence of such financing shall be a condition precedent to the K.B. Alexander Co. of Texas, Inc.'s commencing or continuing the Work. The K.B. Alexander Co. of Texas, Inc. shall be notified prior to any material change in Project financing.

4.3 WORKSITE INFORMATION Except to the extent that the K.B. Alexander Co. of Texas, Inc. knows of any inaccuracy, the K.B. Alexander Co. of Texas, Inc. is entitled to rely on Worksite information furnished by the Eddie Kent pursuant to this Paragraph 4.3. To the extent the Eddie Kent has obtained, or is required elsewhere in the Contract Documents to obtain, the following Worksite information, the Eddie Kent shall provide at the Eddie Kent's expense and with reasonable promptness:

.1 information describing the physical characteristics of the site, including surveys, site evaluations, legal descriptions, data or drawings depicting existing conditions, subsurface conditions and environmental studies, reports and investigations;

.2 tests, inspections and other reports dealing with environmental matters, Hazardous Material and other existing conditions, including structural, mechanical and chemical tests, required by the Contract Documents or by law; and

.3 any other information or services requested in writing by the K.B. Alexander Co. of Texas, Inc. which are relevant to the K.B. Alexander Co. of Texas, Inc.'s performance of the Work and under the Eddie Kent's control.

The information required by Paragraph 4.3 shall be provided in reasonable detail. Legal descriptions shall include easements, title restrictions, boundaries, and zoning restrictions. Worksite descriptions shall include existing buildings and other construction and all other pertinent site conditions. Adjacent property descriptions shall include structures, streets, sidewalks, alleys, and other features relevant to the Work. Utility details shall include available services, lines at the Worksite and adjacent thereto and connection points. The information shall include public and private information, subsurface information, grades, contours, and elevations, drainage data, exact locations and dimensions, and benchmarks that can be used by the K.B. Alexander Co. of Texas, Inc. in laying out the Work.

4.4 BUILDING PERMIT, FEES AND APPROVALS Except for those permits and fees related to the Work which are the responsibility of the K.B. Alexander Co. of Texas, Inc. pursuant to Subparagraph 3.17.1, the Eddie Kent shall secure and pay for all other permits, approvals, easements, assessments and fees required for the development, construction, use or occupancy of permanent structures or for permanent changes in existing facilities, including the building permit.

4.5 MECHANICS AND CONSTRUCTION LIEN INFORMATION Within seven (7) days after receiving the K.B. Alexander Co. of Texas, Inc.'s written request, the Eddie Kent shall provide the K.B. Alexander Co. of Texas, Inc. with the information necessary to give notice of or enforce mechanics lien rights and, where applicable, stop notices. This information shall include the Eddie Kent's interest in the real property on which the Project is located and the record legal title.

4.6 CONTRACT DOCUMENTS Unless otherwise specified, Eddie Kent shall provide Twelve (12) copies of the Contract Documents to the K.B. Alexander Co. of Texas, Inc. without cost.

4.7 OWNER'S REPRESENTATIVE The Eddie Kent's authorized representative is Eddie Kent. The representative shall be fully acquainted with the Project, and shall have authority to bind the Eddie Kent in all matters requiring the Eddie Kent's approval, authorization or written notice. If the Eddie Kent changes

its representative or the representative's authority as listed above, the Eddie Kent shall immediately notify the K.B. Alexander Co. of Texas, Inc. in writing.

4.8 OWNER'S CUTTING AND PATCHING Cutting, patching or altering the Work by the Eddie Kent or Others shall be done with the prior written approval of the K.B. Alexander Co. of Texas, Inc., which approval shall not be unreasonably withheld.

4.9 OWNER'S RIGHT TO CLEAN UP In case of a dispute between the K.B. Alexander Co. of Texas, Inc. and Others with regard to respective responsibilities for cleaning up at the Worksite, the Eddie Kent may implement appropriate cleanup measures and allocate the cost among those responsible.

4.10 COST OF CORRECTING DAMAGED OR DESTROYED WORK With regard to damage or loss attributable to the acts or omissions of the Eddie Kent or Others and not to the K.B. Alexander Co. of Texas, Inc., the Eddie Kent may either (a) promptly remedy the damage or loss or (b) accept the damage or loss. If the K.B. Alexander Co. of Texas, Inc. incurs additional costs and/or is delayed due to such loss or damage, the K.B. Alexander Co. of Texas, Inc. shall be entitled to an equitable adjustment in the Contract Price and/or Contract Time.

ARTICLE 5

SUBCONTRACTS

5.1 SUBCONTRACTORS The Work not performed by the K.B. Alexander Co. of Texas, Inc. with its own forces shall be performed by Subcontractors.

5.2 AWARD OF SUBCONTRACTS AND OTHER CONTRACTS FOR PORTIONS OF THE WORK

5.2.1 As soon after the award of this Agreement as possible, the K.B. Alexander Co. of Texas, Inc. shall provide the Eddie Kent and if directed, the CMA Architects with a written list of the proposed subcontractors and significant material suppliers. If the Eddie Kent has a reasonable objection to any proposed subcontractor or material supplier, the Eddie Kent shall notify the K.B. Alexander Co. of Texas, Inc. in writing. Failure to promptly object shall constitute acceptance.

5.2.2 If the Eddie Kent has reasonably and promptly objected as provided in Subparagraph 5.2.1, the K.B. Alexander Co. of Texas, Inc. shall not contract with the proposed subcontractor or material supplier, and the K.B. Alexander Co. of Texas, Inc. shall propose another acceptable to the Eddie Kent. To the extent the substitution results in an increase or decrease in the Contract Price and/or Contract Time, an appropriate Change Order shall be issued as provided in Article 8.

5.3 BINDING OF SUBCONTRACTORS AND MATERIAL SUPPLIERS The K.B. Alexander Co. of Texas, Inc. agrees to bind every Subcontractor and Material Supplier (and require every Subcontractor to so bind its subcontractors and material suppliers) to all the provisions of this Agreement and the Contract Documents as they apply to the Subcontractor's and Material Supplier's portions of the Work.

5.4 LABOR RELATIONS (Insert here any conditions, obligations or requirements relative to labor relations and their effect on the Project. Legal counsel is recommended.)

5.5 CONTINGENT ASSIGNMENT OF SUBCONTRACTS

5.5.1 If this Agreement is terminated, each subcontract agreement shall be assigned by the K.B. Alexander Co. of Texas, Inc. to the Eddie Kent, subject to the prior rights of any surety, provided that:

- .1 this Agreement is terminated by the Eddie Kent pursuant to Paragraphs 11.3 or 11.4; and
- .2 the Eddie Kent accepts such assignment after termination by notifying the Subcontractor

and K.B. Alexander Co. of Texas, Inc. in writing.

5.5.2 If the Eddie Kent accepts such an assignment, and the Work has been suspended for more than thirty (30) consecutive days, following termination, if appropriate, the Subcontractor's compensation shall be equitably adjusted as a result of the suspension.

ARTICLE 6 CONTRACT TIME

6.1 PERFORMANCE OF THE WORK

6.1.1 DATE OF COMMENCEMENT The Date of Commencement is the date of this Agreement as first written in Article 1 unless otherwise set forth below: (Insert here any special provisions concerning notices to proceed and the Date of Commencement.)

Date of Comencement: Formal Written Notice to Proceed from Project Owner and upon Receipt of City Building Permit

6.1.2 TIME Substantial Completion of the Work shall be achieved in One Hundred Twenty Eight (128) days from the Date of Commencement. Unless otherwise specified in the Certificate of Substantial Completion, the K.B. Alexander Co. of Texas, Inc. shall achieve Final Completion within Thirty (30) days after the date of Substantial Completion, subject to adjustments as provided for in the Contract Documents.

6.1.3 Time limits stated above are of the essence of this Agreement.

6.1.4 Unless instructed by the Eddie Kent in writing, the K.B. Alexander Co. of Texas, Inc. shall not knowingly commence the Work before the effective date of insurance that is required to be provided by the K.B. Alexander Co. of Texas, Inc. and Eddie Kent.

6.2 SCHEDULE OF THE WORK

6.2.1 Before submitting the first application for payment, the K.B. Alexander Co. of Texas, Inc. shall submit to the Eddie Kent, and if directed, its CMA Architects, a Schedule of the Work that shall show the dates on which the K.B. Alexander Co. of Texas, Inc. plans to commence and complete various parts of the Work, including dates on which information and approvals are required from the Eddie Kent. On the Eddie Kent's written approval of the Schedule of the Work, the K.B. Alexander Co. of Texas, Inc. shall comply with it unless directed by the Eddie Kent to do otherwise. The K.B. Alexander Co. of Texas, Inc. shall update the Schedule of the Work on a monthly basis or at appropriate intervals as required by the conditions of the Work and the Project.

6.2.2 The Eddie Kent may determine the sequence in which the Work shall be performed, provided it does not unreasonably interfere with the Schedule of the Work. The Eddie Kent may require the K.B. Alexander Co. of Texas, Inc. to make reasonable changes in the sequence at any time during the performance of the Work in order to facilitate the performance of work by the Eddie Kent or Others. To the extent such changes increase K.B. Alexander Co. of Texas, Inc.'s time and costs the Contract Price and Contract Time shall be equitably adjusted.

6.3 DELAYS AND EXTENSIONS OF TIME

6.3.1 If the K.B. Alexander Co. of Texas, Inc. is delayed at any time in the commencement or progress of the Work by any cause beyond the control of the K.B. Alexander Co. of Texas, Inc., the K.B. Alexander Co. of Texas, Inc. shall be entitled to an equitable extension of the Contract Time. In addition, if the K.B. Alexander Co. of Texas, Inc. incurs additional costs as a result of such delay, the K.B. Alexander Co. of Texas, Inc. shall be entitled to an equitable adjustment in the Contract Price subject to Paragraph 10.2. Examples of causes beyond the control of the K.B. Alexander Co.

of Texas, Inc. include, but are not limited to, the following: acts or omissions of the Eddie Kent, the CMA Architects or Others; changes in the Work or the sequencing of the Work ordered by the Eddie Kent, or arising from decisions of the Eddie Kent that impact the time of performance of the Work; labor disputes not involving the K.B. Alexander Co. of Texas, Inc.; fire; encountering Hazardous Materials; adverse weather conditions not reasonably anticipated; concealed or unknown conditions; delay authorized by the Eddie Kent pending dispute resolution and suspension by the Eddie Kent under Paragraph 11.1. The K.B. Alexander Co. of Texas, Inc. shall process any requests for equitable or extensions of Contract Time and/or equitable adjustment in the Contract Price in accordance with the provisions of Article 8.

6.3.2 To the extent a delay in the progress of the Work is caused by adverse weather conditions not reasonably anticipated, fire, unusual transportation delays, general labor disputes impacting the Project but not specifically related to the Worksite, governmental agencies, or unavoidable accidents or circumstances, the K.B. Alexander Co. of Texas, Inc. shall only be entitled to its actual costs without fee and an extension of the Date of Substantial Completion and/or the Date of Final Completion.

6.3.3 NOTICE OF DELAYS In the event delays to the Work are encountered for any reason, the K.B. Alexander Co. of Texas, Inc. shall provide prompt written notice to the Eddie Kent of the cause of such delays after K.B. Alexander Co. of Texas, Inc. first recognizes the delay. The Eddie Kent and K.B. Alexander Co. of Texas, Inc. agree to undertake reasonable steps to mitigate the effect of such delays.

6.4 NOTICE OF DELAY CLAIMS If the K.B. Alexander Co. of Texas, Inc. requests an equitable extension of Contract Time and/or an equitable adjustment in Contract Price as a result of a delay described in Subparagraph 6.3.1, the K.B. Alexander Co. of Texas, Inc. shall give the Eddie Kent written notice of the claim in accordance with Paragraph 8.4. If the K.B. Alexander Co. of Texas, Inc. causes delay in the completion of the Work, the Eddie Kent shall be entitled to recover its additional costs subject to Paragraph 10.2. The Eddie Kent shall process any such claim against the K.B. Alexander Co. of Texas, Inc. in accordance with Article 8.

ARTICLE 7

CONTRACT PRICE

7.1 LUMP SUM As full compensation for performance by the K.B. Alexander Co. of Texas, Inc. of the Work in conformance with the Contract Documents, the Eddie Kent shall pay the K.B. Alexander Co. of Texas, Inc. the lump sum price of Three Hundred Eighty Three Thousand Eight Hundred Seventy One Dollars (\$383,871.00). The lump sum price is hereinafter referred to as the Contract Price, which shall be subject to increase or decrease as provided in Article 8.

7.2 ALLOWANCES

7.2.1 All allowances stated in the Contract Documents shall be included in the Contract Price. While the Eddie Kent may direct the amounts of, and particular material suppliers or subcontractors for, specific allowance items, if the K.B. Alexander Co. of Texas, Inc. reasonably objects to a material supplier or subcontractor, it shall not be required to contract with them. The Eddie Kent shall select allowance items in a timely manner so as not to delay the Work.

7.2.2 Allowances shall include the costs of materials, supplies and equipment delivered to the Worksite, less applicable trade discounts and including requisite taxes, unloading and handling at the Worksite, and labor and installation, unless specifically stated otherwise. The K.B. Alexander Co. of Texas, Inc.'s overhead and profit for the allowances shall be included in the Contract Price, but not in the allowances. The Contract Price shall be adjusted by Change Order to reflect the actual costs when they are greater than or less than the allowances.

ARTICLE 8 CHANGES

Changes in the Work that are within the general scope of this Agreement shall be accomplished, without invalidating this Agreement, by Change Order, and Interim Directed Change.

8.1 CHANGE ORDER

8.1.1 The K.B. Alexander Co. of Texas, Inc. may request and/or the Eddie Kent may order changes in the Work or the timing or sequencing of the Work that impacts the Contract Price or the Contract Time. All such changes in the Work that affect Contract Time or Contract Price shall be formalized in a Change Order. Any such requests for a change in the Contract Price and/or the Contract Time shall be processed in accordance with this Article 8.

8.1.2 The Eddie Kent and the K.B. Alexander Co. of Texas, Inc. shall negotiate in good faith an appropriate adjustment to the Contract Price and/or the Contract Time and shall conclude these negotiations as expeditiously as possible. Acceptance of the Change Order and any adjustment in the Contract Price and/or Contract Time shall not be unreasonably withheld.

8.2 INTERIM DIRECTED CHANGE

8.2.1 The Eddie Kent may issue a written Interim Directed Change directing a change in the Work prior to reaching agreement with the K.B. Alexander Co. of Texas, Inc. on the adjustment, if any, in the Contract Price and/or the Contract Time.

8.2.2 The Eddie Kent and the K.B. Alexander Co. of Texas, Inc. shall negotiate expeditiously and in good faith for appropriate adjustments, as applicable, to the Contract Price and/or the Contract Time arising out of Interim Directed Change. As the Changed Work is performed, the K.B. Alexander Co. of Texas, Inc. shall submit its costs for such work with its application for payment beginning with the next application for payment within thirty (30) days of the issuance of the Interim Directed Change. If there is a dispute as to the cost to the Eddie Kent, the Eddie Kent shall pay the K.B. Alexander Co. of Texas, Inc. fifty percent (50%) of its estimated cost to perform the work. In such event, the parties reserve their rights as to the disputed amount, subject to the requirements of Article 12.

8.2.3 When the Eddie Kent and the K.B. Alexander Co. of Texas, Inc. agree upon the adjustment in the Contract Price and/or the Contract Time, for a change in the Work directed by an Interim Directed Change, such agreement shall be the subject of a Change Order. The Change Order shall include all outstanding Interim Directed Changes issued since the last Change Order.

8.3 DETERMINATION OF COST

8.3.1 An increase or decrease in the Contract Price and/or the Contract Time resulting from a change in the Work shall be determined by one or more of the following methods:

- .1 unit prices set forth in this Agreement or as subsequently agreed;
- .2 a mutually accepted, itemized lump sum;
- .3 costs calculated on a basis agreed upon by the Eddie Kent and K.B. Alexander Co. of Texas, Inc. plus a Fee (either a lump sum or a Fee based on a percentage of cost) to which they agree; or
- .4 if an increase or decrease cannot be agreed to as set forth in Clauses .1 through .3 above, and the Eddie Kent issues an Interim Directed Change, the cost of the change in the Work shall be determined by the reasonable actual expense and savings of the performance of the Work resulting from the change. If there is a net increase in the Contract Price, the K.B.

Alexander Co. of Texas, Inc.'s Fee shall be adjusted accordingly. In case of a net decrease in the Contract Price, the K.B. Alexander Co. of Texas, Inc.'s Fee shall not be adjusted unless ten percent (10%) or more of the Project is deleted. The K.B. Alexander Co. of Texas, Inc. shall maintain a documented, itemized accounting evidencing the expenses and savings.

8.3.2 If unit prices are set forth in the Contract Documents or are subsequently agreed to by the parties, but the character or quantity of such unit items as originally contemplated is so different in a proposed Change Order that the original unit prices will cause substantial inequity to the Eddie Kent or the K.B. Alexander Co. of Texas, Inc., such unit prices shall be equitably adjusted.

8.3.3 If the Eddie Kent and the K.B. Alexander Co. of Texas, Inc. disagree as to whether work required by the Eddie Kent is within the scope of the Work, the K.B. Alexander Co. of Texas, Inc. shall furnish the Eddie Kent with an estimate of the costs to perform the disputed work in accordance with the Eddie Kent's interpretations. If the Eddie Kent issues a written order for the K.B. Alexander Co. of Texas, Inc. to proceed, the K.B. Alexander Co. of Texas, Inc. shall perform the disputed work and the Eddie Kent shall pay the K.B. Alexander Co. of Texas, Inc. fifty percent (50%) of its estimated cost to perform the work. In such event, both parties reserve their rights as to whether the work was within the scope of the Work, subject to the requirements of Article 12. The Eddie Kent's payment does not prejudice its right to be reimbursed should it be determined that the disputed work was within the scope of Work. The K.B. Alexander Co. of Texas, Inc.'s receipt of payment for the disputed work does not prejudice its right to receive full payment for the disputed work should it be determined that the disputed work is not within the scope of the Work.

8.4 CLAIMS FOR ADDITIONAL COST OR TIME Except as provided in Subparagraph 6.3.2 and Paragraph 6.4 for any claim for an increase in the Contract Price and/or the Contract Time, the K.B. Alexander Co. of Texas, Inc. shall give the Eddie Kent written notice of the claim within fourteen (14) days after the occurrence giving rise to the claim or within fourteen (14) days after the K.B. Alexander Co. of Texas, Inc. first recognizes the condition giving rise to the claim, whichever is later. Except in an emergency, notice shall be given before proceeding with the Work. Any change in the Contract Price and/or the Contract Time resulting from such claim shall be authorized by Change Order.

ARTICLE 9

PAYMENT

9.1 SCHEDULE OF VALUES Within twenty-one (21) days from the date of execution of this Agreement, the K.B. Alexander Co. of Texas, Inc. shall prepare and submit to the Eddie Kent, and if directed, the CMA Architects, a schedule of values apportioned to the various divisions or phases of the Work. Each line item contained in the schedule of values shall be assigned a value such that the total of all items shall equal the Contract Price.

9.2 PROGRESS PAYMENTS

9.2.1 APPLICATIONS The K.B. Alexander Co. of Texas, Inc. shall submit to the Eddie Kent, and if directed, its CMA Architects, a monthly application for payment no later than the 25 day of the calendar month for the preceding thirty (30) Days. K.B. Alexander Co. of Texas, Inc.'s applications for payment shall be itemized and supported by the K.B. Alexander Co. of Texas, Inc.'s schedule of values and any other substantiating data as required by this Agreement. Payment applications shall include payment requests on account of properly authorized Change Orders or Interim Directed Change. The Eddie Kent shall pay the amount otherwise due on any payment application, no later than ~~twenty (20)~~ ten (10) days after the K.B. Alexander Co. of Texas, Inc. has submitted a complete and accurate payment application. The Eddie Kent may deduct from any progress payment amounts as may be retained pursuant to Subparagraph 9.2.4.

9.2.2 STORED MATERIALS AND EQUIPMENT If approved by the Eddie Kent, applications for

payment may include materials and equipment not yet incorporated into the Work but delivered to and suitably stored on-site or off-site including applicable insurance, storage and transportation costs to the Worksite. Approval of payment applications for stored materials and equipment stored off-site shall be conditioned on submission by the K.B. Alexander Co. of Texas, Inc. of bills of sale and proof of applicable insurance, or such other procedures satisfactory to the Eddie Kent to establish the proper valuation of the stored materials and equipment, the Eddie Kent's title to such materials and equipment, and to otherwise protect the Eddie Kent's interests therein, including transportation to the site.

9.2.3 LIEN WAIVERS AND LIENS

9.2.3.1 PARTIAL LIEN WAIVERS AND AFFIDAVITS If required by the Eddie Kent, as a prerequisite for payment, the K.B. Alexander Co. of Texas, Inc. shall provide partial lien and claim waivers in the amount of the application for payment and affidavits from its Subcontractors, and Material Suppliers for the completed Work. Such waivers shall be conditional upon payment. In no event shall the K.B. Alexander Co. of Texas, Inc. be required to sign an unconditional waiver of lien or claim, either partial or final, prior to receiving payment or in an amount in excess of what it has been paid.

9.2.3.2 RESPONSIBILITY FOR LIENS If Eddie Kent has made payments in the time required by this Article 9, the K.B. Alexander Co. of Texas, Inc. shall, within thirty (30) days after filing, cause the removal of any liens filed against the premises or public improvement fund by any party or parties performing labor or services or supplying materials in connection with the Work. If the K.B. Alexander Co. of Texas, Inc. fails to take such action on a lien, the Eddie Kent may cause the lien to be removed at the K.B. Alexander Co. of Texas, Inc.'s expense, including bond costs and reasonable attorney's fees. This Clause shall not apply if there is a dispute pursuant to Article 12 relating to the subject matter of the lien.

9.2.4 RETAINAGE From each progress payment made prior to Substantial Completion the Eddie Kent may retain Five percent (5%) of the amount otherwise due after deduction of any amounts as provided in Paragraph 9.3. If the Eddie Kent chooses to use this retainage provision:

- .1 once each early finishing Subcontractor has completed its work and that work has been accepted by the Eddie Kent, the Eddie Kent may release final retention on that portion of the Work;
- .2 after the Work is fifty percent (50%) complete, the Eddie Kent shall withhold no additional retainage and shall pay the K.B. Alexander Co. of Texas, Inc. the full amount of what is due on account of progress payments;
- .3 the Eddie Kent may, in its sole discretion, reduce the amount to be retained at any time.

In lieu of retainage, the K.B. Alexander Co. of Texas, Inc. may furnish securities, acceptable to the Eddie Kent, to be held by the Eddie Kent. The interest on such securities shall accrue to the K.B. Alexander Co. of Texas, Inc.

9.3 ADJUSTMENT OF CONTRACTOR'S PAYMENT APPLICATION The Eddie Kent may adjust or reject a payment application or nullify a previously approved payment application, in whole or in part, as may reasonably be necessary to protect the Eddie Kent from loss or damage based upon the following, to the extent that the K.B. Alexander Co. of Texas, Inc. is responsible therefor under this Agreement:

- .1 the K.B. Alexander Co. of Texas, Inc.'s repeated failure to perform the Work as required by the Contract Documents;
- .2 loss or damage for which the Eddie Kent may be liable arising out of or relating to this Agreement and caused by the K.B. Alexander Co. of Texas, Inc. to the Eddie Kent or to Others;

- .3 the K.B. Alexander Co. of Texas, Inc.'s failure to properly pay Subcontractors and Material Suppliers following receipt of such payment from the Eddie Kent;
- 4 Defective Work not corrected in a timely fashion;
- .5 reasonable evidence of delay in performance of the Work such that the Work will not be completed within the Contract Time, and
- .6 reasonable evidence demonstrating that the unpaid balance of the Contract Price is insufficient to fund the cost to complete the Work.

The Eddie Kent shall give written notice to the K.B. Alexander Co. of Texas, Inc. at the time of disapproving or nullifying an application for payment of the specific reasons therefor. When the above reasons for disapproving or nullifying an application for payment are removed, payment shall be made for the amounts previously withheld.

9.4 ACCEPTANCE OF WORK Neither the Eddie Kent's payment of progress payments nor its partial or full use or occupancy of the Project constitutes acceptance of Work not complying with the Contract Documents.

9.5 PAYMENT DELAY If for any reason not the fault of the K.B. Alexander Co. of Texas, Inc. the K.B. Alexander Co. of Texas, Inc. does not receive a progress payment from the Eddie Kent within seven (7) days after the time such payment is due, as defined in Subparagraph 9.2.1, then the K.B. Alexander Co. of Texas, Inc., upon giving seven (7) days' written notice to the Eddie Kent, and without prejudice to and in addition to any other legal remedies, may stop Work until payment of the full amount owing to the K.B. Alexander Co. of Texas, Inc. has been received, including interest from the date payment was due in accordance with Paragraph 9.9. The Contract Price and Contract Time shall be equitably adjusted by a Change Order for reasonable cost and delay resulting from shutdown, delay and start-up.

9.6 SUBSTANTIAL COMPLETION

9.6.1 The K.B. Alexander Co. of Texas, Inc. shall notify the Eddie Kent and, if directed, its CMA Architects when it considers Substantial Completion of the Work or a designated portion to have been achieved. The Eddie Kent, with the assistance of its CMA Architects, shall promptly conduct an inspection to determine whether the Work or designated portion can be occupied or utilized for its intended use by the Eddie Kent without excessive interference in completing any remaining unfinished Work by the K.B. Alexander Co. of Texas, Inc.. If the Eddie Kent determines that the Work or designated portion has not reached Substantial Completion, the Eddie Kent shall promptly compile a list of items to be completed or corrected so the Eddie Kent may occupy or utilize the Work or designated portion for its intended use. The K.B. Alexander Co. of Texas, Inc. shall promptly complete all items on the list.

9.6.2 When Substantial Completion of the Work or a designated portion is achieved, the K.B. Alexander Co. of Texas, Inc. shall prepare a Certificate of Substantial Completion that shall establish the date of Substantial Completion, and the respective responsibilities of the Eddie Kent and K.B. Alexander Co. of Texas, Inc. for interim items such as security, maintenance, utilities, insurance and damage to the Work, and insurance. The certificate shall also list the items to be completed or corrected, and establish the time for their completion or correction. The Certificate of Substantial Completion shall be submitted by the K.B. Alexander Co. of Texas, Inc. to the Eddie Kent for written acceptance of responsibilities assigned in the Certificate.

9.6.3 Unless otherwise provided in the Certificate of Substantial Completion, warranties required by the Contract Documents shall commence on the date of Substantial Completion of the Work or a designated portion.

9.6.4 Upon acceptance by the Eddie Kent of the Certificate of Substantial Completion, the Eddie

Kent shall pay to the K.B. Alexander Co. of Texas, Inc. the remaining retainage held by the Eddie Kent for the Work described in the Certificate of Substantial Completion less a sum equal to two hundred percent (200%) of the estimated cost of completing or correcting remaining items on that part of the Work, as agreed to by the Eddie Kent and K.B. Alexander Co. of Texas, Inc. as necessary to achieve final completion. Uncompleted items shall be completed by the K.B. Alexander Co. of Texas, Inc. in a mutually agreed upon time frame. The Eddie Kent shall pay the K.B. Alexander Co. of Texas, Inc. monthly the amount retained for unfinished items as each item is completed.

9.7 PARTIAL OCCUPANCY OR USE

9.7.1 The Eddie Kent may occupy or use completed or partially completed portions of the Work when (a) the portion of the Work is designated in a Certificate of Substantial Completion, (b) appropriate insurer(s) consent to the occupancy or use, and (c) appropriate public authorities authorize the occupancy or use. Such partial occupancy or use shall constitute Substantial Completion of that portion of the Work.

9.8 FINAL COMPLETION AND FINAL PAYMENT

9.8.1 Upon notification from the K.B. Alexander Co. of Texas, Inc. that the Work is complete and ready for final inspection and acceptance, the Eddie Kent with the assistance of its CMA Architects shall promptly conduct an inspection to determine if the Work has been completed and is acceptable under the Contract Documents.

9.8.2 When Final Completion has been achieved, the K.B. Alexander Co. of Texas, Inc. shall prepare for the Eddie Kent's acceptance a final application for payment stating that to the best of the K.B. Alexander Co. of Texas, Inc.'s knowledge, and based on the Eddie Kent's inspections, the Work has reached Final Completion in accordance with the Contract Documents.

9.8.3 Final payment of the balance of the Contract Price shall be made to the K.B. Alexander Co. of Texas, Inc. within twenty (20) days after the K.B. Alexander Co. of Texas, Inc. has submitted a complete and accurate application for final payment, including submissions required under Subparagraph 9.8.4, and a Certificate of Final Completion has been executed by the Eddie Kent and the K.B. Alexander Co. of Texas, Inc.

9.8.4 Final payment shall be due on the K.B. Alexander Co. of Texas, Inc.'s submission of the following to the Eddie Kent:

- .1 an affidavit declaring any indebtedness connected with the Work, e.g. payrolls or invoices for materials or equipment, to have been paid, satisfied or to be paid with the proceeds of final payment, so as not to encumber the Eddie Kent's property;
- .2 as-built drawings, manuals, copies of warranties and all other close-out documents required by the Contract Documents;
- .3 release of any liens, conditioned on final payment being received;
- ~~.4 consent of any surety; and~~
- .5 any outstanding known and unreported accidents or injuries experienced by the K.B. Alexander Co. of Texas, Inc. or its Subcontractors at the Worksite.

9.8.5 If, after Substantial Completion of the Work, the Final Completion of a portion of the Work is materially delayed through no fault of the K.B. Alexander Co. of Texas, Inc., the Eddie Kent shall pay the balance due for portion(s) of the Work fully completed and accepted. If the remaining contract balance for Work not fully completed and accepted is less than the retained amount prior to payment, the K.B. Alexander Co. of Texas, Inc. shall submit to the Eddie Kent, and, if directed, the

CMA Architects, the written consent of any surety to payment of the balance due for portions of the Work that are fully completed and accepted. Such payment shall not constitute a waiver of claims, but otherwise shall be governed by these final payment provisions.

9.8.6 Claims not reserved in writing with the making of final payment shall be waived except for claims relating to liens or similar encumbrances, warranties, Defective Work and latent defects.

9.8.7 ACCEPTANCE OF FINAL PAYMENT Unless the K.B. Alexander Co. of Texas, Inc. provides written identification of unsettled claims with an application for final payment, acceptance of final payment constitutes a waiver of such claims.

9.9 LATE PAYMENT Payments due but unpaid shall bear interest from the date payment is due at the prime rate prevailing at the place of the Project.

ARTICLE 10

INDEMNITY, INSURANCE, WAIVERS AND BONDS

10.1 INDEMNITY

10.1.1 To the fullest extent permitted by law, the K.B. Alexander Co. of Texas, Inc. shall defend, indemnify and hold the Eddie Kent, the Eddie Kent's officers, directors, members, consultants, agents and employees, the CMA Architects and Others harmless from all claims for bodily injury and property damage, other than to the Work itself and other property insured under Subparagraph 10.3.4, that may arise from the performance of the Work, but only to the extent of the negligent acts or omissions of the K.B. Alexander Co. of Texas, Inc., Subcontractors or anyone employed directly or indirectly by any of them or by anyone for whose acts any of them may be liable. The K.B. Alexander Co. of Texas, Inc. shall not be required to defend, indemnify or hold harmless the Eddie Kent, the CMA Architects or Others for any negligent acts, omissions of the Eddie Kent, the CMA Architects or Others.

10.1.2 To the fullest extent permitted by law, the Eddie Kent shall defend, indemnify and hold harmless the K.B. Alexander Co. of Texas, Inc., its officers, directors, members, consultants, agents, and employees, Subcontractors or anyone employed directly or indirectly by any of them or anyone for whose acts any of them may be liable from all claims for bodily injury and property damage, other than property insured under Subparagraph 10.4.1, that may arise from the performance of work by Eddie Kent, CMA Architects or Others, to the extent of the negligence attributed to such acts or omissions by Eddie Kent, CMA Architects or Others.

10.2 MUTUAL WAIVER OF CONSEQUENTIAL DAMAGES The Eddie Kent and the K.B. Alexander Co. of Texas, Inc. agree to waive all claims against each other for any consequential damages that may arise out of or relate to this Agreement. The Eddie Kent agrees to waive damages including but not limited to the Eddie Kent's loss of use of the Project, any rental expenses incurred, loss of income, profit or financing related to the Project, as well as the loss of business, loss of financing, principal office overhead and expenses, loss of profits not related to this Project, or loss of reputation. The K.B. Alexander Co. of Texas, Inc. agrees to waive damages including but not limited to loss of business, loss of financing, principal office overhead and expenses, loss of profits not related to this Project, loss of bonding capacity or loss of reputation. This Paragraph 10.2 shall not be construed to preclude contractual provisions for liquidated damages when such provisions relate to direct damages only. The provisions of this Paragraph shall also apply to the termination of this Agreement and shall survive such termination.

10.3 INSURANCE

10.3.1 Prior to the start of the Work, the K.B. Alexander Co. of Texas, Inc. shall procure and maintain in force Workers Compensation Insurance, Employers' Liability Insurance, Business Automobile Liability Insurance, and Commercial General Liability Insurance (CGL). The CGL policy

shall include coverage for liability arising from premises, operations, independent contractors, products-completed operations, personal injury and advertising injury, contractual liability, and broad form property damage. The primary CGL coverage shall also name the Eddie Kent as an additional insured for liability arising out of the Work. If requested, the K.B. Alexander Co. of Texas, Inc. shall provide the Eddie Kent with certificates of the insurance coverages required.

The K.B. Alexander Co. of Texas, Inc.'s Employers' Liability, Business Automobile Liability, and Commercial General Liability policies, as required in this Subparagraph 10.3.1, shall be written with at least the following limits of liability :

.1 Employers' Liability Insurance

a. \$See Attached

Bodily Injury by Accident

Each Accident

b. \$See Attached

Bodily Injury by Disease

Policy Limit

c. \$See Attached

Bodily Injury by Disease

Each Employee

.2 Business Automobile Liability Insurance

a. \$See Attached

Each Accident

.3 Commercial General Liability Insurance

a. \$See Attached

Each Occurrence

b. \$See Attached

General Aggregate

c. \$See Attached

Products/Completed

Operations Aggregate

d. \$See Attached

Personal and Advertising

Injury Limit

10.3.2 Employers' Liability, Business Automobile Liability and Commercial General Liability coverages required under Subparagraph 10.3.1 may be arranged under a single policy for the full limits required or by a combination of underlying policies with the balance provided by Excess and/or Umbrella Liability policies.

10.3.3 The K.B. Alexander Co. of Texas, Inc. shall maintain in effect all insurance coverage required under Subparagraph 10.3.1 at the K.B. Alexander Co. of Texas, Inc.'s sole expense with insurance companies lawfully authorized to do business in the jurisdiction in which the Project is located. If the K.B. Alexander Co. of Texas, Inc. fails to obtain or maintain any insurance coverage required under this Agreement, the Eddie Kent may purchase such coverage and charge the expense to the K.B. Alexander Co. of Texas, Inc., or terminate this Agreement.

The policies of insurance required under Subparagraph 10.3.1 shall contain a provision that the coverages afforded under the policies shall not be cancelled or allowed to expire until at least thirty (30) days' prior written notice has been given to the Eddie Kent. The K.B. Alexander Co. of Texas, Inc. shall maintain completed operations liability insurance for one year after acceptance of the Work, Substantial Completion of the Project, or to the time required by the Contract Documents, whichever is longer. Prior to commencement of the Work, K.B. Alexander Co. of Texas, Inc. shall furnish the Eddie Kent with certificates evidencing the required coverages.

10.4 PROPERTY INSURANCE

10.4.1 Before the start of Work, the Eddie Kent shall obtain and maintain Builder's Risk or all risk upon the entire Project for the full cost of replacement at the time of loss. This insurance shall also name the K.B. Alexander Co. of Texas, Inc., Subcontractors, Subsubcontractors, Material Suppliers and CMA Architects as named insureds. This insurance shall be written as a builder's risk "all risk" or equivalent form to cover all risks of physical loss except those specifically excluded by the policy, and shall insure at least against the perils of fire, lightning, explosion, windstorm, and hail, smoke, aircraft (except aircraft, including helicopter, operated by or on behalf of K.B. Alexander Co. of Texas, Inc.) and vehicles, riot and civil commotion, theft, vandalism, malicious mischief, debris removal, flood, earthquake, earth movement, water damage, wind, testing if applicable, collapse however caused, and damage resulting from defective design, workmanship or material. The Eddie Kent shall be solely responsible for any deductible amounts or coinsurance penalties. This policy shall provide for a waiver of subrogation in favor of the K.B. Alexander Co. of Texas, Inc., Subcontractors, Subsubcontractors, Material Suppliers and CMA Architects. This insurance shall remain in effect until final payment has been made or until no person or entity other than the Eddie Kent has an insurable interest in the property to be covered by this insurance, whichever is sooner. Partial occupancy or use of the Work shall not commence until the Eddie Kent has secured the consent of the insurance company or companies providing the coverage required in this Subparagraph 10.4.1. Prior to commencement of the Work, the Eddie Kent shall provide a copy of the property policy or policies obtained in compliance with this Subparagraph 10.4.1.

10.4.2 If the Eddie Kent does not intend to purchase the property insurance required by this Agreement, including all of the coverages and deductibles described herein, the Eddie Kent shall give written notice to the K.B. Alexander Co. of Texas, Inc. before the Work is commenced. The K.B. Alexander Co. of Texas, Inc. may then provide insurance to protect its interests and the interests of the Subcontractors and Subsubcontractors, including the coverage of deductibles. The cost of this insurance shall be charged to the Eddie Kent in a Change Order. The Eddie Kent shall be responsible for all of K.B. Alexander Co. of Texas, Inc.'s costs reasonably attributed to the Eddie Kent's failure or neglect in purchasing or maintaining the coverage described above.

10.4.3 Eddie Kent and K.B. Alexander Co. of Texas, Inc. waive all rights against each other and their respective employees, agents, contractors, subcontractors and subsubcontractors for damages caused by risks covered by the property insurance except such rights as they may have to the proceeds of the insurance and such rights as the K.B. Alexander Co. of Texas, Inc. may have for the failure of the Eddie Kent to obtain and maintain property insurance in compliance with Subparagraph 10.4.1.

10.4.4 To the extent of the limits of K.B. Alexander Co. of Texas, Inc.'s Commercial General

Liability Insurance specified in Subparagraph 10.3.1 or One Hundred Thousand Dollars (\$100,000.00) whichever is more, the K.B. Alexander Co. of Texas, Inc. shall indemnify and hold harmless the Eddie Kent against any and all liability, claims, demands, damages, losses and expenses, including attorney's fees, in connection with or arising out of any damage or alleged damage to any of Eddie Kent's existing adjacent property that may arise from the performance of the Work, to the extent of the negligent acts or omissions of the K.B. Alexander Co. of Texas, Inc., Subcontractor or anyone employed directly or indirectly by any of them or by anyone for whose acts any of them may be liable.

10.5 OWNER'S INSURANCE

10.5.1 BUSINESS INCOME INSURANCE The Eddie Kent may procure and maintain insurance against loss of use of the Eddie Kent's property caused by fire or other casualty loss.

10.5.2 OWNER'S LIABILITY INSURANCE The Eddie Kent shall obtain and maintain its own liability insurance for protection against claims arising out of the performance of this Agreement, including without limitation, loss of use and claims, losses and expenses arising out of the Eddie Kent's errors or omissions.

10.6 ROYALTIES, PATENTS AND COPYRIGHTS The K.B. Alexander Co. of Texas, Inc. shall pay all royalties and license fees which may be due on the inclusion of any patented or copyrighted materials, methods or systems selected by the K.B. Alexander Co. of Texas, Inc. and incorporated in the Work. The K.B. Alexander Co. of Texas, Inc. shall defend, indemnify and hold the Eddie Kent harmless from all suits or claims for infringement of any patent rights or copyrights arising out of such selection. The Eddie Kent agrees to defend, indemnify and hold the K.B. Alexander Co. of Texas, Inc. harmless from any suits or claims of infringement of any patent rights or copyrights arising out of any patented or copyrighted materials, methods or systems specified by the Eddie Kent and CMA Architects.

10.7 BONDS

10.7.1 Performance and Payment Bonds

(Mark one only)

are ___ / are not X

required of the K.B. Alexander Co. of Texas, Inc.. Such bonds shall be issued by a surety licensed in the state of the location of the Project and must be acceptable to the Eddie Kent. The penal sum of the Payment Bond shall equal the penal sum of the Performance Bond.

ARTICLE 11

SUSPENSION, NOTICE TO CURE AND TERMINATION OF THE AGREEMENT

11.1 SUSPENSION BY OWNER FOR CONVENIENCE

11.1.1 OWNER SUSPENSION Should the Eddie Kent order the K.B. Alexander Co. of Texas, Inc. in writing to suspend, delay, or interrupt the performance of the Work for such period of time as may be determined to be appropriate for the convenience of the Eddie Kent and not due to any act or omission of the K.B. Alexander Co. of Texas, Inc. or any person or entity for whose acts or omissions the K.B. Alexander Co. of Texas, Inc. may be liable, then the K.B. Alexander Co. of Texas, Inc. shall immediately suspend, delay or interrupt that portion of the Work as ordered by the Eddie Kent. The Contract Price and the Contract Time shall be equitably adjusted by Change Order for the cost and delay resulting from any such suspension.

11.1.2 Any action taken by the Eddie Kent that is permitted by any other provision of the Contract Documents and that results in a suspension of part or all of the Work does not constitute a

suspension of Work under this Paragraph 11.1.

11.2 NOTICE TO CURE A DEFAULT If the K.B. Alexander Co. of Texas, Inc. persistently refuses or fails to supply enough properly skilled workers, proper materials, and/or equipment, to maintain the approved Schedule of the Work in accordance with Article 6, or fails to make prompt payment to its workers, Subcontractors or Material Suppliers, disregards laws, ordinances, rules, regulations or orders of any public authority having jurisdiction, or is otherwise guilty of a material breach of a provision of this Agreement, the K.B. Alexander Co. of Texas, Inc. may be deemed in default. If the K.B. Alexander Co. of Texas, Inc. fails within seven (7) working days after written notification to commence and continue satisfactory correction of such default with diligence and promptness, then the Eddie Kent without prejudice to any other rights or remedies may:

- .1 supply workers and materials, equipment and other facilities as the Eddie Kent deems necessary for the satisfactory correction of the default, and charge the cost to the K.B. Alexander Co. of Texas, Inc., who shall be liable for the payment of same including reasonable overhead, profit and attorneys' fees;
- .2 contract with Others to perform such part of the Work as the Eddie Kent determines shall provide the most expeditious correction of the default, and charge the cost to the K.B. Alexander Co. of Texas, Inc.;
- .3 withhold payment due the K.B. Alexander Co. of Texas, Inc. in accordance with Paragraph 9.3; and
- .4 in the event of an emergency affecting the safety of persons or property, immediately commence and continue satisfactory correction of such default as provided in Subparagraphs 11.2.1 and 11.2.2 without first giving written notice to the K.B. Alexander Co. of Texas, Inc., but shall give prompt written notice of such action to the K.B. Alexander Co. of Texas, Inc. following commencement of the action.

11.3 OWNER'S RIGHT TO TERMINATE FOR DEFAULT

11.3.1 TERMINATION BY OWNER FOR DEFAULT If, within seven (7) days of receipt of a notice to cure pursuant to Paragraph 11.2, the K.B. Alexander Co. of Texas, Inc. fails to commence and satisfactorily continue correction of the default set forth in the notice to cure, the Eddie Kent may notify the K.B. Alexander Co. of Texas, Inc. that it intends to terminate this Agreement for default absent appropriate corrective action within fourteen additional days. After the expiration of the additional fourteen (14) day period, the Eddie Kent may terminate this Agreement by written notice absent appropriate corrective action. Termination for default is in addition to any other remedies available to Eddie Kent under Paragraph 11.2. If the Eddie Kent's cost arising out of the K.B. Alexander Co. of Texas, Inc.'s failure to cure, including the cost of completing the Work and reasonable attorneys' fees, exceeds the unpaid Contract Price, the K.B. Alexander Co. of Texas, Inc. shall be liable to the Eddie Kent for such excess costs. If the Eddie Kent's costs are less than the unpaid Contract Price, the Eddie Kent shall pay the difference to the K.B. Alexander Co. of Texas, Inc.. In the event the Eddie Kent exercises its rights under this Paragraph 11.3, upon the request of the K.B. Alexander Co. of Texas, Inc. the Eddie Kent shall furnish to the K.B. Alexander Co. of Texas, Inc. a detailed accounting of the cost incurred by the Eddie Kent.

11.3.2 USE OF CONTRACTOR'S MATERIALS, SUPPLIES AND EQUIPMENT If the Eddie Kent or Others perform work under this Paragraph 11.3, the Eddie Kent shall have the right to take and use any materials, supplies and equipment belonging to the K.B. Alexander Co. of Texas, Inc. and located at the Worksite for the purpose of completing any remaining Work. Immediately upon completion of the Work, any remaining materials, supplies or equipment not consumed or incorporated in the Work shall be returned to the K.B. Alexander Co. of Texas, Inc. in substantially the same condition as when they were taken, reasonable wear and tear excepted.

11.3.3 If the K.B. Alexander Co. of Texas, Inc. files a petition under the Bankruptcy Code, this Agreement shall terminate if the K.B. Alexander Co. of Texas, Inc. or the K.B. Alexander Co. of Texas, Inc.'s trustee rejects the Agreement or, if there has been a default, the K.B. Alexander Co. of Texas, Inc. is unable to give adequate assurance that the K.B. Alexander Co. of Texas, Inc. will perform as required by this Agreement or otherwise is unable to comply with the requirements for assuming this Agreement under the applicable provisions of the Bankruptcy Code.

11.4 TERMINATION BY OWNER FOR CONVENIENCE

11.4.1 Upon written notice to the K.B. Alexander Co. of Texas, Inc., the Eddie Kent may, without cause, terminate this Agreement. The K.B. Alexander Co. of Texas, Inc. shall immediately stop the Work, follow the Eddie Kent's instructions regarding shutdown and termination procedures, and strive to minimize any further costs.

11.4.2 If the Eddie Kent terminates this Agreement pursuant to this Paragraph 11.4, the K.B. Alexander Co. of Texas, Inc. shall be paid for the Work performed to date and any proven loss, cost or expense in connection with the Work, including all demobilization costs and a premium as set forth below: (Insert here the amount agreed to by the parties.)

11.4.3 If the Eddie Kent terminates this Agreement pursuant to Paragraphs 11.3 or 11.4, the K.B. Alexander Co. of Texas, Inc. shall:

- .1 execute and deliver to the Eddie Kent all papers and take all action required to assign, transfer and vest in the Eddie Kent the rights of the K.B. Alexander Co. of Texas, Inc. to all materials, supplies and equipment for which payment has or will be made in accordance with the Contract Documents and all subcontracts, orders and commitments which have been made in accordance with the Contract Documents;
- .2 exert reasonable effort to reduce to a minimum the Eddie Kent's liability for subcontracts, orders and commitments that have not been fulfilled at the time of the termination;
- .3 cancel any subcontracts, orders and commitments as the Eddie Kent directs; and
- .4 sell at prices approved by the Eddie Kent any materials, supplies and equipment as the Eddie Kent directs, with all proceeds paid or credited to the Eddie Kent.

11.5 CONTRACTOR'S RIGHT TO TERMINATE

11.5.1 Upon seven (7) days' written notice to the Eddie Kent, the K.B. Alexander Co. of Texas, Inc. may terminate this Agreement if the Work has been stopped for a thirty (30) day period through no fault of the K.B. Alexander Co. of Texas, Inc. for any of the following reasons:

- .1 under court order or order of other governmental authorities having jurisdiction;
- .2 as a result of the declaration of a national emergency or other governmental act during which, through no act or fault of the K.B. Alexander Co. of Texas, Inc., materials are not available; or
- .3 suspension by Eddie Kent for convenience pursuant to Paragraph 11.1

11.5.2 In addition, upon seven (7) days' written notice to the Eddie Kent, the K.B. Alexander Co. of Texas, Inc. may terminate the Agreement if the Eddie Kent:

- .1 fails to furnish reasonable evidence that sufficient funds are available and committed for Paragraph 4.2, or
- .2 assigns this Agreement over the K.B. Alexander Co. of Texas, Inc.'s reasonable objection,

or

.3 fails to pay the K.B. Alexander Co. of Texas, Inc. in accordance with this Agreement and the K.B. Alexander Co. of Texas, Inc. has complied with the notice provisions of Paragraph 9.6, or

.4 otherwise materially breaches this Agreement.

11.5.3 Upon termination by the K.B. Alexander Co. of Texas, Inc. in accordance with Paragraph 11.5, the K.B. Alexander Co. of Texas, Inc. shall be entitled to recover from the Eddie Kent payment for all Work executed and for any proven loss, cost or expense in connection with the Work, including all demobilization costs plus reasonable overhead and profit on Work not performed.

11.6 OBLIGATIONS ARISING BEFORE TERMINATION Even after termination pursuant to Article 11, the provisions of this Agreement still apply to any Work performed, payments made, events occurring, costs charged or incurred or obligations arising before the termination date.

ARTICLE 12

DISPUTE RESOLUTION

12.1 WORK CONTINUANCE AND PAYMENT Unless otherwise agreed in writing, the K.B. Alexander Co. of Texas, Inc. shall continue the Work and maintain the Schedule of the Work during any dispute resolution proceedings. If the K.B. Alexander Co. of Texas, Inc. continues to perform, the Eddie Kent shall continue to make payments in accordance with this Agreement.

12.2 INITIAL DISPUTE RESOLUTION If a dispute arises out of or relates to this Agreement or its breach, the parties shall endeavor to settle the dispute first through direct discussions between the parties' representatives, who shall have the authority to settle the dispute. If the parties' representatives are not able to promptly settle the dispute, the senior executives of the parties, who shall have the authority to settle the dispute, shall meet within twenty-one (21) days after the dispute first arises. If the dispute is not settled within seven (7) days from the referral of the dispute to the senior executives, the parties shall submit the dispute to mediation in accordance with Paragraph 12.3.

12.3 MEDIATION If the dispute cannot be settled pursuant to Paragraph 12.2, the parties shall endeavor to settle the dispute by mediation under the current Construction Industry Mediation Rules of the American Arbitration Association before recourse to any other dispute resolution procedures. Once one party files a request for mediation with the other party and with the American Arbitration Association, the parties agree to conclude such mediation within sixty (60) days of filing of the request. Either party may terminate the mediation at any time after the first session, but the decision to terminate shall be delivered in person by the party's representative to the other party's representative and the mediator.

12.4 DISPUTE RESOLUTION MENU If the dispute cannot be settled by mediation within sixty (60) days, the parties shall submit the dispute to any dispute resolution procedures selected in Exhibit No. 1.

12.5 MULTIPARTY PROCEEDING All parties necessary to resolve a claim shall be parties to the same dispute resolution proceeding. Appropriate provisions shall be included in all other contracts relating to the Work to provide for the consolidation of such dispute resolution procedures.

12.6 COST OF DISPUTE RESOLUTION The prevailing party in any dispute arising out of or relating to this Agreement or its breach that is resolved by a binding dispute resolution procedures selected in Exhibit No.1 shall be entitled to recover from the other party reasonable attorneys' fees, costs and expenses incurred by the prevailing party in connection with such dispute resolution process.

12.7 LIEN RIGHTS Nothing in this Article 12 shall limit any rights or remedies not expressly waived by the K.B. Alexander Co. of Texas, Inc. that the K.B. Alexander Co. of Texas, Inc. may have under lien laws.

ARTICLE 13

MISCELLANEOUS PROVISIONS

13.1 ASSIGNMENT Neither the Eddie Kent nor the K.B. Alexander Co. of Texas, Inc. shall assign their interest in this Agreement without the written consent of the other except as to the assignment of proceeds. The terms and conditions of this Agreement shall be binding upon both parties, their partners, successors, assigns and legal representatives. Neither party to this Agreement shall assign the Agreement as a whole without written consent of the other except that the Eddie Kent may assign the Agreement to a wholly owned subsidiary of Eddie Kent when Eddie Kent has fully indemnified K.B. Alexander Co. of Texas, Inc. or to an institutional lender providing construction financing for the Project as long as the assignment is no less favorable to the K.B. Alexander Co. of Texas, Inc. than this Agreement. In the event of such assignment, the K.B. Alexander Co. of Texas, Inc. shall execute any consents reasonably required. In such event, the wholly-owned subsidiary or lender shall assume the Eddie Kent's rights and obligations under the Contract Documents. If either party attempts to make such an assignment, that party shall nevertheless remain legally responsible for all obligations under this Agreement, unless otherwise agreed by the other party.

13.2 GOVERNING LAW This Agreement shall be governed by the law in effect at the location of the Project.

13.3 SEVERABILITY The partial or complete invalidity of any one or more provisions of this Agreement shall not affect the validity or continuing force and effect of any other provision.

13.4 NO WAIVER OF PERFORMANCE The failure of either party to insist, in any one or more instances, on the performance of any of the terms, covenants or conditions of this Agreement, or to exercise any of its rights, shall not be construed as a waiver or relinquishment of such term, covenant, condition or right with respect to further performance or any other term, covenant, condition or right.

13.5 TITLES AND GROUPINGS The titles given to the articles of this Agreement are for ease of reference only and shall not be relied upon or cited for any other purpose. The grouping of the articles in this Agreement and of the Eddie Kent's specifications under the various headings is solely for the purpose of convenient organization and in no event shall the grouping of provisions, the use of paragraphs or the use of headings be construed to limit or alter the meaning of any provisions.

13.6 JOINT DRAFTING The parties expressly agree that this Agreement was jointly drafted, and that both had opportunity to negotiate its terms and to obtain the assistance of counsel in reviewing its terms prior to execution. Therefore, this Agreement shall be construed neither against nor in favor of either party, but shall be construed in a neutral manner.

13.7 RIGHTS AND REMEDIES The parties' rights, liabilities, responsibilities and remedies with respect to this Agreement, whether in contract, tort, negligence or otherwise, shall be exclusively those expressly set forth in this Agreement.

13.8 PRECEDENCE In case of any inconsistency, conflict or ambiguity among the Contract Documents, the documents shall govern in the following order: (a) Change Orders and written amendments to this Agreement; (b) this Agreement; (c) subject to Subparagraph 14.2.2 the drawings, specifications and addenda issued prior to the execution of this Agreement; (d) approved submittals; (e) information furnished by the Eddie Kent pursuant to Paragraph 4.3; (f) other documents listed in this Agreement. Among all the Contract Documents, the term or provision that is most specific or includes the latest date shall control. Information identified in one Contract Document and not identified in another shall not be considered to be a conflict or inconsistency.

13.9 OTHER PROVISIONS

(Insert here other provisions, if any, that pertain to this Agreement)

ARTICLE 14

CONTRACT DOCUMENTS

14.1 The Contract Documents in existence at the time of execution of this Agreement are as follows:

Exhibit No. 1: Dispute Resolution Menu

Exhibit No. 2: Construction Proposal / Bid dated July 21, 2006

Exhibit No. 3: Exclusion List

Exhibit No. 4: Construction Documents dated 7/10/06 by CM Architects, P.A.

14.2 INTERPRETATION OF CONTRACT DOCUMENTS

14.2.1 The drawings and specifications are complementary. If Work is shown only on one but not on the other, the K.B. Alexander Co. of Texas, Inc. shall perform the Work as though fully described on both consistent with the Contract Documents and reasonably inferable from them as being necessary to produce the indicated results.

14.2.2 In case of conflicts between the drawings and specifications, the specifications shall govern. In any case of omissions or errors in figures, drawings or specifications, the K.B. Alexander Co. of Texas, Inc. shall immediately submit the matter to the Eddie Kent for clarification. The Eddie Kent's clarifications are final and binding on all parties, subject to an equitable adjustment in Contract Time or Price pursuant to Articles 6 and 7 or dispute resolution in accordance with Article 12.

14.2.3 Where figures are given, they shall be preferred to scaled dimensions.

14.2.4 Any terms that have well-known technical or trade meanings, unless otherwise specifically defined in this Agreement, shall be interpreted in accordance with their well-known meanings.

This Agreement is entered into as of the date entered in Article 1.

ATTEST:

OWNER: Eddie Kent / Easy Ed's Autos

BY:

PRINT NAME _____

PRINT TITLE _____

ATTEST:

CONTRACTOR: K.B. Alexander Co. of Texas, Inc.

BY:

PRINT NAME Keith B. Alexander

PRINT TITLE President

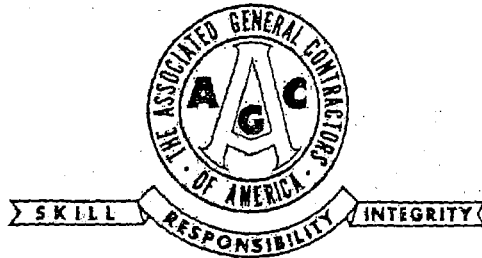


EXHIBIT NO. 1 TO AGC DOCUMENT NO. 200
STANDARD FORM OF AGREEMENT AND GENERAL
CONDITIONS BETWEEN OWNER AND CONTRACTOR

(Where the Contract Price is a Lump Sum)

Dated 08/28/06

DISPUTE RESOLUTION MENU

Pursuant to Paragraph 12.4, if neither direct discussions nor mediation successfully resolve the dispute, the Eddie Kent and the K.B. Alexander Co. of Texas, Inc. agree the following shall be used to resolve the dispute.

(Make the appropriate selection(s). These procedures can be used singularly or progressively as agreed to by the parties.)

~~___ Dispute Review Board. The Dispute Review Board shall be composed of one member selected by the Eddie Kent, one selected by the K.B. Alexander Co. of Texas, Inc., and a third member selected by the Eddie Kent and K.B. Alexander Co. of Texas, Inc. selected members. This Board shall be selected prior to commencement of construction, shall meet periodically, and shall make advisory decisions which may be introduced into evidence at any subsequent dispute resolution process. If a Dispute Review Board is selected, it is understood its review shall precede mediation.~~

Advisory Arbitration. Advisory Arbitration shall be pursuant to the current Construction Industry Rules of the American Arbitration Association, except that the award shall not be binding on the parties.

~~___ Mini Trial. Each party, in the presence of senior executives, shall submit its position to a mutually selected individual who shall make a non-binding recommendation to the parties. Such advisory decision may be introduced into evidence at any subsequent dispute resolution process.~~

~~___ Binding Arbitration. Binding Arbitration shall be pursuant to the current Construction Industry Arbitration Rules of the American Arbitration Association unless the parties mutually agree otherwise. A written demand for arbitration shall be filed with the American Arbitration Association and the other party within a reasonable time after the dispute or claim has arisen, but in no event after the applicable statute of limitations for a legal or equitable proceeding would have run. The location of the arbitration proceedings shall be at the office of the American Arbitration Association nearest the Worksite, unless the parties agree otherwise. The arbitration award shall be final. Notwithstanding Paragraph 13.2, this agreement to arbitrate shall be governed by the Federal Arbitration Act and judgment upon the award may be confirmed in any court having jurisdiction.~~

~~_____ Litigation. Action may be filed in the appropriate state or federal court located in the jurisdiction in which the Project is located.~~

K B A

**K. B. ALEXANDER CO. OF TEXAS
GENERAL CONSTRUCTION**

July 21, 2006

EXHIBIT NO 2

Mr. Eddie Kent
Easy Ed's Autos
2004 E. Division St.
Arlington, Texas 76011

RE: Construction Proposal / Bid
New Auto Facility
Ft. Worth, Texas

Dear Mr. Kent;

Our firm would like to submit the following construction proposal for your review and consideration:

1. Provide labor, materials and equipment to construct a new auto sales facility with associated office structure per plans by CMA Architects dated 7/10/06 our proposal specifically includes:
 - Support general conditions / supervision
 - Site Excavation
 - Site Fencing (7'-0" wrought iron) powder coating with pvc screening
 - Site paving and sidewalks
 - Building structure and canopy
 - Interior finishes / cabinetry/tile
 - Site utilities
 - Plumbing
 - HVAC
 - Electrical & Pole Lights
 - Permits (\$2,800.00 allowance only)
 - Fire Alarm
 - Erosion Control

\$380,871.00

2. Landscape/Irrigation Allowance:

\$ 3,000.00

Total Proposal:

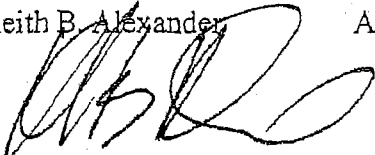
\$383,871.00

We appreciate the opportunity to work with you on this new facility. Attached is some additional information and clarifications to our proposal.

Thank you,

Keith B. Alexander

Accepted / Approved: _____



Title: _____

Keith B. Alexander
President

Date: _____

EASY ED'S AUTOS

Companies, Inc. by reason of our failure, limited in amount to the lesser of the face value of the security deposit or the difference between this bid and the bid upon which a Contract is signed.

- D. In the event our bid is not accepted within the time stated above, the required security deposit shall be returned to the undersigned, in accordance with the provisions of the Instructions to Bidders; unless a mutually satisfactory arrangement is made for its retention and validity for an extended period of time.

1.07 CONTRACT TIME

- A. If this Bid is accepted, we will:
- B. Complete the Work in 128 calendar weeks from issuance of the Building Permit.
- C. Upon completion of the project the Contractor will have secured a Certificate of Occupancy.
- D. Extensions to the contract time will be granted as specified in the AIA A201 - General Conditions of the Contract for Construction.

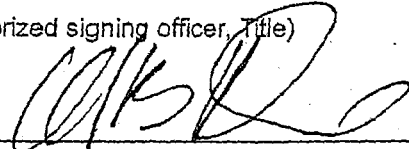
1.08 CHANGES TO THE WORK

- A. When Architect establishes that the method of valuation for Changes in the Work will be net cost plus a percentage fee in accordance with General Conditions, our percentage fee will be:
 - 1. 15% percent overhead and profit on the net cost of our own Work;
 - 2. 10% percent on the cost of work done by any Subcontractor.
- B. On work deleted from the Contract, our credit to Owner shall be Architect-approved net cost plus 10% of the overhead and profit percentage noted above.

1.09 ADDENDA

- A. The following Addenda have been received. The modifications to the Bid Documents noted below have been considered and all costs are included in the Bid Sum.
 - 1. Addendum # _____ Dated _____ No Addendums have been
 - 2. Addendum # _____ Dated _____ received
 - 3. Addendum # _____ Dated _____
 - 4. Addendum # _____ Dated _____

1.10 BID FORM SIGNATURE(S)

- A. The Corporate Seal of
- B. K.B. Alexander Co. of Texas, Inc.
- C. (Bidder - print the full name of your firm)
- D. was hereunto affixed in the presence of:
- E. Keith B. Alexander, President
- F. (Authorized signing officer, Title)
- G. (Seal) 
- H. PRESIDENT
- I. (Authorized signing officer, Title)

1.11 If the Bid is a joint venture or partnership, add additional forms of execution for each member of the joint venture in the appropriate form or forms as above.

END OF BID FORM

CLARIFICATIONS:

Allowances are defined as: Items that will allow the General Contractor and Owner to review all options and give flexibility for the Owner and the Contractor to confirm specified materials and/or labor per approved tenant and/or City review drawings. All costs associated will be allocated toward specific allowance line items and any costs, credits or additions will be processed as a change order to contract. Cost will be defined as direct material labor cost for specific process and will include a fifteen percent (15%) overhead and profit allocation by the Contractor for support services.

This proposal is subject to review of final City approved plans and City permit review requirements.

Proposal is valid for (20) twenty days due to volatile steel and copper prices.

EXCLUSIONS:

1. Signage and foundations
2. Impact / Access fees
3. City development fees
4. Furniture
5. Window treatments
6. Utility Company connections cost or deposits for service
7. Data or communication wiring or systems
8. Fire sprinkler systems
9. Security systems or wiring
10. Builder's risk insurance costs
11. Payment / Performance Bond Costs
12. Testing Costs

EXHIBIT NO. 3

EASY ED'S AUTOS
3269 N. Freeway
Ft. Worth, Texas

Project Exclusions

1. Building and Site pole signage
2. Utility or communication services extension or modification costs
3. Furniture / shelving
4. City excess / impact fees or City development fees
5. Hazardous materials or soil removal or handling
6. Testing - Construction materials
7. Builder's Risk insurance
8. Payment / performance bonds
9. Maintenance bonds / fees
10. Window treatments
11. Appliances
12. Utility company service deposits
13. Communication or data cable or systems
14. Fire sprinkler systems
15. City permit review changes or requirements
16. Pier casing

ACORD™ CERTIFICATE OF LIABILITY INSURANCE

DATE (MM/DD/YYYY)
08/29/06

PRODUCER
817-347-6825 or 800-728-2374 x2253
Higginbotham & Assoc., Inc.
P O Box 908
Fort Worth, TX 76101

THIS CERTIFICATE IS ISSUED AS A MATTER OF INFORMATION ONLY AND CONFERS NO RIGHTS UPON THE CERTIFICATE HOLDER. THIS CERTIFICATE DOES NOT AMEND, EXTEND OR ALTER THE COVERAGE AFFORDED BY THE POLICIES BELOW.

INSURED
K B Alexander & Co. of Texas, Inc.
4709 Old Denton Road
Fort Worth, TX 76117

INSURERS AFFORDING COVERAGE	NAIC #
INSURER A: The Travelers Lloyds Insurance Co	41262
INSURER B: The Travelers Indemnity Co of CT	25682
INSURER C: Travelers Casualty & Surety Co	19038
INSURER D: The Travelers Indemnity Co of Amer	25666
INSURER E:	

COVERAGES

THE POLICIES OF INSURANCE LISTED BELOW HAVE BEEN ISSUED TO THE INSURED NAMED ABOVE FOR THE POLICY PERIOD INDICATED. NOTWITHSTANDING ANY REQUIREMENT, TERM OR CONDITION OF ANY CONTRACT OR OTHER DOCUMENT WITH RESPECT TO WHICH THIS CERTIFICATE MAY BE ISSUED OR MAY PERTAIN, THE INSURANCE AFFORDED BY THE POLICIES DESCRIBED HEREIN IS SUBJECT TO ALL THE TERMS, EXCLUSIONS AND CONDITIONS OF SUCH POLICIES. AGGREGATE LIMITS SHOWN MAY HAVE BEEN REDUCED BY PAID CLAIMS.

INSR ADD'L LTR INSRD	TYPE OF INSURANCE	POLICY NUMBER	POLICY EFFECTIVE DATE (MM/DD/YY)	POLICY EXPIRATION DATE (MM/DD/YY)	LIMITS	
A	GENERAL LIABILITY	CO491D315A	11/11/05	11/11/06	EACH OCCURRENCE	\$1,000,000
	<input checked="" type="checkbox"/> COMMERCIAL GENERAL LIABILITY				DAMAGE TO RENTED PREMISES (Ea occurrence)	\$300,000
	<input type="checkbox"/> CLAIMS MADE <input checked="" type="checkbox"/> OCCUR				MED EXP (Any one person)	\$5,000
					PERSONAL & ADV INJURY	\$1,000,000
					GENERAL AGGREGATE	\$2,000,000
					PRODUCTS - COMPI/OP AGG	\$2,000,000
					GEN'L AGGREGATE LIMIT APPLIES PER: <input type="checkbox"/> POLICY <input checked="" type="checkbox"/> PROJECT <input type="checkbox"/> LOC	
D	AUTOMOBILE LIABILITY	CAP8225A934	11/11/05	11/11/06	COMBINED SINGLE LIMIT (Ea accident)	\$1,000,000
	<input checked="" type="checkbox"/> ANY AUTO				BODILY INJURY (Per person)	\$
	<input type="checkbox"/> ALL OWNED AUTOS				BODILY INJURY (Per accident)	\$
	<input checked="" type="checkbox"/> SCHEDULED AUTOS				PROPERTY DAMAGE (Per accident)	\$
	<input checked="" type="checkbox"/> HIRED AUTOS					
<input checked="" type="checkbox"/> NON-OWNED AUTOS						
	GARAGE LIABILITY				AUTO ONLY - EA ACCIDENT	\$
	<input type="checkbox"/> ANY AUTO				OTHER THAN EA ACC	\$
					AUTO ONLY: AGG	\$
B	EXCESS/UMBRELLA LIABILITY	CUP8225A946	11/11/05	11/11/06	EACH OCCURRENCE	\$1,000,000
	<input checked="" type="checkbox"/> OCCUR <input type="checkbox"/> CLAIMS MADE				AGGREGATE	\$1,000,000
	<input type="checkbox"/> DEDUCTIBLE					\$
	<input type="checkbox"/> RETENTION \$					\$
						\$
C	WORKERS COMPENSATION AND EMPLOYERS' LIABILITY	UB2358A86	11/11/05	11/11/06	<input checked="" type="checkbox"/> WC STATUTORY LIMITS <input type="checkbox"/> OTHER	
	ANY PROPRIETOR/PARTNER/EXECUTIVE OFFICER/MEMBER EXCLUDED?				E.L. EACH ACCIDENT	\$1,000,000
	If yes, describe under SPECIAL PROVISIONS below				E.L. DISEASE - EA EMPLOYEE	\$1,000,000
	OTHER				E.L. DISEASE - POLICY LIMIT	\$1,000,000

DESCRIPTION OF OPERATIONS / LOCATIONS / VEHICLES / EXCLUSIONS ADDED BY ENDORSEMENT / SPECIAL PROVISIONS

Re: Easy Ed's Autos
3269 N Freeway
Fort Worth TX

CERTIFICATE HOLDER

CANCELLATION

Easy Ed's Autos
Attn: Eddie Kent
2004 E Division St
Arlington, TX 76011

SHOULD ANY OF THE ABOVE DESCRIBED POLICIES BE CANCELLED BEFORE THE EXPIRATION DATE THEREOF, THE ISSUING INSURER WILL ENDEAVOR TO MAIL 10 DAYS WRITTEN NOTICE TO THE CERTIFICATE HOLDER NAMED TO THE LEFT, BUT FAILURE TO DO SO SHALL IMPOSE NO OBLIGATION OR LIABILITY OF ANY KIND UPON THE INSURER, ITS AGENTS OR REPRESENTATIVES.

AUTHORIZED REPRESENTATIVE

James R. P. O.

IMPORTANT

If the certificate holder is an ADDITIONAL INSURED, the policy(ies) must be endorsed. A statement on this certificate does not confer rights to the certificate holder in lieu of such endorsement(s).

If SUBROGATION IS WAIVED, subject to the terms and conditions of the policy, certain policies may require an endorsement. A statement on this certificate does not confer rights to the certificate holder in lieu of such endorsement(s).

DISCLAIMER

The Certificate of Insurance on the reverse side of this form does not constitute a contract between the issuing insurer(s), authorized representative or producer, and the certificate holder, nor does it affirmatively or negatively amend, extend or alter the coverage afforded by the policies listed thereon.