



# HOUSING JOURNAL

*Voice of New Mexico Home Builders Association For More Than 30 Years*

Volume 34 Issue 8

November 2004



## What's Inside *Inside*

- Performance Guidelines and Contract Language are Additional Tools for the Construction Business
- Installation of NMHBA 2005 Senior Officers
- "Buckle up in Your Truck"

# PERFORMANCE GUIDELINES AND CONTRACT LANGUAGE ARE ADDITIONAL TOOLS FOR THE CONSTRUCTION BUSINESS

By Peter G. Merrill



In the last issue of the Housing Journal, I described the various Alternate Dispute Resolution (ADR) procedures, including mediation and arbitration that are available to anyone involved in the construction industry. In the previous month's article in the Housing Journal, I mentioned another tool available to

help keep your dispute resolution costs down; the Residential Construction Performance Guidelines (RCPG) that is published by the National Association of Home Builders (NAHB). In this issue, I will concentrate on the RCPG, which if you use it in conjunction with ADR, can do a great deal to help protect yourself, through your construction contract, to avoid the costly and lengthy litigation process. I will also provide suggested contract language that will allow you to modify your construction contract to provide a comprehensive dispute resolution clause that could potentially save you a great deal of money, time, emotional stress, and aggravation in handling disputes with your customers.

It is important to understand that the RCPG is vastly different than building codes. Building codes, by mandate, are restricted to matters affecting health, safety, and welfare and generally do not address "quality" related issues. As a result, after looking at the building codes, builders/remodelers and their customers are left with differing expectations for the quality of the finished project. Although some individual companies define

what constitutes acceptable construction performance for their own products, until the NAHB published the first edition of the RCPG, there were no comprehensive guidelines available from any third party who is recognized as objective and qualified such as the NAHB. The RCPG, unlike building codes, does address the quality of construction.

It is also important for you to know that the RCPG were not developed to, in any way, favor or protect the contractor. They were designed to protect both the contractor and the homeowner equally. The RCPG provides both parties an objective, credible, and uniform set of criteria that spell out minimum performance for acceptable workmanship and product performance. The RCPG are intended for use as a reference and should be interpreted with common sense. It is almost impossible to cover every quality issue in a residential construction project and, as such, the guidelines selected for the RCPG manual deal with those issues that most frequently give rise to questions for the contractor and the homeowner. Although many contractors routinely build to higher standards, this is a collection of minimum performance criteria and should be interpreted as such.

The RCPG were designed to be used in two different ways. They can be used in the warranty section and/or in the dispute resolution section of your construction contract. If they are properly referred to in the dispute resolution section of your contract, by inference, they become part of your warranty. I currently serve on the NAHB committee that is responsible for the updating and revising of the current RCPG edition. I have heard several contractors who told us of how the use of the RCPG in their construction contract has greatly reduced the quality issues that usually led to mediation, arbitration or litigation.

The RCPG manual is divided into chapters generally organized according to the usual sequence of events in the construction process. Each chapter has major categories containing individual construction performance guidelines. Each construction performance guideline has three parts, with an optional fourth part: **OBSERVATION** – A description of a particular defect or potential quality problem. **PERFORMANCE GUIDELINE** – The specific criterion for acceptable workmanship. **CORRECTIVE MEASURE** – A description of the repair work required by the contractor to meet the performance guideline and/or the homeowner's maintenance responsibility.

**DISCUSSION (OPTIONAL)** – An explanation of unique factors pertinent to the observation, performance, or corrective measure.

Many contractors give their customers a copy of the RCPG at the time of contract signing with instructions that if they have any quality questions as the job progresses, they should first look to the manual to answer their questions. This procedure will lesson the time you and your project supervisors will loose discussing these items with your customer.

Making the assumption that you are now convinced to use the RCPG, and that you have decided to use mediation and/or arbitration in your construction contract, I would like to provide you with a possible dispute resolution clause to use in your construction contract. My company, Construction Dispute Resolution Services (CDRS) has run these clauses past our attorney for his approval, however, It is important for you to run any changes to your construction contract past your own attorney before you make any changes to your contract.

In construction–related mediation and arbitration, it is a definite advantage to have a mediator or arbitrator who has extensive experience in the construction field. It is also recommended that you specify an alternate dispute resolution provider in your contract, such as Construction Dispute Resolution Services, if you are satisfied that the provider is experienced in the construction field, properly trained, and competent to conduct your mediation or arbitration. It can literally save you thousands of dollars if you use a mediator or arbitrator who has the substantive and technical knowledge to make informed and educated decisions rather than using a person who has to rely on the arguments and proof submitted by each of the parties, who will then make a gut reaction decision based on who made the best presentation. If you do not specify a provider, you will need to go through a provider selection process with your customer that will most likely cost a significant amount of money and will add a great deal of extra time to your dispute resolution process.

The following is an example of a standard dispute resolution clause from a construction contract. It is specifying "Binding Mediation" as the dispute resolution mechanism. Of course, any ADR process or processes can be specified. It is well understood that the more detailed the clause, the less questions or problems you will encounter if dispute resolution is required. This

clause is just an example of a standard clause and may be modified in any way that you and your attorney agree is best for your business. It is also recommended that you have your customer initial next to this dispute resolution clause in you construction contract that "they have read and completely understand the provisions of this clause". If you then give them a copy of the RCPG after signing your contract, it is further evidence that the discussed and understood the ADR process specified in your contract.

## **DISPUTE RESOLUTION**

Mindful of the high cost of litigation, not only in dollars, but also in time and energy, the parties intend to and do hereby establish the following out-of-court alternate dispute resolution procedure to be followed in the event that any controversy or dispute should arise out of, or relating to this contract or relating to any change orders or other changes or addendums to this contract.

- If a dispute develops between the parties to this contract, the parties will first look to the current issue of the "Residential Construction Performance Guidelines" (RCPG) as published by the National Association of Home Builder. If the disputed item is covered in the RCPG, the homeowners agree to accept the guideline as acceptable and/or the contractor agrees to bring the construction of the disputed item up to the guidelines as specified in the RCPG.
- If the disputed item is not covered in the RCPG, the parties agree to submit to "Binding Mediation" as provided by and according to the rules and procedures of Construction Dispute Resolution Services of Santa Fe, New Mexico. The parties realize that if there are one or more items that remain unresolved at the end of the standard mediation process, the mediator will be empowered to render a final and binding decision on those unresolved items and his/her decision shall be added to the "Final Mediation Settlement Agreement" that will be executed between the parties.
- Any party may initiate the binding mediation process by written notification to Construction Dispute Resolution Services using the "Request for Dispute Resolution Services" form located on the CDRS website: [www.mediate.com/cdrsnm](http://www.mediate.com/cdrsnm).

*Continued on page 11*



- The parties agree to return the applicable forms sent to them by CDRS within fourteen (14) days of the receipt of such forms along with any monies requested.
- The parties shall share the cost of the dispute resolution process equally although personal attorneys, witnesses or specialists, interpreters and any other such direct costs shall be the direct responsibility of each party and their fees and expenses shall be the responsibility of the individual parties.

There are certainly a lot of things that are out of the contractor's control when building or remodeling a residence. Dispute resolution is under your control! Why not take the little time it will take to revise your construction contract and save yourself a great deal of time, money, emotional stress, and aggravation that you will certainly have to deal with if a dispute develops and your contract is not properly written in the area of dispute resolution. Keep in mind that it is not uncommon for there to be multiple binding mediations on one project which keeps the project moving forward with a minimal amount of time, money, and effort wasted in the process.

You can obtain a copy of the RCPG from the NAHB through [www.builderbooks.com](http://www.builderbooks.com), contractor reference item # 00436. It might interest you to know that it is the single most requested book available from NAHB, because of its apparent value to the contractor. There is a great deal of additional information about ADR on the CDRS website mentioned above. Please feel free to contact me if you have any specific questions that the website does not answer.

*Peter Merrill is a past president of NMHBA, and a Certified Kitchen Designer. He is also the president of Construction Dispute Resolution Services, a company that specializes in mediation and arbitration for the construction industry. He is a member of the National Kitchen and Bath Association's Legislative Committee. He serves as a National Director of the National Association of Home Builders and is a member of the NAHB Construction, Codes and Standards Committee and several Construction & Codes Subcommittees. For more information about the benefits of mediation or arbitration, you can check his website: [www.mediate.com/cdrsnm](http://www.mediate.com/cdrsnm).*



## If she can't afford a home for her family, she won't be there to protect yours.

The New Mexico Mortgage Finance Authority (MFA) is the state's housing finance agency and the largest provider of affordable housing finance.

For information,  
call 1-800-444-6880  
toll free statewide,  
or visit  
[www.housingnm.org](http://www.housingnm.org)



*Housing New Mexico's People since 1975*