

**THE TEXAS RESIDENTIAL
CONSTRUCTION COMMISSION ACT –
AN OVERVIEW**

**DALLAS BAR ASSOCIATION CONSTRUCTION
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Texas Residential Construction Commission

Introduction

The Texas Residential Construction Commission (the "Commission") was created in 2003 by the 78th Legislature. It was created by Title 16 of the Texas Property Code, which became effective September 1, 2003, and is known as the Texas Residential Construction Commission Act ("the Act"). The Commission's primary functions are as follows: (1) Register builders and remodelers; (2) register new home construction and most remodeling projects; (3) administer a dispute resolution process for post-construction building disputes between homeowners and builders or remodelers; and (4) develop and implement statewide minimum warranties and performance standards. Additionally, the Act provided for the creation of three task forces – one on arbitration, one on mold issues, and one on rain water harvesting. The Commission was, furthermore, tasked under the Act with developing what is known as the Texas Star Builder Program.

The Statute

The Residential Construction Commission Act can be found at Title 16 of the Texas Property Code. The Act is divided into five Subtitles.

Subtitle A is entitled "General Provisions," and contains one Chapter, Chapter 401, which is also entitled "General Provisions." This Chapter is further subdivided into six sections. Section 401.001 sets forth the short title – Texas Residential Construction Commission Act. Sections 401.002 through .004 contain definitions (key definitions are discussed below). Section 401.005 contains exemptions. The Act does not apply to an individual who builds and owns the home himself or herself and uses the home as his or her primary residence for at least one year after substantial completion of construction of the home. The Act also does not apply to a homeowner or to a homeowner's real estate broker, agent, or property manager who supervises or arranges for the construction of an improvement to a home owned by the homeowner. The final section, section 401.006, is the Sunset Provision, which provides that the Commission shall be abolished and the Act will expire on September 1, 2009 if not continued under Chapter 325 of the Texas Government Code (the Texas Sunset Act).

Subtitle B is entitled "Texas Residential Construction Commission," and contains four Chapters. The first Chapter is 406, entitled "Commission," which in its seven Sections sets forth: the make-up of the Commission; the Commissioners' terms; identifies how presiding officers are selected; membership and employee restrictions; grounds for removal; training; and that Commission meetings must be held at least quarterly. The Commission is made up of nine members who are appointed by the Governor, and are confirmed by the State Senate. Four Commissioners must be registered builders; three must be representatives from the general public; one must be a licensed professional engineer who practices in the area of residential construction; and one must be either a licensed architect who practices in the area of residential

construction or a building inspector who meets the requirements of Chapter 427 of the Act (entitled "Inspectors") and practices in the area of residential construction. The terms are for six years expiring the first of February of odd numbered years, and are staggered so that three members terms expire every second year. A Commissioner may not serve more than two full terms.

The second Chapter of Subtitle B, Chapter 407 entitled "Executive Director and Other Agency Personnel," sets forth the general qualifications and duties of the Commission's personnel. Chapter 408 is titled, and sets forth, "Powers and Duties." Finally, Chapter 409 sets forth, and is titled, "Public Interest Information and Complaint Procedures."

Subtitle C is entitled "Builder Registration." It contains four Chapters. Chapter 416, entitled "Certificate of Registration" addresses builder registration, as well as the Texas Star Builder program. Chapter 417 addresses the "Certification of Residential Construction Arbitrators." Chapter 418 is entitled "Grounds for Disciplinary Action," and sets forth, in four Sections, the "Grounds for Disciplinary Action," the "Disciplinary Powers of the Commission," the "Hearing," and "Appeal." Finally, Chapter 419 speaks to the "Administrative Penalty." In its four Sections, it addresses the "Imposition of Administrative Penalty," "Amount of Penalty," "Payment of Penalty," and "Enforcement of Penalty." All of these areas are discussed in more detail below.

Subtitle D is probably the most important element of the Act. It is entitled "State-Sponsored Inspection and Dispute Resolution Process; Statutory Warranty and Building and Performance Standards." This Subtitle is discussed in more detail below. Generally, however, the structure of this Subtitle is as follows. Chapter 426 contains the "General Provisions;" 427 addresses "Inspectors;" 428 sets forth the actual dispute resolution process, and is entitled "State-Sponsored Inspection and Dispute Resolution Process;" 429, in a Chapter entitled "Appeal of Third-Party Inspector's Recommendation," sets forth the method to appeal the Inspector's report to a Commission appointed three-member panel; and Chapter 430, entitled "Warranties and Building and Performance Standards," sets forth the Act's statutory warranties and performance standards.

Subtitle E is entitled "Residential Construction Arbitration," and sets forth some definitions; provides for venue of residential construction arbitrations (not surprisingly, venue is in the county in which the home with the construction defect is located); creates an arbitration task force to report to the Legislature; provides for the filing of arbitration awards in limited circumstances; and sets forth the grounds for vacating an arbitration award (a manifest disregard of the law standard). The task force is addressed in more detail below.

The Rules

The Residential Act is administered by Rules promulgated by the Commission. The Rules are divided into the following sections:

Chapter 300. Administration

- §300.1 – Procedures Involving Vendor Protests
- §300.2 – Historically Underutilized Business Program
- §300.3 – Commission Employee Training Program
- §300.4 – Sick Leave Pool
- §300.5 – Task Forces

Chapter 301. General Provisions

- §301.1 – Definitions
- §301.2 – Rulemaking Process
- §301.3 – Warranties and Performance Standards Advisory Committee

Chapter 302. Fees

- §302.1 – Adoption of Fees
- §302.2 – Fees for Public Information

Chapter 303. Registration

- Subchapter A – §§303.1 – 303.23 – Registration of Builders
- Subchapter B – §§303.100 – 303.170 – Registration of Homes
- Subchapter C – §§303.200 – 303.210 – Registration of Third Party Inspectors
- Subchapter D – §§303.250 – 303.266 – Registration of Third Party Warranty Companies
- Subchapter E – §§303.300 – Texas Star Builder Program

Chapter 304. Limited Statutory Warranty and Building and Performance Standards

- Subchapter A – §§304.1 – 304.3 – General Provisions
- Subchapter B – §§304.10 – 304.33 – Performance Standards for Components of a Home Subject to a Minimum Warranty of One Year for Workmanship and Materials
- Subchapter C – §§304.50 – 304.52 – Performance Standards for Plumbing, Electrical, Heating and Air-conditioning Delivery Systems Subject to a Minimum Warranty Period of Two Years
- Subchapter D – §§304.100 – Performance Standards for Foundations and Major Structural Components of a Home Subject to a Minimum Warranty Period of Ten Years

Chapter 305. Practice and Procedures for Hearings and Disciplinary Actions

- Subchapter A – §§305.1 – 305.9 – General Provisions

Subchapter B – §§305.20 – 305.28 – Disciplinary Proceedings
Subchapter C – §§305.30 – 305.32 – Proceedings at SOAH
Subchapter D – §§305.40 – 305-41 – Post-Settlement and Post-Hearing
Matters

Chapter 313. State-sponsored Inspection and Dispute Resolution Process (SIRP)

§§313.1 – 313.27 – State-sponsored Inspection and Dispute Resolution
Process (SIRP)

Chapter 318. Residential Construction Arbitration

Subchapter A – §§318.1 – 318.3 – Arbitrations Between Homeowners and
Builders

Subchapter B – §§318.20 – 318.32 – Certification of Arbitrators

Key Definitions.

Clear definitions are important to most any statute. In the case of the Act, they are crucial in determining whether the Act even applies to one's situation. Base definitions are contained within the Act itself at Tex. Prop. Code §§401.002 – 401.004. On December 18, 2003, the Commission adopted on an emergency basis a new rule concerning definitions to be used in construing agency rules promulgated to implement the Act. A permanent rule was adopted on June 17, 2004. The rule on definitions can be found at section 301.1 of the Commission's rules. Some key definitions (some from the Act, some from the Rules) are as follows:

“Builder” means any business entity or individual who, for a fixed price, commission, fee, wage, or other compensation, constructs or supervises or manages the construction of:

- (1) a new home;
- (2) a material improvement to a home, other than an improvement solely to replace or repair a roof of an existing home; or
- (3) an improvement to the interior of an existing home when the cost of the work exceeds \$20,000.

(b) The term includes:

- (1) an owner, officer, director, shareholder, partner, affiliate, or employee of the builder;
- (2) a risk retention group governed by Article 21.54, Insurance Code, that insures all or any part of a builder's liability for the cost to repair a residential construction defect; and
- (3) a third-party warranty company and its administrator.

(c) The term does not include any business entity or individual who has been issued a license by this state or an agency or political subdivision of this state to practice a trade or profession related to or affiliated with residential construction if the work being done by the entity or individual to the home is solely for the purpose for which the license was issued.

So, the Act applies to new home construction (unless excepted under section 401.005), external remodeling (*i.e.*, adding or deleting square footage – *see* “Material Improvement” definition below), and internal remodeling whose cost exceeds \$20,000 (also further defined below).

(In the rest of this paper, the term “Builder” is the same as the foregoing definition. This saves us from having to constantly refer to home builders and remodelers.)

“Construction defect” means:

- (1) the failure of the design, construction, or repair of a home, an alteration of or a repair, addition, or improvement to an existing home, or an appurtenance to a home to meet the applicable warranty and building and performance standards during the applicable warranty period; and
- (2) any physical damage to the home, an appurtenance to the home, or real property on which the home or appurtenance is affixed that is proximately caused by that failure.

“Home” means the real property, improvements, and appurtenances thereto for a single-family residential dwelling unit or duplex.

“Homeowner” means a person who owns a home or a subrogee or assignee of a person who owns a home.

“Improvement to the interior of an existing home when the cost of the work exceeds \$20,000” means any modification to the interior living space of a home, which includes the addition or installation of permanent fixtures inside the home, pursuant to an agreement for work for total consideration in excess of \$20,000 to be paid by a homeowner to a single builder.

“Living space” The enclosed area in a home that is suitable for year-round residential use.

“Material improvement” A modification to an existing home that either increases or decreases the home’s total square footage of living space that also modifies the home’s foundation, perimeter walls, or roof. A material improvement does not include modifications to an existing home if the modifications are designed primarily to repair or replace the home’s component parts.

“Person” An individual, partnership, company, corporation, association, or any other legal entity, however organized.

“State-sponsored inspection and dispute resolution process” means the process by which the commission resolves a request.

Home Registration.

On December 18, 2003, the Commission adopted on an emergency basis new rules at Title 10, Part 7, Chapter 303, concerning the registration of new homes, material improvements to existing homes, and certain interior renovations exceeding \$20,000 in the State of Texas. The adoption of the emergency rules permitted the Commission to comply with the timetable prescribed by House Bill 730 and set out in Title 16 of the Property Code. On May 20, 2004, The Commission adopted its permanent rule on home registration. These new sections establish home registration provisions related to the statutory mandate that Builders register homes with the Commission beginning January 1, 2004. These can be found at sections 303.100 through 303.170 of the Commission's Rules.

As of January 1, 2004, all Builders in the State of Texas are required to register new homes with the Commission, as well as remit a \$30 fee for each registration (\$25 if done online). Once the transfer of title occurs, a Builder will have up to 15 days following the end of the month in which the title transferred to register the new home and submit the required fee. Also beginning January 1, 2004, all Builders in the State of Texas were to begin registering homes with material improvements to existing homes and certain interior renovations exceeding \$20,000 with the Commission, as well as remit a \$30 fee for each registration (\$25 if done online). If a Builder is involved in a transaction that does not involve a transfer of title, the registration and fee must be sent to the Commission within 15 days following the earlier date of when the agreement is signed or the work commences.

The registration of each new home, material improvement, or certain interior renovation exceeding \$20,000 must be remitted on an application prescribed by the Commission, along with the registration fee. The home registration form contains standard information to include such items as the name and contact information of the Builder, where the home is located, when the home was built, and the date of title transfer (if applicable). Home registration forms are accessible in PDF format on the Commission's website (www.trcc.state.tx.us or texasrcc.com), by calling the Commission at 512-305-TRCC or 877-651-TRCC, or may be obtained in person at the Commission office at 311 E. 14th Street, Austin, Texas 78711.

Builders may mail or fax home registration forms to the Commission, or file them over the internet on the Commission's website through Texas Online. Texas Online is an E-pay processing system that allows a Builder to submit the payment and form electronically. This will substantially reduce the processing time by the Commission. Home registrations done electronically have a \$5.00 per registration discount (i.e., the fee is \$25 instead of \$30). A Builder still has the option to file the home registration form manually if it chooses to do so.

If a Builder registers with the Commission less than 60 days after the required filing period, the Builder may still register the home and pay a late penalty of two times the established fee, which is \$60. If a Builder fails to register within those 60 days after the 15 day period, the Builder will be subject to an administrative penalty.

Within thirty (30) days following the registration of a home, the Commission is required by statute to mail to the owner information concerning the function of the Commission, the provisions of the limited statutory warranty and building and performance standards, the state-sponsored inspection and dispute resolution process, and the procedures by which complaints or requests are filed with the Commission.

The registration of homes marks the first phase in establishing the state-sponsored inspection and dispute resolution process. This step will enable newly constructed homes to fall under warranty and building performance standards, which were recently adopted by the Commission, and are discussed in detail below.

Builder registration.

Builder registration is addressed in Subtitle C of the Act, which is found at Chapter 416. On December 18, 2003, the Commission adopted on an emergency basis new rules regarding the registration of Builders in the State of Texas. A permanent rule was adopted on May 20, 2004. This can be found at sections 303.1 through 303.23 of the Commission's Rules. For the first time in the State of Texas, all residential Builders in the State of Texas that fall under the Act must register with the Commission. They must use a Commission prescribed form, and must remit a filing fee. The filing fee was originally set at \$125.00. The 2005 Legislature, in a rider to the Budget, changed this to \$500.00. The current form can be obtained from the Commission, including on its website. Please note that since the Builder registration requirement began on March 31, 2004, a new applicant who has not previously been registered must also submit a Builder/Remodeler Affidavit form attesting that the person has not operated as a Builder in the State of Texas since March 31, 2004. This is on the last page of the form.

A Builder must submit a registration form and filing fee for issuance of a certificate of registration for each name under which it intends to operate as a Builder in this state. Within 15 days after the receipt of a complete registration form and the \$500 fee, the Commission will issue to each Builder that meets the requirements of the Act a certificate of registration.

All applicants must meet the minimum requirements, which include being at least 18 years old at the time of application and a citizen of the United States or a lawfully admitted alien, as well as satisfy to the Commission that the applicant is honest, trustworthy, and has integrity. The rule also requires each applicant to disclose past criminal history for felonies and misdemeanor crimes involving moral turpitude. Under Texas law, a misdemeanor crime involving moral turpitude is basically misdemeanor theft. Nevertheless, the applicant is cautioned to disclose any past criminal conduct other than a class C traffic type violation. It is better to over-disclose, than to have the Commission discover something that was not disclosed, and find out the Commission feels it should have been disclosed. Disclosure of a past crime does not mean automatic non-registration. Instead, the Commission takes into account the following factors:

- (1) the nature and seriousness of any crimes to which the applicant has pled guilty or pled no contest, or for which the applicant has a prior conviction or convictions, including whether such a crime involves moral turpitude;
- (2) the extent to which acting as a registered builder might offer the applicant an opportunity to engage in further criminal activity of a same or similar nature as that for which the applicant has a prior conviction;
- (3) the extent and nature of the applicant's past criminal activity;
- (4) the age of the applicant when any criminal activity discovered occurred;
- (5) the remoteness in time between the submission of the application and the date of the applicant's last criminal conviction;
- (6) the applicant's overall work history in relation to the dates of any criminal convictions;
- (7) evidence of the applicant's successful rehabilitation efforts while incarcerated or after release, including but not limited to, restitution to the victim, completion of probationary requirements, and completion of community service; and
- (8) other evidence of the applicant's eligibility to serve as a registered builder, as requested by the commission.

See, Rule 303.5(e). The Commission considers these factors, and may provide registration despite a criminal history based on mitigating factors. However, non-disclosure will almost always lead to a denial or revocation of registration, in addition to administrative penalties.

The rule further states that the Commission will conduct a criminal background check on each applicant and may conduct a criminal background check on other individuals who are responsible for the registration. Information obtained by the Commission from the conduct of a criminal background check that is not contained in a public record is confidential information and will not be released by the Commission unless under court order or with the express written consent of the applicant.

It is important to note that Builders *register* with the Commission; they are not *licensed* by the Commission. The statute does not currently require any kind of testing or any requirements other than those set forth above for a regular Applicant. (There are educational requirements to be a Texas Star Builder, as discussed further below.)

The rule requires an officer, manager or managing partner of a corporation, limited liability company, and partnership, limited partnership, or limited liability partnership to be designated as an agent and individually register as a Builder with the Commission.

When registering with the Commission, a Builder must designate a fixed physical address in the state of Texas as its designated address for purposes of compliance with the Act; and within thirty (30) days of moving from that physical address, the Builder must submit a new registration form and fee under section 416.010 of the Act. Rule 303.13. "If the postmaster will not deliver to a physical address for the builder or if

delivery to the physical address is not advisable because of theft, and the builder is required to maintain a Post Office Box, the builder may submit a post office box waiver form in order to utilize a Post Office Box address in lieu of a physical address for the receipt of mail only.” Rule 303.13(c).

If a Builder has a change of registered name, that Builder must submit a written notice of a change of name within forty-five (45) days of the date upon which it commences operating as a Builder under a name other than the one under which the certificate of registration was issued. Rule 303.15.

If there is a material change in the information provided to the Commission, such as a change in corporate structure, a criminal conviction, or a bankruptcy filing, between registration periods, the Builder must notify the Commission in writing within thirty (30) days of the material change. Rule 303.17.

The registration is effective for two years. “A builder who has been issued an even-numbered builder registration certificate must renew its registration by the last day of February of each even-numbered year. A builder that has been issued an odd-numbered certificate of registration must renew its registration by February 28 of each odd-numbered year.” Rule 303.19(b). No less than thirty (30) days prior to the expiration of the effective period stated in the certificate of registration, each registered Builder must re-file a renewal registration form and pay a \$300.00 renewal fee for renewal of its certificate of registration. Rule 303.19(d). (Current fee schedules can be obtained from the Commission or found on its website.)

If the Commission denies a Builder registration application, it must provide each applicant with written notice of its decision to deny within fifteen (15) days of receipt of a complete registration form and the required fee. The Commission is required to state the reason for its denial in the written notice to the applicant.

If an applicant wishes to appeal a denied registration by the Commission, the applicant must notify the Commission in writing of its intent to appeal the Commission’s decision within thirty (30) days of receipt of the Commission’s written notice of its decision. Not later than thirty (30) days after receiving the applicant’s notice of its intent to appeal, the Commission shall set a time and place for a hearing on the appeal. Not less than fifteen (15) days prior to the date of the hearing, the Commission shall provide notice of the hearing to the applicant. The Commission shall appoint a hearings officer to conduct the hearings under this section. After the commencement of a hearing under this section, the hearings officer may continue the hearing from time to time with the consent of the applicant. After completion of the hearing under this section the hearings officer shall enter an appropriate order, which may be appealed to the Commission.

The Texas Star Builder Program.

The Act provides, at section 416.011, for the creation of what is known as a “Texas Star Builder Designation.” The intent was to allow Builders who achieved certain

financial and educational goals to be able to designate themselves as Star Builders. A Builder's participation is voluntary, but, once a Builder satisfies the requirements, a Builder can represent to the public that the Builder is a "Texas Star Builder."

The Commission worked through three drafts of rules that would allow a Builder to qualify for a special designation as a Texas Star Builder. The Commission adopted what is known as a "strawman proposal" rule for publication in the Texas Register at its July 23, 2004 meeting, and much comment was received on this Rule. A second version of the rule was circulated in late 2004 and early 2005. The third version was circulated in mid-2005, after the Legislative Session had ended. The primary difficulty in finalizing the rule lay in fashioning a rule applicable to a volume builder that builds hundreds, maybe thousands of homes every year; a custom builder that might build one to five homes per year; and everyone in between. There was also the issue of how to address differences between those who build homes, and those who primarily remodel them. The Star Builder rule was finally adopted by the Commission in July 2005. This program is found at section 303.300 of the Commission's Rules.

Generally speaking, the requirements consist of initial qualifications, continuing education requirements, financial responsibility requirements and indicia, little to no complaints, and best management practices. An outline as to how this program works follows:

- I. **Initial qualifications** – the applicant is the same entity as shown on the Certificate of Registration
 - For the individual applicant (in other words, an applicant that is not a business entity): Applicant must have 12 years experience building or remodeling single family dwellings in the State of Texas. Alternatively, the Applicant can have seven years of such experience, coupled with continuous membership in an applicable trade association for 5 years; or five years experience and a four year degree in construction sciences; or three years experience and a designation of expertise under certain programs, such as the National Association of Builders Graduate Builder and Remodeler program.
 - The business entity applicant follows the same combination of experience and educational requirements, but they must be fulfilled by an increasing number of persons, depending on how many houses the Applicant builds every year. Specifically, one of Applicant's responsible parties, as defined by the Rule, must fulfill these requirements, as well as one individual employee involved with on-site construction activities, for each 40 houses built during the year.

- II. **Continuing Education** – minimum 16 hours annually. The same concept with respect to entity size applies, i.e., one person for each 40 houses built per year.

The Executive Director of the Commission shall be the person responsible for approving all programs offering courses to satisfy the continuing education requirements.

III. **Financial Responsibility**

Proof of General Liability Insurance, as follows for *remodeler applicants*:

- \$300,000 for 25 to 75 registered homes in preceding 12 months;
- \$500,00 for 75 – 125 registered homes in preceding 12 months;
- or
- \$1,000,000 for 126 or more registered homes in preceding 12 months

Proof of General Liability Insurance, as follows for *builder applicants*:

- \$300,000 for 50 to 150 registered homes in preceding 12 months;
- \$500,00 for 151 – 350 registered homes in preceding 12 months;
- \$1,000,000 for 351 – 1000 or more registered homes in preceding 12 months; or
- \$2,000,000 for over 1,000 registered homes in preceding 12 months.

Remodelers with less than 25 homes registered in the preceding 12 months and builder applicants with less than 50 registered homes in the preceding 12 months, do not have a general liability insurance requirement.

Applicant, and its affiliates, officers, or partners, has no bankruptcy filed in the last 7 years.

A letter from a financial institution stating the following:

- Applicant has an excellent relationship with the institution (or highest standard of relationship, as defined by the institution);
- Applicant is eligible for an extension of credit for the purposes of residential construction;
- Applicant is not in default of any credit obligations to the financial institution;
- The financial institution is not aware of a bankruptcy filed by the applicant, any affiliates of the applicant or any of the applicant's corporate officers in the past seven years;

- There are no overdrafts or past due notices by applicant that have not been brought current in a timely manner;
- The financial institution does not have any actual knowledge of any current delinquency in property taxes, unsatisfied judgments or unsatisfied mechanic's liens (unless the Builder has bonded around same or initiated legal action to declare them invalid). This does not require the financial institution to conduct any independent investigation.

Under Rule 303.300(d)(4), if an Applicant is unable to obtain the financial institution certification, the Applicant can instead submit "a statement signed by an officer of its financial institution on a commission-prescribed form that the institution does not choose to provide the requested information or submit an affidavit by the applicant attesting to the fact that the financial institution was asked to provide the information and refused."

Applicant must provide a sworn or attested statement that:

(A) the applicant, any affiliate or corporate officer, general partner or constituent partner of the applicant has not filed for federal bankruptcy in this state or any other state in the seven years immediately preceding the date of the application;

(B) the applicant is current on all state property taxes unless a protest or legal challenge has been properly filed;

(C) the applicant has no unpaid judgments;

(D) the applicant has no enforceable mechanic's and materialmen's liens on any property for which the applicant entered into a transaction governed by the Act as a result of failure to pay a subcontractor or supplier unless the builder has either:

(i) secured a properly filed bond to indemnify the lien pursuant to the provisions of Property Code Chapter 53, Subchapter H;

(ii) secured the issuance of title insurance to protect the homeowner against the lien claim; or

(iii) initiated legal action to contest the lien and demonstrated proof of financial responsibility to pay the costs of defense of title to the property and pay the lien claim if the lien is proven to be proper.

- IV. **SIRP Activity** (effective January 1, 2007) – The number of homeowner instituted State Sponsored Inspection and Dispute Resolution requests that result in a final finding against the Applicant may not exceed: (1) two homes for applicants that registered fewer than 40 homes in the preceding 12 months; or (2) five percent of the number of homes registered for applicants that registered 40 or more homes in the preceding twelve months.

- V. **Best Management Practices** – Applicant must swear or attest that they will comply with at least three of the following:
- The Green Building Program sponsored by the Texas Veterans Land Board or the National Association of Builders, or any successor entities, any local governmental authority or similar programs as approved by the Executive Director;
 - The Energy Star Program, or similar programs as approved by the Executive Director;
 - Certified Aging-in-place Specialist Program or EasyLiving Home Certification Program;
 - Provide a private inspection program for at least three phases of construction for all homes built in a geographic area that are not inspected by municipal inspectors;
 - Other nationally-recognized programs that require a greater standard of residential construction practice than required by the Commission pursuant to the Commission-adopted limited warranty and building and performance standards or usual and customary residential construction practices as approved by the Executive Director;
 - Foundation Practices as defined in Rule 303.300(b)(4);
 - Provide homeowners with a third party warranty program by a Commission-approved third party warranty company; or
 - Provide a two year warranty instead of the statutory one year warranty period for workmanship and materials.

Inspectors.

The Commission adopted permanent rules regarding the registration and qualification of third-party inspectors who take part in the state-sponsored inspection and dispute resolution process on June 17, 2004.

The rules require the Commission to register two basic types of third-party inspectors. On February 17, 2004, the Commission began registering inspectors with experience on issues involving workmanship and materials and inspectors with experience on issues involving a structural matter. An inspector meeting both sets of requirements may apply as a combination inspector.

An individual interested in registering with the Commission as a third-party inspector must submit a completed application on a Commission prescribed form accompanied by a \$50 fee. The Commission will also conduct a criminal background check on each person seeking registration as a third-party inspector.

Individuals wanting to register as third-party inspectors for issues related to workmanship and materials must provide evidence that they have acquired a minimum of five years of experience working in the field of residential construction; provide evidence

of holding a current International Code Council (ICC) certification as a residential combination inspector; and attest that they have not received more than ten percent of their gross income from providing expert witness services.

Those interested in registering as third-party inspectors for issues involving structural matters must provide evidence that they are a state-licensed professional engineer or a state licensed architect; provide evidence that the person has acquired a minimum of ten years of experience working in the field of residential construction; attest that the person has not received more than ten percent of the person's gross income, as reported on the last federal income tax return filed by that person, from providing expert witness services, including retention for the purpose of providing testimony, evidence, or consultation in connection with a pending or threatened legal action, less any fees for expert witness services, including providing testimony or evidence in a threatened legal action, received by that person when in conjunction with service in the capacity of a certified third-party inspector; and provide other information requested by the Commission that the Commission determines is necessary to assess the applicant's qualifications and fitness to serve as a third-party inspector.

An individual seeking to serve as both a workmanship and materials inspector and a structural inspector must meet all of the qualifications for issues relating to workmanship and materials and structural matters. These are known as combination inspectors.

After receiving a third-party inspector application, the Commission must promptly notify those individuals meeting all the qualifications required that they are eligible to serve as a third-party inspector, as well as provide them with evidence of their registration. Each inspector registration will remain effective for one year from the effective date as determined by the Commission, unless otherwise revoked. If a material change in information occurs between a third-party inspector's initial registration and annual renewal, the person must notify the Commission in writing of the material change within thirty (30) days.

In reviewing an application to determine if an applicant is fit to carry out the duties of serving as a third-party inspector, the Commission must consider whether the applicant has a criminal history. If it is determined that the applicant does have a criminal history, the Commission shall consider the following:

1. the nature and seriousness of any crimes for which the applicant has a prior conviction;
2. the extent to which service as a registered inspector might offer an opportunity to engage in further criminal activity of a same or similar nature based on the applicant's prior conviction;
3. the extent and nature of the applicant's past criminal activity;
4. the age of the applicant when the criminal activity occurred;
5. the remoteness in time between the submission of the application and the date of the applicant's last criminal conviction;

6. the applicant's overall work history in relation to the dates of any criminal convictions;
7. evidence of the applicant's successful rehabilitation efforts while incarcerated or after release, including but not limited to, restitution to the victim, completion of probationary requirements, and completion of community service; and
8. other evidence of the applicant's fitness to serve as a third-party inspector, as requested by the Commission.

In order to complete the application process, the applicant must respond to a Commission request for evidence of fitness to serve as a third-party inspector.

If the Commission determines that an applicant is not qualified or fit to carry out the duties of serving as a third-party inspector, the Commission must deny the application for registration. When an application for registration is denied, the Commission must provide written notice to the applicant not later than the 15th day after the date the Commission receives the completed application and \$50 fee.

Individuals registered as third-party inspectors will also have to complete Commission-developed training prior to participating in the state-sponsored inspection and dispute resolution process. The training is available on-line.

Third-party inspectors must annually re-file for renewal of the inspector's registration on a Commission prescribed application accompanied by a renewal fee of \$50, not later than thirty (30) days prior to the expiration of its effective period.

Registration of Certified Arbitrators.

The Act provides for the voluntary registration of arbitrators experienced in residential construction dispute cases. The Commission adopted emergency rules regarding the registration and certification of arbitrators who provide arbitration services in disputes regarding residential construction at its January 6, 2004 meeting. Permanent rules were adopted on April 22, 2004. The statute provides that the Commission establish eligibility requirements and procedures for a person to be certified by the Commission as a residential construction arbitrator and that the Commission maintain a list of certified arbitrators and make that list available to the public. The list is available on the Commission's website.

A person seeking to become certified as a residential construction arbitrator with the Commission must submit a completed application on a Commission-prescribed form accompanied by the appropriate fee, which is currently \$50.00.

Persons seeking to become certified as a residential construction arbitrator with the Commission must provide evidence that they have acquired a minimum of five (5) years of experience conducting arbitrations between homeowners and Builders involving construction defects; certify they are familiar with the statutory warranties and building

and performance standards established in Property Code Chapter 430 and with the provisions of Property Code Chapter 27 (the Residential Construction Liability Act or RCLA); certify they have not had a professional license or certification suspended or revoked in any jurisdiction; and submit a list that includes any person registered as a Builder or certified as a third-party inspector with whom the applicant has a direct or indirect personal or business relationship that could reasonably be considered to create a conflict of interest for that person in serving as an arbitrator in a dispute involving the person listed as a party or a witness.

The Commission must publish in the *Texas Register* notice of the application of each person seeking to become certified as an arbitrator. The Commission will accept public comment on each application for twenty-one (21) days after the date of publication of the notice. After the conclusion of the comment period, if the Commission finds it to be in the public interest, the Commission will certify the arbitrator.

The Commission must deny an application for certification if the Commission determines that the applicant is not qualified or if certification of the applicant would otherwise not be in the public interest.

If the Commission denies an application, the Commission shall provide written notice to the applicant detailing its reasons for denial not later than the 15th day after the closing of the public comment period on the application. A person whose application has been denied by the Commission may appeal the decision to the Executive Director. The decision of the Executive Director is a final agency decision and is not subject to further administrative appeal.

Each person who is certified as an arbitrator with the Commission must report to the Commission in writing any material change in the information provided to the Commission within thirty (30) days of the change.

A person who has been certified as an arbitrator by the Commission must submit an application for renewal of the certification no later than thirty (30) days prior to the expiration of the effective date of the certification as established by the Commission. The person seeking renewal must submit a renewal application on a Commission-prescribed form accompanied by a \$50 fee.

The person must provide evidence of completion of five (5) hours of approved continuing education since the effective date of certification provided by the Commission. The continuing education must consist of attendance of a course or seminar on arbitrations conducted by an accredited institution of higher education, a state bar association, or an entity organized for the purpose of conducting educational seminars or courses that regularly conducts seminars or courses for arbitrators or lawyers; or any other course or seminar approved by the Commission's Executive Director. A person seeking to renew certification as an arbitrator who is also an attorney licensed by the State Bar of Texas may satisfy the continuing education requirements of this section by

satisfying the annual continuing legal education licensure requirements set by the State Bar.

State-Sponsored Inspection and Dispute Resolution Process (“SIRP”).

The SIRP applies to a dispute between a Builder and a homeowner if the dispute arises out of an alleged construction defect or defects. At its January 6, 2004 meeting, the Commission adopted emergency rules relating to the State-sponsored Inspection and Dispute Resolution Process. Additionally, a Strawman Proposal was then published in order to develop a permanent rule governing this process. Comments were taken, and the new rule was adopted at the Commission’s June 17, 2004 meeting.

The rules can be found at sections 313.1 through 313.27 of the Commission’s Rules, however, generally the process is as follows:

A person interested in initiating the SIRP, must file a request with the Commission on or before the second anniversary of discovery of the construction defect, but not later than the thirtieth day after the date that the applicable warranty period expires.

Prior to initiating the SIRP, a homeowner must give the Builder a minimum of thirty (30) days written notice of any alleged construction defect(s). If a homeowner does not provide the Builder with prior notice and an inspection opportunity before submitting a SIRP request to the Commission, the Commission will return the request to the homeowner as incomplete.

If requested by the Builder, after the homeowner has provided written notice to the Builder regarding any alleged construction defect(s), the homeowner must provide the Builder or its designated consultants reasonable access to inspect the affected home. Anytime after the request to initiate the SIRP has been filed with the Commission, including time prior to the conclusion of the SIRP, the Builder, upon written request, must be given a reasonable opportunity to inspect the affected home, or have the home inspected, in order to determine the nature and cause of the alleged construction defect(s), as well as the nature and extent of repairs necessary to remedy the alleged construction defect(s).

If a homeowner delays the Builder’s inspection of the affected home for more than five (5) days after receipt of the Builder’s request to inspect, any period for following action to be taken by the Builder or a registered third-party inspector will be extended one day for each day the Builder inspection is delayed.

No earlier than the thirtieth day after a homeowner has given the Builder written notice of the alleged construction defect(s), either the homeowner or Builder may begin the SIRP by filing a request with the Commission.

If the affected home is not registered with the Commission at the time the SIRP request is made, the requesting party must simultaneously register the home with the Commission on a Commission-prescribed form, accompanied with a \$30 fee. A copy of the SIRP Request form is available from the Commission or on its website. The SIRP request must be submitted to the Commission on the Commission-prescribed form, accompanied by the appropriate filing fee and inspection fees established by the Commission. On May 20, 2004, the Commission established the fees as follows: for a materials and workmanship inspection - \$350.00; for a structural inspection, an initial fee of \$450.00. If at that point a structural problem is found to exist and further analysis is required, the **Builder** pays \$550.00 which goes to the structural inspector. Effective October 1, 2005, this fee structure was modified. As of that date, a **Homeowner** filing a SIRP request pays a flat fee of \$250.00, regardless of the type of request. The other fees remain in effect for **Builder** filed SIRP requests. If the homeowner prevails in the SIRP process, the filing fee is refunded. A homeowner who is able to show financial need may request a reduction or waiver of the home inspection fees. To make such a request, the homeowner must file with the request for an inspection a sworn affidavit of inability to pay the costs on a Commission-prescribed form. The Executive Director will approve or deny the request. The Executive Director's decision is a final agency decision, not subject to further administrative appeal.

The party initiating the SIRP request must also send a copy of the written notice and any evidence submitted to the Commission by certified mail, return receipt requested, to all other parties involved in the dispute.

The person submitting the SIRP request must also submit the name of any person who inspected the home on behalf of the requestor prior to the request in connection with the alleged construction defect(s) that is the subject of the request. If the requestor fails to disclose the name of a person who has performed an inspection, if known at the time of the request, it could prohibit the requesting party from later designating the person who performed the inspection as an expert or from using any materials prepared by such person performing the inspection in the SIRP or any action arising out of any alleged construction defect(s) that is subject to the request.

The SIRP request must include the following information:

1. A description of the transaction giving rise to the dispute;
2. evidence that the homeowner provided the Builder with written notice of the alleged construction defect(s) at least thirty (30) days prior to filing the SIRP request;
3. a general description of the Builder's response to the homeowners written notice of the alleged construction defect(s), as well as any written copies of the Builder's response to the written notice;
4. a reasonably detailed description of the alleged construction defect(s);
5. a listing of the names and addresses of all professionals or other persons that may have inspected the alleged construction defect(s) on behalf of the party

- requesting the SIRP, as well as any written materials prepared during the inspections;
6. an itemization of the amount known of out-of-pocket expenses, including any engineering or consulting fees, incurred by the homeowner in connection with the alleged construction defect(s); and
 7. any evidence showing the nature and cause of the alleged construction defect(s) and the nature and extent of repairs necessary to remedy the alleged construction defect(s), including expert reports, photographs and video tapes.

Upon receipt of the SIRP request, the Commission will review the request to determine that:

1. The dispute arose from a transaction governed by the Act;
2. the request is complete, including required attachments and the payment of appropriate fees;
3. the affected home is registered with the Commission;
4. that alleged construction defect(s) accrued on or after September 1, 2003;
5. the request is timely;
6. the request involved a dispute between a homeowner and a Builder regarding an alleged construction defect(s), and is not:
 - (i) a claim solely for personal injury, survival, wrongful death or damage to goods, which do not include damage to a home; or
 - (ii) a claim for an alleged violation of Section 27.01, Business & Commerce Code, regarding Fraud in Real Estate and Stock Transactions; or
 - (iii) a claim based solely on a Builder's wrongful abandonment of an improvement project before completion; or
 - (iv) a claim for an alleged violation of Chapter 162 of the Texas Property Code, Construction Payments, Loan Receipts, and Misapplication of Trust Funds.

The Commission must assign a third-party inspector within fifteen (15) days following the date the Commission receives a SIRP request. The third-party inspector appointed will be the next available from the list of qualified registered third-party inspectors maintained by the Commission, who performs inspections in the affected home's geographic region.

Once a third-party inspector is chosen, the Commission will notify the homeowner and Builder in writing of the appointment of the inspector. Within three (3) business days of receipt of the Commission notice, each party will have the opportunity to object to the inspector appointed, with or without stating a cause. If either party has an objection, that party must notify the Commission in writing of the objection. Each party will be given one opportunity for each SIRP request submitted to the Commission to object to a Commission appointed inspector. Failure to timely notify the Commission of an objection will serve as a waiver of that party's right to object unless the party is able to show that it has acquired material information that provides the basis for the objection

that could not reasonably have been discovered prior to the expiration of the objection period.

If the Commission receives an objection regarding an assigned inspector, it will appoint the next available third-party inspector from the list of qualified registered third-party inspectors, who performs inspections in the affected home's geographic region, and notify the involved parties of the new appointment.

If the Commission does not receive written objection to the inspector appointed, the Commission will forward to the appointed inspector a copy of the request for SIRP and all supporting documentation submitted with the request.

As soon as practicable, after the appointment, the inspector will contact the homeowner and arrange a mutually convenient time to visit the affected home. The third-party inspector will notify the Builder and the homeowner of the date and time of the inspection. The homeowner and Builder, including any of their consultants or representatives, may be present at the time of inspection.

During the inspection, the third-party inspector will gather all information that he or she deems relevant to the inspection. The inspector may use any reasonable means available to gather information, including taking photographs and interviewing the homeowner, the Builder, and any consultants present. It is possible for an interview to take place outside the presence of others not aligned with the party subject to the interview. The third-party inspector is prohibited from engaging the services of any consultant.

The third-party inspector has the right to suspend the inspection if either party interferes with the inspection in such a manner as to prohibit the inspector from performing his duties in an impartial and professional manner.

If the third-party inspector cannot obtain cooperation in the scheduling of the home inspection, or cannot obtain cooperation during such inspection, the Commission will direct the parties on how to proceed.

The Builder is required to submit to the inspector for his consideration any written documentation generated as a result of having received notice of an SIRP request.

If the alleged construction defect(s) involves workmanship and materials, then the recommendation of the third-party inspector must be issued within fifteen (15) days after the appointment by the Commission. If the alleged construction defect(s) involves a structural matter, the home must be inspected within thirty (30) days after the SIRP request is submitted and the third-party inspector must issue a recommendation no later than sixty (60) days after the date the third-party inspector is assigned. A party to the dispute or the third-party inspector may request additional time from the Commission to complete the inspection, which may include time for further testing, if good cause can be shown for the time extension.

The inspector's report must include findings based on applicable warranty and building and performance standards and recommendations for repairs, if any. The report may not include a recommendation of payment of monetary damages, a price for the recommended repairs, or a determination of the value of any loss allegedly suffered by the homeowner. The third-party inspector is required to deliver its report to the Commission on a Commission-prescribed form. The Commission will in turn promptly forward the report to the homeowner and Builder.

A homeowner or Builder may appeal the third-party inspector's report and recommendation on or before the 15th day after receipt of the report by the objecting party. If either party is able to show good cause why the deadline to file a notice of appeal to the third-party inspector's report should be extended, the Commission may extend the deadline by no more than an additional fifteen days. If a homeowner or Builder appeals the conclusions or recommendations in a third-party inspector's report, the Executive Director will refer the appeal to a three-person panel made up of state inspectors. If the request involves a structural matter, one of the state inspectors on the panel must be a licensed professional engineer. The appellate panel will conduct a review of the written materials submitted with the request, including any information or data gathered by the third-party inspector and the third-party inspector's report and recommendations. The appellate panel will issue written findings of fact and shall approve, reject, or modify the recommendation of the third-party inspector or remand the matter to the third-party inspector for further action as directed by the appellate panel. The appellate panel shall issue its ruling not later than the 30th day after the date the notice of appeal is filed with the Commission. A ruling by an appellate panel is a final agency decision not subject to further administrative appeal.

Not later than the 15th day after the third-party inspector's report has been transmitted to the parties by the Commission, or if the third-party inspector's report and recommendation has been appealed, not later than the 15th day following the date that the appellate panel's ruling has been transmitted to the parties, a Builder may make a written offer of settlement to the homeowner to repair the alleged construction defect(s). The offer must be sent by certified mail, return receipt requested, to the homeowner at the homeowner's last known address or the homeowner's attorney, if the homeowner is represented by counsel. The offer may include either an agreement by the Builder to repair or to have repaired by an independent contractor, partially or totally at the Builder's expense, or at a reduced rate to the homeowner, any construction defect(s) included in the SIRP request. The offer must also include in reasonable detail the repairs to be made, as well as provide that the repairs will be made within forty-five (45) days after the date the Builder receives written notice of the homeowner's acceptance of the offer, except as delayed by the homeowner or the occurrence of events beyond the Builder's control.

If the homeowner considers the Builder's offer to repair to be unreasonable, the homeowner shall notify the Builder in writing on or before the 25th day after the date the homeowner receives the offer why the homeowner considers the offer to be unreasonable. The homeowner shall describe in detail the homeowner's reasons for

concluding that the offer is unreasonable. An offer of repair made that is not accepted before the 25th day after the date of receipt, is considered rejected.

Not later than the tenth day after the date the Builder receives written notice from the homeowner that the homeowner considers the first offer unreasonable, the Builder may make a supplemental written offer of settlement. The Builder must send the supplemental written offer by certified mail, return receipt requested, to the homeowner, or if the homeowner is represented by counsel, to the homeowner's attorney.

If a homeowner accepts a Builder's offer to repair, the Builder, upon completion of the repairs, will engage the Commission appointed third-party inspector who provided the report and recommendation to inspect the repairs and to determine whether the home, as repaired, complies with the applicable statutory warranty and building and performance standards adopted by the Commission. Following the third-party inspector's post-repair inspection, the Builder shall have a reasonable period, not to exceed fifteen (15) days, to address any minor cosmetic deficiencies necessary to fully complete the repairs.

If a third-party inspector registered by the Commission is subpoenaed by a party to a dispute between a homeowner and Builder to provide testimony by deposition, in court or in any alternative form of dispute resolution proceeding, or to provide other witness services, the party who issues the subpoena must pay to the third-party inspector a reasonable fee and related expense for the services requested. The Commission has established reasonable fees for witness services performed by a registered third-party inspector as a result of an inspection undertaken pursuant to the SIRP as follows: Materials and Workmanship - \$75 per hour for testimony time, \$35 per hour for other time; Structural - \$135 per hour for testimony time, \$65.00 per hour for other time. In addition, the inspector may bill for actual, reasonable expenses incurred.

Limited Statutory Warranty and Building & Performance Standards Provisions.

The Act requires warranty periods to be: (1) one year for workmanship and materials; (2) two years for plumbing, electrical, heating, and air-conditioning delivery systems; and (3) 10 years for foundation and major structural components of the home. The warranty period begins on the earlier of occupancy or transfer of title from the Builder to the initial homeowner. For an improvement other than a new home, the warranty period begins on the date the improvement is substantially completed. The Rules also provide that the warranty of habitability set forth in the Act is for ten years. The statutory warranties run with the property, and are, therefore, automatically transferred to any subsequent purchasers (within the applicable warranty periods).

The performance standards were approved by the Commission on January 12, 2005, to be effective June 1, 2005. The original draft was developed by Texas A&M University. Drafts of the limited statutory warranty and performance standards were available throughout the process on the Commission's website. Public town hall meetings were held all over the State on these issues. Much public comment was taken,

and incorporated into the working drafts. On September 9, 2004, a public workshop on warranties and standards was held in Austin, which was well attended by both Builder and homeowner representatives. The drafts were twice published as strawman proposals. The drafts were extensively discussed and analyzed by the Commissioners in two of their meetings. The finished product seeks to strike a balance between homeowner and Builder expectations, taking into consideration costs of implementation. In other words, the Commission sought to make the performance standards as high as reasonably possible, without pricing segments of Texas' population out of the housing market. The warranties and performance standards can be found at Chapter 304 of the Commission's rules, which can be viewed on the website.

The performance standards are divided into four, basic sections. The first section has general comments and definitions; the second section addresses workmanship and materials issues; the third section addresses delivery systems; and the last section addresses structural issues. The second, third, and fourth sections follow a standard format: For each aspect of the residence, they set forth the Condition, the Performance Standard, the Builder Responsibility, then the Homeowner Responsibility, and, finally, an Explanation. Also, within each section, an attempt was made to place the items in a logical order, specifically in the order they would be built.

It is important to distinguish the performance standards from codes. Codes relate to how a home is built; performance standards address how it performs after it is built. These are the standards against which third party inspectors will objectively measure houses in the SIRP process.

The warranties and performance standards are effective for any contract entered into, or construction commenced, on June 1, 2005 or thereafter. Prior to this date, the contract between the parties and common law applies.

The Commission has created an advisory committee that is tasked with periodically reviewing the performance standards and making recommendations for changes to the Commission. This committee is formally known as the "Warranties and Performance Standards Advisory Committee." The committee was created under Rule 301.3, and is composed of:

- One third-party inspector certified by the commission under Chapter 303 of the Rules.
- One professional engineer certified by the commission under Chapter 303 of the Rules.
- Two persons not licensed by the State Bar of Texas, knowledgeable in the construction industry, who have provided a material amount of assistance on behalf of consumers or homeowner interests in legal and non-legal matters.
- Two persons who are homeowners, who are not builders and who do not own and are not employed or otherwise engaged in a trade involving residential construction.

- One attorney licensed in the State of Texas with a significant history of representing consumers in the area of alleged home construction disputes with builders.
- Three persons, each of whom is a registered builder or representative of registered builders under Chapter 303 of the Rules. It is the desire of the commission that these members will represent remodelers and builders of differing volumes of registered homes.
- One person who is a representative of a trade association that is composed of builders, remodelers and associate members related to residential construction.
- One attorney licensed in the State of Texas with a significant history of representing builders in the area of alleged home construction disputes with homeowners.

Task Forces.

The Commission was statutorily responsible for overseeing three task forces. The mold reduction and remediation task force was to advise the Commission regarding the adoption of standards to reduce the general population's exposure to mold formed in indoor environments. The rain harvesting and water recycling task force was to develop design recommendations for residential construction that encourage rain harvesting and water recycling. The task force for residential arbitration's task was to advise the Commission with respect to residential arbitrators and arbitration. The residential arbitration task force must report to the 79th and 80th legislatures on its recommendations and the effect of the implementation of those recommendations. All task forces proceeded diligently with their statutory duties, and reported to the 79th legislature. The reports can be reviewed at the Commission's website, under "Publications." Per the Act, the mold reduction and remediation and the rain harvesting and water recycling task forces were dissolved by the Commission on December 31, 2005.