# *Who* is Going to do *What* by *When*

# The Lawyer's Role in Drafting Construction Agreements For Commercial Leases

**Harriet Anne Tabb**
McGuire, Craddock & Strother, P.C.
Dallas, Texas
htabb@mcslaw.com
214.954.6839

**Presented:**
TexasBarCLE
Advanced Real Estate Drafting Course 2014

March 6-7, 2014

## Chapter 4

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## BIOGRAPHICAL INFORMATION

Harriet Tabb has worked in the area of retail and mixed-use development for almost 30 years. She has represented commercial landlords of both established and new shopping centers and mixed-use developments.

## PUBLICATIONS AND PRESENTATIONS

Harriet is a frequent speaker at legal seminars, usually on practical issues concerning retail and office leasing. As a result, a law professor in Texas has asked to use her materials in his real estate transactions course and a landlord from California contacted her on Facebook to ask for her form of Landlord Subordination.

- 2011 – *Bringing Order out of Chaos: The Lawyer's Role in Drafting Construction Agreements* (Bernard O. Dow Leasing Institute)
- 2009 – *Struggling Tenants: A Landlord's Guide to Evaluating and Responding to Requests for Modification or Termination of Leases* (Bernard O. Dow Leasing Institute)
- 2007 – *Short But Not Sweet: The Landlord's Subordination Agreement* (The University of Texas's Mortgage Lending Institute)
- 2007 – *Real Estate Strategies Program* (Panel Discussion, sponsored by the State Bar of Texas)
- 2001 to Present – Planning Committee (The University of Texas's Mortgage Lending Institute)
- 2000 – *Updating the Landlord's Retail Lease Form* (Advanced Real Estate Drafting Course)
- 1997 – Moderator of Leasing Panel (Advanced Real Estate Transaction Course)
- 1996 – Mock Negotiation of Commercial Real Estate Leases (CLE International)
- 1996 – *Negotiating Subordination, Non-disturbance, and Attornment Agreements: Lender and Tenant Perspectives* (Negotiating Commercial Real Estate Lease Conference)
- 1995 – *Subordination, Non-disturbance, and Attornment Agreements from the Tenant's Point of View* (Advanced Real Estate Law Course of the State Bar of Texas and Advanced Real Estate Law Course, University of Texas School of Law)

## EDUCATION

- J.D., Stanford Law School, J.D., 1985
- B.A. in History, Emory University, B.A., 1981 (*Summa Cum Laude*; Phi Beta Kappa)

# *WHO* IS GOING TO DO *WHAT* BY *WHEN*: THE LAWYER'S ROLE IN DRAFTING CONSTRUCTION AGREEMENTS

**I. INTRODUCTION:** Most office and retail leases include an agreement about the alterations to the space that will be made before the tenant moves in. Often, this agreement takes the form of an exhibit to the body of the lease. Despite the fact that these agreements describe the first interaction between the landlord and tenant and relate to work that costs hundreds of thousands, if not millions, of dollars, they are, almost without exception, shockingly bad. Even the "forms" are repetitive, confusing, and inaccurate. The purpose of this paper is to suggest that the lawyer's job is to bring order out of chaos and clarity out of confusion.

**II. EXISTING "FORMS":** Most landlords have a set of forms for their construction exhibits, which vary depending upon what work is being performed by the landlord before delivering the space to the tenant. They often are entitled things like "Building Standard," "Base Shell," and "White Box" (with their variants, such as "vanilla shell" and "cold white box"). These terms all mean different things to different people and thus are meaningless. And the forms often show signs of having been drafted the way reefs are built, with random parts being attached over time until the original structure is completely hidden. Whether you use your own forms or your client's, it is worth taking the time to ask a lot of questions and then heavily revise the forms, incorporating the specific items that are helpful, but leaving most of the duplicative language and confusing information behind. If you do a lot of leasing work, you should probably create your own forms.

**III. ATTACHED FORMS AND HOW TO USE THEM:** I have forms that I have included with these materials, entitled "New Development," "Limited Landlord's Work," and "Tenant Acceptance of Space 'As-Is'." As you can see from the titles, the differences between them arise from whether or not the project has been constructed and who is performing the work. You are obviously welcome to use them, but you may have your own forms. Whether you use my form or your own, the first step in actually drafting a construction exhibit is to decide which of the possible forms to start with and that requires answers to the following questions:

**A. Where is the Project in the Construction Process?** Is the project in the planning stage, under construction, or already built? If it is under construction, what has been finished and what remains unfinished? What is the schedule for completing the project?

1. Not Yet Built. If it has not already been built or construction has just started, then use a form like my New Development form, modified to describe exactly what the parties are and are not doing, which may not match my form.

2. Finished or Almost Finished. If the project has already been built, or even if it is a new development that has been mostly built, then you should use a form like either my Limited Landlord's Work form or the "As-Is" form. **Danger:** Do not use a "New Development" form if the project has already been built or mostly built. If you include work that has already been completed in the description of Landlord's Work, then you will have over-ridden—or at least called into question—the "as is" provision of the lease. Losing the benefit of an as-is provision is pretty big price to pay for not thinking about what form to use. It is very easy to continue to use the form that the landlord has been using with all the previous leases, but at some point, that form is no long appropriate. It is often up to the lawyer to determine when that time has come.

**B. Who will Perform the Work**? Is landlord doing all the work (unusual in retail leases, but more common in office leases)? Is tenant doing all the work? Or is each of them doing some work?

1. Landlord Performing Any or All Work. If the landlord is doing any work at all, even if it is just demolition work, then you should use a form like my "Limited Landlord's Work" form. I realize that in office leases, the landlord usually does all the work, but I still like this form because it makes everyone think about what the landlord is and is not doing.

2. Tenant Performing All Work. If the tenant is performing everything, then use a form like my "As Is" form. **Danger:** The construction exhibit should not be the only place where you emphasize the "as is" nature of the lease. Be sure that you have full protected yourself with good language in the body of the lease. It used to be easier to have a truly "as is" lease before *Italian Cowboy Partners, Ltd., Francesco Secchi and Jane Secchi v. The Prudential Insurance Company of America and Four Partners, LLC d/b/a Prizm Partners and d/b/a United Commercial Property Services*, No. 08-0989,

2011 WL 1445950, --- S.W.3d ---, 54 Tex. Sup. Ct. J. 822 (Tex. Apr. 15, 2011). You can find a more thorough discussion of this case in David Weatherbie's recent case update, but I will include a short summary for this paper, too.

a. *Short Summary*. In *Italian Cowboy*, the landlord's lease form did not disclaim reliance on any representations--but it did say that no representations were made. But it turns out that representations were made, right and left, by the landlord's leasing agent, Fran Powell, who went well beyond "mere puffery" into egregious lying. She told the tenant--an Italian couple that wanted to open a restaurant--that the previous tenant had not experienced any problems with the building and it was "perfect" when, in fact, the previous tenant had been driven from the space by a terrible sewer smell and she was fully aware of it. She was quoted in the case as saying that the smell the previous tenant encountered was "almost unbearable" and "ungodly." The landlord's weakly-worded statement that there were no representations and failure to say that even if there were representations, the tenant did not rely on them was insufficient to overcome that kind of behavior. Frankly, I am not confident that any disclaimer would be strong enough to overcome that kind of behavior.

b. *Suggested Lease Changes*. In response to *Italian Cowboy*, you should go ahead and state both that no representations have been made, and that the tenant is not relying on any representation. But you should also encourage—not just permit, but encourage—prospective tenants to inspect the space. Here's the language I have added to my form:

"Tenant acknowledges that it has been given the opportunity to inspect the Premises and to have qualified experts inspect the Premises prior to the execution of this lease and that Landlord has encouraged Tenant to do so. If Tenant has not inspected the Premises, Tenant made the affirmative decision to not do so, despite Landlord's encouragement."

c. *Aside: Other Important Leasing Questions*. As an aside, there are three other important lessons to learn from reading the *Italian Cowboy* case.

(1) First, if at all possible, keep a tight rein on your agents. In defense of agents, though, Ms. Powell's statements are well beyond anything I have actually seen in my practice, where most agents do limit themselves to "mere puffery."

(2) Second, recognize how difficult it is to remedy problems like persistent smells (and, I might add, water penetration, whether from leaky roofs or plumbing problems).

(3) Third, always keep in mind how much tenants talk to each other. One of the first clues the plaintiff in the *Italian Cowboy* case had about the problem came from the manager of the movie theater across the parking lot. I always say that there are no secrets in real estate and I think this case demonstrates that fact.

**IV. Organization:** You can see that all of my exhibits follow the same 3-part structure. If you don't want to use my forms, then you should at least try to impose a structure on them that is essentially chronological.

**A. Pre-Construction**. The first part is the pre-construction obligations, almost all of which relate to planning. This is also where I put the insurance requirements and any other notices that the tenant needs to have before it begins designing the work.

**B. Construction**. The second part is a description of the construction obligations attributable to landlord and tenant. Obviously, if only one of them is doing all the work, this is pretty simple. But usually, the landlord and tenant are each doing work and so this section is divided into a description of Landlord's Work followed by a description of Tenant's Work. This structure is chronological because the Landlord's

Work is almost always done before the Tenant's Work. Even if they overlap, the Landlord's Work is usually finished first. Each description is broken down into areas of work and I put them in the same order in Landlord's Work as in Tenant's Work because that helps a lot with clarity (as I describe below under "Respect Your Organization").

**C. Payment Arrangements.** The third part is a description of any Allowance or other payment arrangements. I usually put this in a different exhibit because not every tenant gets an allowance and I do not want the tenants that are not receiving an allowance to see that paying one is part of the landlord's form.

**V. CLARITY IN DRAFTING:** The rules about good drafting apply in construction agreements as much as any other legal document. Most of these suggestions are the ones that you have heard forever, from Bryan Garner and others, but they bear repeating. I find that this process of trying to make things clear almost always results in making them much more accurate, too. It's not at all uncommon for my clients to realize that their form description is not accurate, either for this particular tenant or, even worse, for *any* tenant. That happened in the examples in "C" and "F" below, but it happens all the time. Finding out that the form is not accurate about who was going to do what construction work is a lot easier during negotiations than after construction has started.

**A. Use the Active Voice and Complete Sentences**. In a construction exhibit, by far the most important thing you can do is clearly state who is going to do what by when. Both passive voice ("*HVAC system will be installed*") and sentence fragments ("*Provide HVAC system*") leave that information unsaid and unclear. You will receive information from the leasing agents, contractors, and others that is written that way and it is your job to clear up what they mean. And I would like to issue a small plea to do away with "shall," a word Bryan Garner inveighs against on many grounds, but which I find objectionable because it practically demands the passive voice ("*HVAC system shall be installed*"). Just use "must" or "will." If you want a negative, say "cannot" or "may not."

**B. Avoid Terms of Art, Abbreviations, and Acronyms**. "Terms of Art" are phrases that describe complicated facts and situations that people want to avoid thinking about in any detail, insisting instead that "everyone knows" what they mean. The risk is, of course, that unanimity of understanding does not actually exist and the terms mean different things to different people. "Building Standard," "Base Shell," "White Box," "Cold White Box," and "Vanilla Shell" are all construction "terms of art" and you should not use them, not even in titles. Avoid the term "soft costs" if at all possible. If the agreement you are provided uses a term of art, you need to ask, "Exactly what is included and excluded when you use that term?" Contractors use abbreviations and acronyms a lot, but not everyone reading the construction exhibit will be a contractor and it is possible that not every contractor uses the same abbreviation and acronym. Use the underlying term and not the abbreviation or acronym. If you are confronted with a number of abbreviations or acronyms, just ask what they stand for. Do not be afraid to say that you do not know. Keep pushing until you *do* know. You will be surprised how often the people using terms of art will have trouble describing exactly what they mean and how often two people who think they agree on the meaning of a term of art (or even an abbreviation or acronym) realize that their definitions do not match. The first example below was the original language as it was provided to me with my questions to my client highlighted in lighter shading. The second example below was the "translation" with a few explanations highlighted in darker shading.

> Landlord will provide and install one (1) accessible washroom in the stockroom area [*Is the "stockroom area" shown on the drawing of the Premises? If not, we need to identify it in some way.*], as required by code. Walls, ready to paint, 8' AFF. [*What does AFF mean?*] 2x4 ceiling grid and tile. FRP up to 4' AFF on washroom side only, [*What does FRP mean?*] 4" vinyl cove base. Landlord will provide and install one (1) watercloset, one (1) lavatory, ADA required grab bars, one (1) 18" x 24" mirror mounted to height required by code, toilet paper dispenser, soap dispenser.

> **If required by code,** Landlord will provide and install one accessible washroom in the stockroom area ~~[*Is the "stockroom area" shown on Exhibit "B"? If not, we need to identify it in some way.*], as required by code. Walls, ready to paint, [8' AFF.]~~**shown on the Tenant's Plans and Specifications if they are finished by the time Landlord needs to begin work on (including ordering items for) the sanitary facilities. If the Tenant's Plans and Specifications are not complete**

**by that time, then Landlord will install the washroom in a location Landlord selects. [*The previous language is necessary to avoid having the landlord unable to perform its obligations because the tenant is slow in making construction decisions.*] The interior of the washroom walls will be fiberglass reinforced plastic [*which is what "FRP" meant*] up to 4' above the finished floor [*which is what "AFF" meant*]. The remainder of the interior walls and all of the exterior walls will be drywall, installed and ready to paint to a point that is 8' above the finished floor. The interior of and exterior walls will have 4" vinyl cove base. The ceiling of the washroom will be** 2x4 ceiling grid and tile. ~~[FRP up to 4' AFF on washroom side only,] 4" vinyl cove base.~~ Landlord will provide and install one watercloset, one lavatory, ADA required grab bars, one 18" x 24" mirror mounted to height required by code, toilet paper dispenser, soap dispenser.

**C. Be Precise and Be Specific**. If someone is going to run a water line, specify the size in addition to who is going to run the line. If someone is going to run a conduit for a line, but isn't going to run the line itself, say that. If your client tells you that they have already ordered the HVAC units or other big pieces of equipment, ask them to describe for you exactly what they ordered (by supplier, size, and any identification numbers) and then specify that that is all they are going to provide. You can even include the order form. Eradicate undefined defined terms. In the example below, "Merchandise Zone" was an undefined defined term (note that "stockroom area" had the same problem in the example in "B" above). When I asked about that term, it led to significant redrafting for precision, but it also revealed timing problems (I discuss timing problems in "D" below) and resulted in deletion of certain work that the landlord realized it was not going to be doing after all. Also, try to avoid using the construction that spells out a number and then follows it with the number in parenthesis. It is confusing and leads to mistakes. Usually, I just use the number, but in construction exhibits, which already have a lot of numbers, I usually spell out the number. The first example below was the original language as it was provided to me with my questions to my client in brackets and italics. The second example below was the "translation" with a few explanations in brackets and italics.

Landlord will provide electric service in an electrical meter room for the Building with up to 400 amps available to retail tenants. Landlord will provide one (1) 3" conduit for retail tenants from the base building electrical meter room to the Premises. Landlord will pull the conductor wires from the tenant space back to the base building electrical meter room. The electrical service will be 277/480 volt. Landlord with provide: one (1) 480/277v main circuit breaker panel and one (1) 120/208v secondary circuit breaker panel; [*What does the following mean?*] transformer sized per low voltage load in space.; [*What does the following language mean? Is the Merchandise Zone" shown on the plan for the Premises?*] one (1) four pole timeclock for signage and Merchandise Zone lighting; one (1) duplex [*What does "wall" mean in this context?*] wall per 40 linear feet of demising walls and stockroom walls; one (1) duplex GFI outlet in washroom; one (1) exhaust fan/light switched together [*Where does this exhaust fan/light go? This sounds like it's part of the sanitary facility, but I'm not sure that's the case.*]; one (1) 20A dedicated duplex outlet at roof deck for roof top servicing; one (1) duplex outlet in stockroom by electrical service equipment; one (1) duplex outlet per 12 lineal feet, flush, [*same question about "Merchandise Zone"*] in Merchandise Zone ceiling; one (1) dedicated 20A circuit for cashwrap; and one (1) dedicated 20A circuit for signage wired to open junction box located approximately centerline of entry 1' above soffit height.

Landlord will provide electric service in an electrical meter room for the Building with up to 400 amps available to retail tenants. Landlord will provide one 3" conduit for retail tenants from the base building electrical meter room to the Premises. Landlord will pull the conductor wires from the tenant space back to the base building electrical meter room. The electrical service will be 277/480 volt. Landlord with provide: one 480/277v main circuit breaker panel and one 120/208v secondary circuit breaker panel; **a** transformer **that will be** sized ~~per~~**for a** low voltage load in **the** space~~.~~;~~]~~ ~~[~~one four~~-~~pole timeclock for **Landlord-approved** signage and ~~Merchandise Zone~~ lighting **within the sales area shown on Tenant's Plans and Specifications if they are finished by the time Landlord needs to begin work on**

**(including ordering items) the timeclock. If the Tenant's Plans and Specifications are not complete by that time, then Landlord will purchase and install a four-pole timeclock of Landlord's selection**;~~]~~ ~~[*The previous language is necessary to avoid having the landlord unable to perform its obligations because the tenant is slow in making construction decisions.*]~~ one duplex ~~[wall]~~**outlet** per 40 linear feet of demising walls and stockroom walls; one duplex GFI outlet in washroom; one exhaust fan/light switched together ~~[*where? This sounds like it's part of the sanitary facility, but I'm not sure that's the case.*]~~**in the washroom**; one 20A dedicated duplex outlet at roof deck for roof top servicing; one duplex outlet in stockroom by electrical service equipment; [*The following clause was deleted because the construction supervisor realized, when asked about the term "Merchandise Zone" that the Landlord wasn't actually going to be doing this work.*] one ~~duplex outlet per 12 lineal feet, flush, [in Merchandise Zone ceiling; one (1)~~ dedicated 20A circuit for cashwrap; and one dedicated 20A circuit for signage wired to open junction box located approximately centerline of entry 1' above soffit height.

**D. Be Mindful of Timing**. It is very important when writing a construction exhibit to clearly state the deadlines for every step of the process, including design, approval, pricing, and construction.

1. Penalties and Exclusions from Penalties for Missed Deadlines. If Landlord or Tenant is supposed to prepare designs or perform construction, then failure to do so can create very significant problems for the other party because they are delayed in doing their work or opening their business. Some tenants put penalties in their leases for failure to deliver the premises by a particular date or within a particular time period (often called the "required delivery date") to address these concerns. Some sophisticated tenants even put in penalties for failing to meet interim deadlines before the final required delivery date.

2. Exclusions from Penalties. Landlords do not want to pay a penalty when the delay was due to the tenant's failure to respond to design review or make other decisions or to force majeure. This is one of the reasons why it is so important to clearly describe who is supposed to do what *by when*.

a. *Tenant Delay*. A landlord will want the required delivery date to be extended by one day for each day of "tenant delay." That's a good defensive maneuver to avoid having a penalty imposed.

(1) But the landlord should also make sure that the tenant's delays do not result in a delay in the date the tenant is obligated to begin paying rent (often called the "commencement date"). In most leases, the commencement date is stated as being a certain number of days after delivery of the space by the landlord and that time period is often referred to as the "finish-out" period. The finish-out period should be decreased by 1 day of each day of tenant delay, even if it completely exhausts the finish-out period (so that the rent commences on or, in the case of terrible tenant delay, before the day the landlord turns over the Premises to the tenant).

(2) Rent is one thing, but what about the obligation to open for business? A tenant can be forced to pay rent earlier, but it simply will not be able to open for business before it has finished out the space, even if the delay is its fault. In that case, I would require the tenant to pay a daily assessment for its failure to open by the Commencement Date.

b. *Force Majeure Delays*. Although lawyers can spend a lot of time worrying about tornadoes, hurricanes, or earthquakes delaying construction, the most common cause of delay is rain. It is for this reason that all contractors build in a certain number of days for rain delay in their schedules for construction. There are a couple of rain delay issues to keep in mind:

(1) If you are the party receiving delivery of the work

(usually, the tenant), you should get the benefit of the built-in rain delay days and the days that were already counted in the schedule should not be double-counted to extend the time period for the constructing party (usually landlord) to perform. In practice, this means that some receiving parties seek to exclude rain delays altogether.

(2) If you are a constructing party (usually, the landlord), beware of sophisticated receiving parties (usually, the tenant) who want rain excluded from the list of force majeure altogether. While it is true that contractors build in rain delay days, they do so based upon averages for the area. An unusually wet construction season or snowy winter can still justify some delay. You should still be permitted to count delays for "unusually severe weather."

(3) If you are a receiving party (usually, a tenant), be careful to require that the force majeure event actually caused a delay. Once construction is closed in, there really is not likely to be much in the way of rain delays. So the fact that it is raining does not automatically justify delay.

(4) Finally, everyone needs to be aware of the way contractors count delays. If the contractor was planning to work on a day—even weekend—and cannot, then that's a day of delay. This seems obvious, but what is less obvious is that if the contractor's work week is less than 7 days, then each calendar day of delay is worth more than 1 working day of delay (in one contract I worked on, the contractor had a 6-day work week and so each calendar day of delay was worth 1.167 working days of delay). This sounds aggressive, but I am assured that it is typical in the industry. Be sure when you are writing these provisions that you always talk about the number of days of delay *under the construction contract*.

c. *Mercy Killings*. Sometimes the problems that are causing the delay are simply insurmountable. At some point, the lease should just be put out of its misery. I usually have a provision that provides that if the landlord's work is not done within a certain time period (usually at least 6 months beyond the anticipated date of delivery, but sometimes longer), then either party can walk away. The landlord has to refund the prepaid rent and security deposit, obviously, and sometimes will agree to pay for some architect and design fees, but usually by that point, it seems like a good idea to everyone.

d. *Notices of Delay*. It is often a good idea to require notices of delay, especially if the construction is going to take a long time and one party might be surprised at the end to find out that all the deadlines and commencement dates have moved around without their knowledge. You need to come up with a system that is fair and within which your contractor and architect can operate. The purpose should be to give the other party fair notice, not to keep one party from claiming the delays to which they are entitled. I have generally found 10 days to be way too fast, but monthly notices work well because contractors are used to giving monthly reports. This notice should be all that is required, but it is helpful if the contractor can give a running tally as well, even if it is not binding.

e. *Response to Inaction*. Sometimes, construction exhibits require one party to do something, but their ability to do it is dependent upon a decision or delivery by the other party. This commonly occurs when the construction exhibit requires the landlord to do something that is dependent upon receiving the Tenant's Plans and Specifications or some other tenant decision before the work starts.

If the Tenant's Plans and Specifications are not ready—and that happens much more often than you would think—then the landlord should not be forced to delay its work or start work only to stop it while waiting for the tenant's decision (it is very hard to stop work once it has begun and later stages of the work are often dependent upon finishing earlier, seemingly-unconnected, stages). If the tenant has not gotten the necessary information to the landlord, it is better to just let the landlord decide where to put something and proceed with the rest of its work. This prevents the tenant from delaying Landlord's Work and gives the tenant an incentive to get the information to the landlord. The examples in "B" and "C" above both contain sentences that provide that landlord will do certain work in accordance with Tenant's Plans and Specifications if they are ready on time, but if they are not, allow landlord to make the tenant's decision and proceed with its work.

f. *Bifurcated Delivery Requirements*. It is not unusual for the construction exhibit to inadvertently require landlord to deliver items as part of the delivery of the Premises even thought they are not important to have in place until closer to the Commencement Date. This is particularly true with new developments, where the landlord would like to be able to finish some of the exterior work after they have delivered the space to the tenant for the tenant to perform its own work. That work is still part of the Landlord's Work, but the landlord needs to state clearly that completion of that portion of the work is not a condition to delivery (or being "ready for occupancy" or whatever term you use). Instead, there should be a separate deadline for that work. Be careful about making the deadline the "Commencement Date" or the "Rent Commencement Date" if that term is defined in part by the date tenant opens for business. You would not want the landlord to fail to comply with its obligations just because the tenant finished its work early, especially if the tenant's obligation to pay rent were excused or a penalty were to accrue for landlord's failure to perform the outstanding obligation by a deadline that the tenant can manipulate (even inadvertently). The following example shows one way to address this issue:

> Parking Areas and Walks in front of the Premises. This work is not required to be substantially completed before the Premises are "ready for occupancy," but must be substantially completed within ____ days after the Premises are deemed "ready for occupancy." [*I usually put the number of days in the finish-out period, although sometimes the tenant might need completion a bit earlier.*]
>
> a. Parking Areas: Landlord will provide hard surfaced parking areas and additional parking for tenants and tenants' employees and patrons.
>
> b. Walkways: Landlord will provide walkways surfaced with concrete, stone, brick or other hard material as specified by Landlord.
>
> c. Lighting: Landlord will provide artificial lighting in parking areas, common areas and walkways.

**E. Respect your Organization.** Describe the Landlord's Work only under the section entitled "Landlord's Work" and do the same for Tenant's Work. This is a problem when landlord and tenant are each doing different work in a particular area because the temptation is to write it all in one place. If the obligations are jumbled up, it makes it harder to be clear who is doing what and by when. Here is an example of it done right:

From the Landlord's Work:

> Electrical Work: Landlord will bring electric service to a meter base for the Building and will provide an electrical power conduit between the meter base and the Premises, but will not set any meter (or cause any meter to be set) or run any wires. The electrical service will be 110/208 - volt, 3-phase service, with

> amperage to meet the National Electric Code standards for the Premises.

From the Tenant's Work:

> Electrical Work: Tenant must provide and install a meter at the Landlord-provided meter base and copper conductor from the Landlord-provided meter bank through the Landlord-provided electrical power conduit to the Premises. Tenant must provide and install the electric panel, primary power disconnect and step-down transformer (if required). Tenant must complete the electrical installation within the Premises in accordance with all applicable codes.

**F.** Address Every Issue, But Only Once. Do not address the same issue more than once. In the following example, there were four sentences or sentence fragments that appeared to describe the same thing in slightly different ways. At least this poorly-written provision was all in one place, so the problem was glaringly obvious. But it is just as common for an issue (often, "tenant delay") to be addressed in several different places in the construction exhibit in slightly different ways. If there were a dispute, the court would be required to give effect to every provision and would have to figure out what you meant differently each time. That is almost never a good result for the client or the lawyer's malpractice premiums. To be clear, the description of the electrical work that Landlord is performing is one thing and the electrical work that Tenant is performing is another matter altogether. But you should only describe each of them once. The first example below was the original language as it was provided to me with my questions to my client in brackets and italics. The second example speaks for itself.

> Landlord will provide a storefront knee wall up to 24". Metal studs, dens-glas sheathing and air/vapor barrier on the exterior face [*of what?*]. Landlord will install drywall, ready to paint, on tenant face on knee wall. Approved finished for exterior knee wall where designated. [*There are four sentences or sentence fragments here. One of them describes the knee wall and the other 3 appear to describe something about its construction, which wouldn't normally take 3 sentences/sentence fragments. What is the arrangement?*]

> *Unfortunately, I don't know what was meant because these questions made the Landlord realize they weren't actually putting a knee wall in this space. Subsequent discussions have made it clear that the client was not putting knee walls in any space and never intended to. No one knows how it ended up in their "form" construction exhibit.*

**VI. SPECIAL ISSUE: USE OF THE ALLOWANCE.** The Allowance should only be used in connection with the tenant improvements to the Premises. This seems obvious, but in negotiations, the list of what can be paid for sometimes expands to include items that the landlord never intended to or should not pay for, often through the use of vague terms. I find that most of these unwanted and unwarranted expansions come in the following areas:

**A. "Soft costs."** The term "soft costs" is one that has so many different meanings that it is meaningless. Most landlords think it means costs that are related to construction, but are not direct construction costs, such as architectural and engineering costs (and maybe even costs for fixture and lighting consultants). But the term can also include legal fees and financing costs and the landlord rarely means to have the Allowance used for those types of expenses. Just list the specific non-construction expenses that can be paid and resist using the term "soft costs."

**B. Certain Personal Property.** Sometimes, tenants want to use the Allowance to pay for items that are really personal property. They do not improve the landlord's property at all and will not stay with the landlord's property when the lease expires or is terminated. If a landlord agrees to allow the Allowance to be used to pay for these items, then the landlord is just giving a direct subsidy to the tenant's business. Even worse, as soon as the tenant knows that the Allowance can be used for these costs, it starts banking on the actual construction costing the target amount (which never happens) so that it will have a certain amount of money left over to pay for these items. That never turns out well. When the construction costs exceed this inevitably-inaccurate budget, they seek to blame others—most often the landlord—and start to run out of money to operate the business. It is much better for the tenant to start out knowing that it has to find another source of funds for its personal property. If your landlord nevertheless agrees to this arrangement, at least try to avoid paying for inventory and be very careful about using the following terms:

1. "Removables." "Removables" is another term that sounds like it means something that is easily removed, perhaps by unplugging it, but really means something very different. This is a term that comes from mechanic's lien law; an unpaid contractor can come onto property and remove "removables." Although in *First Nat. Bank in Dallas v. Whirlpool Corp.*, 517 S.W.2d 262, 269 (Tex. 1974), the Texas Supreme Court described removables as those items that can be removed without material injury to the land, pre-existing improvements, or the improvements removed, the cases seem to have more to do with what seems fair to the judge in that particular case than any sort of logical division of improvements into those that are easily removed and those that are not. Just to list one of a very long list of unreconcilable examples, installed windows can be removed, even if removing them requires removing the brick from around the window as long as the brick can be replaced without damaging the structure. But window frames themselves? Those are not removables. *First Continental Real Estate Inv. Trust v. Continental Steel Co.*, 569 S.W.2d 42, 47 (Tex. Civ. App. Fort Worth 1978, no writ)(doors and windows); *McCallen v. Mogul Producing & Refining Co.*, 257 S.W. 918, 923 (Tex. Civ. App. Galveston 1923), writ dismissed w.o.j., (Feb. 6, 1924)(window frames). Even if you or your client is inclined to allow the tenant to use the Allowance to pay for personal property, despite my cogent arguments against doing so, do not use the term "removables." Instead, try to describe the particular items of personal property for which the tenant may use the Allowance.

2. Fixtures, Furniture and Equipment ("FFE" or "FF&E"). Of these three items, which are always listed together, furniture and equipment are actually pretty clear. They are both personal property that is not attached to the property in any way and, by my argument, should not be paid for out of the Allowance. The term "fixture," though, is unclear. Under Texas law, a fixture is personal property that becomes so attached to land or a building that it becomes part of the real property. It is fine for the landlord to pay for true fixtures. But in everyday usage, the term "fixtures" means trade fixtures, like racks for clothes, for which the landlord should not pay. If you need to describe these items for any reason, put the word "trade" before fixtures and avoid the acronyms. Better yet, try to list the specific items for which tenant may use the Allowance.

**VII. SPECIAL ISSUE: WHO PERFORMS THE WORK.** The party that cares the most about the quality and specific appearance of the tenant finish-out should always be the party that designs and performs the construction of the tenant finish-out. Most office leases have a specific standard of construction and in those cases, it is fine to have the landlord design and perform the work. But the more unique the office, the more important it becomes for the tenant to design and perform the work. And in virtually all retail leases, the tenant should design and perform the interior work.

**A. Landlord Often Not the Best Party for Finish-Out Work.** It is very tempting to think that the landlord, because it has constructed the base building, is so familiar with the construction process that the landlord should do the work, but such an approach is fraught with danger. Finish-out work is very different from base building work and experience with one is not as useful for the other as one might expect.

**B. Pitfalls of Tenant Disengagement.** More importantly, the landlord has experience with making the *landlord's* vision into reality, but no experience doing that for others. If the tenant cares about its vision, it should do the hard work to bring it to fruition. And it is hard work, which can seem overwhelming to a tenant. But if the tenant cares about timing, cost, and most importantly, appearance, the tenant should do the work. Otherwise, the tenant ends up disappointed and the other parties end up taking the blame for what was really avoidance behavior by the tenant. It can be a miserable start to a long-term relationship.

**C. Aside: The Same Issues Arise with Damage Clauses in Leases.** This same problem comes up with damage clauses in leases. Most leases require the landlord to carry the insurance on the finish-out and rebuild it either to the way it was when the landlord turned the space over to the tenant or to the way it was right before the damage. It all sounds good until the Premises are actually damaged and the landlord and tenant have to live through the process. It does not work the way it sounds like it will. Far better to have the tenant carry the insurance and rebuild however they want using whatever source of money they want, subject only to the landlord's approval of the design.

1. Landlord Required to Deliver the Space in Original Condition. The tenant rarely wants the space in the condition that it was in when the landlord turned the space over to the tenant, even if it was first generation space. They also need the "excess" insurance proceeds to pay for their finish-out. That usually requires the involvement of the lender, which is an unpleasant complication. If the proceeds are insufficient, the tenant is unhappy about having to come out of pocket or value engineer a re-design, instead complaining that the landlord carried too little insurance or used too much money to rebuild the space to the condition it was in when they turned the space over many years before.

2. Landlord Required to Deliver the Space in Pre-Damage Condition. If the lease requires the landlord to rebuild the space to the condition it was in right before the damage, that is also unworkable and unwanted. Usually, the landlord does not have as-built plans and neither does the tenant, which did not want to pay or take the time to go back and update the construction plans. But even if the landlord could rebuild perfectly, the tenant usually does not want that to happen. Most tenants want to take the opportunity to make changes, either to correct design flaws or just to update the appearance of the store. The tenant wants to re-design, but the landlord does not want to take on the responsibility for building the re-design, especially if they are trying to cap the costs at the available insurance proceeds. The negotiations to address this problem can last a long time and have all sorts of unwanted side effects.

**VIII. SPECIAL ISSUE: CURRENT ANALYSIS OF THE NEW TEXAS ANTI-INDEMNITY STATUTE ON WHICH YOU MAY NOT RELY AT ALL.** In 2011, the Texas legislature passed House Bill 2093, which adds Chapter 151 to the Texas Insurance Code (attached). The bill was effective January 1, 2012. The statute applies to "construction contracts or an agreement collateral to or affecting a construction contract." Under prior law, an owner could obtain an indemnity from its contractor for its own negligence as long as the indemnity met the "fair notice" standard. Construction agreements often required the contractor to name the owner as an additional insured on their CGL policies to back up this obligation. The problems arose when the general contractors turned around and passed the indemnities on to their subcontractors, in a way that was probably over-reaching. And as with so many of our statutes, the result of this over-reaching activity was a statute that was over-reaching in the opposite direction. *The new law renders this type of indemnity provision void, except for claims brought by an employee of the contractor or its subcontractors.* It also renders unenforceable any requirement that the contractor purchase additional insurance or endorsements or name a third party as an additional insured to the extent it requires coverage for the that third party's own negligence. As with the indemnity prohibition, there is an exception for requiring additional insurance to cover claims by employees of the contractor or its subcontractors. These provisions cannot be waived. I am only going to analyze the impact on leases, but obviously the impact on actual construction contracts is greater and you should pay attention to this statute if you work on one. Here are my current recommendations, but they can change on a dime because the legislation is so new and there is no case law. The question is whether or not a lease or the construction exhibit that is usually attached to a lease is something that "affects" a construction contract.

**A. Effect on Leases**. Here is what I think *right now* about the effect on leases:

1. Lease is *Not* "an Agreement that Affects a Construction Contract." The lease and the construction exhibit are not an agreement that "affects a construction contract." I could be wrong about this, but construction exhibits to leases are so far removed from the actual contracts, that I currently think this is the best approach.

2. Keep the Construction Exhibit as Part of the Lease. Many commentators have worried that having the construction exhibit be part of the lease would infect the rest of the lease and possibly render non-construction indemnities invalid. They have therefore recommended that the construction exhibit be removed from the lease and treated as a separate agreement. Right now, I don't agree. I think the construction exhibit should remain part of the lease and the indemnity and insurance provisions should remain in the body of the lease. If you make it a separate document that has to be signed, then you make it look more like an agreement that affects a construction contract. And that also creates some practical problems of drafting and execution that will end up causing a lot of problems for

no good reason. But make sure that you have severability language in your leases.

3. Addition to Forms. The construction exhibit should contain language that clarifies why it is not an agreement "affecting a construction contract." Here is some proposed language for the construction exhibit:

> "Not a Construction Contract or an Agreement Collateral to or Affecting a Construction Contract. Landlord and Tenant agree that this exhibit is merely one part of this lease, which contains the overall agreement concerning Tenant's use and occupancy of the Premises. In no event is this exhibit or this lease a construction contract or an agreement collateral to or affecting a construction contract."

4. Encourage Clients to Discuss with their Insurance Agent. If the end result of this legislation is that claims remain with the owner or Landlord, they can be covered by the commercial general liability insurance. So it's important to encourage your clients to visit with this issue with their insurance agents.

**B. Bonus Discussion about the Applicability to Construction Contracts**. Others at my firm who know more about construction contracts than I do say that it's not as scary for owners as it sounds and is a welcome relief for subcontractors:

1. "Means and Methods" Protection from Third-Party Claims. An owner is protected from claims of injury to third parties at construction sites by chapter 95 of the CPRC (Section 95.003) as long as they don't have a right to control or actually control the "means and methods" of the construction work, or have actual knowledge of a danger that results in injury, death, or property damage. Here is the "means and methods" provision out of Chapter 95:

> § 95.003. LIABILITY FOR ACTS OF INDEPENDENT CONTRACTORS.
>
> A property owner is not liable for personal injury, death, or property damage to a contractor, subcontractor, or an employee of a contractor or subcontractor who constructs, repairs, renovates, or modifies an improvement to real property, including personal injury, death, or property damage arising from the failure to provide a safe workplace unless:
>
> (1) the property owner exercises or retains some control over the manner in which the work is performed, other than the right to order the work to start or stop or to inspect progress or receive reports; and
>
> (2) the property owner had actual knowledge of the danger or condition resulting in the personal injury, death, or property damage and failed to adequately warn.

2. Permitted Indemnities. The owner can and should receive an indemnity from its contractor for claims by the employees of the contractor and subcontractor. The owner should also require the contractors and subcontractors to carry workers compensation insurance. Make sure your indemnity meets the "fair notice" standard. The standard AIA forms *do not* comply with the "fair notice" standard, so if you use the AIA forms, you will need to modify them.

**IX. CONCLUSION.** It is your job as a lawyer to overcome as many of the problems with construction agreements as you can. It is true that the lawyer is the person who understands the intricacies of construction the least and probably will never understand as much as the others involved in the actual design and construction. But that doesn't mean the lawyer doesn't have a valuable role. The lawyer is the one who needs to clarify *who* is going to do *what* by *when*.

**EXHIBIT "A"**

H.B. No. 2093

AN ACT

relating to the operation and regulation of certain consolidated insurance programs.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF TEXAS:

SECTION 1. Title 2, Insurance Code, is amended by adding Subtitle C to read as follows:

SUBTITLE C. PROGRAMS AFFECTING MULTIPLE LINES OF INSURANCE

CHAPTER 151. CONSOLIDATED INSURANCE PROGRAMS

SUBCHAPTER A. GENERAL PROVISIONS

Sec. 151.001. DEFINITIONS. In this chapter:

(1) "Consolidated insurance program" means a program under which a principal provides general liability insurance coverage, workers' compensation insurance coverage, or both that are incorporated into an insurance program for a single construction project or multiple construction projects.

(2) "Construction project" means construction, remodeling, maintenance, or repair of improvements to real property. The term includes the immediate construction location and areas incidental and necessary to the work as defined in the construction contract documents. A construction project under this chapter does not include a single family house, townhouse, duplex, or land development directly related thereto.

(3) "Contractor" means any person who has entered into a construction contract or a professional services contract and is enrolled in the consolidated insurance program.

(4) "Claim" includes a loss or liability for a claim, damage, expense, or governmentally imposed fine, penalty, administrative action, or other action.

(5) "Construction contract" means a contract, subcontract, or agreement, or a performance bond assuring the performance of any of the foregoing, entered into or made by an owner, architect, engineer, contractor, construction manager, subcontractor, supplier, or material or equipment lessor for the design, construction,

alteration, renovation, remodeling, repair, or maintenance of, or for the furnishing of material or equipment for, a building, structure, appurtenance, or other improvement to or on public or private real property, including moving, demolition, and excavation connected with the real property. The term includes an agreement to which an architect, engineer, or contractor and an owner's lender are parties regarding an assignment of the construction contract or other modifications thereto.

(6) "Indemnitor" means a party to a construction contract that is required to provide indemnification or additional insured status to another party to the construction contract or to a third party.

(7) "Insurer" has the meaning assigned by Section 560.001.

(8) "Principal" means the person who procures the insurance policy under a consolidated insurance program.

Sec. 151.002. RULES. The commissioner shall adopt rules as necessary to implement and enforce Subchapter B.

[Sections 151.003-151.050 reserved for expansion]

SUBCHAPTER B. GENERAL REQUIREMENTS

Sec. 151.051. DURATION OF GENERAL LIABILITY COVERAGE. A consolidated insurance program that provides general liability insurance coverage must provide completed operations insurance coverage for a policy period of not less than three years.

[Sections 151.052-151.100 reserved for expansion]

SUBCHAPTER C. REQUIREMENTS RELATED TO INDEMNIFICATION

Sec. 151.101. APPLICABILITY. (a) This subchapter applies to a construction contract for a construction project for which an indemnitor is provided or procures insurance subject to:

(1) this chapter; or

(2) Title 10.

(b) Subsection (a) applies regardless of whether the insurance is provided or procured before or after execution of the contract.

Sec. 151.102. AGREEMENT VOID AND UNENFORCEABLE. Except as provided by Section 151.103, a provision in a construction contract, or in an agreement collateral to or affecting a construction contract, is void and unenforceable as against public policy to the extent that it requires an indemnitor to indemnify, hold harmless, or defend a party, including a third party, against a claim caused by the negligence or fault, the breach or violation of a statute, ordinance, governmental regulation, standard, or rule, or the breach of contract of the indemnitee, its agent or employee, or any third party under the control or supervision of the indemnitee, other than the indemnitor or its agent, employee, or subcontractor of any tier.

Sec. 151.103. EXCEPTION FOR EMPLOYEE CLAIM. Section 151.102 does not apply to a provision in a construction contract that requires a person to indemnify, hold harmless, or defend another party to the construction contract or a third party against a claim for the bodily injury or death of an employee of the indemnitor, its agent, or its subcontractor of any tier.

Sec. 151.104. UNENFORCEABLE ADDITIONAL INSURANCE PROVISION. (a) Except as provided by Subsection (b), a provision in a construction contract that requires the purchase of additional insured coverage, or any coverage endorsement, or provision within an insurance policy providing additional insured coverage, is void and unenforceable to the extent that it requires or provides coverage the scope of which is prohibited under this subchapter for an agreement to indemnify, hold harmless, or defend.

(b) This section does not apply to a provision in an insurance policy, or an endorsement to an insurance policy, issued under a consolidated insurance program to the extent that the provision or endorsement lists, adds, or deletes named insureds to the policy.

Sec. 151.105. EXCLUSIONS. This subchapter does not affect:

(1) an insurance policy, including a policy issued under an owner-controlled or owner-sponsored consolidated insurance program or a contractor-controlled or contractor-sponsored consolidated insurance program, except as provided by Section 151.104;

(2) a cause of action for breach of contract or warranty that exists independently of an indemnity obligation, including an indemnity obligation in a construction contract under a construction project for which insurance is provided under a consolidated insurance program;

(3) indemnity provisions contained in loan and financing documents, other than construction contracts to which the contractor and owner's lender are parties as provided under Section 151.001(5);

(4) general agreements of indemnity required by sureties as a condition of execution of bonds for construction contracts;

(5) the benefits and protections under the workers' compensation laws of this state;

(6) the benefits or protections under the governmental immunity laws of this state;

(7) agreements subject to Chapter 127, Civil Practice and Remedies Code;

(8) a license agreement between a railroad company and a person that permits the person to enter the railroad company's property as an accommodation to the person for work under a construction contract that does not primarily benefit the railroad company;

(9) an indemnity provision pertaining to a claim based upon copyright infringement;

(10) an indemnity provision in a construction contract, or in an agreement collateral to or affecting a construction contract, pertaining to:

(A) a single family house, townhouse, duplex, or land development directly related thereto; or

(B) a public works project of a municipality; or

(11) a joint defense agreement entered into after a claim is made.

[Sections 151.106-151.150 reserved for expansion]

SUBCHAPTER D. NONWAIVER

Sec. 151.151. NONWAIVER. A provision of this chapter may not be waived by contract or otherwise.

SECTION 2. Section 2252.902, Government Code, is repealed.

SECTION 3. (a) Chapter 151, Insurance Code, as added by this Act, applies only to a new or renewed consolidated insurance program for a construction project that begins on or after January 1, 2012. A consolidated insurance program for a construction project that begins before January 1, 2012, is governed by the law as it existed immediately before the effective date of this Act, and that law is continued in effect for that purpose.

(b) The changes in law made by this Act apply only to an original construction contract with an owner of an improvement or contemplated improvement that is entered into on or after the effective date of this Act. If an original construction contract with an owner of an improvement or contemplated improvement is entered into on or after the effective date of this Act, the changes in law made by this Act apply to a related subcontract, purchase order contract, personal property lease agreement, and insurance policy. If an original construction contract with an owner of an improvement or contemplated improvement is entered into before the effective date of this Act, that original construction contract and a related subcontract, purchase order contract, personal property lease agreement, and insurance policy are governed by the law in effect immediately before the effective date of this Act, and that law is continued in effect for that purpose.

SECTION 4. This Act takes effect January 1, 2012.

President of the Senate

Speaker of the House

I certify that H.B. No. 2093 was passed by the House on May 13, 2011, by the following vote: Yeas 103, Nays 41, 1 present, not voting; that the House refused to concur in Senate amendments to H.B. No. 2093 on May 26, 2011, and requested the appointment of a conference committee to consider the differences between the two houses; and that the House adopted the conference committee report on H.B. No. 2093 on May 29, 2011, by the following vote: Yeas 121, Nays 21, 4 present, not voting.

Chief Clerk of the House

I certify that H.B. No. 2093 was passed by the Senate, with amendments, on May 23, 2011, by the following vote: Yeas 23, Nays 8; at the request of the House, the Senate appointed a conference committee to consider the differences between the two houses; and that the Senate adopted the conference committee report on H.B. No. 2093 on May 29, 2011, by the following vote: Yeas 26, Nays 5.

**EXHIBIT " "**

**CONSTRUCTION: NEW DEVELOPMENT**

## ARTICLE I
## PRE-CONSTRUCTION OBLIGATIONS

A. Preparation and Review of Tenant's Plans and Specifications. Tenant must deliver to Landlord, on or before ___ days after the execution of this lease, Tenant's proposed final plans and specifications for Tenant's Work (as described below), which proposed final plans and specifications must be complete and sufficient to obtain a building permit. Without limiting the generality of the immediately-preceding sentence, Tenant's submissions must include a site plan, exterior elevations, a floor plan, a reflected ceiling plan, a plumbing, electrical and HVAC plan, elevations of walls, and a fixture plan. Electrical plans submitted to Landlord for approval must have all load requirements detailed and must include complete panel, lighting fixture and equipment schedules. Tenant's electrical drawing submittal must include a tabulation of the electrical load including quantities and sizes of lamps, appliances, signs, water heaters, HVAC equipment, etc. and kilowatt demand for each installed item. A complete electrical panel schedule is required for each installation. Exposed fluorescent tubes will not be permitted in areas accessible by the public. All drawings must be at a scale of either 1/8" or 1/4". Landlord will not be required to accept and Tenant will not be considered to have delivered any plans that do not meet these requirements. Landlord cannot unreasonably withhold its approval of such proposed final plans and specifications and if Landlord disapproves of such proposed final plans and specifications, Landlord must state with specificity the items to which Landlord objects and the changes that would make the proposed final plans and specifications acceptable. If Landlord does not withhold its approval in the manner set forth above within 10 days after Tenant delivers the proposed final plans and specifications to Landlord, then Landlord will be deemed to have approved of the proposed final plans and specifications. If Landlord disapproves of the proposed final plans and specifications, then Tenant will have 20 days in which to prepare and submit revised proposed final plans and specifications. Landlord and Tenant will continue to exchange plans and specifications and comments, subject in all cases to the time periods set forth above, until the final plans and specifications have been approved. Landlord and Tenant agree to negotiate in good faith until they have reached an agreement, it being expressly understood and agreed that neither of them has the right to terminate this lease because of their failure to reach agreement. The approved designs, plans, specifications, and materials for Tenant's Work are referred to from time to time as the "Tenant's Plans and Specifications." Before beginning Tenant's Work, Tenant must provide Landlord with Tenant's Plans and Specifications in AutoCAD format.

B. Texas Asbestos Health Protection Act; Other Possible Requirements. Tenant must comply with the Texas Asbestos Health Protection Act (Texas Occupations Code, Title 12 – Practices and Trades Related to Water, Health and Safety, Subtitle B, Chapter 1954) in connection with the Premises. Landlord believes (but Tenant will want to confirm that this is the case with Tenant's own legal counsel) that Tenant will be required to obtain an asbestos survey as part of that compliance, and that Tenant may also be required to obtain a Texas Accessibility Standards review and an energy compliance review in connection with its building permit application. As a courtesy, Landlord may provide Tenant with any documentation related to those matters, but Tenant cannot rely on or use that documentation to meet its obligations under this lease. Tenant must submit evidence to Landlord that Tenant has complied with all such applicable requirements before Tenant will be permitted to begin Tenant's Work in the Premises.

C. Reservation of Space: In multi-story construction, the approximately 4' area under the 2nd story structure is reserved by Landlord for Landlord to use or to allow Tenant or any other tenant or occupant to use and may include water and sewer lines for 2nd story occupants, sprinkler mains, bathroom exhaust trunk lines, tenant feeds to electrical and telephone rooms, roof drains, HVAC chases and ductwork (or other method of HVAC distribution), gas lines, and other items as Landlord may install or permit to be installed.

D. Insurance and Indemnity Requirements. During any construction undertaken by or on behalf of Tenant at the Premises during the term of this lease, the insurance requirements under Article 15 of the lease and the indemnity requirements under Article 16 of the lease apply, and Tenant must provide evidence of appropriate insurance coverage prior to beginning any of Tenant's Work. [*If your insurance provisions do not include a requirement for Builder's Risk insurance during construction, then you should add the following, either here or in your insurance provisions: "At all times during which construction work is being performed by or on behalf of Tenant at the Premises, Tenant must maintain "Builder's Risk" insurance, covering the full replacement value of all such work being performed, including the existing structure, naming Landlord as an "additional insured as its interest may appear," and being written in amounts of coverage that meet any coinsurance requirements of the policy or policies. Coverage must include transit coverage and, if any materials are stored off-site, storage coverage in an amount sufficient to protect the property being transported or stored."*]

E. No Reliance. If Landlord ever delivers any drawings, plans, reports, surveys, or other information to Tenant, that delivery will be as a courtesy to Tenant only and is without any representation or warranty whatsoever. Tenant may not rely on or allow any third parties to rely on such items, which Tenant will use at its own risk. Landlord's comments to Tenant's proposed plans and specifications and approval of Tenant's Plans and Specifications do not in any way indicate that Landlord takes any responsibility for those items. All risk for the sufficiency (including code compliance) of plans and specifications, including Tenant's Plans and Specifications, belongs to Tenant.

F. Not a Construction Contract or an Agreement Collateral to or Affecting a Construction Contract. Landlord and Tenant agree that this exhibit is merely one part of this lease, which contains the overall agreement concerning Tenant's use and occupancy of the Premises. In no event is this exhibit or this lease a construction contract or an agreement collateral to or affecting a construction contract.

## ARTICLE II
## DESCRIPTION OF LANDLORD'S WORK

A. Description of Landlord's Work. The following work constitutes Landlord's Work. All work not specified as being Landlord's Work is Tenant's Work. Subject to the provisions below, Landlord agrees that it will proceed to perform Landlord's Work in substantial compliance with the description of Landlord's Work in this Article II.

1. Structure:

   a. Exterior Walls: Landlord will construct the exterior walls and select exterior wall surface materials and will paint exterior trim and other exterior work normally requiring painting.

   b. Roof: Roofing will be built-up composition roofing, or other material specified by Landlord.

   c. Second Floor (if applicable): In multi-story buildings, Landlord will provide metal deck and concrete slab at the second story.

2. Store Front: Landlord will provide the store front for the location, which will be architecturally compatible with the overall design of the Project.

3. Interior Finish:

   a. Floor: Landlord will provide a floor slab of smooth finish concrete. [*If there is a leave-out, specify that fact here, including how wide it is and where it is located. For some tenants, such as restaurant tenants, the landlord will not provide a slab because they'd have to cut it too much to put in the utility lines. In that case, either the tenant pours the slab or the landlord does so within*

*a certain number of days after notice from tenant and that obligation should not be required in order to meet the "ready for occupancy" deadline.*]

b. Interior of Exterior Walls: Landlord will put 1 coat of block filler on the inside of any exterior masonry or concrete walls.

c. Interior Walls: Landlord will provide metal stud framing only, without insulation or gypsum board for the demising walls, front walls, and rear wall, which framing will extend from the floor to the underside of the roof or second story construction, as applicable. Notwithstanding the foregoing, Landlord will provide insulation and gypsum board walls around any electrical room, elevator shaft, elevator machine room, fire riser room and stairwell (at fire stair).

4. Parking Areas and Walks: This work is not required to be substantially completed before the Premises are "ready for occupancy," but must be substantially completed within ____ days after the Premises are deemed "ready for occupancy."

a. Parking Areas: Landlord will provide hard surfaced parking areas.

b. Walkways: Landlord will provide walkways surfaced with concrete, stone, brick or other hard material as specified by Landlord.

c. Lighting: Landlord will provide artificial lighting in parking areas and walkways.

5. Utilities:

a. Domestic Water: Landlord will bring cold water service to a location in the Common Area from which Tenant will run its water into the Premises.

b. Sanitary Sewer: Landlord will provide a sewer line (under the concrete slab of the Premises) for Tenant to tap into for plumbing connections to the lavatory and toilet for toilet room(s), in conformity with applicable code requirements.

c. Natural Gas Service: If the following blank is checked _____, then Landlord will bring gas service to the boundary of the Premises at Tenant's cost. Tenant must deposit $1,500. as an estimate of such cost with Landlord at the same time this lease is executed, but such estimate is not binding upon Landlord. If the foregoing box is not checked or Tenant does not deposit the amount set forth above with Landlord at the same time this lease is executed, then Landlord will have no obligation to deliver gas service to Tenant.

d. Electrical Installation: Landlord will bring electric service to a meter base for the building in which the Premises are located and will provide an electrical power conduit between the meter base and the Premises, but will not set any meter (or cause any meter to be set) or run any wires. The electrical service will be 110/208 - volt, 3-phase service, with amperage to meet the National Electric Code standards for the Premises.

e. Telephone Service: Landlord will provide a conduit for telephone service into the Premises, but will not provide (or cause to be provided) any lines or equipment.

6. Building Systems:

a. Fire Protection System: Landlord will provide a sprinkler main line in conformity with applicable code requirements for an open, exposed area, with no interior partitions, with heads pointed up (Tenant must provide lateral grids and heads, as described in Article III below).

b. Heating, Ventilating and Air Conditioning ("HVAC") Systems: Landlord will provide support on the roof of the building in which the Premises are located for Tenant's HVAC unit at a location that Landlord selects. Landlord will provide a chase for HVAC power and refrigerant lines between the roof and the Premises.

B. Limitations and Conditions:

1. Limited Extent of Landlord's Work. The work to be done by Landlord is limited to that required by this Article II, if any. All work not so classified as Landlord's Work is Tenant's Work.

2. Additional Work. If Landlord consents to perform work that is in excess of that required by this Article II, Landlord will do so only after Tenant has deposited an amount equal to Landlord's non-binding estimate of the cost to perform such excess work in the form of cash, money order, or cashier's check. Tenant agrees to make such deposit within 10 days after Landlord delivers such estimate to Tenant. If Tenant does not make the deposit within that time period, then Landlord will not perform the additional work and 10 days will be subtracted from the date the Premises are deemed "ready for occupancy." The deposit is not binding, so that if the cost to perform the additional work exceeds the amount of the deposit, Tenant must pay that excess within 30 days after Landlord notifies Tenant of the amount of the excess. If Tenant does not do so, then such failure will constitute an event of default under this lease, without the requirement of additional notice from Landlord.

C. "Ready for Occupancy":

1. "Ready for Occupancy." The Premises will be deemed "ready for occupancy" when Landlord's Work has been substantially completed (except for minor finishing jobs). If Landlord's Work is delayed because of a default or failure to act, or both, of Tenant, then the Premises will also be deemed "ready for occupancy" when Landlord's Work would have been substantially completed if Tenant's default or failure, or both, had not occurred. When the Premises are ready for occupancy (which, unless Tenant objects and Landlord's architect or general contractor fails to certify to the date selected by Landlord, is the date Landlord delivers to Tenant a written or verbal statement to the effect that they are ready for occupancy), Tenant agrees to accept possession of the Premises and to act and to proceed with due diligence to perform Tenant's Work, as described in Article III below, and to open for business at the Premises.

2. Delay in "Ready for Occupancy." If, for any reason the Premises are not "ready for occupancy'" by any estimated date or by the end of any estimated time period, Landlord cannot be deemed to be in default or otherwise liable in damages to Tenant, nor will the term of this lease be affected. If, however, for any reason the Premises are not "ready for occupancy" by _____, Landlord cannot be deemed to be in default or otherwise liable in damages to Tenant, but this lease will automatically terminate, in which event neither party will have any further liabilities or obligations, except that Landlord must repay to Tenant any prepaid rent or security deposit.

3. Resolution of Disputes Concerning Landlord's Work. If a dispute as to work performed or required to be performed by Landlord or Tenant arises, the certificate of Landlord's architect or general contractor is conclusive. By occupying the Premises, Tenant will be deemed to have accepted the same and to have acknowledged that the same fully comply with Landlord's covenants and obligations under this lease. Occupancy of the Premises by Tenant prior to the Commencement Date is subject to all of the terms and provisions of this lease, excepting only those requiring the payment of rent.

**ARTICLE III**
**DESCRIPTION OF TENANT'S WORK**

A. Description of Tenant's Work. Tenant must construct and perform Tenant's Work at its sole cost and expense. Tenant agrees to begin performing the Tenant's Work and to open for business at the Premises as soon as possible after (but not before) Landlord approves Tenant's Plans and Specifications. "Tenant's Work" includes but is not limited to the following:

1. Store Front: To the extent that Tenant makes changes to the store front (which changes must be approved by Landlord in advance and must comply with all applicable code requirements), then Tenant is responsible for performing and paying for such changes. Tenant is also responsible for all entrance and exit doors and related hardware other than those that are part of the store front.

2. Interior Finish:

   a. Floor: Tenant must provide and install the floor covering and base. Tenant is responsible for all concrete slab saw cuts necessary for the installation of plumbing and other improvements; however, Tenant is not permitted to penetrate or cut the slab without first obtaining Landlord's written approval. Immediately following any such penetration or cut, Tenant must finish the concrete surface to agreed specifications, flush with existing floors.

   b. Interior of Exterior Walls: Tenant must insulate and finish exterior walls on their interior surfaces. At Landlord's option, Tenant must provide either (i) thermal insulation with a minimum R-19 rating, or (ii) sound attenuation with a minimum STC rating of 35. Tenant is not permitted to penetrate exterior walls without first obtaining Landlord's written approval. All materials must be non-combustible and have U.L. approval and mill stamp indicating type of treatment. Field applied treatment of combustible materials is not be permitted. Tenant must provide and perform all interior finish. Tenant must provide and install display window enclosures and interior finish.

   c. Interior Walls: Tenant must install 5/8" fire core gypsum board, taped and bedded up to structural deck. Tenant must seal all penetrations for sleeves, conduit, pipe, etc. airtight. No sound transmission or vibration transmission will be permitted outside the Premises and Tenant must insulate demising walls to prevent such transmission. At Landlord's option, Tenant must provide either (i) thermal insulation with a minimum R-19 rating or (ii) sound attenuation with a minimum STC rating of 35. All other interior partitions must be of metal stud construction and have gypsum board finish on all sides, taped and bedded. All materials must be non-combustible and have U.L. approval and mill stamp indicating type of treatment. Field applied treatment of combustible materials is not be permitted. Tenant must provide and perform all interior finish.

   d. Structural Columns: Tenant must finish all structural columns from the floor to the underside of roof construction.

   e. Ceiling Material: Tenant is responsible for designing and installing the ceiling, but must obtain Landlord's prior written consent to any ceiling before installing it. The easiest way to submit ceiling plans for approval is to include them in Tenant's proposed final plans and specifications. Landlord will not approve _____. Ceilings must be non-combustible and must terminate tight against wall surfaces or be returned to structure and sealed as required by code.

   f. Store Fixtures and Furnishings. Tenant must provide and install all store fixtures and furnishings.

3. Sanitary Facilities: Tenant must build and install as many bathrooms as are required by Code, all of which must have, at a minimum, a toilet and sink and the necessary plumbing connections plus interior walls and doors with hardware necessary to separate the bathrooms from any adjacent space. The bathrooms must have 1 exhaust fan and 1 wall light with convenience outlet switched together.

4. Signs and Awnings: Tenant must provide signs and any awnings approved by Landlord, including any required blocking for support. If electrical service is required to light Tenant's exterior storefront sign, then Tenant must provide the electrical power (including any conduit, wiring, relays, junction boxes, transformers, and access panels) from Tenant's electrical panel to the sign. The actual hook-up of Tenant's sign is Tenant's responsibility. All penetrations of exterior walls must be approved in advance by Landlord.

5. Utilities:

   a. Domestic Water: Tenant must connect to the Landlord-supplied water line in the Common Area and set its own meter or submeter, as the case may be.

   b. Sanitary Sewer: Tenant must tap all sewer service and install all other plumbing work in accordance with all applicable codes. Tenant must install a minimum of 1 floor drain in each kitchen and bathroom area. All cleanouts must be accessible. Grease traps are required for any system or appliance producing grease. If grease traps and associated plumbing have not been installed prior to Landlord's exterior paving, Landlord may install the grease traps and associated plumbing to Tenant's specifications and Tenant will reimburse Landlord for the cost.

   c. Natural Gas Service (if provided as part of Landlord's Work): Tenant is responsible for setting the meter and all associated costs.

   d. Electrical Installation: Tenant must provide and install a meter at the Landlord-provided meter base and copper conductor from the Landlord-provided meter bank through the Landlord-provided electrical power conduit to the Premises. Tenant must provide and install the electric panel, primary power disconnect, and step-down transformer (if required). Tenant must complete the electrical installation within the Premises in accordance with all applicable codes.

   e. Telephone System: Tenant must connect to the local telephone company distribution point outside the Premises through any Landlord-provided conduit to the Premises. If Landlord is not providing conduit, then adding the conduit is part of Tenant's Work and must be shown on Tenant's Plans and Specifications. All telephone equipment panels, outlets, conduit and wiring are Tenant's responsibility.

6. Store Systems:

   a. Fire Protection System: Tenant must connect its lateral grids and heads to the Landlord-supplied trunk line in the Premises using a licensed sprinkler contractor approved by Landlord. Tenant must receive approval from this work from all governing authorities and Landlord's insurance carrier. At Landlord's option, Landlord may provide such grids and heads during Landlord's Work and then charge back the cost of such system to Tenant.

   b. Heating, Ventilating and Air Conditioning Systems: Tenant must provide a unit or units adequate to provide at least a 25-degree differential and must firmly secure the roof top units to the Landlord-provided supports. Tenant must connect each unit to Tenant-provided power and

refrigerant lines through the Landlord-provided chase to Tenant's electrical panel and Tenant's air handling unit or units located above the ceiling. Tenant must provide all air handling units, ductwork, and distribution. Tenant must install and provide all connections to the make-up air intake louver or louvers. Tenant must provide necessary screening for Tenant's unit per Landlord's specifications and as required by code.

c. Fire Alarm System: Tenant must provide and install smoke detectors, pull station, horn, strobes, and other items as required by code.

d. Security System. If Tenant wishes to have a security system, Tenant is responsible for installing it.

B. Performance of Tenant's Work. Tenant must follow whatever "work letter" instructions, if any, that Landlord delivers to Tenant in connection with the timing and performance of Tenant's Work. Tenant must not damage the building in which the Premises are located or any other portion of the Project. Any roof penetration must be performed by Landlord's roofer or, at Landlord's option, by a bonded roofer approved in advance by Landlord. Roof work can begin only after Landlord has given its consent, which consent may be conditioned upon Landlord's approval of the steps Tenant and Tenant's roofer will be taking to prevent injury to the roof and to spread the weight of any equipment being installed. Tenant is also responsible for obtaining, and paying for, professional inspections of any structural work (including any roof work or concrete work).

C. Cost; Licenses and Permits. All work undertaken by Tenant is at Tenant's expense. Tenant must secure all necessary licenses and permits necessary or useful in connection with Tenant's Work. If any part of the work that Tenant performs at the Premises requires a building permit, then Tenant may not begin any work in the Premises until Tenant has received a building permit and must, if Landlord request, deliver a copy of the building permit to Landlord.

D. Landlord Must Pre-Approve all Contractors. Tenant must obtain Landlord's written approval of all contractors before awarding any portion of Tenant's Work to such contractor or otherwise permitting such contractor to perform work in the Premises.

E. Completion Notice. Tenant must notify Landlord that Tenant's Work is complete and deliver to Landlord, in AutoCAD format, the Tenant's Plans and Specifications, updated to reflect all changes to the previously-delivered AutoCAD Tenant's Plans and Specifications. Tenant must deliver to Landlord a copy of Tenant's certificate of occupancy within 30 days after Tenant's Work is substantially complete but in any event before Tenant opens for business in the Premises. Tenant's finished Tenant's Work is subject to Landlord's approval and acceptance. However, if the finished Tenant's Work is constructed in substantial accordance with the Tenant's Plans and Specifications, then Landlord must approve the finished Tenant's Work.

F. Confirmation of Commencement Date. Tenant agrees that at the request of Landlord, Tenant will, following the Commencement Date, execute and deliver a written statement acknowledging that Tenant has accepted possession and reciting the exact Commencement Date and expiration date of this lease.

G. Joint Opening. Tenant agrees to participate in a joint opening of the Project if requested to do so by Landlord.

**EXHIBIT " "**

**CONSTRUCTION: LIMITED LANDLORD'S WORK**

**ARTICLE I**
**PRE-CONSTRUCTION OBLIGATIONS**

A. Preparation and Review of Tenant's Plans and Specifications. Tenant must deliver to Landlord, on or before ___ days after the execution of this lease, Tenant's proposed final plans and specifications for Tenant's Work (as described below), which proposed final plans and specifications must be complete and sufficient to obtain a building permit. Without limiting the generality of the immediately-preceding sentence, Tenant's submissions must include a site plan, exterior elevations, a floor plan, a reflected ceiling plan, a plumbing, electrical and HVAC plan, elevations of walls, and a fixture plan. Electrical plans submitted to Landlord for approval must have all load requirements detailed and must include complete panel, lighting fixture and equipment schedules. Tenant's electrical drawing submittal must include a tabulation of the electrical load including quantities and sizes of lamps, appliances, signs, water heaters, HVAC equipment, etc. and kilowatt demand for each installed item. A complete electrical panel schedule is required for each installation. Exposed fluorescent tubes will not be permitted in areas accessible by the public. All drawings must be at a scale of either 1/8" or 1/4". Landlord will not be required to accept and Tenant will not be considered to have delivered any plans that do not meet these requirements. Landlord cannot unreasonably withhold its approval of such proposed final plans and specifications and if Landlord disapproves of such proposed final plans and specifications, Landlord must state with specificity the items to which Landlord objects and the changes that would make the proposed final plans and specifications acceptable. If Landlord does not withhold its approval in the manner set forth above within 10 days after Tenant delivers the proposed final plans and specifications to Landlord, then Landlord will be deemed to have approved of the proposed final plans and specifications. If Landlord disapproves of the proposed final plans and specifications, then Tenant will have 20 days in which to prepare and submit revised proposed final plans and specifications. Landlord and Tenant will continue to exchange plans and specifications and comments, subject in all cases to the time periods set forth above, until the final plans and specifications have been approved. Landlord and Tenant agree to negotiate in good faith until they have reached an agreement, it being expressly understood and agreed that neither of them has the right to terminate this lease because of their failure to reach agreement. The approved designs, plans, specifications, and materials for Tenant's Work are referred to from time to time as the "Tenant's Plans and Specifications." Before beginning Tenant's Work, Tenant must provide Landlord with Tenant's Plans and Specifications in AutoCAD format.

B. Texas Asbestos Health Protection Act; Other Possible Requirements. Tenant must comply with the Texas Asbestos Health Protection Act (Texas Occupations Code, Title 12 – Practices and Trades Related to Water, Health and Safety, Subtitle B, Chapter 1954) in connection with the Premises. Landlord believes (but Tenant will want to confirm that this is the case with Tenant's own legal counsel) that Tenant will be required to obtain an asbestos survey as part of that compliance, and that Tenant may also be required to obtain a Texas Accessibility Standards review and an energy compliance review in connection with its building permit application. As a courtesy, Landlord may provide Tenant with any documentation related to those matters, but Tenant cannot rely on or use that documentation to meet its obligations under this lease. Tenant must submit evidence to

Landlord that Tenant has complied with all such applicable requirements before Tenant will be permitted to begin Tenant's Work in the Premises.

C. Reservation of Space: In multi-story construction, the approximately 4' area under the 2nd story structure is reserved by Landlord for Landlord to use or to allow Tenant or any other tenant or occupant to use and may include water and sewer lines for 2nd story occupants, sprinkler mains, bathroom exhaust trunk lines, tenant feeds to electrical and telephone rooms, roof drains, HVAC chases and ductwork (or other method of HVAC distribution), gas lines, and other items as Landlord may install or permit to be installed.

D. Insurance and Indemnity Requirements. During any construction undertaken by or on behalf of Tenant at the Premises during the term of this lease, the insurance requirements under Article 15 of the lease and the indemnity requirements under Article 16 of the lease apply, and Tenant must provide evidence of appropriate insurance coverage prior to beginning any of Tenant's Work. [*If your insurance provisions do not include a requirement for Builder's Risk insurance during construction, then you should add the following, either here or in your insurance provisions: "At all times during which construction work is being performed by or on behalf of Tenant at the Premises, Tenant must maintain "Builder's Risk" insurance, covering the full replacement value of all such work being performed, including the existing structure, naming Landlord as an "additional insured as its interest may appear," and being written in amounts of coverage that meet any coinsurance requirements of the policy or policies. Coverage must include transit coverage and, if any materials are stored off-site, storage coverage in an amount sufficient to protect the property being transported or stored."*]

E. No Reliance. If Landlord ever delivers any drawings, plans, reports, surveys, or other information to Tenant, that delivery will be as a courtesy to Tenant only and is without any representation or warranty whatsoever. Tenant may not rely on or allow any third parties to rely on such items, which Tenant will use at its own risk. Landlord's comments to Tenant's proposed plans and specifications and approval of Tenant's Plans and Specifications do not in any way indicate that Landlord takes any responsibility for those items. All risk for the sufficiency (including code compliance) of plans and specifications, including Tenant's Plans and Specifications, belongs to Tenant.

F. Not a Construction Contract or an Agreement Collateral to or Affecting a Construction Contract. Landlord and Tenant agree that this exhibit is merely one part of this lease, which contains the overall agreement concerning Tenant's use and occupancy of the Premises. In no event is this exhibit or this lease a construction contract or an agreement collateral to or affecting a construction contract.

## ARTICLE II
## DESCRIPTION OF LANDLORD'S WORK

A. Description of Landlord's Work. The following work constitutes Landlord's Work. All work not specified as being Landlord's Work is Tenant's Work. Subject to the provisions below, Landlord agrees that it will proceed to perform Landlord's Work in substantial compliance with the description of Landlord's Work in this Article II. [*The work varies for each tenant, but when writing it, be sure to fill in the various categories in the order presented below and then just put "none" next to the other categories.*]

1. Demolition.

2. Structure.

3. Store Front.

4. Interior Finish.

5. Sanitary Facilities.

6. Utilities.

7. Building Systems (fire protection, HVAC, etc.).

8. Parking Areas and Walks in front of the Premises. [*If this work does not have to be completed before the Premises are ready for occupancy, then say so and give a deadline for completion.*]

B. Limitations and Conditions:

1. Limited Extent of Landlord's Work. The work to be done by Landlord is limited to that required by this Article II, if any. All work not so classified as Landlord's Work is Tenant's Work.

2. Additional Work. If Landlord consents to perform work that is in excess of that required by this Article II, Landlord will do so only after Tenant has deposited an amount equal to Landlord's non-binding estimate of the cost to perform such excess work in the form of cash, money order, or cashier's check. Tenant agrees to make such deposit within 10 days after Landlord delivers such estimate to Tenant. If Tenant does not make the deposit within that time period, then Landlord will not perform the additional work and 10 days will be subtracted from the date the Premises are deemed "ready for occupancy." The deposit is not binding, so that if the cost to perform the additional work exceeds the amount of the deposit, Tenant must pay that excess within 30 days after Landlord notifies Tenant of the amount of the excess. If Tenant does not do so, then such failure will constitute an event of default under this lease, without the requirement of additional notice from Landlord.

C. "Ready for Occupancy":

1. "Ready for Occupancy." The Premises will be deemed "ready for occupancy" when Landlord's Work has been substantially completed (except for minor finishing jobs). If Landlord's Work is delayed because of a default or failure to act, or both, of Tenant, then the Premises will also be deemed "ready for occupancy" when Landlord's Work would have been substantially completed if Tenant's default or failure, or both, had not occurred. When the Premises are ready for occupancy (which, unless Tenant objects and Landlord's architect or general contractor fails to certify to the date selected by Landlord, is the date Landlord delivers to Tenant a written or verbal statement to the effect that they are ready for occupancy), Tenant agrees to accept possession of the Premises and

to act and to proceed with due diligence to perform Tenant's Work, as described in Article III below, and to open for business at the Premises.

2. Delay in "Ready for Occupancy." If, for any reason the Premises are not "ready for occupancy'" by any estimated date or by the end of any estimated time period, Landlord cannot be deemed to be in default or otherwise liable in damages to Tenant, nor will the term of this lease be affected. If, however, for any reason the Premises are not "ready for occupancy" by _____, Landlord cannot be deemed to be in default or otherwise liable in damages to Tenant, but this lease will automatically terminate, in which event neither party will have any further liabilities or obligations, except that Landlord must repay to Tenant any prepaid rent or security deposit.

3. Resolution of Disputes Concerning Landlord's Work. If a dispute as to work performed or required to be performed by Landlord or Tenant arises, the certificate of Landlord's architect or general contractor is conclusive. By occupying the Premises, Tenant will be deemed to have accepted the same and to have acknowledged that the same fully comply with Landlord's covenants and obligations under this lease. Occupancy of the Premises by Tenant prior to the Commencement Date is subject to all of the terms and provisions of this lease, excepting only those requiring the payment of rent.

## ARTICLE III
## DESCRIPTION OF TENANT'S WORK

A. Description of Tenant's Work. Tenant must construct and perform Tenant's Work at its sole cost and expense. Tenant agrees to begin performing the Tenant's Work and to open for business at the Premises as soon as possible after (but not before) Landlord approves Tenant's Plans and Specifications. "Tenant's Work" and includes, but is not limited to, the following [*This description is just a starting place; it will probably change depending on what is included in Landlord's Work.*]:

1. Store Front: To the extent that Tenant installs or makes changes to the store front (which changes must be approved by Landlord in advance and must comply with all applicable code requirements), then Tenant is responsible for performing and paying for such changes. Tenant is also responsible for all entrance and exit doors and related hardware other than those that are part of the store front.

2. Interior Finish:

   a. Floor: Tenant is not permitted to penetrate or cut the slab without first obtaining Landlord's written approval. Tenant must provide and install the floor covering and base.

   b. Interior of Exterior Walls: If the interior surface of exterior walls has not been finished or if Tenant wishes to make changes to the finish, then Tenant must insulate and finish exterior walls on their interior surfaces. At Landlord's option, Tenant must provide either (i) thermal insulation with a minimum R-19 rating, or (ii) sound attenuation with a minimum STC rating of 35. Tenant is not permitted to penetrate exterior walls without first obtaining Landlord's written approval. All materials must

be non-combustible and have U.L. approval and mill stamp indicating type of treatment. Field applied treatment of combustible materials is not permitted. Tenant must provide and install display window enclosures and interior finish.

c. Interior Walls: If the surface of interior walls has not been finished or if Tenant wishes to make changes to the finish, then Tenant must install 5/8" fire core gypsum board, taped and bedded up to structural deck. Tenant must seal all penetrations for sleeves, conduit, pipe, etc. airtight. No sound transmission or vibration transmission will be permitted outside the Premises and Tenant must insulate demising walls to prevent such transmission. At Landlord's option, Tenant must provide either (i) thermal insulation with a minimum R-19 rating or (ii) sound attenuation with a minimum STC rating of 35. All other interior partitions must be of metal stud construction and have gypsum board finish on all sides, taped and bedded. All materials must be non-combustible and have U.L. approval and mill stamp indicating type of treatment. Field applied treatment of combustible materials is not permitted. Tenant must provide and perform all interior finish.

d. Structural Columns: If the structural columns have not already been finished or if Tenant wishes to modify them, then Tenant must finish all structural columns from the floor to the underside of roof construction.

e. Ceiling Material: If no ceiling is in place or if Tenant wishes to make changes to the ceiling, Tenant must obtain Landlord's prior written consent to any ceiling before installing it. The easiest way to submit ceiling plans for approval is to include them in Tenant's proposed final plans and specifications. Landlord will not approve _____. Ceilings must be non-combustible and must terminate tight against wall surfaces or be returned to structure and sealed as required by code.

f. Store Fixtures and Furnishings. Tenant must provide and install all store fixtures and furnishings.

3. Sanitary Facilities: If there is an existing bathroom, Tenant must bring it up to code. If there is not an existing bathroom and one or more is required by code, Tenant must build and install as many bathrooms as are required by Code, all of which must have, at a minimum, a toilet and sink and the necessary plumbing connections plus interior walls and doors with hardware necessary to separate the bathrooms from any adjacent space. The bathrooms must have 1 exhaust fan and 1 wall light with convenience outlet switched together.

4. Signs and Awnings: Tenant must provide signs and any awnings approved by Landlord, including any required blocking for support. If electrical service is required to light Tenant's exterior storefront sign, then Tenant must provide the electrical power (including any conduit, wiring, relays, junction boxes, transformers, and access panels) from Tenant's electrical panel to the sign. The actual hook-up of Tenant's sign is Tenant's responsibility. All penetrations of exterior walls must be approved in advance by Landlord.

5. Utilities: [*Include the following sentences only if true.*] Landlord makes no representation or warranty concerning the existence, size, or placement of any utility lines, meters, or systems. Tenant accepts all lines and systems in their "AS IS" condition. Tenant must perform any utility work in accordance with applicable codes. All service deposits must be made by Tenant at Tenant's expense.

   a. Domestic Water: Tenant may re-use any existing lines, but is responsible for any changes to those lines. If there is no existing service, then Tenant must connect to the main line and distribute the service to and within the Premises. Tenant must provide all meters or other measuring devices used in connection with the utility service.

   b. Sanitary Sewer: Tenant may re-use any existing lines, but is responsible for any changes to those lines. If there is no existing service, then Tenant must connect to the main line and distribute the service to and within the Premises. Tenant must install a minimum of 1 floor drain in each kitchen and bathroom area. Grease traps are required for any system or appliance producing grease. If grease traps and associated plumbing have not been installed prior to Landlord's exterior paving, Landlord may install the grease traps and associated plumbing to Tenant's specifications and Tenant will reimburse Landlord for the cost. All cleanouts must be accessible.

   c. Natural Gas Service (if present): Tenant is responsible for setting any meter and all associated costs.

   d. Electrical Installation: If there is no existing conduit, then adding the conduit is part of Tenant's Work and must be shown on Tenant's Plans and Specifications. All electrical equipment panels, outlets, conduit and wiring are Tenant's responsibility.

   e. Telephone System: If there is no existing conduit, then adding the conduit is part of Tenant's Work and must be shown on Tenant's Plans and Specifications. All telephone equipment panels, outlets, conduit and wiring are Tenant's responsibility.

6. Store Systems:

   a. Fire Protection System (if present): If there is an existing trunk line (or Landlord is providing one) in the Premises, Tenant must connect its lateral grids and heads to that trunk line, using a licensed sprinkler contractor approved by Landlord. The sprinkler system installation will be subject to approval by all governing authorities and Landlord's insurance carrier.

   b. Heating, Ventilating and Air Conditioning ("HVAC") Systems: [*Include the following sentences only if true.*] If there is an existing HVAC system, then Tenant accepts all HVAC equipment and the system in its "AS-IS" condition. Tenant is solely responsible for all work associated with the HVAC system. Tenant must provide necessary screening for

Tenant's unit in accordance with the requirements of Landlord and applicable code.

c. Fire Alarm System: Tenant must provide and install smoke detectors, pull station, horn, strobes, and other items as required by code.

d. Security System. If Tenant wishes to have a security system, Tenant is responsible for installing it.

B. Performance of Tenant's Work. Tenant must follow whatever "work letter" instructions, if any, that Landlord delivers to Tenant in connection with the timing and performance of Tenant's Work. Tenant must not damage the building in which the Premises are located or any other portion of the Project. Any roof penetration must be performed by Landlord's roofer or, at Landlord's option, by a bonded roofer approved in advance by Landlord. Roof work can begin only after Landlord has given its consent, which consent may be conditioned upon Landlord's approval of the steps Tenant and Tenant's roofer will be taking to prevent injury to the roof and to spread the weight of any equipment being installed. Tenant is also responsible for obtaining, and paying for, professional inspections of any structural work (including any roof work or concrete work).

C. Cost; Licenses and Permits. All work undertaken by Tenant is at Tenant's expense. Tenant must secure all necessary licenses and permits necessary or useful in connection with Tenant's Work. If any part of the work that Tenant performs at the Premises requires a building permit, then Tenant may not begin any work in the Premises until Tenant has received a building permit and must, if Landlord request, deliver a copy of the building permit to Landlord.

D. Landlord Must Pre-Approve all Contractors. Tenant must obtain Landlord's written approval of all contractors before awarding any portion of Tenant's Work to such contractor or otherwise permitting such contractor to perform work in the Premises.

E. Completion Notice. Tenant must notify Landlord that Tenant's Work is complete and deliver to Landlord, in AutoCAD format, the Tenant's Plans and Specifications, updated to reflect all changes to the previously-delivered AutoCAD Tenant's Plans and Specifications. Tenant must deliver to Landlord a copy of Tenant's certificate of occupancy within 30 days after Tenant's Work is substantially complete but in any event before Tenant opens for business in the Premises. Tenant's finished Tenant's Work is subject to Landlord's approval and acceptance. However, if the finished Tenant's Work is constructed in substantial accordance with the Tenant's Plans and Specifications, then Landlord must approve the finished Tenant's Work.

F. Confirmation of Commencement Date. Tenant agrees that at the request of Landlord, Tenant will, following the Commencement Date, execute and deliver a written statement acknowledging that Tenant has accepted possession and reciting the exact Commencement Date and expiration date of this lease.

**EXHIBIT " "**

**CONSTRUCTION: TENANT ACCEPTANCE OF SPACE "AS-IS"**

**ARTICLE I**
**GENERAL AND PRE-CONSTRUCTION OBLIGATIONS**

A. Preparation and Review of Tenant's Plans and Specifications. Tenant must deliver to Landlord, on or before ___ days after the execution of this lease, Tenant's proposed final plans and specifications for Tenant's Work (as described below), which proposed final plans and specifications must be complete and sufficient to obtain a building permit. Without limiting the generality of the immediately-preceding sentence, Tenant's submissions must include a site plan, exterior elevations, a floor plan, a reflected ceiling plan, a plumbing, electrical and HVAC plan, elevations of walls, and a fixture plan. Electrical plans submitted to Landlord for approval must have all load requirements detailed and must include complete panel, lighting fixture and equipment schedules. Tenant's electrical drawing submittal must include a tabulation of the electrical load including quantities and sizes of lamps, appliances, signs, water heaters, HVAC equipment, etc. and kilowatt demand for each installed item. A complete electrical panel schedule is required for each installation. Exposed fluorescent tubes will not be permitted in areas accessible by the public. All drawings must be at a scale of either 1/8" or 1/4". Landlord will not be required to accept and Tenant will not be considered to have delivered any plans that do not meet these requirements. Landlord cannot unreasonably withhold its approval of such proposed final plans and specifications and if Landlord disapproves of such proposed final plans and specifications, Landlord must state with specificity the items to which Landlord objects and the changes that would make the proposed final plans and specifications acceptable. If Landlord does not withhold its approval in the manner set forth above within 10 days after Tenant delivers the proposed final plans and specifications to Landlord, then Landlord will be deemed to have approved of the proposed final plans and specifications. If Landlord disapproves of the proposed final plans and specifications, then Tenant will have 20 days in which to prepare and submit revised proposed final plans and specifications. Landlord and Tenant will continue to exchange plans and specifications and comments, subject in all cases to the time periods set forth above, until the final plans and specifications have been approved. Landlord and Tenant agree to negotiate in good faith until they have reached an agreement, it being expressly understood and agreed that neither of them has the right to terminate this lease because of their failure to reach agreement. The approved designs, plans, specifications, and materials for Tenant's Work are referred to from time to time as the "Tenant's Plans and Specifications." Before beginning Tenant's Work, Tenant must provide Landlord with Tenant's Plans and Specifications in AutoCAD format.

B. Texas Asbestos Health Protection Act; Other Possible Requirements. Tenant must comply with the Texas Asbestos Health Protection Act (Texas Occupations Code, Title 12 – Practices and Trades Related to Water, Health and Safety, Subtitle B, Chapter 1954) in connection with the Premises. Landlord believes (but Tenant will want to confirm that this is the case with Tenant's own legal counsel) that Tenant will be required to obtain an asbestos survey as part of that compliance, and that Tenant may also be required to obtain a Texas Accessibility Standards review and an energy compliance review in connection with its building permit application. As a courtesy, Landlord may provide Tenant with any documentation related to those matters, but Tenant cannot rely on or use that documentation to meet its obligations under this lease. Tenant must submit evidence to

Landlord that Tenant has complied with all such applicable requirements before Tenant will be permitted to begin Tenant's Work in the Premises.

C. Reservation of Space: In multi-story construction, the approximately 4' area under the 2nd story structure is reserved by Landlord for Landlord to use or to allow Tenant or any other tenant or occupant to use and may include water and sewer lines for 2nd story occupants, sprinkler mains, bathroom exhaust trunk lines, tenant feeds to electrical and telephone rooms, roof drains, HVAC chases and ductwork (or other method of HVAC distribution), gas lines, and other items as Landlord may install or permit to be installed.

D. Insurance and Indemnity Requirements. During any construction undertaken by or on behalf of Tenant at the Premises during the term of this lease, the insurance requirements under Article 15 of the lease and the indemnity requirements under Article 16 of the lease apply, and Tenant must provide evidence of appropriate insurance coverage prior to beginning any of Tenant's Work. [*If your insurance provisions do not include a requirement for Builder's Risk insurance during construction, then you should add the following, either here or in your insurance provisions: "At all times during which construction work is being performed by or on behalf of Tenant at the Premises, Tenant must maintain "Builder's Risk" insurance, covering the full replacement value of all such work being performed, including the existing structure, naming Landlord as an "additional insured as its interest may appear," and being written in amounts of coverage that meet any coinsurance requirements of the policy or policies. Coverage must include transit coverage and, if any materials are stored off-site, storage coverage in an amount sufficient to protect the property being transported or stored."*]

E. No Reliance. If Landlord ever delivers any drawings, plans, reports, surveys, or other information to Tenant, that delivery will be as a courtesy to Tenant only and is without any representation or warranty whatsoever. Tenant may not rely on or allow any third parties to rely on such items, which Tenant will use at its own risk. Landlord's comments to Tenant's proposed plans and specifications and approval of Tenant's Plans and Specifications do not in any way indicate that Landlord takes any responsibility for those items. All risk for the sufficiency (including code compliance) of plans and specifications, including Tenant's Plans and Specifications, belongs to Tenant.

F. Not a Construction Contract or an Agreement Collateral to or Affecting a Construction Contract. Landlord and Tenant agree that this exhibit is merely one part of this lease, which contains the overall agreement concerning Tenant's use and occupancy of the Premises. In no event is this exhibit or this lease a construction contract or an agreement collateral to or affecting a construction contract.

## ARTICLE II
## DESCRIPTION OF TENANT'S WORK

A. All Work is Tenant's Work. Tenant hereby accepts the Premises "As-Is" and "ready for occupancy." Landlord will not perform any work in the Premises. All work to be done in the Premises is "Tenant's Work" and includes, but is not limited to, the following, which Tenant must perform at its sole cost and expense. Tenant agrees to begin performing the Tenant's Work and to open for business at the Premises as soon as possible after (but not before) Landlord approves Tenant's Plans and Specifications.

1. Store Front: To the extent that Tenant makes changes to the store front (which changes must be approved by Landlord in advance and must comply with all applicable code requirements), then Tenant is responsible for performing and paying for such changes. Tenant is also responsible for all entrance and exit doors and related hardware other than those that are part of the store front.

2. Interior Finish:

   a. Floor: Tenant is not permitted to penetrate or cut the slab without first obtaining Landlord's written approval. Tenant must provide and install the floor covering and base.

   b. Interior of Exterior Walls: Tenant must insulate and finish exterior walls on their interior surfaces. At Landlord's option, Tenant must provide either (i) thermal insulation with a minimum R-19 rating, or (ii) sound attenuation with a minimum STC rating of 35. Tenant is not permitted to penetrate exterior walls without first obtaining Landlord's written approval. All materials must be non-combustible and have U.L. approval and mill stamp indicating type of treatment. Field-applied treatment of combustible materials is not permitted. Tenant must provide and install display window enclosures and interior finish.

   c. Interior Walls: Tenant must install 5/8" fire core gypsum board, taped and bedded up to structural deck. Tenant must seal all penetrations for sleeves, conduit, pipe, etc. airtight. No sound transmission or vibration transmission will be permitted outside the Premises and Tenant must insulate demising walls to prevent such transmission. At Landlord's option, Tenant must provide either (i) thermal insulation with a minimum R-19 rating or (ii) sound attenuation with a minimum STC rating of 35. All other interior partitions must be of metal stud construction and have gypsum board finish on all sides, taped and bedded. All materials must be non-combustible and have U.L. approval and mill stamp indicating type of treatment. Field applied treatment of combustible materials is not permitted. Tenant must provide and perform all interior finish.

   d. Structural Columns: Tenant must finish all structural columns from the floor to the underside of roof construction.

   e. Ceiling Material: Tenant is responsible for designing and installing the ceiling, but must obtain Landlord's prior written consent to any ceiling before installing it. The easiest way to submit ceiling plans for approval is to include them in Tenant's proposed final plans and specifications. Landlord will not approve _____. Ceilings must be non-combustible and must terminate tight against wall surfaces or be returned to structure and sealed as required by code.

   f. Store Fixtures and Furnishings. Tenant must provide and install all store fixtures and furnishings.

3. Sanitary Facilities: If there is an existing bathroom, Tenant must bring it up to code. If there is not an existing bathroom and one or more is required by code,

Tenant must build and install as many bathrooms as are required by code, all of which must have, at a minimum, a toilet and sink and the necessary plumbing connections plus interior walls and doors with hardware necessary to separate the bathrooms from any adjacent space. The bathrooms must have 1 exhaust fan and 1 wall light with convenience outlet switched together.

4. Signs and Awnings: Tenant must provide signs and any awnings approved by Landlord, including any required blocking for support. If electrical service is required to light Tenant's exterior storefront sign, then Tenant must provide the electrical power (including any conduit, wiring, relays, junction boxes, transformers, and access panels) from Tenant's electrical panel to the sign. The actual hook-up of Tenant's sign is Tenant's responsibility. All penetrations of exterior walls must be approved in advance by Landlord.

5. Utilities: Landlord makes no representation or warranty concerning the existence, size, or placement of any utility lines, meters, or systems. Tenant accepts all lines and systems in their "AS IS" condition. Tenant must perform any utility work in accordance with applicable codes. All service deposits must be made by Tenant at Tenant's expense. Tenant's utility work includes, but is not limited to the following:

   a. Domestic Water: Tenant may re-use any existing lines, but is responsible for any changes to those lines. If there is no existing service, then Tenant must connect to the main line and distribute the service to and within the Premises. Tenant must provide all meters or other measuring devices used in connection with the utility service.

   b. Sanitary Sewer: Tenant may re-use any existing lines, but is responsible for any changes to those lines. If there is no existing service, then Tenant must connect to the main line and distribute the service to and within the Premises. Tenant must install a minimum of 1 floor drain in each kitchen or toilet area. Grease traps are required for any system or appliance producing grease. All cleanouts must be accessible.

   c. Natural Gas Service (if present): Tenant is responsible for setting any meter and all associated costs.

   d. Electrical Installation: If there is no existing conduit, then adding the conduit is part of Tenant's Work and must be shown on Tenant's Plans and Specifications. All wiring, panels, and distribution are Tenant's responsibility. Tenant must complete the electrical installation within the Premises.

   e. Telephone System: If there is no existing conduit, then adding the conduit is part of Tenant's Work and must be shown on Tenant's Plans and Specifications. All telephone equipment panels, outlets, conduit and wiring are Tenant's responsibility.

6. Store Systems:

a. Fire Protection System (if present): If there is an existing trunk line in the Premises, Tenant must connect its lateral grids and heads to that trunk line, using a licensed sprinkler contractor approved by Landlord. The sprinkler system installation will be subject to approval by all governing authorities and Landlord's insurance carrier.

b. Heating, Ventilating and Air Conditioning ("HVAC") Systems: If there is an existing HVAC system, then Tenant accepts all HVAC equipment and the system in its "AS-IS" condition. Tenant is solely responsible for all work associated with the HVAC system. Tenant must provide necessary screening for Tenant's unit in accordance with the requirements of Landlord and applicable code.

c. Fire Alarm System: Tenant must provide and install smoke detectors, pull station, horn, strobes, and other items as required by code.

d. Security System. If Tenant wishes to have a security system, Tenant is responsible for installing it.

B. Performance of Tenant's Work. Tenant must follow whatever "work letter" instructions, if any, that Landlord delivers to Tenant in connection with the timing and performance of Tenant's Work. Tenant must not damage the building in which the Premises are located or any other portion of the Project. Any roof penetration must be performed by Landlord's roofer or, at Landlord's option, by a bonded roofer approved in advance by Landlord. Roof work can begin only after Landlord has given its consent, which consent may be conditioned upon Landlord's approval of the steps Tenant and Tenant's roofer will be taking to prevent injury to the roof and to spread the weight of any equipment being installed. Tenant is also responsible for obtaining, and paying for, professional inspections of any structural work (including any roof work or concrete work).

C. Cost; Licenses and Permits. All work undertaken by Tenant is at Tenant's expense. Tenant must secure all necessary licenses and permits necessary or useful in connection with Tenant's Work. If any part of the work that Tenant performs at the Premises requires a building permit, then Tenant may not begin any work in the Premises until Tenant has received a building permit and must, if Landlord request, deliver a copy of the building permit to Landlord.

D. Landlord Must Pre-Approve all Contractors. Tenant must obtain Landlord's written approval of all contractors before awarding any portion of Tenant's Work to such contractor or otherwise permitting such contractor to perform work in the Premises.

E. Completion Notice. Tenant must notify Landlord that Tenant's Work is complete and deliver to Landlord, in AutoCAD format, the Tenant's Plans and Specifications, updated to reflect all changes to the previously-delivered AutoCAD Tenant's Plans and Specifications. Tenant must deliver to Landlord a copy of Tenant's certificate of occupancy within 30 days after Tenant's Work is substantially complete but in any event before Tenant opens for business in the Premises. Tenant's finished Tenant's Work is subject to Landlord's approval and acceptance. However, if the finished Tenant's Work

is constructed in substantial accordance with the Tenant's Plans and Specifications, then Landlord must approve the finished Tenant's Work.

F. Confirmation of Commencement Date. Tenant agrees that at the request of Landlord, Tenant will, following the Commencement Date, execute and deliver a written statement acknowledging that Tenant has accepted possession and reciting the exact Commencement Date and expiration date of this lease.

**EXHIBIT " "**

**(ALLOWANCE)**

Landlord will pay to Tenant up to $_____ per square foot of the Premises (the "Allowance"), as a reimbursement for Tenant's bona fide (and verified) construction expenses paid to parties not related to Tenant. Tenant's payment request will be processed only upon:

A. Completion of Tenant's Work. Full completion of Tenant's Work and any other improvements to Landlord's satisfaction.

B. Delivery of Certificate of Occupancy. Tenant's delivery to Landlord of a true copy of its Certificate of Occupancy (or similar governmental occupancy permit).

C. Delivery of Bonds. Tenant obtaining and, if required, recording the Bonds (as defined in Section ___ of the lease) and delivering a copy of the Bonds, recorded if required, to Landlord. Failure of Tenant to do so will suspend Landlord's obligation to pay any portion of the Allowance until Tenant does so. If Tenant delivers the Payment Bond so late that it does not operate to bond Tenant's Work (whether in accordance with the Texas Property Code or otherwise), then such failure to deliver will terminate Landlord's obligation to pay any portion of the Allowance.

D. Satisfaction Concerning Payment of Bills. Landlord's satisfaction that all bills have been paid to Tenant's contractors, subcontractors and professionals and that no person or entity has claimed or has any right to claim a lien against the Premises or the Project.

E. Commencement of Business. Tenant's commencement of business in the Premises.

F. Delivery of As-Built Plans and Specifications. Tenant's delivery to Landlord as as-built plans and specifications (as described in Section __ of this lease).

Note: If you don't define bonds or don't have a requirement for delivery of as-built plans and specification s in the body of the lease, then add those definitions and provisions here.