

## **The Vendor Agreement (Builder Agreement)**

As indicated ONHWP has extensively revised what used to be their Vendor/Builder Agreement, and has replaced it with a far more comprehensive document called a Vendor Agreement (Builder Agreement), which agreements are more detailed than the original Vendor/Builder Agreement ONHWP used for many years.

The following is an analysis of the provisions of the Vendor Agreement (the Builder Agreement being almost identical), in order to understand the meaning of these provisions and the impact it may have on registrants in the Province of Ontario.

It appears ONHWP intends to have all registrants sign the new Vendor Agreement, upon their initial registration if they are proposed new registrants, and upon renewal of the registration of a current registrant, so that within a year from April 1, 2000 in as much as renewals are on an annual basis, the new Vendor Agreement and Builder Agreement will have been signed by all registered builders, to replace the old Vendor/Builder Agreement.

In my opinion the purpose of the new Vendor Agreement is to oblige every vendor or builder registered with the Warranty Program to execute such an agreement as a term of registration. By doing so each registrant will, by contract, agree with ONHWP that the complete terms and conditions of that builder's registration are contractual in nature, in addition to the statutory obligations a vendor or builder has, pursuant to the Act and the Regulations.

To that end, there are a number of provisions in the new Vendor Agreement which may be of significance to registrants.

### **Clause 1.2 (also see clauses 1.3 and 1.5)**

In these clauses the registrant warrants to ONHWP not only that the information set forth in an application for registration is true and accurate, but does not omit information that may have an adverse impact on the registrant's abilities to fulfill its obligations under the agreement, or that may have a reasonably material effect on the risk assessment undertaken in connection with the registration by ONHWP.

This wording shifts the onus to the registrant, to determine what information ONHWP is supposed to have regarding the registrant's business, failing which the registrant may be in breach of the Vendor Agreement and therefore a term or condition of registration.

It is unlikely that a builder can anticipate what information ONHWP needs for its risk assessment, or what information, if left undisclosed, might affect that risk assessment.

ONHWP ought to ascertain what is or is not required by way of information for its risk assessment, not the builder.

### **Clause 1.3 (also see clauses 3.6 and 3.10)**

With respect to letters of credit and other security, this clause requires registrant's to furnish to ONHWP such security as ONHWP may reasonably require pursuant to the Act, Regulations and/or the Bulletins.

In addition, this clause equates Bulletins with the provisions of the Act and the Regulations when it is clear that Bulletins are only guidelines, unlike the provisions of the Act or the Regulations. Therefore, a vendor, by signing this agreement, concedes that the Bulletins are on the same footing as the provisions of the Act and the Regulations. Once the new Vendor Agreement is executed, vendors may not be able to argue that the Bulletins are only guidelines, because they have contracted to comply with such Bulletins.

The last part of clause 1.3 states that between renewal periods ONHWP shall not require additional documentation, but it can nevertheless do so if the ONHWP believes that intervening circumstances have arisen which may impair the Registrant's ability to build or sell homes.

In my opinion this is inconsistent with the decision of V. Marques Construction (a CRAT decision). V. Marques Construction stated that, between registration periods, no builder can be reassessed with respect to security provisions.

If a builder executes the Vendor Agreement, he apparently waives that part of the decision of the Tribunal and, by contract, agrees that security re-assessments between renewal periods may be appropriate.

#### **Clause 1.4**

Paragraph 1.4 authorizes ONHWP to utilize credit information regarding a Registrant, and simultaneously immunizes ONHWP from any damages that may occur by their use of this credit information regarding third parties.

This clause does not identify which, if any, credit reporting agencies ONHWP may owe a duty of disclosure, particularly in view of the in-depth financial information often requested by the Program. ONHWP could advise Equifax or any credit rating service of an unpaid invoice and this information may affect the builder's credit rating.

#### **Clause 1.7**

Paragraph 1.7 states that a Registrant is bound by the provisions of this agreement, when he signs as a Registrant, even if his status as a Registrant has expired.

Vendors and Builders should be careful about provisions in an agreement that extend beyond the expiration of their registration, because it may give rise to continued contractual obligations when the expiration of the registration terminates the registrants status pursuant to the Act and Regulations. By this clause a former registrant may end up with all of the obligations of a registrant, but none of the benefits.

#### **Clause 2.3**

This paragraph appears to incorporate something new to the old Vendor/Builder Agreement, wherein the Registrant is now responsible by contract to ONHWP for the Major Structural Defect (“MSD”) warranty. This warranty exists pursuant to the Act and is provided directly by ONHWP not the vendor, after the second year of the warranty period begins.

This paragraph also appears to add a time period whereby ONHWP can proceed against the Registrant for indemnity for an MSD claim, up to two years after the defect is detected.

There is no such provision in the Act or Regulations. Therefore by signing the new Vendor Agreement this provision requires a registrant to contract with ONHWP that the registrant is now liable for the MSD warranty, together with ONHWP.

### **Clause 2.6**

Paragraph 2.6 is a difficult paragraph to understand, but the import of this clause is that the Registrant is obliged, by contract, to preserve any legal rights it may have against manufacturers, suppliers, contractors, sub-contractors and others with respect to construction defects and breaches of the Ontario Building Code.

Prior to this provision, if ONHWP paid out money from the guarantee fund to an owner or Condominium Corporation, it was entitled to be subrogated to the rights of such owner or Condominium Corporation.

This new clause appears to create additional contractual subrogation provisions, wherein the Registrant is required to preserve its rights against third parties other than the owner, for the benefit of ONHWP, and assign these rights to them at the request of ONHWP.

Furthermore, there does not appear to be any consideration for such a provision in as much as the builder receives nothing from the ONHWP in return. ONHWP has no right of subrogation to the vendor or the Registrant pursuant to the provisions of the Act or the Regulations.

### **Clause 2.7 and 2.8**

These are provisions in which the Registrant agrees to pay to ONHWP the amount of any invoice it sends to the vendor, when ONHWP determines there has been a breach of warranty and the vendor has failed to undertake repair work. The invoice is comprised of the repair amount, plus a 15 per cent administration fee, as well as interest at the rate of 18 per cent annually on the unpaid invoice.

All builders now contract to agree to these provisions. The combination of administration fee and interest on an unpaid invoice for one year is 33% which is a hefty premium to pay on an invoice, where the vendor may have a disagreement with ONHWP as to its validity.

### **Clause 2.9**

In my opinion this provision states that an agreement is binding upon not only the Registrant, but his legal representatives, which may include its lawyers; it may be prudent for lawyers acting for builders to question ONHWP as to the meaning of “legal representatives” because most

lawyers acting for builders would not assume they are bound by any contractual agreement between the Registrant and the Ontario New Home Warranty Program.

### **Clause 3.1**

The effect of this paragraph is considerable. By its provisions, the Registrant can access and inspect a Registrant's books and records relating to the sale and construction of any home sold by a Registrant. This may be similar to a vendor or a Registrant agreeing to a civil search warrant whereby ONHWP may enter a builder's premises and review its books and records.

### **Clause 3.4**

This particular paragraph overlaps the responsibility of the Building Department or the Municipality in which homes are being constructed. Municipalities and their Building Departments are responsible for dealing with interim inspections, and issuing stop work or compliance orders, where necessary. However, clause 3.4 authorizes ONHWP to do much the same thing; it amounts to a duplication of function where the warranty with respect to construction, has not as yet begun.

### **Clause 3.5**

In this clause ONHWP changes the onus for renewal of registration from itself to the Registrant, by stating that, even if ONHWP does not send out the renewal forms as it is supposed to do at least 60 days prior to the renewal deadline, the Registrant is responsible for renewing its application, notwithstanding that no renewal application forms have been delivered to it.

This may result in many builders, for whatever reason, not filing their renewal forms on time, allowing expiration of their registration; such expiration would automatically preclude any builder from building in the Province of Ontario because as soon as its registration expires, ONHWP may notify the Municipality that the builder is not registered and no further building permits will be issued.

### **Clause 3.6**

This particular provision attempts to legitimize the Bulletins, such as Bulletins No. 19 and 28, and put them on the same footing as the provisions of the Act and Regulations. In my opinion, no security requirements arise prior to the commencement of a warranty period pursuant to the Act or Regulations; however here, the registrant is agreeing to the validity of security provisions and other documentary requirements being provided prior to any warranty coming into effect or any risk being assumed. Further, such security requirements are contractual and may not exist in the Act or Regulations.

### **Clause 3.7**

This particular provision is confusing because a Registrant is entitled to a deposit receipt from ONHWP when it takes a purchaser's deposit. Such deposit receipt is prescribed security

pursuant to the Condominium Act and Regulations and the production by the Program of such a receipt, is not dependent on the provision of alternative security by the Registrant to ONHWP.

This provision attempts by contract to oblige the Registrant to provide security before it can obtain an ONHWP deposit receipt, which may conflict with the Condominium Act and the Ontario New Home Warranties Plan Act.

### **Clause 3.12**

This clause states that the Registrant shall include in each purchase agreement all changes to such purchase agreement as prescribed by ONHWP, which means that it adds to any purchase agreement any change, or addition that may be implemented by ONHWP through a Bulletin or a Regulation etc; therefore, by this provision the vendor or Registrant is agreeing to a provision that may become part of a purchase agreement in the future before any such provision has even been drafted by ONHWP. It conveys to ONHWP the right to determine provisions of purchase agreements, as if ONHWP were a party to these agreements.

### **Clause 4.2**

This clause reduces the length of time that a Registrant has to receive a Notice of a Proposal or a Notice of Revocation from 5 to 3 days, for no apparent reason. In addition, this clause means that a Notice of Proposal or Final Notice may be faxed to a builder and be deemed to be received the day it was faxed.

This change has the effect of overcoming recent case law from the Tribunal which refused to adopt ONHWP's argument that, when ONHWP sent a Final Notice to the builder, the Notice was not in force on the date of its mailing but rather when it was received by the builder pursuant to section 20 of the Act, some 5 days later (see J. C. McElwain Construction v. ONHWP).

### **Clause 4.3**

By the provisions of clause 4.3 the Registrant is authorizing ONHWP to report on the Registrants performance or compliance with respect to the construction of any home, including the publication of such performance in a manner ONHWP deems fit.

Why would any builder agree to this provision in the abstract? In addition, although ONHWP agrees to exercise diligence with respect to the truth of what it publishes, it can publish anyway, even if the builder disputes the accuracy of the publication.

### **Conclusion**

By way of conclusion ONHWP has proposed that each and every Registrant in the Province of Ontario contract with it, in a comprehensive manner, regarding the terms and conditions of registration, whether or not those rights and obligations are set out in the Act or Regulations. In addition this new agreement has elevated the status of Bulletins to a contractual obligation, which if breached, can lead to a Proposal to Revoke the Registration of a vendor/builder.

Vendors and Builders should be aware of the implications of signing such an agreement as it may curtail their rights against ONHWP.

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