
TERMS AND CONDITIONS

The following terms and conditions shall govern the relationship between Kirk Windows, LLC (“Contractor”) and the Customer (together, Contractor and Customer are referred to herein as the “Parties”)

1. Agreement. These terms and conditions are incorporated within with any quote or estimate provided to Customer (the “Quote”) and, together with the Quote, constitute the Parties’ full and complete Agreement concerning the Work (as defined below) (together, the “Agreement”). This Agreement shall be binding on the individual(s) identified in the Quote, as well as any other person with an interest in the property where the Work will be performed, as well as each of their respective agents, assigns, spouses, family members, heirs, beneficiaries, or insurers (together, the “Customer”).

2. Contractor’s Work. Contractor shall measure and install windows, doors, and/or other products purchased from Contractor (collectively, the “Products”) in Customer’s property as provided in the Quote (collectively, the “Work”). Customer shall confirm, prior to any order being placed, that all Products to be ordered by Contractor and installed as part of the Work match Customer’s preferences and specifications, including, but not limited to, style, color, and functionality. Contractor is not responsible for, and the Work shall not include, unless otherwise agreed to in writing by the Parties: (i) relocation and/or removal of furniture or other personal property in front of Customer’s windows, or that otherwise obstructs or interferes with Contractor’s Work; (ii) installation or reinstallation of alarm systems or any components thereof, including but not limited to window sensors or contacts; (iii) any work related to any unique, unusual, or unforeseen conditions that (a) materially differ from the conditions indicated in the information provided by Customer or (b) are of an unusual nature, differing materially from the conditions ordinarily encountered and generally recognized as inherent in the Work, including, but not limited to, any Exterior Insulation Finishing System (“EIFS”), stucco exterior materials, damaged, rotted, water-damaged, infested, or deteriorated wood or other damaged, deteriorated building materials not reasonably accessible or visible to Contractor without destructive testing, unlevel, uneven, or out of square window or door openings, foundation shifting or ground movement, and/or existing windows or doors supporting other building or construction materials (collectively, “Unforeseen Conditions”); and (iv) any other work not reasonably necessary to remove and/or install the Products in Customer’s property as provided in the Quote. Contractor does not promise and makes no representations concerning timeframes for delivery of the Products or completion of the Work, except that Contractor shall use commercially reasonable efforts to receive Customer’s Products and schedule the Work consistent with Contractor’s availability.

3. Changes to Work and Additional Work. To the extent Contractor and Customer agree in writing to any modification of Contractor’s Work to include any activities or services excluded herein, or to the extent Contractor is required to perform additional Work as a result of ancillary issues such as damages to sheetrock, paint, or window sills (the “Additional Work”), Customer agrees that Contractor shall be entitled to charge Customer reasonable fees for such Additional Work, unless Customer and Contractor agree in writing prior to any Additional Work performed to a specific amount to be paid for such Additional Work. Additionally, Customer agrees that Contractor shall be entitled to charge Customer reasonable fees for any Additional Work required to address any Unforeseen Conditions.

4. Payment for Contractor’s Work. Customer, in consideration for the performance of the Work, shall pay to Contractor the amount identified in the Quote, as well as any amounts owed for Additional Work as provided herein. Unless otherwise agreed to by the Parties in writing, payment for Contractor’s Work shall be paid as follows: (i) 50% paid prior to commencement of the Work, (ii) Contractor reserves the right, determined at its sole discretion, to send additional invoices as the Work progresses (each, a “Progress Invoice”), including, but not limited to, in the event the Work is delayed for reasons beyond Contractor’s control or due to any unforeseen events or circumstances. Customer agrees to pay each Progress Invoice within seven (7) days of receipt. In the event any Progress Invoice is not timely paid, Contractor reserves the right to cease all Work or Additional Work until complete payment has been made; and (iii) all remaining amounts paid immediately upon completion of the Work or Additional Work. To the extent Contractor is required to take any action to recover any unpaid amounts, including, but not limited to, hiring legal counsel, initiating arbitration as provided in this Agreement, or otherwise taking action to collect any unpaid amounts, Customer shall pay to Contractor any and all reasonable attorneys’ fees, expenses, and costs incurred by Contractor in connection with and/or related to such efforts.

5. Title and Risk of Loss. Title to all materials procured by Contractor for incorporation into Customer’s property as part of the Work shall pass to Customer upon delivery of the material to Customer’s property. Risk of loss for all materials and equipment shall be with Contractor until delivery to Customer’s property and shall thereafter be with the Customer.

6. Force Majeure. In the event performance of the Work or the Agreement, or any obligation hereunder, is either directly or indirectly prevented, restricted, delayed, or interfered with by reason of fire; flood; Unforeseen Conditions; adverse weather conditions; earthquake, natural disasters, or other acts of God; wars; civil commotion; explosion; acts of public enemy; embargo; acts of the government in its sovereign capacity; labor difficulties, including without limitation,

strikes, slowdowns, picketing, or boycotts; unavailability of timely labor, materials, or equipment from suppliers, vendors, or subcontractors; pandemic or epidemic (including, but not limited to any conditions, circumstances, policies, regulations, or other measures, whether private or public, related to COVID-19 or other virus-related issues); or any other circumstances beyond the reasonable control and without the fault of Contractor (each a “Force Majeure Event”), then Contractor shall be excused from such performance on a day-to-day basis to the extent of such prevention, restriction, delay, or interference. Any amounts owed by Customer for the Work shall be equitably adjusted for additional costs incurred by Contractor as a result of any Force Majeure Event.

7. COVID-19 and Price Escalation. Customer and Contractor acknowledge the ongoing COVID-19 pandemic and the unusual and significant volatility in market conditions, including those within the design and construction industry (“COVID Conditions”). It has led to short notice changes to and extended lead times and price increases in labor, material, and equipment across the construction industry, all of which could impact the cost of the Work or delivery times, the causes for which are sometimes not within Contractor’s control. Contractor will use commercially reasonable efforts to maintain cost of the Work as set forth in the Quote, but in the event delays or price escalation occur due to COVID Conditions or any other subsequent epidemic, pandemic, or endemic, and not due to Contractor’s negligence, Contractor shall be entitled to additional payments in connection with the cost of the Products and the Work commensurate with any additional costs or price escalation experienced by Contractor.

8. Permits. Although permits, licenses, and/or approvals from third parties are not ordinarily required for Contractor to perform the Work, to the extent the Customer’s applicable city, county, state, other political entity or subdivision, historical association, zoning board, conservation district, homeowners’ association, or any other third party is required to approve, license, or permit the Work under any applicable law, ordinance, regulation, or other legal requirement, it shall be Customer’s sole and exclusive responsibility to obtain any such permits, licenses, and/or approvals necessary for Contractor to initiate and/or complete the Work. The cost to obtain such permits, licenses, and/or approvals is not included in any amount owed by Customer under the Quote, and shall be paid directly by Customer unless otherwise agreed to in writing by the Parties. To the extent the Parties agree that Contractor shall obtain any permits, licenses, and/or approvals to perform the Work, Contractor reserves the right to charge Customer a permit fee of \$100 in addition to the direct cost of the permit, license, and/or approval.

9. Customer Responsibilities. In connection with the Work, it shall be Customer’s sole and exclusive responsibility to: (i) notify Contractor of any Unforeseen Conditions;

(ii) relocate and/or remove furniture or other personal property in front of Customer’s windows, or that otherwise obstructs or interferes with Contractor’s Work; (iii) install, move, or reinstall alarm systems or any components thereof, including but not limited to window sensors or contacts; and (iv) cleaning or removing incidental materials leftover as a result of Contractor’s Work, such as dust, dirt, incidental residue, excess caulk, screws, or glass in or around the exterior and interior areas of Customer’s property after completion of Contractor’s Work. For purposes of clarity, Contractor shall be responsible for removing and disposing of Customer’s old windows, doors, or other materials removed in the Course of the Work, as well as any large pieces of glass, wood, insulation, or other building materials that are obvious and visible during a walk-through inspection of the site following the completion of Contractor’s Work.

10. Unforeseen Conditions. Contractor shall not be liable for any damages, loss, or costs arising out of, in connection with, or related to any Unforeseen Conditions experienced by Contractor during the Work. If Contractor encounters any Unforeseen Conditions in the course of performing the Work, Contractor may, at its sole discretion and to the extent Contractor agrees to proceed with the Work, be entitled to an equitable adjustment in the amount owed for the Work, as well as any additional costs for material or labor incurred by Contractor to perform the Work in light of the Unforeseen Conditions.

11. Limited Warranty. Contractor warrants that the Work shall be free from defects exclusively with respect to installation of the Products properly ordered and approved by Customer. During performance of the Work and for a period of twelve (12) months following substantial completion of the Work, Contractor shall correct defective Work caused by a breach of this warranty at Contractor’s sole cost and expense. The express warranty in this paragraph is Customer’s exclusive remedy for breach of warranty and defective Work and is provided in lieu of all other warranties, whether express or implied, including without limitation **ALL IMPLIED WARRANTIES, INCLUDING ANY WARRANTY OF FITNESS FOR A PARTICULAR PURPOSE AND WARRANTY OF MERCHANTABILITY, EACH OF WHICH IS HEREBY DISCLAIMED BY CONTRACTOR AND WAIVED BY CUSTOMER.** Any warranties offered or provided by any manufacturer of the Products installed in connection with the Work are expressly disclaimed by Contractor, and Customer’s sole and exclusive remedy in connection with any defects or problems of any kind with the Products, other than those exclusively caused by defective installation by Contractor, must be addressed directly with the manufacturer.

12. Hazardous Conditions. Contractor is not responsible for any hazardous conditions, materials, or substances

encountered in connection with the Work. Upon encountering any such hazardous conditions, materials, or substances (including, but not limited to, mold, asbestos, or any other chemical or substance recognized as a hazardous substance under Texas law or regulations), Contractor shall be entitled to stop Work immediately in the affected area by providing notice to Customer, and Contractor shall not be required to resume the Work until Customer has provided written certification from appropriately licensed professionals that such materials, conditions or substances do not exist or have been removed or rendered harmless. The amount owed by Customer for the Work and time for performance of the Work shall be equitably adjusted prior to Contractor resuming the Work. **TO THE FULLEST EXTENT PERMITTED BY LAW, CUSTOMER SHALL INDEMNIFY, DEFEND AND HOLD HARMLESS CONTRACTOR AND ITS SUBCONTRACTORS AND ANYONE EMPLOYED DIRECTLY OR INDIRECTLY BY ANY OF THEM, AND EACH OF THEIR OFFICERS, DIRECTORS, MEMBERS, MANAGERS, EMPLOYEES AND AGENTS FROM AND AGAINST ANY AND ALL CLAIMS, LOSSES, DAMAGES, LIABILITIES AND EXPENSES, INCLUDING REASONABLE ATTORNEYS' FEES AND EXPENSES, ARISING OUT OF OR RESULTING FROM THE PRESENCE, REMOVAL OR REMEDIATION OF HAZARDOUS CONDITIONS, MATERIALS, OR SUBSTANCES, EVEN TO THE EXTENT CAUSED BY THE NEGLIGENCE OF THE INDEMNIFIED PARTIES, BUT NOT INCLUDING ANY LOSSES, DAMAGES, LIABILITIES, AND EXPENSES CAUSED BY THE GROSS NEGLIGENCE OR INTENTIONAL MISCONDUCT OF THE INDEMNIFIED PARTIES.**

13. Assignment. Neither party to the Agreement shall assign the Agreement, in part or in whole, without written consent of the other. If either party attempts to make such an assignment without such consent, that party shall nevertheless remain legally responsible for all obligations under the Agreement.

14. Governing Law. The Agreement shall be governed by the laws of the State of Texas, without giving effect to its conflict of law principles.

15. Severability and Amendment. If any provision or any part of a provision of the Agreement shall be determined to be invalid, illegal, or unenforceable pursuant to any applicable law, such determination shall not impair or otherwise affect the validity, legality, or enforceability of the remaining provision or parts of any provision of the Agreement, which shall remain in full force and effect as if the unenforceable provision or part were deleted. The Agreement may not be changed, altered, or amended in any way except in writing signed by a duly authorized representative of each party.

16. No Waiver. The failure of either Contractor or Customer to insist, in any instance, on the performance of any of the obligations required by the other under the Agreement shall not be construed as a waiver or relinquishment of such obligation or right with respect to future performance. No waiver shall be effective unless made in writing by the party waiving such right.

17. Entire Agreement and Disclaimer of Reliance. This Agreement constitutes the entire agreement by and between the Contractor and the Customer with respect to the subject matter hereof. This Agreement supersedes any prior understandings, negotiations, agreements, or representations of the parties of any nature, whether written or oral, to the extent they relate in any way to the subject matter hereof, including, but not limited to, the Work. Customer hereby expressly disclaims reliance, and expressly represents that he/she is not relying, on any representations of Contractor of any kind other than representations expressly made in writing in this Agreement.

18. WAIVER OF CONSUMER RIGHTS. NOTWITHSTANDING ANY PROVISION HEREIN TO THE CONTRARY, TO THE FULLEST EXTENT PERMITTED BY APPLICABLE LAW, CUSTOMER HEREBY WAIVES HIS/HER RIGHTS UNDER THE DECEPTIVE TRADE PRACTICES-CONSUMER PROTECTION ACT, SECTION 17.41 ET SEQ., BUSINESS AND COMMERCE CODE, A LAW THAT GIVES CONSUMERS SPECIAL RIGHTS AND PROTECTIONS. AFTER CONSULTATION WITH AN ATTORNEY OF MY OWN SELECTION, I VOLUNTARILY CONSENT TO THIS WAIVER.

_____ CUSTOMER'S INITIALS

19. LIMITATION OF LIABILITY. TO THE FULLEST EXTENT PERMITTED BY APPLICABLE LAW, AND NOTWITHSTANDING ANY PROVISION HEREIN TO THE CONTRARY, NEITHER CONTRACTOR NOR ITS MEMBERS, MANAGERS, OFFICERS, DIRECTORS, OWNERS, EMPLOYEES, SUBCONTRACTORS, SUCCESSORS OR ASSIGNS (THE "CONTRACTOR PARTIES"), SHALL BE LIABLE FOR ANY INDIRECT, CONSEQUENTIAL, SPECIAL, PUNITIVE, OR EXEMPLARY LOSS OR DAMAGE, INCLUDING BUT NOT LIMITED TO ANY AND ALL (i) LOST OPPORTUNITY COST; (ii) LOSS OF BUSINESS; (iii) LOSS OF PROFIT (iv) LOSS OF GOODWILL; (v) DAMAGE TO REPUTATION; AND/OR (vi) LOSS OR CORRUPTION OF DATA. FURTHER, CONTRACTOR PARTIES SHALL NOT BE LIABLE IN ANY WAY, FOR

DIRECT OR INDIRECT DAMAGES OR LOSSES OF ANY KIND CAUSED BY OR RELATED TO THE EXISTENCE OF UNFORESEEN CONDITIONS, EXCEPT TO THE EXTENT SUCH DAMAGES OR LOSSES WERE CAUSED BY CONTRACTOR'S GROSS NEGLIGENCE OR INTENTIONAL MISCONDUCT.

20. **ARBITRATION.** Any dispute or matter in controversy between Contractor and Customer arising under, in connection with, or related to this Agreement and/or the Work shall be resolved exclusively by binding arbitration administered by the American Arbitration Association ("AAA") in accordance with the AAA's then-existing Construction Rules (the "Arbitration"). The Arbitration shall take place in Dallas County, Texas. The Arbitration shall be conducted by a single arbitrator with at least 10 years' experience in the residential construction industry (the "Arbitrator"). The Arbitrator shall be selected jointly by the Parties and, to the extent the Parties cannot agree on an Arbitrator, the AAA shall provide a list of five qualified arbitrators and each side shall rank the arbitrators in the order of their preference. The AAA shall then appoint the arbitrator with the highest average collective ranking. The Parties agree that they shall not be entitled to discovery in the Arbitration other than (i) disclosure of witnesses and other persons with knowledge of facts relevant to the claims and defenses in the Arbitration; (ii) an inspection of Customer's property where the Work was performed and/or photographs or other visual depictions of Customer's property or the Work; (iii) disclosure of expert reports and materials relied upon by experts designated by the Parties, if any; and (iv) depositions of experts designated by the Parties, if any, not to exceed three hours of total deposition time per expert. The Arbitrator shall, at the conclusion of a final hearing, render a reasoned award in the Arbitration, explaining the general factual and legal basis for the award. The Arbitrator shall not have the right to award attorneys' fees as part of any final award in the Arbitration unless specifically provided in this Agreement. For the avoidance of doubt, the Arbitrator may not commence or administer an arbitration, including, but not limited to, issuing any award, to the extent any attorneys' fees and expenses identified in and awarded to any party pursuant to § 22(ii) herein have not been paid.

21. **WAIVER OF JURY TRIAL.** TO THE FULLEST EXTENT PERMITTED UNDER APPLICABLE LAW, EACH OF THE PARTIES IRREVOCABLY WAIVES ALL RIGHT TO A TRIAL BY JURY IN ANY ACTION OR PROCEEDING IN CONNECTION WITH ANY CLAIM OR COUNTERCLAIM (WHETHER BASED ON CONTRACT, TORT OR OTHERWISE) ARISING OUT OF, IN CONNECTION WITH, OR RELATED TO THIS AGREEMENT OR THE WORK.

22. **WAIVER OF ATTORNEYS' FEES.** TO THE FULLEST EXTENT PERMITTED UNDER APPLICABLE LAW, EACH OF THE PARTIES IRREVOCABLY WAIVES ANY AND ALL RIGHTS TO RECOVER ATTORNEYS' FEES IN ANY ARBITRATION AND/OR OTHER LEGAL ACTION OR PROCEEDING, INCLUDING BUT NOT LIMITED TO, ANY RIGHT TO RECOVER ATTORNEYS' FEES UNDER THE TEXAS DECEPTIVE TRADE PRACTICES ACT, THE RESIDENTIAL CONSTRUCTION LIABILITY ACT, AND CHAPTERS 37 OR 38 OF THE TEXAS CIVIL PRACTICE AND REMEDIES CODE, UNLESS SPECIFICALLY PROVIDED FOR IN THIS AGREEMENT. NOTWITHSTANDING ANYTHING HEREIN TO THE CONTRARY, A PARTY MAY RECOVER ATTORNEYS' FEES (i) IF SPECIFICALLY PROVIDED IN THIS AGREEMENT; OR (ii) IF ANY OTHER PARTY INITIATES ANY LEGAL ACTION OR PROCEEDING OTHER THAN ARBITRATION AS SET FORTH IN SECTION 20 ABOVE. THE PARTY THAT DID NOT INITIATE THE LEGAL ACTION SHALL BE ENTITLED TO RECOVER ALL REASONABLE AND NECESSARY ATTORNEYS' FEES AND EXPENSES INCURRED TO COMPEL ARBITRATION, AND SUCH FEES SHALL BE AWARDED BY THE COURT OR OTHER TRIBUNAL COMPELLING ARBITRATION. SUCH FEES AND EXPENSES SHALL BE PAID PRIOR, AND AS AN EXPRESS PRECONDITION, TO INITIATION OF AN ARBITRATION.

AGREED AND ACCEPTED BY CUSTOMER. I REPRESENT AND AGREE THAT I HAVE READ, OR HAVE HAD THE OPPORTUNITY TO READ, THE FOREGOING TERMS AND CONDITIONS, AND I UNDERSTAND THAT THESE PROVISIONS, TOGETHER WITH THE QUOTE, CONSTITUTE THE FULL AND COMPLETE AGREEMENT BETWEEN THE CONTRACTOR AND MYSELF, AS WELL AS ANY OTHER PERSONS WITH AN INTEREST IN THE PROPERTY WHERE THE WORK WILL BE PERFORMED.

CUSTOMER'S SIGNATURE

DATE