

If after evaluating a potential project, a manufacturer decides to provide units for that project, the written agreement between the builder/developer and the manufacturer must cover an array of issues, from pricing and installation to conflict resolution. A guiding principle during the development of any such agreement is that you are seeking a long-term, trusting relationship with the builder/developer. The agreement should be beneficial for both parties and help avoid legal, financial, or other conflicts throughout your collaboration.

### **IMPORTANT ISSUES TO BE ADDRESSED AS PART OF A MANUFACTURER AND BUILDER/DEVELOPER AGREEMENT**

The items listed below are suggested issues to be considered for such an agreement.

- Involved parties

Name manufacturer and plant location.

Name developer; identify who is actually buying homes from the plant.

Name owner of land upon which the homes will be installed.

- Financial statements - initial and ongoing

If manufacturer is public, refer to annual reports, SEC filings.

If manufacturer is private, decide what to disclose to developer.

Full financial information on developer and land owner, audited if necessary.

- Licensing

Does each party have evidence that it is licensed to carry out its activities (if licenses are required in your state)?

- Identify the land

Include a legal description; assessor parcel number; number of lots.

● Request for Notice of Default

Will the manufacturer be notified if a default on any land financing has occurred?

● Specify the quantities

How many lots are there? In phases? How many lots are finished now?

● Statement of commitment

At some point, a mutually binding commitment must be made to justify further resource use.

● Exclusive purchase statement

Will there be an exclusive purchase agreement stating that the builder/developer will use only your manufactured homes in the proposed development?

● Payment of engineering fees

Who will pay the manufacturer's product development costs and engineering fees?

● Ownership of models

Who will own the resulting models?

● Control of plans, drawings, and elevations

Are the plans available for release to the manufacturer's retailers? Is the developer permitted to release the plans to other manufacturers?

● Production capacity allowance

Does the manufacturer need to make a certain capacity and delivery commitment? Is there an offsetting minimum periodic order commitment on the developer's part?

● Estimated time frame

What is the builder/developer's estimate of the marketing period for project?

- Date of initial orders

What is the builder/developer's estimate of the date the models will be ordered?

- Prototyping

If the required models are a significant departure from manufacturer's standard, this section should discuss the procedure for building prototypes.

- Deposits

Will the manufacturer require a deposit before engineering? Before prototype development? Before delivery of any home? How are deposits credited or forfeited?

- Payment terms

Which method will be used: C.O.D.? Flooring? Deposit? Payment before shipment? ILC? Escrow proceeds? Contract?

- Treatment of MCO

When does manufacturer send? To whom?

- Freight

Who will pay freight for the units?

- Passing of title

When will title be transferred from the manufacturer to the builder/developer?

- Insurance during transportation and before payment

Who are named as insured during transportation and before payments?

- Public liability insurance

Who are named as insured on the builder/developer's property loss-property damage (PL-PD) policy.

- Liens

Will there be any materialmen's liens or fixture filings?

- Sales taxes

Who will be responsible for any sales taxes?

- Shipment of homes from yard

Will there be a defined time period for delivery of each home from the date that the home is ready to ship?

- Risk of storage

If the builder/developer must make use of a temporary storage facility, risk during that storage must be addressed.

- Manufacturer's offer of inspection

The manufacturer should recommend that the developer inspect each house at the factory before shipment. The developer is to notify the manufacturer of its intention to inspect so the manufacturer can provide personnel and access.

- Manufacturer's commitment to thorough inspection, testing, check for correct specs, and completeness

The manufacturer should make a statement about quality control programs and its plan to assure high quality and complete homes. The manufacturer should also state how it will verify that the homes were built to correct specifications and options.

- Developer's inspection of homes

The builder/developer should be encouraged to inspect each home within 24 hours of arrival from the factory and if there is a problem, report its condition, including any shortages, at once.

- Damage claims to transporter

What items require claims to be made to the transporter?

- Repurchase agreement

Will there be repurchase agreements?

- Method of reporting material shortages and warranty claims should follow these guidelines

Timeliness - that reports should be submitted on current basis.

Accuracy - description of damage, defect, or shortage.

Written - provide manufacturer's form if available.

Supply cost estimate if reimbursement desired.

What is the time frame for factory response?

What is the time frame for factory work?

- Manufacturer's name in project

The manufacturer should determine whether he or she wants significant identification with project. Would it cause dealer friction?

- Conflict with dealers

Should the manufacturer sell only in the project? Any agreements which address dealer concerns should be in the text. Refer to the discussion on dealer involvement in Chapter 2.

- Resolution of disputes

Will disputes be settled through mediation or arbitration? A good way to minimize problems is to use wording such as: "No action shall be taken with respect to any default hereunder until written notice has been given and a reasonable time to cure the same has expired without a cure being effected."

- Purchase of material - terms of sale, transportation

Discuss the method by which the developer may purchase extra material from the manufacturer.

- Programs: marketing support, rebates, etc.

Any agreed rebates, subsidies, promotion allowances, assistance with models, decorating, advertising, etc. should be clearly described. Any allowances that are a function of performance should be accurately written.

- Participation in model center, display, etc.

Any agreed participation in the model center, display, etc. should be clearly described. Any allowances that are a function of performance should be accurately written.

- Method of ordering, confirming

The key purpose here is to distinguish between a quote, a sample price-out, and a firm order. Are purchase orders needed? How does the developer launch production?

- Change order process, deadlines

Describe how a change order is made, and what time constraints there are for change orders.

- Limitation on custom orders beyond original agreement

Will the manufacturer entertain additional customization beyond the initial designs? How is this requested, how much time is needed to respond, and how is pricing affected?

- Price increases

Unexpected rising prices can cause problems. There should be some statement about how many days written notice of increases are required.

- Material changes

After the initial specifications are agreed upon, what happens when the manufacturer wants to change material, or if an item becomes unavailable? The builder/developer's investment in

its model complex makes any changes difficult. This needs to be addressed.

- Foundation requirements

The agreement should express minimum foundation requirements.

- Attaching structures (garages, porches, etc.)

Prior approval - The developer, manufacturer, and code enforcement agencies should agree on all attaching structures.

Permits and inspections - No work can be done on the home without the required permits and inspections.

Hold harmless re: home integrity - Who will be responsible for home failure caused by site-added structures?

- Representations to consumer; presentation of manufacturer's warranty

How will the manufacturer's warranty be presented to the customer? Will the manufacturer's warranty be displayed at the sales office?

- Quality of installation & finish

Are licensed contractors required to perform work on the house(s)? Are written standards of workmanship for on-site work needed?

- Boilerplate: Force Majeure; governing law, severability, notice, termination, etc.

The manufacturer and builder/developer need to have all elements of the agreement approved by their legal advisors.