

CONSTRUCTION CONTRACT

**U.S. Department of Housing and
Urban Development**
Office of Housing

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HUD Project No.: _____
Project Name: _____

Cost Plus Contract _____
Lump Sum Contract _____

THIS CONSTRUCTION CONTRACT (“Contract”) is made this _____ day of _____, 20____, between _____ (“**Contractor**”) and _____ (“**Owner**”) (**together, the “Parties”**).

The definition of any capitalized term or word used herein can be found in this Contract and the General Conditions, except the term “**Project**” shall have the same definition as in the Regulatory Agreement between Borrower (Owner) and HUD, except that the term “**Program Obligations**” means (1) all applicable statutes and any regulations issued by the Secretary pursuant thereto that apply to the Project, including all amendments to such statutes and regulations, as they become effective, except that changes subject to notice and comment rulemaking shall become effective only upon completion of the rulemaking process, and (2) all current requirements in HUD handbooks and guides, notices, and mortgagee letters that apply to the Project, and all future updates, changes and amendments thereto, as they become effective, except that changes subject to notice and comment rulemaking shall become effective only upon completion of the rulemaking process, and provided that such future updates, changes and amendments shall be applicable to the Project only to the extent that they interpret, clarify and implement terms in this Contract rather than add or delete provisions from such document. Handbooks, guides, notices, and mortgagee letters are available on “HUDCLIPS,” at www.hud.gov. Any HUD form referenced herein shall be the current version of that form, and shall include any successor form adopted by HUD.

The Contractor and the Owner agree as follows:

Article 1: Scope of Contract

A. The Contract between the Parties is set forth in the Contract Documents, which consist of this Contract and the other documents identified in Article 2 below. Together, these form the entire contract between Owner and Contractor, and by this

reference these Contract Documents are fully incorporated herein. Any previously existing contract or understanding concerning the Work contemplated by the Contract Documents is hereby revoked. Any side agreements between Owner and Contractor shall be disclosed to HUD.

B. Except to the extent specifically indicated in the Contract Documents to be the responsibility of others, Contractor shall furnish all of the materials and perform all of the Work shown on, and in accordance with, the Drawings and Specifications.

C. The Contract Documents shall not be amended without the prior written approval of Lender and HUD in accordance with Program Obligations. Failure to receive such prior HUD and Lender approval shall render any such amendment void.

Article 2: Identification of Contract Documents

A. The “**Contract Documents**” are identified as follows:

(1) This Construction Contract (HUD-92442M).

(2) The General Conditions of the Contract for Construction, AIA Document A201 – **{Insert year of current edition}** (“General Conditions”, attached hereto as Exhibit __), expressly excepting those provisions mandating binding arbitration. If any of the provisions of this Contract (HUD-92442M) conflict with the terms contained in the General Conditions, the provisions in this Contract shall control.

(3) The Supplementary Conditions to the Construction Contract (HUD-92554M), attached hereto as Exhibit __.

(4) The Drawings, an index of which is attached hereto as Exhibit__.

Number_____Title_____Pages_____

(5) The Specifications, an index of which is attached hereto as Exhibit__

Number_____Title_____Pages_____

(6) The Contractor's and/or Mortgagor's Cost Breakdown (HUD-2328), approved by HUD on the date of _____, 20____, attached hereto as Exhibit__.

(7) The Prevailing Wage Determination _____ Modification Number_____, last published/modified on (date) _____, 20____, and attached hereto as Exhibit__.

(8) Completed and fully-executed document identifying Identities of

Interest among Owner, Contractor, Subcontractors, and Architect on a form approved by HUD, attached hereto as Exhibit ____.

(9) Any change orders approved by HUD after the execution of this Contract.

(10) If applicable, the Retainage Reduction Rider attached hereto as Exhibit ____.

(11) If applicable, the Construction Contract Incentive Payment (HUD-92443) form is attached hereto as Exhibit ____ (**“Incentive Payment Addendum”**).

B. The Drawings and Specifications were prepared by _____ (**“Design Architect”**). The architect administering the Construction Contract is _____ (**“Architect”**).

C. A master set of the Drawings and Specifications, identified by the signatures of Owner, Contractor, Design Architect, Architect, Lender (as defined in Article 11), and Contractor’s surety or guarantor (if applicable), have been placed on file with HUD, and shall govern in all matters that arise with respect to the Contract Documents.

D. Changes in the Drawings and Specifications, or any terms of the Contract Documents, including orders for extra work, changes by altering or adding to the Work, orders that shall change the design concept, or orders extending the Project Substantial Completion Deadline (identified in Article 3) may be effected only with the prior written approval of Lender and HUD, and under such conditions as either Lender or HUD may establish.

Article 3: Time

A. Contractor shall commence the Work to be performed under this Contract within fourteen (14) days of this Contract and shall bring the Work to Project Substantial Completion by _____, 20____ [this date shall be dependent on when the Work is commenced](**“Project Substantial Completion Deadline”**).

B. **“Project Substantial Completion”** shall be the date that the HUD Representative signs the final FHA Inspection Report contained in form HUD-92485 (Permission to Occupy Project Mortgages) for the Project required by the Contract Documents and Program Obligations, provided the Permission to Occupy in the same HUD-92485 is subsequently signed by the Authorized Agent of FHA. For purposes of determining any Liquidated Damages in Article 3.E below, **“Substantial Completion”** shall be the stage in the progress of the Work when a designated portion of the Work is sufficiently complete in accordance with the Contract Documents and Program Obligations so that the Owner can occupy or utilize that designated portion of the Work for its intended use, the HUD Representative signs the FHA Inspection Report in form

HUD-92485, and the Permission to Occupy in the same HUD-92485 is subsequently signed by the Authorized Agent of FHA. Notwithstanding any other provision in the Contract Documents, Contractor remains liable to complete items of incomplete construction as approved in HUD's sole discretion.

C. The Project Substantial Completion Deadline may be extended in accordance with the terms of the General Conditions only with the prior written approval of HUD through a HUD-approved change order.

D. Contractor shall correct any defects due to faulty materials or workmanship which appear within twelve (12) months from Project Substantial Completion. Warranty for Work first performed after Project Substantial Completion or portions of the Work not specifically included in a Certificate of Substantial Completion (defined as any executed Permission to Occupy in HUD-92485) shall extend twelve (12) months from the Date of Final Completion. The "**Date of Final Completion**" shall be the date the HUD representative signs the final HUD Representative's Trip Report (form HUD-95379) provided that the trip report is subsequently endorsed by the Construction Manager. Warranty for all Work performed after the Date of Final Completion shall extend twelve (12) months from the date all such Work is completed.

E. If Contractor does not meet the Project Substantial Completion Deadline or such date to which the Project Substantial Completion Deadline may be mutually extended by approved change order, in accordance with the Drawings and Specifications, including any authorized changes, the maximum sum stated in Article 4 (either Option 1 or Option 2) below shall be reduced by \$_____ per unit for each day of delay until Project Substantial Completion ("**Liquidated Damages**"). Liquidated Damages, however, shall not be assessed against any of the Work that has reached Substantial Completion (if applicable) in accordance with Program Obligations. When Owner submits to HUD its Cost Certification, Actual Damages shall be calculated. The term "**Actual Damages**" is defined as the actual cost of interest, taxes, insurance and mortgage insurance premiums, less the Project's net operating income, for the period from the Project Substantial Completion Deadline through Project Substantial Completion, the calculation of which shall be approved by HUD. The lesser of the Liquidated Damages or Actual Damages shall be applied.

[F. Applicable when the Parties agree to a potential incentive payment:
The Parties have completed the appropriate blank spaces in Article 4 (Option 1 or Option 2) below with respect to **Incentive Payment**, providing for the payment of an additional sum to Contractor as an incentive for completing the Project earlier than the Project Substantial Completion Deadline, or by such date to which the Project Substantial Completion Deadline may be extended by approved change order. If the Work is brought to Project Substantial Completion before the Project Substantial Completion Deadline, the contract sum stated in Article 4 below shall be increased, as indicated, by an Incentive Payment calculated in accordance with Article 4 **[Option 1, paragraph D] [Option 2, paragraph B]** below, consistent with Program Obligations. In cases requiring cost certification by Contractor, Contractor shall not be entitled to any

Incentive Payment resulting from early completion if HUD determines that Contractor's cost certification is fraudulent or materially misrepresents Contractor's Actual Cost of Construction, as defined herein.]

Article 4 [Option 1]: Contract Sum -- Cost Plus Contract

A. Subject to the provisions hereinafter set out, Owner shall pay to Contractor for the performance of this Contract the following items in cash:

- (1) The Actual Cost of Construction as defined in Article 13 below; plus
- (2) Builder's Profit of \$ _____. **{Must be zero when there is an Identity of Interest between the Parties.}**

In no event, however, shall the total cash payable pursuant to this paragraph A exceed \$_____.

B. In addition to any cash fee provided for in paragraph A, Owner shall pay to Contractor, by means other than cash, the following:

- (1) A promissory note in the form prescribed by HUD in the amount of \$ _____.
- (2) \$_____ in the form of _____.

C. If Contractor shall have received cash payments in excess of (a) the Actual Cost of Construction plus (b) the Builder's Profit, plus any additional amount to be paid under the provisions of paragraph B, all such excess shall be refunded to Owner.

[D. [Applicable when there is no Identity of Interest between the Parties. "Incentive Payment":

- (1) If the Work is completed prior to the Project Substantial Completion Deadline, Owner shall make an incentive payment to Contractor. The amount of the payment shall be determined according to Exhibit ____, Incentive Payment Addendum, attached hereto, and consisting of page 2 of HUD-92443, entitled Incentive Payment Computation. **(Steps 1(a) and 3(b) thereof contain blanks that are to be filled in at the time this Contract is executed. Insert that portion of the sum of interest, taxes, insurance, and Mortgage Insurance Premium that appears in Section G of HUD-92264 attributable to the construction period. If there has been a change in the interest rate charged for the construction period (see footnote designated "***" on page 1 of HUD-92443), the dollar amount included in Section G of HUD-92264 must be adjusted. The adjusted amount must be reflected in the savings computation. Furthermore, the procedures set forth in footnote**

designated “” on page 1 of HUD-92443 must be followed.)**

(2) If Contractor shall have received cash payments in excess of (a) the Actual Cost of Construction plus (b) the Builder's Profit, plus any additional amount to be paid under the provisions of paragraph B, plus the Incentive Payment under the provisions of paragraph D(1) above, all such excess shall be refunded to Owner.

(3) The Incentive Payment shall not be allowed on savings in costs disallowed by HUD or if Contractor's cost certification is found by HUD to be either fraudulent or to materially misrepresent the Actual Cost of Construction.]

OR

[Applicable when there is an Identity of Interest between the Parties. “Incentive Payment” (when soft cost savings are used to offset increased construction costs):

(1) The cash upset figure set forth at the end of paragraph A, immediately above is hereby increased by the amount by which \$_____ (the estimated sum of interest on the Loan, taxes, and property insurance and mortgage insurance premiums applicable to the construction period for this Project (See footnote designated “**” on page 1 of HUD-92443)) exceeds the Borrower's certified actual cost for these items through Project Substantial Completion, as approved by HUD, provided that construction is completed prior to the Project Substantial Completion Deadline, as amended by approved change order, and, further, that in no event shall the total cash payable exceed the Actual Cost of Construction as approved by HUD.

(2) If the aggregate interest rate during the construction period is determined at the time of cost certification to be less than that upon which the Note was endorsed, the estimated amount for interest, line 53 of HUD-92264, shall be adjusted accordingly and the dollar amount set forth in paragraph D(1) shall be reduced.]]

Article 4 [Option 2]: Contract Sum -- Lump Sum Contract [Permitted only when there is no Identity of Interest between the Parties]

A. Owner shall pay Contractor for the performance of this Contract, hereinafter provided, the sum of \$_____.

[B. “Incentive Payment”: If the Work is completed prior to the Project Substantial Completion Deadline, Owner shall pay to Contractor, in addition to the contract sum stated in paragraph A, an amount equal to ____% (not to exceed 50%) of

the amount by which the sum of Owner's certified cost of interest, real estate taxes, insurance premiums and mortgage insurance premium during construction, as approved by HUD through Project Substantial Completion, is exceeded by HUD's estimates of these same items, which estimate is \$_____. **(Insert that portion of the sum of interest, taxes, insurance, and mortgage insurance premium that appears in Section G of HUD-92264 attributable to the construction period. If there has been a change in the interest rate charged for the construction period (See footnote designated "***" on page 1 of HUD-92443), the dollar amount included in Section G of HUD-92264 must be adjusted. The adjusted amount must be reflected in the savings computation.)** The Incentive Payment shall not be allowed on savings in costs disallowed by HUD or if Contractor's cost certification is found by HUD to be either fraudulent or to materially misrepresent the Actual Cost of Construction.]

Article 5: Requisition and Payment Procedures

A. Each month after the commencement of Work hereunder, Contractor shall make a monthly request on HUD-92448 for payment by Owner for Work done during the preceding month. Each request for payment shall be filed at least 15 days before the date payment is desired. Subject to the approval of Lender and HUD, Contractor shall be entitled to payment thereon in an amount equal to (1) the total value of classes of the Work acceptably completed; plus (2) the value of materials and equipment not incorporated in the Work, but delivered to and suitably stored at the site; plus (3) the value of components stored off-site in compliance with Program Obligations; less (4) ten (10) percent holdback [as this percentage may be reduced in accordance with the provisions of the Retainage Reduction Rider attached hereto, if applicable](or as reduced by HUD in writing) and less (5) prior payments. The "values" of (1), (2) and (3) shall be computed in accordance with the amounts assigned to classes of Work in HUD-2328.

B. With its final application for payment by Owner, Contractor shall disclose, on a form prescribed by HUD, all unpaid obligations contracted in connection with the Work performed under this Contract. Contractor agrees that within 15 days following receipt of final payment, it shall pay such obligations in cash and furnish satisfactory evidence of such payment to Owner.

C. The balance due to Contractor hereunder shall be payable upon the expiration of thirty (30) days after the Work hereunder is fully completed, provided the following have occurred: (1) all Work hereunder requiring inspection by Governmental Authorities having jurisdiction has been inspected and approved by such authorities and by the rating or inspection organization, bureau, association or office having jurisdiction; (2) all certificates of occupancy, or other approvals, with respect to the Project have been issued by Governmental Authorities; (3) Permission(s) to Occupy (HUD-92485) for all units of the Project have been issued by HUD; (4) where applicable, HUD shall have approved Contractor's Certificate of Actual Cost; (5) as-built Drawings and Specifications, the as-built survey and all warranties shall have

been delivered to Owner; and (6) all executed final advance documents required by HUD have been submitted.

Article 6: Receipts, Releases of Liens & Payments for Materials & Equipment

A. Contractor agrees that within fifteen (15) days following receipt of each monthly payment, it shall pay in full and in cash all obligations for Work done and materials, equipment and fixtures furnished through the date covered by such monthly payment. Contractor may withhold retainage from the payment due each subcontractor, corresponding to, but not exceeding, the ten (10) percent holdback specified in item (4) of Article 5, paragraph A.

B. Owner may require Contractor to attach to each request for payment its acknowledgment of payment and all subcontractors' and material suppliers' acknowledgments of payment for Work done and materials, equipment and fixtures furnished through the date covered by the previous payment.

C. Contractor agrees that no materials or equipment required by the Specifications shall be purchased under a conditional sale contract or with the use of any security agreement or other vendor's title or lien retention instrument.

D. Concurrently with the final payment, Contractor shall execute a waiver or release of lien for all the Work performed and materials furnished hereunder, and Owner shall require Contractor to obtain similar waivers or releases from all subcontractors and material suppliers, if permitted by state law.

Article 7: Obligations of Contractor

A. **{Insert either "Contractor" or "Owner" as negotiated between the Parties}** shall furnish, at its own expense, all building and other permits. Contractor shall furnish, at its own expense, all licenses, tools, equipment and temporary structures necessary for the construction of the Project. Contractor shall give all required notices and shall comply with all applicable codes, laws, ordinances, rules and regulations, and protective covenants, wherever applicable. Contractor shall comply with the provisions of the Occupational Safety and Health Act of 1970. Contractor shall immediately notify Owner, Lender and HUD of the delivery of all permits, licenses, certificates of inspection, certificates of occupancy, and any other such certificates and instruments required by law, regardless of to whom issued, and shall cause them to be displayed to Owner, Lender and HUD upon request.

B. If Contractor observes that the Drawings and Specifications are at variance with any applicable codes, laws, ordinances, rules or regulations, or protective covenants, it shall promptly notify Architect in writing, and any necessary changes shall be made as provided in this Contract for changes in the Drawings and Specifications. If Contractor performs any Work knowing it to be contrary to such codes, laws, ordinances, rules or regulations, or protective covenants, without giving such notice to

Architect, it shall bear all costs arising therefrom.

C. Upon completion of construction, Contractor shall furnish to Owner a land survey map prepared in accordance with Program Obligations, ALTA-NSPS standards and the HUD Surveyor's Report showing the location on the site of all improvements constructed thereon, and showing the location of all water, sewer, gas and electric lines and mains, and of all existing utility easements. Such survey map shall be prepared by a licensed surveyor who shall certify that the Work is installed and erected entirely upon the land covered by the Security Instrument and within any building restriction lines on said land, and does not overhang or otherwise encroach upon any easement or right-of-way of others. To the extent such data shows that the Contractor has deviated from the Plans and Specifications, Contractor shall be responsible, at its own expense (or Owner's expense, if applicable), for correcting any such deviations. In addition, Contractor shall furnish additional surveys when Owner so requires, for any improvements, including structures and utilities not theretofore located on a survey.

D. Contractor shall assume full responsibility for the maintenance of all landscaping that may be required by the Drawings and Specifications until such time as both Parties to this Contract shall receive written notice from HUD that such landscaping has been finally completed. Owner hereby agrees to make available to the Contractor, for such purpose, without cost to the latter, such facilities as water, hose and sprinkler.

E. There shall be withheld from the final payment an amount satisfactory to Lender and HUD for any Work items that are incomplete at the time of such final payment.

Article 8: Assurance of Completion

Contractor shall furnish to Owner assurance of completion of the Work in the form of (specify) _____. Such assurance of completion shall run to HUD, Owner and Lender as obligees and shall contain a provision whereby the surety agrees that any claim or right of action that either Owner or Lender might have thereunder may be assigned to HUD.

Article 9: Waiver of Lien or Claim

A. In jurisdictions where permitted by law, Contractor shall not file a mechanic's or materialman's lien or maintain any claim against Owner's Land or Improvements for or on account of any Work done, labor performed or materials furnished under this Contract, and shall include in each subcontract a clause which shall impose this requirement on the subcontractor.

B. In jurisdictions where permitted by law, Owner may require Contractor to execute a waiver of liens that shall be recorded prior to the commencement of

construction. Contractor for itself, subcontractors, suppliers, materialmen, and all persons acting through or under it, agrees not to file or maintain mechanics' liens or claims against the property described herein, on account of Work done, labor performed or materials provided by them.

Article 10: Right of Entry

A. At all times during construction, HUD, Lender, and their agents or assigns shall have the right of entry and free access to the Project and the right to inspect all Work done and materials, equipment and fixtures furnished, installed or stored in and about the Project. For such purpose, Contractor shall furnish such enclosed working space as Lender or HUD may require and find acceptable as to location, size, accommodations and furnishings.

Article 11: Assignments, Subcontracts and Termination

A. This Contract shall not be assigned by either party without the prior written consent of the other party, Lender and HUD, except that Owner may assign this Contract, or any rights hereunder, to Lender or HUD.

B. Contractor shall not subcontract all of the Work to be performed hereunder without the prior written consent of Owner, Lender and HUD.

C. Upon request by Owner, Lender or HUD, Contractor shall disclose the names of all persons with whom it has contracted or will contract with respect to Work to be done and materials and equipment to be furnished hereunder.

D. Contractor understands that the Work under this Contract is to be financed by a building loan to be secured by a Security Instrument and insured by HUD, and that the terms of said Loan are set forth in a Building Loan Agreement between Owner as Borrower and _____ as "Lender."

E. Contractor further understands that said Building Loan Agreement provides that, in the event of the failure of Owner to perform its obligations to Lender thereunder, Lender may, as attorney-in-fact for Owner, undertake the completion of the Project in accordance with this Contract. In the event Lender elects not to undertake such completion, this Contract shall terminate pursuant to AIA Document A201 § 14.2 in the case of termination for cause, or AIA Document A201 § 14.4 in the case of termination for convenience.

Article 12: Roles of HUD and Lender

HUD is the insurer of Lender's Loan made to finance the construction identified herein, pursuant to the Building Loan Agreement. Nothing provided herein, no action or inaction of the Parties to this Contract, or actions or inaction by any third parties, shall impute to HUD or Lender status as a party to this Contract; HUD and Lender have no

liability to Contractor or Owner under the Contract Documents.

Article 13 [Option 1]: Certification of Actual Cost -- Cost Plus Contract

A. The “**Actual Cost of Construction**” shall include all items of cost and expense incurred by Contractor in the performance of this Contract. Allowable items of cost and expense incurred by Contractor in the performance of this Contract shall include costs and expenses of labor, materials for construction, equipment and fixtures, field engineering, sales taxes, workmen’s compensation insurance, social security, public liability insurance, general requirements and all other expenses directly connected with construction. The value of any kickbacks, rebates or discounts received or receivable in connection with the construction of the Project shall be subtracted from all items of cost and expense. Any cost or expense attributable to maintaining Contractor’s working capital is not to be included within the Actual Cost of Construction.

B. Contractor shall keep accurate records of account of the Actual Cost of Construction, and shall, upon demand, make such records and invoices, receipts, subcontracts and other information pertaining to the construction of the Project available for inspection by Owner, Lender and HUD.

C. With its final application for payment, Contractor shall furnish to Owner a completed “**Contractor’s Certificate of Actual Cost**” that shall be accompanied and supported by an independent public accountant’s or independent certified public accountant’s certificate as to actual cost in form acceptable to HUD.

D. Contractor shall include in all subcontracts, equipment leases and purchase orders a provision requiring the subcontractor, equipment lessor or supplier to certify its costs incurred in connection with the Project, in the event HUD determines there is an Identity of Interest between either Owner or Contractor and any such subcontractor, equipment lessor or supplier.

Article 13 [Option 2]: Cost Certification -- Lump Sum Contract

In the event HUD determines that there is an Identity of Interest between Contractor and Owner, Contractor shall certify, on a form prescribed by HUD, its cost incurred in the performance of the Work under this Contract.

Article 14: Designation of Representatives

A. Owner hereby designates _____ as its representative for all communications involving Work performed pursuant to this Contract.

B. Contractor hereby designates _____ as its representative for all communications involving Work to be performed pursuant to this Contract.

Article 15: Dispute Resolution

A. Any mediated settlement agreement or non-binding arbitration agreement made pursuant to the General Conditions must be approved by HUD in writing before it will be effective.

B. Section 15.3.3 of the General Conditions concerning waiver of binding dispute resolution proceedings is hereby stricken and of no force or effect.

C. The Parties agree that the method of binding dispute resolution shall be litigation in a court of competent jurisdiction.

Article 16: Headings and Titles

Any heading, section title, paragraph or part of this Contract is intended for convenience only, and is not intended, and shall not be construed, to enlarge, restrict, limit or affect in any way the construction, meaning, or application of the provisions thereunder, or under any other heading or title.

Article 17: Severability

The invalidity of any provision of this Contract shall not affect the validity of any other provision, and all other provisions shall remain in full force and effect.

IN WITNESS WHEREOF, the Parties to these presents have executed this Contract in counterparts, each of which shall be deemed an original.

{The following statement must be included above each party's signature and appear on the same page as the signature.}

The signatory below certifies that all of the information provided in this Contract and in any accompanying documentation is true, accurate, and complete, has been made, presented, and delivered for the purpose of influencing an official action of HUD, and may be relied upon by HUD as a true statement of the facts contained therein. The signatory acknowledges that the submission of any false, fictitious, or fraudulent statement, representation, or certification in this Contract or on any accompanying documents may result in criminal, civil, and/or administrative sanctions, including fines, penalties, and/or imprisonment under applicable federal law.

CONTRACTOR _____

By (authorized agent): _____

Printed Name, Title: _____

Name of Entity: _____

OWNER _____

By (authorized agent): _____

Printed Name, Title: _____

Name of Entity: _____

Exhibit General Conditions

Exhibit HUD-92554M

Exhibit Drawings Index

Exhibit Specifications Index

Exhibit HUD-2328

Exhibit HUD-92443, Incentive Payment Addendum

Exhibit Prevailing Wage Determination

Exhibit Identities of Interest

Exhibit Retainage Reduction Rider