

Agreement and Certification

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

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This AGREEMENT AND CERTIFICATION (“Agreement”) is effective as of the

_____ day of _____, 20____, by and among

_____ (“**Borrower**”),

whose principal address is _____,
and _____

(“**Lender**”), whose principal address is

_____, and (if applicable),

_____ (“**General Contractor**”), whose principal
address is _____, in connection

with HUD Project No. _____, located in the City/County of
_____, State of _____. (The definition of any
capitalized term or word used herein can be found in this Agreement, the Regulatory
Agreement between Borrower and HUD, the Note, and/or the Security Instrument,
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 Agreement rather than add or delete
provisions from such document. Handbooks, guides, notices, and mortgagee letters are
available on “HUDCLIPS,” at www.hud.gov.)

Borrower has applied to Lender for a Loan for one of the following purposes [*check applicable box*] in connection with the Project:

- Constructing or substantially rehabilitating a Project, the work to be performed by General Contractor, and Lender has applied to HUD for insurance

of the Loan in the amount of \$ _____, under Section _____ of the National Housing Act, as amended;

or

Financing or refinancing, after the completion of repairs (or satisfactory arrangements for completion of repairs), of a Project, and Lender has applied to HUD for insurance of the Loan in the amount of \$ _____, under Section _____ of the National Housing Act, as amended.

HUD has issued a Firm Commitment to insure the Loan in said amount pursuant to said Section of the National Housing Act, as amended, and Program Obligations issued pursuant thereto. The amount of the Loan is subject to reduction, as provided in said Act, and this Agreement is automatically amended accordingly.

In consideration of the mutual promises and undertakings contained herein, and for the purpose of inducing the Lender to make and HUD to insure said Loan, the parties acknowledge and agree as follows [for construction and substantial rehabilitation projects, check boxes 1 – 9 and 12 – 14; if HUD processed the Project to include a Builder's and Sponsor's Profit and Risk Allowance (“**BSPRA**”) under the National Housing Act, as amended, also check box 10; if there is no BSPRA, also check box 11] [for Section 223(f) and Section 223(a)(7) projects, check boxes 1, 2, and 6]:

1. Prior to receipt of the final advance under the Loan, and within the time fixed by the Loan Documents, Borrower agrees, if required by Program Obligations for cost certification and the National Housing Act, as amended, to submit to HUD, (a) a fully completed and executed Mortgagor's Certificate of Actual Cost, HUD-92330, and (b) a fully completed and executed Contractor's Certificate of Actual Cost (or Subcontractor's Certificate of Actual Cost) on HUD-92330-A or forms prescribed by HUD; or in the case of a loan insured pursuant to Section 223(f) of the National Housing Act, as amended, a fully completed and executed Mortgagor's Certificate of Actual Cost, HUD-2205-A. Borrower and General Contractor understand, agree and shall ensure that each of the certificates of cost is supported by the certificate of an independent Certified Public Accountant or independent public accountant in form acceptable to HUD, if required by Program Obligations for cost certification.

2. Borrower and Lender agree that the total advances under the Loan cannot exceed the amount permitted by Section 227 of the National Housing Act, as amended, and Program Obligations. In the case of loans insured pursuant to Sections 223(a)(7) or 223(f) of the National Housing Act, as amended, Borrower and Lender understand and agree that the Firm Commitment and Loan may be reduced to comply with the provisions of said Section 227 and Program Obligations issued pursuant thereto, and Borrower and Lender further agree to execute such instruments as may be required to accomplish such reduction.

3. Borrower agrees that if it receives Loan funds in excess of that permitted under the National Housing Act, as amended, and Program Obligations, it shall pay upon demand to Lender any such excess for application to the reduction of the then-outstanding principal balance of the Loan. Lender agrees that upon its receipt of such excess funds the Contract of Insurance shall be reduced accordingly, and Borrower and Lender agree to execute such instruments as may be required to accomplish such reduction. Borrower further agrees that if HUD, for cost certification purposes, accepts estimates for any items, Borrower shall, at final endorsement, establish a cash escrow to pay all the "to be paid in cash items" identified in its Certificate of Actual Cost, and to pay debts to third parties who made the original disbursement for an item listed as paid on the Certificate of Actual Cost, unless documentation, satisfactory to HUD, is submitted evidencing that Borrower paid these amounts after the date of its Certificate of Actual Cost. Borrower understands that the items covered by this cash escrow must be paid within forty-five (45) days after the date of final endorsement, except for those items in dispute, involved in litigation or those items that are repairs to be completed after endorsement and covered by an appropriate escrow agreement. If Borrower's actual cost is less than the estimates accepted for cost certification purposes, and HUD determines that this difference plus the net amount (total receipts less expenses of perfecting claims) of settlement of claims against bonding companies or others, would have required a reduction of the Loan, Borrower understands that prepayment of the Loan is required in an amount equal to the scheduled monthly principal payments, to the extent possible, and any remaining balance shall be deposited to the Project's Reserve for Replacement.

4. Borrower certifies that any financial or business interests or family relationships which exist between Borrower, or any of its officers, directors, stockholders, partners, managers, managing members, members, or principals ("**Principals**") and the Architect, General Contractor, subcontractors, suppliers, equipment lessors, or any of the Principals of any of the foregoing entities ("**Identity of Interest**") for the Project are herewith listed by name, title, address, relationship and interest: *(Attach exhibit if necessary. If None, so state).*

5. Borrower agrees to notify HUD in writing within ten (10) days of any change in relationships covered by Section 4 herein which results in the creation or elimination of an Identity of Interest at any time prior to final endorsement of the Note. In the event that there currently exists, or there comes into being prior to final endorsement of the Note, an Identity of Interest between Borrower or its Principals, and General Contractor or its Principals, Borrower's Certificate of Actual Cost will be accompanied by the Contractor's Certificate of Actual Cost, in the form prescribed by HUD; and, if required by HUD, similar certificates by any subcontractor, supplier, or

equipment lessor covered by this Section 5. It is agreed that the absence of such notice to HUD of the creation or elimination of an Identity of Interest may be treated by HUD as a representation that no Identity of Interest has been created or eliminated.

6. Borrower agrees to maintain and keep adequate records of all costs incurred in connection with the Project, and to make such records available for examination by HUD upon request.

7. If this Agreement discloses an Identity of Interest between Borrower and General Contractor, Borrower shall include in the Construction Contract a provision requiring General Contractor, upon completion of the Project, to submit to Borrower for delivery to HUD the Contractor's Certificate of Actual Cost, in the form prescribed by HUD. Borrower further agrees to include in said Construction Contract the requirement that General Contractor shall maintain adequate records of all such costs, and make such records, documents, contracts and accounts available for review upon request by HUD.

8. Borrower agrees that it shall include in the Construction Contract, and require the inclusion in all subcontracts, whether for labor, material, or equipment leases, a provision that if there is, or comes into being, an Identity of Interest between Borrower and any subcontractor; or, in those cases in which General Contractor is required to certify actual costs, between General Contractor and any subcontractor, then, if HUD so requires, such subcontractor shall submit to HUD a Certificate of Actual Cost in the form and with the audit standards prescribed by HUD, including the deduction of all kickbacks, rebates, adjustments, discounts, or any other arrangements in the nature thereof. For purposes of determining actual cost, no profit or general overhead may be included in the subcontract unless HUD has granted advance written approval of a specific dollar amount or a specific percentage.

9. Borrower agrees that if there currently exists, or if there comes into being prior to final endorsement of the Note, any Identity of Interest between Borrower and the Architect, or between the General Contractor and the Architect, the Architect shall immediately be relieved of inspection duties and the maximum Architect's fees allowable for cost certification purposes will be \$_____ for design services only, and no fees will be allowed for supervision.

10. If HUD processed the Project to include BSPRA, Borrower and General Contractor agree as follows:

- a. The form of construction contract shall be cost-plus, with a maximum upset price. So long as the requisite Identity of Interest is maintained through final endorsement of the Note, and subject to Section 10.c herein, then in lieu of General Contractor's fee, Borrower will be entitled to include in its Certificate of Actual Cost a BSPRA. The BSPRA shall be determined by applying the profit and risk percentage provided for in Section 227 of the National Housing Act, as amended, and Program Obligations issued pursuant thereto, that were in effect

on the date of the Firm Commitment, to the actual cost, as accepted by HUD, of those items which, under the provisions of said Act, and Program Obligations, are included in computing the BSPRA. For the purpose of determining actual cost, General Contractor's general overhead shall not exceed \$_____.

b. If the Identity of Interest between Borrower and General Contractor is not maintained through final endorsement of the Note, then the BSPRA provided for in Section 10.a herein will not be applicable. Instead, Borrower will be entitled to include in its Certificate of Actual Cost a Sponsor's Profit and Risk Allowance ("**SPRA**"). The SPRA shall be determined by applying the profit and risk percentage provided for in Section 227 of the National Housing Act, as amended, and Program Obligations issued pursuant thereto, that were in effect on the date of the Firm Commitment, to the actual cost, as accepted by HUD, of those items which, under the provisions of the said Act, and Program Obligations, are included in computing the SPRA.

c. If more than fifty percent (50%) of the actual cost of construction is subcontracted with any one contractor or subcontractor, or more than seventy-five percent (75%) with three or fewer contractors or subcontractors ("**50-75% Rule**"), the BSPRA provided for in Section 10.a herein shall not be allowed as an actual cost, and Borrower shall be limited to the inclusion on its Certificate of Actual Cost of the SPRA cited in Section 10.b herein. Further, in that event, for the purpose of determining actual cost, HUD will not allow any expense for General Contractor's general overhead.

11. If HUD did not process the Project to include a BSPRA, Borrower and General Contractor agree that the provisions of this Section 11 shall apply. If there currently exists, or if there comes into being prior to final endorsement of the Note, an Identity of Interest between Borrower and General Contractor, or in any other circumstance required by HUD, the form of construction contract shall be cost-plus, with a maximum upset price. For the purpose of determining actual cost, General Contractor's fee shall not exceed \$_____, and the general overhead shall not exceed \$_____. In the event that the 50-75% Rule is violated, for the purpose of determining actual cost, HUD will not allow any expense for General Contractor's fee and general overhead. If an Identity of Interest does not exist or is not maintained through final endorsement of the Note, and if authorized by the National Housing Act, as amended, and Program Obligations that were in effect on the date of the Firm Commitment, Borrower will be allowed to include in its Certificate of Actual Cost the SPRA cited in Section 10.b of this Agreement.

12. Borrower and General Contractor understand that for purposes of the 50-75% Rule, the terms "contractor" and "subcontractor" include material suppliers and equipment lessors, and any two or more contractors or subcontractors having an Identity of Interest or common ownership are considered as one contractor or subcontractor. Further, it is understood that the 50-75% Rule is not applicable to

manufacturers of industrialized housing, trade items performed by persons on General Contractor's payroll, mobile home park programs, supplemental loan programs, or rehabilitation programs other than gut rehabilitation.

13. Borrower and General Contractor further understand and agree that if an Identity of Interest arises between Borrower and General Contractor following their execution of a lump-sum form of construction contract, allowable costs shall be governed by the applicable provisions of Sections 11 and 12 of this Agreement.

14. Additional Certifications, if any. [*List here only those certifications that have been included as special conditions to the Firm Commitment and that concern construction/rehab/repairs, and that further relate to matters covered in this Agreement and Certification, e.g., cost certifications, identity of interest, and excess/unused mortgage proceeds. It is not HUD's intent that all certifications otherwise required for closing to be listed here:*]

Each signatory below hereby certifies that the statements and representations of fact made by such signatory contained in this Agreement and all supporting documentation thereto are true, accurate, and complete. This Agreement has been made, presented, and delivered for the purpose of influencing an official action of HUD in insuring the Loan, and may be relied upon by HUD as a true statement of the facts contained therein.

IN WITNESS WHEREOF, the following parties have duly executed this Agreement and Certification.

BORROWER:

LENDER:

By: _____

By: _____

Print name and title

Print name and title

GENERAL CONTRACTOR:

By: _____

Print name and title