

# Capital Advance Program Construction Contract Cost Plus

Under Section 202 of the Housing Act of 1959 or  
Section 811 of the National Affordable Housing Act

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

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The Department of Housing and Urban Development (HUD) is authorized to collect this information by provisions set forth in Article 1.E of the National Housing Act (Public Law 479, 48 Stat., 1246, 12 U.S.C. 1701 et. seq.). It is provided by contractors and mortgagors to document the terms and conditions of the Construction Contract; i.e., change for extra work or changes by altering or adding to the work, or which will change the design concept of the Construction Document for the approval of the FHA Commissioners. This information is used by HUD to ensure that viable projects are being developed. This information is considered non-sensitive and no assurance of confidentiality is provided. Furnishing of this information is mandatory, and failure to provide it may result in your not receiving your benefits.

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This Agreement, made the \_\_\_\_\_ day of \_\_\_\_\_, 20\_\_\_\_, between \_\_\_\_\_

\_\_\_\_\_ (hereinafter called the "Contractor") and

\_\_\_\_\_ (hereinafter called the "Owner").

**Witnesseth**, that the Contractor and the Owner, for the consideration hereinafter set out, agree as follows:

## Article 1 – Scope of Contract

A. The Contract between the parties is set forth in the "Contract Documents" which consists of this Agreement, the Drawings and Specifications, the current edition of AIA Document A201, "General Conditions of the Contract for Construction," except for all paragraphs concerning arbitration and Form HUD 2554, "Supplementary Conditions of the Contract for Construction." The provisions of this instrument and the said HUD Supplementary Conditions take precedence over all inconsistent provisions in the said AIA General Conditions. This Contract constitutes the entire agreement between the parties, and any previously existing contract concerning the work contemplated by the Contract Document is hereby revoked.

B. The Contractor shall furnish all of the materials and perform all of the work (within the property lines) shown on, and in accordance with, the Drawings and Specifications entitled \_\_\_\_\_

\_\_\_\_\_,  
HUD Project No. \_\_\_\_\_, dated \_\_\_\_\_.

C. The Drawings, which are numbered \_\_\_\_\_,  
and the Specifications, the pages of which are numbered \_\_\_\_\_

\_\_\_\_\_ ,  
have been prepared by \_\_\_\_\_  
\_\_\_\_\_ ("Design Architect").

The Architect administering the Construction Contract (hereinafter, and elsewhere in the Contract Documents, referred to as the "Architect") is \_\_\_\_\_

D. A master set of said Drawings and Specifications, identified by the parties hereto and by the Design Architect, the Architect, and the Contractor's Surety or Guarantor have been placed on file with the Department of Housing and Urban Development ("HUD"), and shall govern in all matters which arise with respect to such Drawings and Specifications.

E. Changes in the Drawings and Specifications or any terms of the Contract Documents, or orders for extra work, or changes by altering or adding to the work, or which will change the design concept, may be effected only with the prior written approval of HUD under such conditions as HUD may establish.

## Article 2 – Time

A. The work to be performed under this Contract shall be commenced within \_\_\_\_\_ days of this Agreement, and shall be completed by \_\_\_\_\_, 20\_\_\_\_. The time by which the work shall be completed may be extended in accordance with the terms of the said AIA General Conditions only with the prior written approval of HUD.

B. The Contractor shall correct any defects due to faulty materials or workmanship which appear within one year from the date of final completion.

C. If the work is not brought to final completion in accordance with the Drawings and Specifications, including any authorized changes, by the date specified above, or by such date to which the contract time may be extended, the contract sums stated in Article 3A(1) below shall be reduced by the actual cost of taxes and insurance, as approved by HUD, for the period from the scheduled date of completion through the date construction was actually completed. This cost shall be reduced by an amount equal to the project's net operating income (as determined by HUD) for the period upon which the aforementioned actual costs are based.

D. The Owner and Contractor may amend this contract prior to initial endorsement, in a form prescribed by the Commissioner, to provide for an incentive payment to the Contractor, which will result in an increase in the contract sums stated in Article 3A below, if the work is completed before the date specified in this contract. The Contractor will **not** be entitled to any incentive payment resulting from early completion if HUD determines that the Contractor's cost certification, required by Article 10, is fraudulent or materially misrepresents the Contractor's actual cost of construction.

E. The date of final completion shall be the date the HUD representative signs the final HUD Representative's Trip Report provided that the trip report is subsequently endorsed by the Chief Architect.

**Article 3 – Contract Sum and Payments**

A. (1) Subject to the provisions hereinafter set out, the Owner shall pay to the Contractor for the performance of this Contract the following items in cash:

- (a) The actual cost of construction as defined in Article 10 below; plus
- (b) A fee of \$ \_\_\_\_\_. In no event, however, shall the total cash payable pursuant to this paragraph (1) exceed \$ \_\_\_\_\_.

(2) If, upon completion, the Contractor shall have received cash payments in excess of (a) the actual cost of construction, plus (b) the cash fee specified in paragraph (1), all such excess shall be refunded to the Owner.

B. Each month after the commencement of work hereunder, the Contractor shall make a monthly request on Form HUD-92448 for payment by the Owner for work done during the preceding month. Each request for payment shall be filed at least \_\_\_\_\_ days before the date payment is desired. Subject to the approval of HUD, the 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 applicable HUD requirements less (4) 10 percent holdback and less prior payments. The "values" of (1), (2) and (3) shall be computed in accordance with the amounts assigned to classes of the work in the "Contractor's and/or Mortgagor's Cost Breakdown," attached hereto as Exhibit "A". The Contractor agrees that no materials or equipment required by the Specifications will be purchased under a conditional sale contract or with the use of any security agreement or other vendor's title or lien retention instrument.

C. The balance due the Contractor hereunder shall be payable upon the expiration of 30 days after the work hereunder is fully completed, provided the following have occurred:

- (1) All work hereunder requiring inspection by municipal or other 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 all units of the project have been issued by State or local governmental authorities having jurisdiction; and
- (3) Permission(s) To Occupy (Form HUD-92485) for all units of the project have been issued by HUD.

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

**Article 4 – Receipts and Releases of Liens**

The Owner may require the Contractor to attach to each request for payment its acknowledgement of payment and all subcontractors'

and material supplier's acknowledgements of payment for work done and materials, equipment, and fixtures furnished through the date covered by the previous payment. Concurrently with the final payment, the Owner may require the Contractor to execute a waiver or release of lien for all work performed and materials furnished hereunder, and may require the Contractor to obtain similar waivers or releases from all subcontractors and material suppliers.

**Article 5 – Requirements of Contractor**

A. The Contractor shall furnish, at its own expense, all building and other permits, licenses, tools, equipment and temporary structures necessary for the construction of the project. The Contractor shall give all required notices and shall comply with all applicable codes, laws, ordinances, rules and regulations, and protective covenants, and with the current regulations of the National Board of Fire Underwriters, wherever applicable. The Contractor further shall comply with the provisions of the Occupational Safety and Health Act of 1970. The Contractor shall immediately notify 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 HUD upon request.

B. If the 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 the Architect in writing, and any necessary changes shall be made as provided in this Contract for changes in the Drawings and Specifications.

C. Upon completion of construction, the Contractor shall furnish to the Owner a survey 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 shall be prepared by a licensed surveyor who shall certify that the work is installed and erected entirely upon the land covered by the mortgage 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. In addition, the Contractor shall furnish additional surveys when required by the Owner for any improvements, including structures and utilities, not theretofore located on a survey. The Contractor shall furnish copies of such survey required hereunder for HUD.

D. The Contractor shall assume full responsibility for the maintenance of all landscaping which 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. The Owner hereby agrees to make available to the Contractor, for such purpose, without cost to the latter, such facilities as water, hose and sprinkler.

**Article 6 – Assurance of Completion**

The Contractor shall furnish to the Owner assurance of completion of the work in the form of (specify) \_\_\_\_\_

\_\_\_\_\_

\_\_\_\_\_

\_\_\_\_\_

\_\_\_\_\_

\_\_\_\_\_

Such assurance of completion shall run to the Owner and HUD as obligees.

**Article 7 – Waiver of Lien or Claim**

The Contractor shall file no mechanic's or materialman's lien or maintain any claim against the Owner's real estate 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.

**Article 8 – Right of Entry and Interpretation**

A. HUD, its agents or assigns, at all times during construction, has 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, the Contractor shall furnish such enclosed working space as HUD may require and find acceptable as to location, size, accommodations and furnishings.

B. HUD shall also have the right to interpret the Contract Documents and to determine compliance therewith.

**Article 9 – Assignments, Subcontracts and Termination**

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

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

C. Upon request by the Owner, or HUD, the 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. The Contractor understands that the work under this contract is to be financed by a capital advance to be secured by a mortgage and subject to the terms of a Capital Advance Agreement between the Owner and HUD.

The Contractor further understands that said Capital Advance Agreement provides that in the event of the failure of the Owner to perform its obligations to HUD thereunder, HUD may, as attorney-in-fact for the Owner, undertake the completion of the project in accordance

with this Contract. In the event HUD elects not to undertake such completion, the Contractor's obligations under this Contract shall terminate.

**Article 10 – Certification of Actual Cost**

A. The "actual cost of construction," as used in Article 3 above, shall include all items of cost and expense incurred by the Contractor in the performance of this Contract, including costs and expenses of labor, materials for construction, equipment and fixtures, field engineering, sales taxes, workmen's compensation insurance, social security, public liability insurance, job overhead expenses, and all other expenses directly connected with construction, and including general overhead expenses, but excluding kickbacks, rebate and discounts received in connection with the construction of the project; and excluding any return on or cost of the Contractor's working capital, such return on or cost of working capital being a part of or to be paid from the Contractor's fee or profit.

B. The Contractor shall keep accurate records of account of the said 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 the Owner and HUD.

C. With its final application for payment, the Contractor shall furnish to the Owner a completed "Contractor's Certificate of Actual Cost," which shall be accompanied and supported by an independent public accountant's certificate as to actual cost (in form acceptable to HUD).

D. The 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 the Owner or the Contractor and any such subcontractor, equipment lessor or supplier.

**In Witness Whereof**, the parties to these presents have executed this contract in six (6) counterparts, each of which shall be deemed an original, in the year and day first above mentioned.

(Seal) Attest	Owner
Witness	By
Witness	Title

(Seal)	Contractor
Witness	By
Witness	Title