

Construction Contract
Section 242

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

OMB Approval No. 2502-0602
(Exp. XX/XX/XXXX)

Public reporting burden for this collection of information is estimated to average 2 hours. This includes the time for collecting, reviewing, and reporting the data. The information is being collected to obtain the supportive documentation which must be submitted to HUD for approval, and is necessary to ensure that viable projects are developed and maintained. The Department will use this information to determine if properties meet HUD requirements with respect to development, operation and/or asset management, as well as ensuring the continued marketability of the properties. This agency may not collect this information, and you are not required to complete this form, unless it displays a currently valid OMB control number.

Warning: Federal law provides that anyone who knowingly or willfully submits (or causes to submit) a document containing any false, fictitious, misleading, or fraudulent statement/certification or entry may be criminally prosecuted and may incur civil administrative liability. Penalties upon conviction can include a fine and imprisonment, as provided pursuant to applicable law, which includes, but is not limited to, 18 U.S.C. 1001, 1010, 1012; 13 U.S.C. 3729, 3802, 24 C.F.R. Parts 25, 28 and 30, and 2 C.F.R. Parts 180 and 2424..

FHA Project No.: _____

Project Name: _____

Lump Sum Contract _____

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

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 HUD's official website: (http://portal.hud.gov/hudportal/HUD?src=/program_offices/administration/hudclips, or a successor location to that site). 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 (“Work”) 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.

Article 2: Identification of Contract Documents

- A. The Contract Documents are identified as follows:

- (1) This Construction Contract (**Agreement**).
- (2) The General Conditions of the Contract for Construction, AIA Document A201 – _____ **{Insert year of current edition}** (“**General Conditions**”), expressly excepting those provisions mandating binding arbitration. If any of the provisions of this Agreement conflict with the terms contained in the General Conditions, the provisions in this Agreement shall control.
- (3) The Supplementary Conditions of the Contract for Construction (HUD-92554-OHF).
- (4) The HUD Special Conditions, attached hereto as Exhibit____.
- (5) The Drawings, an index of which is attached hereto as Exhibit____.
Number_____ Title_____ Pages_____
- (6) The Specifications, an index of which is attached hereto as Exhibit____.
Number_____ Title_____ Pages_____
- (7) The schedules of values approved by HUD on the date of _____, 20____, attached hereto as Exhibit____.
- (8) The Prevailing Wage Determination _____ Modification Number_____, last published/modified on (date) _____, 20____, and attached hereto as Exhibit____.
- (9) Any change orders approved by HUD after the execution of this Contract.

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

- C. A master set of the Drawings and Specifications, identified by the signatures of Owner, Contractor, Architect, 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 Final Completion Deadline (identified in Article 3) may be effected only with the prior written approval of the Lender (as defined in Article 11) 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 _____ calendar days of the Owner's "Notice to Proceed" date. The "Notice to Proceed" shall be transmitted to the Contractor no later than __ calendar days from initial endorsement. Furthermore, the project shall be substantially complete within ___ calendar days of the "Notice to Proceed."
- B. The "Date of Substantial Completion" shall be the date as determined by the HUD Architect/Engineer upon inspection of the project and review of the pertinent documents submitted by the Contractor and Architect. The Owner shall be notified in writing of the established Substantial Completion date.
- 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 the Date of Substantial Completion.
- E. The Owner will suffer financial loss if the project is not substantially complete on the date set forth in the Contract Documents. The Contractor (and Surety) shall be liable for and shall pay to the Owner the sums hereinafter stipulated as fixed, agreed and liquidated damages for each calendar day of delay until the work is substantially complete: _____(\$ _____). This amount is based upon \$.09/\$1,000 of total construction cost in the contract,
 - a. In cases where there are several buildings, wings, and/or phases which will be occupied by the Owner as they become available, the overall liquidated damages shall be reduced in accordance with Program Obligations.
 - b. Owner shall, in Exhibit __ attached there, identify the phase, indicate the completion date and the pro-rata liquidated damage assessment dollar amount for each phase.

Article 4: Contract Sum -- Lump Sum Contract

A. Owner shall pay Contractor for the performance of this Contract, hereinafter provided, the sum of \$ _____ (_____ and _____/100 dollars)

(1) **[Applicable in the event HUD approves in writing the early commencement of Work to be performed prior to issuance of a firm commitment by HUD]**

The preceding amount includes the sum of \$ _____ (_____ and _____/100 dollars) for the early commencement of Work to be performed prior to issuance of a Firm Commitment by HUD (**“Pre-Commitment Work”**).

(2) **[Applicable in the event HUD approves in writing the early start of Work to be performed after issuance of the Firm Commitment by HUD and prior to initial endorsement of the Note by HUD]**

The preceding amount includes the sum of \$ _____ (_____ and _____/100 dollars) for the early start of Work to be performed after issuance of the Firm Commitment by HUD and prior to initial endorsement of the Note by HUD (**“Early Start Work”**).

Article 5: Requisition and Payment Procedures

A. Each month after the commencement of Work hereunder following initial endorsement, Contractor shall make a monthly request on HUD-92448-OHF for payment by Owner for Work done during the preceding month. Each request for payment shall be filed at least 25 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 (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 the schedule of values attached hereto as Exhibit _____.

B. Holdback requirement for the purposes of this Section is defined as the withholding of 10% [or such lower maximum dictated by State law] on the entire request by the Contractor for the (a) fee for services performed; (b) cost of the work performed; and (c) reimbursement of General Conditions items. Holdback will be withheld up to 50% of the sum established in this Construction Contract between Owner and Contractor, on a cumulative basis. Thereafter, with the approval of the Owner, the Lender, the architect for the Project (_____), HUD, and the surety company providing payment and performance bonds for the Project (_____), no further retainage may be required on the balance.

- C. 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.
- D. 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) as-built Drawings and Specifications and all warranties shall have been delivered to Owner; and (4) all executed final advance documents required by HUD have been submitted.
- E. **[Applicable in the event HUD approves Pre-Commitment Work or Early Start Work]** Contractor agrees that the foregoing provisions of Article 5 are not applicable to the payment for any Pre-commitment Work or Early Start Work until initial endorsement of the Note by HUD.

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 Drawings and 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 an unconditional 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. 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. 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, HUD shall be furnished an As-Built ALTA/ACSM Land Title Survey prepared in accordance with Program Obligations, 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 Borrower's Security Instrument (as defined in the Regulatory Agreement) 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 Drawings and Specifications, Contractor shall be responsible, at its own expense, for correcting any such deviations.
- D. Contractor shall assume full responsibility for the maintenance of all landscaping that may be required by the Drawings and Specifications until such landscaping has been fully 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 performance and payment bonds (HUD-92452-OHF and HUD-92452A-OHF each in the amount of 100% of the Contract Sum. (specify amount) Such assurance of completion shall run to 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 (as each such term is defined in the Regulatory Agreement) 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

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 the 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. **[Applicable in the event HUD approves Pre-Commitment Work or Early Start Work]** Contractor acknowledges that the foregoing provisions of Article 11.D. are not applicable to Pre-Commitment Work and/or Early Start Work; Owner and Contractor agree to accept the entire risk for financing and payment of Pre-Commitment Work and Early Start Work in the event HUD does not insure a mortgage with respect to the project.

Note: If Contractor or Owner is a corporation, Secretary should attest.