

# COOPERATIVE AGREEMENT

By and Between the

United States DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

AND \_\_\_\_\_

for the Multifamily Energy and Water Conservation Pay for Success Pilot (MFS P4S)

This **COOPERATIVE AGREEMENT** (the “Agreement”) is made and entered into this \_\_\_\_ day of \_\_\_\_\_, 2018, by and between the U.S. Department of Housing and Urban Development (“HUD”) and \_\_\_\_\_ (the “Intermediary”).

## ARTICLE I – GENERAL

- A. The Intermediary and HUD hereby enter into this Agreement as a condition to and in consideration of the Intermediary’s participation in the Multifamily Energy and Water Conservation Pay for Success Pilot (“MFHP4S”). The MFH P4S is authorized by the Fixing America’s Surface Transportation Act of 2015, P.L. 111-117 (the “Act”) and the Notice of Funding Availability, FR-6200-N-36 (“NOFA”). The Intermediary has been selected under the NOFA to enter into this Cooperative Agreement with HUD. The Intermediary agrees to undertake the design and implementation of budget-neutral energy and water conservation (EWC) retrofit program for properties participating in some HUD multifamily rental assistance programs and will receive performance payments based on utility savings realized by HUD, subject to and in accordance with the terms and conditions of this Agreement, the Act, and the NOFA.
- B. In addition to all applicable federal laws, regulations and guidance, this Agreement is governed and controlled by the NOFA, which is incorporated herein by reference. Terms not defined in this Agreement shall be defined as provided in the NOFA.
- C. By executing this Agreement, the Intermediary for itself, agents and contractors covenants, agrees, assumes responsibility, and certifies that all activities related to implementing the MFS P4S program under this Agreement shall be in compliance with and subject to the Act, the NOFA, and all other applicable laws and requirements. In the event of a conflict between the terms of this Agreement and the NOFA, the terms of the NOFA shall apply.
- D. The Intermediary was awarded the opportunity to enter into Cooperative Agreements with HUD for a total of \_\_\_\_ units under the NOFA. The Intermediary will also enter

into Pay For Success (PFS) contracts with the Owners of those units. This Agreement applies only to those units covered by the PFS contract attached as an Exhibit to this Agreement. The Intermediary understands and agrees that it shall not receive any performance payments under this Agreement for any savings realized from units not covered by this Agreement.

## **ARTICLE II –DEFINITIONS**

In addition to the definitions contained in the NOFA, including the program definitions, the following definitions apply to this agreement:

- A. Act means the Fixing America’s Surface Transportation Act of 2015, P.L. 111-117
- B. Agreement means this Cooperative Agreement.
- C. NOFA means the Notice of Funding Availability, FR-6200-N-36, published on xxxx
- D. Program Requirements mean this Agreement, the Act, and the NOFA.
- E. Key Personnel means individuals identified in the Intermediary’s application in response to the program NOFA who will perform one or more of the following functions: project management, capital sourcing, property recruitment, oversight of Scope of Work development and retrofit implementation, and financial administration.

## **ARTICLE III – PERIOD OF PERFORMANCE**

- A. Performance Period. The period for performance may be up to twelve years long. It will begin on the date of the execution of this Agreement by HUD. Notwithstanding the foregoing, the Intermediary acknowledges that certain requirements related to administration, monitoring, reporting, and compliance and oversight set forth in this Agreement may survive the expiration or termination of the Performance Period. No performance payments will be made beyond the expiration of the Performance period.
- B. Termination. This Agreement, in full or in part, including without limitation, any of the initiatives to be undertaken by Intermediary, its agents and contractors, may be terminated by HUD prior to the end of the Performance Period, pursuant to Article VII of this Agreement. In the event Intermediary seeks termination in order to recover units allocated under this agreement to allocate to another property being retrofitted under this program, the Intermediary must submit a written request to HUD providing, among other information, the reasons for termination and the number of units allocated to the Intermediary sought for use at another project. Approval of any Intermediary request for termination shall be in the sole discretion of HUD.

## **ARTICLE IV--TERMS AND CONDITIONS**

- A. Intermediaries are responsible for securing all funding necessary for program execution and implementation of energy and water conservation measures (“EWCMs”). Performance payments from HUD to Intermediaries will only be made

in accordance with the terms of this Agreement, the Act and the NOFA and will be the only source of funding provided to the Intermediary by HUD under this Agreement. In accordance with the Act, payments from HUD may not exceed accrued savings as a result of retrofits performed under this program.

B. The Intermediary must identify and retain a qualified Third-Party Independent Evaluator (“IE”), consistent with the following provisions:

1. The IE may not have any financial stake in the outcomes of the PFS Contracts or this Agreement and no actual or apparent conflicts of interest with the Intermediary or Owner(s). All payments to the IE by the Intermediary must be negotiated prior to any agreement between the parties. Fees may not in any way be contingent on the results of the measurements and outcomes of the analysis to be performed by the IE. The Intermediary shall promptly notify HUD should the Intermediary become aware of a conflict of interest or the appearance thereof with the Independent Evaluator arising at any time during the term of the Agreement.
2. Independent Evaluator Qualifications. The Intermediary will submit to HUD a request for approval of the selected IE detailing its qualifications to serve in this role. The Intermediary may not enter a contract with the IE before HUD has given approval. The minimum qualifications for the Independent Evaluator are the following:
  - a. Holding at least one of the following qualifications/professional designations: Certification to complete building energy audits by RESNET, BPI, or their training providers; Certified Energy Manager (CEM); State-level equivalent of a certified energy auditor certification; RESNET-certified Home Energy Rater; BPI-Certified Building Analyst; or professional architect or registered professional engineer.
  - b. Agreeing to pursue the American Society of Heating, Refrigerating and Air-Conditioning Engineers (ASHRAE) sustainability certification program, within 12 months of it being available.
  - c. Not being under suspension or debarment by HUD or involved as a defendant in criminal or civil action with HUD.
3. Conflicts of Interest. The Intermediary shall promptly notify HUD should the Intermediary become aware of a conflict or an appearance of conflict by the Independent Evaluator arising at any time during the term of the Cooperative Agreement.

- C. The Intermediary may not take any security interest or lien on fixtures or equipment constituting the EWC retrofits or the real property in which the EWC retrofits are installed.
- D. PFS Contracts. To be eligible to earn performance payments for the units associated with the retrofit of a property, the Intermediary must within 30 days of the execution of this agreement submit to HUD a PFS Contract with the property Owner. The PFS Contract will be attached as an exhibit to this Agreement and will include a clear description of every unit in the property being retrofitted. Nothing contained in the PFS Contract between the Intermediary and Owner may be inconsistent with the Program Requirements. In the event of a conflict between the PFS contract and this Agreement, the Agreement shall control. The form and content of any PFS Contract shall be negotiated between the Intermediary and Owner, provided that nothing contained in the PFS Contract will be inconsistent with the terms of the Cooperative Agreement. The following provisions must be included in the PFS Contract for the Intermediary to be eligible to receive performance payments for units thereunder:
1. Confirmation that the PFS Contract shall terminate on the earlier of its scheduled termination date or the termination of the Intermediary's Cooperative Agreement.
  2. In the event of any inconsistency between the PFS Contract and the Cooperative Agreement, the terms of the Cooperative Agreement shall prevail.
  3. For any property having current affordability restrictions that expire prior to the seventeenth (17th) anniversary of the execution of the PFS Contract, agreement by the Owner to extend affordability restrictions in accordance with the approach offered in the Cooperative Agreement.
  4. Agreement to provide any utility bills and other energy and water consumption and cost data requested by an Intermediary during the term of the PFS Contract and to obtain tenant utility release forms as necessary for the determination of savings to HUD as described in section C.3. of this Agreement.
  5. Acknowledgement that final decisions regarding the use of the property-level reserves controlled by HUD will be made by HUD in accordance with the protocol set out in the Cooperative Agreement.
  6. A hold harmless and indemnification of HUD with respect to its role in the PFS Pilot including but not limited to the selection of the Intermediary, the development of the scope of work and the operation of all improvements to the property resulting from the PFS Pilot.
  7. So long as the property has a subsidy or mortgage relationship with HUD or the Federal Housing Administration (FHA), agreement to maintain all improvements made under the PFS Pilot in good working

order and ensure that any replacement of such improvements results in equal or better energy or water efficiency than the improvements installed under the PFS Pilot.

8. Confirmation that HUD has made no representation or warranty to the Owner with respect to the improvements to be installed under the PFS Pilot or their cost or effectiveness.
  9. The PFS Contract does not modify or replace any existing agreement between the Owner and HUD or FHA.
  10. Except as expressly set forth in the Cooperative Agreement, nothing in the PFS Pilot modifies HUD guidance.
  11. Owners shall have no liability to Intermediaries for costs incurred by the Intermediary.
  12. The Owner and Intermediary acknowledge that HUD is a third-party beneficiary of the PFS Contract.
  13. Disclosure of any incentive payments from the Intermediary to the Owner or any cost savings on Owner-paid utilities being recovered from the Owner.
- E. During the period of performance under this Agreement, the parties named as Key Personnel in the Intermediary's Application shall not be replaced without the prior written consent of HUD in its sole discretion.
- F. Intermediaries proposing to use property-level reserve funds controlled by HUD—e.g. from the Reserve for Replacement ("RfR") accounts—to pay for any part of the retrofit performed under this program must get HUD approval in compliance with the protocol set forth in the NOFA. Intermediaries will work with Owners to develop requests for reserve funds that Owners will submit according to existing HUD approval protocols.
- G. An environmental review must be performed before funds from any source are committed to a MFH-P4S project. HUD maintains documentation of the environmental review in an environmental review record, which describes all proposed activities, evaluates the proposal's potential environmental impacts, and documents compliance with all applicable environmental laws and authorities. Accordingly, Intermediary must complete the Site-Specific Environmental Review Form (Part I) specifically created for this program (see attachment to the NOFA entitled "Site-Specific Environmental Review - Part 1 of 2 (completed by intermediary)").

## **ARTICLE V-- PERFORMANCE PAYMENTS**

- A. General. Subject to all terms and conditions of this Agreement being satisfied, including but not limited to the establishment of normalized pre-retrofit baselines

being established and validated by the Independent Evaluator, HUD will make payments to the Intermediary based on third-party verified utility cost savings realized by HUD resulting from reduced energy and water consumption associated with EWC retrofits completed in participating properties under the attached PFS contracts, contingent on the availability of appropriations for project-based rental assistance renewals. HUD will accrue these savings via reduced subsidy levels relative to pre-retrofit baselines estimated based on weather- and occupancy-based pre-retrofit consumption data. HUD's realization of utility savings in participating properties is the threshold for any performance payment to the Intermediary under this agreement.

B. Timing of Payments. The intermediary will submit invoices (see Article V, Section C.3.) annually to HUD in parallel with the property's annual rent adjustment cycle and starting as soon as savings have begun to accrue to HUD in order to align with changes in rents and utility allowances.

1. For properties with retrofit completion dates that do not coincide with a property's annual rent adjustment effective date, the first invoicing period will cover only the portion of the previous year following both the retrofit and completion date. For properties meeting this description, the initial invoice will cover savings on tenant utility expenditures accrued to HUD as a result of post-retrofit Utility Allowance adjustments, which can happen outside of the annual rent adjustment cycle. Concurrent rent adjustments by the owner will allow HUD to capture savings on both owner and tenant utilities going forward, resulting in the Intermediary's second invoice being based on a full year of tenant and owner utility savings.
2. For properties with retrofit completion dates that coincide with the property's annual rent adjustment date, the Intermediary will submit its first invoice concurrent with the property's rent adjustment date the following year. If owners of these properties successfully implement utility allowance and rent adjustments at the time of retrofit completion, HUD will have captured a full year of savings on both owner and tenant utilities and those savings will be reflected in the performance payments in the Intermediary's initial invoice.

C. Determination of Payment Amount. The Intermediary may invoice for 99 percent of the savings accrued to HUD during an invoicing period. HUD's total accrued savings will be considered equal to the difference between weather- and occupancy-normalized utility costs for that period and an estimated pre-retrofit utility cost baseline, per the following methodology, with the specific details of the calculation methodology and method of validation will be codified in the work plan submitted by the Intermediary to HUD for approval (see Article V section B).

1. **All utility cost data used in the determination of savings shall be weather- and occupancy-normalized. All data and calculations shall be validated by the third-party independent evaluator.**

2. The amount of savings to HUD resulting from decreases in Owner-paid utilities in properties with budget-based rents will be determined by:
  - a. calculating the difference between:
    - i. estimated energy and water consumption levels by the owner(s) for units covered by the attached PFS contract(s) prior to commencement of the EWC retrofits (the pre-retrofit baseline), and
    - ii. consumption corresponding to those units for the invoicing period, and
  - b. multiplying the resulting delta by the effective utility rate for the invoice period.
3. The amount of savings to HUD resulting from HUD savings from decreases in tenant-paid utilities for projects where there is a utility allowance will be determined by
  - c. calculating the difference between:
    - i. the pre-retrofit baseline utility allowance for each unit covered by the attached PFS contract(s), recalculated using the best available data on tenant-paid utility consumption and costs (as approved by HUD), and
    - ii. the UA for each of those units in effect during the invoicing period, and
  - d. multiplying the resulting delta by the effective utility rate for the invoicing period.
4. The Intermediary may bill for 99 percent of the total savings accrued to HUD from both owner and tenant utility reductions per the methodology outlined above as provided in the work plan. Before issuing payment, HUD shall confirm that
  - a. the calculations contained in the invoice are correct and
  - b. owner and tenant subsidy levels required to effectuate the savings to HUD calculated therein have been implemented and were in effect for the correct period of time.

D. Invoicing. The Intermediary will invoice HUD annually for Performance Payments earned as provided above. The invoice must include

1. thorough documentation of all calculations contributing to the calculation of the amount being invoiced (as provided in the work plan), and
2. a written certification by the Independent Evaluator that
  - a. the performance payment has been calculated as set forth in this Agreement and
  - b. no conflict of interest or apparent conflict of interest with the Intermediary or with respect to any property or Owner for which a Performance Payment is requested, which would preclude the IE from performing its obligations in a truly independent manner, exists to the best of its knowledge, before any performance payment can be made.

E. Restrictions.

1. Performance payments will **only** be made for **savings to HUD resulting from decreases in Owner-paid utilities in properties with budget-based rents** and for **savings resulting from decreases in tenant-paid utilities in properties where there is a utility allowance**. No performance payments will be made for decreases in Owner-paid utilities in projects with market-based rents, as HUD does not have a mechanism for realizing savings from this reduced consumption. This does not preclude the Owner from agreeing to remit some portion of its accrued utility savings directly to the Intermediary, provided this is disclosed in the PFS Contract.
2. Only savings to HUD (accrued via changes to rental subsidies and/or utility allowances) occurring subsequent to the retrofit completion date will be included in the HUD accrued savings on which payment amounts are based.
3. Performance payments will be paid annually, and only after the resulting budget-based rent adjustment or utility allowance adjustment is made and savings are realized by HUD, accordingly. Failure on behalf of the Owner, Intermediary or IE to provide any information necessary for HUD to make this adjustment may delay this process with no liability to HUD.
4. No performance payments shall be made after the period of performance has expired.



5. Notwithstanding anything in this Agreement, performance payments shall not exceed \$10,000 per unit.

## ARTICLE VI – DOCUMENTATION AND REPORTING

- A. The Intermediary shall comply with all record retention and access requirements in 2 CFR Part 200.
- B. Within 30 days of executing this agreement, the Intermediary will submit a Work Plan to HUD for approval detailing content and due dates of all documentary deliverables as well as a proposed approach to periodic consultation with HUD for the purposes of oversight.
- C. Site-specific environmental review. The Intermediary will use the “Site-Specific Environmental Review - Part 1 of 2” form to report on the following: high-level description of the project’s scope of work; whether the property lies within a Coastal Barrier Resource unit; whether the property lies within a floodplain and proof of any required flood insurance policies; whether the project will destroy or modify a wetland; previous uses of the site and other evidence of contamination on or near the site; and whether any historic preservation policies apply to the site or the building(s).
- D. Certification of Retrofit Completion. Intermediaries will submit a certification of completion of retrofit, cosigned by the property owner. This will include the following information (with specific content and format requirements detailed in the Work Plan), attested to by the independent evaluator:
  1. List of installed measures with cost information
  2. Weather- and occupancy-normalized pre-retrofit consumption baselines for each affected tenant- and owner-paid utility, and all component data used to calculate those baselines, including utility consumption, rates, utility allowances, and climatic and occupancy data, and the calculation methodology used.
  3. Weather- and occupancy-normalized post-retrofit consumption projections for each affected tenant- and owner-paid utility, and all component data used to calculate those baselines, including utility consumption, rates, utility allowances, and climatic and occupancy data, and the calculation methodology used.
  4. Recalculated pre-retrofit baseline utility allowances and post-retrofit utility allowances for each unit size/type calculated based on consumption data in b. and c. above.
  5. Recalculated pre-retrofit baseline owner rental subsidy and post-retrofit owner renter for each unit size/type calculated based on b., c., and d. above.

Post-retrofit per-unit annual savings to HUD relative to pre-retrofit baseline.

- E. Invoices for Performance Payments. The Intermediary will submit invoices to HUD for performance payments on an annual basis concurrent with the property's annual rent adjustment date as specified in the work plan. Invoices will include the following information (with specific content and format requirements detailed in the Work Plan), attested to by the independent evaluator, as provided in Article IV of this Agreement.
- F. Requests for property-level reserve funds. Intermediaries seeking to use property-level reserves to help fund installation costs will submit the following documentation to HUD. In addition, the property owner must also submit a Funds Authorization Form (HUD-9250).
  - 1. Scope of Work. The intermediary will work with the property owner to develop a scope of work, which must include a list of measures to be installed at the property as well as high-level information on sources and uses of funds.
  - 2. Property Reserve Analysis. The Intermediary will submit a 20-year reserve analysis that demonstrates that the retrofit will leave the property in as good or better financial shape as it would otherwise have been. The reserve analysis must present two scenarios: a Status Quo scenario and a Retrofit scenario. The reserve analysis must be based on a capital needs assessment (CNA) prepared by a CNA professional that is more recent than the later of the date of completion of the most recent major capital improvements to the property or two years prior to the date of the reserve analysis.
- G. Request to Replace Key Personnel. Any Intermediary seeking to use a new Partner (as provided in Article III section F) shall submit evidence of the following as applicable to their prospective role: prior experience with similar retrofit projects; names of key personnel to be assigned to the PFS Pilot and their relevant experience; capacity to simultaneously undertake projects of the size proposed by applicant in multiple locations; and history of completing projects on time.
- H. Requests to Assign Payments to Third Parties. In the event that the Intermediary wishes to assign performance payments to a third party, the Intermediary must submit to HUD a request for approval. HUD will evaluate such assignments for compliance with all Program Requirements and grant approval accordingly. Assignment of payments may not commence until the Intermediary has received HUD approval to do so.
- I. Reporting post-retrofit modifications to the physical structure of the property. In the event of a change to the physical structure of the property during the period of performance which materially impacts utility usage, the Intermediary will submit written notice to HUD, validated by the Independent Evaluator, listing all changes

made and any agreed-upon equitable modifications of the pre-retrofit baseline for Owner-paid utility and/or of the pre-retrofit baseline of tenant utility allowances to reflect the impact of the change on utility usage.

- J. Quarterly progress reporting. Intermediaries will submit quarterly reports regarding the status of all properties—including the property covered under this agreement—for which work under the PFS Pilot SOWs is unfinished until all projects have been completed. The reports shall summarize the work that has been completed, what remains to be done and the anticipated projected completion date.
- K. Program evaluation. Per authorizing legislation, HUD will be responsible for submitting annual program evaluation reports to Congress starting no later than a year after that law’s enactment. Intermediaries will work with a program evaluation team and provide relevant information, possibly including (but not limited to) information pertaining to retrofit implementation, program administration, post-retrofit behavioral interventions, and certain fees. Intermediaries may be asked to clarify or provide additional context for previously submitted information, including additional details on their sources and uses of funds.

## **ARTICLE VII – DEFAULTS AND REMEDIES**

- A. Events of Default. Each of the following shall be deemed an Event of Default under this Agreement: (1) any material failure by Intermediary to comply with the terms and conditions of this Agreement, including those stated in any applicable Federal statute, regulation, certification, NOFA, or notice of award; or (2) any misrepresentation by the Intermediary which, if known by HUD, would have resulted in the Intermediary not being selected under the NOFA or would have affected the performance payments.
- B. Notice of Default. If any Event of Default occurs, HUD shall give Intermediary written notice of the occurrence of the Event of Default and a reasonable opportunity to take corrective action, if available. The notice shall identify (1) the Event of Default, (2) the required corrective action by Intermediary, (3) the date by which the corrective action must be taken, and (4) the consequences for failing to take corrective action.
- C. Remedies. If Intermediary materially fails to comply with the terms and conditions of this Agreement, HUD may terminate this agreement and take any enforcement actions and remedies available by law.

INTERMEDIARY:

[INSERT FULL LEGAL NAME]

By: \_\_\_\_\_

Name:

Title:

HUD:

UNITED STATES DEPARTMENT  
OF HOUSING AND URBAN  
DEVELOPMENT

By: \_\_\_\_\_

Name:

Title: