

# CONSTRUCTION CONTRACT

Department of Labor and Economic Growth  
MICHIGAN STATE HOUSING DEVELOPMENT AUTHORITY  
735 East Michigan Avenue, Lansing, Michigan 48912

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## CONSTRUCTION CONTRACT

THIS CONSTRUCTION CONTRACT (the "Contract") is entered into this \_\_\_ day of \*\*\*, 200\*\*\*, by and between \*\*\*, a Michigan \*\*\*, whose address is \*\*\*, Michigan \*\*\* (the "Contractor") and \*\*\* **LIMITED DIVIDEND HOUSING ASSOCIATION LIMITED PARTNERSHIP**, a Michigan limited partnership, whose address is \*\*\*, Michigan \*\*\* (the "Owner").

### RECITALS:

The Owner wishes to construct or rehabilitate a housing development for persons of low and moderate income or the elderly on certain real property described in Exhibit A (the "Property").

The development is identified as \*\*\*, MSHDA Development No. \*\*\*, and is located in the City/Township of \*\*\*, \*\*\*County, Michigan (the "Development").

The Michigan State Housing Development Authority (the "Authority") has agreed to make a mortgage loan (the "Mortgage Loan") to the Owner to aid in financing the acquisition of the Property and/or the construction of the Development.

The Authority's rights and powers with respect to the construction or rehabilitation and operation of the Development are set forth in the documents to be executed by the Owner and the Authority in connection with the Mortgage Loan (the "Mortgage Loan Documents") and in Public Act No. 346 of 1966 of the State of Michigan, as amended (the "Act") and the Rules promulgated under the Act.

All capitalized terms used in this document, if not defined herein, shall have the meaning ascribed to them in the General Conditions of the Construction Contract (the "General Conditions").

NOW, THEREFORE, the Owner and the Contractor, for the considerations described below, agree as follows:

### ARTICLE 1 - SCOPE OF CONTRACT

Section 101. Contract Documents. The Contract Documents shall mean and collectively refer to this Contract; the General Conditions and, if the Development is federally assisted, Exhibits A-GC, B-GC, C-GC and D-GC thereto; the Trade Payment Breakdown (Exhibit B); the specifications dated \*\*\*, with all revisions thereto, and identified in Exhibit C (the "Specifications"), including all additions issued by the Architect and approved by the Owner and the Authority as provided in the Contract Documents; the drawings dated \*\*\*, with all revisions thereto, and identified in Exhibit D (the "Drawings"), along with such additional plans, drawings, profiles, typical cross-sections, general cross-sections, working drawings and supplemental drawings and any amendments as may be approved by the Owner and the Authority; the Contractor's Equal Employment Opportunity Plan, as approved by the Authority (Exhibit E); the Incentive Payment Agreement (Exhibit F); the Contractor's Payment and Performance Bonds; and all other written agreements between the Mortgagee and the Contractor relating to construction of the Development and delivered to the Authority.

Section 102. Identity of Architect(s). The Drawings and the Specifications have been prepared by \*\*\* (the "Design Architect"). This Contract is also being administered by \*\*\*, who, in this capacity, is also referred to in this Contract and the General Conditions as the "Architect".

Section 103. Master Drawings and Specifications. A master set of the Drawings and Specifications initialed by the parties, the Architect, and the Contractor's surety or guarantor have been placed on file with the Authority, and such master set, as amended from time to time pursuant to Section 105 of this Contract, shall govern in all matters which arise with respect to such Drawings and Specifications.

Section 104. Interpretation of Contract Documents. The Contract Documents shall constitute the sole understanding of the parties notwithstanding any prior oral or written statements, instructions, contracts, representations or other communications. The Contract Documents are complementary, and what is required by any one of them shall be construed as binding on the parties as if required by all Contract Documents. The Contract Documents are intended to agree with each other and be mutually explanatory, and shall be accepted and used as a whole and not separately. In the event of any conflict between the Contract Documents, the terms of this Contract shall prevail over any inconsistent provision in any other Contract Document. As between the Drawings and the Specifications, the terms of the Specifications shall prevail over any inconsistent provision in the Drawings. The intention of the Contract Documents is to include all labor, materials, equipment and other items necessary for the proper execution and completion of the Work. It is not intended that Work not covered under any heading, section, branch, class or trade of the Specifications shall be supplied unless it is required elsewhere in the Contract Documents or is reasonably inferable therefrom as being necessary to produce the intended results. Words having technical or trade meanings or defined in a specific program applicable to the Development are used herein in accordance with such recognized meanings.

Section 105. Changes in Contract Documents. All changes in the Drawings and Specifications or any terms of the Contract Documents, or in any Work, must be approved by the Owner and shall be submitted to, and placed on file with, the Authority. No change in the Drawings and Specifications or in the terms of the Construction Documents that would (i) change the scope of the Work or (ii) add to or reduce the cost of constructing and completing the Development in strict accordance with the Drawings and Specifications may be made except in accordance with the Authority's Administration of Change Orders policy. Changes in the design concept can be made only with the written approval of the Design Architect. No changes may be made to the Contract or the General Conditions without the prior written approval of the Authority.

Section 106. Work to be Performed. The Contractor shall provide all materials, supplies, tools, equipment, labor and professional and non-professional services, and shall perform all other acts and supply all other things (including, but not limited to, all light, power, water and sanitary facilities for workmen during the progress of the Work) necessary to complete the Development and related facilities as described in the Contract Documents, including all items expressly specified and such additional items as may reasonably be inferred, saving and excepting only those items that are specifically stated in the Contract Documents not to be the obligation of the Contractor.

Section 107. Work Performance Standard. The Work shall equal or exceed the standards required by the Contract Documents.

## **ARTICLE 2 - RIGHTS OF AUTHORITY**

Section 201. Authority Not Liable. The Contract Documents are intended to govern the rights of the Owner and the Contractor between themselves, and all references to the Authority in the Contract Documents are made to satisfy obligations of the Owner to the Authority under the Mortgage Loan Documents, and the Act. The parties agree and recognize that the terms of this Contract constitute an inducement to the Authority to make the Mortgage Loan, but nothing contained in this Article 2 or in any other provision of the Contract Documents shall be construed to make the Authority a party to this Contract, and none of the Contract Documents shall be construed to bind or obligate the Authority or its agents or employees as a result of or arising out of this Article 2 or any other provision of the Contract Documents. The foregoing is not intended

to limit any rights the Authority may have, however, as a third party beneficiary under this Contract.

Section 202. Authority's Right to Complete. In the event of the failure of the Owner to perform its obligations to the Authority under the Building Loan Agreement between the Owner and the Authority (the "Building Loan Agreement"), the Authority may, but shall not be obligated to, undertake the completion of the Development in accordance with this Contract as attorney-in-fact for the Owner. In the event that the Authority so undertakes the completion of the Development as attorney-in-fact for the Owner, the Contractor shall continue to be bound by the terms of this Construction Contract and all rights of the Owner shall accrue to the Authority.

Section 203. Authority Access to Development. The Authority and its authorized agents shall have the right of entry and free access to the Development and any other location or locations where materials, equipment or fixtures intended for use in connection with the Work may be stored pending such use, and the right to inspect all Work done and materials, equipment and fixtures furnished, installed or stored in and about the Development. For such purposes, the Contractor shall furnish whatever enclosed office space, including telephone, as the Authority may from time to time require and find acceptable as to location, size, accommodations and furnishings.

Section 204. Actions on Behalf of Authority. Except as otherwise provided, the following officers of the Authority are authorized to give any approval or notice or take any action on behalf of the Authority in connection with the administration of this Contract: the Executive Director, the Deputy Director/Chief Underwriter, the Director of Finance and the Director of Legal Affairs. The Costing Manager is authorized to approve the Trade Payment Breakdown. The Authority's Design Review Officers are authorized to approve the initial Drawings and Specifications prepared by the Design Architect. The Chief Construction Manager is authorized to approve the Work for the purpose of loan disbursements and to issue the Authority's "Permission to Occupy." The Director of Equal Employment Opportunity is authorized to approve the Contractor's Equal Employment Opportunity Plan and to monitor its implementation. This includes approval of the selection of subcontractors as set forth in Article XV of the General Conditions for the purpose of certifying compliance with the Authority's Equal Employment Opportunity requirements. The term "Authorized Officer of the Authority" refers to the foregoing employees of the Authority when acting within the scope of their authority. Any reference to any action, consent or decision to be made by the Authority shall mean the action, consent or decision of an Authorized Officer of the Authority.

### **ARTICLE 3 - CONTRACTOR'S REPRESENTATIONS AND WARRANTIES**

Section 301. Representations and Warranties. The Contractor represents and warrants to the Owner that:

1. It is a Michigan \*\*\* duly organized, validly existing and in good standing under the laws of the State of Michigan and has the requisite power and authority to perform its obligations under the Contract Documents.
2. All necessary proceedings have been taken to authorize the execution, delivery and performance of the Contract Documents.
3. It is fully licensed under any applicable law and authorized to do business in the State of Michigan in the name of the entity identified as the Contractor in this Contract.
4. It is financially solvent and has sufficient working capital to complete the Work, construct the Development and otherwise perform its obligations under the Contract Documents.

5. It is experienced and skilled in the construction or rehabilitation of residential developments of the type described in the Contract Documents.

6. It is able to furnish the labor, materials, equipment and machinery necessary to complete the Work for the agreed upon price.

7. It has visited the job site and examined its nature and location, including without limitation: the surface condition of the land and any structures or obstructions both natural and man-made, and the surface water conditions of the site and surrounding area; the subsurface condition of the land as disclosed by soil test borings and engineering studies performed by \*\*\*; the availability, location and adequacy of electric and natural gas utility lines and water, sanitary and storm sewer lines. Based upon this examination, the Contractor is satisfied that the Development can be constructed in accordance with the Contract Documents.

8. It has reviewed and accepted the Drawings and Specifications; the Drawings and Specifications are satisfactory to the Contractor; and the construction of the Development in accordance therewith will comply with all building codes, applicable provisions of the zoning ordinance, and all other laws and regulations that are applicable to the construction of the Development.

9. No work, materials or equipment covered by an Application for Payment will have been acquired by the Contractor or by any other person performing the Work on the Property or furnishing materials and equipment for the Development subject to a contract under which an interest therein or an encumbrance thereon is retained by the seller or otherwise imposed by the Contractor or such other person.

Section 302. Identity of Interest with Subcontractor or Supplier.

1. The Contractor certifies that there is no common ownership or family relationship existing between the Contractor and the Owner except as set forth in the Contractor's Certificate of Identity of Interest attached hereto. For purposes of this Section 302, "Contractor" shall include (i) the Contractor or any officer or director of the Contractor, or any stockholder, member, partner or person holding ten percent (10%) or more of the voting stock or voting rights of the Contractor, or (ii) any person holding, directly or indirectly, a financial interest of ten percent (10%) percent or more in the Contractor or (iii) any member of the family of any officer or director of, or any stockholder, member, partner or person holding (directly or indirectly) a financial interest in, the Contractor. The Contractor further represents to the Owner and the Authority that the Contractor is not a Subcontractor or Supplier or Equipment Lessor contracting for work at the Development, does not hold ten percent (10%) or more of the voting stock or voting rights of any such Subcontractor or Supplier or Equipment Lessor, and does not hold (directly or indirectly) a financial interest of ten percent (10%) or more in any such Subcontractor or Supplier or Equipment Lessor. The Contractor agrees to give written notification and obtain the approval of the Owner and the Authority before entering into any contract on this job with any Subcontractor, Supplier or Equipment Lessor where there exists an identity of interest as defined in this section.

2. When (i) the Contractor or any officer or director of the Contractor, or any stockholder, member, partner or person holding ten percent (10%) or more of the voting stock or voting rights of the Contractor, or (ii) any person holding, directly or indirectly, a financial interest of ten percent (10%) percent or more in the Contractor, also (a) is a subcontractor or supplier or equipment lessor contracting for work at the Development, or (b) holds ten percent (10%) or more of the voting stock or voting rights of any such subcontractor or supplier or equipment lessor, or (c) holds (directly or indirectly) a financial interest of ten percent (10%) or more in any such subcontractor or supplier or equipment lessor, then the Contractor shall disclose in writing to the Authority the identity of the parties and their relationship prior to the performance of any Work, or furnishing of any material by such subcontractor or supplier or equipment lessor, and the Contractor shall certify simultaneously with the request for any payment to such subcontractor or supplier or equipment lessor, that the amount requested is a fair and reasonable price for the Work or materials.

3. The Contractor agrees that the following provision will be included in all subcontracts:

Representatives of the Michigan State Housing Development Authority shall have full and free access, during working hours, to all books of account and records of the subcontractor relating to the Work, as defined in the Contract Documents, including the right to make excerpts or transcripts from such books of account and records and related and supporting documents and statements, in the event that the Authority determines that there is an Identity of Interest (as defined in the Contract Documents) between the Owner and the subcontractor or the Contractor and the subcontractor.

#### ARTICLE 4 - TIME

Section 401. Commencement and Completion of Work. The Contractor shall commence the Work within ten (10) days of the initial disbursement of funds by the Authority, and shall finally complete the Work not more than \*\*\* **days/months** from that date. The Contractor will provide written notice of the date on which Work was commenced to the Owner, the Architect and the Authority within seven (7) days of commencing Work. If the Contractor does not receive any funds from the initial disbursement of funds, it shall be obligated to commence the Work within ten (10) days after receipt of written notice from the Owner or the Authority that the Initial Mortgage Loan Closing has occurred. The Contractor agrees, however, not to commence the Work until the Owner: (1) notifies the Contractor that the Authority has acknowledged the recording of the mortgage securing the Mortgage Loan, and (2) has recorded and posted a notice of commencement in compliance with Michigan law. For purposes of this Contract, the Initial Mortgage Loan Closing shall be deemed to have occurred on the date of the initial disbursement.

\*\*\*NOTE: *Substitute the following language if the Owner is using an Early Start:* If the Contractor, the Owner and the Authority have entered into an Early Start Agreement and Work is commenced prior to the disbursement of any funds by the Authority, then the Contractor shall finally complete the Work not more than \*\*\* **days/months** from the date that Work is commenced. The Contractor will provide written notice of the date on which Work was commenced to the Owner, the Architect and the Authority within seven (7) days of commencing Work. If the Contractor has not commenced the Work prior to the initial disbursement of funds, it shall be obligated to commence the Work within ten (10) days after receipt of written notice from the Owner or the Authority that the Initial Mortgage Loan Closing has occurred. The Contractor agrees, however, not to commence the Work until the Owner: (1) notifies the Contractor that the Authority has acknowledged the recording of the mortgage securing the Mortgage Loan, and (2) has recorded and posted a notice of commencement in compliance with Michigan law. For purposes of this Contract, the Initial Mortgage Loan Closing shall be deemed to have occurred on the date of such initial disbursement.

Section 402. Time is of the Essence; Damages for Delay. TIME IS OF THE ESSENCE TO THIS CONTRACT. If the Work is not finally completed by the expiration date of this Contract, as may be extended by change order, the Owner may deduct from any balance due or to become due the Contractor a sum equal to the actual costs incurred by the Owner for each day of delay until final completion. The Contractor's total liability under this clause shall be reduced by the amount of net operating income (gross income less expenses of operation) realized by the Development for the period on which damages are based. This clause shall in no way limit the Contractor's liability to the Owner for other costs incurred as a result of delay or for any costs incurred by the Owner or Authority in the event either of them completes construction of the Development.

#### ARTICLE 5 - CONTRACT PRICE

Section 501. Total Contract Sum.

1. For the strict performance of all of its obligations under the Contract Documents, the Owner shall pay the Contractor (A) the lesser of (i) the Actual Cost of Construction (as determined by the Owner and the Authority pursuant to Section 10.3 of the General Conditions) or (ii) the Contract price of \$\*\*\* as may be amended under Article XII of the General Conditions (the "Total Contract Sum"), plus (B) any incentive payment due the Contractor under the Incentive Payment Agreement (if any).

2. The Total Contract Sum includes the net cost of the materials and equipment delivered and unloaded at the site, and all applicable taxes. The Total Contract Sum also includes the Contractor's handling costs on the site, labor, installation costs and overhead.

3. The Contractor understands that the Authority has agreed to lend to the Owner a sum not to exceed the amount of the Mortgage Loan, which includes an amount for construction limited to the Total Contract Sum prior to any change orders made under Article XII of the General Conditions. The Contractor acknowledges and agrees that unless a mortgage loan increase is authorized by the Authority, any funds over and above the Total Contract Sum (prior to any change orders made under Article XII of the General Conditions) that the Owner becomes obligated to pay the Contractor shall be paid by the Owner from funds other than Mortgage Loan proceeds.

Section 502. Collateral Fee or Profit Contracts. Any contract by the Owner to pay the Contractor a fee or profit or any compensation, no matter how characterized, that is in addition to the Total Contract Sum payable under Section 501 shall be considered a contract collateral to this Contract. The failure of the Owner to pay the Contractor any such fee, profit or additional compensation other than that set forth in Section 501 shall not constitute a breach of this Contract, nor shall it give the Contractor cause to refuse to perform or to terminate this Contract, nor shall it impose any obligation on the Authority to pay said fee or profit in the event it completes construction as the Owner's attorney-in-fact, nor shall it be considered a failure on the part of the Owner to pay the Contractor in accordance with this Contract within the meaning of any such provision in a payment or performance bond or completion assurance agreement, nor shall it give the Contractor the right to claim a construction lien for any sum not paid under such contract. The Contractor hereby expressly waives its right to claim a construction lien for the nonpayment of any fees or compensation in excess of the Total Contract Sum.

**ARTICLE 6 - PROGRESS PAYMENTS**

Section 601. Applications for Advances.

1. The Owner and the Contractor have agreed to, and the Authority has approved, the Trade Payment Breakdown that is an estimate of the cost of the various components and quantities of work to be done for the purpose of making partial payments. The Trade Payment Breakdown may subsequently be amended by the parties with the written approval of the Authority, to more accurately reflect the cost of the various divisions of work. Except as set forth in the Contractor's Performance Bond, any amendment may be effected without the approval of the Contractor's surety and will in no way modify or prejudice the rights of the Owner or the Authority under any bond posted by the surety.

2. Not more than once a month, and as of a date mutually agreed upon by the Contractor, the Owner, the Architect and the Authority's Construction Division, the parties shall inspect the Work and, on the basis of the Trade Payment Breakdown, estimate the value of the labor and materials incorporated in the Work and materials suitably stored at the site. The Contractor shall request payment on the Authority's Application for Disbursement of Mortgage Loan Proceeds (Form PSD 10:001/CD 260), together with the items listed below, and shall be entitled to receive a sum equal to 90% of the total of:

(i) the estimated value of the Work approved by the Owner, the Architect and the Authority (except as provided in Section 602.2.c.); plus

(ii) a percentage of the overhead and general requirements allowance in the Trade Payment Breakdown equal to the percentage of the Work acceptably completed; plus

(iii) a percentage of the builder's profit equal to the percentage of the Work acceptably completed,

less the aggregate of all payments received previously for items (i), (ii) and (iii). The Contractor shall deliver its request for payment to the Authority's Construction Division at least ten (10) working days before payment is desired, together with:

a. An updated survey prepared by a licensed professional surveyor or civil engineer, showing all improvements, structures and utilities (if any) installed on the property since the survey submitted to the Authority for the previous disbursement, and dated no earlier than thirty (30) days prior to the date of the disbursement for which the Contractor is applying, unless the Authority determines that a survey is not required for that disbursement;

b. An endorsement extending the title insurance policy insuring the Authority to cover the advance of proceeds of the Mortgage Loan at the time of payment thereof, dated at least through the date of the Contractor's sworn statement for the disbursement for which the Contract has applied, in an amount equal to the payment received, and showing no construction or other liens against the Development or exceptions to the policy since the date of the policy or any subsequent endorsement provided hereunder, except such liens or other matters that either have been insured over by the title company or are acceptable to the Authority;

c. At the option and request of the Owner or Authority, copies of full or partial waivers of lien from the Contractor and each subcontractor, supplier or laborer for the full amount then due for work performed or material furnished prior to the inspection date; and

d. A copy of the General Contractor's sworn statement dated as of the date of inspection.

After the Architect has signed the Certificate for Payment on the Application for Disbursement of Mortgage Loan Proceeds, the Owner shall make payment in the manner, and subject to the conditions, provided in this - Contract.

3. Upon acquisition or production by the Contractor, title to all parts and materials acquired or produced by the Contractor for the performance of the Work shall forthwith vest in the Owner. It is understood and agreed that the risk of loss to property, title to which passes to the Owner solely by virtue of this Section 601.3, shall remain with the Contractor, except to the extent such property is covered by the Owner's property insurance policy.

4. It is mutually agreed that no payment made under this Contract, shall be evidence of the performance by Contractor hereunder, either wholly or in part. It is further agreed that no Certificate for Payment, progress payment, vesting of title under Section 601.3 or any partial or entire use or occupancy of the Development by the Owner shall be construed to be an acceptance of defective or improper materials or workmanship or shall constitute an acceptance of any Work not in accordance with the Contract Documents.

5. The Contractor waives any and all construction lien rights which have arisen in the

performance of this Contract and further agrees that no payment shall be due so long as any lien or right *in rem* of any kind lies or has attached against the Work or materials, articles of equipment, or any part either for or on account of any work done upon or about work or materials, articles of equipment furnished or any other cause or thing, or any claims or demands of any kind. The Contractor agrees, and this Contract is upon the express condition, that no liens or rights *in rem* shall so lie or attach. In the event any liens do attach and are not promptly discharged or insured against by the Title Insurance Company, the Owner or the Authority may pay the lien holder directly from any sum due or to become due the Contractor, including the Contractor's holdback, or the Owner or Authority may deposit with the Title Insurance Company a sum sufficient to obtain insurance against the lien from any sum due or to become due the Contractor. The Owner or the Authority may furnish a copy of any payment bond or the completion assurance contract to any subcontractor or supplier who has furnished labor, materials or equipment in connection with the construction of the Development. In the event any lien or right *in rem* remains after final payment under this Contract, the Contractor shall reimburse the Owner or the Authority all expenses incurred by them in discharging such lien or rights *in rem*.

6. No partial payment will be made after the time fixed for Final Completion of the Work, or the time to which completion may be extended under the terms of this Construction Contract, until Final Completion of the Work, unless authorized in writing by the Authority.

7. The obligation of the Owner to make any of the payments required under this Contract shall be subject to:

- a. Any unsettled claims against the Contractor for labor or materials;
- b. Reasonable deductions on account of defects in materials or workmanship; and
- c. Any claims the Owner may have against the Contractor under or in connection with this Contract. Any overpayments to the Contractor shall, unless otherwise adjusted, be repaid to Owner upon demand.

Section 602. Release of Retainage.

1. The Contractor shall be entitled to receive a portion of the funds retained from each progress payment pursuant to the schedule specified in Section 602.2, if the Owner and the Authority determine that:

- a. Construction is progressing on schedule;
- b. After reducing the retainage by the amount requested, the undisbursed balance of the Contract exceeds by a reasonable amount the Authority's estimate of the cost to complete the Work;
- c. The marketability of the buildings turned over to the Owner is not impaired because of incomplete adjacent site work or ongoing construction activities disruptive to prospective tenants; and
- d. The Contractor is in compliance with the Contract Documents in all other respects.

2. If the conditions of Section 602.1 are satisfied, then upon completion of the following Work the Contractor shall be entitled to a reduction of its retainage in the amount set forth below.

- a. With respect to items other than structures costs, upon completion of 90% of each line item of non-structure work on the approved Trade Payment Breakdown, the Contractor shall be entitled to receive up to one-half of the amount previously withheld for such work, provided that the retainage shall not be reduced below 5% of the estimated value of the completed Work until such Work is 100% complete and the provisions of Section 701 are complied with.

b. With respect to the first 50% of the garden apartments or townhouse apartment buildings finally completed, upon final completion of each such building (as evidenced by the issuance of Certificates of Occupancy), the Contractor shall be entitled to receive the full amount of the funds retained for the Work incorporated in each such completed building. With respect to each building which is finally completed after the final completion of the first 50% of the buildings, the Contractor shall receive up to one-half of the retainage attributable to the cost of each such building provided that, the retainage shall not be reduced below 5% of the total estimated value of the Work incorporated in such completed building until the provisions of Section 701 are complied with. If the cost of each building is not separately estimated on an approved Trade Payment Breakdown, the Owner and the Authority shall be the sole judge of the amount of retainage attributable to the Work incorporated in the building.

c. With respect to buildings four stories and over in height, upon the Owner's and the Authority's written acknowledgment of satisfactory completion of 50% of the Work attributable to such building, no funds shall be withheld from each succeeding draw provided the Contractor remains in compliance with the conditions of Paragraph 1 of this Section. Upon compliance with this Section, the remaining retainage shall be released.

d. The Contractor agrees to reduce the retainage of the subcontractors whose work is incorporated in and attributable to such building as the Contractor's retainage is reduced, subject to such claims or setoffs the Contractor may have against a subcontractor. The Contractor shall, to the extent feasible, utilize retainage funds released pursuant to this section to first reduce the retainage held on subcontractors who have satisfactorily completed performance under their contracts. Amounts remaining shall be distributed on a pro rata basis to other subcontractors with respect to whose work retainage has been withheld, in an amount which reflects the relative amount of the Work performed by that subcontractor for which retainage funds have been disbursed.

3. All requests for reduction of retainage shall be made jointly by the Owner and the Contractor on the Authority's Application for Disbursement of Mortgage Loan Proceeds (Form PSD 10:001/CD 260) and shall be accompanied by a title insurance endorsement in an amount equal to the payment requested.

## **ARTICLE 7 - FINAL PAYMENT**

Section 701. Final Payment. The unpaid balance of the Total Contract Sum shall be due and payable to the Contractor fifteen (15) days after the Contractor satisfies all of the following conditions:

1. Final Completion of the Work as defined by Section 10.1 of the General Conditions.
2. Authority approval of the Contractor's final application for payment and completed Cost Certification, including the Certificate of the Actual Cost of Construction, pursuant to Section 10.3 of the General Conditions.
3. Receipt by the title insurer, and by the Authority of a duplicate, of the Contractor's final sworn statement that complies with Section 110 of the Construction Lien Act, listing all contractors, subcontractors and suppliers who have provided an improvement (as defined in the Construction Lien Act) to the Development. The final sworn statement shall also list all laborers who have provided a Notice of Furnishing or who have appeared on the Contractor's or any subcontractor's previous sworn statement as having had payments for wages, fringe benefits or withholdings due but not paid. The final sworn statement shall certify that there are no liens, claims or demands by subcontractors, suppliers, laborers, employees or third persons. The Contractor shall also submit to the title insurer final unconditional waivers of lien from all contractors, subcontractors or suppliers who have provided an improvement to the Development and final

unconditional waivers of lien from all laborers with respect to whom a Notice of Furnishing has been provided or who have appeared on a previous sworn statement during the course of construction.

4. Establishment of an escrow for any incomplete or defective work to be performed at the Development, and compliance with the assurance of completion requirements in Section 901 of this Contract. The Owner shall be under no obligation to make Final Payment to the Contractor unless the Owner and Authority have received satisfactory guarantees from the Contractor and an escrow has been established to assure that any incomplete or defective items of Work will be completed promptly and in a satisfactory manner. All escrowed sums for work to be completed after Final Payment shall be disbursed in accordance with the terms of the escrow agreement between the Owner and the Authority. The Owner and Authority may require, as a guarantee of completion of incomplete or defective items of Work, that the Contractor escrow funds equal to 150% of the estimated cost to complete or correct the Work.

5. Assignment of all manufacturers' or subcontractors' warranties on material or equipment installed in the development.

6. Final compliance with any other Authority reporting requirements.

Section 702. Contractor to Correct Defective or Deficient Work After Final Payment. Neither final acceptance of the Work, nor payment therefor, nor any provision of the Contract Documents shall relieve the Contractor of responsibility for defective or deficient materials or work.

Section 703. Waiver of All Claims.

1. The making of final payment shall constitute a waiver of all claims by the Owner except those arising from:

- a. unsettled liens;
- b. faulty or defective Work discovered after Final Completion;
- c. failure of the Work to comply with the requirements of the Contract Documents; or
- d. the terms of any special guarantees required by the Contract Documents.

2. The acceptance of Final Payment shall constitute a waiver of all claims by the Contractor except those previously made in writing and still unsettled.

## **ARTICLE 8 - INDEMNIFICATION**

Section 801. Indemnification of Owner, Authority, State and Architect.

1. The Contractor shall indemnify and hold the Owner, the Authority, the State of Michigan and the Architect, and their agents, officers and employees harmless from and against all claims, damages, losses and expenses, including but not limited to attorney's fees, arising out of or resulting from the performance or non-performance of the Work. The indemnification established pursuant to this Section 801 shall apply to any claim, damage, loss or expense which (a) is attributable to bodily injury, sickness, disease or death, or to injury to or destruction of tangible property (other than the Work itself) including the loss of use resulting from the injury or destruction, and (b) is caused in whole or in part by any negligent act or omission, or any willful misconduct of the Contractor, any subcontractor, anyone directly or indirectly employed by any one of them, or anyone for whose acts any one of them may be liable. The indemnification established pursuant to this Section 801 shall apply regardless of whether the injury, sickness, disease, death, or to injury to or destruction of property is caused in part by a party indemnified by this Section. This obligation shall not be construed to negate, abridge, or otherwise reduce any other right or obligation of

indemnity which would otherwise exist as to any party or person as described in this Section.

2. In any and all claims against the Owner, the Authority, the State of Michigan or the Architect or any of their agents, officers or employees by an employee of the Contractor, any subcontractor, anyone directly or indirectly employed by any of them or anyone for whose acts any of them may be liable, the indemnification obligation under this Section 801 shall not be limited in any way by any limitation on the amount or type of damages, compensation or benefits payable by or for the Contractor or any Subcontractor under workmen's compensation acts, disability benefit acts or other employee benefit acts.

3. The obligations of the Contractor under this Section 801 shall not extend to the liability of the Architect, its agents or employees arising out of (a) the preparation or approval of maps, drawings, opinions, reports, surveys, Change Orders, designs or specifications, or (b) the giving of or the failure to give directions or instructions by the Architect, its agents or employees.

4. The obligations of the Contractor under this Section will survive Final Completion of the Work and Final Payment.

## **ARTICLE 9 - ASSURANCE OF COMPLETION**

Section 901. Form of Assurance. The Contractor shall furnish to the Owner and the Authority assurance of completion of the Work in the form of a Performance Bond (Dual Obligee) (Legal Form 019) and a Payment Bond (Legal Form 020), each in the amount of \$\*\*\* (100% of the Total Contract Sum), or a Completion Assurance Agreement (Legal Form 021), together with an unconditional, irrevocable letter of credit issued to the Authority by a commercial bank acceptable to the Authority in the amount of \$\*\*\* (25% of the Total Contract Sum) (*delete inapplicable reference*). The assurance of completion furnished shall remain in effect for the duration of the Guarantee Period as defined in Article XIII of the General Conditions.

*\*\*\*Delete the following section if inapplicable:*

Section 902. Reduction of Amount of Letter of Credit. At such time as the Authority determines that construction of the Development is seventy-five percent (75%) or more complete, the Owner and the Contractor jointly may make application to the Authority for a reduction in the amount of the Contractor's letter of credit to an amount not less than fifteen percent (15%) of the Total Contract Sum. Further, at such time as the Authority determines that construction of the Development is Ninety percent (90%) or more complete, the Owner and the Contractor jointly may make application to the Authority for a reduction in the amount of the Contractor's letter of credit to an amount not less than ten (10%) percent of the Total Contract Sum. The application shall be approved if the Authority determines that: (i) construction of the Development is progressing on schedule; (ii) the Contractor is delivering units to the Owner in accordance with the approved schedule of completion; (iii) model units have been completed by the Contractor for use in connection with the marketing program as to the Development; and (iv) the amounts remaining to be paid to the Contractor under this Contract exceed by a reasonable amount the Authority's estimate of the cost of the remaining work under this Contract, plus any unpaid Change Orders.

Upon Final Completion and Final Payment for the Work, the Owner and the Contractor jointly may make application to the Authority for a reduction in the amount of the letter of credit, to an amount not less than two and one-half percent (2.5%) of the Total Contract Sum, which sum shall be held for the duration of the Guarantee Period.

## **ARTICLE 10 - TERMINATION OR SUSPENSION**

Section 1001. Failure to Perform or Correct Work.

1. If the Contractor fails to correct defective Work as required by Section 13.2 of the General Conditions or persistently fails to carry out the Work in accordance with the Contract Documents, the Owner, by a written order signed personally or by an agent specifically so empowered by the Owner in writing, may order the Contractor to stop the Work, or any portion thereof, until the cause for such order has been eliminated; however, this right of the Owner to stop the Work shall not give rise to any duty on the part of the Owner to exercise this right for the benefit of the Contractor or any other person or entity, except to the extent required by Section 7.1.2 of the General Conditions.

2. If the Contractor defaults or neglects to carry out the Work in accordance with the Contract Documents or fails to perform any provision of this Contract, after seven (7) days' written notice to the Contractor and without prejudice to any other remedy it may have, the Owner may make good such deficiencies. In such case an appropriate Change Order shall be issued deducting from the payments then or thereafter due the Contractor the cost of correcting such deficiencies, including the cost of the Architect's additional services made necessary by such default, neglect or failure. The Architect must approve both the action and the amount charged to the Contractor. If the payments then or thereafter due the Contractor are not sufficient to cover the cost, the Contractor shall pay the difference to the Owner.

3. If the Contractor does not remove defective or nonconforming Work as required by Section 13.2 of the General Conditions within a reasonable time fixed by written notice from the Architect, the Owner may remove it and may store the materials or equipment at the expense of the Contractor. If the Contractor does not pay the cost of such removal and storage within ten (10) days thereafter, the Owner may, upon ten (10) additional days written notice, sell such Work at auction or at private sale and shall account for the net proceeds thereof, after deducting all the costs that should have been borne by the Contractor including compensation for additional architectural services. If such proceeds of sale do not cover all costs which the Contractor should have borne, the difference shall be charged to the Contractor and an appropriate Change Order shall be issued. If the payments then or thereafter due the Contractor are not sufficient to cover such amount, the Contractor shall pay the difference to the Owner.

#### Section 1002. Termination for Contractor's Default.

1. In the event that: (a) the Contractor is adjudged a bankrupt; (b) the Contractor makes a general assignment for the benefit of its creditors; (c) a receiver is appointed on account of the Contractor's insolvency; (d) the Contractor persistently or repeatedly refuses or fails to supply enough properly skilled workmen or proper materials to perform the work in accordance with the Contract Documents, including particularly the time and scheduling provisions thereof; (e) the Contractor persistently or repeatedly incorporates defective, faulty or inferior workmanship or materials into the work; (f) the Contractor fails to make prompt payment to Subcontractors or for materials or labor; (g) the Contractor persistently or repeatedly disregards laws, ordinances, rules, regulations or orders of any public authority having jurisdiction; or (h) the Contractor commits a substantial violation of any provision of the Contract Documents, as determined by the Architect or an Authorized Officer of the Authority; the Owner may terminate the employment of the Contractor and take possession of the Development site and of all materials, equipment, tools, construction equipment and machinery thereon owned by the Contractor and the Owner may complete the work by whatever method he may deem expedient and is approved by the Authority. Any such termination of the employment of the Contractor by the Owner as aforesaid shall be without prejudice to any other right or remedy of the Owner, and shall be effective only after the Owner shall have given the Contractor and its surety, if any, and the Authority seven (7) days' written notice of the Owner's intention to terminate the employment of the Contractor.

2. Upon the occurrence of any of the events specified in Section 8.2.1 of the General Conditions, the Authority may direct the Owner to terminate the employment of the Contractor, or the Authority may exercise its power to act as the Owner's attorney-in-fact under the Act and Loan Documents

and terminate the Contractor. In the event of such direction or action by the Authority, the termination of the employment of the Contractor and the rights and remedies of the Authority to complete the work shall be subject to the provisions of Section 1002.1.

3. In the event of the termination of the Contractor, the Contractor shall not be entitled to receive any further payment until the work is completed. If the cost of completing the work, including compensation to the Owner or the Authority for additional architectural, managerial and administrative services, exceeds the unpaid balance of the Total Contract Sum, the Contractor shall pay the amount of such excess cost to the Owner. The costs incurred by the Owner in completing the work pursuant hereto shall be certified to the Authority, as part of the Actual Cost of Construction, in accordance with the provisions of Article X of the General Conditions .

Section 1003. Termination for Inability to Obtain Financing. The Contractor understands that the Owner has entered into this Agreement in reliance upon the receipt of the Mortgage Loan from the Authority. The Contractor agrees that the Owner shall have the right to terminate this Agreement without liability prior to the commencement of construction if the reason for the termination is the Owner's inability to conclude its financing arrangements with the Authority. The financing arrangements will be considered "concluded" at such time as the first disbursement is made from the Mortgage Loan.

Section 1004. Withholding of Payments. Payments shall be withheld or reduced by the Owner if in the determination of an Authorized Officer of the Authority (1) the work is not proceeding in accordance with the Contract Documents, (2) the undisbursed proceeds of the Mortgage Loan (after provisions for reserves, fees, expenses and other deposits required by the Authority) do not equal or exceed the amount necessary to pay for all work completed and all materials delivered, for which payment has not been made, and the estimated cost of completing construction of the Development in accordance with the Drawings and Specifications per the Trade Payment Breakdown, as may be amended. If at any time the Owner or Authority determine that the estimated cost of completing the development substantially exceeds any sum due or to become due the Contractor, the Owner or Authority may demand evidence that the Contractor has sufficient funds to pay for the completion of construction. Any determination of an Authorized Officer of the Authority shall be reasonable in relation to the Authority's interests as lender under the Act.

## **ARTICLE 11 - ASSIGNMENTS AND MISCELLANEOUS**

Section 1101. Contract Not Assignable. This Contract shall not be assignable by either party without the prior written consent of the other party and the Authority, except that the Owner may assign the Contract, or any rights hereunder, to the Authority.

Section 1102. Notices. Any notice required to be given pursuant to the Contract Documents shall be deemed sufficient if in writing and delivered personally or by certified mail to the parties to which such notice is required to be given at the following addresses:

Owner:                   \*\*\*LIMITED DIVIDEND HOUSING  
                                  ASSOCIATION LIMITED PARTNERSHIP  
                                  \*\*\*  
                                  \*\*\*, Michigan \*\*\*

Contractor:           \*\*\*  
                                  c/o \*\*\*  
                                  \*\*\*  
                                  \*\*\*, Michigan \*\*\*

Authority: Ted S. Rozeboom  
Director of Legal Affairs  
Michigan State Housing Development Authority  
735 East Michigan Avenue  
Lansing, Michigan 48912

With a copy to:

Chief Construction Manager  
Michigan State Housing Development Authority  
735 East Michigan Avenue  
Lansing, Michigan 48912

This provision does not affect or abrogate any notice that may be required to be given to the Architect under the Contract Documents.

Section 1103. Actions on Behalf of the Parties. The following persons are authorized by the Owner and the Contractor to execute any and all instruments requiring their respective signatures and to act on behalf of each with respect to all matters arising out of the Contract:

Owner: \*\*\*

Contractor: \*\*\*

Section 1104. Captions. Captions to the sections of this Contract are included for reference convenience only and are not to be construed as affecting the meaning of any Section or to have any legal effect whatsoever.

Section 1105. Fraud Penalties. The undersigned acknowledges that any false pretense, including any false statement or representation; or the fraudulent obtaining of money, real or personal property; or the fraudulent use of an instrument, facility, article, or other valuable thing or service pursuant to his/her participation in any Michigan State Housing Development Authority program, is punishable by imprisonment for up to ten (10) years or by a fine of up to \$5,000.00.

Section 1106. Choice of Law. The Contract Documents shall be interpreted and construed according to the law of the State of Michigan.

IN WITNESS WHEREOF, the parties have signed this Construction Contract on the date shown above.

\*\*\* LIMITED DIVIDEND HOUSING  
ASSOCIATION LIMITED PARTNERSHIP, a  
Michigan limited partnership (**Owner**)

By: \_\_\_\_\_  
\*\*\* (for individual)  
Its: General Partner

By: \*\*\* , a Michigan corporation  
Its: General Partner

By: \_\_\_\_\_  
\*\*\* (for corporation)  
Its: \*\*\*

\*\*\*, a Michigan corporation/joint venture  
**(General Contractor)**

By: \_\_\_\_\_  
\*\*\*  
Its: \*\*\*

**ATTACHMENT TO CONSTRUCTION CONTRACT**

**Contractor's Certificate of  
Identity of Interest**

Pursuant to Section 302 of the Contract to which this is attached, the General Contractor, \*\*\*, certifies that the only financial interests and family relationships existing between the General Contractor or any of its officers, directors, stockholders or owners and the Owner or any subcontractor or supplier or equipment lessor contracting for work at the Development, are as follows:

Please indicate the exact percentage of ownership, office or position held. If none, indicate "None."

\*\*\*

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

\*\*\*

Its: