

## PENNSYLVANIA HOUSING FINANCE AGENCY

### **ADDENDUM TO AIA DOCUMENTS A101 AND A201, 2007 EDITIONS FOR PHFA FUNDED DEVELOPMENTS**

*This Addendum shall amend the American Institute of Architects Document A101, Standard Form of Agreement Between Owner and Contractor, 2007 Edition ("the Agreement") and the American Institute of Architects Document A201, General Conditions of the Contract for Construction, 2007 Edition, between the parties named herein and shall be binding unto the parties as part of the whole. This Addendum supplements and amends the Agreement to include the following:*

Contractor and Owner agree that the provisions of this Addendum and the Agreement and the rights and obligations of the parties hereunder shall at all times be subject to and in conformity with the provisions of the Housing Finance Agency Law (the "Act") and the rules, regulations and guidelines of the Pennsylvania Housing Finance Agency ("PHFA"); and

The provisions of this Addendum and any applicable attachments incorporated herein supersede and void all inconsistent provisions in the Agreement or in any prior contract between the parties for the services to be performed hereunder.

#### **ARTICLE I - DEFINITIONS**

1. Actual Construction Completion Date - The date upon which PHFA certifies in writing that the entire Development is completed (except for minor incomplete items) in accordance with the Contract Documents, and all units are ready for occupancy.

2. Contract Documents - AIA Document A101 Standard Form of Agreement Between Owner and Contractor, 2007 Edition, AIA Document A201 General Conditions of the Contract for Construction, 2007 Edition, the Pennsylvania Housing Finance Agency Addendum to AIA Documents A101 and A201, the PHFA Supplemental General Conditions, the drawings, the specifications, PHFA Submission Guide for Architects, The General Payout Procedure for Mortgagors and Contractors, and all Addenda issued prior to and all modifications issued after execution of the Construction Contract; and any other items that may be specifically stipulated as being included in the Contract Documents. Any other agreement or understanding between the parties shall not be considered part of the Contract Documents, will not be included in the Contract Sum and will not be eligible for project funds.

3. Latent Defects - Defects in materials, equipment or completed work which reasonably careful observation could not have discovered.

#### **ARTICLE II - PAYMENTS**

1. All amounts to be paid by Owner to Contractor under the Contract Documents shall be paid in accordance with the PHFA Application for Payment submitted to Architect by Contractor and Certificate for Payment issued by Architect and are subject to the approval of PHFA. In the event Contractor fails to comply with all federal, state and local laws, ordinances, rules or regulations, with all PHFA requirements or guidelines or with all terms and conditions of the Contract Documents, progress payments shall be withheld until Contractor has fully complied with the aforementioned, subject to the approval of PHFA.

2. The period covered by each Application for Payment shall be one month ending on the last day of the month unless otherwise agreed upon by all parties.

3. Subject to the provisions of the Contract Documents, the amount of each progress payment shall be based on:

A. the total schedule of values of the work acceptably completed as approved by PHFA, Architect, Owner and any other necessary contract parties; plus

B. the value of materials and equipment delivered and suitably stored at the site that shall become part of the permanent structure within thirty (30) days after delivery; less

C. at a minimum, ten percent (10%) of each payment request for a construction item shall be retained by PHFA. The percentage retained may be reduced to five percent (5%) after construction has been fifty percent (50%) completed. Upon Substantial Completion, the percentage retained may be reduced to two and one-half percent (2.5%). In the event of multiple Certificates of Substantial Completion being issued for phased projects, reduction to two and one-half percent (2.5%) will be considered only after the final phase of the whole is accepted. The balance due Contractor hereunder shall be payable at final loan closing provided the work is fully completed and Contractor has complied with all provisions of the Agreement and this Addendum to Owner's and PHFA's satisfaction, including, but not limited to, submission and approval of the Contractor's Certificate of Actual Cost to PHFA at final loan closing and receipt of all certificates of occupancy for all units by Owner and PHFA.

4. All payouts are subject to Contractor's compliance with all wage determination processing and record keeping requirements. In the event any submitted supporting material is incomplete or deemed to be inaccurate or inconsistent with the requisite processing requirements, Contractor's payouts may be withheld until such discrepancies and processing requirements are met to PHFA's satisfaction. Under no circumstances shall such suspension or withholding of funding relieve Contractor from performance under the Agreement.

### **ARTICLE III - SCOPE OF AGREEMENT**

Changes in the drawings and specifications or any terms of the Contract Documents, orders for extra work, alterations or additions to the work or any other changes which materially alter the obligations of Owner or alter the design or materially reduce the quality or amenities of the Development shall be submitted to Owner and PHFA for written approval. Contractor covenants to fully indemnify Owner and PHFA against losses or damages or suspension of warranties or other possible consequence associated with any changes made without prior written approval of Owner and PHFA.

### **ARTICLE IV - TIME**

Contractor shall promptly proceed with and complete the Development within the time period specified in the Contract Documents, in accordance with the approved drawings and specifications and the Contract Documents.

### **ARTICLE V - REPRESENTATIONS AND WARRANTIES**

Contractor represents and warrants to Owner and PHFA that:

1. Contractor is financially solvent, able to pay his/her debts as they mature, and possesses sufficient working capital to complete the Agreement; that he/she is able to furnish the plant, tools, materials, supplies, equipment, and labor, and is experienced in and competent to perform the work; and that he/she is qualified to do the work and is authorized to do business in the Commonwealth of Pennsylvania; and

2. Contractor holds a license, permit or other special license, to perform the services included in the Agreement, as required by applicable law, or lawfully employs or works under the general supervision of the holder of such license, permit or special license; and

3. Contractor is not currently under suspension or debarment by the Commonwealth of Pennsylvania, any other state, or the federal government; and

4. Contractor has inspected the development site within thirty (30) days of signing this Addendum and represents and warrants that the site conditions have not changed so as to result in an increase in the scope of work or in the Contract Sum; and

5. Contractor understands that the Development under the Agreement is to be financed by loan(s) from PHFA to Owner and the loan(s) will be secured by mortgages, and that the terms of the loan(s) are set forth in loan documents between Owner as borrower and PHFA as lender. Contractor further understands that the loan documents provide that in the event of the failure of Owner to perform its obligations to PHFA thereunder, PHFA may as attorney-in-fact for Owner elect to undertake the completion of the Development in accordance with the Contract Documents.

The warranties in the Agreement shall not limit or exclude any other warranties, express or implied, which arise by operation of law.

#### **ARTICLE VI - GUARANTEE PERIOD**

Contractor covenants that it shall correct, at its sole expense, any of the work that is found to be not in accordance with the requirements of the Contract Documents, including any Latent Defects resulting from faulty materials or workmanship which appear within one (1) year from the Actual Construction Completion Date (the "Guarantee Period"). Upon written notice from Owner or PHFA, Contractor shall proceed with due diligence, at his or her expense, to replace any defective material or perform any labor necessary to correct any defect in the work. In case Contractor fails to correct defects within seven (7) days after receipt of written notice to replace defective materials or perform any labor required, Owner or PHFA may furnish whatever material or labor it deems necessary in its sole opinion. If Owner or PHFA determines that the condition poses a threat to the health, safety or welfare of the occupants, Contractor shall correct any defects within forty-eight (48) hours of written notice. Contractor agrees to make prompt reimbursement upon demand. If Contractor fails to promptly and properly perform, as determined by Owner and PHFA, during this Guarantee Period, Owner and PHFA may reduce the Contract Sum in an amount equal to the cost of curing any Latent Defects.

#### **ARTICLE VII - REQUIREMENTS OF CONTRACTOR**

1. Contractor agrees, upon request by Owner and at the sole expense of Contractor, to secure occupancy permits from any state or local authority necessary to secure from PHFA the required permission for occupancy of the buildings in the Development. Owner agrees to be responsible for the maintenance and utilities for all such dwelling units turned over to and accepted by Owner. Contractor further agrees that it will at its own expense provide safe and adequate approaches and assure uninterrupted access to all dwelling units which have been approved for occupancy by PHFA or turned over to and accepted by the Owner.

2. Upon the Actual Completion Date, Contractor shall furnish to Owner, PHFA and title insurer, a Record Drawing showing all improvements constructed thereon, and showing the location of all water, sewer, gas and electric lines and mains, and of all existing utility easements.

3. Contractor shall obtain and pay for and keep in effect from the inception of construction, or from such time as PHFA may require, insurance in a form and amount acceptable to PHFA. If Contractor fails to provide and maintain such insurance, Owner may, without notice to Contractor, procure such policies and deduct any monies expended from any amount otherwise due to Contractor.

4. Contractor further agrees to indemnify and save harmless Owner, the Commonwealth of Pennsylvania and PHFA against loss or expense by reason of the liability imposed by law upon Owner, Contractor, the Commonwealth of Pennsylvania or PHFA, for damages because of bodily injuries, including death at any time resulting therefrom, sustained by any person or persons or on account of damage to property arising out of or in consequence of the performance or non-performance of the Agreement, whether such injuries to persons or damage to property are due or claimed to be due as a result of negligence or willful misconduct of Contractor, its subcontractors, employees or agents.

5. Contractor shall abide by all minority and disadvantaged business enterprise outreach programs as required by PHFA throughout the Construction Period.

6. Contractor shall comply with all other applicable federal and state laws, regulations and guidelines required to construct and/or rehabilitate the Project in accordance with PHFA financing.

### **ARTICLE VIII - RECEIPTS AND RELEASES OF LIENS**

Contractor hereby specifically agrees to pay the expenses of and do what is necessary to promptly remove or bond (to PHFA's and Owner's satisfaction) any mechanic's claim or lien against the Development for or on account of any work or labor done or materials furnished under the Contract Documents or otherwise, for, toward, in or about the erection and construction of the Development. In addition, Contractor shall not, at any time, suffer or permit any claim, lien, attachment, or other encumbrance, under the laws of the Commonwealth of Pennsylvania or pursuant to federal law, by any person or persons whomsoever, to remain on file against any money due or to become due, for any work done or materials furnished under the Agreement and, until such claim, lien, attachment, or other encumbrance, is removed, Owner or PHFA shall have the right to preclude any payment to Contractor. Upon delivery of payment and performance bonds to PHFA, Contractor shall execute a waiver of liens that shall be recorded in the Office of the Prothonotary of the county in which the Development is located.

### **ARTICLE IX - ASSURANCE OF COMPLETION**

Contractor shall furnish to Owner and PHFA assurance of completion of the work in the form of a Performance Bond and a Payment Bond, each in the amount of one hundred percent (100%) of the Contract Sum or an unconditional and irrevocable letter of credit in the amount of twenty-five percent (25%) of the Contract Sum. Such assurance of completion shall run to Owner and PHFA as dual obligees and shall extend one (1) year from the day on which final payment under the Agreement falls due. The Payment Bond and Performance Bond shall be posted at the job site during construction by Contractor.

### **ARTICLE X - RIGHT OF ENTRY**

PHFA and Owner or their agents or assigns, shall, at all times during construction have the right of entry and free access to the Development and the right to inspect all work done and materials, equipment and fixtures furnished, installed or stored in and about the Development. For such purpose, Contractor shall furnish such enclosed working space as PHFA and Owner may require and find acceptable as to location, size, accommodations and furnishings.

### **ARTICLE XI - COST CERTIFICATION**

1. Contractor shall keep accurate records of account of the said Actual Cost of Construction and shall, upon demand, make such records and invoices, receipts, subcontracts and other information pertaining to the construction of the Development available for inspection by Owner, PHFA, and the Secretary of Labor of the Commonwealth of Pennsylvania.

2. Upon completion of the Development, Contractor shall furnish to Owner and PHFA a completed "Contractor's Certificate of Actual Cost" which shall be in form acceptable to PHFA.

3. Contractor shall include in all subcontracts, equipment leases and purchase orders a provision requiring the subcontractor, equipment lessor or supplier to certify its costs incurred in connection with the Development, in the event PHFA determines there is an identity of interest between either the Owner or Contractor and any such subcontractor, equipment lessor or supplier.

## ARTICLE XII - CONTRACTOR INTEGRITY

1. Definitions for this section are as follows:

(a) Confidential information means information that is not public knowledge, or available to the public on request, disclosure of which would give an unfair, unethical, or illegal advantage to another desiring to contract with the Commonwealth and/or PHFA.

(b) Consent means written permission signed by a duly authorized officer or employee of the Commonwealth and/or PHFA, provided that where the material facts have been disclosed, in writing, by prequalification, bid, proposal, or contractual terms, the Commonwealth and/or PHFA shall be deemed to have consented by virtue of execution of the Agreement.

(c) Contractor means the individual or entity that has entered into the Agreement with Owner, including directors, officers, partners, managers, key employees, and owners of more than five percent (5%) interest.

(d) Financial interest means ownership of more than a five percent (5%) interest in any business or holding a position as an officer, director, trustee, partner, employee, or the like, or holding any position of management.

(e) Gratuity means any payment of more than nominal monetary value in the form of cash, travel, entertainment, gifts, meals, lodging, loans, subscriptions, advances, deposits of money, services, employment, or contracts of any kind.

2. Contractor shall maintain the highest standards of integrity in the performance of the Agreement and shall take no action in violation of state or federal laws, regulations, or other requirements that govern contracting with the Commonwealth and/or PHFA.

3. Contractor shall not disclose to others any confidential information gained by virtue of the Agreement.

4. Contractor shall not, in connection with this or any other Agreement with the Commonwealth and/or PHFA, directly or indirectly, offer, confer, or agree to confer any pecuniary benefit on anyone as consideration for the decision, opinion, recommendation, vote, other exercise of discretion, or violation of a known legal duty by any officer or employee of the Commonwealth and/or PHFA.

5. Contractor shall not, in connection with this or any other Agreement with the Commonwealth and/or PHFA, directly or indirectly offer, give, or agree or promise to give to anyone any gratuity for the benefit of or at the direction or request of any officer or employee of the Commonwealth and/or PHFA.

6. Except with the consent of the Commonwealth and/or PHFA, neither Contractor nor anyone in privity with it shall accept or agree to accept from, or give or agree to give to, any person, any gratuity from any person in connection with the performance of work under the Agreement except as provided therein.

7. Except with the consent of the Commonwealth and/or PHFA, Contractor shall not have a financial interest in any other contractor, subcontractor or supplier providing services, labor or material on this Development.

8. Contractor, upon being informed that any violation of these provisions has occurred or may occur, shall immediately notify PHFA in writing.

9. Contractor, by execution of the Agreement and by the submission of any bills or invoices for payment pursuant thereto, certifies and represents that it has not violated any of these provisions.

10. Contractor shall, upon request of the Office of State Inspector General, reasonably and promptly make available to that office and its representatives, for inspection and copying, all business and financial records of Contractor of, concerning, and referring to the Agreement, or which are otherwise relevant to the enforcement of these provisions.

11. For violation of any of the above provisions, the Commonwealth and/or PHFA may terminate this and any other Agreement with Contractor, claim liquidated damages in an amount equal to the value of anything received in breach of these provisions, claim damages for all expenses incurred in obtaining another contractor to complete performance hereunder, and debar and suspend the contractor from doing business with PHFA. These rights and remedies are cumulative, and the use of nonuse of any one shall not preclude the use of all or any other. These rights and remedies are in addition to those PHFA may have under law, statute, regulation or otherwise.

### **ARTICLE XIII - CONTRACTOR RESPONSIBILITY**

1. Contractor certifies that it is not currently under suspension or debarment by the Commonwealth, any other state, or the federal government, and if the Contractor cannot so certify, then it agrees to submit along with the bid/proposal a written explanation of why such certification cannot be made.

2. If Contractor enters into subcontracts or employs under the Agreement any subcontracts/individuals who are currently suspended or debarred by the Commonwealth or the federal government or who become suspended or debarred by the Commonwealth or federal government during the term of the Agreement or any extensions or renewals thereof, the Commonwealth shall have the right to require the Contractor to terminate such subcontracts or employment.

3. Contractor agrees to reimburse the Commonwealth for the reasonable costs of investigation incurred by the Office of Inspector General for investigations of the Contractor's compliance with the terms of this or any other agreement between Contractor and the Commonwealth which result in the suspension or debarment of the Contractor. Such costs shall include, but not be limited to, salaries of investigators, including overtime; travel and lodging expenses; and expert witness and documentary fees. The Contractor shall not be responsible for investigative costs for investigations which do not result in the Contractor's suspension or debarment.

4. Contractor may obtain the current list of suspended and debarred contractors and subcontractors by contacting the:

Department of General Services  
Office of Chief Counsel  
North Office Building Room 603  
Harrisburg, Pennsylvania 17125  
Phone: (717) 783-6472  
Fax: (717) 787-9138

### **ARTICLE XIV - NONDISCRIMINATION/SEXUAL HARASSMENT CLAUSE**

During the term of the Agreement, Contractor agrees as follows:

1. Contractor shall not discriminate against nor intimidate any employee, applicant for employment, independent contractor, or any other person for the manufacture of supplies, performance of work, or any other activity because of race, color, religious creed, ancestry, handicap, national origin, age, or sex. Contractor shall take affirmative action to insure that applicants are employed, and that employees or agents are treated during employment, without regard to their race, color, religious creed, handicap, ancestry, national origin, age, or sex. Such affirmative action shall include, but is not limited to: employment, upgrading, demotion or transfer, recruitment or recruitment advertising; layoff or termination; rates of pay or other forms of compensation; and selection for training. Contractor shall post in conspicuous places, available to employees, agents, applicants for employment, and other persons, a notice to be provided by the contracting agency setting forth the provisions of this nondiscrimination clause.

2. Contractor shall, in advertisements or requests for employment placed by it or on its behalf, state that all qualified applicants will receive consideration for employment without regard to race, color, religious creed, handicap, ancestry, national origin, age, or sex.

3. Contractor shall send each labor union or workers' representatives with which it has a collective bargaining agreement or other contract or understanding, a notice advising said labor union or workers' representative of its commitment to this nondiscrimination clause. Similar notice shall be sent to every other source of recruitment regularly utilized by Contractor.

4. Contractor and any subcontractors shall establish and maintain a written sexual harassment policy and shall inform their employees of the policy. The policy must contain a notice that sexual harassment will not be tolerated and employees who practice it will be disciplined.

5. It shall be no defense to a finding of noncompliance with this Nondiscrimination/Sexual Harassment Clause that Contractor had delegated some of its employment practices to any union, training program, or other source of recruitment which prevents it from meeting its obligations. However, if the evidence indicates that the Contractor was not on notice of the third-party discrimination or made a good faith effort to correct it, such factor shall be considered in mitigation in determining appropriate sanctions.

6. Where the practices of a union or any training program or other source of recruitment will result in the exclusion of minority group persons, so that Contractor will be unable to meet its obligations under this nondiscrimination clause, Contractor shall then employ and fill vacancies through other nondiscriminatory employment procedures.

7. Contractor shall comply with all state and federal laws prohibiting discrimination in hiring or employment opportunities. In the event of Contractor's noncompliance with the nondiscrimination clause of the Agreement or with any such laws, the Agreement may be terminated or suspended, in whole or in part, and all money due or to become due under the Agreement may be forfeited. In addition, Contractor may be declared temporarily ineligible for further PHFA or Commonwealth contracts and PHFA may proceed with debarment or suspension and may place the Contractor in the Contractor Responsibility File and other sanctions may be imposed and remedies invoked.

8. Contractor shall furnish all necessary employment documents and records to, and permit access to its books, records, and accounts by the contracting agency and the Department of General Services' Bureau of Contract Administration and Business Development for purposes of investigation to ascertain compliance with the provisions of this Nondiscrimination/Sexual Harassment clause. If Contractor does not possess documents or records reflecting the necessary information requested, it shall furnish such information on reporting forms supplied by the contracting agency or the Department of General Services' Bureau of Contract Administration and Business Development.

9. Contractor shall actively recruit minority and women subcontractors or subcontractors with substantial minority representation among their employees.

10. Contractor shall include the provisions of this Nondiscrimination/Sexual Harassment clause in every subcontract, so that such provisions will be binding upon each subcontractor.

11. Contractor obligations under this clause are limited to Contractor's facilities within Pennsylvania or, where the contract is for purchase of goods manufactured outside of Pennsylvania, the facilities at which such goods are actually produced.

#### **ARTICLE XV - ASSIGNMENTS AND SUBCONTRACTORS**

1. The Agreement shall not be assignable by either party, except that Owner may assign the Agreement, or any rights hereunder, to PHFA, subject to the rights of PHFA, and shall be deemed to have made such assignment of the Agreement to PHFA upon PHFA sending written notice to Owner invoking said assignment and setting forth the breach by Owner of the loan documents between Owner and PHFA.

2. Contractor understands that the Development under the Agreement is to be financed by loans from PHFA to Owner and the loans will be secured by mortgages, and that the terms of the loans are set forth in an agreement between Owner as Contractor and PHFA as lender. Contractor further understands that the agreement provides that in the event of the failure of Owner to perform its obligations to PHFA thereunder,

PHFA may as attorney-in-fact for Owner elect to undertake the completion of the Development in accordance with the Contract Documents.

3. Contractor shall not employ any subcontractors that Owner or PHFA within a reasonable amount of time, object to as incompetent, unfit or objectionable for any other reason.

4. Contractor agrees that it is fully responsible to Owner for the acts and omissions of its subcontractors, suppliers and persons directly or indirectly employed by it. Nothing contained in the Contract Documents shall create privity of contract between any subcontractor and Owner or PHFA.

5. All work performed for Contractor by a subcontractor shall be pursuant to an appropriate agreement between Contractor and subcontractor (and where appropriate, between subcontractor and subcontractor). PHFA reserves the right to review and approve any such agreement.

## **ARTICLE XVI – HOME REQUIREMENTS**

(Applicable with HOME funding)

If the Owner is receiving financing from PHFA made available through the federal HOME Investment Partnerships Program (“HOME”), Contractor and subcontractors shall comply with the following requirements:

1. Section 3 – Section 3 of the Housing and Urban Development Act of 1968, as amended, and the implementing regulations at 24 CFR Part 135 require that to the greatest extent feasible opportunities for training and employment be given to low and moderate income residents of the county in which the Development is located and contracts for work in connection with the Development be awarded to eligible businesses.

2. Federal Labor Standards – The Federal Labor Standards contained in HUD Handbook 1344.1 (Federal Labor Standards Compliance in Housing and Community Development Programs). Contractor shall be responsible for the full compliance of all employers (Contractor, subcontractors and any lower-tier subcontractors) with the labor standards identified therein.

3. Davis-Bacon Compliance - If the Development has 12 or more HOME assisted units, Contractor shall comply with the Davis-Bacon Act and regulations promulgated by the U.S. Department of Labor at Title 29 CFR Parts 1, 3, 5, 6 and 7, as amended, which includes, but is not limited to, compliance with the Davis-Bacon wage decision/determination, requirements for payroll deductions, submission of weekly certified payroll reports and labor standards relating to Davis-Bacon wage rates.

4. The Copeland Act - The Copeland (Anti-Kickback) Act prohibits anyone to require any laborer or mechanic to give up or pay back any part of their wages. Contractor and subcontractors shall comply with all requirements of the Copeland Act and any and all regulations promulgated therewith as amended from time to time.

5. Contract Work Hours and Safety Standards Act - The Contract Work Hours and Safety Standards Act requires that no contractor or subcontractor under the Agreement may require or permit laborers or mechanics to work in excess of 40 hours in any workweek unless said laborer or mechanic receives compensation at a rate not less than one and one-half times the basic rate of pay for all hours worked in excess of 40 hours in such workweek.

6. Byrd Anti-Lobbying Certification- Contractor and any subcontractor who receives more than \$100,000 in federal funds must submit an executed Byrd Anti-Lobbying Certification Form regarding compliance with 24 CFR Part 87 with each request for payment.

**ARTICLE XVII - MISCELLANEOUS**

1. The Agreement shall be governed by the laws of the Commonwealth of Pennsylvania and may be amended only in writing signed by both parties hereto.

2. The invalidity of any clause, part or provision of this Addendum and the Agreement shall not affect the validity of the remaining portions thereof.

IN WITNESS WHEREOF, the parties hereto, intending to be legally bound, have executed this Addendum on the \_\_\_\_ day of \_\_\_\_\_, 20\_\_.

WITNESS (ATTEST)

**CONTRACTOR:**

\_\_\_\_\_

\_\_\_\_\_

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

Title: \_\_\_\_\_

WITNESS (ATTEST)

**OWNER:**

\_\_\_\_\_

a Pennsylvania \_\_\_\_\_

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

\_\_\_\_\_

\_\_\_\_\_

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

Title: \_\_\_\_\_

WITNESS (ATTEST)

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

\_\_\_\_\_

\_\_\_\_\_

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

Title: \_\_\_\_\_