

**COST PLUS FEE (WITH GUARANTEED MAXIMUM) CONSTRUCTION CONTRACT
BETWEEN OWNER AND CONTRACTOR**

This Construction Contract (the "Contract" or "Agreement") is made and entered into as of this ____ day of _____, 20__, by and between _____ ("OWNER") and _____ ("CONTRACTOR"), a corporation having its principal office and place of business in _____ County, North Carolina, being duly licensed to engage in general contracting in North Carolina, and being qualified to do business in the State of North Carolina.

The Owner and Contractor agree as follows:

1. Project Location

The project involving the Work and its location are described in Attachment A (the "Project"), which is incorporated herein by reference.

2. Scope of Work

The Contractor agrees to provide the labor, services, equipment, and materials needed to construct improvements for the Owner in conformity with the plans, and specifications described more particularly in Attachment A. Such labor, services, equipment, and materials shall constitute the "Work."

3. Contractor's Responsibilities

The Contractor agrees to be responsible for the following:

Supervision. The Contractor will supervise and direct the Work and shall furnish, provide, and pay for all labor, materials, equipment, machinery, utilities, and services reasonably necessary for the proper execution and completion of the Work in accordance with the plans and specifications described more particularly in Attachment A and in a good and workmanlike manner.

Specifications. The Contractor agrees to prepare and furnish to the Owner the Specifications for the Project. The Contractor agrees that the requirements of the Specifications will be free from defects and inconsistencies and will conform to all applicable codes, ordinances, laws, regulations and industry standards.

Coordination with Others. The Contractor agrees to coordinate its Work with the work of any other separate contractors hired by Owner to avoid delaying or interfering with their work. The Contractor further agrees to inform the Owner on a regular basis or at the Owner's request of the progress of the Work.

Permits and Licenses; Discipline; Cleanup. Unless otherwise provided, the Contractor shall secure and pay for all permits, licenses, or inspections necessary for the proper execution and completion of the Work; shall comply with all laws, ordinances, or regulations bearing on the performance of the Work; shall enforce good order and discipline among his employees and subcontractors on the Project; and shall keep the Project reasonably free from waste materials or rubbish resulting from the Contractor's

operations.

Insurance. Through the term of this Agreement the Contractor agrees to maintain worker's compensation insurance in compliance with the laws of North Carolina. The Contractor further represents that the Contractor maintains commercial general liability insurance coverage in the amount of at least \$ _____ per occurrence and \$ _____ general aggregate for bodily injury and property damage liability (combined single limit per occurrence), agrees to maintain commercial general liability insurance coverage in that amount in full force and effect until the Work is fully and finally completed, and agrees to furnish to the Owner at the Owner's request a Certificate of Insurance evidencing such insurance coverages.

The Contractor further agrees to obtain and maintain builder's risk insurance covering the Project during the construction of the Project against the perils of fire (with extended coverage) and physical loss or damage including, without duplication of coverage, theft, vandalism, malicious mischief, collapse, windstorm, and debris removal including demolition occasioned by enforcement of any applicable legal requirements. The Contractor agrees to name the Owner as an additional insured with regard to such insurance.

Commencement of Work; Completion Date; Time Extensions. The Contractor agrees to promptly commence the Work and substantially complete the Work by the Date of Substantial Completion set forth in Attachment A and to be responsible for liquidated damages as set forth therein in the event of unexcused delay in achieving substantial completion of the Work. The Contractor shall be entitled to an extension of time for completion of the Work to the extent that critical path activities in connection with the Contractor's performance of the Work are delayed by (1) any interference by the Owner hindering the progress of the Work, including but not limited to delays by the Owner in selecting materials, colors, equipment, and similar items for the Project, (2) changes in the scope of the Work, (3) unusually adverse weather conditions not reasonably anticipated, (4) acts of God, (5) material shortages or delays in transportation of materials not reasonably anticipated, or (6) the discovery of unforeseen subsurface conditions, such as rock, water, unsuitable soil, or sewer, water, or other utility lines.

Compliance with Laws; Warranty. The Contractor warrants that the Contractor has visited the location of the Project and is familiar with all field conditions bearing upon the Contractor's performance of the Work; that the materials and equipment furnished under the Contract are of good quality and new (unless otherwise permitted); that the Work meets or exceeds the standards ordinarily observed in the industry; and that the Work conforms to the requirements of the Plans and Specifications and to all applicable codes, ordinances, laws, or regulations. The Contractor further warrants and promises that the Work shall be free from defects and nonconformities in materials and workmanship for a period of one year from the Date of Substantial Completion. During such period the Contractor will remedy at Contractor's expense nonconformities or defects in the Work within a reasonable time after receiving notice thereof from Owner.

Injury or Damage Indemnification. The Contractor agrees to defend, indemnify and hold the Owner harmless from and against all claims, damages, losses, and expenses, including reasonable attorneys fees, arising out of or resulting from the performance of the Work, where such claims, damages, losses and expenses are attributable to bodily injury, sickness, disease, or death or injury to property (other than the Work itself) and are caused by the negligence of the Contractor, subcontractors engaged by the

Contractor, or anyone for whose acts the Contractor or its subcontractors are responsible.

Lien Indemnification. The Contractor further agrees to defend and indemnify the Owner from and against all liens, claims, damages, losses, and expenses, including reasonable attorneys' fees, arising out of or in connection with the Work or the Project by suppliers or subcontractors engaged by the Contractor, or anyone for whose acts the Contractor or its subcontractors or suppliers are responsible.

4. Owner's Responsibilities

The Owner agrees to be responsible for the following:

Plans and Easements. The Owner agrees to furnish the Plans for the Project to the Contractor and to obtain and pay for all necessary easements, licenses, or charges necessary for access to the Project site for the proper execution and completion of the Work.

Access. The Owner warrants that the Project is located on real property owned by the Owner and that access to such real property will be furnished to the Contractor at such times and on such dates as the Contractor may reasonably require in connection with the execution and completion of the Work.

Payment. The Owner agrees to pay the Contractor the Contract Price for the Work as set forth in Attachment B, which is incorporated by reference, in the manner described therein.

Owner's Representative. The Owner may designate a representative to serve as the Owner's project manager in connection with the Project and in connection with the Contractor's performance under this Contract. In the event the Owner designates such a representative, then the Owner shall promptly notify the Contractor in writing and provide the name and contact information of the Owner's representative.

Photographs. The Owner grants to the Contractor a non-exclusive license to take, use, and publish photographs of the Project for advertising purposes and waives any right to inspect or approve the finished advertising copy or to receive any compensation for its use.

5. Changes

The Contractor agrees that the Owner may order changes in the general scope of the Work, including additions, deletions, and similar revisions. The parties agree to adjust the Guaranteed Maximum Price and Date of Substantial Completion to reflect the effects of such changes, which adjustments shall be authorized only upon execution of a written change order.

Change Orders. The Owner may issue written Change Orders to the Contractor directing a change in the Work. The amount of any increase or decrease in the Guaranteed Maximum Price shall be by mutual acceptance and agreement of a total amount supported by sufficient data and information to substantiate the change. If the Owner and Contractor do not mutually agree on the amount of the change in the Guaranteed Maximum Price, the Contractor will proceed with the Work described in the Change Order and the Owner will pay the reasonable costs of any additional work, plus 15% of such costs for the Contractor's Fee. Any decrease in the Guaranteed Maximum Price for a decrease in the Work will be the reasonable costs of the Work deleted.

Claims. The Contractor may submit claims for an increase in the Guaranteed Maximum Price or an extension of the Date of Substantial Completion by means of a written Change Request. The Contractor agrees to submit the Change Request within a reasonable time after the event giving rise to the requested change and before the Contractor undertakes any additional work. Upon receipt of a Change Request, the Owner shall inform the Contractor whether to proceed with the additional work and shall approve any adjustment in the Guaranteed Maximum Price or Date of Substantial Completion by issuing a Change Order as provided above.

6. Default

A. Default by Contractor. If the Contractor unreasonably or persistently fails to supply a sufficient number of workers and quantity of materials to perform the Work in accordance with the Plans and Specifications, unreasonably or persistently fails to perform the provisions in the Contract, or fails to pay subcontractors or suppliers for materials or labor furnished to the Project, then the Owner may immediately notify the Contractor in writing of such default and of the Owner's intention to terminate this Contract within seven (7) days. If the Contractor fails to cure such failure within seven (7) days after receiving Owner's written notice, then the Owner may terminate this Contract and seek to recover Owner's actual damages from the Contractor.

Notwithstanding the foregoing, if such default cannot be cured within said time period but is curable, Contractor shall be deemed to have cured such default if Contractor so notifies Owner in writing, commences cure of the default within said time period, thereafter diligently and in good faith continues with said cure while concurrently providing Owner with written notice at the end of every two (2) week period as to the progress of Contractor's cure, and actually completes said cure within a reasonable period of time.

B. Default by Owner. In the event of default by Owner, after the earnest money deposit has been paid to Contractor, Contractor shall at the sole option of Contractor, be entitled either to retain all earnest money deposited by Owner and held by Contractor as liquidated damages (it being acknowledged and agreed that the exact amount of damages which would be sustained by Contractor is not and will not be susceptible of specific ascertainment), in which event all parties shall be relieved of further liability each to the other, or to seek Contractor's actual damages.

7. Miscellaneous

Entire Agreement. This Agreement constitutes the entire understanding and agreement of the Contractor and the Owner and supersedes any prior negotiations, representations, or agreements. This Agreement may not be amended, changed, or modified except in writing signed by both the Contractor and the Owner.

Assignment. The Contractor and Owner agree that neither of them shall assign or transfer their respective interests in this Agreement without the written consent of the other.

Governing Law. The Contractor and the Owner agree that this Agreement shall be governed by and construed in accordance with the laws of the State of North Carolina.

Severability. In the event that any provision of this Agreement is determined to be invalid or unenforceable, the validity and enforceability of the other provisions of this Agreement shall not be affected.

Notice. The Contractor and the Owner agree that the giving of any written notice required by this Agreement shall be sufficient if sent by hand-delivery, email, telecopy, or regular mail to the Contractor or the Owner (or Owner's representative, if any) at the addresses of their respective principal offices and places of business.

Resolution of Disputes. The Owner and Contractor agree that they will attempt in good faith to resolve all claims, controversies, or disputes arising out of or relating to this Agreement or an alleged breach thereof by negotiation. If a dispute cannot be resolved by negotiation, the Owner and Contractor agree as a condition precedent to commencing a lawsuit or arbitration to submit the dispute to mediation under the Construction Mediation Rules of the American Arbitration Association.

In the event a claim, controversy, or dispute is not resolved by negotiation or mediation as described above, the Owner and Contractor agree that such matters shall be decided by binding arbitration in Mecklenburg County, North Carolina in accordance with the Construction Industry Arbitration Rules of the American Arbitration Association.

Effective as of the ____ day of _____, 20__.

This ____ day of _____, _____.

_____, OWNER

By: _____

____ President

_____, CONTRACTOR

By: _____

____ President

ATTACHMENT A

Location

The Project shall be referred to as the _____ Project and is located at _____.

Plans and Specifications

The Plans and Specifications are incorporated by reference in this Agreement.

The Specifications are those specifications prepared by _____ and dated _____, _____.

The Plans are those drawings prepared by _____ dated _____, _____ and consisting of the following:

Sheet No. __ - _____

Completion of the Work

Completion Date; Construction Schedule. The Contractor agrees to substantially complete the Work, no later than _____ months [or _____ days] from the closing of the Owner's construction loan (the "Date of Substantial Completion") and to fully and finally complete the Work, including all punch list items, no later than _____ months (or _____ days] following the Date of Substantial Completion, all as subject to changes as provided in the Agreement. The Date of Substantial Completion shall be the date that the governmental authority having jurisdiction over the Project issues a temporary or permanent certificate of occupancy permitting the Owner to take possession of and occupy the Project for the Owner's intended use.

ATTACHMENT B

Contract Price

Contract Price; Guaranteed Maximum Price. The Owner agrees to pay the Contractor a total price (the "Contract Price") consisting of the Cost of the Work plus the Contractor's Fee of ____% of the Cost of the Work, subject to modification as set forth in the Agreement. The Contract Price is guaranteed by the Contractor not to exceed a maximum of \$_____ (the "Guaranteed Maximum Price"), subject to additions and deductions by Change Orders as provided in this Agreement.

Changes in Materials Pricing. The Guaranteed Maximum Price is based on current material costs, without margin for fluctuations in the price of construction materials. The current market for construction materials is considered to be volatile and sudden price increases or decreases could occur. The Contractor agrees to use its best efforts to obtain the lowest possible price from available building material suppliers, but should there be a change in the price of materials purchased after execution of this Agreement for use in the construction of the Project, in order to avoid inequities, the parties agree to adjust the Guaranteed Maximum Price accordingly by means of a change order or change request.

Subcontractor Bids. The Contractor agrees to furnish to the Owner, upon request, copies of all bids, offers, or proposals from subcontractors relating to the Project for the Owner's information and review.

Earnest Money. The Owner has paid and the Contractor has received a nonrefundable initial deposit of \$_____ to be held by the Contractor and applied to payment of the Contract Price as all or part of the Owner's final payment to the Contractor.

Cost of the Work. The Cost of the Work shall include:

1. Costs of materials incorporated in the Project, including transportation and deposits for advanced ordering thereof. Unused excess materials, if any, shall become the Owner's property at the completion of the Work. Any amounts realized from material returns shall be credited to the Owner as a deduction from the Cost of the Work;
2. Salaries, wages, and hourly rates of Contractor's employees performing the construction of the Work at the site or, with the Owner's approval, at off-site workshops, including all overhead and expenses for employee taxes, insurance, and benefits and wages or salaries of the Contractor's supervisory and administrative personnel when stationed as necessary at the site, including all overhead and expenses for employee taxes, insurance, and benefits;
3. Payments made by the Contractor to Subcontractors in accordance with the requirements of the subcontracts;
4. Costs, including transportation and storage, installation, maintenance, dismantling and removal of materials, supplies, temporary facilities and utilities (including telephone service and delivery fees), machinery, equipment, and hand tools not customarily owned

by construction workers, that are provided by the Contractor at the site and fully consumed in the performance of the Work; and cost of such items if not fully consumed;

5. Rental charges for temporary facilities, machinery, equipment, and hand tools not customarily owned by construction workers that are provided by the Contractor at the site, whether rented from the Contractor or others;
6. Costs of removal of debris from the Project site;
7. The portion of insurance and bond premiums that can be directly attributed to this Contract;
8. Sales, use or similar taxes imposed by a governmental authority that are related to the Work;
9. Costs due to emergencies incurred in taking action to prevent threatened damage, injury or loss in case of an emergency affecting the safety of persons and property;
10. Fees and assessments for the building permit and for other permits, licenses and inspections, and developer or community required fees for which the Contractor is required to pay in connection with the Project;
11. Change Order preparation fees in the amount of \$300.00 per change order beginning with the tenth change order for change orders prepared and priced by the Contractor at the Owner's direction or request, except that on the condition that the Owner accepts and agrees to such a change order, then such preparation fees will be deemed waived; and
12. Other costs incurred in the performance of the Work if and to the extent approved in advance in writing by the Owner.

The Cost of the Work shall not include:

1. Salaries and other compensation of the Contractor's personnel stationed at the Contractor's principal office or offices other than the site office;
2. Expenses of the Contractor's principal office and offices other than the site office;
3. Overhead and general expenses, except as may be expressly included in the Cost of the Work;
4. The Contractor's capital expenses, including interest on the Contractor's capital employed for the Work;
5. Rental costs of machinery and equipment, except as expressly included in the Cost of the Work;
6. Costs due to the negligence or failure to fulfill a specific responsibility of the Contractor,

Subcontractors and suppliers or anyone directly or indirectly employed by any of them or for whose acts any of them may be liable.

7. Any cost not specifically and expressly included in the Cost of the Work; and
8. Costs, other than costs included in Change Orders approved by the Owner, that would cause the Guaranteed Maximum Price to be exceeded.

The Contractor agrees keep full and detailed accounts and exercise such controls as may be necessary for proper financial management under this Agreement, and the accounting and control systems shall be satisfactory to the Owner. The Owner and the Owner's accountants shall be afforded access to, and shall be permitted to audit and copy, the Contractor's records, books, correspondence, instructions, drawings, receipts, subcontracts, purchase orders, vouchers, memoranda and other data relating to this Contract at any time upon the Owner's request.

Manner of Payment. The Contractor shall submit Contractor's invoices or requests for payment to Owner monthly by the last day of the month for the Work completed during that month. The Contractor's invoices or requests for payment shall include an itemized summary of the costs incurred during the billing period, the Contractor's Fee for the billing period, and the total costs and Contractor's Fee previously paid by the Owner.

The Owner shall review and approve as appropriate the Contractor's invoices or requests for payment and shall issue payment to Contractor within twenty (20) days after receipt of the Contractor's invoice or request for payment.

All cash discounts obtained on payments made by the Contractor shall accrue to the Owner.

Final Payment. Promptly after the Date of Substantial Completion, the Contractor will submit the Contractor's final invoice or request for payment as described above, assignments of warranties covering components, fixtures, or equipment incorporated in the Project, and final lien waivers or lien releases from the Contractor and from subcontractors and suppliers of the Contractor with respect to labor, materials, or equipment furnished to the Project. The Owner shall review and approve the Contractor's final invoice and shall issue payment to the Contractor within twenty (20) days after receipt thereof.

Interest. Payments not paid when due shall bear interest at a rate of ___% per month.