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**REPRESENTING THE PARTIES TO A  
CONSTRUCTION PROJECT**

**2015 Edition**



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# REPRESENTING THE PARTIES TO A CONSTRUCTION PROJECT

2015

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# 4

## Representing the General Contractor

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## I. [4.1] INTRODUCTION

This chapter addresses the pre-construction issues faced by the general contractor. In a perfect world, all potential issues and pitfalls in the construction process are foreseen, reviewed, and agreed on in advance between the general contractor, the subcontractors, and the owner's representative or construction manager. In theory, pre-construction interaction should involve all project participants, including the owner, designer, project managers, superintendents, and supervisors of the general contractor, as well as all major subcontractors and suppliers. Rarely, however, does this theoretical perfect world exist. Nevertheless, attempts should always be made at the outset of a construction project to streamline the project through a pre-construction communication process. During this process, the following pre-construction issues should take priority:

**Introductions.** As much as possible, everyone involved in the project should be familiar with each other, including all parties' names, organizations, titles, and roles in the project.

**Site issues.** The precise project address and location should be clear, and the proposed layout of the construction site should be made available, including the location of office trailers, storage trailers, entry and exit points, location of existing underground utilities, and existence of any potential underground hazards.

**Rules for on-site conduct.** Everyone should understand the agreed-on access roads, points for entry, permitted signage rules and requirements, temporary or partial street closures, location of employee parking, location of toilets, security systems, lighting, and any special safety concerns.

**Permits.** Participants in the project should review which permits are required and who is responsible for obtaining them and paying for them.

**Final construction documents.** All parties must understand which sets of plans, specifications, contracts, and amendments are final for construction and which documents outline each parties' rights and obligations.

**Submittals.** The parties should agree on a list of submittals and shop drawings that are required and clarify the contractually required procedures, including the number of copies to be submitted.

**Relocation plans.** Parties must review the requirements for relocation of existing utilities, buildings, or other physical items, plus any planned service interruptions, including any restrictions on service interruptions.

**Safety plans.** The parties must review the safety plans and schedule a mandatory pre-construction safety meeting. Everyone must be aware of project safety requirements, location of first aid kits, and contacts for emergency services.

**Inspection plans.** An agreement must be reached regarding who conducts the inspections and when and how these inspections will take place.



**Owner-furnished items.** A review must take place of the plans for furnishing materials and/or equipment, as well as separate general contracts between the owner and other parties.

**Reports.** It must be clear who will be expected to create reports and how the reports will be maintained and shared with others.

**Communication.** Parties should discuss and agree on a communication plan under which everyone will be held accountable, including voice communication, email, and informal and formal written communication.

**Change orders.** The steps and requirements in the change order process must be clear. Everyone must understand who is authorized to issue change orders and the dollar limitations of those orders.

**Dispute resolution processes.** The parties must understand the contractual process for resolution of disputes, including what alternative dispute resolution mechanisms are in place to reach resolutions.

**Payment.** Parties must also understand the contractual requirements for payment, as well as the general contractor's additional requirements for payment to subcontractors.

## II. [4.2] THE CONSTRUCTION CONTRACT

The construction contract is the primary agreement that sets forth the specifications for a building project's construction. There are several general types of construction contracts.

### A. Types of Construction Contracts

#### 1. [4.3] Build-to-Print Contract

A "build-to-print contract," sometimes referred to as a "design-build contract" or "design specification contract," is a contract "requiring the contractor to build a product according to exact technical specifications provided by the customer." BLACK'S LAW DICTIONARY, p. 391 (10th ed. 2014). The design specifications are explicit and are often coupled with performance specifications, so the contractor has little discretion in how to perform. *Id.*

#### 2. [4.4] Fixed-Price Contract

A "fixed-price contract," sometimes referred to as a "lump-sum contract," is a contract "in which the buyer agrees to pay the seller a definite and predetermined price regardless of increases in the seller's cost or the buyer's ability to acquire the same goods . . . at a lower price." BLACK'S LAW DICTIONARY, p. 393 (10th ed. 2014). The fixed-price contract, therefore, provides that a general contractor and owner agree to perform all specified work for an agreed flat price. The contract can provide that the price may be altered subject to written change orders, if the parties agree.

### 3. [4.5] Cost-Plus Contract

The “cost-plus contract,” sometimes referred to as a “time-and-material contract,” is a contract “in which payment is based on a fixed fee or a percentage added to the actual cost incurred.” BLACK’S LAW DICTIONARY, p. 393 (10th ed. 2014). It typically involves an owner who pays a builder the actual costs of material and labor plus a fixed percentage over that amount. *Id.* The percentage varies typically from 8 percent – 26 percent and can also be subject to written change orders if the parties agree.

### 4. [4.6] Construction Management Contract

A relatively new form of contract is a “construction management contract.” A construction management contract is usually separate from the general contractor’s contract and involves supervising, directing, and coordinating the labor and material resources throughout the construction process by using management techniques to achieve predetermined objectives of scope, cost, time, quality, and satisfaction. Construction management services will be defined in the contract but can be broad enough to encompass the design process as well as the construction itself. The construction management contract typically has a finite time frame and an outcome-oriented objective for project completion.

### B. [4.7] Letter of Agreement

It is always preferable that a construction contract be signed as soon as possible. Nevertheless, some general contractors, when faced with a reluctant owner or unreasonable time pressure, will first use an interim letter of agreement. If such a letter is used, it should contain enough terms to be an enforceable contract. Otherwise, a defaulting owner might argue that the letter of agreement is a mere “letter of intent” and unenforceable under Illinois law. *See Quake Construction, Inc. v. American Airlines, Inc.*, 141 Ill.2d 281, 565 N.E.2d 990, 994, 152 Ill.Dec. 308 (1990). *See also Harris v. American General Finance Corp.*, 54 Ill.App.3d 835, 368 N.E.2d 1099, 1103, 11 Ill.Dec. 491 (3d Dist. 1977) (court stated that legal effect of document is not determined by its label). A comprehensive contract should always be executed after the circulation of a letter of agreement.

### C. Material Terms for the General Contract

#### 1. [4.8] Determining Costs and Fees

A plan needs to be set forth in the contract outlining the methods of calculation to precisely determine the costs, fees, and ultimate contract price. This is true whether the contract is based on a fixed-price, cost-plus, or build-to-print contract. In situations in which a contractor is determining fees based on a percentage plan, those fees need to be specifically outlined in the contract.

#### 2. [4.9] Project Requirements and Specifications

As detailed as possible, the obligations of the general contractor should be expressly outlined in the contract. This description can be less critical in a pure build-to-print or fixed-price contract

but is absolutely paramount in any cost-plus or “hybrid” form of contract. Moreover, any process for modifying the contract price should be clearly delineated with the timing and substance requirements included, as well as the prescribed process for the presentation of written change orders.

### **3. [4.10] Liquidated Damages/Bonuses for Early Completion**

If the contractor does not complete the work on time without a valid contractual excuse or justification, the owner might want liquidated damages for the delay. Contractors often refuse to agree to liquidate damages. However, liquidated damages are a substitute for the owner’s actual damages and can be the owner’s exclusive remedy for the contractor’s delay. *X.L.O. Concrete Corp. v. John T. Brady & Co.*, 104 A.D.2d 181, 482 N.Y.S.2d 476 (1984), *aff’d*, 66 N.Y.2d 970 (1985). Thus, depending on the amount, in some circumstances liquidated damages actually might be advantageous to the contractor. On the other side of this analysis, it would be prudent for a contractor to request performance bonuses for early or timely completion when timing is of the essence.

### **4. [4.11] Choosing To Use/Discontinue the Use of Subcontractors**

The processes by which a contractor and owner choose to use a subcontractor need to be set forth in writing to avoid issues as they arise. Beyond the initial choice of subcontractors, the process for terminating and substituting subcontractors also should be addressed.

### **5. [4.12] Surety Bonds for Contractors**

Contractors typically use surety bonds to protect themselves against financial loss suffered by an owner, and there are several types to consider.

In instances regarding payments to subcontractors and suppliers, an owner may require a bond that provides security to ensure that, as part of the contractor’s agreement, the owner is not liable for payments in the event the contractor defaults on payments to subcontractors or suppliers of the construction materials. This type of bond should clearly outline who and what limits are covered by the bond.

Moreover, a work-product bond ensures that, in the event a contractor defaults on its obligations under the agreement, a surety will either cure the defect in the obligations or pay the owner an amount determined by the surety necessary to cure the obligations. If the default rises to a legally significant deficiency, the surety may invoke its rights under the general indemnity agreement.

Another type of indemnity bond specifically ensures payment for subcontractors and/or suppliers, thereby satisfying the encumbrances on the title of the property, and avoids a subcontractor’s ability to foreclose on the construction project. Typically, it is common practice for an owner or title company to require this type of bond, but in Illinois this type of bond is not statutorily required.

Finally, in times when improvements are required by a municipality as part of a construction project, an owner may be required to have a bond to ensure that the interests of the municipality are completed. These requirements may include such things as roads, sewers, and traffic signals. Owners may want to require the contractor to obtain a bond to guarantee that the municipal requirements are met. This bond is between the owner and the municipality. For a contractor, this sort of bond can be problematic as the contractor may not be the party performing these requirements in that it may not exercise control or be able to oversee that the requirements are met.

## 6. [4.13] Insurance

The questions surrounding insurance, *e.g.*, what various potential issues are insured and by whom, can be contentious points of negotiation between the owner and contractor. A comprehensive discussion of construction insurance is beyond the scope of this chapter. Nevertheless, the contractor must understand that these issues should be expressly addressed in the contract, for failure to understand the basic “risks of loss” and account for them can lead to financial disaster for the project.

### a. [4.14] Liability Insurance for Owners

Commercial general liability (CGL) insurance protects owners against claims arising from the operation of their business. One of the problem areas of owner insurance relates to the scope of coverage. Exclusions in the policy may preclude coverage for a given loss, so it may be relevant and important for the general contractor to seek to broaden that coverage to avoid the possibility of a noncovered risk.

### b. [4.15] Liability Insurance for Contractors

A general contractor needs to recognize that it will likely be requested to provide coverage to the owner for construction accidents. The contractor has the choice of adding the owner as an additional insured to the contractor’s commercial general liability policy or purchasing a policy for the owner.

Unfortunately, the risk allocation process between the owner and the general contractor is often complicated by virtue of the insurance procurement provisions in the contract, the specific language of the policies, and, of course, case decisions. Under most standard industry contracts, if there is a cost to provide the coverage, the owner pays for the coverage. This can, however, be negotiated between the parties.

It is important to note that if an owner brings a claim for contribution against the contractor, the contractor’s own CGL policy may not cover that contribution claim. *Virginia Surety Co. v. Northern Insurance Company of New York*, 224 Ill.2d 550, 866 N.E.2d 149, 161, 310 Ill.Dec. 338 (2007). In *Virginia Surety*, the Illinois Supreme Court held that higher-tier contribution claims are not covered by a contractor’s CGL policy because the indemnity agreement between the owner and the general contractor is not an “insured contract” but rather a waiver of an affirmative defense such that the “insured contract” exception to the employee exclusion is not applicable.

Because the general contractor's employee initiated the litigation against the owner, the employee exclusion in the general contractor's policy excluded the owner's contribution claim.

The prevailing view is still that the contractor's employee liability policy will likely provide coverage for the owner's contribution claim. The Supreme Court in *Virginia Surety* impliedly overruled the appellate decision in *Christy-Foltz, Inc. v. Safety Mutual Casualty Corp.*, 309 Ill.App.3d 686, 722 N.E.2d 1206, 243 Ill.Dec. 137 (4th Dist. 2000), which had previously held that higher-tier contribution claims were not covered by the employer's liability policy. See *Virginia Surety Co. v. Northern Insurance Company of New York*, 224 Ill.2d 550, 310 Ill.Dec. 338 (2007).

#### **D. Typical Risks Encountered by Contractors**

##### **1. [4.16] Getting Paid**

A major risk facing a general contractor is getting paid. Ideally, the general contractor has a prior relationship with the owner or is in possession of information relating to the owner's ability to pay for the project. Unfortunately, this is not always possible, nor can the contractor always obtain such information.

Nevertheless, the contractor can closely monitor the time frame for payment as prescribed in the contract.

In addition, there are statutory protections for the contractor. Illinois enacted the Contractor Prompt Payment Act, 815 ILCS 603/1, *et seq.*, which applies to contracts entered on or after August 31, 2007. Under the statute, "if a contractor has performed in accordance with the provisions of a construction contract and the payment application has been approved by the owner or the owner's agent, the owner shall pay the amount due to the contractor pursuant to the payment application not more than 15 calendar days after the approval." 815 ILCS 603/10(1).

Illinois also enacted the State Prompt Payment Act, 30 ILCS 540/0.01, *et seq.*, which provides that state entities must pay interest on any late invoices. Indeed, bills must be paid within 60 days of receipt, or an interest penalty of one percent applies. 30 ILCS 540/3-2(1).

##### **2. [4.17] Responsibility for Damaged or Destroyed Property During Construction**

Construction contracts typically will allocate risks of destroyed property between the owner and the contractor. This allocation is always negotiable, and the question of responsibility for the risk of loss from the destruction or damage during performance under the contract varies from project to project. In *Unger v. Nunda Township Rural Fire Protection District*, 135 Ill.App.3d 758, 482 N.E.2d 123, 90 Ill.Dec. 416 (2d Dist. 1985), the plaintiff filed suit against various parties seeking to recover damages for the destruction by fire of certain trees on property that he was in the process of purchasing under an installment sales contract. The court held that the purchaser assumed the risk of loss because the contract did not otherwise expressly allocate the risk. 482 N.E.2d at 126. Having possession of the property is the standard by which the courts

will determine liability unless the contract contains a provision expressly stating otherwise. *See also Premier Electrical Construction Co. v. Ragnar Benson, Inc.*, 111 Ill.App.3d 855, 444 N.E.2d 726, 67 Ill.Dec. 490 (1st Dist. 1982); *Trans World Airlines, Inc. v. Standard Paving Co.*, 45 Ill.App.3d 276, 359 N.E.2d 764, 3 Ill.Dec. 905 (1st Dist. 1976).

### 3. [4.18] Clauses Related to Site Conditions

Site conditions can be a critical component to a contract bid. Modern contracts have departed from the historic principle that the contractor should bear responsibilities for any unusual or differing site conditions encountered on a project. It has become more common for general contractors to negotiate a clause in the construction contract that provides that if the conditions encountered differ materially from those indicated in the contract, then an adjustment should be made to the contract price and/or deadline. Of course, if successful in obtaining such a clause, owners will require that contractors need to give timely notice for any changes in conditions.

### 4. [4.19] Delays to Completion of the Project

Whether the project schedule is a material term to the contract depends on the language of the particular contract. Nevertheless, authority exists for the proposition that a schedule can be deemed material even when it is not attached to the contract and expressly adopted and labeled material. *See Edwin J. Dobson, Jr., Inc. v. Rutgers, State University*, 157 N.J.Super. 357, 384 A.2d 1121 (1978), *aff'd*, 90 N.J. 253 (1982).

### 5. [4.20] Determining Liability for Defective Work

In determining liability for defective work, Illinois courts have set standards requiring that the contractor must adhere to the plans and specifications from the designers. *St. Joseph Hospital v. Corbetta Construction Co.*, 21 Ill.App.3d 925, 316 N.E.2d 51, 65 (1st Dist. 1974). Thus, an analysis of any claimed defect, and defenses thereto, will begin with the covenants, representations, and warranties provided by the contractor to the owner in the contract.

### 6. [4.21] The Difference in Contractor Warranties

Contractors generally provide warranties covering the work performed or materials supplied to the project. These warranties are subject to negotiation, and the contractor should scrutinize warranty provisions contained in proposed contracts and understand the nature and extent of the warranties sought.

With respect to implied warranties under the Uniform Commercial Code (UCC), 810 ILCS 5/1-101, *et seq.*, the courts have held that the UCC generally applies only to the sale of “goods.” *See Overton v. Kingsbrooke Development, Inc.*, 338 Ill.App.3d 321, 788 N.E.2d 1212, 273 Ill.Dec. 336 (5th Dist. 2003); *Hopkins v. Hartman*, 101 Ill.App.3d 260, 427 N.E.2d 1337, 56 Ill.Dec. 791 (4th Dist. 1981) (Illinois courts limit implied warranties of habitability to new residential homes). Under some circumstances, these warranties can be waived. To be enforceable, waivers must be expressly disclosed to the buyer. *Petersen v. Hubschman*

*Construction Co.*, 76 Ill.2d 31, 389 N.E.2d 1154, 27 Ill.Dec. 746 (1979); *Board of Managers of Chestnut Hills Condominium Ass'n v. Pasquinelli, Inc.*, 354 Ill.App.3d 749, 822 N.E.2d 12, 19, 290 Ill.Dec. 730 (1st Dist. 2004). Thus, the general contractor should require that such a waiver be included in any construction contract.

#### 7. [4.22] Remedies for Breach

It is always advisable that express default and remedies provisions are incorporated into a contract, and the construction contract is no exception. Any liquidated damages clauses that are negotiated and set forth in the contract must be considered. Contractors must also understand that potential remedies exist at equity, such as those prescribed under the Illinois Mechanics Lien Act, 770 ILCS 60/0.01, *et seq.* Thus, it is advisable for general contractors to reserve all available remedies at both law and equity.

#### 8. [4.23] Determining Damages

Of course, the measurement of damages can always be prescribed in the contract, subject to statutory and public policy limitations. When defects arise, an owner typically can be entitled to a valuation for the cure of the defects or the diminution in value of the property. *Park v. Sohn*, 89 Ill.2d 453, 433 N.E.2d 651, 60 Ill.Dec. 609 (1982); *Mayfield v. Swafford*, 106 Ill.App.3d 610, 435 N.E.2d 953, 62 Ill.Dec. 155 (5th Dist. 1982); *Village of Pawnee v. Azzarelli Construction Co.*, 183 Ill.App.3d 998, 539 N.E.2d 895, 132 Ill.Dec. 332 (4th Dist. 1989); *Wells v. Minor*, 219 Ill.App.3d 32, 578 N.E.2d 1337, 161 Ill.Dec. 691 (4th Dist. 1991). The courts have limited this recovery to actual damages of restoring the project to its original valuation. *St Joseph Hospital v. Corbetta Construction Co.*, 21 Ill.App.3d 925, 316 N.E.2d 51 (1st Dist. 1974). However, if owners can show that the damages were foreseeable at the inception of the contract, the courts have expounded consequential damages such as loss of use, loss of income, and loss of profits. *Edward E. Gillen Co. v. City of Lake Forest*, 221 Ill.App.3d 5, 581 N.E.2d 739, 163 Ill.Dec. 585 (2d Dist. 1991); *Jones v. Melrose Park National Bank*, 228 Ill.App.3d 249, 592 N.E.2d 562, 569, 170 Ill.Dec. 126 (1st Dist. 1992). The general contractor can limit its exposure to these additional damages, but the contract needs to expressly waive the damages.

#### E. [4.24] Public Projects

Although a comprehensive review of the statutes and caselaw that govern the public bidding process is beyond the scope of this chapter, a comment should be made about public projects. No doubt the aspects of construction processes are similar for the general contractor whether the project is public or private. Perhaps the greatest distinction between these two types of projects lies up front during the acquisition and bidding for the business. There is a perceived need for a fair bidding process in publicly owned projects that results from past political abuse. *See Keefe-Shea Joint Venture v. City of Evanston*, 332 Ill.App.3d 163, 773 N.E.2d 1155, 266 Ill.Dec. 85 (1st Dist. 2002). Public entities typically have legislation prescribing their procedures for contracting. Most public entities by statute are required to publicly bid their projects, and compliance with the terms and conditions of these statutory requirements is critical to success. Failure to engage this process by a public entity that is statutorily required to use the public bid process can result in a void contract. *Branigar v. Village of Riverdale*, 396 Ill. 534, 72 N.E.2d 201 (1947).

### 1. [4.25] The Bid Package

Rather than an arm's-length contract negotiation, public projects typically begin with a bid package. The bid package for public projects generally includes instructions and prerequisites for the project. It also should include sufficient information and project specifications to enable the contractor to price and bid the project.

### 2. [4.26] Substitution of Materials, Products, or Equipment

A bid should be based on the information, including the materials and equipment, that was specified by the contract documents. Selection of materials, products, and equipment is a detailed process and must be undertaken with care. Once the materials and products are identified, the compatibility of any additional materials needed can be confirmed. Unilateral or unapproved substitutions should be avoided.

### 3. [4.27] Clarity of the Scope

The bid submittal form should clearly define the scope of the work, with pricing and some reasonable estimate of volume in order to determine the lowest bidder. The bid submittal form must identify what is within the base contract and what is an extra.

### 4. [4.28] Award of the Contract

It should be noted that a public entity is given deference to its discretion in awarding a contract. *Walsh/II in One Joint Venture III v. Metropolitan Water Reclamation District of Greater Chicago*, 389 Ill.App.3d 138, 904 N.E.2d 1158, 328 Ill.Dec. 648 (1st Dist. 2009). Instructions to bidders typically afford the owner the discretion in determining the low bidder.

## III. [4.29] CONCLUSION

A construction contract consists of two key elements: (a) the written agreement itself; and (b) the drawings and specifications for the project. The written agreement identifies the parties, critical dates, contract price, payment schedules, schedule under which the work is to be performed, and signatures of the parties. The agreement often incorporates and references the other parts of the contract, namely, the specifications and drawings. The specifications involve a written description of the work to be performed, types of material, and standards for performance. They detail the scope of the work to be performed. The drawings are a graphic representation of the work to be performed and usually consist of site, foundation, floor, roof, elevation, and cross-section plans. They show the location, character, dimensions, and details of all work to be performed.

The extent to which all items are critical and binding must be made clear in the documents. These matters must be discussed and considered from the outset. The more issues that are foreseen and resolved up front, the smoother the construction process will be.



#### IV. [4.30] SAMPLE CONSTRUCTION AGREEMENT

##### CONSTRUCTION AGREEMENT

THIS CONSTRUCTION AGREEMENT is made this \_\_\_\_\_ day of \_\_\_\_\_, 20\_\_\_, by and between [name of owner] (Owner) and [name of contractor] (Contractor).

##### RECITALS

A. Owner owns the real property commonly known as [address, city], Illinois, and legally described as set forth in the attached Exhibit A (Property).

B. Contractor is a general construction contractor with its principal place of business located at [address, city], Illinois.

C. Contractor desires to act, and Owner has agreed to engage Contractor, as the general contractor, supervisor, and site administrator for the Improvements (Work) on the Property in accordance with plans and specifications, prepared by [name of architect] (Architect), dated [date], and consisting of \_\_\_\_\_ numbered sheets, which plans and specifications are hereinafter referred to together as the “Project Documents.”

D. Owner has agreed to engage Contractor to perform the Work, and Contractor has agreed to perform the Work for Owner upon the terms and conditions set forth in this Agreement.

E. This written Agreement, together with the Project Documents, represents the entire and integrated agreement between the parties hereto, and it supersedes prior negotiations, representations, or agreements, either written or oral.

##### PROVISIONS

In consideration of the premises set forth in the foregoing Recitals, in consideration of the mutual promises and covenants set forth below, and for good and valuable considerations, the receipt and sufficiency of which are hereby acknowledged, Owner and Contractor hereby agree as follows:

###### 1. DEFINITIONS:

[List definitions.]

###### 2. DUTIES OF CONTRACTOR:

2.1. Contractor shall act as general contractor, supervisor, and site administrator for the Work, supplying thereto all of the skilled and unskilled trades and labor and all of the materials (all such trades and labor and the suppliers of materials being hereinafter referred to individually as a “Subcontractor” and together as “Subcontractors”) required

to complete the Work, all in accordance with this Agreement and the Project Documents (the Project Documents are hereby incorporated herein by this reference). Contractor represents and warrants to Owner that all materials and equipment to be furnished under this Agreement, the Project Documents, and/or any modifications or amendments thereto will be new unless otherwise specified, and that all work will be of good quality, free from faults and defects, and in conformance with this Agreement, the Project Documents, and any modifications or amendments thereto. All work not so conforming to these standards may, in Owner's sole and absolute discretion, be considered defective. If requested by Owner, Contractor shall furnish satisfactory evidence to Owner as to the kind and quality of materials and equipment so furnished. In the event that it becomes necessary, due to conditions beyond the control of Contractor, to substitute any materials, Contractor may do so, provided that the substituted materials are of equal or greater quality to that so specified and are approved, in writing, by Owner. Construction shall conform to this Agreement, the Project Documents, and any and all modifications or amendments thereto, unless otherwise permitted by Owner's prior written approval and consent. All construction shall be done in a neat and good workmanlike manner and in accordance with the regulations of all applicable municipal governing bodies and authorities.

2.2. In its capacity hereunder as supervisor and site administrator, Contractor shall (a) accept bids from and contract directly with all Subcontractors for performance of any portion of the Work in accordance with the Project Documents and any applicable Change Order or Change Orders, as such orders are hereinafter defined; (b) supervise and direct the Work using its best skill and attention; (c) be responsible for all construction means, methods, techniques, and sequences, for coordinating all work on the Project, and for the acts and omissions of its employees, Subcontractors, and their agents and employees, and other persons performing any of the Work under a contract with Contractor. Owner, or its agent, shall have the right to inspect the work performed to date, any time or from time to time, upon giving reasonable notice to Contractor. All such inspections will be at Owner's sole cost and expense and risk. If Owner's inspection indicates the existence of defects in the Work, Owner shall immediately give notice thereof to Contractor, and Contractor shall immediately cure and/or repair said defect, at Contractor's sole cost and expense, as soon as reasonably possible.

3. **CONTRACT SUM:** Owner shall pay to Contractor \$\_\_\_\_\_ (Contract Sum). Notwithstanding anything in this Agreement to the contrary, the Contract Sum shall include the cost of all Work to be performed in connection with this Agreement and any modifications or amendments thereto. The Contract Sum shall be subject to increase and reduction only pursuant to a Change Order, as such orders are hereinafter defined, which shall be issued as provided in §§6.1 and 6.2 below.

4. **PAYMENT TO CONTRACTOR:** The Contract Sum shall be paid to Contractor as follows:

- a. Contractor acknowledges receipt of \$\_\_\_\_\_ from Owner; and
- b. The balance of the Contract Sum, not to exceed \$\_\_\_\_\_, shall be paid to the Contractor on [date].

## **5. COMMENCEMENT AND COMPLETION OF THE WORK:**

**5.1. The Work shall commence upon issuance of a building permit and shall proceed with all due diligence and shall be substantially completed on or before [date]. The Work shall be deemed to be substantially completed when [name of agency, department, or local government] has issued its certificate of occupancy, permitting full use and occupancy of the entire Property as [a rental apartment complex].**

**5.2 When Contractor considers the Work to be substantially completed, Owner shall have the right to inspect the Work. If Owner's inspection indicates the existence of any punch list items or defects in the condition of the Work, Owner shall immediately give notice thereof to Contractor, and Contractor shall cure and/or repair said defects, within reasonable time. The failure of Owner to notify Contractor of any item does not alter the responsibility of Contractor to correct the defect and/or complete the Work in accordance with this Agreement, the Project Documents, and any and all modifications or amendments thereto. Warranties provided by §§10.1 and 10.2 below shall commence on the Payment Date.**

**5.3. No payment for final completion of the Work shall be due until Contractor submits to Owner (a) an affidavit that all payrolls, bills for materials and equipment, and other indebtedness connected with the Work for which Owner or the Property might in any way be responsible, or lienable, have been paid or otherwise satisfied; (b) if required by Owner, other data establishing payment or satisfaction of all obligations, such as receipts, releases, and waivers of liens arising out of this Agreement, and provides extended title insurance over any possible mechanics lien claims of Contractor and its Subcontractors and Suppliers. If any Subcontractor refuses to furnish any such release or waiver required by Owner, Contractor may furnish a bond satisfactory to Owner to indemnify Owner against any such lien. If any such lien remains unsatisfied after all payments are made, Contractor shall refund to Owner all sums that Owner may be compelled to pay in discharging such lien.**

**5.4. The making of final payment shall constitute a waiver of all claims by Owner except those arising from (a) unsettled liens; (b) faulty or defective work appearing after final completion of the Work; (c) failure of the Work to comply with the requirements of this Agreement, the Project Documents, or any modifications or amendments thereto; or (d) terms of any special warranties required by this Agreement, the Project Documents, or any modifications or amendments thereto. The acceptance of final payment, respectively, by Contractor or any Subcontractor shall constitute a waiver of all claims of Contractor and such Subcontractor, except those claims identified in writing as unsettled to Owner by Contractor or any Subcontractor at the time of submission of the final Application.**

## **6. CHANGE ORDERS:**

**6.1. A Change Order is a written order to Contractor signed by Owner and Contractor, issued after execution of this Agreement, authorizing a change in the Work and/or an adjustment in the Contract Sum.**

**6.2.** If requested by Owner, Contractor shall prepare a Change Order setting forth any change to be made to the Work. Change Orders prepared to document requested changes in the Work shall reasonably describe the change to be made and the materials and labor required to carry out the change, and shall set forth the actual cost to Contractor of such labor and materials and Contractor's charge, if any, applicable thereto for profit and overhead. When a Change Order is completed by Contractor, it shall be submitted to Owner for [his] [her] signature signifying acceptance thereof and shall be returned to Contractor. Change Orders that are submitted for acceptance by Owner that are not signed and returned to Contractor within five working days of such submission shall be deemed to be rejected.

**7. PERMITS, APPROVALS, AND SITE WORK:** Contractor shall secure and pay for the building permit for the Work. Owner shall execute and do all things reasonably required to assist Contractor in obtaining same. Contractor, any and all subcontractors, agents, servants, and employees shall comply with and shall perform the Work at all times in accordance with any and all statutes, ordinances, rules, regulations, and lawful orders of public authorities bearing on performance of the Work. Contractor shall be obligated to ascertain that the Project Documents are in accordance with applicable laws, statutes, ordinances, building codes, rules, and regulations, or do not contain mistakes or omissions; and if Contractor observes that any portion of the Project Documents are at variance therewith or contain mistakes or omissions, it shall promptly notify Owner thereof in writing. If Contractor deviates from this Agreement, the Project Documents, and/or any modifications or amendments thereto, which deviation is in violation of any applicable law, statute, ordinance, building code, rule, and/or regulation, Contractor shall be liable for all of the damages and costs incurred by Owner with respect thereto and shall take all actions necessary so that same complies with said law, statute, ordinance, building code, rule, or regulation. Contractor shall provide temporary electric power and provide water and gas to the site and shall pay for all utilities during the Work. Contractor shall take such steps as are necessary to ensure that the utility usage during the Work is reasonable under the circumstances.

**8. CLEANING UP:** Contractor shall keep the Property and the area surrounding the Property free from accumulation of waste materials or rubbish caused by operations under this Agreement. Upon completion of the Work, Contractor shall remove or cause to be removed from and about the Property waste materials, rubbish, Contractor's and other's tools, construction equipment, machinery, and surplus materials and shall deliver the finished Work to Owner in "broom clean" condition. If Contractor fails to clean up as provided in this Agreement or the Project Documents, Owner may cause such cleanup to be performed, and the cost thereof shall be charged to Contractor and deducted from the next payment of the Contract Sum due Contractor. Contractor shall replace or repair any improvements or other property damaged during the course of the Work and not scheduled for replacement or repair as part of the Work.

**9. INSURANCE:**

**9.1.** Contractor and each Subcontractor shall purchase and maintain insurance coverage, with types and limits set forth in Exhibit B attached hereto, to protect Owner

from claims set forth below that may arise out of or result from Contractor's operations under this Agreement, whether such operations be by Contractor or by any Subcontractor or by anyone directly or indirectly employed by any of them, or by anyone for whose acts any of them may be liable: (a) claims for damages because of bodily injury, sickness or disease, or death of any person, other than employees of Contractor and Subcontractors; (b) claims for damages, other than to the Work itself, because of injury to or destruction of tangible property, including loss of use resulting therefrom; and (c) claims for damages because of bodily injury or death of any person or property damage arising out of the ownership, maintenance, or use of any motor vehicle. In addition, Contractor shall cause each Subcontractor to purchase and maintain insurance coverage for claims under workers' compensation disability benefit or other similar employee benefit Acts. Such policies shall include a provision that coverages afforded under the policies will not be canceled without thirty days' prior written notice.

9.2. Contractor shall purchase and maintain throughout the term of this Agreement casualty insurance with extended coverage on the Work to the full insurable value thereof. Such insurance shall cover the interests of Owner, Contractor, and Subcontractors in the Work and shall insure against the perils of fire and other casualty on an "all-risk" basis for physical loss and damage, including, without duplication of coverage, theft, vandalism, and malicious mischief. Owner shall pay Contractor the proceeds received from any loss incurred hereunder in an amount not to exceed the lesser of (a) the proceeds received from the insurance company; or (b) the dollar amount of the Work that was damaged or destroyed due to the loss, provided, however, that if the proceeds of insurance are not sufficient to pay Contractor for the damaged or destroyed work, such payment shall not relieve Owner from [his] [her] obligation to pay Contractor the remaining balance on the Work that was damaged or destroyed. Owner and Contractor waive all rights against each other for damages caused by fire and other perils to the extent covered by property insurance applicable to the Work, except such rights as either party may have to the proceeds of such insurance.

9.3. Contractor shall provide Owner with Certificates of Insurance evidencing its compliance (or the compliance of each and every Subcontractor) with the requirements of this Section. The insurance required pursuant to the provisions hereof shall also include contractual liability insurance applicable to any of Contractor's obligations pursuant to this Agreement.

9.4. To the fullest extent permitted by law, Contractor shall indemnify and hold Owner harmless from and against any and all claims, damages, losses, and expenses, including, but not limited to, attorneys' fees, which may arise out of or result from, directly or indirectly, the actions or negligence or failure to act of Contractor, or any Subcontractor, servant, agent, or employee. Contractor shall take all reasonable precautions to prevent damage, injury, or loss to

- a. all employees on the Work and all other persons who may be affected thereby;
- b. all the Work and materials and equipment to be incorporated therein, whether in storage on-site or off-site, under the care, custody, or control of Contractor or any subcontractors; and
- c. other property at the site or adjacent thereto, including, but not limited to, buildings, trees, shrubs, lawns, walks, pavements, roadways, structures, and utilities not designated for removal, relocation, or replacement in the course of the Work.

#### **10. CONTRACTOR'S WARRANTIES:**

**10.1.** Contractor hereby warrants, represents, and undertakes that the Work shall be constructed and performed in a good and workmanlike manner and in accordance with the Project Documents and this Agreement and in compliance with all applicable laws, ordinances, and regulations. Contractor, at its sole cost and expense, will correct all defects in the Work and shall make all necessary repairs, replacements, and corrections of any nature or description, interior or exterior, structural or nonstructural, of which notice is given prior to the expiration of one year from the Payment Date. In addition, Contractor shall cause each of its Subcontractors to furnish a warranty in substantial conformity with Exhibit C attached hereto.

**10.2.** Contractor represents and warrants to Owner that no Hazardous Materials, including, without limitation, radon, will be used in the completion of the Work. To the extent Hazardous Materials are discovered, at any time (including any time after the Work is completed), Contractor shall remove same, at its sole cost and expense, and with as little inconvenience as possible to Owner.

#### **11. NONPERFORMANCE BY CONTRACTOR:**

Owner may terminate this Agreement for the following reasons:

- a. Failure of Contractor to commence the Work as required by this Contract;
- b. Failure of Contractor to prosecute the Work to completion, as required by this Agreement and the Project Documents, in a diligent, workmanlike, and skillful manner;
- c. Failure of Contractor to perform any of its obligations under this Agreement;
- d. Adjudication of Contractor as a bankrupt;
- e. Any general assignment by Contractor for the benefit of its creditors, appointment of a receiver for Contractor on account of its insolvency, or any other act of insolvency by Contractor;

- f. **Failure of Contractor to make prompt payments to its subcontractors, material suppliers, or laborers.**

When any of the above reasons exists, Owner shall notify Contractor in writing of [his] [her] intent to terminate this Agreement, and if the matter complained of is not corrected within fourteen days after receipt of said notice from Owner, the Agreement shall be terminated, and Owner may avail [himself] [herself] of any and all remedies against Contractor. However, if, during the fourteen-day period, Contractor commences to correct such breaches and diligently proceeds therewith to completion, then Contractor shall not be in breach of this Agreement, and Owner may not terminate this Agreement.

**12. ARBITRATION OF DISPUTES:** All claims, disputes, and other matters in question between Contractor and Owner arising out of, or relating to, this Agreement shall be decided by arbitration, in accordance with the Construction Industry Arbitration Rules of the American Arbitration Association, unless the parties mutually agree otherwise. Such agreement to arbitrate, and any other agreement to arbitrate with an additional person or persons duly consented to by the parties to this Agreement, shall be specifically enforceable under the prevailing arbitration law. The award rendered by the arbitrators shall be final, and judgment may be entered on it in accordance with applicable law in any court having jurisdiction thereof. Demand for arbitration shall be made in accordance with the notice provisions contained in §13.3 below, with copies sent to the American Arbitration Association. Unless otherwise agreed in writing, Contractor shall diligently proceed with the Work during any arbitration proceedings, and Owner shall cause payments of the Contract Sum to be made to Contractor for such Work performed by it in accordance with this Agreement.

**13. MISCELLANEOUS:**

**13.1.** The duties and obligations imposed by this Agreement and the rights and remedies available hereunder shall be in addition to, and not a limitation of, any duties, obligations, rights, and remedies otherwise imposed or available by law.

**13.2.** No action or failure to act by the Owner or Contractor shall constitute a waiver of any right or duty afforded any of them under this Agreement, nor shall any such action or failure to act constitute an approval of or acquiescence in any breach thereunder, except as may be specifically agreed in writing.

**13.3.** All notices, demands, or other communications to be given or delivered under, or by reason of the provisions of this Agreement, shall be in writing and will be deemed to have been properly given when (a) personally delivered to the party entitled to receive same, or (b) actually received or refused by the recipient or when returned to the sender as undeliverable, if sent by a reputable overnight courier service (charges prepaid) or if mailed by certified or registered mail, postage prepaid, return receipt requested, addressed as follows:

**If to Contractor, to:** [name, address, city, state]

**If to Owner, to:** [name, address, city, state]

Any party may change its address for notice by providing notice to the other in the form as provided herein.

**13.4. Owner and Contractor each bind themselves, their beneficiaries, successors, assigns, and legal representatives to the other party hereto and to the successors, assigns, and legal representatives of such other party in respect to all covenants, agreements, and obligations contained in this Agreement. No party to this Agreement, or any part thereof, shall assign it without the written consent of the other, nor shall Contractor assign any moneys due or to become due to [him] [her] hereunder, without the previous written consent of Owner.**

**13.5. The Agreement constitutes the entire Agreement between the parties, and any modification or change will not be effective unless in writing signed by the parties. This Agreement has been made within the State of Illinois and shall be governed by the laws of said state.**

**13.6. Contractor shall furnish a current survey for the Property, showing all of the improvements, restrictions, and easements affecting use or occupancy of the Property and shall be responsible for securing any easement or similar right necessary to carry out the Work. Contractor shall be responsible for obtaining a stakeout or foundation survey at [his] [her] expense, if one is required to carry out the Work.**

**13.7. All sections, titles, and captions contained herein are for reference purposes only and shall not be used in the interpretation of any part of this Agreement.**

**13.8. In the event Contractor or Owner shall institute any action or proceeding against the other relating to the enforcement of the Agreement, any provision hereof, or any default hereunder, the unsuccessful party in such action or proceeding agrees to pay the successful party's attorneys' fees and costs incurred herein by the successful party, as well as other costs incurred in that action or proceeding, in addition to any other relief to which the successful party may be entitled.**

**14. INCONSISTENCIES AMONG DRAWINGS, SPECIFICATIONS, AND CONTRACT:** If there is an inconsistency among the Project Documents, the inconsistency shall be determined in accordance with the following priority: (a) plan and specifications; (b) this Agreement; (c) any additional supplements to this Agreement.

**15. ALLOWANCES:** The Contractor shall include in the Contract Sum all allowances stated in the Contract Documents. Items covered by allowances shall be supplied by such persons or entities as the Contractor may decide. Whenever cost of an item is more than allowance provided therefore, the Contract Sum shall be adjusted by Change Order. The



amount of the Change Order shall reflect (a) the difference between actual costs and the allowances, and (b) changes in Contractor’s costs of handling of materials and equipment, labor, installation, and profit and overhead.

IN WITNESS WHEREOF, the parties hereto have executed this Agreement as of the date first above written.

Owner: \_\_\_\_\_ Contractor: \_\_\_\_\_

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

**EXHIBIT A**

[Description of the Property]

**EXHIBIT B**

[Insurance Coverage To Be  
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**EXHIBIT C**

[Warranty]

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