

PRECONSTRUCTION SERVICE AGREEMENT
(PROJECT NAME)

THIS Preconstruction Services Agreement (“AGREEMENT”) is by and among [name of SPONSOR], (“Sponsor”) and CONTRACTOR, a licensed general contractor duly licensed in the state where the Project is located and in good standing under applicable law (“Contractor”) (collectively, the “Parties”). This AGREEMENT is entered into _____, 20xx (“Effective Date”).

RECITALS

A. Sponsor, or its affiliate, is the current owner of the property located at PROPERTY ADDRESS, which is improved with an affordable housing development known as COMMON NAME (“Property”).

B. Property will undergo [rehabilitation] or [new construction] (the “Project Type”) and if applicable the Sponsor intends to form a new partnership in which it will be the general partner (the “Partnership”) for the purpose of obtaining financing to acquire the Property and complete the Project consistent with the Project Type (“Project”). If financing for the Project is obtained the Partnership will ultimately own and complete the Project.

C. The Project may be financed in part by federal low income housing tax credits and other sources of financing. The Project will be subject to those laws, rules, and regulations governing such applicable financing.

D. To the extent the Project involves substantial rehabilitation, the Project may be performed while existing occupants remain in residence at the Property.

E.

F. The Parties may enter into a [Guaranteed Maximum Price] [Stipulated Sum] contract for construction of the Project, based on Mercy’s Form of GC Contract as modified by agreement between the Parties. (the “GC Contract”).

NOW, THEREFORE, in accordance with the Recitals set forth above, which are fully incorporated into this AGREEMENT, the Parties agree as follows:

1. Scope of Services. Services to be performed by Contractor under this AGREEMENT are described below (“Scope of Services”). Upon completion of the Scope of Services, the Contractor shall stop all work on the Project pursuant to this AGREEMENT unless otherwise authorized in writing by the Sponsor to proceed.

1.1. During the Project’s budgeting process, Contractor shall review the construction schedule and plans.

1.2. Contractor shall prepare a cost estimate for the Project’s schematic design and provide value-engineering and constructability suggestions.

1.3. Contractor shall provide a schematic relocation phasing plan, schedule and detailed general conditions cost based on the relocation phasing plan.

1.4. Upon completion of 100% Design Development Documents (as defined in Section 3.3 of the unmodified AIA B101 Owner Architect Agreement, Contractor shall revise the Project's cost estimate and provide a constructability review a list of value engineering suggestions and cost savings associated with each item. The Contractor will provide any revisions to the project schedule and relocation phasing plan and associated general conditions cost.

1.5. Upon completion of 50% or 80% completed Construction Documents (as defined in Section 3.4 of the unmodified AIA B101 Owner Architect Agreement, Contractor shall revise the Project's cost estimate and provide a constructability review, a list of value engineering suggestions and cost savings associated with each item. The Contractor will provide any revisions to the project schedule and relocation phasing plan and associated general conditions cost.

1.6. If an updated cost estimate is not performed upon completion of 80% completed Construction Documents (as defined in Section 3.4 of the unmodified AIA B101 Developer-Architect AGREEMENT), Contractor shall review the previous cost estimates and provide a constructability review, a list of value engineering suggestions and cost savings associated with each item. The Contractor will provide any revisions to the project schedule and relocation phasing plan and associated general conditions cost.

1.7. Contractor shall provide a final proposal that includes a [guaranteed maximum price] [stipulated sum] to construct the Project and a list of value engineering suggestions and cost savings associated with each item.

1.8. Throughout the Term, as defined below, Contractor shall maintain a designated Project Manager, who shall participate in appropriate meetings for the planning, development and promotion of the Project.

2. Compensation.

2.1. Total Construction Cost for the Project. The target total budget for construction (including general conditions, contractor fee, insurance, city taxes, bond, etc.) of the Project is currently estimated to be [\$cost of the work\$] (the "Construction Cost").

2.2. Fee for Scope of Services Pursuant to this AGREEMENT. The compensation for performing the Scope of Services pursuant to this AGREEMENT shall not exceed [\$\$\$] prior to [date] and shall not exceed a total of [\$amount of the fee\$] (the "Fee"). The Fee shall include all of Contractor's costs and expenses relating to the Scope of Services. Contractor shall provide monthly reports to Sponsor describing the percentage of the Scope of Services completed and the corresponding dollar amount attributable to such completed Scope of Service.

2.3. Payment of Fee.

2.3.1. If the Parties enter the GC Contract, payment of the Fee shall be deferred and included in the Contractor's fee under the GC Contract, which will be negotiated, but in no event shall the Contractor's fee under the GC Contract, together with overhead and general conditions, exceed fourteen percent (14%) of the Construction Cost.

2.3.2. Sponsor reserves the right to cease negotiations with Contractor if, in the sole discretion of Sponsor, AGREEMENT on a GC Contract satisfactory to Sponsor cannot be achieved. Subject to the limitation of Section 4.1 below, in the event that the Parties do not enter into a GC Contract for the Project prior to the end of the Term, as defined below, following receipt of an invoice from Contractor, Sponsor shall, following receipt of an invoice from Contractor, pay Contractor for services performed in connection with the Scope of Services based upon the actual, reasonable, and documented costs of personnel and materials incurred in performing the Scope of Services.

2.3.3. If the Parties execute the GC Contract for the Project, all preconstruction services performed by Contractor prior to execution of the GC Contract shall be deemed fully compensated through payments made under this AGREEMENT or inclusion of such compensation in the Contractor's fee under the GC Contract. Contractor shall not be entitled to recover any preconstruction costs or fees through the Contractor's contingency, savings, general conditions, or otherwise under the GC Contract. For clarity, Contractor shall not seek or recover any additional compensation for preconstruction services under any subsequent AGREEMENT.

3. Personnel. Contractor will assign the following personnel to the Project (the "Personnel Assignment"):

- Project Manager:
- General Superintendent:
- Estimator:

The Contractor shall not change the Personnel Assignment without prior notification to, and the written approval of, Sponsor. Such approval shall not be unreasonably withheld, if to the Sponsor's reasonable satisfaction, Contractor's proposed staff has the experience and capacity to effectively work on the Project.

4. Term; Termination. The term of this AGREEMENT (the "Term") shall commence as of the date first written above and, unless extended in writing by mutual Agreement of the Parties, shall terminate upon the earliest to occur of i. completion of the Scope of Services, unless sooner terminated pursuant to the terms of this AGREEMENT; or ii. execution by the Parties of the GC Contract for the Project.

4.1. Termination by Sponsor for Cause. Sponsor may, at any time, terminate this AGREEMENT in whole or in part if Contractor is in breach of any provision of this AGREEMENT after giving Contractor ten (10) days written notice and opportunity to cure. Notwithstanding any other provision of this AGREEMENT, Sponsor shall owe no compensation to Contractor in connection with this AGREEMENT in the event that:

4.1.1. Contractor engages in intentional misconduct with regard to a material matter or fails in a substantial manner to exercise reasonable care in the discharge of its duties and obligation hereunder;

4.1.2. Contractor fails to meet its obligations under this AGREEMENT or otherwise violates any provisions of this AGREEMENT;

4.1.3. The Parties fail to execute the GC Contract due to the Contractor's inability to secure a 100% Payment and Performance Bond as required by Sponsor;

4.1.4. The difference between Contractor's 80% Construction Document cost estimate and the final proposal construction costs exceed 5%; or

4.1.5. The project is terminated and does not proceed to construction due to financing, permitting or regulatory issues.

4.2. Termination by Sponsor for Convenience. Sponsor may, at any time, terminate this AGREEMENT in whole or in part for Sponsor's convenience and without cause after ten (10) days written notice to Contractor.

4.2.1. In case of a termination for convenience, as Contractor's sole remedy for such termination, Contractor shall be entitled to receive payment for Scope of Services properly executed pursuant to the AGREEMENT prior to termination. Sponsor shall not be liable for any termination expenses or penalties, lost profits or any other special or consequential damages suffered by Contractor as a result of Sponsor's termination of this AGREEMENT.

4.3. Termination Actions. Upon receipt of written notice from Sponsor of such termination, Contractor shall take the following actions: (i) cease operations as directed by Sponsor in the notice; (ii) deliver to Sponsor all Work Product (defined below) completed up to the date of termination, and (iii) except for Scope of Services directed to be performed prior to the effective date of termination stated in the notice, terminate all existing subcontracts and purchase orders and enter into no further subcontracts and purchase orders.

5. No Guarantee of a GC Contract. It is the intent of the Parties to work expeditiously towards a construction start. It is the desire of the Sponsors to begin construction by no later than [ANTICIPATED START DATE]. However, the Contractor acknowledges and agrees that there is no guarantee that the Parties will enter into a GMP Contract or that construction will start by [ANTICIPATED START DATE]. Or The Parties acknowledge that this AGREEMENT is limited to preconstruction services only. Sponsor reserves the right not to proceed with the Project.

6. Ownership of Work Product. All documents (including without limitation schedules of values, excel spread sheets, etc.), data, drawings, specifications, reports, materials, and all other information developed or assembled by Contractor and any subconsultants retained by Contractor in connection with this AGREEMENT (the "Work Product") are the exclusive property of Sponsor. Sponsor shall have the rights granted in this Section regardless of whether this AGREEMENT is terminated early or Contractor fully performs its services under this AGREEMENT. Any Work Product in the possession of Contractor upon completion or termination of this AGREEMENT shall be immediately delivered to Sponsor. Sponsor shall have the unrestricted right to use, reproduce, modify, and share the Work Product with third parties in connection with the Project.

7. Standard of Care. Contractor and its employees, subcontractors, and other persons or entities performing portions of the Scope of Services for or on behalf of Contractor, shall perform all Scope of Services in a manner consistent with the standard of professional skill and care ordinarily exercised by contractors performing similar services under similar circumstances in the jurisdiction where the Project is located.

8. Confidentiality. Contractor understands and agrees that, in the performance of the work or in contemplation thereof, Contractor may have access to private or confidential information which may be owned or controlled by, or otherwise in the possession of Sponsor and that such information may contain proprietary or confidential details, the disclosure of which to third parties may be damaging to Sponsor. Contractor agrees that all information disclosed by the Sponsor to Contractor shall be held in confidence and shall not be divulged, disclosed or communicated in any manner without the consent of Sponsor except as required by law, and shall be used only in the performance of the work.

9. Insurance. Contractor shall at all times during the performance of this AGREEMENT maintain at his/her own expense in full force and effect all types of insurance which are usually and customarily maintained by general contractors performing such Services in this industry, including workers' compensation insurance, errors and omissions coverage, and automobile insurance.

10. Indemnification. Contractor shall hold harmless, defend and indemnify Sponsor and its officers, directors, employees and agents, from and against all claims demands, damages, liabilities, costs, and expenses (including court costs and attorney's fees) arising out of or resulting from the performance of the Scope of Services by Contractor or its employee, agents, subcontractor, or subconsultants, including any acts or omissions, negligence, recklessness, or willful misconduct or breach of this AGREEMENT, except to the extent caused by the sole negligence or willful misconduct of Sponsor. The provisions of this Section shall survive completion of Scope of Services and termination of this AGREEMENT.

11. Severability. If any term or provision of this AGREEMENT is found by a court of competent jurisdiction to be invalid or unenforceable, then such provision shall be severed

from this AGREEMENT and all other terms and provisions of this AGREEMENT shall nevertheless remain in full force and effect.

12. Entire AGREEMENT. This AGREEMENT constitutes the entire agreement between the Parties with respect to the subject matter hereof, and there are no other agreements, understandings, representations or warranties, oral or written. This AGREEMENT may be amended only by a written instrument signed by the Parties..

13. Assignment. Contractor shall not assign the AGREEMENT without the written consent of Sponsor, which consent Sponsor may withhold in its sole discretion. Sponsor may assign this AGREEMENT to the Partnership.

14. Rights of Third Parties. Nothing expressed or implied in this AGREEMENT is intended or shall be construed to confer upon or give any person or entity, others than the Parties hereto, any right or remedies under or by reason of this AGREEMENT.

15. Time. Time is of the essence in the performance of all obligations under this AGREEMENT.

16. No Partnership or Joint Venture. Nothing in this AGREEMENT shall be deemed to create any relationship of employer and employee, principal and agent, partnership, or joint venture between Sponsor and Contractor. Contractor shall at all times be deemed an independent contractor and shall be solely responsible for the manner in which it performs the services required of it by the terms of this AGREEMENT.

17. No Waiver. No waiver of any provision or breach of this AGREEMENT shall constitute a waiver of any other provision or breach of this AGREEMENT.

18. Captions. The headings or captions to the sections of this AGREEMENT are not a part of this AGREEMENT and shall have no effect upon the construction or interpretation of any part thereof.

19. Governing Law. This AGREEMENT shall be governed by and construed in accordance with the laws of the state in which the Project is located, without regard to conflict of law principles.

20. Counterparts. This AGREEMENT may be executed in one or more counterparts, each of which shall be deemed to be an original, but all of which together shall constitute but one and the same instrument.

[Signatures on Following Page]

IN WITNESS WHEREOF, Sponsor and Contractor have executed this AGREEMENT as of the date first above written.

Sponsor:

By: _____

Its: _____

Contractor:

By: _____

Its: _____