

## CONSTRUCTION AGREEMENT

This Construction Agreement (the "Agreement") is made this \_\_\_ day of \_\_\_\_\_, 20\_\_\_ (the "Effective Date") by and between \_\_\_\_\_, an \_\_\_\_\_ with a mailing address of \_\_\_\_\_ ("Owner") and \_\_\_\_\_, an \_\_\_\_\_ with a mailing address of \_\_\_\_\_ ("Contractor").

### BACKGROUND INFORMATION

- A. Owner is the fee simple owner of the real estate commonly known as \_\_\_\_\_ (the "Premises").
- B. Owner desires Contractor to construct certain improvements to the Premises in accordance with the terms of this Agreement.

### AGREEMENT

**NOW THEREFORE**, in consideration of the mutual covenants contained herein, and for other good and valuable consideration the receipt and sufficiency of which is hereby acknowledged, Contractor and Owner hereby agree as follows:

### ARTICLE I PERFORMANCE OF THE WORK

**1.1 The Work.** Contractor agrees to furnish or cause to be furnished all labor and materials necessary to construct the improvements upon the Premises in accordance with the plans prepared by \_\_\_\_\_ dated \_\_\_\_\_, 20\_\_\_, and attached hereto as Exhibit "A" and the specifications attached hereto as Exhibit "B". Exhibits "A" and "B" are hereinafter collectively referred to as the "Plans and Specifications". The construction shall be performed in accordance with the Plans and Specifications (except as to minor deviations permitted pursuant to 1.5 of this Section) which Plans and Specifications have been examined and approved by Owner. The construction undertaking as described in this Section is hereinafter sometimes referred to as the "Work".

**1.2 Time of Performance.** Contractor can neither imply nor guarantee a firm completion and availability date. However, Contractor will use commercially reasonable efforts to complete the construction of the Work by \_\_\_\_\_, 20\_\_\_ (the "Scheduled Completion Date"). Owner acknowledges that Contractor's ability to meet the construction schedule described above will be directly affected by any Change Order(s), as defined herein, requested by Owner, Owner's failure to timely select any options not heretofore specified within the Plans and Specifications, and/or Owner's interference with the construction process itself. Further, Contractor shall not be liable for any delay in the completion of construction caused by weather, fire, or other casualty or act of God, nor shall Contractor be liable for any delay in the completion of the construction caused by governmental control, inability to obtain materials or supplies, or other regulations,

restrictions, or conditions over which Contractor has no reasonable control. Delays in construction arising as a result of the events described in this Section 1.2 are hereinafter sometimes collectively referred to as “Excused Construction Delays”. Contractor shall not be obligated to compensate Owner for any losses or damages arising as a result of Excused Construction Delays.

**1.3 Laws; Regulations.** Contractor shall obtain all permits necessary for the performance of the Work, and Contractor shall cause all subcontractors to obtain any permits necessary for the performance of the Work undertaken by such subcontractor (except as provided to the contrary within Article VIII herein). Contractor and all subcontractors employed by Contractor shall comply with all applicable federal, state, city, and local laws, ordinances, codes and regulations governing the Work and the materials furnished pursuant to this Agreement. Owner acknowledges that Contractor’s relationship with the individual building inspectors is important to the timely completion of the Work, and accordingly Owner agrees not to obstruct such relationships or to otherwise harass the building inspectors reviewing the Work.

**1.4 Workmanship.** Construction of the Work shall substantially conform to the Plans and Specifications allowing for minor deviations occasioned by expediency, practicality, and the availability of labor and materials provided Contractor agrees not to materially deviate from the Plans and Specifications without first notifying Owner of the same. In the event Owner does not thereafter notify Contractor of Owner’s objection to the same in writing within seventy-two (72) hours, Owner shall be deemed to have consented to the same. Further, Contractor expressly reserves the right to make such modifications, additions, or deletions to the Plans and Specifications as may be required by a mortgagee which holds a mortgage upon the Premises, or as may be necessary in order to meet any applicable federal, state, city and local building or zoning code requirements. The costs of any changes arising as a result of the requirements of any mortgagee holding a mortgage upon the Premises or as are necessary to comply with applicable laws/codes as described in the immediately preceding sentence shall be paid by Owner.

**1.5 Change Orders.** Prior to completion of the Work and except as permitted pursuant to the operation of Section 1.4 above, no alteration shall be made to the Plans and Specifications without the prior written approval of Contractor and Owner. If Owner requests changes to the Plans and Specifications, Contractor shall prior to commencing the alteration submit to Owner a written proposal for the cost or credit associated with the completion of such alteration. If Owner approves such proposal, the same shall constitute a Change Order (“Change Order”) and the Contract Price, Scheduled Completion Date, and the Work to be performed hereunder shall be amended accordingly, and such alterations shall thereafter be completed by Contractor in accordance with the requirements of this Agreement. If Owner does not approve such proposal, Contractor shall not be obligated to construct such alterations. Owner shall pay in full for the cost of any Change Order, if applicable, at the time of approving such proposal unless otherwise mutually agreed by Owner and Contractor; provided, however in no event shall the payment for such Change Order be made later than at the time the next progress payment is made.

## ARTICLE II CONTRACT PRICE

**2.1 Contract Price.** Owner shall pay Contractor for performance of the Work, subject to additions and deletions as herein provided, the sum of \_\_\_\_\_ and \_\_\_/100 Dollars (\$\_\_\_\_\_) (the "Contract Price"), payable as set forth in Sections 2.2 and 2.3 of this Section.

### **2.2 Payment of Contract Price.**

The Contract Price shall be due and payable as follows:

- A. \$\_\_\_\_\_ construction deposit due upon execution of this Agreement (the "Deposit"). Contractor retains the right to use the Deposit for construction or other purposes and Owner acknowledges that the Deposit shall not be subject to any escrow, trust, or security agreement, nor shall interest accrue thereon.
- B. The remainder of the Contract Price shall be paid as progress payments as provided herein.

### **2.3 Progress Payments.**

2.3.1 Upon a request by Contractor for a payment ("Application for Payment"), Owner shall make payments on the balance of the Contract Price remaining due to Contractor as invoiced by Contractor on a monthly basis. Each Application for Payment shall contain an itemization of the Work completed during the subject period for which payment is being requested.

2.3.2 Subject to the limitations herein provided, Owner will pay and/or will authorize Owner's lender to pay the amount described above within five (5) business days after Contractor submits the Application for Payment. Owner or Owner's lender's inspector may inspect the Work described in any Application for Payment submitted by Contractor; provided, however, such inspection shall not suspend, delay, or otherwise affect Owner's obligation to make such payment within the time period described above, unless Owner or Owner's lender can reasonably demonstrate that the Work has not been performed in accordance with the Plans and Specifications.

2.3.3 Owner agrees that the failure of Contractor to complete any item not required by the appropriate governmental authority in order to issue a Certificate of Occupancy shall not operate to delay the payment of the monies due under this Agreement. Further, Contractor shall not be obligated to establish an escrow for items which may be incomplete as of the date Contractor requests the delivery of the final payment. Payments which are due and unpaid shall bear interest from the date such payment is due until paid in full at the rate of eight percent (8%) per annum.

2.3.4 Notwithstanding anything previously set forth in this Section to the contrary, Contractor and Owner acknowledge that in the event Owner has secured financing for the

payment of the Contract Price from a lender (as opposed to the situation where the Owner has provided Contractor with other evidence of Owner's ability to satisfy the Contract Price without the need of a construction loan) that Owner's lender may wish to modify certain aspects of the schedule and method for making the payments described within this Section, and to this end Contractor and Owner agree to undertake reasonable modifications to the same provided such proposed modifications do not cause either party any undue hardships. Any such modifications shall be reduced to writing and signed by both parties.

### **ARTICLE III INDEPENDENT CONTRACTOR**

Owner and Contractor agree that Contractor is serving as an independent contractor under this Agreement and that all employees, laborers, and subcontractors employed by Contractor in connection with performing the Work shall, except as provided in Article VIII herein, be the employees or agents of and the responsibility of Contractor. Contractor shall be responsible for satisfying all state and federal employment laws and regulations with respect to such laborers and employees hired by Contractor including, without limitation, all applicable income tax withholding requirements, social security withholding requirements, unemployment compensation premiums, workers compensation premiums, fair labor standards laws, employment discrimination laws, civil rights laws and occupational safety laws.

### **ARTICLE IV INSURANCE**

Contractor shall, at Contractor's cost, maintain workers' compensation insurance for its employees and commercial general liability insurance in an amount of at least One Million and 00/100 Dollars (\$1,000,000.00). Contractor shall ensure that any subcontractors used in connection with the Work carry commercial general liability insurance with policy limits equal or greater to the limits carried by Contractor as well as workers' compensation insurance. Owner shall, at Owner's cost, maintain adequate liability insurance and property insurance on an "all-risk" policy form, including builder's risk, in the amount of the Contract Price plus the value of subsequent modifications and cost of materials supplied and installed by others comprising the total value for the Work on a replacement cost basis. Such property insurance shall be maintained until final payment has been made to Contractor.

### **ARTICLE V LIENS**

Provided Owner makes all payments when due hereunder, Contractor shall maintain the Premises free of all mechanic's liens for labor or materials furnished pursuant to this Agreement. Notwithstanding the aforementioned, Owner agrees that Contractor shall be entitled to negotiate for the removal of any such lien with the subcontractor responsible therefor; provided, however, that within sixty (60) days after Owner notifies Contractor that a mechanic's lien has been recorded, Contractor either: (A) shall remove such lien by payment of or bonding off at Contractor's expense, or; (B) shall pay into escrow with an agent mutually selected by Contractor and Owner a sum equal to the amount of such lien. Notwithstanding the above

provisions, Owner shall be liable for the cost of removing any liens recorded against the Premises as a result of Owner failing to make timely payments or Owner otherwise interfering or delaying the progress of the Work performed pursuant to this Agreement.

## **ARTICLE VI POSSESSION**

Owner hereby grants to Contractor a license that is irrevocable and coupled with an interest during the performance of the Work to exclusively enter upon the Premises for the performance of the Work, and Owner hereby grants to Contractor the right to exclusively occupy and possess the Premises prior to the delivery of the Certificate of Occupancy and the corresponding final progress payment, subject only to the limited privilege of Owner or its agents to enter upon the Premises for the purpose of inspection. When entering upon the Premises, neither Owner nor its agents shall unreasonably interfere with, restrict, interrupt, harass, or obstruct construction or its progress in any manner. Owner shall not communicate any criticisms, changes, or any other matter to any subcontractor or laborer except in the presence of and with the approval of Contractor. In the event Owner or its agents cause such interference or obstruction, Contractor shall be entitled to undertake reasonable actions to restrain Owner or its agents from further entries upon the Premises until after completion of construction of the Work, delivery of the Certificate of Occupancy, and receipt of the final progress payment. Further, Owner acknowledges that if Owner (including invitees and guests of Owner) visit the Premises prior to the completion of the Work, such visit shall be at Owner's risk. In this respect, by the execution of this Agreement, Owner further releases, discharges, indemnifies and agrees to hold Contractor and its employees, subcontractors and materialmen harmless from any and all claims, costs (including attorney fees), liability or damages arising as a result of such visit, including injury to person or property.

## **ARTICLE VII DEFAULT**

**7.1 Events of Default.** The following occurrences shall constitute events of default under this Agreement:

- A. Owner fails to pay any progress payment as it becomes due;
- B. Contractor fails to timely satisfy or bond-off a mechanic's lien; or
- C. A party fails to perform any other duty or obligation undertaken herein within ten (10) days after receipt of written notice thereof from the other party.

**7.2 Default by Owner.** In the event of a default by Owner, Contractor shall be entitled to cease or suspend the performance of any further Work and retain the Deposit paid to Contractor on account for any damages incurred by Contractor and proceed with an action at law or in equity to recover all damages arising from such breach including, but not limited to, direct, indirect, consequential, and/or incidental damages. To this end and without limitation, Contractor shall be entitled to recover from Owner as an element of the damages incurred by

Contractor the reasonable attorney's fees and other professional fees, including the fees of expert witnesses, incurred by Contractor as a result of such default.

**7.3 Default by Contractor.** If Contractor fails or refuses to perform Contractor's obligations under this Agreement and if such default is substantial and material and does not fall within the scope of this Article VII, and if such default continues for ten (10) days after written notice of the default from Owner, then Owner shall be entitled to terminate this Agreement and to receive the return of the Deposit made by Owner hereunder, subject to payment for any Work which was completed prior to such termination. To this end and without limitation, Owner shall be entitled to recover from Contractor as an element of the damages incurred by Owner the reasonable attorney's fees and other professional fees, including the fees of expert witnesses, incurred by Owner as a result of such default

## **ARTICLE VIII SELECTION OF SUBCONTRACTORS**

**8.1 Subcontractors Generally.** Contractor shall generally select the subcontractors and/or materialmen to provide the services and/or materials to complete the Work.

**8.2 Owner's Selection of Subcontractors.** In the event Owner requests that Contractor utilize the services or acquire materials from a particular subcontractor and/or materialmen, or in the event Owner elects independent of this Agreement to utilize the services or acquire materials from a particular subcontractor and/or materialmen, and in the event Contractor consents to the same (provided, however, Contractor may withhold its consent to the same in its sole and absolute discretion), then Owner by such request or action specifically waives any warranties, delays, responsibilities, or liabilities as against Contractor which may arise as a result of the use of such subcontractor and/or materialmen, and the portion of the Work and/or materials completed or supplied by such subcontractors and/or materialmen. In addition in such event, Owner shall be responsible for (and shall require each such subcontractor and/or materialmen to be responsible for) obtaining all licenses, permits and inspections associated with the portion of the Work completed by such subcontractors and/or materialmen, and maintaining liability insurance and benefit coverages (i.e., workers compensation coverages, unemployment compensation coverages, etc.) relating to such subcontractor and/or materialmen. To this end, Owner further releases, discharges, indemnifies, and agrees to hold Contractor and its employees, subcontractors, and materialmen harmless from any and all claims, costs (including attorney's fees and other professional fees), liability or damages arising as a result of the failure of Owner (or Owner's subcontractors and/or materialmen) to comply with the obligations of this Section. Further, during the period such subcontractors and/or materialmen are working at the Premises and thereafter upon completion of the portion of the Work undertaken by such subcontractor and/or materialmen, Owner shall be responsible for obtaining and shall require such subcontractor and/or materialmen to provide appropriate lien waivers attesting to the amount of the Work so completed, the number and names of sub-subcontractors, laborers, or other materialmen utilized, and the amount of monies received from the Owner for such Work to date. The terms and conditions of this Section are intended to be applicable notwithstanding

whether or not the subcontractor and/or materialmen receive the compensation due them directly from Owner or indirectly from Owner by virtue of the payment of the same through Contractor.

**ARTICLE IX**  
**OWNER'S USE OF ARCHITECT AND/OR ENGINEER; EFFECT ON LOCAL CODES**  
**AND INDUSTRY STANDARDS**

In the event Owner retains (or has retained) an architect to provide or modify the Plans and/or an engineer to seal or certify the Plans, Contractor assumes no responsibility to assure that the Plans are drawn or written by the architect or sealed or certified by the engineer (as applicable) in accordance with industry standards, applicable laws, statutes or local building code requirements or regulations and to this end notwithstanding any terms or conditions of this Agreement to the contrary, Contractor shall not be liable for any costs, expenses or damages arising to Owner in the event such Plans fail to comply with applicable laws, ordinances, codes and regulations and/or industry standards provided Contractor completed the Work in accordance with such Plans.

**ARTICLE X**  
**RIGHT TO TERMINATE, REMOVE MATERIALS, SUPPLIES AND TOOLS**

Notwithstanding any other language in the Agreement, Contractor may terminate this Agreement by providing ten (10) days written notice of termination to Owner. In such event, Owner agrees to pay Contractor for all labor and materials supplied by Contractor and/or its subcontractors and/or materialmen prior to the date of termination. Further, notwithstanding any other language in this Agreement, in the event Owner orders Contractor off the job or Contractor voluntarily leaves the job as a result of the default of Owner in accordance with Article VII herein (or other applicable law), Contractor reserves the right, and Owner agrees to allow Contractor and Contractor's subcontractors and materialmen to visit the Premises to retrieve tools, equipment, uninstalled materials and supplies which are rightfully the property of Contractor and Contractor's subcontractors and materialmen, provided, however, Contractor agrees on behalf of Contractor and Contractor's subcontractors and materialmen not to remove any uninstalled materials and supplies for which Contractor has already been paid by Owner pursuant to a progress payment.

**ARTICLE XI**  
**WAIVER OF OWNER AND INDEMNIFICATION OF CONTRACTOR**

In the event that as a result of the default of Owner Contractor voluntarily leaves the job in accordance with Section VII herein (or other applicable law), or in the event (except for those situations where the Contractor is in default hereunder) Owner orders Contractor to stop work, or otherwise removes Contractor from the job, Owner waives any claims for subsequent damage to the Premises due to the stop work order or the removal or withdrawal of Contractor from the job including, but not limited to, damage from the natural elements or as a result of third parties arising as the result of Work in progress not being adequately secured or protected, and Owner agrees to indemnify and hold Contractor harmless from any costs, expenses, including attorney's

fees, and other professional fees, liabilities or damages arising as a result of Contractor's pre-existing contractual arrangement with any subcontractor or materialmen.

## **ARTICLE XII COMPLETION OF THE WORK**

The Work shall be deemed to be complete ("Substantial Completion") upon the earlier of the approval of the final inspection of the Premises the appropriate building inspector, the issuance of a Certificate of Occupancy by the applicable governmental authority, or the approval of the Premises by Owner's lending institution. Owner agrees that the failure of Contractor to complete any pre-occupancy/walk-through item or other minor items not required by the appropriate governmental entity in order to issue a Certificate of Occupancy shall not be grounds to withhold payment from Contractor, nor shall Contractor be required to set up an escrow or to accept less than the full amount required hereunder because of such incomplete items, provided that Contractor undertakes in writing to complete such items within a reasonable time after receipt of the final progress payment. In the event an escrow is required by Owner's lending institution, or a completion, performance, or similar bond is required by the appropriate governing authority, and the same relates to obligations of Owner, Owner's agents or subcontractors or the requirements of Owner's lending institution, then the funds necessary to establish the escrow or pay for the bond shall be provided by Owner; provided, however, nothing set forth within the preceding sentence is intended to require the Owner to provide funds for such escrow, or such completion, performance, or similar bond if the portion of the Work for which such escrow, or such completion, performance, or similar bond as required relates to items for which Owner has already heretofore paid Contractor.

## **ARTICLE XIII OWNERSHIP OF PLANS**

In the event Contractor has provided the Plans to be used under this Agreement, Owner acknowledges that Owner shall have no ownership rights in the Plans and that Owner shall be liable to Contractor for the reuse or resale of the Plans. In the event Owner has provided the Plans to be used under this Agreement, Owner acknowledges that Owner shall have no claims against Contractor for any deficiencies arising under the Plans.

## **ARTICLE XIV LIMITED WARRANTY**

Contractor warrants that all construction related to the Work substantially conforms with the Plans and Specifications and Change Orders, if any, and that the materials that were used with respect to the Work were new (unless expressly agreed upon by the parties), and that the Work was completed in a workmanlike manner. Within one (1) year from the issuance of the final Certificate of Occupancy, Contractor will repair or replace, at Contractor's option, any defects in material or workmanship. Owner agrees to accept a reasonable match in any repair or replacement in the event the original item is no longer available. Owner hereby grants Contractor the right and ability to investigate, resolve, and cure, when determined necessary, any alleged construction defect before Owner may commence legal action for any purpose. This limited



warranty does not cover the following items: (A) damages from the elements (such as fire, wind, hail, lighting, ground movement or other natural occurrence or casualty); (B) misuse, abuse, ordinary wear and tear, and/or the failure of Owner to follow proper operating instructions or to otherwise fail to properly maintain the Premises; (C) damages from the failure of utility services; (D) damages related to items not furnished by Contractor, including damage to personal property and defects in materials and workmanship or negligence attributable to persons other than Contractor, or its subcontractors, suppliers or employees; (E) items arising after the one (1) year period referenced above; (F) incidental or consequential damages, such as loss of the use of the Premises, including secondary damages and damages from mental anguish; (G) damages to anyone other than the original Owner; (H) defects in appliances and equipment and other miscellaneous items that are covered by manufacturers' warranties, however, Contractor warrants that appliances shall be properly installed; (I) conditions or damages caused or aggravated by any failure to give notice to Contractor within a reasonable time that inhibits Contractor's opportunity to take remedial action or denial of or lack of cooperation with Contractor's right to cure; and (J) any aesthetic changes to materials which do not compromise the structural integrity of the materials. Contractor shall assign and pass through to Owner (to the extent they are assignable) the manufacturers' warranties on all appliances and equipment. NOTICE: APPLIANCES, EQUIPMENT OR OTHER COMPONENTS SUPPLIED OR INSTALLED UNDER A MANUFACTURER'S WARRANTY WILL BE REPAIRED OR SERVICED BY THE MANUFACTURER OR DESIGNATED SERVICE PERSONNEL AND NOT CONTRACTOR. **CONTRACTOR MAKES NO OTHER EXPRESS WARRANTIES RELATIVE TO THE WORK OTHER THAN THE WARRANTIES CONTAINED HEREIN.**

## **ARTICLE XV MISCELLANEOUS**

**15.1 Amendment and Waiver.** This Agreement may only be amended or modified by an instrument in writing executed by all of the parties hereto.

**15.2 Notices.** Any notices or other communications required or permitted hereunder shall be sufficiently given if delivered personally or sent by registered or certified mail, postage prepaid, addressed to the respective parties at the addresses set forth above, or at such other address as shall be furnished in writing by any party to the others, and shall be deemed to have been given as of the date so delivered or deposited in the United States mail, as the case may be.

**15.3 Choice of Law/Venue.** It is the intention of the parties that the laws of Texas should govern the validity of this Agreement, the construction of its terms, and the interpretation of the rights and duties of the parties and that the proper venue for any action arising from this Agreement shall be the state or federal courts located in [REDACTED] County, [STATE].

**15.4 Section and Other Headings.** Section, paragraph, and other headings contained in this Agreement are for reference purposes only and shall not affect in any way the meaning or interpretation of this Agreement.

**15.5 Counterpart Execution.** This Agreement may be executed in two or more counterparts, each of which shall be deemed an original, but all of which together shall constitute but one and the same instrument.

**15.6 Gender.** All personal pronouns used in this Agreement shall include the other genders whether used in the masculine or feminine or neuter gender, and the singular shall include the plural whenever and as often as may be appropriate.

**15.7 Parties in Interest.** All of the terms and provisions of this Agreement shall be binding upon and inure to the benefit of, and be enforceable by, the parties hereto and their successors and assigns.

**15.8 Integrated Agreement.** This Agreement constitutes the entire agreement between the parties hereto, and there are no agreements, understandings, restrictions, warranties, or representations between the parties other than those set forth herein or herein provided for which relate to the subject matter of this Agreement.

**15.9 Severability.** The invalidity or unenforceability of any provision of this Agreement in any particular respect shall not affect the validity and enforceability of any other provision of this Agreement or of the same provision in any other respect.

**IN WITNESS WHEREOF,** Owner and Contractor have executed this Agreement on the dates set forth below.

**OWNER:**

**CONTRACTOR:**

\_\_\_\_\_

\_\_\_\_\_

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

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

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

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