

COST-PLUS CONSTRUCTION CONTRACT

WHEREAS, _____, (AContractor@) a Mississippi limited liability company and _____ (hereinafter called AOwner@) desire to enter into a Contract for the Construction of improvements on that certain part and parcel of Real Estate described as or located at _____, _____, Mississippi (the AProperty@); and

WHEREAS, the aforesaid Contractor and Owner further desire to enter into an agreement regarding the aforesaid Property and to provide for the construction of said improvements thereon.

NOW THEREFORE, KNOW ALL MEN BY THESE PRESENTS, that upon the following terms, conditions and consideration aforesaid, the Contractor and Owner agree as follows (hereinafter Athe Agreement@):

1. **The Project:** Contractor agrees to construct a house on the above described real estate in substantial compliance with the Project Architect's plans and specifications, if there are any (hereinafter Athe Project@), subject to the provisions of paragraph 1.3, herein below.

1.1 The Contractor shall supervise and oversee the construction of the Project, using its best skill and judgment and pursuant to the current local customs and standards in the home building industry.

1.2 Unless otherwise specifically noted, the Contractor shall contract for all labor, materials, equipment, tools, construction equipment and machinery, water, heat, utilities, transportation, and other facilities and services necessary for the execution and completion of the Project.

1.3 The Contractor shall pay all sales, consumer, use and other similar taxes required by law and shall secure all permits, fees and licenses necessary for the execution of the Project. Contractor=s overhead and profit, is included in the price. The Contractor shall give all notices and comply with all laws, ordinances, rules, regulations and orders of any public authority bearing on the performance of the work on the Project, and shall notify the Owner if the drawings and specifications are at variance therewith. At the completion of the Project the Contractor shall remove all of its waste materials and rubbish from and about the Project as well as its tools, construction equipment, machinery and surplus materials, and shall clean all glass surfaces and shall leave the work Abroom clean@ or its equivalent, except as otherwise specified.

1.4 The Owner acknowledges that all aspects of the design of the Project is the Owner's responsibility. To the extent that the Owner so chooses, it is the Owner's responsibility to retain and contract with suitable design professionals, including, but not limited to a Project Architect, Structural Engineer and Geotechnical Engineer, as well as any other Design Professional recommended to the Owner by the Project Architect (the Design

Professionals). In all cases, the Project Architect, if retained and contracted for The Project, shall be the Owner's representative for all of the design aspects of The Project. Furthermore, the Owner shall be responsible for retaining and contracting with a certified soil testing laboratory to perform all of the necessary soil and compaction testing, if necessary for The Project. The Owner or the Project Architect, is responsible for providing the Contractor with all design specification, design drawings, soil test results, compaction test results, and any other quality control report necessary for the Contractor to perform its work on The Project in a good an workman like fashion.

1.4.1 The Project Architect/Plan Designer is _____,
of _____ City and _____ State; None applicable.

1.4.2 The Project Structural Engineer is _____, of
_____ City and _____ State; None applicable.

1.4.3 The Project Geotechnical Engineer is _____, of
_____ City and _____ State; None applicable.

1.4.4 The Project Testing Laboratory is _____, of
_____ City and _____ State; None applicable.

1.4.5 Other Design Professionals retained and contracted with by the Owner include:

None applicable.

1.5 The Owner acknowledges and represents to the Contractor that all soil testing for the Project site has been completed, all reports have been or prior to the commencement of the work of the Project will be, delivered to the Contractor, and that the Contractor has the right to rely upon the accuracy of said soil testing reports for the purpose of carrying out the work of the Project. The Owners agrees that, in the event that the Owner fails to provide such reports to the Contractor, the Owner is thereby representing to the Contractor that the site is suitable for construction, and that the Contractor can reasonably rely upon such representation. Further, in any event, the Owner acknowledges that the Property is and has been owned by the Owner before the execution of this Agreement; and the Owner understands and acknowledges that the area in which the Property is situated is commonly known to have within its soil make up, heavily expansive clays, commonly known as "Yazoo Clays", which require special and specific engineering, testing and design criteria to design and construct a proper foundation system there upon. All of this notwithstanding, the

Owner waives any claims as against the Contractor for damages to The Project caused by soil conditions that were not disclosed by or represented on any soil test delivered to the Contractor under this paragraph, or that were not disclosed as the result of the Owner's failure to obtain a soil test for the Property.

2. **Project Fee:** Contractor shall receive as compensation a fee equal to _____ percent (____%) of the Project Cost, which said term is defined herein below, incurred in the construction of the Project (the AProject Fee@).

2.1 The term "Project Cost", as used herein, shall include any and all fees and expenses incurred in the course of construction of the Project, including all costs of labor, materials, subcontractor profit, expenses, allowances, and change orders, whether such is paid by Contractor or Owner. The following items shall not be charged as Project Cost: Architectural and design fees paid by Owner, land procurement costs paid by Owner, bank fees paid by Owner, salaries of Contractor's management and supervisory personnel, expenses of Contractor's offices, Contractor's overhead and general expenses and Contractor's capital expenses.

2.1.1 Prior to the beginning of construction, the Contractor shall provide the Owner with an estimate of the projected Project Cost (hereinafter the "Estimated Project Cost"). The Owner hereby understands and acknowledges that the Estimated Project Cost is merely a good faith estimate for use in budgeting and for determining the amount of the Construction Deposit and the Contractor shall in no way be bound thereto.

2.2 The Owner agrees to provide contractor with copies of any invoices for material or labor which contributed toward the completion of the home and were paid for by the owner.

2.3 Five percent (5.0%) of the Estimated Project Cost, shall contemporaneously herewith be deposited with Contractor to be applied towards the construction of the Project, as that term is defined herein below (hereinafter AConstruction Deposit@). The Construction Deposit will be used during the project and may be applied towards any costs of labor or materials used during the construction of the Project, at the sole discretion of the Contractor. Any balance of the Construction Deposit remaining at the completion of the Project shall be applied to any balance due and remaining on the Project.

2.5 The Contractor shall deliver to the Owner an invoice every two (2) weeks representing the Project Cost for the preceding two weeks, plus an amount equal to the Project Fee divided by the total number of weeks that the Project is estimated to take, as provided by in paragraph 5 herein below, multiplied by two (2) (hereinafter AInvoice Amount@).

2.5.1 The Owner shall pay each invoice, remitting the entire Invoice Amount to the Contractor, within 3 calendar days of the receipt of each such invoice (hereinafter APayment Date@).

2.5.2 If the Contractor does not receive remittance of the entire Invoice Amount for any invoice delivered to the Owner within three (3) days of the date of such delivery, the Contractor shall have the right to cease all work and activity on the Project, without recourse, until such time as all of the Invoice Amounts due and owing have been paid to the Contractor.

2.5.3 If the Contractor does not receive remittance of the Invoice Amount for any invoice delivered to the Owner within ten (10) days of the date of such delivery, or in the case of any final amounts due and owing, as provided for in paragraph 2.6, below, in addition to any other remedies available under this Agreement, the Contractor may seek any available remedies to him at law, including, but not limited to, the placing of a lien over the Project as provided by law.

2.5.4 Contractor is entitled to interest on all amounts past due and owing for more than thirty (30) days at the rate of one-half of one percent (.5%) per day or for any portion thereof, until said amounts and all interest accrued thereon is paid in full.

2.5.5 The rights and remedies contained in paragraphs 2.5.2, 2.5.3 and 2.5.4, herein are not mutually exclusive of one another, but may be exercised concurrent with one another and with any other applicable rights and remedies contained within this Agreement.

2.6 Within thirty (30) days after both the Owner and the Contractor have signed the Certificate of Substantial Completion, as provided for herein below, all amounts due and owing, including any remaining Project Cost and Project Fee, less any remaining Construction Deposit, shall be remitted and paid to the Contractor by the Owner. If the balance of the remaining Project Cost plus Project Fee is less than the remaining Construction Deposit, then the remaining Project Cost and Project Fee shall be deducted from the remaining Construction Deposit, and any remaining amount shall be refunded to the Owner by the Contractor within thirty (30) days after both the Owner and the Contractor have signed the Certificate of Substantial Completion, as provided for herein below. Collection of any amounts due and owing under this paragraph shall be subject to and governed by paragraph 2.5.3, above.

2.7 Owner is responsible for obtaining his own financing. The Owner shall provide to the Contractor satisfactory evidence of sufficient financing to secure permanent mortgage financing.

3. **Substantial Completion:** Unless extended as provided herein, completion of the Project shall take place immediately upon receipt of a Certificate of Substantial Completion, signed by both the Contractor and the Owner, stating that the residence has been substantially completed according to the plans and specifications, if applicable (hereinafter ADate of Substantial Completion@).

3.1 Within thirty (30) days after either (1) the issuance of a Certificate of Occupancy, or (2) written notice of completion of the Project from the Contractor to the Owner, the Owner shall create a "punch list" which shall be completed by the Owner and

returned to the Contractor.

3.2 Upon receipt of the “punch list” from the Owner, the Contractor shall make every reasonable effort to substantially complete the items contained on the punch list to the extent that said items fall within the Plans and Specifications, or any amendments thereto, within thirty (30) days of the receipt thereof.

3.3 There shall only be one (1) “punch list”, as described in sub-paragraphs 3.1 and 3.2, above. The Owner acknowledges that it is the Owner’s responsibility to diligently, carefully and completely prepare the “punch list” for delivery to the Contractor. The Owner further acknowledges that the Contractor has no obligation, whatsoever, to accept multiple amendments or counterparts to said “punch list” once it has been submitted to the Contractor as per 3.1, above.

3.4 Upon substantial completion by the Contractor of the items contained on the punch list that fall within the purview of the Plans and Specifications, as amended, or upon the failure of the Owner to submit a “punch list” to the Contractor within the time permitted pursuant to 3.1, above, the Owner shall sign a Certificate of Substantial Completion furnished to him by the Contractor.

4. **Insurance:**

4.1 Insurance on the Property and the existing structure is to be maintained by the Owner, the cost of such will not be a part of, and is excluded from, the Project Cost.

4.2 A Builder’s Risk or similar insurance policy may be taken out by the Contractor and paid for by the Owner, as part of the Project Cost, upon mutual agreement to do so by the parties.

4.3 Risk of loss or damage to the Property by fire or other hazard is assumed by Owner.

4.4 Owner waives any rights or claims for damage to persons or property that it or any of its successors in interest or insurers may have against Contractor for any claim or action arising out of Contractor’s operations related to the Project or this Agreement, but only to the extent that such rights or claims for damages are covered by a policy of liability, casualty, property or other insurance, regardless of who procures such insurance.

5. **Construction:** Contractor agrees to begin construction within thirty (30) days of final execution of this Agreement and to continue such construction to substantial completion with due diligence, with said construction to be completed within _____ calendar weeks after commencement of construction, delays due to acts of God, government, supply of materials, subcontracted labor, wind, water, rain or force majeure excepted.

6. **Manufacturer’s Warranties:** Any manufacturer’s warranties on fixtures, equipment, appliances or other property located or installed on the Property shall be

deemed assigned by Contractor to Owner with the execution of the Certificate of Substantial Completion. All warranties, documentation and instruction booklets shall be presented to Owner upon final payment per 2.6, above.

7. **Contract Documents.** The Contract Documents consist of this Agreement, and any written amendments thereto, the plans and project specifications, attached as **Exhibit AA**, all modifications, and change orders, all of which must be in writing and signed by both Contractor and Owner to be deemed valid and enforceable.

8. **No other agreements.** This Agreement contains the complete agreement of the parties hereto and cannot be modified or amended except in writing and signed by both the Contractor and the Owner.

9. **Nonwaiver.** No waiver by a party of any provision of this Agreement shall be deemed to have been made unless in writing and signed by such party.

10. **Governing Law.** This Agreement shall be governed by and construed in accordance with the laws of the State of Mississippi.

11. **Time is of the Essence.** Time is of the essence with respect to all time requirements set out in this Agreement.

12. **Successor Obligation.** The rights and obligations under this Agreement shall be binding on the parties, their successors, heirs and assigns, to the extent permitted under the terms of this Agreement.

13. **Notice:** Any notice required or permitted under the terms of this Agreement shall be addressed to Contractor or Owner, as the case may be, at the address stated below, and when deposited in the United States mail, postage prepaid, certified mail, return receipt requested, delivery shall be deemed to have been made. Any notice made to the Contractor shall also be copied to Clyde X. Copeland, III, Esq., P.O. Box 2598, Ridgeland, Mississippi 39158-2598.

14. **Enter at Own Risk.** Owner acknowledges that any on-site inspections or entry upon the construction site by the Owner, his guests, invitees, licensees, family or pets is done expressly at the Owner's risk.

15. **Laborers.**

15.1 All workmen, subcontractors, laborers or any person working on the Project shall only have contractual privity with the Contractor and not the Owner, and the Owner understands and agrees that the Owner shall have no right of control over any such workmen, subcontractors or laborers. Contractor has complete discretion over all material purchased for the Project, so long as same is consistent with the plans and specifications. All purchases made by the Owner must be coordinated through the Contractor.

15.2 The Contractor shall not be held responsible or liable for the actions or

omissions of any of the contractors contracted by the Owner, prior Prime contractors or others to perform the work or provide construction or design services prior to the date hereof, and any damage to persons or property caused or resulting thereby, whether actual or latent and whether discovered prior to the completion of the work or in the future.

16. **Change Orders.**

16.1 All changes in the plans and specifications shall be made only by a written change order agreement, signed by both the Owner and the Contractor at the time of the execution of such change. Subcontractors, laborers or salespersons representing the Contractor do not have authority to authorize changes to this construction job.

16.2 The Owner agrees to pay, in addition to the amounts agreed upon in paragraph 2, above, to the Contractor an administrative fee of \$95.00 per Change Order, whether the work for said Change Order is actually done or not. Said administrative fee shall be paid to the Contractor at the time of execution of the Change Order, and payment of said fee will be a condition precedent to said Change Order. Allowance selections, choices and directives will be documented with a Change Order, but will not be subject to the administrative fee outlined herein.

16.3 A Change Order Summary with the Revised Contract Amount, Revised Project Fee and Updated Completion Date will be supplied with each new Change Order.

16.4 Change Orders unexecuted as of the Project Completion Date shall be deemed null and void.

16.5 Change Order work will alter the original scope of work and may also alter the warranty and liability coverage provided by the Contractor. Such changes or limitations to those coverages will be noted on individual Change Orders.

16.6 No oral change orders shall be binding on the Parties hereto.

17. **Contractual Interpretation.** When the context so requires in this Agreement, words of gender shall include either or both of the other genders and the singular number shall include the plural. The headings of the sections of this Agreement are inserted for convenience of reference only and shall not be deemed to constitute a part hereof and shall not be deemed to limit, expand or modify in any way the provisions of this Agreement.

18. **Warranty.**

18.1 The parties understand, acknowledge and agree that there shall be no warranties, either expressed or implied, as to the fitness, quality and/or merchantability of the workmanship and/or the product of the Contractor, other than those provided by the Mississippi New Home Warranty Act, West=s A.M.C. ' ' 83-58-1, *et. seq.*, and any amendments thereto, a copy of which is attached hereto as **Exhibit AB@**, and which is incorporated herein by reference. **ALL OTHER WARRANTIES, INCLUDING THE WARRANTIES OF MERCHANTABILITY AND FITNESS FOR A PARTICULAR PURPOSE, ARE EXPRESSLY**

WAIVED AND DISCLAIMED BY THE PARTIES HEREBY.

18.2 It is understood and agreed that any materials and equipment utilized and incorporated in the Project by “others”, and not by the Contractor, shall not fall within the purview of the warranty made under this Section 18, and shall be specifically and expressly excepted there from.

18.3 It is further understood and agreed that that Contractor does not warrant the work, labor, materials and/or equipment provided by any non-employee contractors or suppliers who may provide work, labor, materials and/or equipment towards the construction of the Project, beyond what is required of the Contractor under the Mississippi New Home Warranty Act, West=s A.M.C. ' ' 83-58-1, *et. seq.*, and any amendments thereto.

19. **Hold Harmless and Indemnification.** Owner agrees to indemnify, save harmless, and defend Contractor (including its officers, directors, employees and agents) from and against any and all liabilities, claims, penalties, forfeitures, suits and any costs and expenses incident thereto (including costs of defense, settlement, and reasonable attorney's fees), which Contractor may hereafter incur, become responsible for, or pay as a result of death or personal or bodily injuries to any person, destruction of or damage to any property (including the person or property of indemnitor, its employees and/or agents), contamination of or adverse effects on the environment or any violation of governmental laws, regulations, or orders to the extent caused by or resulting from (i) Owner=s breach of any term or provision of this agreement; (ii) any negligent or willful acts and/or omissions of Owner and/or its employees and/or agents (iii) the work of others to which the Contractor has no privity or control; (iv) work of others that was initiated prior to the date of this Agreement, hereof.

20. **Severability.** The invalidity or unenforceability of any provision in this Agreement shall not affect the validity or enforceability of any other provisions of this Agreement, and each provision shall be enforced to the maximum extent permitted by applicable law.

21. **ArbitrationBAttorney=s FeesBClaims.**

21.1 ALL DISPUTES, CONTROVERSIES OR CLAIMS, OF WHATEVER KIND OR CHARACTER, ARISING OUT OF, RELATED TO THE SUBJECT MATTER OF OR IN CONNECTION WITH THIS AGREEMENT, SHALL BE SETTLED AND DETERMINED BY BINDING ARBITRATION IN ACCORDANCE WITH WEST=S A.M.C. ' ' 11-15-101, *ET SEQ.*, AS AMENDED. FURTHERMORE, ALL DISPUTES, CONTROVERSIES OR CLAIMS ARBITRATED HEREUNDER RELATED TO THE WORK OR THE PROJECT SHALL BE EXCLUSIVELY GOVERNED BY THE WARRANTIES, REMEDIES, LIMITATIONS AND EXCLUSIONS CONTAINED IN THE MISSISSIPPI NEW HOME WARRANTY ACT. SAID ARBITRATION SHALL BE CONDUCTED BY ONE (1) ARBITRATOR UNLESS THE PARTIES MUTUALLY AGREE THAT THE NATURE OF THE DISPUTE REQUIRES MORE THAN ONE (1) ARBITRATOR. THE ARBITRATION SHALL BE GOVERNED BY MISSISSIPPI LAW AND SHALL BE CARRIED OUT IN THE CITY OF MADISON, MISSISSIPPI OR SUCH OTHER LOCATION AS THE PARTIES MAY AGREE. CONTRACTOR AND OWNER SHALL SHARE EQUALLY ALL ADMINISTRATIVE FEES AND EXPENSES RELATED TO THE ARBITRATION, INCLUDING ANY ARBITRATOR'S FEES. THE AWARD

OF THE ARBITRATOR(S) SHALL BE ENFORCEABLE IN A COURT OF COMPETENT JURISDICTION, SHALL BE FINAL, BINDING AND NOT APPEALABLE. THIS PROVISION SHALL SURVIVE THE TERMINATION OR EXPIRATION OF THE AGREEMENT AND SHALL SURVIVE THE SUBSTANTIAL COMPLETION OF THE WORK. IF A CLAIM RELATES TO OR IS THE SUBJECT OF A MECHANIC'S OR CONSTRUCTION LIEN, THE PARTY ASSERTING SUCH CLAIM MAY PROCEED IN ACCORDANCE WITH APPLICABLE LAW TO COMPLY WITH THE LIEN NOTICE OR FILING DEADLINES PRIOR TO THE INSTITUTION OF A CLAIM UNDER THIS PARAGRAPH, AND DOING SO WILL NOT BE CONSTRUED AS A WAIVER OF ANY PARTY'S RIGHTS TO INVOKE THIS PROVISION. FOR THE PURPOSE OF THIS ARBITRATION PROVISION, THE "PARTIES" SHALL INCLUDE NOT ONLY THE CONTRACTOR, BUT ALSO THE CONTRACTOR'S INDIVIDUAL SHAREHOLDERS, DIRECTORS, OFFICERS, MEMBERS, MANAGERS, PRINCIPALS AND/OR AGENTS.

21.2 If the Contractor or Owner brings any action to enforce, interpret the terms of this Agreement or otherwise arbitrate any claim arising under or related to this Agreement, the losing party in such proceedings shall pay the prevailing party's reasonable attorneys' fees (but not contingent fees), including expert or other litigation expenses. If less than the full amount of the monetary claim is awarded to the prevailing party, the claimant shall recover reasonable attorneys' fees (but not contingent fees), including expert or other litigation expenses, equal to the proportion of the amount awarded, to the amount demanded, and the complaining party shall pay the responding party's reasonable attorneys' fees (but not contingent fees), including expert or other litigation expenses, equal to the proportion of the amount denied, to the amount demanded.

21.3 The rights, duties, responsibilities and remedies, as between the Owner and Contractor, as to notice and right to cure, as set forth and provided by The Mississippi New Home Warranty Act, West=s A.M.C. '83-58-7, as amended, are incorporated herein by reference, which are specifically attached hereto as **Exhibit AB@**, and are made apart of this Agreement.

21.4 The parties agree that with regard to any claims made by Owner against Contractor, or *vice versa*, all claims, rights or remedies for incidental or consequential damages are hereby waived.

21.5 ALL DISPUTES, CONTROVERSIES OR CLAIMS, OF WHATEVER KIND OR CHARACTER, ARISING OUT OF OR IN CONNECTION WITH THIS AGREEMENT, THE PROJECT OR THE WORK, SHALL BE EXCLUSIVELY GOVERNED BY AND SUBJECT TO THE WARRANTIES, LIMITATIONS AND REMEDIES CONTAINED IN THE MISSISSIPPI NEW HOME WARRANTY ACT, WEST=S A.M.C. '83-58-7, AS AMENDED.

Mississippi law requires that the Contractor inform you as to whether the Contractor carries general liability insurance insuring the Contractor's work under this contract. The Contractor DOES carry general liability insurance. By your signature below, you signify your understanding and acknowledgment of this fact.

WITNESS OUR SIGNATURES, this the ____ day of _____,

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200____.

Contractor:

Owner:

BY: _____

Contractor=s Address & Phone #.:

Owner=s Address & Phone #:

(601) _____

() _____