

United States Department of the Air Force

Air Education and Training Command Air Force Center for Environmental Excellence (AFCEE)



Privatization of Military Family Housing AETC Group I

Solicitation No. AFCEE-05-0004

APPENDIX N-1 Agreement To Share Proceeds

**STEP ONE PROPOSALS ARE DUE NO LATER THAN
5:00 P.M. EST 7 March 2005 AT:**

PSC MILITARY HOUSING COMPANY
132 South 600 East
Salt Lake City UT 84102
Voice 866-801-2253 Fax 801-363-1912
Email binks@psc-evg.com
Web site www.pscmhc.com

After recording return to:

Gordon O. Tanner, Chief Counsel, Legal Division
Air Force Housing Privatization Center of Excellence
c/o AFCEE/HDP
2735 Louis Bauer Drive. Bldg. 728
Brooks City-Base, Texas 78235-5133

Prepared by:

State of _____
County of _____

MORTGAGE, DEED OF TRUST, AND/OR DEED TO SECURE DEBT,

SECURITY AGREEMENT

AND

AGREEMENT TO SHARE PROCEEDS

THIS MORTGAGE, DEED OF TRUST, AND/OR DEED TO SECURE DEBT, SECURITY AGREEMENT AND AGREEMENT TO SHARE PROCEEDS (this "Agreement") is given as of _____, 20__ by _____, a _____, organized pursuant to the laws of the State of _____ (together with its permitted successors and permitted assigns, the "Project Owner") to and for the benefit of **THE UNITED STATES OF AMERICA**, acting by and through its Secretary of the Air Force (the "Government" or the "Air Force").

RECITALS:

A. In response to Solicitation No. AFCEE-_____ (the "Solicitation") issued by the Government, the Project Owner has been selected by the Government to perform the design, construction, operation, maintenance, replacement and/or rehabilitation of a privately-owned rental housing development (the "Project") to be located on **Basename** Air Force Base (the "Installation") primarily for use by military personnel and their families authorized to live on the Installation.

B. In connection with the Project, the Project Owner and the Government have entered into one or more documents, including without limitation, a Lease of Property dated as of _____, 20__ (the "Lease") (sometimes collectively referred to herein as the "Project

Documents”) pursuant to which the Project Owner is obligated for the design, construction, operation, maintenance, replacement and rehabilitation of the Project.

C. As a condition of the Solicitation, the Government has required, and pursuant to the Selected Proposal (as defined in the Lease) the Project Owner has so agreed, that the Project Owner shall pay to the Government certain sale or refinancing proceeds realized from the Project.

D. The Project Owner has further agreed to execute and deliver this Agreement in order to place a lien upon its leasehold interest in the land which is subject to the Project Documents and more particularly described in Exhibit A to this Agreement, together with the improvements and personalty which are or will be located on the land (collectively, the “Property”), for the purpose of evidencing and securing its agreement to share certain sale or refinancing proceeds with the Government.

NOW THEREFORE, in consideration of the above recitals and other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, the Project Owner and the Government hereby agree as follows:

1. **Defined Terms.** As used herein, the following terms shall be defined as set forth below:

“Capital Event Gross Proceeds” means (a) in the case of a Sale, an amount equal to the value of all consideration to be paid to or received by the Project Owner or others at the discretion of the Project Owner in connection with such Sale and (b) in the case of a Refinancing, the original principal balance of the refinancing loan. “Refinancing” means a refinancing of the indebtedness secured by the Project, including specifically but without limitation, a refinancing of the Senior Loan or the Direct Loan.

“Day” shall mean a calendar day unless otherwise specified in writing in this document.

“Sale” means any transfer of the Project.

“Shared Proceeds” means the Capital Events Gross Proceeds in connection with the Sale or Refinancing of the Project.

Capitalized terms used, but not otherwise defined herein, shall have the meanings ascribed to such terms in the Lease.

2. **Shared Proceeds.** Contemporaneously with the closing of either (i) a Sale or (ii) a Refinancing, the Project Owner shall pay Shared Proceeds (gross proceeds minus cost of refinancing, pay off of the existing loan and costs of 25-year upgrade/modernization) to the Government as additional interest under the Direct Loan as follows:

_____(__%) Percent of the Capital Event Gross Proceeds from the Refinancing;
and

_____(__%) Percent of the Capital Event Gross Proceeds from the Sale.

3. **Application to All Sales and Refinancing During Term.** The obligation to pay Shared Proceeds to the Government shall apply **TO EACH AND EVERY SALE OR REFINANCING WHICH OCCURS ON OR BEFORE THE TERMINATION OF THIS AGREEMENT.**

4. **Records of Sales and Refinancings.** The Project Owner shall keep, or cause to be kept, and shall deliver to the Government, accurate records of account of any Sale or Refinancing and such further statements and information as the Government may reasonably request in order to enable the Government to determine or verify the amounts of Shared Proceeds which the Project Owner shall be required to pay to the Government pursuant to this Agreement. The Secretary shall have the right, upon reasonable notice and during normal business hours, to enter and have free access to inspect all books and records of the Project Owner regarding any such sale or refinancing. Upon the written request of the Government, the Project Owner shall cause, at its sole expense, an independent certified public accountant to prepare an accounting of any Sale or Refinancing. If either the Government or the certified public accountant determines that the Project Owner underpaid the amount of Shared Proceeds owed to the Government, then the Project Owner shall pay the deficiency to the Government within ten (10) Business Days of written notice of the underpayment.

5. **Unlawful Rate of Interest.** It is not intended by this Agreement to charge interest at a rate in excess of the maximum lawful rate of interest permitted to be charged to the Project Owner under the laws of the State of _____ or the laws of any other jurisdiction which may be deemed to govern this Agreement. Therefore, if the Government has made a Direct Loan in connection with the Project and if payments under this Agreement shall be construed by a court of law to constitute additional interest under such Direct Loan, and if, in such case, the payment by the Project Owner to the Government of Shared Proceeds shall cause the interest under the Direct Loan to be deemed to be in excess of the maximum lawful rate, then the interest rate imposed under the Direct Loan shall be reduced to a rate such that the combination of interest received under the Direct Loan plus the amount of Shared Proceeds shall not exceed the maximum lawful rate. Furthermore, if the interest rate on the Direct Loan cannot be reduced to a level such that the amount of interest paid under the Direct Loan together with the Shared Proceeds would be lawful, then any amounts of Shared Proceeds that are deemed to be excessive interest shall be applied to the reduction of the unpaid principal balance due under the Direct Loan and not to the payment of Shared Proceeds.

6. **Default.** The failure by the Project Owner to pay when due Shared Proceeds shall constitute a "Default" under this Agreement.

7. **Security Instrument and Security Agreement.**

a. To the maximum extent permitted under applicable law, this Agreement is intended to be, shall be construed to be, and is (i) a mortgage, deed of trust, deed to secure debt, security deed, or other security instrument, whichever is customary in the jurisdiction of _____, _____ (as applicable, a "Security Agreement") and (ii) a security agreement under the Uniform Commercial Code for the portion of the Property which, under applicable law, may be subjected

to a security interest under the Uniform Commercial Code, whether such portion of the Property is owned now or acquired in the future, and all products and cash and non-cash proceeds thereof (collectively, "UCC Collateral"). Project Owner hereby grants to the Government a lien on and mortgage interest in the Property and a security interest in the UCC Collateral to secure the performance of its obligations under this Agreement.

b. Notwithstanding anything to the contrary in this Agreement, both the lien and security interest granted in this Agreement by the Project Owner to the Government shall be automatically subordinated to the lien of any financing secured by the Property that has been or will be approved by the Government as required by the Lease without the need for any further action on the part of the Government or the Project Owner. Notwithstanding the foregoing, the Government agrees to confirm the aforementioned subordination in a form reasonably satisfactory to the Project Owner and any Approved Mortgagee.

c. The Project Owner hereby authorizes the Government to prepare and file financing statements, continuation statements and financing statement amendments in such form as the Government may require to perfect or continue the perfection of its security interest in the UCC Collateral and Project Owner agrees, if the Government so requests, to execute and deliver to the Government such financing statements, continuation statements, and amendments. The Project Owner shall pay all filing costs and all costs and expenses of any record searches for financing statements and/or amendments that the Government may require. The Project Owner shall not create or permit to exist any other lien or security interest in any of the UCC Collateral other than to the holders of any financing approved by the Government pursuant to the Lease.

8. Remedies.

a. The Government shall provide written notice to the Project Owner and any Approved Mortgagee of any Default under this Agreement. The Project Owner shall have (i) ten (10) days to cure any Default under this Agreement. If the Default is not cured within the applicable cure period, then the Government shall have all rights, remedies, and recourses available to it at law or in equity, including, but without limitation, the right to foreclose the Liens securing payment of the Shared Proceeds.

b. The Project Owner acknowledges that the power of sale granted in this Agreement may be exercised by the Government without prior judicial hearing. The Project Owner has the right to bring an action to assert the nonexistence of a Default or any other defense of the Project Owner to a sale. The Government shall be entitled to collect all costs and expenses that it incurs in pursuing such remedies including attorneys' fees and costs of documentary and title evidence.

c. The Government may exercise its remedies against the Project and the UCC Collateral separately or together, and in any order, without in any way affecting the Government's other remedies.

d. The exercise by the Government of its remedies under this Agreement shall be subordinate to the rights of any Approved Mortgagee.

9. **Miscellaneous.**

a. **Notice.** Notice to the parties shall be provided in accordance with the Lease.

b. **Amendment.** No amendment to this Agreement shall be binding upon any party until such amendment is reduced to writing and executed by both parties.

c. **Entire Agreement.** This Agreement contains all agreements among the parties, and there are no other representations, warranties, promises, agreements, or understandings, oral, written, or implied, among the parties except as expressly referenced in this Agreement.

d. **Binding Effect.** This Agreement shall be binding upon the parties and their respective successors and assigns.

e. **Severability.** If any clause, provision, or section of this Agreement shall be ruled invalid or unenforceable by any court of competent jurisdiction, the invalidity or unenforceability of such clause, provision, or section shall not affect any of the remaining clauses, provisions, or sections.

f. **Term.** This Agreement shall be in full force and effect from its date to and including the later of (i) the date on which the Project Owner pays any and all amounts owed to the Government under this Agreement, or (ii) the Lease Termination Date. Upon the termination of this Agreement, and upon request of the Project Owner, the Government shall execute a recordable document evidencing such termination, if so requested by the Project Owner.

g. **No Joint Venture.** The Government is not and shall not be deemed to be a partner, shareholder, or other owner of, or a joint venturer with, the Project Owner as a result of this Agreement. The relationship between the Government and the Project Owner is that of creditor and debtor and all payments of Shared Proceeds under this Agreement are required solely by reason of that relationship.

h. **Governing Law.** This Agreement shall be construed, and the rights and obligations of the Government and the Project Owner under this Agreement shall be determined, in accordance with the laws of the State of _____.

IN WITNESS WHEREOF, the undersigned Project Owner has executed this Agreement To Share Proceeds as of the date first above written.

PROJECT OWNER:

_____,
a _____

By _____
Name: _____
Title: _____

[Add Proper Acknowledgment]

AGREED TO AND ACCEPTED BY:

THE UNITED STATES OF AMERICA, acting by and through
its Secretary of the Air Force

By _____
Name: _____
Deputy Assistant Secretary of
the Air Force (Installations)

EXHIBIT A
DESCRIPTION OF LAND