

**United States Department of the Air Force
Air Combat Command
(ACC)
Air Force Center for
Environmental Excellence
(AFCEE)**



**Privatization of Military Family Housing
Cannon Air Force Base, New Mexico**

Solicitation Number: AFCEE-03-0003

**APPENDIX P
Intercreditor Agreement**

**Step One Proposals Are Due No Later Than
5:00 P.M. MT 18 Aug 03 At:**

PSC MILITARY HOUSING COMPANY

132 South 600 East

Salt Lake City, Utah 84102

Voice 801.363.2277 Fax 801.363.1912

Email: rusty@psc-evg.com

Web site: www.pscmhc.com

APPENDIX P. INTERCREDITOR AGREEMENT

INTERCREDITOR AGREEMENT

THIS INTERCREDITOR AGREEMENT (this "Intercreditor Agreement") is made and entered into as of _____, 20__, by and among THE UNITED STATES OF AMERICA represented by THE SECRETARY OF THE AIR FORCE (the "Secretary" or the "Government"); [NAME OF GUARANTEED LENDER], a _____ (the "Guaranteed Lender"); and [NAME OF BORROWER], a _____ (the "Borrower").

RECITALS

A. The Borrower and the Government have entered into one or more Project Documents (as defined in the Guaranty Agreement) pursuant to which the Borrower is obligated for the design, construction, operation, maintenance, replacement and rehabilitation, as applicable, of a privately-owned rental housing development (the "Project") primarily for use by military personnel and their families assigned to Cannon AFB, New Mexico (the "Installation").

B. In connection with the Project, the Guaranteed Lender has agreed to make a first lien mortgage loan to the Borrower in the original principal amount of \$_____ (the "Guaranteed Loan") and the Government has agreed to make a subordinate mortgage loan to the Borrower in the original principal amount of \$_____ (the "Subordinate Loan").

C. The Guaranteed Loan and the terms and provisions of the Guaranteed Loan Documents shall be superior in priority to the Subordinate Loan and the terms and provisions of the Subordinate Loan Documents.

D. The parties desire to execute this Intercreditor Agreement in order to establish certain rights and responsibilities among the parties, to coordinate their financing arrangements, and to confirm certain agreements with respect to procedures for approvals, inspections, documentation, subordination and other matters in connection with the Loans.

NOW, THEREFORE, in consideration of the above recitals and other good and valuable consideration, the receipt and sufficiency of which is hereby acknowledged, the parties hereby agree as follows:

1. Definitions. The terms defined in this Section 1 and in the Recitals (except as herein otherwise expressly provided or unless the context otherwise requires) for all purposes of this Intercreditor Agreement shall have the respective meanings specified in this Section 1 and the Recitals. Any capitalized terms used herein which are not expressly defined in this Intercreditor Agreement shall have the meanings set forth in the Guaranty Agreement.

"Authorized Representative" means with respect to all parties to this Intercreditor Agreement, an officer, a principal, an agent or other person who is authorized to act on behalf of and whose actions are binding upon that party. As of the date of execution of this Intercreditor Agreement, the primary Authorized Representative of the Borrower is _____; of the Guaranteed Lender is _____; and of the Government is _____. Any party may designate additional or substitute persons to act as an Authorized Representative on its behalf at any time by a written notice to the other parties.

“Borrower means the Project Owner, _____, a _____, or any of its successors or assigns which are approved as the owner of the Project by the Secretary and which is the borrower under a guaranteed loan, a direct loan or any other financing secured by a mortgage on the project.

“Direct Loan” means the loan made by the Government to the Borrower in the original principal amount of \$ _____ which is subordinate to the lien of the Guaranteed Loan.

“Direct Loan Documents” means the note, the security instrument and any related documents, as they may be amended or modified in accordance with their terms, evidencing or securing the obligations of the Borrower and Government with respect to the Direct Loan.

“Guaranteed Lender” means the maker of a mortgage loan, its successors and/or permitted assigns, that extends DoD guaranteed loans to the private sector for financing of the Project. In this transaction, the Guaranteed Lender is _____, a lender approved or pending approval by the DoD.

“Guaranteed Loan” means a first lien mortgage loan in the original principal amount approved by the government, from the Guaranteed Lender to the Borrower, which is guaranteed by the Secretary, under certain specified limited circumstances pursuant to the terms of the Guaranty Agreement.

“Guaranteed Loan Documents” means the note, the security instrument and any related documents, as they may be amended or modified in accordance with their terms, evidencing or securing the obligations of the Borrower and Guaranteed Lender with respect to the Guaranteed Loan.

“Guaranty Agreement” means the Military Housing Loan Guaranty Agreement of even date with this Intercreditor Agreement by and between the Government and the Guaranteed Lender as amended or modified in accordance with its terms.

“Intercreditor Agreement” means the Intercreditor Agreement to be entered into among the Secretary, all lenders and the Project Owner, as may be amended and modified from time to time.

“Lease of Property” means the Department of the Air Force Lease of Property by and between the Secretary of the Air Force and the Project Owner, as amended and modified from time to time.

“Lenders” means collectively, the Guaranteed Lender and the Government.

“Loan Documents” means collectively, the Guaranteed Loan Documents and the Direct Loan Documents.

“Loans” means collectively, the Guaranteed Loan and the Direct Loan.

“Secretary” means the Secretary of the Air Force or his Authorized Representative.

“Selected Proposal” means the proposal, including any and all amendments, prepared by or on behalf of the Project Owner, and selected by the Government as the winning proposal in response to the RFP. “Solicitation” means United States Department of the Air Force Solicitation Number _____, including any and all appendices, exhibits, and amendments thereto..

2. Borrower’s Compliance. The Borrower agrees to borrow the Loans and to apply the proceeds of the Loans as required under and in compliance with the terms and conditions of the Loan Documents. The Borrower represents and warrants to the Lenders that neither the Borrower nor the Project is in breach, violation or default under any of the Loan Documents or any other document or agreement by which the Borrower or the

Project is or may be bound, and no event or circumstance has occurred or exists which would constitute such a breach, violation or default with notice or the passage of time or both.

3. Representations of Lenders.

a. The Guaranteed Lender has delivered to the Government complete and accurate copies of all of the Guaranteed Loan Documents described in Exhibit B. The Guaranteed Loan Documents so delivered: (i) are all of the documents executed by the Guaranteed Lender and Borrower in connection with the Guaranteed Loan, (ii) have not been amended or modified, and (iii) constitute the entire understanding between the Guaranteed Lender and the Borrower with respect to the Guaranteed Loan. To the Guaranteed Lender's knowledge, no default exists under the terms of any of the Guaranteed Loan Documents.

b. The Government has delivered to the Guaranteed Lender complete and accurate copies of all of the Subordinate Loan Documents described in Exhibit C. The Subordinate Loan Documents so delivered: (i) are all of the documents executed by the Government and Borrower in connection with the Subordinate Loan, (ii) have not been amended or modified, and (iii) constitute the entire understanding between the Government and the Borrower with respect to the Subordinate Loan. To the Government's knowledge, no default exists under the terms of any of the Subordinate Loan Documents.

4. Subordination.

a. Subject to the terms and conditions of this Intercreditor Agreement, the lien, operation and effect of the Subordinate Loan Documents are hereby fully subordinated to the lien, operation and effect of the Guaranteed Mortgage and shall at all times until the Guaranteed Loan is paid in full be and remain inferior to the Guaranteed Mortgage; provided, however, the Subordinate Loan shall not be subordinated to the extent any increase, modification, replacement or extension of the Guaranteed Loan is not accomplished in accordance with this Intercreditor Agreement.

b. The Government intentionally subordinates the lien of the Subordinate Loan Documents and the debt evidenced and secured thereby in favor of the Guaranteed Lender and understands that in consideration of this subordination, specific loans are being made to the Borrower by the Guaranteed Lender that would not have been made but for reliance upon this subordination.

5. Application of Project Income; Lockbox Agreement.

a. The Guaranteed Lender, the Government and the Borrower shall enter into a Lockbox Agreement or other similar agreement in form and substance satisfactory to the Government which governs the receipt and disbursement of all rents, revenues and other income from the Project ("Project Income"). Among other provisions, the Lockbox Agreement shall specifically provide for the application of Project Income in the following order of priority as indicated in Exhibit D.

6. Notice of Default; Right to Cure.

a. Each Lender will promptly notify the other of any defaults under its Loan of which such Lender becomes aware, including without limitation, providing copies to the other Lender of any and all default notices sent to the Borrower concurrently with the delivery of same to the Borrower. The Lender under the non-defaulted Loan shall have the right, but not the obligation, exercisable in its sole discretion (and, in the case of the Government, subject, if required, to the receipt of an additional appropriation of funds or legislative authority) to cure such default, and will be provided a cure period which is thirty (30) days beyond the cure period given to the Borrower under the terms of the applicable

Loan Documents (or in those cases in which the Borrower is not provided any cure period, the applicable Lender shall have a cure period of thirty (30) days) in which to cure the default. Each Lender agrees that it will not take any action to enforce its security interest in the Project unless and until it has first provided the required written notice of default to the other Lender and the Lender receiving (or entitled to receive) such notice has not cured such default within the applicable cure period. If a Lender shall effect a cure of a Borrower's default (including without limitation, the payment by the Government to the Guaranteed Lender of Monthly Shortfall Payments in accordance with the Guaranty Agreement), the Lender under the previously defaulted Loan shall not have the right to accelerate such Loan or to exercise any other default and foreclosure rights under its Loan Documents.

b. Notwithstanding the foregoing paragraph (a), it is agreed that if there is a default by the Borrower under either Loan which cannot be cured by the payment of money or performance of maintenance, repair, or construction work, such "personal default" of the Borrower shall not be required to be cured by the Lender of the non-defaulted Loan, and such personal default shall be waived by the Lender under the defaulted Loan as to the other Lender, provided that the applicable Lender shall have cured or provided for the payment of the cost of all defaults (other than personal defaults) within the time and the manner set forth in this Section 6. In the case of an uncured personal default by the Borrower under the Subordinate Loan, the Guaranteed Lender shall be permitted to propose a substitute party to assume the obligations of the Borrower under the Subordinate Loan and the Guaranteed Loan, subject to the Government's reasonable consent and such other terms and conditions as the Government may impose, in its sole reasonable discretion.

7. Borrower's Agreement to Reimburse Lenders. If there is a default under a Loan, either Lender shall have the right, but not the obligation, to take whatever action it deems necessary or appropriate to protect its interest in its Loan and its interest in the security given under its Loan Documents, including without limitation, curing any default by the Borrower under either or both Loans. If a Lender expends any sums in connection with or arising out of any default or alleged default by the Borrower under either Loan, including without limitation, sums paid to the holder of a defaulted Loan, or any other party, to cure the Borrower's default, Borrower agrees:

a. to be liable to the Lender for (i) any and all such sums, together with interest on such sums from and after the date they are incurred to the date of repayment at the default rate set forth in the Loan Documents, or if no such default rate is contained in the Loan Documents, at the rate of 4% per annum above the normal interest rate set forth in the applicable Loan Documents and (ii) all fees and expenses of Lender's counsel incurred in connection with such actions;

b. that all amounts due to the Lender under (a) above, shall constitute additional indebtedness of the Borrower to the Lender, the payment of which shall be secured by the Loan Documents, provided that in the case of amounts advanced by the Guaranteed Lender, the Guaranteed Lender acknowledges and agrees that any such advances shall not be added to or become part of the Guaranteed Principal Balance (as defined in the Guaranty Agreement) for purposes of determining the amount of any Guaranty Payment (as defined in the Guaranty Agreement) that might become due and payable to the Guaranteed Lender under the Guaranty Agreement; and

c. any such amounts will be due and payable by Borrower to the Lender immediately following Lender's demand.

8. Government's Option To Act Under Subordinate Loan Documents For Defaults Under the Guaranteed Loan or Subordinate Loan.

a. All defaults under the Guaranteed Loan shall constitute and be events of default under the Subordinate Loan. With respect to defaults under the Guaranteed Loan which remain uncured at the expiration of the cure period provided to the Government in Section 6, the Guaranteed Lender agrees that the Government shall have the right, but not the obligation, at its sole option, to exercise any and all of the Government's rights and remedies under the Subordinate Loan with respect to such uncured default.

b. Notwithstanding that defaults under the Subordinate Loan may constitute and be events of default under the Guaranteed Loan, if any default under the Subordinate Loan shall remain uncured at the expiration of the cure period provided to the Guaranteed Lender in Section 6, the Guaranteed Lender agrees that the Government shall have the right, but not the obligation, at its sole option, to exercise any and all of the Government's rights and remedies under the Subordinate Loan with respect to such uncured default. The Guaranteed Lender further agrees that if the Government elects within thirty (30) days of the end of such cure period to exercise its remedies under the Subordinate Loan, the Guaranteed Lender shall forebear in the exercise of any of its rights and remedies under the Guaranteed Loan Documents which arise solely as a result of the default under the Subordinate Loan and the cross-default provisions, if any, of the Guaranteed Loan Documents; provided, however, that nothing in this subsection shall prevent the Guaranteed Lender from exercising any of its rights and remedies under the Guaranteed Loan Documents relating to an independent default under the Guaranteed Loan subject to the terms of the Guaranty Agreement and other provisions of this Intercreditor Agreement.

c. Acquisition of the Project whether by the Government or another party by foreclosure, deed-in-lieu of foreclosure, sale or other disposition of the Project pursuant to the exercise of the Government's rights and remedies under the Subordinate Mortgage shall be subject to the Guaranteed Loan Documents. Any proceeds resulting from a foreclosure, deed-in-lieu of foreclosure, sale or other disposition of, or realization upon, the Project under the Subordinate Mortgage or other security agreements or any other interest in the Project pursuant to action taken by the Government shall be distributed in accordance with Section 12.

9. Amendment of Guaranteed Loan Documents. The Guaranteed Lender and Borrower hereby agree that they will not amend or modify, or consent to any amendment or modification of, the Guaranteed Loan or any of the documents evidencing or securing the Guaranteed Loan without the prior written consent of the Government in accordance with the Guaranty Agreement. Any modification or amendment of the terms of the Guaranteed Loan not made in accordance with the terms and conditions of the Guaranty Agreement and this Intercreditor Agreement, shall at the option of the Government, be deemed to be null and void.

10. Amendment of Subordinate Loan Documents. The Government shall not amend or modify, or consent to any amendment or modification of, the Subordinate Loan or any of the documents evidencing or securing the Subordinate Loan without the prior written consent of the Guaranteed Lender, if such proposed amendment or modifications would materially and adversely affect the interests of the Guaranteed Lender.

11. Insurance Proceeds. The Government and Guaranteed Lender agree that any insurance proceeds received as a result of casualty loss to the Project received in connection with the Project shall be applied in accordance with the terms and conditions of the [Lease of Property] [Use Agreement].

12. Distributions of Proceeds of Collateral. The proceeds resulting from any foreclosure, sale or other disposition of, or realization upon, the Project under any of their mortgages or other security agreements or any other interest in the Project, or any part thereof, shall be distributed first to the Guaranteed Lender until all obligations of the Borrower to the Guaranteed Lender under the Guaranteed Loan Documents are paid and performed in full, and any remaining proceeds shall be paid to the Government until all obligations of the

Borrower to the Government under the Subordinate Loan Documents are paid and performed in full, with any excess being distributed to the Borrower.

13. Lenders' Standard of Care. The Government's actions and omissions pursuant to this Intercreditor Agreement shall not result in any liability on the part of the Government to the Guaranteed Lender, for performance or responsibility for any certain standard of care, and the Guaranteed Lender expressly waives all claim against the Government for damages caused by any such action or omission by the Government for performance or responsibility. Guaranteed Lender's actions and omissions pursuant to this Intercreditor Agreement shall not result in any liability on the part of Guaranteed Lender to the Government, for performance or responsibility for any certain standard of care, and the Government expressly waives all claim against the Guaranteed Lender for damages caused by any such action or omission by the Guaranteed Lender for performance or responsibility. The agreements contained in the preceding two sentences do not extend to claims for damages caused by the gross negligence or willful misconduct of officers, agents or employees of the Government or Guaranteed Lender, as applicable, without contributory fault on the part of any other person, firm, entity or party.

14. Termination. This Intercreditor Agreement shall in all respects be a continuing agreement and shall remain in full force and effect until the earlier of the payment in full of the Guaranteed Loan or the Subordinate Loan. Upon such payment in full, this Intercreditor Agreement shall automatically terminate; provided that the parties agree to each execute such instruments as may be reasonably requested by any party to further evidence such termination.

15. Consent by the Borrower. The Borrower is executing this Intercreditor Agreement to evidence its consent to its terms.

16. Conflicts. Between the Lenders, in the event of a conflict between any provision of this Intercreditor Agreement and any provision of any of the Guaranteed Loan Documents, and the Subordinate Loan Documents, the provisions of this Intercreditor Agreement shall control.

17. Interpretation. The words "hereof," "herein," and other words of similar import refer to this Intercreditor Agreement as a whole. Words of the masculine gender shall be deemed and construed to include correlative words of the feminine and neuter genders. Words importing the singular number shall include the plural number and vice versa unless the context shall otherwise indicate. References to sections, subsections, and provisions are to the applicable sections, subsections and provisions of this Intercreditor Agreement as originally executed. The headings of this Intercreditor Agreement are for convenience only and shall not define or limit its provisions.

18. Delay or Omission Not Waiver. No delay or omission of the Guaranteed Lender or of the Government to exercise any right or remedy provided under this Intercreditor Agreement upon a default of the other party (except a delay or omission pursuant to a written waiver) shall impair any such right or remedy or constitute a waiver of any such default or acquiescence therein. Every right and remedy given by this Intercreditor Agreement or by law to such party may be exercised from time to time, and as often as may be deemed expedient by such party.

19. Performance of Obligations. Each party hereby covenants to keep and perform faithfully all of its covenants and undertakings contained in this Intercreditor Agreement.

20. Assignment; No Third Party Beneficiaries. The rights, title and interest of the Guaranteed Lender in, to and under the Guaranteed Loan and the rights and obligations of the Guaranteed Lender under this Intercreditor Agreement shall only be transferred in accordance with the terms and conditions of the Guaranty Agreement that govern transfer of the Guaranteed Loan. There shall be no third party beneficiaries of this

Intercreditor Agreement and the Government shall have no obligation to recognize or deal with any party other than the Guaranteed Lender (or its servicer on behalf of the Guaranteed Lender) or the Borrower with respect to rights, benefits, and obligations of the Guaranteed Lender, the Borrower and the Government under this Intercreditor Agreement.

21. Amendment. The Government and the Guaranteed Lender hereby covenant and agree that this Intercreditor Agreement shall be amended only by an instrument in writing executed by their duly Authorized Representatives.

22. No Individual Liability. No covenant or agreement contained herein shall be deemed to be the covenant or agreement of any individual officer, agent, employee or representative of the Government, in his or her individual capacity and none of such persons shall be subject to any personal liability or accountability by reason of the execution of this Intercreditor Agreement, whether by virtue of any constitution, statute or rule of law or by the enforcement of any assessment or penalty, or otherwise.

23. Notices. Any notice, request, complaint, demand, communication or other paper required or permitted to be delivered to the Guaranteed Lender or the Government, shall be sufficiently given and shall be deemed given (unless another form of notice shall be specifically set forth herein) on the Business Day following the date on which such notice or other communication shall have been delivered to a national overnight delivery service (receipt of which to be evidenced by a signed receipt from such overnight delivery service) addressed to the appropriate party at the addresses set forth below. The Guaranteed Lender and the Government may, by notice given as provided in this paragraph, designate any further or different address to which subsequent notices or other communication shall be sent.

The Guaranteed Lender:

The Borrower:

The Secretary: Department of the Air Force
Deputy Assistant Secretary of the Air Force
(Installations)
1660 Air Force Pentagon
Washington, D.C. 20330-1600
**(all notices, requests and other communications to any party
except for financial records and reports)**

with copies to: Department of the Air Force
Office of the General Counsel
Deputy General Counsel
(Installations and Environment)
1740 Air Force Pentagon
Washington, D.C. 20330-1740
**(all notices, requests and other communications to any party
except for financial records and reports)**

HQ AFCEE / DCP
Attn. Cannon AFB Project Manager,
2735 Louis Bauer Drive
Brooks City-Base, TX 78235-5133

HQ AFCEE / DCP / Portfolio Management
2735 Louis Bauer Drive
Brooks City-Base, TX 78235-5133
(financial reports and records only)

Contracting Officer
27th Contracting Squadron
511 N. Torch Blvd.
Cannon AFB, NM 88103

24. Governing Law. This Intercreditor Agreement shall be construed, and the rights and obligations of the Government, and the Guaranteed Lender under this Intercreditor Agreement shall be determined, in accordance with the laws of the United States of America.

25. Severability. If any provision of this Intercreditor Agreement shall be invalid, illegal or unenforceable, the validity, legality and enforceability of the remaining portions shall not in any way be affected or impaired. In case any covenant, stipulation, obligation or agreement of the Government contained herein shall for any reason be held to be in violation of law, then such covenant, stipulation, obligation or agreement shall be deemed to be the covenant, stipulation, obligation or agreement of the Government to the full extent permitted by law.

26. Multiple Counterparts. This Intercreditor Agreement may be executed in multiple counterparts, all of which shall constitute one and the same instrument and each of which shall be, and shall be deemed to be, an original.

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

[NAME OF GUARANTEED LENDER]

By: _____

Name: _____

Title: _____

[ADD ACKNOWLEDGEMENT]

[Signatures Continue on Following Page]

THE SECRETARY OF THE AIR FORCE

By: _____

Name: _____

Title: _____

[ADD ACKNOWLEDGEMENT]

ATTACHMENTS

- Exhibit A. Description of Leased Premises
- Exhibit B. List of Guaranteed Loan Documents
- Exhibit C. List of Subordinate Loan Documents
- Exhibit D. Lockbox Agreement

The undersigned Borrower is executing this Intercreditor Agreement for the purposes of acknowledging that the Loans are subject to its terms and conditions.

[NAME OF BORROWER]

By: _____

Name: _____

Title: _____

EXHIBIT A
Property Description

EXHIBIT B

List of Guaranteed Loan Documents

EXHIBIT C

List of Subordinate Loan Documents

EXHIBIT D
Lockbox Agreement