

Mixed-Finance Capital Advance Program Agreement & Certification

For Section 202 of the Housing Act of 1959
or Section 811 of the National Affordable
Housing Act

U.S. Department of Housing
and Urban Development
Office of Housing
Federal Housing Commissioner

OMB Control NO. 2502-XXXX
(exp. xx/xx/xxxx)

Public reporting burden for this collection of information is estimated to average 0.5 hour (30 minutes) per response, including the time for reviewing instructions, searching existing data sources, gathering and maintain the data needed, and completing and reviewing the collection of information. HUD may not collect this information and you are not required to complete this form, unless it displays a currently valid OMB control number.

This information collection is necessary to ensure that viable projects are developed. It is important to obtain information from applicants to assist HUD in determining if nonprofit organizations initially funded continue to have the financial and administrative capacity needed to develop a project and that the project design meets the needs of the residents. The Department will use this information to determine if the project meets statutory requirements with respect to the development and operation of the project, as well as ensuring the continued marketability of the project. This information is required in order to obtain benefits. This information is considered non-sensitive and no assurance of confidentiality is provided.

(For use in Capital Advance Closings Upon Completion Cases. Must be executed before executing the construction contract.)

This Agreement made this _____ day of _____, 20____, by and between (hereinafter called Owner), and the Secretary of Housing and Urban Development (hereinafter called HUD).

Whereas, Owner has applied to HUD for a capital advance in the amount of \$_____ for the purpose of constructing, rehabilitating or purchasing with or without rehabilitation a housing project to be located at and identified as Project No. _____ pursuant to Section 202 of the Housing Act of 1959 or Section 811 of the National Affordable Housing Act. The project will contain _____ Capital Advance-assisted units and non-Capital Advance-assisted units.

Whereas, HUD has issued a commitment to disburse capital advance funds upon completion of the project in an amount not to exceed \$ _____, which amount, however, is subject to reduction as provided in the Regulations promulgated pursuant thereto limit the amount of capital advance to the development cost of the Capital Advance-assisted units within the project.

Now Therefore this Agreement Witnesseth:

(1) That in consideration of the agreement by HUD to make said capital advance, the Owner agrees to submit to HUD prior to disbursement of the capital advance its Certificate of Actual Cost, and, if required, the Contractor's Certificate of Actual Cost, on forms prescribed by HUD, and/or Contractor's Subcontractor's and Owner's Certifications. Owner agrees that all Certificates of Actual Cost shall be certified to by an independent Certified Public Accountant or an independent Public Accountant in form acceptable to HUD. The Owner further agrees that if HUD, for cost certification purposes accepts estimates of cost for any items the Owner will, upon determination of actual cost, submit in a form satisfactory to HUD a certification of such

actual costs which shall be reduced by the net amount (total receipts less expenses of perfecting claims) of settlement of claims against bonding companies or others, and if the substitution of such certified actual costs for the estimates of cost which were used at final disbursement would have required a reduction of the mortgage, the reduction so required shall be made provided that the entire amount, or any part thereof may, with the consent of HUD, be deposited in the Reserve Fund for Replacements.

(2) Owner and HUD agree that, prior to disbursement, the mortgage note will comply with the provisions of Section 202 of the Housing Act of 1959 or Section 811 of the

National Affordable Housing Act and the applicable regulations.

(3) Owner certifies that no financial interests or family relationships exist between Owner or any of its officers, directors, or stockholders with the Architect or with the General Contractor, subcontractors, suppliers, or equipment lessors.

(4) Owner agrees to notify HUD, in writing prior to disbursement, of any change in relationship subsequent to the execution of this Agreement which results in an identity of interest of the Owner with the General Contractor, or any subcontractor, supplier, or equipment lessor, in which case the Owner's certification of actual cost will be accompanied by the Contractor's certification of actual cost in form prescribed by HUD and, if required by HUD, certification of actual cost by such subcontractor, supplier, or equipment lessor. It is agreed that the absence of such notice may be treated by HUD as a representation that no change in relationship has occurred which creates any identity of interest.

(5) Owner agrees to maintain and keep adequate records of all costs referred to in (1) above, and to make such records available for examination by HUD upon request.

(6) Owner agrees to include in the construction contract a requirement that the Contractor shall maintain adequate records of all actual costs of labor and materials and necessary services, and make such records, documents, contracts and accounts available for review upon request by HUD.

(7) Owner agrees that it will require in the general contract and in all agreements with subcontractors a provision that if there is or comes into being any identity of interest between the General Contractor and any Subcontractor, then (a) such Subcontractor will agree to submit to HUD (unless specifically waived by HUD) a certificate of the actual cost of providing the material

and/or services after deduction of all kickbacks, rebates, adjustments, discounts, or any other arrangements in the nature thereof, and (b) such Subcontractor will join in the execution and submission of the HUD form for Contractor's, Subcontractor's and Owner's Certifications. The Subcontractors' certificates of actual cost will be supported by the certifications of an independent Certified Public Accountant or an independent Public Accountant in form acceptable to HUD. For purposes of determining actual cost, no profit or general overhead may be included in the subcontract unless HUD has in advance approved in writing of the subcontract and has approved a specific dollar amount or a specific percentage for profit and/or general overhead.

(8) Owner agrees that if there comes into being any identity of interest between the General Contractor and Architect, the Architect will be relieved immediately of inspection duties and the maximum Architect's fees allowable for cost certification purposes will be \$_____ for design services only. No fee will be allowed to the identity of interest Architect for supervision.

(9) Owner agrees that the construction contract will be on a lump-sum fee basis or on a cost-plus fee basis with a maximum upset price and that for the purpose of determining the actual cost of the physical improvements on the mortgaged property, the allowance for the Contractor's fee shall not exceed \$_____ and the general overhead expense shall not exceed \$_____, provided, however, that in the event more than 50 percent of the actual cost of construction is subcontracted with any one contractor or subcontractor, or more than 75 percent with three (3) or less contractors or subcontractors, the Contractor's fee provided for herein shall not be allowed as an actual cost. For the purpose of this paragraph, it is further agreed that (a) the terms contractors or

subcontractors include material suppliers and equipment lessors, and (b) any two or more contractors or subcontractors having an identity of interest or common ownership shall be considered as one contractor or subcontractor.

(10) The Owner agrees to submit with this form signed duplicate copies of any collateral agreement(s) and/or side deal agreement(s) executed by the Owner or any principals of the Owner evidencing any

secured or unsecured borrowing made in association with the construction of the project. The Owner further agrees to obtain the approval of HUD before entering into any such agreement after executing this form.

(11) The foregoing agreements and certifications by the Owner are made and delivered for the purpose of influencing an official action of HUD and are to be relied upon as true and correct.

In Witness Whereof, the parties hereto have duly executed this instrument the year first above written.

Attest:

(Owner)

By:

(General Contractor)

By:

Secretary of Housing and Urban Development by and
Through the Federal Housing Commissioner

By (Authorized Agent)