

Escrow Agreement For Latent Defects

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

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This ESCROW AGREEMENT FOR LATENT DEFECTS (“Agreement”) made this _____ day of _____, 20__, by and between _____, (“**Lender**”), whose principal address is _____, (“**Borrower**”), whose principal address is _____, and _____, (“**Contractor**”), whose principal address is _____, [and if applicable, _____, (“**Depository Institution**”), whose principal address is _____]. (The definition of any capitalized term or word used herein can be found in this Agreement, the Regulatory Agreement between Borrower and HUD, the Note, and/or the Security Instrument, except that the term “**Program Obligations**” means (1) all applicable statutes and any regulations issued by the Secretary pursuant thereto that apply to the Project, including all amendments to such statutes and regulations, as they become effective, except that changes subject to notice and comment rulemaking shall become effective only upon completion of the rulemaking process, and (2) all current requirements in HUD handbooks and guides, notices, and mortgagee letters that apply to the Project, and all future updates, changes and amendments thereto, as they become effective, except that changes subject to notice and comment rulemaking shall become effective only upon completion of the rulemaking process, and provided that such future updates, changes and amendments shall be applicable to the Project only to the extent that they interpret, clarify and implement terms in this Agreement rather than add or delete provisions from such document. Handbooks, guides, notices, and mortgagee letters are available on “HUDCLIPS,” at www.hud.gov.)

RECITALS:

A. Borrower is the owner of a Project known as _____, located in the City/County of _____, State of _____, and further identified as HUD Project No. _____.

B. The Date of Final Completion, which is defined as the date the HUD representative signs the final HUD Representative’s Trip Report (form HUD-95379), provided that the

trip report is subsequently endorsed by the construction manager, was _____, 20_____.

C. Contractor shall remedy or cause to be remedied all defects in the work due to faulty materials or workmanship, defective materials or damage to the Project resulting from such defects, which defects or damage become apparent within twelve (12) months (“**Latent Defects**”) after the Date of Final Completion. Contractor further agrees to pay for all labor and materials necessary to complete the construction and remedy said Latent Defects. Contractor’s liability for the completion of the construction and remedying the Latent Defects shall not be limited to the amount of the Deposit.

AGREEMENTS:

In consideration of the above premises, and for other good and valuable consideration, the parties acknowledge and agree as follows:

1. Contractor herewith deposits with Lender, or subject to the control and order of Lender, with a depository institution satisfactory to Lender in accordance with Program Obligations, the sum of \$_____ (“**Deposit**”). The Deposit shall equal two and one-half percent (2 ½%) of the total amount of the Construction Contract and shall be in the form of (i) a cash escrow; (ii) an irrevocable, unconditional letter of credit issued to Lender by a banking institution, attached hereto as Exhibit “A”. The rating of the issuing banking institution and the duration of such letter(s) of credit shall comply with Program Obligations; or (iii) a surety bond, from a surety on the accredited list of the U.S. Treasury.
2. The Deposit shall be maintained by Lender to guarantee against Latent Defects. The Deposit shall be used for the correction of Latent Defects, as may be required by either Lender or HUD.
3. Contractor covenants and agrees on demand of Borrower, Lender or HUD to remedy or cause to be remedied all Latent Defects, within 60 days of such demand.
4. Contractor acknowledges that all work performed pursuant to this Agreement is subject to the labor standards contained in Supplementary Conditions of the Contract for Construction (HUD-92554M), or its replacement, as acknowledged from time to time by the original General Contractor in executing the Contractor's Prevailing Wage Certificate on the back of Contractor's Requisition, Project Mortgages (HUD-92448) (“**Certificate**”). Contractor expressly agrees to be bound by the terms and provisions of the said Conditions and the Certificate. Prior to the release of any portion of the Deposit, Contractor shall submit a Certificate duly executed by each contractor performing any of the work and dated subsequent to the completion of such work.
5. In the event Contractor fails to comply with the provisions of Section 3 of this Agreement, Lender, with the approval of HUD, shall have the right, in its discretion, to complete the correction of said Latent Defects in construction and pay the cost thereof,

including any related property and/or liability insurance coverage, and all the costs and a reasonable fee of Lender, from the Deposit. For this purpose, Contractor irrevocably appoints Lender as its attorney-in-fact, with full power of substitution, to do and perform for Contractor, in Contractor's name, place and stead, all matters and things which Lender shall in its judgment deem necessary and proper to be done to effectuate the completion of said work, and to apply the Deposit to the payment of debts, expenses, costs and charges of any kind contracted or incurred in connection therewith. The orders given by Lender as attorney-in-fact for Contractor shall be good and sufficient vouchers for all payments made by virtue thereof. In this connection, this power of attorney shall provide Lender with full and sufficient authority to enter into and upon the Project and take charge thereof, together with all materials, appliances, Fixtures, and other improvements and to call upon and require contractors to complete the work. To the extent that Lender and/or its contractors complete said work, such work remains subject to the labor standards referenced in Section 4 of this Agreement, and Lender shall obtain a Certificate duly executed by each contractor performing any of the work at Lender's direction and dated subsequent to the completion of such work. Except for intentional misconduct or gross negligence on the part of Lender, Contractor shall indemnify, hold harmless and defend Lender from and against claims of third parties arising from Lender's performance under this Section. Lender shall have the right to obtain any property and/or liability insurance coverage which Lender shall in its judgment deem necessary or appropriate in connection with Lender's performance under this Section. Lender will not be responsible for the performance of work beyond the expenditure of the amount available from the Deposit, and, if that amount is insufficient, Lender will be under no obligation to proceed further with the work or to demand additional sums. The power granted herein is coupled with an interest, and Contractor and Borrower acknowledge and agree that all powers granted herein to Lender may be assigned to HUD.

6. With the exception of those amounts expended by Lender pursuant to Section 5 of this Agreement, any and all disbursements from the Deposit shall be made only upon prior written authorization by HUD, using a form prescribed by HUD, to meet any established cost for which the Deposit was intended.

7. Subject to HUD approval, and provided that there does not then exist an Event of Default, any balance remaining on account of the Deposit shall be returned to, or as directed by Contractor, upon the later of the following:

- (i) fifteen (15) months after the Date of Final Completion, or
- (ii) such time as all Latent Defects have been corrected to the satisfaction of HUD.

8. The Deposit, when in the form of cash, shall be held by Lender, or a depository institution satisfactory to the Lender, in accordance with Program Obligations. Lender may, at any time, for any reason or no reason, draw upon any letter of credit included in the Deposit and convert the same to cash, which cash shall then be held and disbursed pursuant to the terms of this Agreement. Fees charged by Lender and any interest earned on the Deposit shall be governed by Program Obligations.

9. Notwithstanding an Event of Default by Borrower under the Security Instrument at any time, this Agreement shall not terminate until such time as all Latent Defects have been corrected to the satisfaction of HUD.

Each signatory below hereby certifies that each of their statements and representations contained in this Agreement and all their supporting documentation thereto are true, accurate, and complete. This Agreement has been made, presented, and delivered for the purpose of influencing an official action of HUD in insuring the Loan, and may be relied upon by HUD as a true statement of the facts contained therein.

IN WITNESS WHEREOF, the parties have duly executed this Escrow Agreement for Latent Defects as of the day and year first above written.

BORROWER:

LENDER:

By:_____

By:_____

Print Name and Title

Print Name and Title

CONTRACTOR:

DEPOSITORY INSTITUTION:

By:_____

By:_____

Print Name and Title

Print Name and Title

Attachment: Exhibit "A"

EXHIBIT "A"

Form of Letter of Credit

