



POLICY FOR OPT-OUT PROVISION

Low Income Housing Tax Credit Program



Community Housing and Grants Management Division

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INTRODUCTION

The Omnibus Budget Reconciliation Act of 1989 required that all properties receiving an allocation of Housing Credits after January 1, 1990, are subject to an “extended use period” that lengthened the time that credit properties were required to maintain affordability from 15 to 30 years. To ease concerns of program participants about the economic viability of maintaining affordability without additional subsidy, the 1989 Act also provided an option for owners to exit the program at the end of the initial 15-year compliance period by requesting that the state agency either purchase the property or assist in finding a buyer at a determined “qualified contract price.”

Even though the 1989 Act provided the owners with an opt-out provision in year 15, many owners in North Dakota, as well as across the country, gave up their right to an early opt-out in return for additional points in the scoring process. This policy will apply to those properties that are eligible for opt-out at some time prior to the 29th year of usage.

Owners are encouraged to review their copies of applications submitted to the agency when applying for an allocation of credits as well as the deed restrictions (LURA) to determine if and when they are eligible to pursue the opt-out provision. If eligible for early opt-out, owners may request North Dakota Housing Finance Agency (the “Agency”) to find a buyer for the low-income portion of a property during, or any time after the fourteenth year of the initial compliance period. Owners will be allowed only one opportunity to pursue the Qualified Contract process per property. If the Agency is unable to find a buyer pursuant to a Qualified Contract, the property may be converted to market rate use.

Owners must notify the Agency of their desire to sell the property using the process outlined below. Once complete and proper notice has been received, the Agency has one year to find a buyer for the property at a pre-determined price, not to exceed the “Qualified Contract Price” (QCP). The qualified purchaser can be a nonprofit or for-profit entity that agrees to maintain the affordable housing units and fulfill all requirements of the extended use agreement.

Owners who elect to exercise their opt-out option must complete and submit the following items to the Agency:

- The Qualified Contract Notification Letter (copy attached).
- A fully completed “Calculation of Qualified Contract” Price, including Worksheets A-E (copies attached). This form must be completed by, or reviewed and approved by, an independent third-party CPA who is not an employee, officer, partner, member or shareholder of the owner.
- A thorough narrative description of the property, including all amenities sufficient to familiarize prospective purchasers with the property.
- A description of all income, rental and other restrictions, if any, applicable to the operation of the property.
- A detailed set of photographs of the property, including the interior and exterior of representative apartment units and buildings, and the property’s grounds (including digital photographs that may be easily displayed on the Agency website).
- Copies of the last three years operating statements for the property showing operating expenses, debt service, gross receipts, net cash flow and debt service coverage ratios.
- A current and complete rent roll for the entire property.

- If any portion of the land or improvements is leased, copies of the leases.
- Application fee of one fourth of one percent of the Qualified Contract Price, as determined by the CPA.

Upon receipt of these documents, the Agency will review the material and may request additional information, as needed. Once all the information needed is received and reviewed, the Agency will notify the owner that the one-year period has begun, and the Agency will begin marketing the property. Marketing efforts will include posting the information on our website and in the Agency newsletter and other efforts deemed reasonable. Marketing of the property will continue until such time as title has been transferred, or the one-year time frame has expired.

The owner must agree to list the property for sale with a broker who works with affordable multifamily housing properties and cooperates with the Agency in its efforts to market the property. This may include providing copies of additional rent rolls, project tax returns, income certifications, repair and maintenance records, operating expenses and debt service information, and other due diligence documents, as well as allowing access to the property for inspection by the Agency, its agents, and prospective buyers. Lack of cooperation will cause the process to cease, and the owner will be required to comply with the low-income usage requirements for the remaining extended use period.

The owner is not required to accept the first or any of the purchase offers presented, however, if the owner rejects an offer at or above the QCP that has been presented by a qualified purchaser, the development will remain as affordable for the remaining term of the extended use period. The owner may accept less than the QCP but cannot require a price higher than the QCP. The owner is required to notify the Agency of any purchase offers. The Agency must be satisfied that the purchaser is familiar with and prepared to comply with the requirements of the HC program. The Agency may reject purchasers who have failed to demonstrate proficiency with the HC program or other analogous or similar government programs.

Purchasers who have been convicted or, enter an agreement for immunity from prosecution for, or plead guilty, including a plea of nolo contendere or similar plea, to: a crime of dishonesty, moral turpitude, fraud, bribery, payment of illegal gratuities, perjury, false statement, racketeering, blackmail, extortion, or falsification or destruction of records are ineligible to purchase the developments through the Qualified Contract process. Purchasers or members of the management team who have been debarred from any North Dakota state program, other state program, or any federal program are ineligible. Purchasers having an identity of interest with people or entities falling into any of the above categories may not be eligible, at the sole discretion of the Agency.

If the Agency is unable to find a buyer pursuant to the "Qualified Contract" before the expiration of the one-year period, the project will no longer be subject to the low-income usage restrictions but will be subject to the requirements of Section 42(h)(6)(E)(ii) that state that for a three year period commencing on the termination of the extended use period, the owner may not evict or terminate tenancy for other than good cause of an existing tenant of any low-income unit or increase the gross rent beyond that allowed under the program. The owner will be required, at the end of each year of the three-year period, to provide certification to the Agency that these requirements have been met. The owner will be required to provide notice to the existing tenants that the low-income use restrictions have been terminated and inform them of their protections during the three-year time frame.

Qualified Contract Notification Letter

Date

North Dakota Housing Finance Agency
PO Box 1535
Bismarck, ND 58502

Re:
BIN # ND

Dear

On behalf of _____ (Property Owner), we hereby request that the North Dakota Housing Finance Agency (the "Agency") present a "qualified contract" for the purchase of _____ (Property Name). This request is made pursuant to Section 42(h)(6)(E)(i)(ii) of the Internal Revenue Code. We understand the Agency will have one year from its receipt of this letter and all the accompanying information described below, to present a "qualified contract" for the purchase of the Project.

We have enclosed with this request the following documents and information required by the Agency:

1. A fully completed "Calculation of Qualified Contract" Price, including Worksheets A-E and a certification by an independent CPA that the Calculation Worksheets were completed, or reviewed and approved, by that CPA.
2. A narrative description of the Project, including all amenities, suitable for familiarizing prospective purchasers with the property.
3. A description of all income, rental and other restrictions, if any, applicable to the operation of the property.
4. A detailed set of digital photographs of the property for use on the Agency website, including the interior and exterior of representative apartment units and buildings, and the property grounds.
5. The last three years of historical financial operating statements for the property which will fairly apprise a potential purchaser of the property's operating expenses, debt service, gross receipts, net cash flow, and debt service coverage ratio.
6. A current rent roll for the entire property.
7. If any portion of the land or improvements are leased, copies of the leases.
8. Prepared draft purchase agreement
9. Copy of recent property appraisal that is no more than 6 months old.
10. Application fee of .25% of the CPA-determined Qualified Contract Price

We understand that the above information may be shared with prospective purchasers, real estate brokers, and agents of the Agency and that summary data may be posted on the Agency website.

We will cooperate in a reasonable manner with the Agency and its agents with respect to the Agency's efforts to present a qualified contract for the purchase of the property. In this regard, we understand that prior to the presentation of a qualified contract, we may need to share property "due diligence" with the Agency and with prospective purchasers, including but not limited to, additional rent rolls, project tax returns, income certifications and other Section 42 compliance records, records with respect to repair and maintenance of the property, operating expenses and debt service. Provided, before information is shared with a prospective purchaser, we may require that it enter into a commercially reasonable form of nondisclosure agreement. We will also share with the Agency, at its request, the documents and other information that were used to prepare the enclosed "Calculation of Qualified Contract Price, including Worksheets A-E. We also agree to allow the Agency, its agents, and prospective purchasers, upon reasonable written notice, to visit and inspect the property, including representative apartment units.

We acknowledge and certify that

1. We have conducted our own investigation and due diligence with respect to the Calculation of the Qualified Contract Price and the Qualified Contract procedures set forth in Section 42(h)(6)(F) of the Internal Revenue Code.
2. We are solely responsible for documents and information provided to the Agency with this notification letter, including the Calculation of Qualified Contract Price form and the worksheets thereto, and any other documents or project information that we may provide to the Agency and/or share with prospective purchasers later (Collectively, the "Project Sales Information").
3. To our knowledge, the Project Sales Information is truthful, accurate and complete and contains no misstatements or misleading information.
4. Neither the Agency nor any employees or agents have made any independent investigation or review of the accuracy, truthfulness or completeness of the Project Sales Information.
5. By submission of this notification letter, we agree to indemnify, defend, and hold the Agency harmless with respect to the Agency's use of the Project Sales Information.

We agree that the Agency and its employees and agents shall have no liability to us with respect to the Calculation of the Qualified Contract Price or any other act, omission, or determination by the Agency with respect to marketing the property or carrying out its responsibilities under Section 42(h)(6)(F) of the Code, so long as the Agency is acting in good faith.

We also understand that if the Agency finds a prospective purchaser willing to present an offer to purchase the property for an amount equal to or greater than the "qualified contract" price, we agree to enter into a commercially reasonable form of earnest money agreement or other contract of sale for the property which will allow prospective purchaser a reasonable period of time to undertake additional, customary due diligence prior to closing of the purchase.

Sincerely,

Attachments

Instructions for Calculation of Qualified Contract Price

Before the Agency will commence marketing your project, you must complete the Calculation of Qualified Contract Price form attached to these instructions (the "Calculation Form"). This calculation will establish the minimum price at which the Agency will market your project and present an offer for its purchase.

To complete the Calculation Form, you must complete Worksheets A through D and, if the project has market rate units, Worksheet E. The results of Worksheets A through E are transferred to the Calculation Form to determine the Qualified Contract Price for the property.

The Calculation Form is derived from a statutory formula set forth in Section 42 (h)(6)(F) of the Internal Revenue Code. The statutory formula divides the purchase price between the low-income portion of the project and the market rate portion of the project, if any. Qualified Contract Price for the low-income portion of the project is equal to the sum of project indebtedness (Worksheet A), investor equity (Worksheet B), and other capital contributions (Worksheet C) reduced by the total cash that has been distributed, or is available for distribution, from the project (Worksheet D). If the project has any market rate units, the Qualified Contract Price is increased by the fair market value of those units (Worksheet E).

Please remember that the twelve-month period for finding a buyer will not commence until the Calculation, and Worksheets A through E, are completed and returned to the Agency with the notification letter and other required materials. The Calculation must be prepared or reviewed and approved by an independent third-party CPA who is not an employee of the owner.

Calculation of Qualified Contract Price Pursuant to Section 42(h)(6)(F) of the Internal Code

As of Date

A. Calculation of Low-Income Portion of Payment:

1. Outstanding Indebtedness secured by, or with respect to the buildings (from Worksheet A)	
2. Adjusted Investor Equity (from Worksheet B)	
3. Other Capital Contributions not reflected in from Worksheet C	
4. Total of 1, 2 and 3	
5. Cash Distributions from or available from, the Project (from Worksheet D)	
6. Line 4 reduced by Line 5	
7. Applicable fraction (as set forth in the Tax Credit Regulatory Agreement)	%
8. Low-Income Portion of Qualified Contract Price (Line 6 multiplied by Line 7)	

B. Fair Market Value of Non-Low-Income Portion of Building(s) (from Worksheet E)	
Qualified Contract Price (Sum of Line A8 and Line B)	

WORKSHEET A**Outstanding Indebtedness with Respect to Low-Income Building(s) Code Section 42(h)(6)(F)(i)(I)****Instructions**

The Qualified Contract Price includes the unpaid balance of all secured and unsecured indebtedness with respect to the low-income buildings. Worksheet A requires you to set forth certain information with respect to each mortgage loan and other project indebtedness: The name of the lender, the unpaid principal balance, the accrued interest, the maturity date, and other relevant information.

In the section marked “Other Information” (with respect to each loan), please set forth any information with respect to the loan that may be relevant to the Agency’s efforts to market the project. Examples of relevant information include whether the loan has a “due-on- sale” clause or if any portion of the loan is payable from net cash flow (i.e., is “soft” debt). Please also attach to the worksheet an amortization schedule for each loan, if available.

In addition to mortgage indebtedness, you should also list any unsecured, long-term debt the proceeds of which were used directly in the construction, rehabilitation, or operations of the project.

The unpaid principal balance and accrued interest for each loan set forth on this worksheet should be totaled and that total should be transferred to Section A1 of the Calculation Form.

A. First Mortgage Loan (attach amortization schedule, if available)

Lender	
Principal Balance	
Accrued Interest	
Maturity Date	
Other Information	
Subtotal	

B. Second Mortgage Loan (attach amortization schedule, if available)

Lender	
Principal Balance	
Accrued Interest	
Maturity Date	
Other Information	
Subtotal	

C. Third Mortgage Loan (attach amortization schedule, if available)

Lender	
Principal Balance	
Accrued Interest	
Maturity Date	
Other Information	
Subtotal	

D. Fourth Mortgage Loan (attach amortization schedule, if available)

Lender	
Principal Balance	
Accrued Interest	
Maturity Date	
Other Information	
Subtotal	

E. Other Indebtedness with respect to low-income building(s) (attach amortization schedule, if available)

Lender	
Principal Balance	
Accrued Interest	
Maturity Date	
Other Information	
Subtotal	

Total Indebtedness with respect to Low-Income Portion of the building(s). Sum of A-E subtotals above.	
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WORKSHEET B

Calculation of Adjusted Investor Equity in the Low-Income Building(s) Code Section 42(h)(6)(F)(i)(II)

Instructions

The Qualified Contract Price includes the sum of the “Adjusted Investor Equity” with respect to the project. “Adjusted Investor Equity” means, with respect to each calendar year, the aggregate amount of cash that taxpayers invested with respect to the low-income buildings, increased by the applicable cost-of-living adjustment, if any.

Not all capital contributions with respect to the project qualify as “Adjusted Investor Equity.” Specifically, cash invested in the project should be included in this Worksheet B only if each of the following is true:

The cash is contributed as a capital contribution and not as a loan or advance.

1. The amount is reflected in the adjusted basis of the project (until there is further guidance from the Internal Revenue Service, the Agency will interpret this to mean cash contributions used to directly fund adjusted basis and cash contributions used to pay off a construction or bridge loan, the proceeds of which directly funded adjusted basis).
2. There was an obligation to invest the amount as of the beginning of the credit period (until there is further guidance from the Internal Revenue Service, the Agency will interpret this to include cash actually invested before the beginning of the credit period and cash invested after the beginning of the credit period for which there was an obligation to invest at the beginning of the credit period).
3. With respect to Worksheet B, for each calendar year, requires you to set forth the identity of the investor. Typically, this will be the tax credit investor (i.e., the investor limited partner); however, it may include a general partner if the cash investment by a general partner otherwise satisfies the requirements set forth above.

Subsection 2 requires you to set forth the amount of qualifying cash equity that was invested in the project for that calendar year. This amount should include only cash that was actually contributed to the project that year; it should not include amounts for which there was a mere obligation to invest.

Subsection 3 sets forth the cost-of-living adjustment for each calendar year. Investment amounts qualifying as investor equity are entitled to a cost-of-living adjustment. The Agency has calculated the applicable cost-of-living adjustment for each year based on the Consumer Price Index – All Urban Consumers available through the U.S. Department of Labor, Bureau of Labor Statistics. Pursuant to Sections 1(f) and 42(h)(6)(G)(ii) of the Code, the CPI adjustment is calculated for each twelve-month period ending August 31. Accordingly, in September of each year the Agency will recalculate and revise the “Cost of Living Adjustments” set forth in this worksheet. If you have questions with respect to the Agency’s calculations of the cost-of-living adjustments, you may request an explanation from the Agency.

For each calendar year, the amount of “Adjusted Investor Equity” is the sum of the qualifying investment amount and the cost-of-living adjustment. After calculating the investment amount and cost-of-living adjustment, if any, for each year, these amounts must be totaled and set forth in the final row of the worksheet. This total is then transferred to Section A2 of the Calculation Form.

A. Adjusted Investor Equity

Year	
Investor	
1. Investment Amount	
2. Cost of living adjustment %	
3. Subtotal (1+2)	

B. Adjusted Investor Equity

Year	
Investor	
1. Investment Amount	
2. Cost of living adjustment %	
3. Subtotal (1+2)	

C. Adjusted Investor Equity

Year	
Investor	
1. Investment Amount	
2. Cost of living adjustment %	
3. Subtotal (1+2)	

D. Adjusted Investor Equity

Year	
Investor	
1. Investment Amount	
2. Cost of living adjustment %	
3. Subtotal (1+2)	
Total Adjusted Investor Equity (Sum of all subtotals)	

Attach additional sheets if necessary.

WORKSHEET C**Other Capital Contributions Code Section 42(h)(6)(F)(i)(III)**

Instructions

The Qualified Contract Price includes the amount of other capital contributions made with respect to the project. For this purpose, “other capital contributions” are not limited to cash (at least until there is contrary guidance from the Internal Revenue Service) and, therefore, include “in-kind” contributions such as land. However, if you include any non-cash contributions in this worksheet, please describe in detail the type of contribution, the value you have assigned to the contribution, and your justification for assigning that value.

Do not include in this Worksheet C any amounts included in Worksheets A or B. Further, all amounts included in this worksheet must constitute contributed capital and not be a debt or advance.

After setting forth the required information with respect to each contribution, please total the contribution amounts and then transfer the total to Section A(iii) of the Calculation Form.

Investment Amount	
Name of Investor	
Date of Investment	
Use of Contributions/Proceeds	
Other Information	

Investment Amount	
Name of Investor	
Date of Investment	
Use of Contributions/Proceeds	
Other Information	

Total of Other Contributions	
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Attach additional sheets if necessary.

WORKSHEET D

Cash Distributions From, or available from the Project Code Section 42 (h)(6)(F)(ii)

Instructions

The Qualified Contract Price is reduced by the total of all cash distributions from, or available from, the project. To assist you in this calculation, we have divided Worksheet D into three sections.

In Section A, set forth all cash distributions with respect to the project for calendar years requested by the Agency. Generally, this will include all cash payments and distributions from net operating income (i.e., “below the line” distributions and payments, after the payment of operating expenses, debt service, and reserve). Distributions set forth in Section A of the worksheet will include, but not be limited to, amounts paid to partners or affiliates as fees (including investor fees, partnership management fees, incentive management fees and guaranty fees) and amounts distributed to partners as a return of capital or otherwise. Until guidance is provided by the Internal Revenue Service, the Agency will not reduce the Qualified Contract Price by payments of deferred Developer Fee to the extent the amount of fee was within the Agency’s guidelines. We require, however, that you list all payments and distributions from net cash flow. If you believe any portion of a payment or distribution should be excluded from the calculation (such as deferred Developer Fee), please identify such payments or distributions and provide an explanation of why it should be excluded.

Section A of the worksheet provides for up to five (5) types of distributions of net operating income for each year. If there are more in any calendar year, you will need to attach an addendum to the worksheet setting forth the recipient, characterization and amount of such distribution.

The Qualified Contract Price is reduced not only by cash distributions made with respect to the project but also all cash that is available for distribution. In Section B you are required to set forth the amounts held in reserve and other project accounts and the amounts thereof that are available for distribution. Until such time as guidance is provided by the Internal Revenue Service, the Agency will interpret “available for distribution” to mean all cash held in project accounts the distribution of which is not prohibited by mortgage restrictions, regulatory agreements or similar third-party contractual prohibitions. An amount currently held in a project account that will become unrestricted and available for distribution on or before the expiration of the one-year qualified contract period should be listed as available for distribution in Section B.

Finally, Section C requires you to set forth and describe any non-cash distributions that have been made with respect to the project. Absent unusual circumstances, the amount of “non-cash distributions” will not be applied to reduce the Qualified Contract Price (until contrary guidance from the Internal Revenue Service).

To complete Worksheet D, please total the qualifying cash distributed for all calendar years under Section A and the cash available (or that will be available) for distribution in Section B. The total of Sections A and B should be transferred to Section A5 of the Calculation Form.

A. Cash Distributed

Year	
Recipient and Characterization	Amount

Low Income Housing Tax Credit Program Policy for Opt-Out Provision

Total Distributions	

Year	
Recipient and Characterization	Amount
Total Distributions	

Year	
Recipient and Characterization	Amount
Total Distributions	

Year	
Recipient and Characterization	Amount
Total Distributions	

Attach additional sheets if necessary.

Total Distributions (Sum of All Totals)	
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B. Cash Available for Distribution

1. Amounts Held in Replacement Reserve Account(s)	
a. Amount available for Distribution	
2. Amount(s) Held in Operating Reserve Account(s)	
a. Amount available for Distribution	
3. Amounts Held in Other Reserve Accounts (identify each account, the terms thereof, and amount held therein)	
a. Amount available for Distribution	
4. Amounts Held in Partnership Accounts Other than Reserves	
a. Amount available for Distribution	
Total Amount Available for Distribution (sum of lines 1a-4a)	
Total Cash Distributed and Available for Distribution (sum of Sections A and B)	

C. List of All Non-Cash Distributions (identify asset distributed, recipient value, and characterization of distribution)

Asset Distributed	
Recipient	
Date of Distribution	
Estimated Value of Asset When Distributed	
Reason For and/or Characterization of Distribution	

Asset Distributed	
Recipient	
Date of Distribution	
Estimated Value of Asset When Distributed	
Reason For and/or Characterization of Distribution	

Attach additional sheets if necessary.

WORKSHEET E

Fair Market Value on Non-Low-Income Portion of Building(s)

The fair market value of the non-low-income portion of the project buildings is:	
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Set forth or attach to this worksheet the appraisal, study, methodology proof or other support for the fair market value of the non-low-income portion of the building(s). The fair market value set forth above should be transferred to Section B of the Calculation Form.