

Release of Contractor's 10 Percent Holdback

The holdback provides an incentive for the general contractor and mortgagor to promptly complete the project, submit cost certification and reach final closing.

- A. Amount Of Holdback. The Building Loan Agreement requires the mortgagee to retain at least 10 percent of the construction proceeds from each advance. The construction contract also provides for 10 percent holdback from the contractor's monthly payments for acceptably completed work, acceptably stored materials, and where applicable, components acceptably stored offsite.
- B. Identity of Interest Contractor. Except as provided in paragraphs D. and E. below, do not release any part of the holdback until final closing for a contractor with an identity of interest.
- C. Nonidentity of Interest Contractor. Release the contractor's holdback or remaining balance at the next to last advance, where requisitioned on Form HUD 92403, Application for Insurance of Advance of Mortgage Proceeds, and subject to compliance with the following:
 - 1. Contractor's cost certification, when required, has been reviewed and necessary adjustments made to Form HUD-92451, Financial Record and Mortgage Loan Transaction,
 - 2. Contractor has disclosed its final obligations on Form HUD-92023, Request for Final Endorsement of the Credit Instrument,
 - 3. All work under the construction contract has been inspected and approved by the controlling jurisdictions and/or authorities,
 - 4. Certificates of occupancy or other required approvals for the dwelling units, and non-dwelling facilities, where applicable, have been issued by governmental authorities having jurisdiction. Separate buildings for community rooms, rental offices, laundry rooms, etc., commonly require certificates of occupancy.

5. Permission To Occupy, Form FHA-2485 has been issued by HUD for all units,
6. All Davis-Bacon payroll requirements have been satisfied,
7. Surveyor's Certificate, Form HUD-92457, and survey showing the location of all improvements, utility easements and site utility distribution lines have been submitted to HUD, and
8. Retain, where applicable, an adequate amount for the following:
 - a. Items of delayed completion in an amount equal to 150 percent of the HUD representative's cost estimate for completion,
 - b. Any owed or contested amounts indicated by mechanics, subcontractor, supplier, or equipment lessor liens, etc.,
 - c. Lesser of the liquidated damages or actual damages computed at cost certification, and
 - d. Net effect of negative change orders.

D. Early Partial Release of Holdback.

1. After 90 percent contract completion, the Field Office Manager may release part of the contractor's holdback and suspend further withholding of holdback from payments due, where:
 - a. The contractor has no identity of interest or the contractor's only identity of interest is a project ownership of less than 5 percent,
 - b. The contractor, mortgagor and mortgagee request the early release of the holdback in accordance with the specimen letter below and attach the request to Form HUD 92403, Application for Insurance of Advance of Mortgage Proceeds, and
 - c. Prior written consent from surety, if any, for

the early release of holdback is provided with the request, and

2. The Field Office Manager determines that:
 - a. The contractor's general performance warrants partial release of the holdback without conditions, or
 - b. Partial release of the holdback with conditions, e.g., measures to assure immediate distributions to subcontractors or others, would be in the mutual interest of all participants, and
3. The undisbursed holdback must equal or exceed 5 percent of the contract amount.

E. Projects In Difficulty. Release of part of the contractor's holdback before 90 percent contract completion may be granted only to prevent a default of the construction loan and only if it would solve the project's problems and enable it to reach construction completion.

1. Consider the contractor's performance including:
 - a. The completed work must be satisfactory,
 - b. The percentage of completed contract work must be sufficient to ensure project completion within the specified contract time, and
 - c. Do not release any holdback if there are serious, unresolved questions concerning:
 - 1) Quality of work,
 - 2) Compliance with the contract, including outstanding change orders, or
 - 3) Work is progressing behind the contractor's construction schedule, as amended by approved change orders.

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2. Require a written consent for the early release of holdback from the surety, if any, the mortgagor and mortgagee.

SPECIMEN LETTER
REQUEST FOR EARLY PARTIAL RELEASE OF CONTRACTOR'S HOLDBACK

_____ (Field Office Manager) _____

RE: _____ (Project Name) _____
_____ (Project Location) _____
Project No. _____

Dear:

We request that you authorize release of \$ _____, of the contractor's retainage at this time. Current holdback through Requisition No. _____, \$ _____, minus the requested release, leaves \$ _____ as undisbursed holdback, which equals _____ percent of the contract amount. We also request that no further holdback be retained from future amounts due the contractor. The following certifications are provided as a basis for your favorable determination.

The undersigned hereby certify in regard to subject project, that to the best of our knowledge the following are true statements:

1. The contractor, _____, has no identity of interest as defined by the Amendment To The Construction Contract To Identify Identities Of Interest Between Owner/Contractor/Subcontractors/Architect, except that the contractor has a _____ percent ownership interest in the project.
2. Actual project completion is _____ percent, and scheduled completion is _____ percent.
3. There is no noncompliant work nor other exceptions, including: stop orders, other sanctions, or warning to impose sanctions against the contract work, or the contractor in regard to the contract work, by any controlling authority.
4. There is no violation of the Davis-Bacon and Related Acts, no claim for nonpayment by any mechanic, subcontractor,

supplier and/or lessor, no dispute regarding under or nonpayment, nor payment more than 30 days past due, except:

_____.

5. There is no claim for damage arising from the performance of the contract.
6. The contractor's performance has been timely and responsive throughout the construction period.
7. The surety, _____(where applicable, Surety Name, otherwise_____omit item)_____, has given its consent for the early release of the contractor's retainage, as requested herein. The surety's consent and power of attorney for the authorizing agent are attached hereto.

_____ (Contractor)_____ (Mortgagor)_____

By _____ By _____

_____ (Title)_____ (Title)_____

_____ Date _____ Date _____

_____ (Mortgagee)_____

By _____

_____ (Title)_____

_____ Date _____

WARNING: Title 18 U.S.C. 1001, provides in part that whoever knowingly and willfully makes or uses a document containing any false, fictitious fraudulent statement or entry, in any matter in the jurisdiction of any department or agency of the United States, shall be fined not more than \$10,000 or imprisoned for not more than five years or both.