

WISCONSIN HOUSING & ECONOMIC DEVELOPMENT AUTHORITY (WHEDA)
LOW INCOME HOUSING TAX CREDIT (LIHTC) PROGRAM
OWNER/TAXPAYER 10% INSTRUCTIONS

IMPORTANT!

Attorney or Certified Public Accountant's Certification, completed Owner/Taxpayer Certification of 10% Expenditure (all pages), and all supporting documentation must be returned to WHEDA 30 days prior to the "Required Date".

The IRS "Required Date" is 12 months after the date the LIHTC Carryover allocation was issued for the project.

If you discover that you will not be able to incur more than 10% of reasonably expected project basis 30 days prior to the "Required Date", YOU MUST NOTIFY WHEDA IMMEDIATELY! Failure to do so may result in loss of your Credit allocation and/or a penalty fee.

INSTRUCTIONS

Section 42 of the Internal Revenue Code (the "Code") requires a project being placed in service in a year subsequent to the Credit allocation year must qualify for an LIHTC Carryover Allocation. For a Carryover Allocation to remain valid, Owner/Taxpayer's basis in the project must exceed 10% of the Owner/Taxpayer's reasonably expected basis in the project by the "Required Date".

If Owner/Taxpayer accepted a Carryover Allocation for a LIHTC project and said project will place in service in the year the Carryover Allocation was issued, 10% test requirements must be met. IRS Code §42(h)(1)(e) and Treas. Reg. §1.42-6 require WHEDA verify Owner/Taxpayer has satisfied the 10% requirement by the "Required Date". To allow WHEDA sufficient time to review/verify 10% certifications, Owner/Taxpayer must certify and provide evidence that the 10% requirement has been satisfied 30 days prior to the "Required Date" (see definition of "Required Date" above).

To demonstrate to WHEDA that the 10% expenditure qualification has been satisfied, the Owner/Taxpayer must:

1. List on the "Worksheet for Calculation of 10% Expenditure" form eligible costs as of **30 days prior to the "Required Date"**. Provide supporting documentation for costs constituting more than 10% of the Owner/Taxpayer's reasonably expected basis in the project as of the "Required Date",
2. Have the "Owner/Taxpayer Certification of 10% Expenditure" form **and** "Sample Third Party Opinion Letter" completed by an Attorney or Certified Public Accountant, and
3. Certify to WHEDA on the "Owner/Taxpayer Certification" the 10% expenditure requirement of section 42 has been or will be satisfied prior to "Required Date".

REQUIRED DOCUMENTATION FOR QUALIFYING 10% EXPENDITURES

When returning these Certifications to WHEDA, the Owner/Taxpayer must submit documentation to support amounts included in the Owner/Taxpayer's accumulated basis as of the "Required Date". Accumulated basis must total more than 10% of the reasonably expected project basis.

Because WHEDA is performing this review to verify the 10% test has been met, Owner/Taxpayer need only submit sufficient documentation to accomplish that goal.

Example: Developer Bucky Badger Affordable Development (BBAD) holds a Carryover Allocation on a LIHTC project. BBAD's accumulated basis in the project 30 days prior to the "Required Date" is \$500,000. The reasonably expected project basis is \$1,000,000. BBAD satisfied the 10% test (\$500,000 divided by \$1,000,000 is equal to 50%). BBAD need **not** submit supporting documentation for the entire \$500,000 of accumulated basis; instead, submit verification of amounts in excess of \$100,000 (\$1,000,000 multiplied by 10%.)

Depending upon the situation, acceptable supporting documentation may include--but may not be limited to--copies of the following documents:

- property deed
- options to purchase
- nonrefundable deposits
- invoices
- purchase agreements
- construction contract payments

Owner/Taxpayer should obtain competent tax advice regarding expenditures eligible to meet the 10% test and the necessary documentation to support them. Since certain expenditures are open to eligibility interpretation, WHEDA recommends expending a minimum of 1% over the required 10%. Additionally, Owner/Taxpayer must provide an accountant's opinion that such expenditures are eligible.

CONSIDERATIONS REGARDING QUALIFYING 10% EXPENDITURE

The following are general guidelines regarding qualified 10% expenditures. THEY SHOULD NOT BE VIEWED AS A SUBSTITUTE FOR COMPETENT TAX ADVICE; RATHER, THEY SHOULD BE CONSIDERED ISSUES TO RAISE WITH YOUR LEGAL AND TAX COUNSEL. (This is particularly important with regard to new regulations.)

Land, or land and building acquisition, is often the largest expenditure used to meet the 10% test. Under Treas. Reg. §1.42-6, actual ownership of the land is not required; however Owner/Taxpayer must have basis in land or depreciable property. A nonrefundable deposit or an amount paid to acquire an option on land or depreciable property may be included in Carryover allocation basis to the extent that it is properly capitalizable with respect to the land or depreciable property that is reasonably expected to be a part of the project.

Increases in eligible basis as a result of the project being in a Qualified Census Tract are not counted either for the carryover-allocation basis or the reasonably expected basis.

Owners using the accrual accounting method may count accrued but unpaid costs, but cash-method Owner/Taxpayer must have actually paid the costs. Before including the costs in basis, however, the services must have been performed and the expense must meet the "all events" test.

Fees for services can satisfy the 10% requirement under the new regulations providing the:

- 1) fee is reasonable;
- 2) taxpayer is legally obligated to pay the fee;
- 3) fee is capitalizable as part of the taxpayer's basis in the land or depreciable property that is reasonably expected to be a part of the project; and
- 4) fee is not paid (or to be paid) by the taxpayer to itself.

Please Note: Owner/Taxpayer must be able to properly accrue the fees in cases where fees are paid to a person who might be considered a related person by the IRS or a person who might be regarded as being engaged in trades or business under common control . (See Treas. Reg. §1.42-6 ; IRS "TAM"s 200043017 and corresponding "Land Costs Position Paper"; TAM 200044004, 200044005 and 200043016).

Costs satisfying the 10% requirement must be incurred by the same entity that received the Credit allocation.