

§ 298.34

Cost are not then due and payable, then we and the Obligor by written agreement shall extend the Termination Date for such period as we and the Obligor shall determine is sufficient to allow for such contingencies. Any amounts remaining in the Escrow Fund on the Termination Date which are in excess of 87½ percent or 75 percent of Actual Cost, as the case may be, shall be applied to retire a pro rata portion of the Obligations.

§ 298.34 Construction fund.

(a) *Circumstances requiring deposits.* (1) When the Security Agreement provides for the establishment of an Escrow Fund, the Obligor shall also make Construction Fund deposits when the Obligor:

(i) Submits a claim to the agency that it has previously paid for items of Actual Cost and

(ii) Is seeking reimbursement at the Closing.

(2) The Obligor shall make the Construction Fund deposits as follows:

(i) At the time of the sale of the Obligations, the Obligor shall deposit with the Depository cash equal to the principal amount of the Obligations issued at such time less the sum of the aggregate principal amount then required to be in the Escrow Fund, and

(ii) The amount in excess of 12½ or 25 percent of Actual Cost or Depreciated Actual Cost, as applicable (whichever is payable under § 298.33(b) which we determine has been paid by or for the account of the Obligor.

(b) *Security interest and control.* We must have a security interest in and control over the Construction Fund and its proceeds.

(c) *Balance of the proceeds.* The Obligor will retain the balance of the proceeds, if any, from the sale of the Obligations, after depositing the amounts required to be deposited in the Escrow Fund and/or the Construction Fund.

(d) *Withdrawals and redeposits.* We shall, subject to the satisfaction of any applicable conditions contained in the Security Agreement, periodically approve disbursements from the Construction Fund under the same procedures and conditions as from the Escrow Fund in § 298.33(b), except the request for withdrawal will not be sub-

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ject to § 298.33(b)(2)(i) and (e). The administration of the Construction Fund shall also be subject to the terms and conditions of § 298.33.

§ 298.35 Title XI Reserve Fund and Financial Agreement.

(a) *Purpose.* In order to provide us with further security and to ensure payment of the interest and principal due on the Obligations, we will require the Company to enter into a Title XI Reserve Fund and Financial Agreement (Agreement) at the first Closing at which the Company issues Obligations. We may waive or modify provisions of the Agreement based on our evaluation of the aggregate security for the Guarantees.

(b) *Financial covenants.* There will be two sets of covenants. One set of covenants will be imposed regardless of the Company's financial condition (primary covenants). The other set of covenants will be imposed only if the Company does not meet specific financial conditions (supplemental covenants). The primary and supplemental covenants are to be set forth in the Agreement. Covenants shall be imposed on the Company as follows:

(1) *Primary covenants.* So long as Guarantees are in effect the Company shall not, without our prior written consent:

(i) Make any distribution of earnings, except as may be permitted as follows:

(A) From retained earnings in an amount specified in paragraph (b)(1)(i)(C) of this section, provided that, in the fiscal year in which the distribution of earnings is made there is no operating loss to the date of such payment of such distribution of earnings, and there was no operating loss in the immediately preceding three fiscal years, or there was a one-year operating loss during the immediately preceding three fiscal years, but such loss was not in the immediately preceding fiscal year, and there was positive net income for the three year period;

(B) If distributions of earnings may not be made under paragraph (b)(1)(i)(A) of this section, a distribution can be made in an amount equal to the total operating net income for the immediately preceding three fiscal year period, provided that: