

## PERFORMANCE BOND

No. \_\_\_\_\_ (the “**Bond**”)                      Bond Amount \$ \_\_\_\_\_ (the “**Bond Amount**”)

\_\_\_\_\_  
(name of the principal\*)

as a principal, hereinafter [collectively] called the “**Principal**”, and

\_\_\_\_\_  
(name of the surety company\*\*)

a corporation created and existing under the laws of \_\_\_\_\_

\_\_\_\_\_  
(place of incorporation)

as a surety, and duly authorized to transact the business of Suretyship in \_\_\_\_\_ and hereinafter called the “**Surety**”, jointly and severally, bind themselves, their heirs, executors, administrators, successors and assigns unto

\_\_\_\_\_  
(name of the obligee)

as obligee, hereinafter called the “**Obligee**”, in the amount of

\_\_\_\_\_  
(Bond amount in figures)

hereinafter called the “**Bond Amount**”, for the payment of which sum the Principal and the Surety bind themselves, their heirs, executors, administrators, successors and assigns, jointly and severally in accordance with the provisions of this Bond (the “**Obligation**”).

WHEREAS the Principal has entered into a written contract with the Obligee dated the \_\_\_\_\_ day of \_\_\_\_\_  
(name of month)

in the year \_\_\_\_\_ for: \_\_\_\_\_

\_\_\_\_\_  
(title or description of the contract)

(the “**Original Contract**”) and, for the purpose of specifying the conditions of the Obligation, this contract together with amendments made in accordance with its terms are by reference made part hereof and are hereinafter referred to collectively as the “**Contract**”.

NOW THEREFORE the condition of this Obligation is such that if the Principal shall promptly and faithfully perform the Contract then this Obligation shall be null and void; otherwise, it shall remain in full force and effect, subject to the following terms and conditions:

**1. Written Notice**

- 1.1 The Obligee may make a written demand on the Surety in accordance with this Bond, by giving notice to the Surety substantially in the form attached as Schedule A (the “**Notice**”). Except for a Pre-Notice Meeting in accordance with Section 2.1, the Surety shall have no obligation under this Bond until it receives a Notice.
- 1.2 Where the Surety includes two or more companies, the Notice may be delivered to the first listed Surety on behalf of all Sureties. The first listed Surety is hereby authorized to respond to the Notice on behalf of the Sureties,

and the Obligee is not required to give separate Notice to each Surety and is entitled to correspond with the first listed Surety on behalf of all Sureties.

## 2. **Pre-Notice Meeting**

2.1 The Obligee may, at its sole discretion and acting reasonably, request a pre-Notice conference by notifying the Surety and the Principal in writing that it is considering declaring the Principal to be in default under the Contract (the "**Pre-Notice Meeting**"). This notice and request for a Pre-Notice Meeting by the Obligee does not constitute a Notice under this Bond, nor under the Contract, nor is it a precondition to the giving of a Notice.

Upon receipt of such request the Surety shall propose a face-to-face meeting, a telephone conference call, or a meeting by any other form of electronic media between the Principal, the Obligee, and the Surety to take place at a time and place mutually convenient for all parties within seven (7) business days (or such longer time as agreed by all parties) after the Surety's receipt of the Obligee's request for a Pre-Notice Meeting in accordance with this Section. The Obligee, the Principal and the Surety shall make reasonable efforts to arrange and attend the Pre-Notice Meeting. In the event that the Obligee delivers a Notice prior to the Pre-Notice Meeting, then the request for the Pre-Notice Meeting is deemed to be retracted.

2.2 The purpose of a Pre-Notice Meeting is to allow the Obligee, prior to exercising its other rights under this Bond, to express any concerns about the Principal's performance pursuant to the Contract and to allow the Principal to respond to such concerns. The participation of the parties in one or more Pre-Notice Meetings shall be without prejudice to their respective rights and obligations under the Contract, this Bond or applicable law, and neither the participation by any party in any Pre-Notice Meeting, nor any statement or position taken or information provided by any party during any Pre-Notice Meeting, may be relied on by any other party as a waiver or compromise of the rights or obligations of the Obligee, the Surety or the Principal under the Contract, this Bond or applicable law; including, but not limited to the Obligee's right to declare the Principal in default under the Contract and give Notice under this Bond.

## 3. **Surety's Investigation and Response**

3.1 Upon receipt of a Notice from the Obligee, the Surety shall promptly initiate an investigation of the Notice (the "**Investigation**"), using its best efforts, to determine if the Conditions Precedent have been satisfied and to determine its liability, if any, under the Bond.

3.2 Within the four (4) business days following receipt of the Notice, the Surety shall provide the Obligee with an acknowledgement, substantially in the form set out as Schedule B (the "**Acknowledgement**"), identifying the date on which the Notice was received and requesting from the Obligee the information and documentation (the "**Information**") the Surety requires to continue the Investigation and, if necessary, request access to personnel who are knowledgeable about the circumstances of the Notice and to the Contract work site(s) where the work is being performed. Upon receipt of the Surety's Acknowledgement, the Obligee shall promptly, and in accordance with terms of the Contract, provide the Surety with the requested Information and access to personnel and the work site(s) within its possession or control.

3.3 The Surety shall within a reasonable time conduct the Investigation, but in any event no later than twenty (20) business days after receipt by the Surety of a Notice (or such longer period as may be agreed between the Surety and Obligee), the Surety shall provide the Obligee with its written response to the Notice, substantially in the form set out at Schedule C (the "**Surety's Position**"), advising either that:

- a) The Surety accepts liability under the Bond and proposes to satisfy its Obligation by performing one of the options set out in Section 6.1; or
- b) The Surety does not accept liability, providing its specific reasons; or
- c) The Surety is unable to determine whether or not one or more of the Conditions Precedent has been satisfied and, in the Surety's sole discretion, the Surety may propose a process for collaborating with the Obligee in the advancement of the completion of the work so as to attempt to mitigate the Obligee's cost to complete the Contract.

- 3.4 The Surety shall also, if requested by the Obligees to do so, meet with the Obligees to discuss the status of the Investigation within five days following receipt of the request. This meeting may take place via a face-to-face meeting, a telephoneconference call, or a meeting by any other form of electronic media as may be mutually agreed to by the Obligees and Surety.

#### 4. **Necessary Interim Work**

- 4.1 Prior to and during the Investigation if the Obligees must take action which is necessary to:

- a) ensure public or worker safety,
- b) preserve or protect the work under the Contract from deterioration or damage, or
- c) comply with applicable law,

(the “**Necessary Interim Work**”)

The Obligees may, acting with due diligence and provided written notice is subsequently provided to the Surety within three (3) Business Days of the commencement of such Necessary Interim Work, undertake such Necessary Interim Work provided that:

- i. Obligees shall allow the Surety and/or its consultant(s) reasonable access to the Contract work site(s) during the course of the Necessary Interim Work for the purpose of monitoring the progress of the Necessary Interim Work;
- ii. any such Necessary Interim Work shall be undertaken without prejudice to the rights of the Obligees, the Principal or the Surety under the Contract, this Bond or applicable law; and
- iii. the reasonable costs incurred by the Obligees in undertaking such Necessary Interim Work (to the extent they are not deducted in the calculation of the Balance of Contract Price in Section 9.1) shall be reimbursed by the Surety, subject to the Surety’s liability being subsequently established and subject to such expenses being covered by this Bond. Any payments made by the Surety in respect of the Necessary Interim Work shall reduce the Bond Amount by the amount of any such payments.

- 4.2 Nothing in this section is intended to limit the ability of an Obligees to take whatever steps are reasonably necessary in the public interest.

- 4.3 Subject to the foregoing provisions in Section 4.1, the Surety shall not raise the mere fact that the Necessary Interim Work proceeded as a defence to any claim by the Obligees hereunder.

#### 5. **Post-Notice Conference**

- 5.1 Upon receipt of a Notice, the Surety shall propose a face-to-face meeting, telephone conference call or a meeting by any other form of electronic media (a “**Post-Notice Conference**”) with the Obligees at a mutually convenient time and place within five (5) business days (or such longer period as may be agreed between the Surety and Obligees). The Principal may participate in a Post-Notice Conference at the invitation of the Surety.

- 5.2 The purpose of the Post-Notice Conference shall be to determine what actions or work, if any, the Obligees believes must be done while the Surety is conducting the Investigation in order to effectively mitigate the costs for which the Obligees is seeking recovery under this Bond (the “**Mitigation Work**”). Mitigation Work may be performed after Necessary Interim Work and throughout the period of investigation by the Surety.

- 5.3 Provided the Obligees provides reasonable evidence to the Surety that Mitigation Work is necessary during the Investigation and that the anticipated costs are reasonable, the Obligees may proceed with the Mitigation Work subject to the following conditions:

- a) Obligees shall pay the reasonable costs of the Mitigation Work;
- b) Obligees shall keep separate records of all amounts related to the Mitigation Work for which it intends to seek recovery under this Bond, including amounts to be set off against the Balance of Contract Price;

- c) Obligee shall allow the Surety and/or its consultant(s) reasonable access to the Contract work site(s) during the course of the Mitigation Work for the purpose of monitoring the progress of the Mitigation Work; and
  - d) the Mitigation Work shall be without prejudice to the rights or obligations of the Obligee, the Principal or the Surety under the Contract, this Bond or applicable law.
- 5.4 If the Surety objects to any part of the Mitigation Work, including without limitation the Obligee's proposed Mitigation Work contractor(s), scope of work, cost, or method of work, it shall immediately advise the Obligee in writing of its objections and the reasons therefor. The Obligee may still proceed with the Mitigation Work and the Surety's objections will be addressed through negotiation with the Obligee or at the trial of any action brought pursuant to this Bond.
- 5.5 The reasonable costs incurred by the Obligee in undertaking the Mitigation Work shall be reimbursed by the Surety, subject to the Surety's liability being subsequently established. Any payments made by the Surety in respect of the Mitigation Work shall form part of its Obligation under this Bond and shall reduce the Bond Amount by the amount of any such payments.
- 5.6 For greater clarity, any Necessary Interim Work being performed by the Obligee pursuant to Section 4 may continue to be performed pending an agreement, if any, as to the Mitigation Work.
- 5.7 Subject to the foregoing provisions in this Section 5, the Surety shall not raise the mere fact that the Mitigation Work proceeded as a defence to any claim by the Obligee hereunder.

## 6. **Surety's Options**

- 6.1 If the Surety has accepted liability pursuant to this Bond, the Surety shall promptly select and commence one of the following options:
- a) remedy the default; or
  - b) complete the Contract in accordance with its terms and conditions; or
  - c) obtain a bid or bids for submission to the Obligee for completing the Contract in accordance with its terms and conditions and, upon determination by the Obligee and the Surety of the lowest responsible bidder:
    - i. arrange for a contract between such bidder and the Obligee; and
    - ii. make available as work progresses (even if there should be a default, or a succession of defaults, under the contract or contracts of completion, arranged under this paragraph) sufficient funds to complete the Principal's obligations in accordance with the terms and condition of the Contract including any applicable value-added taxes for which the Surety may be liable, less the Balance of Contract Price; or
  - d) pay the Obligee the lesser of: (1) the Bond Amount, or (2) without duplication, (1) the Obligee's Direct Expenses plus the Obligee's proposed cost of completion of the Contract and any applicable value-added taxes for which the Surety may be liable, less the Balance of Contract Price.
- 6.2 The option selected by the Surety is referred to in this Bond and the Schedules as the "**Surety Option**".

## 7. **Obligee's Direct Expenses**

- 7.1 Where the Surety is liable under this Bond, then the Surety shall be liable for the following fees and expenses, without duplication (the "**Obligee's Direct Expenses**"):
- a) reasonable professional fees incurred by the Obligee to complete the Contract which are a direct result of the Principal's default, and which would not have been incurred but for the default of the Principal;
  - b) reasonable external legal fees incurred by the Obligee to complete the Contract, which are a direct result

of the Principal's default and which would not have been incurred but for the default of the Principal, with the exception of legal fees incurred by the Obligee in defending a claim or action by the Principal, or incurred by the Obligee in pursuing an action against the Principal;

- c) reasonable, miscellaneous, and out-of-pocket expenses incurred by the Obligee to complete the Contract which are a direct result of the default of the Principal, and which would not have been incurred but for the default of the Principal;
- d) direct costs incurred as a result of an extension of the duration of the supply of services or materials used or reasonably required for use in the performance of the Contract, which are a direct result of the default of the Principal, and which would not have been incurred but for the default of the Principal;
- e) reasonable costs of the Necessary Interim Work;
- f) reasonable costs of the Mitigation Work; and
- g) any additional fees and expenses agreed to by the Obligee, the Principal, and the Surety.

7.2 For the purpose of Section 7.1(d), the "direct costs" incurred are the reasonable costs of performing the Contract during the extended period of time, including costs related to the additional supply of services or materials (including equipment rentals), insurance and surety bond premiums, and costs resulting from seasonal conditions, that, but for the extension, would not have been incurred.

7.3 Subject to any agreement to the contrary, between the Obligee, the Principal and the Surety, the Surety shall not be liable under this Bond for:

- a) any liquidated damages under the Contract;
- b) if no liquidated damages are specified in the Contract, any damages caused by delayed performance or non-performance of the Principal, except as provided in Section 7.1(d); or
- c) any indirect or consequential damages, including but not limited to costs of financing, extended financing, hedging arrangements, loss of or deferral of profit, productivity or opportunity, or head office overhead costs.

7.4 If the Surety is liable under this Bond, then, at the Obligee's option, Obligee's Direct Expenses may be deducted by the Obligee from the Balance of the Contract Price as defined hereinafter or will be promptly reimbursed by the Surety subject to the other terms, conditions and limitations of this Bond and will reduce the Bond Amount.

## **8. Conditions Precedent**

8.1 The Surety shall have no liability or Obligations under this Bond unless all the following conditions precedent (the "**Conditions Precedent**") have been satisfied:

- a) The Principal is, and is declared by the Obligee to be, in default under the Contract;
- b) The Obligee has given such notice to the Principal of a default of the Principal, as may be required under the terms of the Contract;
- c) The Obligee has performed the Obligee's obligations under the Contract; and
- d) The Obligee has agreed to pay the Balance of Contract Price to the Surety or as directed by the Surety.

## **9. Balance of Contract Price**

9.1 The term "**Balance of Contract Price**" means the total amount payable by the Obligee to the Principal under the Contract, including any adjustments to the price in accordance with the terms and conditions of the Contract, or other amounts to which the Principal is entitled, reduced by any amounts deducted by the Obligee for the Obligee's Direct Expenses under Section 7.4 and all valid and proper payments made to or on behalf of the Principal under the Contract.

9.2 The Balance of Contract Price shall be used by the Obligee to first mitigate against any potential loss to the

Surety under this Bond and then under any Labour & Material Payment Bond issued by the Surety, together with this bond for the Contract, and the Obligees shall assert all rights and remedies available to the Obligees to the Balance of Contract Price and make payment of the Balance of Contract Price as directed by the Surety.

**10. Limitations on the Surety's Liability**

- 10.1 Notwithstanding anything to the contrary contained in this Bond or in the Contract, the Surety shall not be liable for a greater sum than the Bond Amount under any circumstances.
- 10.2 The Surety's responsibility to the Obligees under this Bond in respect of any Surety Option or Obligees' Direct Expenses shall be secondary to, and not greater than, that of the Principal under the Contract. The Surety shall not be obligated to pay any sums which the Principal is not obligated to pay the Obligees or for which the Obligees' remedy against the Principal is barred.

**11. Right of Action**

- 11.1 No right of action shall accrue on this Bond to or for the use of any person or corporation other than the Obligees named herein, or the heirs, executors, administrators, or successors of the Obligees.

**12. Commencement of Action**

- 12.1 It is a condition of this Bond that any suit or action must be commenced before the expiration of two (2) years from the earlier of: (a) the date of substantial performance of the Contract as defined in the lien legislation where the work under the Contract is taking place; or (b) the date on which a Notice in respect of the default that is the subject of such suit or action is received by the Surety under this Bond.
- 12.2 The Obligees, the Principal and the Surety agree that any suit or action is to be made to a court of competent jurisdiction in the location in which the work under the Contract is taking place and agree to submit to the jurisdiction of such court notwithstanding any terms to the contrary in the Contract.

**13. Extended Warranty (Maintenance Security)**

- 13.1 If applicable, the Principal and Surety hereby represent and warrant that all work specified under Extended Warranty found in the Contract shall be free from defects in materials and workmanship for a period commencing on the termination of the standard one-year defects and omissions warranty and shall remain in effect for the full duration of the extended warranty (maintenance) period. Such requirements, duration and value of the extended warranty, if applicable, are as defined in the Contract Documents.

**14. Law Rights**

- 14.1 The rights and obligations of the Obligees, the Principal, and the Surety under this Bond are in addition to their respective rights and obligations at common law and in equity.

**15. Applicable Law**

- 15.1 This Bond is governed by the laws of the jurisdiction in which the work under the Contract is taking place.

**16. Notices**

- 16.1 All notices under this Bond shall be delivered by registered mail, facsimile, or electronic mail at the addresses set out below, subject to any change of address in accordance with this Section. Any notice given by facsimile or electronic mail shall be deemed to have been received on the next business day or, if later, on the date actually received if the person to whom the notice was given establishes that he or she did not, acting in good faith, receive the notice until that later date. Any notice given by registered mail shall be deemed to have been received five (5) days after the date on which it was mailed, exclusive of Saturdays and holidays or, if later, on the date actually received if the person to whom the notice was mailed establishes that he or she did not, acting in good faith, receive the notice until that later date. The address for the Surety, the Obligees or the Principal may be changed by giving notice to the other parties setting out the new address in accordance with this Section.

**The Surety:**

**The Obligees:**

[Surety corporate name]  
[address]  
[fax]  
[email]

[Obligee proper name]  
[address]  
[fax]  
[email]

**The Principal:**

[Principal corporate name]  
[address]  
[fax]  
[email]

**1. Headings for Reference Only**

1.1 The headings and references to them in this Bond are for convenience only, shall not constitute a part of this Bond, and shall not be taken into consideration in the interpretation of this Bond.

IN WITNESS WHEREOF, the Principal and the Surety have Signed and Sealed this Bond this \_\_\_\_\_ day of \_\_\_\_\_ in the year \_\_\_\_\_.

[Principal proper name]

Witnessed by:

By \_\_\_\_\_

\_\_\_\_\_

Name: \_\_\_\_\_

Name of Witness \_\_\_\_\_

Title: \_\_\_\_\_

Address of Witness \_\_\_\_\_

I have authority to bind the corporation.

[Surety corporate name]

By: \_\_\_\_\_

By \_\_\_\_\_

Name: \_\_\_\_\_

Name \_\_\_\_\_

Attorney-in-fact \_\_\_\_\_

Attorney-in-fact: \_\_\_\_\_

**\* IF THERE ARE TWO OR MORE COMPANIES IN PARTNERSHIP OR JOINT VENTURE, JOINTLY AND SEVERALLY BOUND, INSERT THE NAME OF EACH PARTNER OR JOINT VENTURE PARTY, AND INSERT THE WORD "COLLECTIVELY" AFTER THE WORD "HEREINAFTER" IN THE FIRST LINE.**

**\*\* IF THERE ARE TWO OR MORE SURETY COMPANIES, JOINTLY AND SEVERALLY BOUND, INSERT THE "[Name of the surety company], a corporation created and existing under the laws of [Place of incorporation]," FOR EACH SURETY, FOLLOWED BY "each as a surety and each duly authorized to transact the business of Suretyship in the [Jurisdiction in which the work under the Contract is taking place] and hereinafter collectively called the "Surety"".**