

# SUBCONTRACT PERFORMANCE BOND

Bond No.:

KNOW ALL BY THESE PRESENTS: That [name of subcontractor], a [state] corporation, as Principal, hereinafter called Principal, and [name of surety], a [state] corporation, as Surety, hereinafter called Surety, are held and firmly bound unto [name of contractor], as Oblige, hereinafter called Oblige, in the amount of U.S. Dollars (\$) (the "Penal Sum"), for the payment whereof Principal and Surety bind themselves, their heirs, executors, administrators, successors and assigns, jointly and severally, firmly by these presents.

WHEREAS, Principal has by written agreement dated entered into a subcontract number with Oblige for the performance of subcontract work , including warranty obligations, in accordance with drawings and specifications for the construction of the project (hereinafter "the Project"), which subcontract is by reference made a part hereof, and is hereinafter referred to as the "Subcontract".

A. NOW, THEREFORE, THE CONDITIONS OF THIS OBLIGATION are such that, if Principal shall promptly and faithfully perform said Subcontract, then this obligation shall be null and void; otherwise it shall remain in full force and effect, subject to the following conditions: (i) Principal is in default under the Subcontract; and (ii) Principal has been declared by Oblige to be in default under the Subcontract; and (iii) the Oblige has performed its obligations under the Subcontract. Upon the occurrence of each of the above conditions, Surety shall have 30 days ("Investigatory Period") from the last event to occur of the following: (a) receipt of the written notice of default; (b) the date access to the Project site is provided to Surety; or (c) the date the information and documentation in Oblige's or its agent's possession and requested by Surety is received by the Surety, which information and documentation must be requested by Surety within 10 days of its receipt of Oblige's written notice of default, to:

- (1) Notify Oblige that it has elected to complete the Subcontract through independent contractor(s) retained by Surety and thereafter commence such performance with reasonable promptness. In such event, that portion of the Balance of the Subcontract Price as may be required to complete the Subcontract or remedy the default and to reimburse the Surety for its expenditures shall be paid to the Surety at the times and in the manner as said sums would have been payable to Principal had there been no default under the Subcontract; or
- (2) Notify the Oblige that it has elected to arrange for a subcontract between Oblige and a replacement subcontractor reasonably acceptable to Oblige guaranteed by subcontract performance and payment bonds provided by the replacement subcontractor in the amount of the replacement subcontract. In such event, Surety shall pay Oblige the difference between the cost of the replacement subcontractor and the amount that would have been payable to the Principal had there been no default under the Subcontract. Such payments may be in a lump sum (in the case of a lump sum subcontract) or periodically as incurred by Oblige; or
- (3) Request that Oblige complete the Subcontract. In such event, Surety shall pay Oblige the difference between the reasonable cost of a replacement subcontractor and the amount that would have been payable to the Principal had there been no default under the Subcontract; or
- (4) Arrange to provide financial and/or other assistance to the Principal ("Financing") to assist the Principal with completion of the Subcontract. In the event Oblige has formally terminated Principal's right to proceed under the Subcontract, this option shall be subject to Oblige's concurrence, which shall not be unreasonably withheld. The Oblige shall pay the Balance of the Subcontract Price as directed by the Surety. In the event Surety provides Financing, Surety, in its sole discretion, may upon written notice to Oblige cease providing such Financing at any time, in which event Surety shall immediately make a further election without a further Investigatory Period under this paragraph A; or
- (5) Deny liability and notify the Oblige, citing the reasons therefor; or
- (6) After investigation, determine the amount for which it may be liable to the Oblige and, as soon as practicable after the amount is determined, make payment to the Oblige.

B. After Oblige has provided Surety with written notice of the Principal's default, and during the Investigatory Period and any subsequent period before the commencement of work under paragraph A, subparagraphs 1 or 2, Oblige may take action pursuant to its Subcontract rights to mitigate the damages caused by the

Principal's default. To the extent that Obligees perform obligations under the Subcontract during this period (the "Mitigation Work") Obligees shall be entitled to deduct the Cost of the Mitigation Work from the Balance of the Subcontract Price. To the extent the Balance of the Subcontract Price is exhausted, and Surety elects to proceed under paragraph A, subparagraphs 1, 2, 3 or 4, Surety shall reimburse Obligees for the difference between the Balance of the Subcontract Price and the Cost of the Mitigation Work incurred and paid by Obligees.

- C. If Surety proceeds under paragraph A, subparagraphs 1, 2, 3, 4 or 6, Surety may additionally advise in its notice of its election to Obligees that the Obligees' claim is disputed as to liability and/or amount and Surety is proceeding under a reservation of all rights and defenses. In that event, Surety shall make all payments otherwise called for under this Bond. However, in the event it is determined that Surety is not liable, in whole or in part, under this Bond and Surety expended monies in excess of the funds paid by Obligees to Surety, then Surety shall be entitled to recover the excess from Obligees.
- D. The Surety's aggregate liability is limited to the Penal Sum of this Bond, regardless of whether the liability arises from the actions or failure to act of Principal or Surety. All amounts expended by the Surety under paragraphs A and/or B and/or C of this Bond, in excess of funds paid by Obligees to Surety, shall be credited against the Penal Sum. However, in the event it is determined that Surety expended monies in excess of the Penal Sum of this Bond, then Surety shall be entitled to recover the excess from Obligees. The Penal Sum of this Bond shall automatically be increased or decreased by the amount of any change order, provided the change order(s) do not, either singly or in the aggregate, exceed 10% of the original Subcontract amount. Should any change order singly or in the aggregate exceed 10% of the original Subcontract amount, Surety's written consent must be obtained by Obligees in order to increase the penal sum.
- E. Definitions:
  - (1) The term "Balance of the Subcontract Price," as used in this Bond, shall mean the total amount payable by Obligees to Principal under the Subcontract and any amendments thereto, less the amounts heretofore properly paid by Obligees under the Subcontract.
  - (2) The term "Cost of the Mitigation Work" means the cost actually incurred by Obligees in proper performance of work under the Subcontract, including remedying defects in the work of the Principal. Such costs shall be at rates and hours not higher than the standard customarily incurred at the place of the Project except with the prior written consent of the Surety. Obligees' overhead (both field and home office) as well as profit shall be included in the Cost of the Mitigation Work at a markup of 15% to the actual labor, material, equipment, and subcontractor costs incurred and paid for by Obligees. Obligees shall not apply markup to the cost of any subcontractor that is affiliated with Obligees.
- F. Notwithstanding any provision in this Bond and any document incorporated herein to the contrary, any proceeding, legal or equitable, under this Bond must be instituted in a court of competent jurisdiction in the location in which the work or part of the work is located and shall be instituted within two years after a declaration of default or within two years after the Principal ceased working or within two years after the Surety refuses or fails to perform its obligations under this Bond, whichever occurs first. If the provisions of this paragraph are void or prohibited by law, the minimum period of limitation available to sureties as a defense in the jurisdiction of the suit shall be applicable.
- G. 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.
- H. Any notice given or any demand made under this Bond shall be given in writing and may be provided to the following email address \_\_\_\_\_ or given by any method of delivery that provides evidence or confirmation of receipt, including personal delivery, express courier (such as Federal Express), and prepaid certified or registered mail with return receipt requested. The Surety's address for notice is \_\_\_\_\_.
- I. The Surety shall not be liable to the Obligees or others for obligations of the Principal that are unrelated to the Subcontract work, and the Balance of the Subcontract Price shall not be reduced or set off on account of any such unrelated obligations.

