

**WESTERN NATIONAL MUTUAL INSURANCE COMPANY**

**PERFORMANCE BOND**

**Bond No.** \_\_\_\_\_

KNOW ALL MEN BY THESE PRESENTS: That we, the undersigned, \_\_\_\_\_, as Principal, and Western National Mutual Insurance Company, with its home office at 4700 West 77<sup>th</sup> Street, Edina, MN 55435, a corporation organized and existing under and by virtue of the laws of the State of Minnesota, and duly authorized to transact business in the State of \_\_\_\_\_, as Surety, are held and firmly bound, jointly and severally, with our heirs, executors, administrators, successors and assigns, unto \_\_\_\_\_, having an address of \_\_\_\_\_ (hereinafter referred to as "Obligee"), in the penal sum of \_\_\_\_\_ (\$ \_\_\_\_\_) for the performance of the Construction Contract incorporated herein by reference, contingent upon all of the terms, conditions and limitations set forth herein.

SIGNED and sealed this \_\_\_\_ day of \_\_\_\_\_, 20 \_\_\_\_

THE CONDITION OF THE ABOVE OBLIGATION IS SUCH THAT, WHEREAS, the above named Principal did on the \_\_\_\_ day of \_\_\_\_\_, 20 \_\_\_\_, enter into a written contract with the Obligee for \_\_\_\_\_ (hereinafter "the Contract").

NOW, if the said Principal shall well and faithfully do and perform the things agreed by Principal to be done and performed according to the terms of the said Construction Contract, the Surety and Principal shall have no obligation under this Bond, except when applicable to participate in duly noticed conferences as provided in paragraph 1(a), and this obligation shall be void; otherwise, the same shall remain in full force and effect, it being expressly understood and agreed that this undertaking shall be for the benefit of the Obligee herein only and that the total liability of the Surety hereunder shall in no event exceed the penal amount of this obligation as herein stated.

1. If there is no Obligee Default under the Construction Contract, the Obligee having performed all of its obligations under the Contract, the Surety's obligation to the Obligee under this bond shall arise only after:

- a) The Obligee first provides notice to the Principal and the Surety at its address set forth above that the Obligee is considering declaring a Principal Default. **Such notice shall indicate whether the Obligee is requesting a conference among the Obligee, Principal and Surety to discuss the Principal's performance. If the Obligee does not request a conference, the Surety may, within five (5) business days after receipt of the Obligee's notice, request a conference, the Obligee shall attend.** Unless the Obligee agrees otherwise, any conference requested under this Section 1(a) shall be held within ten (10) business days of the Surety's receipt of the Obligee's notice.

If the Obligee, the Principal and the Surety agree, the Principal shall be allowed a reasonable time to perform the Construction Contract, but such agreement shall not waive the Obligee's right, if any, subsequently to declare a default; and

- b) The Obligee declares a Principal Default, terminates the Construction Contract and notifies the Surety; and
- c) The Obligee has agreed in writing to pay the Balance of the Contract Price in accordance with the terms of the Construction Contract to the Surety or to a contractor selected by Surety to perform the Construction Contract.

2. **Failure on the part of the Obligee to comply with the notice requirement in subparagraph (a) of the preceding paragraph 1 shall not constitute a failure to comply with a condition precedent to the Surety's obligations, or release the Surety from its obligations, except to the extent the Surety demonstrates actual prejudice.**

3. When the Obligee has satisfied all of the conditions of subparagraphs (a) through (c) of the preceding paragraph 1, the Surety shall promptly and at the Surety's expense take one of the following actions:

- a) Arrange for the Principal, with consent of the Obligee, to perform and complete the Construction Contract;
- b) Undertake to perform and complete the Construction Contract itself; through its agents or independent contractors;
- c) Obtain bids or negotiated proposals from contractors acceptable to the Obligee for a contract for performance and completion of the Contract, arrange for a contract to be prepared for execution between the Obligee and the contractor to be secured with performance and payment bonds executed by the new contractor and a qualified surety in a form and amount equivalent to the bonds issued by Surety in connection with the Contract, and pay to the Obligee the difference between the price of the new contract and the balance of the Contract Price; or
- d) Waive its right to perform and complete, arrange for completion, or obtain a new contractor, and with reasonable promptness under the circumstances:
  - i. After investigation, determine the amount for which it may be liable to the Obligee, subject to all of the limitations as set forth herein and particularly in subparagraph 2(c) above, and as soon as practicable after the amount is determined, make payment of that amount to the Obligee; or
  - ii. Deny liability in whole or in part and notify the Obligee, citing the reasons for denial.

4. Surety's liability to Obligee hereunder is limited to the reasonable cost of completion of the Contract in excess of the Balance of the Contract Price, and Surety shall not be liable for any other claims, costs, losses or expenses of Obligee or any other party of any nature whatsoever.

5. Obligee agrees that amounts owed by Obligee to the Principal under the Construction Contract shall be used for the performance of the Construction Contract and to pay valid claims by subcontractors, suppliers and/or others providing labor, materials and/or equipment to or on behalf of the Principal in the performance of the Construction Contract. By the Principal furnishing and the Obligee accepting this bond, they each agree that all funds earned by the Principal in the performance of the Construction Contract are dedicated to satisfy the obligations of the Principal and Surety under this bond. The Obligee further agrees that Surety shall not be liable to Obligee or others for obligations of the Principal that are unrelated to the Construction Contract, and that the Balance of the Contract Price shall not be reduced or set off on account of any such unrelated obligations or by any other claims of Obligee or others.

6. The Obligee agrees that any and all payments issued by the Surety in connection with this bond, whether to Obligee, to or on behalf of Principal and/or in furtherance of the performance or satisfaction of Surety's obligations hereunder in any way (including but not limited to costs and expenses incurred in undertaking or arranging to perform any work under or in connection with the Contract), are to be credited against and reduce the penal amount of the bond. Further, Obligee hereby waives notice of the Surety's issuance, undertaking or agreement to issue any such payment(s) and/or incur any such costs and Obligee covenants and agrees that the Surety may cease any and all work, payments or other performance hereunder of any kind whatsoever at any time that the penal amount of the bond has been reached or that the Surety deems the penal amount will be reached due to obligations incurred by the Surety (whether or not payment has been issued therefore); all without any requirement of prior notice to Obligee, and that any and all further obligations of Surety hereunder shall thereupon be deemed fully and unconditionally discharged.

7. No suit or action shall be commenced hereunder by Obligee:

- a) After the expiration of one (1) year following the date on which Principal ceased work on said Contract or Obligee declared Principal in default, whichever occurs first, it being understood, however, that if any limitation embodied in this bond is prohibited by any law controlling the construction hereof, such limitation shall be deemed to be amended so as to be equal to the minimum period of limitation permitted by such law;
- b) Other than in a state court of competent jurisdiction in and for the county or other political subdivision of the state in which the project, or any part thereof, is situated, or in the United States District Court for the District in which the project, or any part thereof, is situated, and not elsewhere.

8. No right of action shall accrue on this bond to or for the use of any person or corporation other than the Obligee named herein or the heirs, executors, administrators or successors of the Obligee.

9. Definitions:

- a) **Balance of the Contract Price.** The total amount payable by the Obligee to Principal under the Construction Contract after all proper adjustments have been made, including allowance to Principal of any amounts received by the Obligee in settlement of insurance or other claims for damages to which the Principal is entitled, reduced by all valid and proper payments made to or on behalf of the Principal under the Contract.

- b) **Construction Contract.** The agreement between the Obligee and the Principal identified on the cover page, including all Contract Documents and changes made to the agreement and the Contract Documents.
- c) **Principal Default.** Material breach by the Principal, which has not been remedied or waived, of its obligation to perform or otherwise to comply with a material term of the Construction Contract.
- d) **Obligee Default.** Failure of the Obligee, which has not been remedied or waived, to pay the Principal as required under the Construction Contract or material breach of its obligation to perform, complete or comply with the other material terms of the Construction Contract.
- e) **Contract Documents.** All the documents that comprise the agreement between the Owner and Contractor.
- f) If this bond is issued for an agreement between a Contractor and subcontractor, **the term Contractor in this Bond shall be deemed to be Subcontractor and the term Obligee shall be deemed to be Principal.**

10. Any notices to the Surety or the Principal or the Obligee shall be mailed or delivered to the address for each shown below.

Principal  
Company:  
Address:

Attest: \_\_\_\_\_  
Name and Title:

Signature: \_\_\_\_\_  
Name and Title:

Surety  
Company:  
Address:

Attest: \_\_\_\_\_  
Name and Title:

Signature: \_\_\_\_\_  
Attorney-In-Fact: