

SUBCONTRACT PERFORMANCE AND PAYMENT BOND

(Private Work)

Bond No.:

KNOW ALL PERSONS BY THESE PRESENTS, That we, _____, as Principal, and Western National Mutual Insurance Company, a Minnesota corporation, as Surety, are held and firmly bound unto _____, as Oblige, in the sum of _____ Dollars (_____) for the payment whereof said Principal and Surety bind themselves, jointly and severally, as provided herein.

WHEREAS, Principal has entered into a Subcontract with Oblige, dated _____, for _____ ("Subcontract").

NOW, THEREFORE, the condition of this obligation is such that if Principal shall promptly and faithfully perform the Construction Work to be done under the Subcontract and shall promptly make payment to all Claimants, as hereinafter defined, for all labor and material actually used, consumed or incorporated in the performance of the Construction Work under the Subcontract, then this obligation shall be null and void; otherwise to remain in full force and effect.

Surety's obligations hereunder to the Oblige shall not arise unless Principal is in default under the Subcontract for failing to perform the Construction Work, and has been declared by Oblige to be in default under the Subcontract for failing to perform the Construction Work; and Oblige has performed its obligations under the Subcontract. In such event, Surety shall have a reasonable period of time to:

1. Upon entering into an acceptable written takeover agreement with Oblige, undertake to perform and complete the Construction Work to be done under the Subcontract; or
2. Obtain bids or negotiated proposals from qualified contractors for a contract for completion of the Construction Work to be done under the Subcontract, arrange for a contract to be prepared for execution by Oblige and contractor, to be secured with performance and payment bonds executed by a qualified surety; or
3. Waive its right to perform or complete the Construction Work pursuant to paragraphs 1 and 2 above, and with reasonable promptness under the circumstances: (a) After investigation, determine the amount for which it may be liable to the Oblige and, as soon as practicable after the amount is determined, tender payment therefor to the Oblige; or (b) Deny liability in whole or in part and notify the Oblige citing reasons therefor.
4. The Subcontract balance, as defined below, shall be credited against the reasonable cost of completing the Construction Work to be performed under the Subcontract. If completed by Oblige pursuant to paragraphs 2 or 3 above, and the reasonable construction cost exceeds the Subcontract balance, Surety shall pay to Oblige such excess, but in no event shall the aggregate liability of Surety exceed the amount of this bond. If Surety completes the work pursuant to paragraph 1, above, that portion of the Subcontract balance as may be required to complete the Construction Work to be done under the Subcontract and to reimburse Surety for its outlays shall be paid to 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; provided, however, that to the extent that Surety's outlays exceed the balance of the Subcontract price paid to Surety by Oblige, Surety shall be entitled to a dollar for dollar reduction of its liability under this bond, and Surety's aggregate liability shall not exceed the penal sum of this bond. The term "Subcontract balance," as used in the paragraph, shall mean the total amount payable by Oblige under the Subcontract and any amendments thereto, less the amounts heretofore properly paid by Oblige under the Subcontract. The term "Construction Work" as used herein shall mean the providing of all labor and/or material necessary to complete Principal's scope of work under the Subcontract. Notwithstanding any language in the Subcontract to the contrary, the Subcontract balance shall not be reduced or set off on account of any obligation, contractual or otherwise, except the reasonable construction cost incurred in completing the Construction Work.

5. Any suit by Obligee under this bond must be instituted before the earlier of: (a) the expiration of one year from the date of substantial completion of the Construction Work, or (b) one year after Principal ceased performing the Construction Work under the Subcontract, excluding warranty work. If the limitation set forth in this bond is 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, and said period of limitation shall be deemed to have accrued and shall commence to run no later than (y) the date of substantial completion of the Construction Work or (z) the date Principal ceased performing Construction Work, excluding warranty work, whichever occurs first.

6. A Claimant is defined as one other than the Obligee having a direct contract with Principal or with a direct subcontractor of Principal for labor and/or materials actually used, consumed or incorporated in the performance of the Construction Work under the Subcontract, and (b) an enforceable lien on the property improved under the Subcontract for labor and/or materials actually used, consumed or incorporated in the performance of the construction work under the Subcontract.

7. The above-named Principal and Surety hereby jointly and severally agree with the Obligee that every Claimant as herein defined, who has not been paid in full before the expiration of a period of ninety (90) days after the later of: (a) the date on which the last of such Claimant's work or labor was done or performed or materials were furnished by such Claimant, or (b) the date Claimant filed an enforceable lien, may sue on this bond for the use of such Claimant, prosecute the suit to final judgment for the amount due under Claimant's contract for the labor and/or materials supplied by Claimant which were actually used, consumed or incorporated in the performance of the Construction Work, and have execution thereon. Obligee shall not be liable for the payment of any costs or expenses of any such suit.

8. No suit or action shall be commenced hereunder by any Claimant after the expiration of one (1) year after the day on which Claimant last supplied the labor and/or materials for which the claim is made. If this limitation is void or prohibited by law, then the minimum period of limitation available to sureties as a defense in the jurisdiction of the suit shall be applicable, and said period of limitation shall be deemed to have accrued and shall commence to run on the day Claimant last supplied the labor and/or materials for which the claim is made.

9. No suit or action shall be commenced hereunder by Obligee or any Claimant other than in a court of competent jurisdiction in 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.

10. The amount of this bond shall be reduced by and to the extent of any payment or payments made by Surety in good faith hereunder, whether made directly to Obligee or Claimant(s) or otherwise in discharge of Principal's obligations. Surety's liability hereunder to Obligee and all Claimants is limited, singly, or in the aggregate, to the penal sum of the bond set forth above. Surety may, at its option, discharge all obligations under this bond by interpleading into the registry of any court of competent jurisdiction of the full-unexonerated penal sum of this bond, or such portion thereof that will satisfy the obligations owed to Obligee and/or Claimant(s). No right of action shall accrue on this bond to any person or entity other than the named Obligee and/or Claimant(s). This bond shall not afford coverage for any liability of Principal for tortious acts, whether or not said liability is direct or is imposed by the Subcontract, and shall not serve as or be a substitute for or supplemental to any liability or other insurance required by the Subcontract.

Signed this _____ day of _____, _____.

(Principal)

By: _____

Western National Mutual Insurance Company

By: _____, Attorney-in-Fact