

SURETY (PERFORMANCE) BONDS

How to Get Paid by the Surety

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By the time a City (or any project owner) is calling upon a performance bond surety, the construction project is almost certainly in significant trouble. At this stage, the owner is likely facing substantial project delays, significant construction defects, and any number of other material breaches by its contractor. “Not to worry” owners sometimes (maybe even often) and understandably believe—the performance bond surety will solve these problems. After all, isn’t the whole point of a performance bond to assure the project is completed without costing the owner additional time and money?

Unfortunately, the answer is not a simple “Yes.” Cities (and all types of owners) are often surprised in these situations to learn that sureties rarely immediately ride in to save the day, and in fact, may ultimately deny the owner’s bond claim. But fear not—as with most things, knowledge is power. Read on to learn more about public performance bonds, including a process for claims and tips for avoiding common surety defenses that will put a City in the best position to enlist the surety’s assistance and money to complete a troubled project.

Talking the Talk: Performance Bond Lingo

A performance bond involves a three-party or tripartite relationship among a principal, obligee, and surety.

- The **principal** is the general contractor.¹ A principal obtains the bond for the project.
- The **obligee** is the project owner (for our purposes, the City). An obligee is the beneficiary of the bond and the entity that originally contracted with the principal.
- The **surety** is the entity that issues the bond and by issuing the bond, agrees to respond if certain conditions are met. In a typical construction project, the surety issues both a payment bond and a performance bond.

Other important surety jargon:

- Every surety relationship involves one or more **indemnitors**. An indemnitor is a person or entity that has entered into an agreement to indemnify the surety from *any losses* the surety suffers as the result of issuing the bond. This means the indemnitor is responsible for covering the surety’s costs for completing construction and associated costs, like consultant and legal fees.
- The **bonded contract** is the underlying construction contract between the City and the general contractor.

¹ This paper and its terminology discuss and apply to a performance bond secured by a general contractor for the benefit of the owner. However, subcontractors are sometimes required to obtain a performance bond for the benefit of the contractor. In that case, the contractor would be the obligee and the subcontractor would be the principal.

Public Performance Bonds: Contracts with Statutory Overlay

At its essence, a performance bond is simply a contract where a surety agrees to guarantee the obligations of the principal owed to the obligee under the bonded contract in return for payment of a premium. It is important to remember that performance bonds are not insurance.² The surety relationship is a credit relationship where the surety pledges his credit standing to secure the performance of the general contractor. For that extension of credit, the principal (and generally other indemnitors, often company principals) also signs an indemnity agreement requiring the principal to repay the surety for any losses.

Public performance bonds also contain a statutory overlay—Chapter 2253 of the Texas Government Code (also known as the McGregor Act). Governmental entities entering into a public work construction contract for more than \$100,000 must require the general contractor to execute a performance bond to the governmental entity.³ Chapter 2253 sets out the scope of the bond and required language (namely, surety contact information) that must be included in the bond document.⁴ Public performance bonds must be:

1. Solely for the protection of the governmental entity awarding the public work contract;
2. In the amount of the contract; and
3. Conditioned on the faithful performance of the work in accordance with the plans, specifications, and contract documents.⁵

A suit on a performance bond must be brought within one year of final completion, abandonment, or termination of the public work contract.⁶ Chapter 2253 is incorporated into every public performance bond and attempts to expand or restrict a statutory right or liability through a bond will be disregarded.⁷

Key Surety Law Principles

A surety generally “stands in the shoes of its principal” so that its liability is co-extensive with the general contractor.⁸ Indeed, a surety is defined as “someone who is primarily liable for paying another’s debt or performing another’s obligation.”⁹ Accordingly, most damages arising from a contractor’s material breach are recoverable from the surety, including warranty

² *Great Am. Ins. Co. v. N. Austin Mun. Util. Dist. No. 1*, 908 S.W.2d 415, 419-19 (Tex. 1995).

³ Tex. Gov’t Code § 2253.021(a)(1).

⁴ *See id* at § 2253.021, .023.

⁵ *Id.* at § 2253.021(b).

⁶ *Id.* at § 2253.078(a).

⁷ *Id.* at § 2253.023.

⁸ *See, e.g., Beard Family P’ship v. Com. Indem. Ins. Co.*, 116 S.W.3d 839 *845 (Tex. App.—Austin 2003, no pet.) (a surety “stands in the shoes” of its principal in the event of default by the principal in performance of the construction contract).

⁹ *Surety*, BLACK’S LAW DICTIONARY (11th ed. 2019).

obligations and correction of defective work.¹⁰ But these general principles also provide two interrelated bases for a surety's defenses. First, a surety is not obligated to perform or is not liable under a bond unless the principal fails to perform.¹¹ Second, a surety is generally entitled to assert all defenses of its principal in response to a demand or claim under a bond.¹² Thus, many demands or claims presented against sureties on performance bonds are resolved primarily based on the general contractor's defenses.

Although performance bonds are to be read and construed in connection with the bonded contract (which is generally incorporated by reference into the terms of the contract), a surety's obligations arise out of and are imposed and measured by the bond.¹³ In the case of a conflict between the terms of a bond and the bonded contract, the bond controls.¹⁴ Texas courts strictly construe bonds and will not extend a bond beyond its express terms by implication, construction or presumption.¹⁵ As a result, in addition to the general contractor's defenses, a surety may have additional defenses arising from the bond's terms and conditions and the common law of suretyship.

Mechanics of a Performance Bond Claim

STEP 1: Read the Bond

The first place to start an analysis of a demand or claim on a performance bond is the language of the bond itself. Performance bonds come in *many* different flavors—some simple, some complex. Appendix A contains a selection of bonds to illustrate this point. Because bonds can be so varied, owners should review the bond when it is provided by the contractor, when any trouble arises on the project, and before taking any action against the contractor or surety for the contractor's failure to perform. Let me say that again: READ THE BOND.

¹⁰ *City of Wolfe City v. Am. Safety Cas. Ins. Co.*, 557 S.W.3d 699, 703 (Tex. App.—Texarkana 2018, pet. denied) (“Texas courts have long held that a surety’s liability under a performance bond issued to secure performance of a construction contract is determined by examining the underlying contract”); *Bayshore Constructors, Inc. v. S. Montgomery Cnty. Mun. Util. Dist.*, 543 S.W.2d 898, 902 (Tex. App.—Beaumont 1976, writ ref’d n.r.e.) (construction contract, which included one-year warranty, was part of the performance bond).

¹¹ This limit on the surety’s liability is generally expressed in the bond through a defeasance clause. Examples of defeasance language include: “If the Contractor performs the Construction Contract, the Surety and the Contractor shall have no obligations under this Bond” and “NOW, THEREFORE, THE CONDITION OF THIS OBLIGATION is such that, if the Contractor shall promptly and faithfully perform said contract, then this obligation shall be null and void; otherwise it shall remain in full force and effect.”

¹² *N. Austin MUD*, 908 S.W.2d at 419 (surety’s liability is derivative and depends on the principal’s liability; unless a cause of action exists against the principal, it cannot exist against the surety).

¹³ *Emp.’s Liab. Assurance Corp. v. Trane Co.*, 163 S.W.2d 398, 401 (Tex. 1942); *Bill Curphy Co. v. Elliot*, 207 F.2d 103, 108 (5th Cir. 1953).

¹⁴ *Bill Curphy*, 207 F.2d at 107-08.

¹⁵ *U.S. Fid. & Guar. Co. v. Borden Metal Prods. Co.*, 539 S.W.2d 170, 173 (Tex. App.—Fort Worth 2004, writ ref’d n.r.e.).

STEP 2: Understand a Surety’s Potential Defenses

Successful bond claimants understand a surety’s potential defenses so that they can avoid them wherever possible. The following is an explanation of the most common surety defenses.

1. Liability Limited to the Bond’s Penal Sum

Performance bonds include a stated sum on the bond, usually in the original amount of the bonded contract, which is referred to as the “penal sum.”¹⁶ The penal sum is the maximum liability of the surety for an obligee’s actual damages, even if the contractor is liable for damages that exceed that amount.¹⁷

2. Limitations

A suit against a surety on a public performance bond is subject to a 1-year limitations period.¹⁸ Section 2253.078 of the Government Code provides:

A suit on a performance bond may not be brought after the first anniversary of the date of final completion, abandonment, or termination of the public work contract.¹⁹

In “legal parlance,” final completion occurs upon substantial completion—*i.e.*, generally when the owner can take occupancy, a punch list is generated, and warranties begin to run.²⁰ The date of substantial completion may be certified by the architect and agreed to by the parties.²¹

Owners should proceed carefully and conservatively in determining this date where no such certification exists, as it can be a hotly contested and fact-intensive issue. Owners should also recognize that the warranty period (usually one year) and limitations period are generally coextensive. Owners should be especially alert to limitations for performance bond claims

¹⁶ Typical penal sum language is: “[Principal] and [Surety] are held and firmly bound unto [Obligee] in the sum of [\$_____], for the payment whereof Principal and Surety bind themselves and their heirs, administrators, executors, successors and assigns, jointly and severally, firmly by these presents.” Chapter 2253 requires the bond to be in the amount of the bonded contract. Tex. Gov’t Code § 2253.021(b)(2).

¹⁷ *N. Austin MUD*, 908 S.W.2d at 426-27 (although obligee obtained a judgment against principal for actual damages of \$411,000, surety’s liability for actual damages could not exceed \$397,503.20, the penal sum of the bond).

¹⁸ Tex. Gov’t Code § 2253.078(a).

¹⁹ *Id.*

²⁰ *Transamerica Ins. Co. v. Hous. Auth. of City of Victoria*, 669 S.W.2d 818, 822-23 (Tex. App.—Corpus Christi 1984, writ ref’d n.r.e.) (date of substantial completion is regarded “in legal parlance” as full performance and final completion for purposes of the 1-year statute of limitations). Note that *Transamerica* also held that limitations did not begin to run until the one-year warranty period expired. The author believes this portion of the holding is no longer valid because *Transamerica* was decided prior to amendments to Chapter 2253 that added (i) abandonment and termination as accrual dates for limitations, and (ii) the prohibition on varying from rights and liabilities under the statute. See *Am. Prods. Co. v. Reynolds & Stone, Rogers-O’Brien Constr. Co.*, No. 05-96-01628-CV, 1998 WL 821540, at *4 (Tex. App.—Dallas Nov. 30, 1998, pet. denied).

²¹ *Hartford Fire Ins. Co. v. City of Mont Belvieu*, 611 F.3d 289, 295 (5th Cir. 2010).

concerning a contractor's failure to honor its warranty, as the time to file suit will generally expire on the same day as the warranty.

3. Failure to Give Surety Notice of Default or to Comply with Other Conditions Precedent

A frequent defense of the performance bond surety is lack of proper notice of the contractor's default or other similar conditions precedent provided by the bond. As the guarantor of performance, a surety understandably wants to be notified of any problems with its contractor's performance that might lead to a demand on the bond, and if so, given the opportunity to investigate and determine a course of action. Notice requirements and other conditions precedent are controlled by the language of the bond (and the bonded contract);²² so again, read the bond (and the bonded contract). Many bond forms contain one or more notice requirements and one or more options for the surety to perform.²³

The primary case in Texas in relatively recent years concerning notice in the commercial construction context is *Nova Casualty Co. v. Turner Construction Company*.²⁴ This case provides a good example of the complexities of these cases, and although the obligee ultimately prevailed, it should illustrate the wisdom in erring on the side of "too much" notice to avoid a protracted dispute. The key facts affecting the *Nova* decision include:

- Public project to install a new cargo facility at Bush International Airport for the City of Houston;²⁵
- Subcontractor performance bond where Turner was the contractor/obligee, BOCA was the subcontractor/principal installing the baggage handling system, and Nova was the surety.²⁶
- BOCA's subcontract work needed to be installed during a narrow window near the end of the project;²⁷
- The subcontract allowed Turner to supplement BOCA's work and/or terminate BOCA upon default;²⁸
- When BOCA fell behind schedule, Turner notified BOCA (but not the surety) of default and demanded BOCA cure;²⁹

²² See *Harrison, Walker & Harper, L.P. v. Federated Mut. Ins. Co.*, No. 2-03-048-CV, 2004 WL 726813 at *2 (Tex. App.—Fort Worth Apr. 1, 2004, no pet.) (surety's liability determined by language of bond itself and applying rule of strict construction.).

²³ See, e.g., AIA Document A312-210 Performance Bonds; EJCDC C-610, Performance Bond.

²⁴ 335 S.W.3d 698 (Tex. App.—Houston [14th Dist.] 2011, no pet.).

²⁵ *Id.* at 700.

²⁶ *Id.* at 700-01.

²⁷ *Id.* at 700.

²⁸ *Id.*

²⁹ *Id.* at 701.

- BOCA did not cure, and Turner elected to supplement and deduct the cost of supplementation from any money due to BOCA (but still did not notify the surety);³⁰
- BOCA abandoned the project roughly a month later, and Turner notified the surety the next day of BOCA's default, stating this letter "constitutes notice of default by BOCA, Inc. per the terms of the bond."³¹
- The cost to supplement and complete BOCA's work was over twice as much as the penal sum of the bond due to rework and delays;³²

BOCA's bond required Nova to perform "Whenever [BOCA] shall be, and be declared by [Turner] to be in default under the subcontract."³³ Relying on an out of state case interpreting similar language, Nova rejected Turner's bond claim, arguing that Turner did not meet a condition precedent of the bond because it had not terminated BOCA's subcontract.³⁴ The 14th Court of Appeals disagreed, holding that the plain language of the bond did not require termination and the court would not imply terms into an unambiguous contract.³⁵ The court also found that Nova had adequate notice to allow it to exercise its performance options, even though Turner did not notify Nova before supplementing BOCA's work.³⁶ The court reasoned that Nova knew that the construction contract gave Turner the right to supplement without notice when it executed the bond, because the bond incorporated the construction contract.³⁷

4. Improper Default or Termination and Other Contractor Defenses

Generally, a surety may assert any defense available to the general contractor even if the contractor does not raise the defense on its own.³⁸ Thus, Owners must be careful to comply with their obligations under both the bond and the bonded contract. Termination and default are fertile grounds for mistakes, as both generally require specific notices and an opportunity to cure.

³⁰ *Id.*

³¹ *Id.*

³² *Id.* at 702.

³³ *Id.* at 700-01.

³⁴ *Id.* at 703, n.3.

³⁵ *Id.* at 703-04.

³⁶ *Id.* at 705.

³⁷ *Id.* at 704-705 (citing *In re Lyon Fin. Servs., Inc.*, 257 S.W.3d 228, 232 (Tex. 2008) (stating that a party who signs an agreement is presumed to know its contents as well as the contents of documents incorporated by reference).

³⁸ See Restatement (Third) of Suretyship & Guaranty § 34 cmt. A (1996); see also *Cnty. of Dauphin, Penn. v. Fid. & Deposit Co. of Maryland*, 770 F. Supp. 248, 254 (M.D. Pa. 1991), *aff'd*, 937 F.2d 596 (3d Cir. 1991) (noting surety can generally avail itself of all defenses available to its principal); *Wright Way Constr. Co., Inc. v. Harlingen Mall Co.*, 700 S.W.2d 415, 426 (Tex. App.—Corpus Christi 1990, writ denied) (reversal of judgment against the principal would cause of reversal of judgment against the surety, even in the absence of the taking of an appeal by the surety.).

In *Milton Regional Sewer Authority v. Travelers Casualty & Surety Company of America*, a Pennsylvania federal district court granted the surety's motion to dismiss for improper termination.³⁹ The underlying bonded contract included a cure provision prior to termination.⁴⁰ The owner failed to follow the cure provision, claiming it was entitled to an immediate termination because the principal had materially breached the contract.⁴¹ The court recognized that the contractor had "probably breached the contract" but found the breach was not material because the contractor did not have a chance to cure.⁴² In reaching its holding, the court explained the importance of the improper default/termination defense to the surety industry:

For the court to conclude and hold otherwise would result in a perverse result for Travelers and other sureties. To expect a surety to insure a contract, but then allow one party to the contract to avoid the express terms of the insured contract would expose the sureties to increased risk. A surety must rely on the parties' compliance with contractual provision in order to adequately assess the risk of insuring its insured.⁴³

5. Material Alteration of the Bonded Contract

Material alteration is an affirmative defense that a surety must plead and prove.⁴⁴ The elements are: (i) the parties to the bonded contract materially altered or deviated from its terms, (ii) without the consent of the surety, and (iii) to the surety's prejudice.⁴⁵ If proved, a material alteration discharges the surety from liability under the performance bond.⁴⁶

Proof of material alteration often turns on the language of the performance bond. It is rare to have evidence of a surety's actual consent to a material alteration. But most bonds include some form of a provision waiving material alterations such as: "No alteration or change to the terms of contract, or in the work to be done thereunder, or an extension of time for the performance of the contract, shall in any way release the principal or surety hereunder, notice to surety of any such alteration, change or extension being hereby waived."

Some courts have held that similar language meant the surety consented up front to "any and all alterations and changes" regardless of their nature or magnitude,⁴⁷ while other

³⁹ No. 4:13-CV-2786, 2014 WL 5529169, at *8 (M.D. Pa. Nov. 3, 2014).

⁴⁰ *Id.* at *4.

⁴¹ *Id.* at *5.

⁴² *Id.* at *8.

⁴³ *Id.*

⁴⁴ *Sonne v. Fed. Deposit Ins. Corp.*, 881 S.W.2d 789, 793 (Tex. App.—Houston [14th Dist.] 1994, writ denied).

⁴⁵ *Frost Nat'l Bank v. Burge*, 29 S.W.3d 580, 587-88 (Tex. App.—Houston [14th Dist.] 2000, no pet.); see *Old Colony Ins. Co. v. City of Quitman*, 352 S.W.2d 452, 455 (Tex. 1961)

⁴⁶ *Old Colony*, 352 S.W.2d at 455.

⁴⁷ See, e.g., *Star Ins. Co. v. Skanska USA Bldg., Inc.*, No. SA-13-CA-640-OLG (HJB), 2015 WL 11538254, *4-5 (W.D. Tex. Dec. 2, 2015) (citing *Jones v. Gambill*, 241 S.W. 1067 (Tex. App.—Amarillo 1922, no writ); *U.S. ex.*

courts have interpreted such provisions to apply only to immaterial changes to the contract.⁴⁸ In light of this split, the safest course is to seek surety consent for significant changes, or at the very least, keep the surety in the loop on such changes so it has an opportunity to object.

Some examples of the most common types of material alterations include:

- *Improper payment or overpayment to contractor*

Texas courts consistently hold that the bonded contract's payment terms inure to the benefit, protection, and security of the surety, and when an obligee materially deviates from or "impairs" those terms, the surety is discharged from liability on the bond.⁴⁹ A material alteration by payment can occur when an owner knowingly pays for defective or incomplete work, pays without receiving a contractually-required architect's certificate, releases retainage before it's due, and/or pays contract funds without obtaining contractually-required close out documents like a consent of surety or all bills paid affidavit.

- *Changes to scope of work or price*

Although most construction contracts allow an owner to make changes to the scope of work without invalidating the contract, sometimes changes are so significant that they materially increase the risk of loss or harm the surety.⁵⁰ Potential material alterations might include: (i) bonded price increase of more than 20%, (ii) addition of scope that is materially different and outside the expertise of the general contractor, (iii) changes that make the contractor's ability to perform substantially more difficult, and/or (iv) a change to the method of payment that materially increases the surety's risk of loss.⁵¹

Rel. T.M.S. Mech. Contractors v. Millers Mut. Fire Ins. Co. of Tex., 942 F.2d 946, 954, n.6, 8 (5th Cir. 1991) (rejecting surety's material alteration defense because surety waived notice of "duly authorized modifications" of the contract in the bond.).

⁴⁸ See, e.g., *Fort Worth Indep. Sch. Dist. v. Aetna Cas. & Sur. Co.*, 48 F.2d 1, 5-6 (5th Cir. 1931) (provision in bond that "any alterations which may be made in the terms of the Contract . . . shall not in any way release the Principal and the surety . . . notice to the surety . . . of any such alteration . . . being hereby waived" did not authorize any substantial change in the contract.).

⁴⁹ See, e.g., *Ryan v. Morton*, 65 Tex. 258, 261-62 (1886) (payment in full under different payment schedule and without completion of work); *Bullard v. Norton*, 182 S.W. 668, 671-72 (Tex. 1916) (early payment of retainage); *Williams v. Baldwin*, 228 SW. 554 (Tex. Comm'n App. 1921, jdgmt. adopted) (payment without certification of architect and without sufficient work in place); *Old Colony*, 352 S.W.2d at 456 (payment of contract balance without obtaining results from contractually-required water testing.).

⁵⁰ See, e.g., *Emps. Ins. of Wausau v. Constr. Mgmt. Eng'rs of Fla., Inc.*, 297 SC. 354, 377 (Ct. App. 1989) (discharging surety from bond where bonded contract that increased the scope and price from \$2.3 million to \$6.2 million.).

⁵¹ See, e.g., *Lonergan v. San Antonio Loan & Trust Co.*, 104 S.W. 1061, 1062-63 (Tex. 1907) (surety discharged when obligee and principal added additional work not mentioned or contemplated by the original contract without reducing same to writing contrary to terms of the contract.).

STEP 3: Pre-Dispute Best Practices

A successful bond claim starts by implementing pre-dispute practices to avoid losing coverage under the bond. These practices all stem from (1) involving the surety and (2) recognizing situations that might result in a surety defense. Performance bond sureties are generally involved in decisions made by an owner through a consent, rider, or amendment.

Consents are just what they say they are and are very common.⁵² Riders are frequently used where significant changes to the underlying contract are being made (e.g., next phase of work). Riders become an attachment to the performance bond that recite the purpose of the rider and the amount the performance bond is being increased. A rider is typically executed by the surety only to unilaterally add the associated scope and money changes to the bond. Amendments are used for very significant changes to the contract (often for design-build, where the design and scope of the work to be performed are not well developed at contract inception). Both the contractor and the surety execute an amendment to demonstrate each parties' intention to enter into a much larger and potentially different scope of work and financial commitment.

Some recommended, pre-dispute best practices include:

- Upon receipt of the bond, confirm the bond includes the information required by Section 2253.021 of the Texas Government Code and is in the penal sum of the bonded contract.
- Review the bond thoroughly for familiarity with notice provisions and anything out of the ordinary. Remember that the bond cannot expand or restrict a party's rights or liabilities as defined by Chapter 2253. Inconsistent provisions (e.g., a longer or shorter limitations period) will be construed to conform to the statute.
- Review the bonded contract for any provisions referencing the surety. Many construction contracts contemplate or require surety consent for various actions. Follow these requirements.
- Require the contractor to update the penal sum of the bond, as additive change orders are granted to conform to the Government Code requirement that the bond be "in the amount of the contract."
- Obtain surety consent before varying materially from contract requirements; particularly payment. Specific instances where consent is advisable include:
 - Advances on materials and payroll. Advances are a prepayment of contract proceeds that could prejudice the surety.
 - Payment when liquidated damages exceed the remaining contract balance.

⁵² See, e.g., AIA G707 (Final Payment), AIA G707A (Partial Release of Retainage).

- Early release of some or all retainage. Generally, this is not an issue on public projects because retainage is statutorily required. Of course, that doesn't mean it never happens.
- Payment based on additional warranties or promises for work in place that is potentially defective.
- Keep the surety informed of defaults and potential defaults by the contractor.

STEP 4: Making the Performance Bond Claim

When a contractor has acted in a manner that constitutes default under the bonded contract, the owner must carefully follow both the bond and bonded contract requirements to engage the surety and preserve the owner's rights under the bond. The following steps provide an outline for doing so:

1. Review the bond for notice requirements and other conditions precedent to the surety's liability under the bond, such as conference requirements.
2. Compare the bond notice requirements with the notice, default, supplementation and/or termination requirements in the bonded contract. The requirements in the bond and bonded contract often differ. For example, the bonded contract may allow three days to cure while the bond allows for seven days to cure. Comply with the longer or more onerous requirement to avoid arguments that the surety was prejudiced.
3. Send written notice of default to both the contractor and the surety. Send the letters certified mail, return receipt requested, and be certain to send the letters to the addresses and/or persons as stated in the bonds regardless of whether you have been dealing or communicating with others (those folks may be copied). Adding the suspenders to the belt, also send a copy of the notice to the surety's registered agent. You can find the registered agent and its contact information on the Texas Department of Insurance's website using the surety search function.⁵³
4. Call the surety and request a conference with the agent for the surety to discuss the contractor's default before supplementing the contractor's work or terminating the contractor. Document the call was made and any messages that were left. Again, the purpose of these efforts is to eliminate an argument from the surety that it was prejudiced by lack of notice or opportunity to perform.

⁵³ <https://www.tdi.texas.gov/consumer/company-profiles-and-agents-for-service-of-process.html>

5. Write any termination letters with extreme care. The substance of an effective contractor termination letter is beyond the scope of this paper, but an owner should know that this letter will eventually be closely examined in determining whether termination was proper.
6. At the end of any required cure periods, send a second notice of default to both the contractor and surety before moving forward with supplementation or termination. Identify all the attempts made to request assistance from the surety and enclose copies of those letters, emails, and other correspondence.
7. Comply with any other notices or conditions of the bond, which may include an agreement to provide the contract balance, additional requests for the surety to perform before surety default, etc.

The Surety's Response to a Claim

Investigation

When a surety is advised of a claim or a potential claim on a performance bond, the surety has the right to investigate before being expected to act.⁵⁴ At the beginning of its investigation, the surety is likely to request a considerable amount of documentation, which may include: construction contract documents, bid documents, job status inquiries, the owner's and contractor's project accounting information, change orders, pay applications, subcontracts, correspondence, and job schedules.

The surety may also want to visit the site to review the work and to see and inventory stored materials. The surety's efforts are aimed at gathering a complete picture of the status of the project and answering the following questions:

- Why did the claim arise?
- If the contractor has been terminated, was termination proper?
- Has the owner met its obligations under the bond and construction contract?
- What is the scope of the remaining work?
- How much of the contract price is the owner still holding?
- What is the likely time for completion of the project?
- Does the contractor have any defenses to the claim?
- Does the surety have any independent defenses to the claim?
- What will the surety's performance options cost?

⁵⁴ See *Seaboard Sur. Co. v. Town of Greenfield*, 266 F. Supp. 2d 189, 194 (D. Mass. 2003), *aff'd*, 370 F.3d 215 (1st Cir. 2004).

The Surety's Options

1. *Deny the Claim*

If the surety's investigation reveals that the default or termination of the contractor was improper or that the surety has a defense to the claim, the surety can deny the claim. Owners are often surprised to learn that denials are common. But remember, the surety's defense costs must be covered by the contractor and any other indemnitors. So, the cost to the surety to wait and see if the owner will prevail is low (so long as the indemnitors are solvent).

2. *Assist the Contractor: Finance/Funds Control/Consultant Assistance*

A surety can choose to provide assistance to the defaulting contractor to help it cure the default and/or complete the project. A surety's assistance is generally aimed at solving a cash-flow problem. The surety may provide the cash or, more likely, will offer to provide oversight and control of the funds paid by the owner to ensure such funds are paid to subcontractors and otherwise properly used by contractor.

3. *Take Over the Project*

A surety has the option to take over for the contractor and complete the project. Under this option, two new agreements would be negotiated and signed. The owner and surety would typically enter into a takeover agreement, and the surety and completion contractor would execute a completion agreement. In some cases, the surety hires the original contractor as its completion contractor.

Takeover agreements are generally lengthy and complex, addressing a myriad of issues, including: memorializing the termination of the original contract; the owner's acceptance of the completion contractor; the contract amount, any change orders, the contract balance, and amounts to be paid by the owner; the scope of work to be completed; delay and liquidated damages; the surety's maximum liability; costs that may be charged against the penal sum; insurance; warranty obligations; and the date for completion work to commence. The owner typically commits to paying the contract balance available for the completing the project and the surety agrees to pay an excess up to the penal sum of the bond.

The surety will then typically enter into a separate construction contract with the completion contractor, which usually requires the completion contractor to post a payment and performance bond.

Appendix A

Bond No. 1037007

Performance Bond

(Private Work)

KNOW ALL MEN BY THESE PRESENTS:

That we, _____
(Here insert the name and address or legal title of the Contractor)

_____ ,
as Principal, hereinafter called Contractor, and

_____ ,
(Here insert the name of the Surety) a corporation of the State of New Hampshire , with its Home
Office, City of Worcester, MA

as Surety, hereinafter called Surety, are held and firmly bound unto

_____ ,
(Here insert the name and address or legal title of the Owner)

as Obligee, hereinafter called Owner,

in the amount of Fourteen Million, Four Hundred Ninety-Seven Thousand, One Hundred Seventy-Eight and 80/100
Dollars (\$ 14,497,178.80), for the payment whereof Contractor and Surety bind themselves,
their heirs, executors, administrators, successors and assigns, jointly and severally, firmly by these presents.

WHEREAS, Contractor has by written agreement dated February , 25 , 2015
entered into a contract with Owner for _____

_____ ,
in accordance with drawings and specifications prepared by _____

_____ ,
(Here insert full name, title and address)

which contract is by reference made a part hereof, and is hereinafter referred to as the Contract.

NOW, THEREFORE, THE CONDITION OF THIS OBLIGATION is such that, if Contractor shall promptly and
faithfully perform said contract, then this obligation shall be null and void; otherwise it shall remain in full force and
effect.

The Surety hereby waives notice of any alteration or extension of time made by the Owner.

Whenever Contractor shall be, and declared by Owner to be in default under the Contract, the Owner having performed Owner's obligations thereunder, the Surety may promptly remedy the default, or shall promptly

(1) Complete the Contract in accordance with its terms and conditions, or


(2) Obtain a bid or bids for completing the Contract in accordance with its terms and conditions, and upon determination by Surety of the lowest responsible bidder, or, if the Owner elects, upon determination by the Owner and Surety jointly of the lowest responsible bidder, arrange for a contract between such bidder and Owner, and make available as work progresses (even though there should be a default or a succession of defaults under the contract or contracts of completion arranged under this paragraph) sufficient funds to pay the cost of completion less the balance of the contract price; but not exceeding, including other costs and damages for which the Surety may be liable hereunder, the amount set forth in the first paragraph hereof. The term "balance of the contract price," as used in this paragraph, shall mean the total amount payable by Owner to Contractor under the Contract and any amendments thereto, less the amount properly paid by Owner to Contractor.


Any suit under this bond must be instituted before the expiration of two (2) years from the date on which final payment under the contract falls due. 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.

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

Signed and sealed this 27th day of February A. D. 2015

In the presence of:





Principal
President

(SEAL)
Title



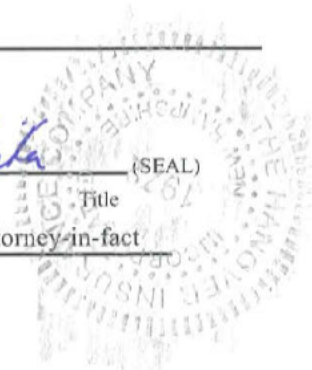
Connie Williamson

By 

Emily Meliska

(SEAL)
Title

Attorney-in-fact



THE HANOVER INSURANCE COMPANY
MASSACHUSETTS BAY INSURANCE COMPANY
CITIZENS INSURANCE COMPANY OF AMERICA

POWERS OF ATTORNEY
CERTIFIED COPY

KNOW ALL MEN BY THESE PRESENTS: That THE HANOVER INSURANCE COMPANY and MASSACHUSETTS BAY INSURANCE COMPANY, both being corporations organized and existing under the laws of the State of New Hampshire, and CITIZENS INSURANCE COMPANY OF AMERICA, a corporation organized and existing under the laws of the State of Michigan, do hereby constitute and appoint

John R. Ward, Douglas Moore, Emily Mikeska and/or Eva O. Limmer

of **Ward & Moore Insurance Services LP of Gatesville, TX** and each is a true and lawful Attorney(s)-in-fact to sign, execute, seal, acknowledge and deliver for, and on its behalf, and as its act and deed any place within the United States, or, if the following line be filled in, only within the area therein designated any and all bonds, recognizances, undertakings, contracts of indemnity or other writings obligatory in the nature thereof, as follows:

Any such obligations in the United States, not to exceed Thirty Five Million and No/100 (\$35,000,000) in any single instance


and said companies hereby ratify and confirm all and whatsoever said Attorney(s)-in-fact may lawfully do in the premises by virtue of these presents. These appointments are made under and by authority of the following Resolution passed by the Board of Directors of said Companies which resolutions are still in effect:

"RESOLVED, That the President or any Vice President, in conjunction with any Vice President, be and they are hereby authorized and empowered to appoint Attorneys-in-fact of the Company, in its name and as its acts, to execute and acknowledge for and on its behalf as Surety any and all bonds, recognizances, contracts of indemnity, waivers of citation and all other writings obligatory in the nature thereof, with power to attach thereto the seal of the Company. Any such writings so executed by such Attorneys-in-fact shall be as binding upon the Company as if they had been duly executed and acknowledged by the regularly elected officers of the Company in their own proper persons." (Adopted October 7, 1981 - The Hanover Insurance Company; Adopted April 14, 1982 - Massachusetts Bay Insurance Company; Adopted September 7, 2001 - Citizens Insurance Company of America)

IN WITNESS WHEREOF, THE HANOVER INSURANCE COMPANY, MASSACHUSETTS BAY INSURANCE COMPANY and CITIZENS INSURANCE COMPANY OF AMERICA have caused these presents to be sealed with their respective corporate seals, duly attested by two Vice Presidents, this **22nd** day of **May 2014**.




THE HANOVER INSURANCE COMPANY
MASSACHUSETTS BAY INSURANCE COMPANY
CITIZENS INSURANCE COMPANY OF AMERICA


Robert Thomas, Vice President


Joe Brenstrom, Vice President

THE COMMONWEALTH OF MASSACHUSETTS)
COUNTY OF WORCESTER) ss.

On this **22nd** day of **May 2014** before me came the above named Vice Presidents of The Hanover Insurance Company, Massachusetts Bay Insurance Company and Citizens Insurance Company of America, to me personally known to be the individuals and officers described herein, and acknowledged that the seals affixed to the preceding instrument are the corporate seals of The Hanover Insurance Company, Massachusetts Bay Insurance Company and Citizens Insurance Company of America, respectively, and that the said corporate seals and their signatures as officers were duly affixed and subscribed to said instrument by the authority and direction of said Corporations.

 **BARBARA A. GARLICK**
Notary Public
Commonwealth of Massachusetts
My Commission Expires Sept. 21, 2018



Barbara A. Garlick, Notary Public
My Commission Expires September 21, 2018

I, the undersigned Vice President of The Hanover Insurance Company, Massachusetts Bay Insurance Company and Citizens Insurance Company of America, hereby certify that the above and foregoing is a full, true and correct copy of the Original Power of Attorney issued by said Companies, and do hereby further certify that the said Powers of Attorney are still in force and effect.

This Certificate may be signed by facsimile under and by authority of the following resolution of the Board of Directors of The Hanover Insurance Company, Massachusetts Bay Insurance Company and Citizens Insurance Company of America.

"RESOLVED, That any and all Powers of Attorney and Certified Copies of such Powers of Attorney and certification in respect thereto, granted and executed by the President or any Vice President in conjunction with any Vice President of the Company, shall be binding on the Company to the same extent as if all signatures therein were manually affixed, even though one or more of any such signatures thereon may be facsimile." (Adopted October 7, 1981 - The Hanover Insurance Company; Adopted April 14, 1982 - Massachusetts Bay Insurance Company; Adopted September 7, 2001 - Citizens Insurance Company of America)

GIVEN under my hand and the seals of said Companies, at Worcester, Massachusetts, this 27TH day of February, 2015.

THE HANOVER INSURANCE COMPANY
MASSACHUSETTS BAY INSURANCE COMPANY
CITIZENS INSURANCE COMPANY OF AMERICA


J. Michael Pete, Vice President

IMPORTANT NOTICE

To obtain information or make a complaint:

You may call The Hanover Insurance Company/
Citizens Insurance Company of America's toll-free
telephone number for information or to make a
complaint at:

1-800-608-8141

You may also write to The Hanover Insurance Company/
Citizens Insurance Company of America at:

440 Lincoln Street
Worcester, MA 01615

You may contact the Texas Department of Insurance
to obtain information on companies, coverages,
rights or complaints at:

1-800-252-3439

You may write the Texas Department of Insurance:

P. O. Box 149104
Austin, TX 78714-9104
Fax: (512) 475-1771
Web: <http://www.tdi.texas.gov>
E-mail: ConsumerProtection@tdi.texas.gov

PREMIUM OR CLAIM DISPUTES:

Should you have a dispute concerning your premium
or about a claim you should contact the agent or the
company first. If the dispute is not resolved, you may
contact the Texas Department of Insurance.

ATTACH THIS NOTICE TO YOUR POLICY: This
notice is for information only and does not become
a part or condition of the attached document.

AVISO IMPORTANTE

Para obtener informacion o para someter una queja:

Usted puede llamar al numero de telefono gratis de
The Hanover Insurance Company/Citizens Insurance
Company of America's para informacion o para
someter una queja al:

1-800-608-8141

Usted tambien puede escribir a The Hanover Insurance
Company/Citizens Insurance Company of America al:

440 Lincoln Street
Worcester, MA 01615

Puede comunicarse con el Departamento de Seguros
de Texas para obtener informacion acerca de
compañias, coberturas, derechos o quejas al:

1-800-252-3439

Puede escribir al Departamento de Seguros de Texas:

P. O. Box 149104
Austin, TX 78714-9104
Fax: (512) 475-1771
Web: <http://www.tdi.texas.gov>
E-mail: ConsumerProtection@tdi.texas.gov

DISPUTAS SOBRE PRIMAS O RECLAMOS:

Si tiene una disputa concerniente a su prima o a un
reclamo, debe comunicarse con el agente o la com-
pañia primero. Si no se resuelve la disputa, puede
entonces comunicarse con el departamento (TDI).

UNA ESTE AVISO A SU POLIZA: Este aviso es solo
para proposito de informacion y no se convierte en
parte o condicion del documento adjunto.

Document A312™ – 2010

Conforms with The American Institute of Architects AIA Document 312

Performance Bond

Bond Number: 107363585

CONTRACTOR:

(Name, legal status and address)



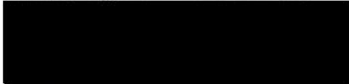
SURETY:

(Name, legal status and principal place of business)



OWNER:

(Name, legal status and address)



This document has important legal consequences. Consultation with an attorney is encouraged with respect to its completion or modification.

Any singular reference to Contractor, Surety, Owner or other party shall be considered plural where applicable.

CONSTRUCTION CONTRACT

Date: January 12, 2021

Amount: \$2,366,929.00

Description: (Name and location)



BOND

Date: January 12, 2021

(Not earlier than Construction Contract Date)

Amount: \$2,366,929.00

Modifications to this Bond: None See Section 16

CONTRACTOR AS PRINCIPAL

Company: (Corporate Seal)



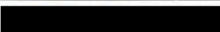
SURETY

Company: (Corporate Seal)



Signature: *[Handwritten Signature]*

Name



And Title: *V.P.*

(Any additional signatures appear on the last page of this Performance Bond)

Signature: *[Handwritten Signature]*

Name



And Title:

(FOR INFORMATION ONLY – Name, address and telephone)

AGENT or BROKER:



OWNER'S REPRESENTATIVE:

(Architect, Engineer or other party:)

§ 1 The Contractor and Surety, jointly and severally, bind themselves, their heirs, executors, administrators, successors and assigns to the Owner for the performance of the Construction Contract, which is incorporated herein by reference.

§ 2 If the Contractor performs the Construction Contract, the Surety and the Contractor shall have no obligation under this Bond, except when applicable to participate in a conference as provided in Section 3.

§ 3 If there is no Owner Default under the Construction Contract, the Surety's obligation under this Bond shall arise after

- .1 the Owner first provides notice to the Contractor and the Surety that the Owner is considering declaring a Contractor Default. Such notice shall indicate whether the Owner is requesting a conference among the Owner, Contractor and Surety to discuss the Contractor's performance. If the Owner does not request a conference, the Surety may, within five (5) business days after receipt of the Owner's notice, request such a conference. If the Surety timely requests a conference, the Owner shall attend. Unless the Owner agrees otherwise, any conference requested under this Section 3.1 shall be held within ten (10) business days of the Surety's receipt of the Owner's notice. If the Owner, the Contractor and the Surety agree, the Contractor shall be allowed a reasonable time to perform the Construction Contract, but such an agreement shall not waive the Owner's right, if any, subsequently to declare a Contractor Default;
- .2 the Owner declares a Contractor Default, terminates the Construction Contract and notifies the Surety; and
- .3 the Owner has agreed 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 to perform the Construction Contract.

§ 4 Failure on the part of the Owner to comply with the notice requirement in Section 3.1 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.

§ 5 When the Owner has satisfied the conditions of Section 3, the Surety shall promptly and at the Surety's expense take one of the following actions:

§ 5.1 Arrange for the Contractor, with the consent of the Owner, to perform and complete the Construction Contract;

§ 5.2 Undertake to perform and complete the Construction Contract itself, through its agents or independent contractors;

§ 5.3 Obtain bids or negotiated proposals from qualified contractors acceptable to the Owner for a contract for performance and completion of the Construction Contract, arrange for a contract to be prepared for execution by the Owner and a contractor selected with the Owner's concurrence, to be secured with performance and payment bonds executed by a qualified surety equivalent to the bonds issued on the Construction Contract, and pay to the Owner the amount of damages as described in Section 7 in excess of the Balance of the Contract Price incurred by the Owner as a result of the Contractor Default; or

§ 5.4 Waive its right to perform and complete, arrange for completion, or obtain a new contractor and with reasonable promptness under the circumstances:

- .1 After investigation, determine the amount for which it may be liable to the Owner and, as soon as practicable after the amount is determined, make payment to the Owner; or
- .2 Deny liability in whole or in part and notify the Owner, citing the reasons for denial.

§ 6 If the Surety does not proceed as provided in Section 5 with reasonable promptness, the Surety shall be deemed to be in default on this Bond seven days after receipt of an additional written notice from the Owner to the Surety demanding that the Surety perform its obligations under this Bond, and the Owner shall be entitled to enforce any remedy available to the Owner. If the Surety proceeds as provided in Section 5.4, and the Owner refuses the payment or the Surety has denied liability, in whole or in part, without further notice the Owner shall be entitled to enforce any remedy available to the Owner.

§ 7 If the Surety elects to act under Section 5.1, 5.2 or 5.3, then the responsibilities of the Surety to the Owner shall not be greater than those of the Contractor under the Construction Contract, and the responsibilities of the Owner to the Surety shall not be greater than those of the Owner under the Construction Contract. Subject to the commitment by the Owner to pay the Balance of the Contract Price, the Surety is obligated, without duplication, for

- .1 the responsibilities of the Contractor for correction of defective work and completion of the Construction Contract;
- .2 additional legal, design professional and delay costs resulting from the Contractor's Default, and resulting from the actions or failure to act of the Surety under Section 5; and
- .3 liquidated damages, or if no liquidated damages are specified in the Construction Contract, actual damages caused by delayed performance or non-performance of the Contractor.

§ 8 If the Surety elects to act under Section 5.1, 5.3 or 5.4, the Surety's liability is limited to the amount of this Bond.

§ 9 The Surety shall not be liable to the Owner or others for obligations of the Contractor that are unrelated to the Construction Contract, and the Balance of the Contract Price shall not be reduced or set off on account of any such unrelated obligations. No right of action shall accrue on this Bond to any person or entity other than the Owner or its heirs, executors, administrators, successors and assigns.

§ 10 The Surety hereby waives notice of any change, including changes of time, to the Construction Contract or to related subcontracts, purchase orders and other obligations.

§ 11 Any proceeding, legal or equitable, under this Bond may be instituted in any 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 Contractor Default or within two years after the Contractor 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.

§ 12 Notice to the Surety, the Owner or the Contractor shall be mailed or delivered to the address shown on the page on which their signature appears.

§ 13 When this Bond has been furnished to comply with a statutory or other legal requirement in the location where the construction was to be performed, any provision in this Bond conflicting with said statutory or legal requirement shall be deemed deleted herefrom and provisions conforming to such statutory or other legal requirement shall be deemed incorporated herein. When so furnished, the intent is that this Bond shall be construed as a statutory bond and not as a common law bond.

§ 14 Definitions

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

§ 14.2 **Construction Contract.** The agreement between the Owner and Contractor identified on the cover page, including all Contract Documents and changes made to the agreement and the Contract Documents.

§ 14.3 **Contractor Default.** Failure of the Contractor, which has not been remedied or waived, to perform or otherwise to comply with a material term of the Construction Contract.

§ 14.4 **Owner Default.** Failure of the Owner, which has not been remedied or waived, to pay the Contractor as required under the Construction Contract or to perform and complete or comply with the other material terms of the Construction Contract.

§ 14.5 **Contract Documents.** All the documents that comprise the agreement between the Owner and Contractor.

§ 15 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 Owner shall be deemed to be Contractor.

§ 16 Modifications to this bond are as follows:

(Space is provided below for additional signatures of added parties, other than those appearing on the cover page.)

CONTRACTOR AS PRINCIPAL

SURETY

Company: _____
(Corporate Seal)

Company: _____
(Corporate Seal)

Signature: _____
Name and Title:
Address

Signature: _____
Name and Title:
Address



**Travelers Casualty and Surety Company of America
Travelers Casualty and Surety Company
St. Paul Fire and Marine Insurance Company**

POWER OF ATTORNEY

KNOW ALL MEN BY THESE PRESENTS: That Travelers Casualty and Surety Company of America, Travelers Casualty and Surety Company, and St. Paul Fire and Marine Insurance Company are corporations duly organized under the laws of the State of Connecticut (herein collectively called the "Companies"), and that the Companies do hereby make, constitute and appoint Camille M. Cruz, of Atlanta, Georgia, their true and lawful Attorney-in-Fact to sign, execute, seal and acknowledge any and all bonds, recognizances, conditional undertakings and other writings obligatory in the nature thereof on behalf of the Companies in their business of guaranteeing the fidelity of persons, guaranteeing the performance of contracts and executing or guaranteeing bonds and undertakings required or permitted in any actions or proceedings allowed by law.

IN WITNESS WHEREOF, the Companies have caused this instrument to be signed, and their corporate seals to be hereto affixed, this **3rd** day of **February**, 2017.



State of Connecticut

City of Hartford ss.

By:
Robert L. Raney, Senior Vice President

On this the **3rd** day of **February**, 2017, before me personally appeared **Robert L. Raney**, who acknowledged himself to be the Senior Vice President of Travelers Casualty and Surety Company of America, Travelers Casualty and Surety Company, and St. Paul Fire and Marine Insurance Company, and that he, as such, being authorized so to do, executed the foregoing instrument for the purposes therein contained by signing on behalf of the corporations by himself as a duly authorized officer.

In Witness Whereof, I hereunto set my hand and official seal.

My Commission expires the **30th** day of **June**, 2021



Marie C Tetreault
Marie C. Tetreault, Notary Public

This Power of Attorney is granted under and by the authority of the following resolutions adopted by the Boards of Directors of Travelers Casualty and Surety Company of America, Travelers Casualty and Surety Company, and St. Paul Fire and Marine Insurance Company, which resolutions are now in full force and effect, reading as follows:

RESOLVED, that the Chairman, the President, any Vice Chairman, any Executive Vice President, any Senior Vice President, any Vice President, any Second Vice President, the Treasurer, any Assistant Treasurer, the Corporate Secretary or any Assistant Secretary may appoint Attorneys-in-Fact and Agents to act for and on behalf of the Company and may give such appointee such authority as his or her certificate of authority may prescribe to sign with the Company's name and seal with the Company's seal bonds, recognizances, contracts of indemnity, and other writings obligatory in the nature of a bond, recognizance, or conditional undertaking, and any of said officers or the Board of Directors at any time may remove any such appointee and revoke the power given him or her; and it is

FURTHER RESOLVED, that the Chairman, the President, any Vice Chairman, any Executive Vice President, any Senior Vice President or any Vice President may delegate all or any part of the foregoing authority to one or more officers or employees of this Company, provided that each such delegation is in writing and a copy thereof is filed in the office of the Secretary; and it is

FURTHER RESOLVED, that any bond, recognizance, contract of indemnity, or writing obligatory in the nature of a bond, recognizance, or conditional undertaking shall be valid and binding upon the Company when (a) signed by the President, any Vice Chairman, any Executive Vice President, any Senior Vice President or any Vice President, any Second Vice President, the Treasurer, any Assistant Treasurer, the Corporate Secretary or any Assistant Secretary and duly attested and sealed with the Company's seal by a Secretary or Assistant Secretary; or (b) duly executed (under seal, if required) by one or more Attorneys-in-Fact and Agents pursuant to the power prescribed in his or her certificate or their certificates of authority or by one or more Company officers pursuant to a written delegation of authority; and it is

FURTHER RESOLVED, that the signature of each of the following officers: President, any Executive Vice President, any Senior Vice President, any Vice President, any Assistant Vice President, any Secretary, any Assistant Secretary, and the seal of the Company may be affixed by facsimile to any Power of Attorney or to any certificate relating thereto appointing Resident Vice Presidents, Resident Assistant Secretaries or Attorneys-in-Fact for purposes only of executing and attesting bonds and undertakings and other writings obligatory in the nature thereof, and any such Power of Attorney or certificate bearing such facsimile signature or facsimile seal shall be valid and binding upon the Company and any such power so executed and certified by such facsimile signature and facsimile seal shall be valid and binding on the Company in the future with respect to any bond or understanding to which it is attached.

I, **Kevin E. Hughes**, the undersigned, Assistant Secretary of Travelers Casualty and Surety Company of America, Travelers Casualty and Surety Company, and St. Paul Fire and Marine Insurance Company, do hereby certify that the above and foregoing is a true and correct copy of the Power of Attorney executed by said Companies, which remains in full force and effect.

Dated this 12th day of January, 2021



Kevin E. Hughes, Assistant Secretary

**To verify the authenticity of this Power of Attorney, please call us at 1-800-421-3880.
Please refer to the above-named Attorney-in-Fact and the details of the bond to which the power is attached.**

PAYMENT BOND

Any singular reference to Contractor, Surety, Owner, or other party shall be considered plural where applicable.

CONTRACTOR (Name and Address):

[Redacted]

SURETY (Name, and Address of Principal Place of Business):

[Redacted]

OWNER (Name and Address):

[Redacted]

CONTRACT

Effective Date of Agreement:

Amount: \$1,687,475.48

Description (Name and Location):

[Redacted]

BOND

Bond Number: **4444507**

Date (Not earlier than Effective Date of Agreement):

Amount: \$1,687,475.48

Modifications to this Bond Form:

Surety and Contractor, intending to be legally bound hereby, subject to the terms set forth below, do each cause this Payment Bond to be duly executed by an authorized officer, agent, or representative.

CONTRACTOR AS PRINCIPAL

SURETY

[Redacted] (Seal)
Contractor's Name and Corporate Seal

[Redacted] (Seal)
Surety's Name and Corporate Seal

By: [Signature] Signature

By: [Signature] Signature (Attach Power of Attorney)

[Signature] Print Name

[Redacted] Print Name

[Signature] Title

Attorney-In-Fact Title

Attest: [Signature] Signature

Attest: [Signature] Signature

[Signature] Title

[Redacted] Title

1. Contractor and Surety, jointly and severally, bind themselves, their heirs, executors, administrators, successors, and assigns to Owner to pay for labor, materials, and equipment furnished by Claimants for use in the performance of the Contract, which is incorporated herein by reference.
2. With respect to Owner, this obligation shall be null and void if Contractor:
 - 2.1 Promptly makes payment, directly or indirectly, for all sums due Claimants, and
 - 2.2 Defends, indemnifies, and holds harmless Owner from all claims, demands, liens, or suits alleging non-payment by Contractor by any person or entity who furnished labor, materials, or equipment for use in the performance of the Contract, provided Owner has promptly notified Contractor and Surety (at the addresses described in Paragraph 12) of any claims, demands, liens, or suits and tendered defense of such claims, demands, liens, or suits to Contractor and Surety, and provided there is no Owner Default.
3. With respect to Claimants, this obligation shall be null and void if Contractor promptly makes payment, directly or indirectly, for all sums due.
4. Surety shall have no obligation to Claimants under this Bond until:
 - 4.1 Claimants who are employed by or have a direct contract with Contractor have given notice to Surety (at the address described in Paragraph 12) and sent a copy, or notice thereof, to Owner, stating that a claim is being made under this Bond and, with substantial accuracy, the amount of the claim.
 - 4.2 Claimants who do not have a direct contract with Contractor:
 1. Have furnished written notice to Contractor and sent a copy, or notice thereof, to Owner, within 90 days after having last performed labor or last furnished materials or equipment included in the claim stating, with substantial accuracy, the amount of the claim and the name of the party to whom the materials or equipment were furnished or supplied, or for whom the labor was done or performed; and
 2. Have either received a rejection in whole or in part from Contractor, or not received within 30 days of furnishing the above notice any communication from Contractor by which Contractor had indicated the claim will be paid directly or indirectly; and
 3. Not having been paid within the above 30 days, have sent a written notice to Surety (at the address described in Paragraph 12) and sent a copy, or notice thereof, to Owner, stating that a claim is being made under this Bond and enclosing a copy of the previous written notice furnished to Contractor.
5. If a notice by a Claimant required by Paragraph 4 is provided by Owner to Contractor or to Surety, that is sufficient compliance.
6. When a Claimant has satisfied the conditions of Paragraph 4, the Surety shall promptly and at Surety's expense take the following actions:
 - 6.1 Send an answer to that Claimant, with a copy to Owner, within 45 days after receipt of the claim, stating the amounts that are undisputed and the basis for challenging any amounts that are disputed.
 - 6.2 Pay or arrange for payment of any undisputed amounts.
7. Surety's total obligation shall not exceed the amount of this Bond, and the amount of this Bond shall be credited for any payments made in good faith by Surety.
8. Amounts owed by Owner to Contractor under the Contract shall be used for the performance of the Contract and to satisfy claims, if any, under any performance bond. By Contractor furnishing and Owner accepting this Bond, they agree that all funds earned by Contractor in the performance of the Contract are dedicated to satisfy obligations of Contractor and Surety under this Bond, subject to Owner's priority to use the funds for the completion of the Work.

9. Surety shall not be liable to Owner, Claimants, or others for obligations of Contractor that are unrelated to the Contract. Owner shall not be liable for payment of any costs or expenses of any Claimant under this Bond, and shall have under this Bond no obligations to make payments to, give notices on behalf of, or otherwise have obligations to Claimants under this Bond.

10. Surety hereby waives notice of any change, including changes of time, to the Contract or to related subcontracts, purchase orders, and other obligations.

11. No suit or action shall be commenced by a Claimant under this Bond other than in a court of competent jurisdiction in the location in which the Work or part of the Work is located or after the expiration of one year from the date (1) on which the Claimant gave the notice required by Paragraph 4.1 or Paragraph 4.2.3, or (2) on which the last labor or service was performed by anyone or the last materials or equipment were furnished by anyone under the Contract, whichever of (1) or (2) first occurs. 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.

12. Notice to Surety, Owner, or Contractor shall be mailed or delivered to the addresses shown on the signature page. Actual receipt of notice by Surety, Owner, or Contractor, however accomplished, shall be sufficient compliance as of the date received at the address shown on the signature page.

13. When this Bond has been furnished to comply with a statutory requirement in the location where the Contract was to be performed, any provision in this Bond conflicting with said statutory requirement shall be deemed deleted herefrom and provisions conforming to such statutory requirement shall be deemed incorporated herein. The intent is that this Bond shall be construed as a statutory Bond and not as a common law bond.

14. Upon request of any person or entity appearing to be a potential beneficiary of this Bond, Contractor shall promptly furnish a copy of this Bond or shall permit a copy to be made.

15. Definitions

15.1 Claimant: An individual or entity having a direct contract with Contractor, or with a first-tier subcontractor of Contractor, to furnish labor, materials, or equipment for use in the performance of the Contract. The intent of this Bond shall be to include without limitation in the terms "labor, materials or equipment" that part of water, gas, power, light, heat, oil, gasoline, telephone service, or rental equipment used in the Contract, architectural and engineering services required for performance of the Work of Contractor and Contractor's subcontractors, and all other items for which a mechanic's lien may be asserted in the jurisdiction where the labor, materials, or equipment were furnished.

15.2 Contract: The agreement between Owner and Contractor identified on the signature page, including all Contract Documents and changes thereto.

15.3 Owner Default: Failure of Owner, which has neither been remedied nor waived, to pay Contractor as required by the Contract, or to perform and complete or otherwise comply with the other terms thereof.

FOR INFORMATION ONLY – *(Name, Address, and Telephone)*
Surety Agency or Broker: [REDACTED]
Owner's Representative: [REDACTED]

PERFORMANCE BOND

Any singular reference to Contractor, Surety, Owner, or other party shall be considered plural where applicable.

CONTRACTOR (Name and Address):

[Redacted]

SURETY (Name, and Address of Principal Place of Business):

[Redacted]

OWNER (Name and Address):

[Redacted]

CONTRACT

Effective Date of Agreement:

Amount: \$1,687,475.48

Description (Name and Location):

[Redacted]

BOND

Bond Number: 4444507

Date (Not earlier than Effective Date of Agreement):

Amount: \$1,687,475.48

Modifications to this Bond Form:

Surety and Contractor, intending to be legally bound hereby, subject to the terms set forth below, do each cause this Performance Bond to be duly executed by an authorized officer, agent, or representative.

CONTRACTOR AS PRINCIPAL

[Redacted] (Seal)

Contractor's Name and Corporate Seal

By:

Signature

Suzi Dale

Print Name

President

Title

Attest:

Signature

VP of operations

Title

SURETY

[Redacted] (Seal)

Surety's Name and Corporate Seal

By:

Signature (Attach Power of Attorney)

[Redacted]
Print Name

Attorney-In-Fact

Title

Attest:

Signature

[Redacted]
Title

Contractor and Surety, jointly and severally, bind themselves, their heirs, executors, administrators, successors, and assigns to Owner for the performance of the Contract, which is incorporated herein by reference.

1. If Contractor performs the Contract, Surety and Contractor have no obligation under this Bond, except to participate in conferences as provided in Paragraph 2.1.
2. If there is no Owner Default, Surety's obligation under this Bond shall arise after:
 - 2.1 Owner has notified Contractor and Surety, at the addresses described in Paragraph 9 below, that Owner is considering declaring a Contractor Default and has requested and attempted to arrange a conference with Contractor and Surety to be held not later than 15 days after receipt of such notice to discuss methods of performing the Contract. If Owner, Contractor, and Surety agree, Contractor shall be allowed a reasonable time to perform the Contract, but such an agreement shall not waive Owner's right, if any, subsequently to declare a Contractor Default; and
 - 2.2 Owner has declared a Contractor Default and formally terminated Contractor's right to complete the Contract. Such Contractor Default shall not be declared earlier than 20 days after Contractor and Surety have received notice as provided in Paragraph 2.1; and
 - 2.3 Owner has agreed to pay the Balance of the Contract Price to:
 1. Surety in accordance with the terms of the Contract; or
 2. Another contractor selected pursuant to Paragraph 3.3 to perform the Contract.
3. When Owner has satisfied the conditions of Paragraph 2, Surety shall promptly, and at Surety's expense, take one of the following actions:
 - 3.1 Arrange for Contractor, with consent of Owner, to perform and complete the Contract; or
 - 3.2 Undertake to perform and complete the Contract itself, through its agents or through independent contractors; or
 - 3.3 Obtain bids or negotiated proposals from qualified contractors acceptable to Owner for a contract for performance and completion of the Contract, arrange for a contract to be prepared for execution by Owner and contractor selected with Owner's concurrence, to be secured with performance and payment bonds executed by a qualified surety equivalent to the bonds issued on the Contract, and pay to Owner the amount of damages as described in Paragraph 5 in excess of the Balance of the Contract Price incurred by Owner resulting from Contractor Default; or
 - 3.4 Waive its right to perform and complete, arrange for completion, or obtain a new contractor, and with reasonable promptness under the circumstances:
 1. After investigation, determine the amount for which it may be liable to Owner and, as soon as practicable after the amount is determined, tender payment therefor to Owner; or
 2. Deny liability in whole or in part and notify Owner citing reasons therefor.
4. If Surety does not proceed as provided in Paragraph 3 with reasonable promptness, Surety shall be deemed to be in default on this Bond 15 days after receipt of an additional written notice from Owner to Surety demanding that Surety perform its obligations under this Bond, and Owner shall be entitled to enforce any remedy available to Owner. If Surety proceeds as provided in Paragraph 3.4, and Owner refuses the payment tendered or Surety has denied liability, in whole or in part, without further notice Owner shall be entitled to enforce any remedy available to Owner.
5. After Owner has terminated Contractor's right to complete the Contract, and if Surety elects to act under Paragraph 3.1, 3.2, or 3.3 above, then the responsibilities of Surety to Owner shall not be greater than those of Contractor under the Contract, and the responsibilities of Owner to Surety shall not be greater than those of Owner under the Contract. To the limit of the amount of this Bond, but subject to commitment by Owner of the Balance of the Contract Price to mitigation of costs and damages on the Contract, Surety is obligated without duplication for:

- 5.1 The responsibilities of Contractor for correction of defective Work and completion of the Contract;
- 5.2 Additional legal, design professional, and delay costs resulting from Contractor's Default, and resulting from the actions of or failure to act of Surety under Paragraph 3; and
- 5.3 Liquidated damages, or if no liquidated damages are specified in the Contract, actual damages caused by delayed performance or non-performance of Contractor.

6. Surety shall not be liable to Owner or others for obligations of Contractor that are unrelated to the Contract, and the Balance of the Contract Price shall not be reduced or set off on account of any such unrelated obligations. No right of action shall accrue on this Bond to any person or entity other than Owner or its heirs, executors, administrators, or successors.

7. Surety hereby waives notice of any change, including changes of time, to Contract or to related subcontracts, purchase orders, and other obligations.

8. Any proceeding, legal or equitable, under this Bond may be instituted in any 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 Contractor Default or within two years after Contractor ceased working or within two years after 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.

9. Notice to Surety, Owner, or Contractor shall be mailed or delivered to the address shown on the signature page.

10. When this Bond has been furnished to comply with a statutory requirement in the location where the Contract was to be performed, any provision in this Bond conflicting with said statutory requirement shall be deemed deleted here from and provisions conforming to such statutory requirement shall be deemed incorporated herein. The intent is that this Bond shall be construed as a statutory bond and not as a common law bond.

11. Definitions.

- 11.1 Balance of the Contract Price: The total amount payable by Owner to Contractor under the Contract after all proper adjustments have been made, including allowance to Contractor of any amounts received or to be received by Owner in settlement of insurance or other Claims for damages to which Contractor is entitled, reduced by all valid and proper payments made to or on behalf of Contractor under the Contract.
- 11.2 Contract: The agreement between Owner and Contractor identified on the signature page, including all Contract Documents and changes thereto.
- 11.3 Contractor Default: Failure of Contractor, which has neither been remedied nor waived, to perform or otherwise to comply with the terms of the Contract.
- 11.4 Owner Default: Failure of Owner, which has neither been remedied nor waived, to pay Contractor as required by the Contract or to perform and complete or otherwise comply with the other terms thereof.

FOR INFORMATION ONLY – <i>(Name, Address and Telephone)</i>	
Surety Agency or Broker	[REDACTED]
Owner's Representative:	[REDACTED]

SureTec Insurance Company

LIMITED POWER OF ATTORNEY

Know All Men by These Presents, That SURETEC INSURANCE COMPANY (the "Company"), a corporation duly organized and existing under the laws of the State of Texas, and having its principal office in Houston, Harris County, Texas, does by these presents make, constitute and appoint

Edward Arens, Philip Baker, Michele Bonnin, Erica Anne Cox, Jillian O'Neal, Rebecca Garza

its true and lawful Attorney-in-fact, with full power and authority hereby conferred in its name, place and stead, to execute, acknowledge and deliver any and all bonds, recognizances, undertakings or other instruments or contracts of suretyship to include waivers to the conditions of contracts and consents of surety for, providing the bond penalty does not exceed

Three Million and 00/100 Dollars (\$3,000,000.00)

and to bind the Company thereby as fully and to the same extent as if such bond were signed by the President, sealed with the corporate seal of the Company and duly attested by its Secretary, hereby ratifying and confirming all that the said Attorney-in-Fact may do in the premises. Said appointment is made under and by authority of the following resolutions of the Board of Directors of the SureTec Insurance Company:

Be it Resolved, that the President, any Vice-President, any Assistant Vice-President, any Secretary or any Assistant Secretary shall be and is hereby vested with full power and authority to appoint any one or more suitable persons as Attorney(s)-in-Fact to represent and act for and on behalf of the Company subject to the following provisions:

Attorney-in-Fact may be given full power and authority for and in the name of and of behalf of the Company, to execute, acknowledge and deliver, any and all bonds, recognizances, contracts, agreements or indemnity and other conditional or obligatory undertakings and any and all notices and documents canceling or terminating the Company's liability thereunder, and any such instruments so executed by any such Attorney-in-Fact shall be binding upon the Company as if signed by the President and sealed and effected by the Corporate Secretary.

Be it Resolved, that the signature of any authorized officer and seal of the Company heretofore or hereafter affixed to any power of attorney or any certificate relating thereto by facsimile, and any power of attorney or certificate bearing facsimile signature or facsimile seal shall be valid and binding upon the Company with respect to any bond or undertaking to which it is attached. (Adopted at a meeting held on 20th of April, 1999.)

In Witness Whereof, SURETEC INSURANCE COMPANY has caused these presents to be signed by its President, and its corporate seal to be hereto affixed this 12th day of May, A.D. 2021.

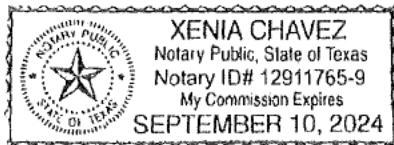
SURETEC INSURANCE COMPANY

By: Michael C. Keimig
Michael C. Keimig, President



State of Texas ss:
County of Harris

On this 12th day of May, A.D. 2021 before me personally came Michael C. Keimig, to me known, who, being by me duly sworn, did depose and say, that he resides in Houston, Texas, that he is President of SURETEC INSURANCE COMPANY, the company described in and which executed the above instrument; that he knows the seal of said Company; that the seal affixed to said instrument is such corporate seal; that it was so affixed by order of the Board of Directors of said Company; and that he signed his name thereto by like order.



Xenia Chavez
Xenia Chavez, Notary Public
My commission expires September 10, 2024

I, M. Brent Beaty, Assistant Secretary of SURETEC INSURANCE COMPANY, do hereby certify that the above and foregoing is a true and correct copy of a Power of Attorney, executed by said Company, which is still in full force and effect; and furthermore, the resolutions of the Board of Directors, set out in the Power of Attorney are in full force and effect.

Given under my hand and the seal of said Company at Houston, Texas this _____ day of _____, A.D.

M. Brent Beaty
M. Brent Beaty, Assistant Secretary

Any instrument issued in excess of the penalty stated above is totally void and without any validity. 4221314
For verification of the authority of this power you may call (713) 812-0800 any business day between 8:30 am and 5:00 pm CST.

SureTec Insurance Company

THIS BOND RIDER CONTAINS IMPORTANT COVERAGE INFORMATION

Statutory Complaint Notice

To obtain information or make a complaint: You may call the Surety's toll free telephone number for information or to make a complaint at: 1-866-732-0099. You may also write to the Surety at:

SureTec Insurance Company
9737 Great Hills Trail, Suite 320
Austin, Tx 78759

You may contact the Texas Department of Insurance to obtain information on companies, coverage, rights or complaints at 1-800-252-3439. You may write the Texas Department of Insurance at

PO Box 149104
Austin, TX 78714-9104
Fax#: 512-475-1771

PREMIUM OR CLAIM DISPUTES: Should you have a dispute concerning your premium or about a claim, you should contact the Surety first. If the dispute is not resolved, you may contact the Texas Department of Insurance.

Terrorism Risks Exclusion

The Bond to which this Rider is attached does not provide coverage for, and the surety shall not be liable for, losses caused by acts of terrorism, riot, civil insurrection, or acts of war.

Exclusion of Liability for Mold, Mycotoxins, Fungi & Environmental Hazards

The Bond to which this Rider is attached does not provide coverage for, and the surety thereon shall not be liable for, molds, living or dead fungi, bacteria, allergens, histamines, spores, hyphae, or mycotoxins, or their related products or parts, nor for any environmental hazards, bio-hazards, hazardous materials, environmental spills, contamination, or cleanup, nor the remediation thereof, nor the consequences to persons, property, or the performance of the bonded obligations, of the occurrence, existence, or appearance thereof.

Project No. _____

PERFORMANCE BOND

PERFORMANCE BOND

KNOW ALL MEN BY THESE PRESENTS: That we _____ (name of contractor) _____, Principal, and _____ (name of surety) _____, a corporation duly organized under the laws of the State of _____, and authorized to issue surety bonds in the State of Texas, Surety herein, are held and firmly bound unto _____ (name of property owner) _____, Obligee, in the penal sum of _____ (this should be the GMP or Contract Price of the Contract) Dollars (\$ _____) for the payment of which sum we will bind ourselves, our heirs, executors, administrators, successors, and assigns, jointly and severally, firmly by these presents.

WHEREAS, Principal has entered into a certain written contract, hereinafter referred to as the "Contract", with the Obligee, dated the ____ day of _____, 20 __, to _____ (brief description of work/project) _____; which Contract is hereby referred to and made a part hereof as fully and to the same extent as if copied at length herein.

NOW, THEREFORE, THE CONDITION OF THIS OBLIGATION IS SUCH, that if the said Principal shall faithfully perform the Work required under the Contract in accordance with the plans, specifications, and contract documents, including any warranty work required under the Contract, and shall fully indemnify and save harmless Obligee from all costs and damage which Obligee may suffer by reason of Principal's default or failure to perform, and shall fully reimburse and repay Obligee all outlay and expense which Obligee may incur in making good such default or failure to perform, then this obligation shall be void, otherwise it shall remain in full force and effect.

In the event the Principal is declared in default under the Contract, Surety will, within fifteen (15) days of the determination of such default, take over and assume responsibility for completion of such Contract and become entitled to the payment of the balance of the Contract Price, or the Surety shall make other arrangements satisfactory to the Obligee for the completion of the defaulted Work. Conditioned upon the Surety's faithful performance of its obligations, the Surety's liability shall not exceed the penal sum of this Bond.

Surety, for value received, stipulates and agrees that no change, extension of time, alteration or addition to the terms of this Contract or to the Work to be performed thereunder, or the plans, specifications, or drawings accompanying the same, shall in any way affect its obligation on this Bond, and it does hereby waive notice of any such change, extension of time, alteration or addition to the terms of the Contract, or to the work to be performed thereunder.

Surety agrees to pay to the Obligee upon demand all loss and expenses, including attorney's fees and court costs, incurred by the Obligee by reason of or on account of any breach of this obligation by Surety.

IN WITNESS WHEREOF, this instrument has been executed by the duly authorized representatives of the Principal and the Surety.

Signed and sealed this ____ day of _____, 20__.

PRINCIPAL: _____

By: _____
Title: _____

SURETY: _____

By: _____
_____, Attorney-in-Fact

[Attach Power of Attorney for Surety's Attorney-in-Fact.]