



A Member of the Tokio Marine Group

***Premium Based on Final Contract Price, Not Penal Sum***

Bond Number: \_\_\_\_\_

Initial Premium: \$

## **PERFORMANCE BOND**

Take notice that \_\_\_\_\_, as Principal (hereinafter called "the Principal"), and **PHILADELPHIA INDEMNITY INSURANCE COMPANY**, as Surety (hereinafter called "the Surety"), are held and firmly bound unto \_\_\_\_\_, as Obligee, (hereinafter called the "Obligee"), in the amount of \_\_\_\_\_ DOLLARS (\$) (hereinafter called "the Penal Sum"), for the payment whereof the Principal and the Surety bind themselves, their heirs, executors, administrators, successors and assigns, jointly and severally, firmly by these presents.

WHEREAS. The Principal has by written agreement dated \_\_\_\_\_, entered into a contract with Obligee for \_\_\_\_\_ (hereinafter called "the Contract")

NOW THEREFORE, THE CONDITION OF THIS OBLIGATION is such that, if the Principal shall promptly and faithfully furnish all labor, material, and equipment necessary to complete the Principal's scope of work under the Contract (hereinafter collectively called "the Construction Work"), then this obligation shall be null and void, otherwise it shall remain in full force and effect subject to the terms and conditions of this Performance Bond. Although the Surety waives notice of any reasonable modifications to the terms of the Contract, the Surety's obligations under this Performance Bond are expressly conditioned upon:

- a. The Obligee's compliance with the material terms of the Contract including, but not limited to, payment to the Principal as required by the Contract; and
  - b. The Obligee's written notice to the Principal and the Surety that it is considering declaring a Contractor Default. Within 5 business days of the Surety's receipt of the written notice described in this Paragraph 1(b), the Surety, in its sole discretion, may request a conference among the Obligee, the Principal and the Surety to discuss the Principal's completion of the Construction Work, which conference shall be conducted within 10 business days of the Surety's request for said conference; and
  - c. The Obligee's written notice to the Principal and the Surety of the Obligee's formal declaration of a Contractor Default and the termination of the Principal's right to complete the Construction Work, which formal declaration and termination shall not be made until 10 business days from the date of the Surety's receipt of the written notice required by Paragraph 1(b) or the date the conference described in Paragraph 1(b) of this Performance Bond occurs, whichever date last occurs; and
  - d. The Obligee's written notice to the Principal and the Surety of the Obligee's agreement to pay the Contract Balance to the Surety (or at the Surety's direction to a contractor selected by the Surety to perform the Construction Work as set forth herein).
2. If there is no Obligee Default and when all of the conditions precedent set forth in Paragraph 1 of this Performance Bond have been satisfied, the Surety shall, within 21 business days, provide written notice to the Obligee of the Surety's election of one of the following options:

- a. Directing the Principal to complete the Construction Work with the Obligee's consent, which consent will not be unreasonably withheld; or
  - b. Undertaking to complete the Construction Work itself or through others (including the Principal) upon entering into an acceptable completion agreement with the Obligee; or
  - c. Arranging for a separate contract between the Obligee and a completion contractor, who is reasonably acceptable to the Obligee, for the completion of the Construction Work, which separate contract will be secured by a performance bond and a payment bond furnished by the completion contractor in favor of the Obligee and the Surety; or
  - d. Waiving the Surety's right to direct, undertake, or arrange for the completion of the Construction Work and pay the Obligee the amount the Surety has determined it is liable to the Obligee under this Performance Bond; or
  - e. Waiving the Surety's right to direct, undertake, or arrange for the completion of the Construction Work, and deny liability to the Obligee under this Performance Bond, and notifying the Obligee of the bases of the Surety's denial of liability.
3. If, but only if, each of the conditions precedent set forth in Paragraph 1 of this Performance Bond have been satisfied and the Surety fails to provide written notice to the Obligee of the Surety's election of one of the options set forth in Paragraph 2 within 21 business days, the Surety shall be deemed to be in default under this Performance Bond if Surety fails to elect an option under Paragraph within 7 business days after receipt of an additional written notice from the Obligee to the Surety demanding that Surety perform its obligations under the Performance Bond, after which the Obligee may then exercise any right or remedy granted to it by the Contract.
  4. If the Surety elects the option set forth in Paragraph 2(a) or set forth in Paragraph 2(b) of this Performance Bond, the Obligee shall pay the Contract Balance to the Surety at the times and in the manner that payments would have been owed to the Principal had no Contractor Default existed under the Contract, free from any reduction or offset on account of any obligation that is unrelated to the Contract. All amounts the Surety expends in excess of the Contract Balance paid to the Surety to complete the Construction Work shall reduce the Penal Sum. If Surety elects any of the options set forth in Paragraph 2(c), Paragraph 2(d), or Paragraph 2(e), the Surety's liability under this Performance Bond may not exceed the reasonable cost to complete the Construction Work minus the Contract Balance paid to the Surety or its completion contractor up to the Penal Sum of the Performance Bond.
  5. Notwithstanding the option elected by the Surety under Paragraph 2 of this Performance Bond and/or the Surety's failure to make such an election, the Surety's aggregate liability is limited to and shall not exceed the Penal Sum under any circumstances. The Penal Sum may only be modified by means of a written rider to this Performance Bond executed by an authorized representative of the Surety.
  6. The Obligee is the only intended beneficiary of this Performance Bond. Any suit or action by Obligee relating to this Performance Bond shall be:
    - a. Commenced or instituted in a court of competent jurisdiction in the location in which the Construction Work or a part of the Construction Work is situated;
    - b. Commenced or instituted within 1 year of the earlier of:
      - i. the Principal's cessation of performing the Construction Work;
      - ii. the substantial completion of the Construction Work; or
      - iii. the Obligee's satisfaction of the conditions precedent set forth in Paragraph 1 of this Performance Bond;
    - c. Commenced or instituted within the shortest period of limitation enforceable by sureties in the jurisdiction at issue if the limitation period set forth in Paragraph 6(b) is void or is otherwise in that jurisdiction.

7. Definitions:

- a. **Contract Balance:** The total amount payable by the Obligee to the Principal under the Contract after all proper adjustments are made, including any amounts received or to be received by the Obligee in settlement of insurance or other claims for damages to which the Principal is entitled, reduced by all valid and proper payments made to or on behalf of the Principal under the Contract.
- b. **Contractor Default:** The failure of the Principal, which has not been remedied or waived, to perform or otherwise comply with a material term of the Contract relative to the Construction Work.
- c. **Obligee Default:** The failure of the Obligee, which has not been remedied or waived, to comply with a material term of the Contract relative to the Construction Work.

DATED: \_\_\_\_\_ day of \_\_\_\_\_, 20\_\_\_\_\_.

(Principal) **Philadelphia Indemnity Insurance Company** (Surety)

By: \_\_\_\_\_ By: \_\_\_\_\_, Attorney In Fact  
Its: \_\_\_\_\_