

# DRAFT AIA<sup>®</sup> Document A312<sup>™</sup> - 1984

## Performance Bond

### ANNEX C

CONTRACTOR (Name and Address):

SURETY (Name and Principal Place of Business):

OWNER (Name and Address):

### CONSTRUCTION CONTRACT

Date:

Amount:

Description (Name and Location):

### BOND

Date (Not earlier than Construction Contract Date):

Amount:

Modifications to this Bond:

X

See Last Page

### CONTRACTOR AS PRINCIPAL

Company: (Corporate Seal)

Signature:

Name and

Title:

(Any additional signatures appear on the last page)

### SURETY

Company: (Corporate Seal)

Signature:

Name and

Title:

(FOR INFORMATION ONLY - Name, Address and Telephone)

AGENT or BROKER:

OWNER'S REPRESENTATIVE

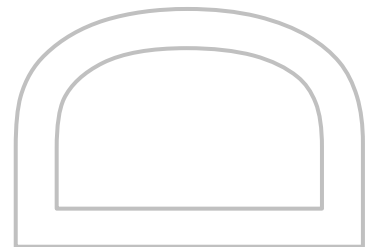
(Architect, Engineer or other party):

### ADDITIONS AND DELETIONS:

The author of this document has added information needed for its completion. The author may also have revised the text of the original AIA standard form. An *Additions and Deletions Report* that notes added information as well as revisions to the standard form text is available from the author and should be reviewed.

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

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



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§ 1 The Contractor and the 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 to participate in conferences as provided in Section 3.1.

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

§ 3.1 The Owner has notified the Contractor and the Surety at its address described in Section 10 below that the Owner is considering declaring a Contractor Default and has requested and attempted to arrange a conference with the Contractor and the Surety to be held not later than fifteen days after receipt of such notice to discuss methods of performing the Construction Contract. 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; and

§ 3.2 The Owner has declared a Contractor Default and formally terminated the Contractor's right to complete the contract. Such Contractor Default shall not be declared earlier than twenty days after the Contractor and the Surety have received notice as provided in Section 3.1; and

§ 3.3 The Owner has agreed to pay the Balance of the Contract Price to the Surety in accordance with the terms of the Construction Contract or to a contractor selected to perform the Construction Contract in accordance with the terms of the contract with the Owner.

§ 4 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:

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

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

§ 4.3 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 the 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 6 in excess of the Balance of the Contract Price incurred by the Owner resulting from the Contractor's default; or

§ 4.4 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, tender payment therefor to the Owner; or
- .2 Deny liability in whole or in part and notify the Owner citing reasons therefor.

§ 5 If the Surety does not proceed as provided in Section 4 with reasonable promptness, the Surety shall be deemed to be in default on this Bond fifteen 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 4.4, and the Owner refuses the payment tendered 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.

§ 6 After the Owner has terminated the Contractor's right to complete the Construction Contract, and if the Surety elects to act under Section 4.1, 4.2, or 4.3 above, 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. To the limit of the amount of this Bond, but subject to commitment by the Owner of the Balance of the Contract Price to mitigation of costs and damages on the Construction Contract, the Surety is obligated without duplication for:

§ 6.1 The responsibilities of the Contractor for correction of defective work and completion of the Construction Contract;

§ 6.2 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 4; and

§ 6.3 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.

§ 7 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 or successors.

§ 8 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.

§ 9 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 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.

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

§ 11 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 here from and provisions conforming to such statutory or other legal 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.

## § 12 DEFINITIONS

§ 12.1 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.

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

§ 12.3 Contractor Default: Failure of the Contractor, which has neither been remedied nor waived, to perform or otherwise to comply with the terms of the Construction Contract.

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

## § 13 MODIFICATIONS TO THIS BOND ARE AS FOLLOWS:

### **The following shall be added at the end of Section 6.2**

The Parties agree that the additional legal, design professional and delay costs that the Owner shall be entitled to recover pursuant to Section 6.2 shall include (but not be limited to) attorneys' fees, design professional fees, and other administrative costs and expenses incurred by the Owner resulting from the Contractor's Default and until the Surety enters into a written agreement with the Owner to act under Subparagraphs 4.1, 4.2, or 4.3, above."

**The following shall be added at the end of Section 8 of the Bond:**

"Further, the Surety authorizes the Contractor and the Owner to make any addendum, variation or amendment to the Construction Contract or the Works without reference to the Surety, and agrees that this Bond shall apply to such addendum, variation or amendment. The obligations and liabilities of the Surety shall not in any way be discharged or reduced by any allowance of time or other indulgence whatsoever by the Owner to the Contractor, or by any variation or suspension of the Works to be executed under the Construction Contract, or by amendments to the Construction Contract or to the constitution of the Owner or Contractor, or by any other matters, whether with or without the knowledge or consent of the Surety. The Surety's rights are subject to the rights of the Owner set forth in any collateral warranty required to be provided under Sub-Clause 4.1.8 of the Construction Contract.

Notwithstanding any rights the Surety may otherwise possess, the Surety expressly acknowledges that Sub-Clauses 14.2A and 14.2B of the Construction Contract provide for specific pre-payments to the Contractor therein and consents to and agrees to those payments, and the Surety waives any objections, defenses, or claims the Surety may have, if any, against Owner in regards to the Surety's obligations hereunder as a result of those payments.

**Section 9 of the Bond shall be deleted and replaced with:**

"This Bond shall be governed by and construed in accordance with the laws of the State of New York, United States of America (without regard to choice of law or conflict of law principles).

Any dispute arising out of, under or in connection with the Bond or out of the subject matter of this Bond shall be finally settled by international arbitration.

Unless otherwise agreed by both Parties:

- (a) the dispute shall be finally settled under the Rules of Arbitration of the International Chamber of Commerce (the "Rules"),
- (b) in addition to the Rules, the arbitration shall be conducted according to the International Bar Association Rules on the Taking of Evidence in International Commercial Arbitration,
- (c) the dispute shall be settled by three arbitrators who shall all be licensed lawyers appointed in accordance with these Rules,
- (d) the arbitration shall be conducted in the English language,
- (e) the venue of the arbitration shall be Miami, Florida - United States of America, and
- (f) the arbitration agreement and the arbitration shall be governed by the United States Federal Arbitration Act, 9 U.S.C. §§ 1 et seq.

Section 11 of the Bond shall be deleted and replaced with the words "Not Used".

There shall be a new Section 14 as follows:

A) Upon seven (7) days written notice to the Surety, the Owner may pay to any Subcontractor (as defined in the Construction Contract) any sums owed to them by the Contractor prior to the date of termination. Upon payment, the rights of the Subcontractors under the Payment Bond in respect of such sums are assigned to the Owner. The Surety reserves the right to contest the reasonableness of the amounts paid by the Owner.

B) The Surety acknowledges that pursuant to the terms of any collateral warranty required to be provided under Sub-Clause 4.1.8 of the Construction Contract, the Owner may accept assignment by the subcontractor of its rights under this Bond to the extent the Owner pays the subcontractor for work which the subcontract performs for the Contractor. The Surety reserves the right to contest the reasonableness of the amounts paid by the Owner to the subcontractor.

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

CONTRACTOR AS PRINCIPAL

Company: \_\_\_\_\_ (Corporate Seal)

SURETY

Company: \_\_\_\_\_ (Corporate Seal)

Signature: \_\_\_\_\_

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

Address: \_\_\_\_\_

Signature: \_\_\_\_\_

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

Address: \_\_\_\_\_

ANNEX C-1

Payment Bond

CONTRACTOR (Name and Address):

SURETY (Name and Principal Place of Business):

OWNER (Name and Address):

CONSTRUCTION CONTRACT

Date:

Amount:

Description (Name and Location):

BOND

Date (Not earlier than Construction Contract Date):

Amount:

Modifications to this Bond:

X

See Last Page

CONTRACTOR AS PRINCIPAL

Company: (Corporate Seal)

SURETY

Company: (Corporate Seal)

Signature:

Name and Title:

(Any additional signatures appear on the last page)

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 the Surety, jointly and severally bind themselves, their heirs, executors, administrators, successors and assigns to the Owner to pay for labor, materials and equipment furnished for use in the performance of the Construction Contract, which is incorporated herein by reference.

§ 2 With respect to the Owner, this obligation shall be null and void if the Contractor:

§ 2.1 Promptly makes payment, directly or indirectly, for all sums due Claimants, and

§ 2.2 Defends, indemnifies and holds harmless the Owner from claims, demands, liens or suits by any person or entity whose claim, demand, lien or suit is for the payment for labor, materials or equipment furnished for use in the performance of the Construction Contract, provided the Owner has promptly notified the Contractor and the Surety (at the address described in Section 12) of any claims, demands, liens or suits and tendered defense of such claims, demands, liens or suits to the Contractor and the Surety, and provided there is no Owner Default.

§ 3 With respect to Claimants, this obligation shall be null and void if the Contractor promptly makes payment, directly or indirectly, for all sums due.

§ 4 The Surety shall have no obligation to Claimants under this Bond until:

§ 4.1 Claimants who are employed by or have a direct contract with the Contractor have given notice to the Surety (at the address described in Section 12) and sent a copy, or notice thereof, to the 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 the Contractor:

- .1 Have furnished written notice to the Contractor and sent a copy, or notice thereof, to the 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 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 the Contractor, or not received within 30 days of furnishing the above notice any communication from the Contractor by which the Contractor has 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 the Surety (at the address described in Section 12) and sent a copy, or notice thereof, to the Owner, stating that a claim is being made under this Bond and enclosing a copy of the previous written notice furnished to the Contractor.

§ 5 If a notice required by Section 4 is given by the Owner to the Contractor or to the Surety, that is sufficient compliance.

§ 6 When the Claimant has satisfied the conditions of Section 4, the Surety shall promptly and at the Surety's expense take the following actions:

§ 6.1 Send an answer to the Claimant, with a copy to the Owner, within 60 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 The 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 the Surety.

§ 8 Amounts owed by the Owner to the Contractor under the Construction Contract shall be used for the performance of the Construction Contract and to satisfy claims, if any, under any Construction Performance Bond. By the Contractor furnishing and the Owner accepting this Bond, they agree that all funds earned by the Contractor in the performance of the Construction Contract are dedicated to satisfy obligations of the Contractor and the Surety under this Bond, subject to the Owner's priority to use the funds for the completion of the work.

§ 9 The Surety shall not be liable to the Owner, Claimants or others for obligations of the Contractor that are unrelated to the Construction Contract. The 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 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 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 Section 4.1 or Section 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 Construction 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 the Surety, the Owner or the Contractor shall be mailed or delivered to the address shown on the signature page. Actual receipt of notice by Surety, the Owner or the 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 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. The intent is that this Bond shall be construed as a statutory bond and not as a common law bond.

§ 14 Upon request by any person or entity appearing to be a potential beneficiary of this Bond, the 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 the Contractor or with a subcontractor of the 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 Construction Contract, architectural and engineering services required for performance of the work of the Contractor and the 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 Construction Contract: The agreement between the Owner and the Contractor identified on the signature page, including all Contract Documents and changes thereto.

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

#### § 16 MODIFICATIONS TO THIS BOND ARE AS FOLLOWS:

**The following shall be added at the end of Section 7 of the Bond:**

Claims **for and in respect** of labor shall take precedence over all other claims under the Bond.

**The following shall be added at the end of Section 10 of the Bond:**

Further, the Surety authorizes the Contractor and the Owner to make any addendum, variation or amendment to the Construction Contract or the Works without reference to the Surety, and agrees that this Bond shall apply to such addendum, variation or amendment. The obligations and liabilities of the Surety shall not in any way be discharged or reduced by any allowance of time or other indulgence whatsoever by the Owner to the Contractor, or by any variation or suspension of the Works to be executed under the Construction Contract, or by amendments to the Construction Contract or to the constitution of the Owner or Contractor, or by any other matters, whether with or without the knowledge or consent of the Surety. The Surety's rights are subject to the rights of the Owner set forth in any collateral warranty required to be provided under Sub-Clause 4.1.8 of the Construction Contract.

Notwithstanding any rights the Surety may otherwise possess, the Surety expressly acknowledges that Sub-Clauses 14.2A and 14.2B of the Construction Contract provide for specific pre-payments to the Contractor therein and



consents to and agrees to those payments, and the Surety waives any objections, defenses, or claims the Surety may have, if any, against Owner in regards to the Surety's obligations hereunder as a result of those payments.

**Section 11 of the Bond shall be deleted and replaced with the following wording:**

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 one hundred and eighty days after the date of the third and final publication in a Panamanian National Newspaper of the Notice of Completion of the Works (as such notice is defined in the Construction Contract)

**Section 13 of the Bond shall be deleted and replaced with "Not Used".**

**Add new Section 17 as follows:**

**A) Upon seven (7) days written notice to the Surety, the Owner may pay to any Subcontractor (as defined in the Construction Contract) the sums owed to them by the Contractor prior to the date of termination. Upon payment, the rights of the Subcontractors under the Payment Bond in respect of such sums are assigned to the Owner. The Surety reserves the right to contest the reasonableness of the amounts paid by the Owner.**

**B) The Surety acknowledges that pursuant to the terms of any collateral warranty required to be provided under Sub-Clause 4.1.8 of the Construction Contract, the Owner may accept assignment by the subcontractor of its rights under this Bond to the extent the Owner pays the subcontractor for work which the subcontract performs for the Contractor. The Surety reserves the right to contest the reasonableness of the amounts paid by the Owner to the subcontractor.**

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

**CONTRACTOR AS PRINCIPAL**

Company: \_\_\_\_\_  
(Corporate Seal)

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

**SURETY**

Company: \_\_\_\_\_  
(Corporate Seal)

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