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## Performance Bond

**Bond No.: \*\*\*\* (the "Bond")**

**Bond Amount: \$ (the "Bond Amount")**

\*\*\*\* as Principal (the "Principal") and \*\*\*\* a corporation created and existing under the laws of \*\*\*\* and duly authorized to transact the business of Suretyship in \*\*\*\* as Surety (the "Surety") are held and firmly bound unto \*\*\*\* as Obligee (the "Obligee") in the amount of \*\*\*\* Dollars (\$\*\*\*\*) lawful money of Canada for the payment of which sum the Principal and the Surety bind themselves, their heirs, executors, administrators, successors and assigns, jointly and severally.

WHEREAS, the Principal entered into a written contract (the "Contract") with the Obligee, dated \*\*\*\* for [Insert the description of the project as it is set out in the Contract].

The condition of this obligation is such that if the Principal shall promptly and faithfully perform the Contract then this obligation shall be null and void; otherwise it shall remain in full force and effect.

### I - Pre-Demand Conference

Prior to a Demand (as defined in Section II 3) below) under this Bond, the Obligee may notify the Surety and the Principal in writing that it is considering declaring the Principal to be in default under the Contract and request a pre-demand conference (the "Pre-Demand Conference"). Upon receipt of such request the Surety and Principal shall participate in a Pre-Demand Conference meeting or telephone conference call, on a without prejudice basis, with the Obligee which shall be arranged by the Surety and held at a mutually agreeable time and place not later than fifteen (15) calendar days after receipt of such notice, unless otherwise mutually agreed to by each of the Obligee, Surety and Principal.

The purpose of the Pre-Demand Conference is to allow the Obligee to express its concerns about the Principal's performance pursuant to the Contract and to allow the Principal to respond to such concerns prior to the Obligee exercising its rights under the Contract or this Bond. It should not be construed as an alternative to any dispute resolution provisions which may appear in the Contract. Neither the participation by any party in the Pre-Demand Conference, nor any statement or position taken by any party during the Pre-Demand Conference or any follow-up Pre-Demand Conference, may be relied on by any other party as a waiver or compromise of the rights or duties of the Obligee, the Surety or the Principal under the Contract, this Bond or applicable law.

### II - Conditions Precedent to Liability

The Surety shall have no liability under this Bond unless all of the following conditions precedent (the "Conditions Precedent") have been satisfied:

1. The Principal is, and is declared by the Obligee to be, in default under the Contract; and
2. The Obligee has performed the Obligee's obligations under the Contract; and
3. The Obligee has made a Demand under the Bond. In this Bond, "Demand" means a clear and unequivocal written statement by the Obligee, delivered to the Surety in accordance with Section XI below, that the Principal is in default of its obligations under the Contract and requesting that the Surety fulfill its obligations under this Bond; and
4. The Obligee has agreed to make available the Balance of the Contract Price to the Surety in accordance with the terms and conditions of the Contract. In this Bond, "Balance of the Contract Price" means the total amount payable by the Obligee to the Principal under the Contract less the amount properly paid by the Obligee to the Principal.

### III - Surety's Investigation and Response

Upon receipt of a Demand from the Obligee, the Surety shall be entitled to a reasonable time within which to conduct an investigation of the Demand and determine its liability under the Bond, if any. Within five (5) business days of receipt of the Demand the Surety shall acknowledge receipt of the Demand in writing and request from the Obligee the information and documentation the Surety shall require to complete its investigation (the "Information") and access to the site where the work is being performed, if necessary. Upon receipt of the Surety's acknowledgement, the Obligee shall promptly provide the requested Information and site access to the Surety.

Upon receipt of all the Information, and completion of the site visit, if required, the Surety shall have twenty-one (21) calendar days to complete its investigation and advise the Obligee, in writing, of its position on liability pursuant to the Bond and to choose an option for discharging its obligation hereunder, if appropriate. In the event that the Surety is unable to complete its investigation and take a position on liability within such twenty-one

(21) calendar days it shall write to the Obligee prior to the expiration of such twenty-one (21) calendar days and provide the Obligee with an update which sets out the status of the Surety's investigation and the Surety's estimate of when the investigation will be completed and its position delivered to the Obligee. In the event that the Surety denies that it has any liability pursuant to this Bond, the Surety shall

explain its reasons therefore to the Obligee in writing.

#### **IV- Emergency Remedial Action by the Obligee**

If during the time the Surety is investigating a Demand, circumstances dictate that the Obligee must undertake emergency remedial work which is necessary to:

- a) ensure public safety; or
- b) preserve or protect the work under the Contract from deterioration or damage,

the Obligee may, acting with due diligence and upon giving written notice to the Surety, undertake such emergency remedial work provided that:

1. reasonable costs incurred by the Obligee in undertaking such emergency remedial work shall be reimbursed by the Surety in accordance with the terms and conditions of this Bond and subject to the Principal's default and the Surety's liability being subsequently established. Any payments made by the Surety in respect of such work shall form part of its obligation under this Bond and shall reduce the Bond Amount by the amount of any such payments; and
2. any such emergency remedial work shall be limited to work which is within the scope of the Contract and which is reasonably required to mitigate the potential costs or damages of the Obligee in the circumstances; and
3. any such emergency remedial work shall be undertaken without prejudice to the rights of the Obligee, the Principal or the Surety under the Contract, this Bond or applicable law.

#### **V - Post-Demand Conference**

Following a Demand, the Surety and the Principal shall participate in a meeting or telephone conference call (the "Post Demand Conference") with the Obligee, on a without prejudice basis, which shall be arranged by the Surety and held at a mutually agreeable time and place not later than

(10) calendar days after receipt of the Demand, unless otherwise mutually agreed to by the Obligee and the Surety.

The purpose of the Post Demand Conference shall be to determine what remedial action, if any, the Obligee believes must be taken while the Surety is conducting its investigation. If the Obligee reasonably believes that the work of the Contract must proceed for the benefit/protection of the Project overall and in mitigation of any damages the Obligee intends to seek from the Surety hereunder, while the Surety is conducting its investigation and provides reasonable evidence thereof to the Surety, the Obligee may engage an appropriate contractor(s) to continue the work of the Contract (the "Remedial Work") subject to the following conditions:

1. the Obligee shall pay the costs of the Remedial Work on terms the same as or similar to those of the Contract;
2. the Obligee shall keep separate records of all amounts related to the Remedial Work it intends to seek as damages from the Surety hereunder; and
3. the Obligee shall allow the Surety and/or its consultant(s) access to the Project during the course of the Remedial Work for the purpose of preserving evidence and monitoring the progress of the Remedial Work.

If the Surety objects to any part of the Remedial Work, including without limitation the Obligee's proposed completion contractor(s), it shall immediately advise the Obligee in writing of its objections and the reasons therefor. The Obligee may still proceed with the Remedial Work and the Surety's objections will be addressed through negotiation with the Obligee or at the trial of any action brought pursuant to this Bond.

The reasonable costs incurred by the Obligee in undertaking the Remedial Work shall be reimbursed by the Surety in accordance with the terms and conditions of this Bond subject to the Principal's default and the Surety's liability being subsequently established. Any payments made by the Surety in respect of the Remedial Work shall form part of its obligation under this Bond and shall reduce the Bond Amount by the amount of any such payments.

So long as the Obligee has attended a Post Demand Conference and otherwise complied with all of the conditions of this Bond the Obligee may proceed with the Remedial Work and the Surety shall not raise the mere fact that the Remedial Work proceeded as a defence to any claim by the Obligee hereunder.

Neither the participation in the Post-Demand Conference, nor any statement or position taken by either party during the Post-Demand Conference or any follow-up Post-Demand Conference, shall be relied on by any other party as a waiver or compromise of the rights or duties of any the Obligee, the Surety or the Principal under the Contract or this Bond.

## VI- Surety's Options

Following the completion of the Surety's investigation, if the Conditions Precedent have been satisfied by the Obligee and the Surety has accepted liability pursuant to this Bond, subject to Sections VII and VIII below, the Surety shall promptly:

1. remedy the default; or
2. complete the Contract in accordance with its terms and conditions; or
3. obtain a bid or bids for submission to the Obligee for completing the Contract in accordance with its terms and conditions and upon determination by the Obligee and the Surety of the lowest responsible bidder, arrange for a contract between such bidder and the Obligee 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 complete the Principal's obligations in accordance with the terms and condition of the Contract and to pay those expenses incurred by the Obligee as a result of the Principal's default relating directly to the performance of the work under the Contract, less the Balance of the Contract Price; or
4. pay the Obligee the lesser of : (1) the Bond Amount, or (2) the Obligee's proposed cost of completion less the Balance of Contract Price.

## VII - Limitation on the Surety's Liability

Notwithstanding anything to the contrary contained in this Bond or in the Contract, the Surety shall not be liable for a greater sum than the Bond Amount under any circumstances.

In the province of Québec, the coverage period of this Bond begins at the date of commencement of the Contract work and ends two (2) years following acceptance of such work pursuant to Article 2110 of the Civil Code. Only defaults declared by the Obligee in writing to the Principal during such period shall be subject to coverage under this Bond.

## VIII-Commencement of Action

It is a condition of this Bond that any suit or action must be commenced before the expiration of two (2) years from the earlier of : (1) the date of Substantial Performance of the Contract as defined in the lien legislation where the work under the Contract is taking place, or, if no such definition exists, the date when the work is ready for use or is being used for the purpose intended, or (2) the date on which the Principal is declared in default by the Obligee.

## IX- Right of Action

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

## X- Headings for Reference Only

The headings and references to them in this Bond are for convenience only, shall not constitute a part of this Bond, and shall not be taken into consideration in the interpretation of this Bond.

## XI- Notices

All Demands and notices under this Bond shall be delivered by facsimile and registered mail at the addresses set out below. All other correspondence may be delivered by any of facsimile, regular mail, registered mail, email or courier at the addresses set out below.

### The Surety:

[Surety corporate name]  
[address ]  
[fax]  
[email]

### The Obligee:

[Obligee proper name]  
[address ]  
[fax]  
[email]

### The Principal:

[Principal corporate name]  
[address]  
[fax]  
[email]

**IN WITNESS WHEREOF**, the Principal and the Surety have Signed and Sealed this Bond this \*\*\*\* day of \*\*\*\* in the year

\*\*\*\*. [Principal corporate name]

Witnessed by:

By:

Name:

Title:

I have authority to bind the corporation.

Name of Witness:

Address of Witness:

[Surety corporate name]

By: \_\_\_\_\_

Name:

Attorney-in-Fact

By: \_\_\_\_\_

Name:

Attorney-in-Fact

Specimen