

AIA Bond Form Commentary and Comparison

AIA Document A310™ – 2010, Bid Bond, and AIA Document A312™ – 2010, Performance Bond and Payment Bond

INTRODUCTION

Since the first publication of *The Standard Form of Bond of the American Institute of Architects, First Standard Edition* in 1911, The American Institute of Architects has recognized the importance of soliciting comments from industry participants, including owners and sureties, in creating or revising the bond forms published as part of the AIA's Contract Documents program. In 2009, the AIA began the process of revising the long standing AIA Document A310™–1970, Bid Bond, and AIA Document A312™–1984, Performance Bond and Payment Bond, (the Bond Forms), and again solicited the support and feedback of members of the construction and surety industries.

The process of revising the Bond Forms began in April, 2009 with a meeting held at the AIA's offices in Washington, D.C. At that meeting, members of various industry groups were invited to provide comments about the existing bond forms and to make suggestions for changes to address developments that had occurred over the past 25 years. Among those in attendance were representatives of: the American Bar Association Forum Committee on the Construction Industry, the Associated Builders & Contractors, the American Subcontractors Association; the Associated General Contractors of America; the Associated Specialty Contractors; the Construction Owners Association of America; the National Association of Surety Bond Producers; The Surety & Fidelity Association of America; the National Society of Professional Engineers; the American Council of Engineering Companies; the American Insurance Association; the Engineers Joint Contract Documents Committee; and the American College of Construction Lawyers.

After receiving these comments, the AIA began the process of revising the Bond Forms. A first draft was presented to industry participants in September of 2009, with a request for additional comments. In October of 2009, the same participants were again invited to the AIA's offices to participate in a collaborative forum to discuss the proposed changes to the Bond Forms.

Comments from each of the participants were carefully considered throughout the drafting process. Subsequent drafts were sent to industry representatives and, when necessary to discuss comments or questions, industry stakeholders participated in conference calls throughout the drafting process. It was only after completion of this collaborative process that the AIA finalized and released the 2010 Bond Forms. Due to this collaborative process, these bond forms are expected to continue as the industry standard, representing the fair and balanced interests of their users.

The 2010 Bond Forms retain much of the language that has been interpreted by the courts and which has become familiar to owners, sureties, contractors and subcontractors over the years. However, some changes were made to clarify language, and to address concerns raised by various stakeholders. This Commentary and Comparison will identify and explain those changes.

NOTICES

This Commentary was prepared by the American Institute of Architects with the assistance of Edward G. Gallagher, Esq., General Counsel, The Surety & Fidelity Association of America, and Mark H. McCallum, Esq. Chief Executive Officer, National Association of Surety Bond Producers.

This publication does not constitute and does not offer legal or other professional services. If legal advice or other expert assistance is required, the services of a competent professional should be sought.

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FORMAT

This Commentary and Comparison is presented in two parts. Part 1 includes a commentary that details the key changes in the 2010 documents. This Section identifies all areas where changes are made and discusses those changes to the 2010 Bond Forms that impact the relationship of the parties, and beneficiaries, to the bonds. Part 2 includes the full text of A310–1970 and A312–1984 presented side-by-side with the full text of the 2010 Bond Forms. This format allows for the easy comparison of the earlier edition documents with the 2010 Bond Forms. In addition, text related to concepts discussed in the commentary has been highlighted in **bold** for easy reference.

COMMENTARY ON AIA BOND FORM 2010 EDITIONS

A310–2010, Bid Bond

Because AIA Document A310™–2010 does not include specific section references, changes are described in the order of the paragraphs in which they appear.

Naming the Parties. Traditionally, the parties to the bond have been termed the principal, obligee and surety in the form, as these are terms of art in the insurance industry. However, these terms may be somewhat confusing to the casual user of the bond. To alleviate this confusion, the principal has been identified as the “Contractor” and the obligee has been identified as the “Owner.” These new designations represent the typical parties or beneficiaries to the bid bond and are consistent with language used in other AIA Documents.

Description of the Project. Certain owners require that the bond form adequately identify the project to which the bond pertains. One key way of identifying the project is to list the project number issued by the owner in the description of the project. A310–2010 has been modified to include an instruction prompting the user to list the project number, if applicable.

Time for Acceptance of Bids. For various reasons, time limits for acceptance of bids are often extended. Language has been included to allow for up to a 60-day extension of the time for acceptance of the bid specified in the bid documents. This allows the owner and contractor to agree to an extension of the acceptance date, without notice to the surety. However, because the surety cannot remain liable on a bid bond indefinitely, the surety must be notified of, and consent to, any extension of the date for acceptance of the bid by more than 60 days in the aggregate.

Performance and Payment Bond Surety. A310–1970 required the Contractor, in satisfying its obligations under the bid bond, to enter into the construction contract and provide a bond or bonds as specified in the contract from a “good and sufficient” surety. However, A310–1970 does not make clear what constitutes a “good and sufficient” surety. A310–2010 has been modified to state that any bonds provided by the contractor in fulfilling its obligations under the bidding or contract documents will be issued by a surety admitted in the jurisdiction of the project and otherwise acceptable to the owner. The drafters understand that “admitted” is a term of art in the insurance industry meaning holding a certificate of authority from the insurance commissioner allowing the admitted entity to issue surety bonds in that state.

Subcontractor’s Bid Bond. Language has been included to allow for use of the A310–2010 in circumstances where a contractor is requiring a bid bond from its subcontractors. In such a case, the word “Owner” is read to mean “Contractor” and “Contractor” is read to mean “Subcontractor.”

Statutory Requirements. Some public owners may require a bid bond to meet certain statutory requirements. In order to enable use of the A310–2010 on such public projects, language has been included in A310–2010 stating that provisions of the bond that fail to meet statutory requirements will be read out of the bond and provisions meeting the statutory requirements will be read into the bond.

A312–2010 Performance Bond

New or changed language is referenced by section number as it appears in AIA Document A312™–2010, Performance Bond.

§ 3.1 In the 1984 document, this Section required that the owner request, and attempt to arrange, a conference among the owner, contractor and surety. That requirement of the owner, per Section 4 of the 1984 document, has been held by some courts to be a condition precedent to the surety’s obligation under the bond. In revising the 2010 bond forms, the drafters recognized that the owner may believe that a conference would be unsuccessful and might prefer to move forward with terminating the contractor and exercising its rights under the bond. Therefore, the owner may, but is no longer required to, request a conference as part of its notice of potential contractor default. However, if the owner does not request a

conference, the surety is entitled to request a conference within five business days after receipt of the owner's notice. If the surety requests a conference, the owner is required to attend.

§ 3.2 In drafting the 2010 Bond Forms, an effort was made to streamline the process for declaring a contractor default and to avoid what some stakeholders believed were unnecessary deadlines and waiting periods. One such instance is Section 3.2 of A312–1984, which required that the owner wait 20 days after providing notice that it is considering declaring a contractor default before actually terminating the construction contract. In some instances the owner may have already determined that the contractor has failed to perform to such a degree that terminating the contractor's right to proceed is warranted. In these instances, the 20 day period constitutes an unnecessary additional delay. A312–2010 deletes this waiting period.

§ 3.3 Minor edits.

§ 4 Under A312–1984, the owner is required to provide notice that it is considering declaring a contractor default. After consideration of different viewpoints, AIA concluded that a failure to provide notice in accordance with Section 3.1 should not automatically extinguish the surety's bond obligations. The new Section 4 states that a failure of the owner to comply with the notice requirements of 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. However, to the extent the surety can demonstrate that it was actually prejudiced by the owner's failure to provide notice under Section 3.1, the surety's obligations would be reduced.

§ 5.4.1 Minor edits.

§ 5.4.2 Minor edits.

§ 6 As noted in Section 3.2, waiting periods in the bond have been eliminated or reduced. AIA felt that if the Surety did not act with reasonable promptness pursuant to Section 5 it was unnecessary to retain the A312–1984 requirement that the owner send an additional demand for the surety's performance and wait 15 days before deeming the surety in default under the bond. To streamline this process, the 15 day waiting period has been reduced to 7 days, allowing the owner to take corrective action with less delay to the project while still giving the surety notice and an opportunity to cure any default in its performance.

§ 7 Under Section 6 of A312–1984, the surety's obligations were limited to the amount of the bond. This language has been deleted in Section 7 of A312–2010 and replaced with a new Section 8, detailed below.

§ 8 As described under Section 7 above, the A312–1984 could be interpreted to mean that the surety's obligation under the bond would be limited to the amount of the bond in all instances. In drafting A312–2010, it was recognized that in a situation where the surety elects, under Section 5.2, to undertake to perform and complete the construction contract itself, this limitation could leave the owner with an unfinished project once the surety has expended the amount of the bond. Under the new terms of A312–2010, in those instances the surety's obligation is not limited by the bond. If the surety proposes to take over completion of the work pursuant to a subsequently drafted "takeover agreement", the preservation or waiver of the limit of the amount of the bond is a matter of negotiation between the parties. The amount of the bond will limit the surety's obligations in a takeover pursuant to Section 5.2 if the owner agrees to such a limit in connection with the surety's takeover of the work.

§ 12 Minor edits.

§ 13 Minor edits.

§ 14.2 Minor edits.

§ 14.4 Minor edits.

§ 14.5 A312–1984 referenced the contract documents as a defined term in several sections. Recognizing that this bond form may be used with non-AIA documents, treating contract documents as a defined term without a corresponding definition may result in a point of confusion. The term "Contract Documents" has been defined in Section 14.5 consistent with industry use.

§ 15 Like A310–2010, language has been included to allow for use of A312–2010 in circumstances where a contractor is requiring a performance bond from its subcontractors. In this case, "Owner" is read to mean "Contractor" and "Contractor" is read to mean "Subcontractor."

A312–2010 Payment Bond

New or changed language is referenced by Section number as it appears in AIA Document A312™–2010, Payment Bond.

§ 1 Case law, in one jurisdiction, recently interpreted Section 1 of a bond as an obligation independent of the additional terms of the bond. To confirm that this was not the intent of the drafters, language has been added stating that the conditions of Section 1 are subject to the remaining provisions of the payment bond.

§ 2 Section 2 of A312–1984 has been reorganized in A312–2010 to better reflect the parties’ obligations under the bond. Section 2 of A312–1984 has been separated into three separate sections, Sections 2 through 4, in the A312–2010. Section 2 of A312–2010 now states that the contractor and surety will not have any obligation under the bond if the contractor makes payment of all sums due claimants and indemnifies and holds harmless the owner from claims, demands, liens or suits by any person seeking payment for labor, materials or equipment furnished for use in the construction contract. This one paragraph eliminates the necessity to split the contractor’s obligations into two subparagraphs as was done in Section 2 of A312–1984.

§ 3 Under A312–1984 Section 2.2, the owner’s right to provide notice of claims, demands, liens or suits and tender defense of those actions to the contractor and surety was awkwardly placed in a section meant to outline the obligations of the contractor under the bond. The drafters of A312–2010 felt that it would be clearer to include these obligations in a separate, new Section 3.

§ 4 A312–1984 made it clear that the surety was jointly bound with the contractor to pay for all labor, materials and equipment furnished for use in the construction of the project. It also stated that the owner could provide notice to the contractor and surety of any claim, demand, lien or suit arising from the contractor’s and surety’s failure to meet these obligations. However, A312–1984 did not provide a clear trigger for the surety to correct this failure. Section 4 has been included in A312–2010 to clarify that the surety will defend, indemnify and hold harmless the owner against a duly tendered claim, demand, lien or suit upon the owner’s satisfaction of the conditions described in Section 3 (notice and tender of defense).

§ 5.1 The drafters of the A312–2010 Payment Bond were mindful of the differences between and different purposes of notices and claims. Section 4.2 of A312–1984 required a claimant that did not have a direct contract with the contractor to submit notice of nonpayment to the contractor. The claimant was then required to wait 30 days for a response before sending a notice to the surety, with a copy to the owner, stating that it had not been paid. This process has been streamlined. The 30 day waiting period has been eliminated. A claimant that does not have a direct contract with the contractor is now required only to provide a notice of non-payment to the contractor and then to submit a claim to the surety in accordance with Section 16.1. This streamlined process places the contractor on notice of the non-payment so that it can try to arrange, if appropriate, for the intervening subcontractor to pay the potential claimant. The claimant, however, need not wait and may send a “Claim” to the surety.

§ 5.2 Modifications to Section 4.1 of A312–1984 are minor but worth noting. This Section has been moved to Section 5.2. In addition, the requirement that a notice of claim state with substantial accuracy the amount of the claim has been replaced with the defined term “Claim.” The term “Claim” is defined in Section 16.1 and includes a list of items the claimant is required to provide to assist the surety in properly evaluating the claim.

§ 6 Section 5 of A312–1984 recognized that there may be situations where the owner becomes aware of a claim, demand, lien or suit and provides notice to the contractor or surety. Under A312–1984, this was sufficient to satisfy the requirements of Section 4. Under A312–2010, the definition of “Claim” provides a clear description of the information required from a claimant to trigger the surety’s evaluation and response period set forth in Section 7.1. Notice from the owner would be insufficient to meet these requirements. Therefore, Section 6 of A312–2010 recognizes that the owner can give the contractor a notice of non-payment pursuant to Section 5.1.1, but a claim under Section 5.1.2 or Section 5.2 must be submitted by the claimant to the surety.

§ 7 Minor edits.

§ 7.1 The 45 day period for the surety to respond to the claim included in Section 6.1 of A312–1984 was sometimes insufficient for the surety to compile adequate information related to the claim and to issue a response to the claimant. This period has been extended to 60 days under Section 7.1 of A312–2010.

§ 7.3 Some recent court decisions have held that a surety’s failure to strictly comply with its reply obligations under Section 6 of the A312–1984 Payment Bond would result in a waiver of the contractor’s and surety’s defenses under the bond. Section 7.3 has been added to address these decisions. A312–2010 expressly states that a failure of the surety to act under the bond is not a waiver of defenses, except for amounts upon which the surety and claimant have reached agreement. However, if the surety fails to send an answer and pay undisputed amounts within the times specified in the bond, the surety is required to indemnify a claimant for reasonable attorneys’ fees incurred in recovering any sums found to be due and owing to the claimant.

§ 8 While Section 8 of A312–2010 continues to recognize that the surety’s obligation is generally limited to the amount of the bond, attorneys’ fees to be paid under Section 7.3 do not reduce the amount of the bond available to pay claims. Language has been added stating that the surety’s obligation is limited to the amount of the bond plus the amount of reasonable attorneys’ fees payable under Section 7.3

§ 12 Language has been added to Section 12 clarifying that actions under the bond must be brought in a court of competent jurisdiction in the state in which the project that is the subject of the construction contract is located. This will allow suit in the federal, as well as state, court even if the federal court for that state is not located in the same local jurisdiction as the project.

§ 13 Minor edits.

§ 14 Minor edits.

§ 16.1 A312–1984 required claimants under the bond to provide notice of a claim. That notice, was sent to the surety to initiate a claim under the bond. The notice must only state with substantial accuracy the amount of the claim and, when a claimant did not have a direct contract with the contractor, the name of the party to whom the materials were furnished or supplied or for whom the labor was done or performed. A definition of “Claim” has been included in A312–2010 in order to provide the information necessary for the surety to begin evaluation of the merits of a claim. Additional information may be requested by the surety and furnished by the claimant to provide a fuller evaluation of the claim, but the submission to the surety by the claimant of the information included in the definition of a Claim is sufficient to trigger the 60 day evaluation and response period under Section 7.1.

§ 16.2 The definition of a “Claimant” under the bond has been broadened to include any individual or entity that has rightfully asserted a claim under an applicable mechanics’ lien or similar statute against the real property upon which the project is located. This was done because the previous definition only defined a claimant as a person or entity having a contract with the contractor or a subcontractor of the contractor. This language excluded any subcontractor below the third tier. Because one of the main intents of the payment bond is to protect the owner from liens, the definition of claimant has been expanded to include all rightful lien claimants.

§ 16.3 Minor edits.

§ 16.4 Minor edits.

§ 16.5 A312–1984 referenced the Contract Documents as a defined term in several sections. Recognizing that this bond form may be used with non-AIA documents, treating contract documents as a defined term without a corresponding definition may result in a point of confusion. The term “Contract Documents” has been defined in Section 14.5 consistent with industry use.

§ 17 Like A310–2010, language has been included to allow for use of the A312–2010 if a contractor is requiring a payment bond from its subcontractor. In this case, “Owner” is read to mean “Contractor” and “Contractor” is read to mean “Subcontractor.”

A310 BID BOND COMPARISON

AIA Document A310™–1970

KNOW ALL MEN BY THESE PRESENTS, that we
(Here insert full name and address or legal title of Contractor.)
as Principal, hereinafter called the Principal, and
(Here insert full name and address or legal title of Surety.)
a corporation duly organized under the laws of the State of
as Surety, hereinafter called the Surety, are held and firmly
bound unto
(Here insert full name and address or legal title of Owner.)
as Obligee, hereinafter called the Obligee, in the sum of

Dollars (\$),
for the payment of which sum well and truly to be made,
the said Principal and the said Surety, bind ourselves, our
heirs, executors, administrators, successors and assigns,
jointly and severally, firmly by these presents.

WHEREAS, the Principal has submitted a bid for
(Here insert full name, address and description of project.)

AIA Document A310™–2010

CONTRACTOR:
(Name, legal status and address)

SURETY:
(Name, legal status and principal place of business)

OWNER:
(Name, legal status and address)

BOND AMOUNT:

PROJECT:
(Name, location or address, and **Project number**, if any)

NOW, THEREFORE, if the Obligee shall accept the bid of the Principal and the Principal shall enter into a Contract with the Obligee in accordance with the terms of such bid, and give such bond or bonds as may be specified in the bidding or Contract Documents with good and sufficient surety for the faithful performance of such Contract and for the prompt payment of labor and material furnished in the prosecution thereof, or in the event of the failure of the Principal to enter such Contract and give such bond or bonds, if the Principal shall pay to the Obligee the difference not to exceed the penalty hereof between the amount specified in said bid and such larger amount for which the Obligee may in good faith contract with another party to perform the Work covered by said bid, then this obligation shall be null and void, otherwise to remain in full force and effect.	The Contractor and Surety are bound to the Owner in the amount set forth above, for the payment of which the Contractor and Surety bind themselves, their heirs, executors, administrators, successors and assigns, jointly and severally, as provided herein. The conditions of this Bond are such that if the Owner accepts the bid of the Contractor within the time specified in the bid documents, or within such time period as may be agreed to by the Owner and Contractor, and the Contractor either (1) enters into a contract with the Owner in accordance with the terms of such bid, and gives such bond or bonds as may be specified in the bidding or Contract Documents, with a surety admitted in the jurisdiction of the Project and otherwise acceptable to the Owner, for the faithful performance of such Contract and for the prompt payment of labor and material furnished in the prosecution thereof; or (2) pays to the Owner the difference, not to exceed the amount of this Bond, between the amount specified in said bid and such larger amount for which the Owner may in good faith contract with another party to perform the work covered by said bid, then this obligation shall be null and void, otherwise to remain in full force and effect. The Surety hereby waives any notice of an agreement between the Owner and Contractor to extend the time in which the Owner may accept the bid. Waiver of notice by the Surety shall not apply to any extension exceeding sixty (60) days in the aggregate beyond the time for acceptance of bids specified in the bid documents, and the Owner and Contractor shall obtain the Surety's consent for an extension beyond sixty (60) days.
	If this Bond is issued in connection with a subcontractor's bid to a Contractor, the term Contractor in this Bond shall be deemed to be Subcontractor and the term Owner shall be deemed to be Contractor.
	When this Bond has been furnished to comply with a statutory or other legal requirement in the location of the Project, 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.

A312 PERFORMANCE BOND COMPARISON	
<i>AIA Document A312™–1984</i>	<i>AIA Document A312™–2010</i>
§ 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.	§ 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 to participate in conferences as provided in Section 3.1.	§ 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.

A312 PERFORMANCE BOND COMPARISON	
<i>AIA Document A312™–1984</i>	<i>AIA Document A312™–2010</i>
§ 3 If there is no Owner Default, the Surety's obligation under this Bond shall arise after:	§ 3 If there is no Owner Default under the Construction Contract, 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	.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;
§ 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	.2 the Owner declares a Contractor Default, terminates the Construction Contract and notifies the Surety; 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.	.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.
§ 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:	§ 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:
§ 4.1 Arrange for the Contractor, with consent of the Owner, to perform and complete the Construction Contract; or	§ 5.1 Arrange for the Contractor, with the consent of the Owner, to perform and complete the Construction Contract;
§ 4.2 Undertake to perform and complete the Construction Contract itself, through its agents or through independent contractors; or	§ 5.2 Undertake to perform and complete the Construction Contract itself, through its agents or independent contractors;
§ 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,	§ 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,

A312 PERFORMANCE BOND COMPARISON	
<i>AIA Document A312™–1984</i>	<i>AIA Document A312™–2010</i>
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	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
§ 4.4 Waive its right to perform and complete, arrange for completion, or obtain a new contractor and with reasonable promptness under the circumstances:	§ 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, tender payment therefor to the Owner; or	.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 reasons therefor.	.2 Deny liability in whole or in part and notify the Owner, citing the reasons for denial.
§ 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 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.
§ 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:	§ 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
§ 6.1 The responsibilities of the Contractor for correction of defective work and completion of the Construction Contract;	.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	.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

A312 PERFORMANCE BOND COMPARISON	
<i>AIA Document A312™–1984</i>	<i>AIA Document A312™–2010</i>
§ 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.	.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.
§ 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.	§ 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.
§ 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.	§ 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.
§ 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.	§ 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.
§ 10 Notice to the Surety, the Owner or the Contractor shall be mailed or delivered to the address shown on the signature page.	§ 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.
§ 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.	§ 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.
§ 12 DEFINITIONS	§ 14 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	§ 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

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which the Contractor is entitled, reduced by all valid and proper payments made to or on behalf of the Contractor under the Construction Contract.	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.	§ 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.
§ 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.	§ 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.
§ 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.	§ 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.
§ 13 MODIFICATIONS TO THIS BOND ARE AS FOLLOWS:	§ 16 Modifications to this bond are as follows:

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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 to pay for labor, materials and equipment furnished for use in the performance of the Construction Contract, which is incorporated herein by reference.	§ 1 The Contractor and 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, subject to the following terms.
§ 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	§ 2 If the Contractor promptly makes payment of all sums due to Claimants, and defends, indemnifies and holds harmless the Owner from claims, demands, liens or suits by any person or entity seeking payment for labor, materials or equipment furnished for use in the performance of the Construction Contract, then the

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(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.	Surety and the Contractor shall have no obligation under this Bond.
	§ 3 If there is no Owner Default under the Construction Contract, the Surety's obligation to the Owner under this Bond shall arise after the Owner has promptly notified the Contractor and the Surety (at the address described in Section 13) of claims, demands, liens or suits against the Owner or the Owner's property by any person or entity seeking payment for labor, materials or equipment furnished for use in the performance of the Construction Contract and tendered defense of such claims, demands, liens or suits to the Contractor and the Surety.
	§ 4 When the Owner has satisfied the conditions in Section 3, the Surety shall promptly and at the Surety's expense defend, indemnify and hold harmless the Owner against a duly tendered claim, demand, lien or suit.
§ 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:	§ 5 The Surety's obligations to a Claimant under this Bond shall arise after the following:
§ 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:	§ 5.1 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	.1 have furnished a written notice of non-payment to the Contractor, stating with substantial accuracy the amount claimed and the name of the party to whom the materials were, or equipment was, furnished or supplied or for whom the labor was done or performed, within ninety (90) days after having last performed labor or last furnished materials or equipment included in the Claim; 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	.2 have sent a Claim to the Surety (at the address described in Section 13).

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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.	
	§ 5.2 Claimants, who are employed by or have a direct contract with the Contractor, have sent a Claim to the Surety (at the address described in Section 13).
§ 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 If a notice of non-payment required by Section 5.1.1 is given by the Owner to the Contractor, that is sufficient to satisfy a Claimant's obligation to furnish a written notice of non-payment under Section 5.1.1.
§ 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:	§ 7 When a Claimant has satisfied the conditions of Sections 5.1 or 5.2, whichever is applicable, 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 45 days after receipt of the claim, stating the amounts that are undisputed and the basis for challenging any amounts that are disputed.	§ 7.1 Send an answer to the Claimant, with a copy to the Owner, within sixty (60) days after receipt of the Claim, stating the amounts that are undisputed and the basis for challenging any amounts that are disputed; and
§ 6.2 Pay or arrange for payment of any undisputed amounts.	§ 7.2 Pay or arrange for payment of any undisputed amounts.
	§ 7.3 The Surety's failure to discharge its obligations under Section 7.1 or Section 7.2 shall not be deemed to constitute a waiver of defenses the Surety or Contractor may have or acquire as to a Claim, except as to undisputed amounts for which the Surety and Claimant have reached agreement. If, however, the Surety fails to discharge its obligations under Section 7.1 or Section 7.2, the Surety shall indemnify the Claimant for the reasonable attorney's fees the Claimant incurs thereafter to recover any sums found to be due and owing to the Claimant.
§ 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 The Surety's total obligation shall not exceed the amount of this Bond, plus the amount of reasonable attorney's fees provided under Section 7.3 , 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 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 Surety under this Bond, subject to the Owner's priority to use the funds for the completion of the work.

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§ 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 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 the payment of any costs or expenses of any Claimant under this Bond, and shall have under this Bond no obligation to make payments to, or give notice on behalf of, Claimants or otherwise have any 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 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 No suit or action shall be commenced by a Claimant under this Bond other than in a court of competent jurisdiction in the state in which the project that is the subject of the Construction Contract is located or after the expiration of one year from the date (1) on which the Claimant sent a Claim to the Surety pursuant to Section 5.12 or 5.2, 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 Notice and Claims 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. Actual receipt of notice or Claims, however accomplished, shall be sufficient compliance as of the date received.
§ 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 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 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 Upon request by any person or entity appearing to be a potential beneficiary of this Bond, the Contractor and Owner shall promptly furnish a copy of this Bond or shall permit a copy to be made.
§ 15 DEFINITIONS	§ 16 DEFINITIONS
	§ 16.1 Claim. A written statement by the Claimant including at a minimum:
	.1 the name of the Claimant;

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	.2 the name of the person for whom the labor was done, or materials or equipment furnished;
	.3 a copy of the agreement or purchase order pursuant to which labor, materials or equipment was furnished for use in the performance of the Construction Contract;
	.4 a brief description of the labor, materials or equipment furnished;
	.5 the date on which the Claimant last performed labor or last furnished materials or equipment for use in the performance of the Construction Contract;
	.6 the total amount earned by the Claimant for labor, materials or equipment furnished as of the date of the Claim;
	.7 the total amount of previous payments received by the Claimant; and
	.8 the total amount due and unpaid to the Claimant for labor, materials or equipment furnished as of the date of the Claim.
§ 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.	§ 16.2 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 Construction Contract. The term Claimant also includes any individual or entity that has rightfully asserted a claim under an applicable mechanic's lien or similar statute against the real property upon which the Project is located. 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.	§ 16.3 Construction Contract. The agreement between the Owner and Contractor identified on the cover page, including all Contract Documents and all changes made to the agreement and the Contract Documents.
§ 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.	§ 16.4 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.
	§ 16.5 Contract Documents. All the documents that comprise the agreement between the Owner and Contractor.

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	§ 17 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:	§ 18 Modifications to this bond are as follows: