
**DEPARTMENT OF ADMINISTRATION
REAL ESTATE AND CONSTRUCTION SERVICES**

**POLICY AND PROCEDURE FOR EXERCISING OWNER'S RIGHTS
UNDER THE CONTRACT FOR CONSTRUCTION
RECS – CT - 04**

12 December 2009

A. PURPOSE

1. To provide a uniform procedure for exercising the State's rights with construction contractors. Upon receiving notice from the Architect/Engineer of Record, it is incumbent upon Project Management staff to exercise owner's rights under the contract by issuing notices to contractors when work is not in conformance with the contract.
2. To comply with the State's rights, in accordance with the contract for construction.

B. REFERENCES

1. AIA Document A201: General Conditions of the Contract for Construction (Current Edition, with State Amendments).
2. RECS Contracting Policies
3. RECS Standards of Work for all contract types
4. Vendor Performance Reporting Policy, RECS-CT-02

C. PROCEDURE

1. Procedure is attached.
2. After issuing 3 (three) day notices to the contractor (per the attached procedure), the Project Manager shall also complete a Vendor Performance Report in accordance with Reference B.2 above.
3. Attach three day notices to the Vendor Performance Report as supporting documentation.
4. Complete a Contractor Evaluation prior to final payment.



GUIDELINE PROCEDURE

FOR EXERCISING OWNER'S RIGHTS

under the

General Conditions of the Contract for Construction

AIA Document A201 – 2007 Edition as Modified by Owner

REAL ESTATE and CONSTRUCTION SERVICES

AUGUST 2009

First Edition

Guideline Procedure for Exercising Owner's Rights
under the General Conditions of the Contract for Construction *AIA Document A201 – 2007 Edition as
Modified by Owner*

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INSTRUCTIONS FOR EXERCISING OWNER'S RIGHTS UNDER THE CONTRACT

Actions available for an owner to exercise its rights under the contract are contained in the *General Conditions of the Contract for Construction (AIA Document A201 - 2007 edition)* which include the State's amendments. Along with the General Conditions, the "*Special Conditions of the Contract*" contain project specific amendments and requirements also need to be considered.

A. Background to exercising Owner's rights

Contracts contain obligations for all who are a party to them. Being successful in exercising an Owner's rights will depend upon how the Owner (and owner's architect and agents) carry out their obligations. In some situations such as delay claims, an owner (includes owner's A/E agents) will need to review their own actions surrounding the events that lead up to exercising their rights. The following are actions that an Owner can take to support their position and, preferably, avoid claims and problems with contractor performance:

1. Prior to bidding, review plans and specifications for thoroughness. Conducting a third party coordination and/or constructability review on major projects is recommended.
2. Prescribe criteria for contractor qualifications in the bid documents. This will eliminate contractors who have not had experience with projects of similar size and scope.
3. Resolve claims (particularly delay claims) at the time of occurrence. Always include a contractor's time extension(s) in the Supplemental Agreements (change orders) when a change that requires additional time occurs.
4. Promptly respond to the contractor's Requests For Information (RFIs).
5. Establish a time period for owner's consultant to complete and return shop drawings.
6. When you issue a Certificate of Substantial Completion make sure it is accompanied by a punchlist and fill in the time period allowed for completing the punch list.
7. Do not issue a Certificate of Substantial Completion if major work remains. If a partial substantial completion is issued, clearly state the work that is not included.
8. Always document the date of a verbal claim by the contractor.
9. Always get written documentation from the architect/engineer of record indicating concurrence and approval of nonconforming and incomplete work.
10. Include Liquidated and/or Actual Damages amounts in the specifications.
11. Carefully review and approve Contractor Pay Requests. Avoid any overpayment.
12. Complete the "*Worksheet For Determining Breach of Contract*"

B. Types of Breach by Contractors:

1. There are two primary types of Breach of Contract:
 - a) Substantial (Major) Breach of Contract: Contractor is unable to complete the work, is persistently ignoring laws, codes, and requirements of the contract or refuses to do the work or a major part of the work does not conform to the contract.
 - b) Minor breach of contract: Examples: 1) A small part of the work is not being provided or an unspecified or unapproved product is being installed.

2) Substantial Completion is near, Certificate of Substantial Completion has been issued with a punch list, and there are disputes over uncompleted items; 3) partial or minor work that is nonconforming.

C. Taking Action:

1. When taking action and corresponding with a contractor/vendor, always identify the type of breach and cite the applicable AIA document and paragraph along with the applicable contract document specification or drawing. (Form template letters are attached).
 - a) Major/Substantial (material) breach of contract: Refer to *Article 14.2 (Attachment D)* but consult with the RECS Construction Program Manager first who will determine the need to involve the Attorney General's Office (AGO) prior to initiating final action.
 - b) Minor breach of contract: Owner may use the "correct-and-deduct" remedy per *Article 2.4 (Attachment A)*.
 - c) If breach is Nonconforming work requiring Correction: Refer to *Article 12.2 (Attachment B)* Owner may integrate with procedures set forth in *Article 2.4 (Attachment A)*. Nonconforming work may be either a minor or substantial breach.
 - d) If breach is minor in the form of nonconforming work which is to be accepted refer to *Article 12.3 (Attachment C)*.
2. Engage the consultant architect/engineer of record; they are the party responsible for interpretation of the contract documents. (If a breach of contract has occurred, the architect/engineer of record must provide a written certification – see template letter).
3. Review obligations contained in paragraph A.1 thru 12 above.
4. Review the contract documents to ensure that the basis for the claim of breach (and subsequent action) is contained in the documents and is clear.
5. Review documentation of previous actions taken to remedy the situation. i.e. discussions, phone calls, meeting minutes, letters, memos, RFIs and PRs.
6. Recognize that when action is initiated there is a subsequent commitment to follow through with the process at the time deadlines that are set.
7. Determine the type of breach (Substantial or Minor). If it is determined that the breach is substantial, the Attorney General's Office will need to get involved to review the documentation and plan of action.
8. Complete and submit a "Vendor Performance Report" to Materials Management Division (MMD). The Vendor Management staff can use MMD Rules regarding suspension and or debarment at the same time as RECS takes action on the other Steps under the AIA document.

9. If the breach of contract is a substantial one (requiring termination of contract and/or notification and claim to the surety bond company), the following steps are taken:
- a) Step 1: Review, with the architect/engineer of record and complete the “**Worksheet For Determining Breach of Contract**” (page 7) to determine that a substantial breach of contract, as defined by *Article 14.2 (Attachment D)* has occurred.
 - b) Step 2: Obtain “**Consultant’s Certification of Sufficient Cause/Approval of Owner’s Action**” (page 8) letter.
 - c) Step 3: Consult with the RECS Construction Program Manager regarding the action to terminate. The RECS Construction Program Manager will review the worksheet and documentation and consult with MMD and the Attorney General’s Office regarding the intent to terminate.
 - d) Step 4: In situations where there is a possibility that the contractor can recover and remedy the breach, prepare and finalize the **Ten-Day Notice letter (form “ T-10DN-BOND)** prior to moving directly to declaring default and termination. Review with the RECS Construction Program Manager prior to sending to the contractor and the surety/bonding company.
 - e) Step 4: In situations where there is not a possibility that the contractor cannot recover and remedy the breach, or has not responded to the Ten-Day notification letter in Step 4 above, prepare the form “ **T-7DN-BOND – Seven-Day Notice of Termination For Cause**” (page 9) letter. Attach all pertinent documentation and forward to the RECS Construction Program Manager who will review and request a review by MMD and the Attorney General’s Office.
 - f) Step 6: Should the surety agree that the claim is valid (which will be dependent upon the documentation), follow up with providing any additional information requested.
 - g) Step 7: Working with MMD and the surety company, to prepare a “**Takeover Agreement**” (Attachment E-page 17).

Note that you will need to have your claim well documented for the bonding company and you will be asked to provide this documentation along with information on the project. It is also important to note that the bonding company will use project funds to complete the work and if overpayment to the contractor has been made; the owner will be required to provide sufficient additional funds to complete the work.

10. If the breach is a minor one:

- a) Step 1: Review, with the architect/engineer of record and complete the “**Worksheet For Determining Breach of Contract**” (page 7) to determine that a minor breach of contract, as defined by *Article 14.2 (Attachment D)* has occurred.
- b) Step 2: Obtain written concurrence and recommendation from the architect/engineer of record using “**Consultant’s Certification of Sufficient Cause/Approval of Owner’s Action**” (page 8).

- c) Step 3: Consult with the RECS Construction Program Manager regarding the action to correct the work using Owner's (facility) work force or through a separate contract, and then deduct the amount from the contract. The RECS Construction Program Manager will review the worksheet and documentation and, if needed, consult with MMD and the Attorney General's Office regarding the intent to "deduct and correct".
 - d) Step 4: Prepare and issue the form "***C 10 DN - Ten-Day Notice to Correct Deficiencies in the Work***" (page 10) if work does not commence and continue, move on to Step 5.
 - e) Step 5: Draft a notification letter to the contractor, for review by the RECS Construction Program Manager and the Attorney General's Office, referencing the 10-day notice letter, indicating that the State will be hiring a separate contractor to complete the work and the cost, including associated architectural and engineering fees, will be deducted from the contract sum or the State will invoice the contractor for the balance.
 - f) Step 6: Send letter to the contractor and work with MMD to attempt to resolve or arrange method for owner completion of minor work. (Might involve procuring another contractor to complete the work under certain circumstances or Owner's staff will complete the work if possible).
11. If there is a situation where nonconforming work is discovered during the warranty period or after the date of substantial completion, review *Article 12.2.2 (Attachment B)* and:
- a) Step 1: Forward the "***Form NC - Notice to Correct Nonconforming Work***" (page 11) with a reasonable time period to correct the work. Should the contractor not respond or refuse, move on to Step 2 in Paragraph #8 above.
12. If there is a need to terminate the contract and work "without cause", refer to *Article 14.4 (Attachment D)*. This action is one where the Owner is not seeking a remedy from the contractor or making a claim under the contract.

-END-

(worksheet, template form letters & surety takeover agreement follow)

WORKSHEET For Determining Breach of Contract

[Date]

Project Information

[insert project name] [insert building name] [insert construction company name] Company
[insert facility name] [insert facility location] [insert street address]
State Contract No. [insert] Project No. [insert] [insert city, state, zip code]
Bond No. [insert number]

[insert bonding company name] Company
[insert street address]
[insert city, state, zip code]

[insert Original Contract Amount] and [insert Original Contract Amount plus Supplemental Agreement Amount]

[insert original completion date, as specified in contract]
[insert completion date, as approved by supplemental agreements]
[insert date of Certificate of Substantial Completion]
[insert final completion date entered on Certificate of Substantial Completion for completion of punchlist items]

Review of owner/owner's consultant actions

Review of Instructions For Exercising Owner's Rights Under The Contract (Respond to each)

- a) Plans & Specifications are thorough resulting in few changes
Coordination/Constructibility Review was done by third party
- b) Plans & Specifications have been reviewed for substantiating the proposed exercising of owner's rights.
Enter Spec. Section and/or Drawing no. of nonconformance _____.
- c) Criteria for qualifying contractor was included in the specifications.
- d) Time Extensions for additional work are incorporated in the associated Suppl. Agreements
- e) A/E responses to the Contractor's RFIs are timely
- f) A/E responses to shop drawing submittals are timely
- g) Certificate of Substantial Completion was issued (when completion date is an issue)
- h) Major work that remains was itemized on the Certificate of Substantial Completion
The punchlist was issued with the Certificate of Substantial Completion
A date for final completion of punchlist items was indicated
- i) All verbal and written claims by the Contractor have been documented and addressed.
- j) Liquidated/Actual Damage amount was included in the specifications. Amount \$_____per day

Description of issue(s) that may give credible reason for not justifying the State's (owner's) actions to remedy the breach. (Note: The architect/engineer of record is required to provide a written concurrence with owner's actions).

Determining Breach of Contract

Written Description of Breach: _____

Major Breach _____ Minor Breach _____

Note: Be specific; avoid using general terms such as "some work", "believed to be", "and may be" etc. frame your description around the specific contract requirement, drawing, specification and Article and Section of the AIA 201 Document.

Minor Breach of Contract –Minor amount of Incomplete work, failure to complete minor work.
Apply Section 2.4, General Conditions of the Contract for Construction

Minor Breach of Contract -Nonconforming work
Apply Section 12.2.1 & 12.2.2, General Conditions of the Contract for Construction

Major Breach of Contract - Contractor defaults or Contractor ignores contract requirements and Owner is exercising their right to terminate the contract. Refusal or failure to complete a substantial portion of work.
Apply Section 14.2.1, General Conditions of the Contract for Construction.

Consultant's Certification of Sufficient Cause/Approval of Owner's Action

Architect/Engineer Letterhead

[Note to Consultant: This sample form is for certifying to the State that sufficient cause exists to initiate action in accordance with Section 2.4 of the General Conditions of the Contract for Construction or to initiate action under Section 14.2.

For a minor breach, where the owner intends to use the "correct-and-deduct" method, Article 2.4 is to be cited and used as the basis for the action taken

For a major breach, where the owner intends to terminate the contract and request completion by the Contractor's Surety/Bonding company, Article 14.2 is to be cited and used for the action taken.]

[insert date]

[insert name] State Project Manager
Real Estate and Construction Services
309 Administration Building
50 Sherburne Ave
St. Paul, MN 55155

Re: [insert project name] [insert building name]
[insert facility name] [insert facility location]
RECS Project No. [insert]
[insert contractor name] [insert contract no.] [insert contract completion date]

Certification of Sufficient Cause and Agreement with Owner's Actions to Remedy

*Choose [Section 2.4 of the General Conditions of the Contract for Construction] or
[Section 14.2 of the General Conditions of the Contract for Construction]*

Dear [insert name of State's Project Manager]:

The purpose of this letter is to certify that sufficient cause exists for the State (owner) to initiate action as outlined in *choose* [Section 2.4 of the General Conditions of the Contract for Construction] *or* [Section 14.2 of the General Conditions of the Contract for Construction].

Sufficient cause exists based upon [select from below] (*Note: consultant to provide documentation*)

- [The contract completion date (including supplemental agreements) is [insert date] and no work has occurred for a period of [enter number] days]
- [The time period that is indicated on the Certificate of Substantial Completion for the contractor to complete the punch list items, is [insert number of days] and no work has occurred to complete the work]
- [No action being taken to correct nonconforming work]
- [Any of the contractor's actions contained in Section 14.2.1.1 through 14.2.1.6]

Based upon this certification, and as architect/engineer of record, we recommend action by the State of Minnesota (owner) to exercising their right, under the contract, to [issue notice to the contractor, and if the contractor fails to proceed with diligence and promptness, to correct the deficiencies and deduct the cost from the contractor's contract sum] or [terminate the contract and notify the contractor's bonding company of the default].

Should you have any questions regarding this matter please contact me.

Sincerely,

[insert name of Architect/Engineer of Record] Title

FORM T-7DN-BOND



Real Estate and Construction Services
309 Administration Building
50 Sherburne Ave
St. Paul, MN 55155
Voice: (651)201.2550
TTY/TDD: (800)627.3529
FAX: (651)215.6245

[Note to Project Manager: This sample form is for situations where the deficiencies in the work or contract amount to a substantial/major breach under section 14.2 of the General Conditions and where the State wishes to declare the contractor in default and file a claim with their surety/bonding company. Resort to this remedy requires a written recommendation and approval from the architect/engineer of record, followed by a ten-day written notice to both the surety and the contractor. A declaration of default is a serious step and this form must be reviewed with the Attorney General's Office in light of the particular circumstances of each case to determine whether its use is appropriate. This letter should be sent by certified/registered mail. In situations involving nonconforming work, this notice may be integrated with procedures under Section 12.2.]

[insert date]

[insert bonding company name] Company
[insert street address]
[insert city, state, zip code]

[insert construction company name] Company
[insert street address]
[insert city, state, zip code]

Re: [insert project name] [insert building name]
[insert facility name] [insert facility location]
State Contract No. [insert] Project No. [insert] [Insert Construction Co. name] Bond No. [insert number]

Seven-Day Notice of Termination For Cause
Section 14.2, General Conditions of the Contract for Construction

Dear Sirs,

The purpose of this letter is to give notice of termination of contract for the above referenced project.

In accordance with Article 14, Section 14.2.1 of the General Conditions of the Contract for Construction, the State declares that [enter construction company's name] is considered in default due to [see section for breaches –*Note to Project Manager: You must have and provide documentation to back the claim*]. Seven days after this notice, the State will take possession of the site and all materials, equipment, tools, and machinery remaining at the site. The State will request payment of damages for the default when the amount of damages has been determined. Enclosed is the architect of record's communication that sufficient cause exists that prompts this action by the State.

Should you need information regarding the scope of work under the contract please contact me.

Sincerely,

[insert State Project Manager's name]
State Project Manager

Enclosures

cc: [Architect] [Project File] [Materials Management Division] [AGO]

Form C 10 D N



Real Estate and Construction Services
309 Administration Building
50 Sherburne Ave
St. Paul, MN 55155
Voice: (651)201.2550
TTY/TDD: (800)627.3529
FAX: (651)215.6245

[Note to Project Manager: In situations involving nonconforming work, this notice may be integrated with procedures under Section 12.2 This letter should be sent by certified/registered mail. This form must be reviewed in light of the particular circumstances of each case to determine its use. This sample form is for situations where:

- 1. The deficiencies in the work do not amount to a substantial breach under Section 14.2 of the General Conditions and where the State wishes to exercise the “correct-and-deduct” remedy in Section 2.4. if the deficiencies are not corrected. Resort to this remedy requires a written notice to the contractor following a written recommendation of the action by the architect.*
- 2. There is a major breach of contract wherein prior to terminating the contract (declaring default) via the 7 Day Notice of Termination letter , the A/E and Owner believe recovery by the contractor is possible.*

[insert date]

[insert name] Construction Company
[insert street address]
[insert city, state, zip code]

Re: [insert project name] [insert building name]
[insert facility name] [insert facility location]
State Contract No. [insert] Project No. [insert]

**Ten-Day Notice
To Commence and Continue Correction of Work**
Section 2.4, General Conditions of the Contract for Construction

Dear [insert name]:

You [have not carried out] or [have not installed] the work in accordance with the contract documents. The deficiencies are [e.g.: as follows; listed on the attached punch list dated (insert date); described in the attached (insert date) letter of (insert name), etc.].

In accordance with section 2.4 of the General Conditions of the Contract for Construction, you are hereby notified that you must commence and continue correction of these deficiencies with diligence and promptness within ten days after receipt of this letter.

A copy of section 2.4 is enclosed for your review and attention. Please note that if you do not comply with the notices provided by section 2.4, the State will proceed to correct the deficiencies and charge the cost and expenses to you.

Sincerely,

[insert State Project Manager’s name]
State Project Manager

cc: [Architect/Engineer] [Project File] [Materials Management Division] [AGO]

Enclosure

FORM NC



Real Estate and Construction Services
309 Administration Building
50 Sherburne Ave
St. Paul, MN 55155
Voice: (651)201.2550
TTY/TDD: (800)627.3529
FAX: (651)215.6245

[Note to Project Manager: This sample form is for situations where the deficiencies in the work were discovered before or after substantial completion (see Section 12). For corrective work discovered after substantial completion (See Section 12.2.2), a reasonable amount of time needs to be given for the correction of the work as established by written notice from the Architect of Record; if the contractor does not comply with this notice the State may then proceed with the a Ten Day notice per Section 2.4. This form must be reviewed in light of the particular circumstances of each case to determine whether its use is appropriate. This letter should be sent via certified/registered mail.

[insert date]

[insert name] Construction Company
[insert street address]
[insert city, state, zip code]

Re: [insert project name] [insert building name]
[insert facility name] [insert facility location]
State Contract No. [insert] Project No. [insert]

Notice to Correct Nonconforming Work
Section 12.2 of the General Conditions of the Contract for Construction

Dear [insert name],

This letter is for the purpose of informing you that work has been discovered that does not conform to the requirements of the contract documents on the above referenced project.

Please be advised that you must promptly correct the nonconforming work [insert a brief description or refer to another list]. This work must be completed by [insert date]. Please commence work immediately and provide the State, via the architect/engineer of record, your schedule for the work.

If you do not comply with this notice, the State will exercise owner's rights in accordance with the procedures set forth in Article 2, Section 2.4 of the contract (AIA 201 General Conditions of the Contract for Construction – 2007 Edition). [Note to Project Manager: Should the contractor not comply with this notice, proceed with a Ten Day Notice to "Correct and Deduct" or, if a major breach, and the surety bond is still active, proceed with declaration of a default .

Sincerely,

[insert State Project Manager's name]
State Project Manager

C: [insert Consultant]
[Project File]
[Materials Management Division]
[AGO]

Attachment “A”

General Conditions of the Contract for Construction (AIA Doc. 201 -2007edition as modified by Owner)

Article 2.4 OWNER’S RIGHT TO CARRY OUT THE WORK

§ 2.4 OWNER’S RIGHT TO CARRY OUT THE WORK

If the Contractor fails or neglects to carry out the Work in accordance with the Contract Documents and fails within a **ten-day** period after receipt of written notice from the Owner to commence and continue correction of such failure or neglect with diligence and promptness, the Owner may, without prejudice to other remedies the Owner may have, correct such deficiencies. In such case an appropriate Change Order shall be issued deducting from payments then or thereafter due the Contractor the reasonable cost of correcting such deficiencies, including Owner’s expenses and compensation for the Architect’s additional services made necessary by such default, neglect or failure. The amounts charged to the Contractor are subject to prior approval of the Architect. If payments then or thereafter due the Contractor are not sufficient to cover such amounts, the Contractor shall pay the difference to the Owner. Article 15, Claims and Disputes does not apply to a request by the Owner that the Architect approve the use of the remedy provided in Section 2.4.”

Attachment “B”

General Conditions of the Contract for Construction (AIA Doc. 201 -2007 edition as modified by Owner)

§ 12.2 CORRECTION OF WORK

§ 12.2.1 BEFORE OR AFTER SUBSTANTIAL COMPLETION

The Contractor shall promptly correct Work rejected by the Architect or failing to conform to the requirements of the Contract Documents, whether discovered before or after Substantial Completion and whether or not fabricated, installed or completed. Costs of correcting such rejected Work, including additional testing and inspections, the cost of uncovering and replacement, and compensation for the Architect’s services and expenses made necessary thereby, shall be at the Contractor’s expense. The costs of corrections include labor, material, equipment, safety precautions in accordance with the Contract Documents.

§ 12.2.2 AFTER SUBSTANTIAL COMPLETION

§ 12.2.2.1 In addition to the Contractor’s obligations under Section 3.5, if, within one year after the date of Substantial Completion of the Work or designated portion thereof or after the date for commencement of warranties or special warranty required by the Contract Documents, any of the Work is found to be not in accordance with the requirements of the Contract Documents, the Contractor shall correct it promptly after receipt of written notice from the Owner to do so unless the Owner has previously given the Contractor a written acceptance of such condition. The Owner shall give such notice promptly after discovery of the condition. During the one-year period for correction of Work, if the Owner fails to notify the Contractor and give the Contractor an opportunity to make the correction, the Owner waives the rights to require correction by the Contractor and to make a claim for breach of warranty. If the Contractor fails to correct nonconforming Work within a reasonable time during that period after receipt of notice from the Owner or Architect, the Owner may correct it in accordance with Section 2.4. Notice of discovery and required correction may be given by either the Owner or the Architect.

§ 12.2.2.2 The one-year period for correction of Work shall be extended with respect to portions of Work first performed and accepted after Substantial Completion by the period of time between Substantial Completion and the actual completion and acceptance of that portion of the Work.

§ 12.2.2.3 The one-year period for correction of Work shall not be extended by corrective Work performed by the Contractor pursuant to this Section 12.2.

§ 12.2.3 The Contractor shall remove from the site portions of the Work that are not in accordance with the requirements of the Contract Documents and are neither corrected by the Contractor nor accepted by the Owner.

§ 12.2.4 The Contractor shall bear the cost of correcting destroyed or damaged construction, whether completed or partially completed, of the Owner or separate contractors caused by the Contractor’s correction or removal of Work that is not in accordance with the requirements of the Contract Documents.

§ 12.2.5 Nothing contained in this Section 12.2 shall be construed to establish a period of limitation with respect to other obligations the Contractor has under the Contract Documents. Establishment of the one-year period for correction of Work as described in Section 12.2.2 relates only to the specific obligation of the Contractor to correct the Work, and has no relationship to the time within which the obligation to comply with the Contract Documents may be sought to be enforced, nor to the time within which proceedings may be commenced to establish the Contractor’s liability with respect to the Contractor’s obligations other than specifically to correct the Work.

§ 12.2.6 The Contract Documents survive final payment and are applicable to the performance of all corrective work required, regardless of time.

§ 12.2.7 The obligation of the Contractor to perform corrective work shall survive final completion of the work and final payment under the Contract.

§ 12.2.8 The Owner does not waive any remedies for the cost of performing corrective work the Contractor neglects or refuses to perform in a timely manner.

Attachment “C”

General Conditions of the Contract for Construction (AIA Doc. 201 -2007 edition as modified by Owner)

Article 12.3 ACCEPTANCE OF NONCONFORMING WORK

§ 12.3 ACCEPTANCE OF NONCONFORMING WORK

If the Owner prefers to accept Work that is not in accordance with the requirements of the Contract Documents, the Owner may do so instead of requiring its removal and correction, in which case the Contract Sum will be reduced as appropriate and equitable. Such adjustment shall be effected whether or not final payment has been made. If the Owner chooses to accept nonconforming work pursuant to this provision, then the Contractor shall warrant the accepted work for the period stated in Section 12.2 as amended. The adjusted Contract Sum, when determined after final payment, shall be reimbursed to the Owner by the Contractor.

Attachment “D”

General Conditions of the Contract for Construction (AIA Doc. 201 -2007 edition as modified by Owner)

Article 14.2 TERMINATION BY THE OWNER FOR CAUSE

§ 14.2 TERMINATION BY THE OWNER FOR CAUSE

§ 14.2.1 The Owner may terminate the Contract if the Contractor

- .1 repeatedly refuses or fails to supply enough properly skilled workers or proper materials;
- .2 fails to make payment to Subcontractors for materials or labor in accordance with the respective agreements between the Contractor and the Subcontractors;
- .3 repeatedly disregards applicable laws, statutes, ordinances, codes, rules and regulations, or lawful orders of a public authority; or
- .4 otherwise is guilty of substantial breach of a provision of the Contract Documents.
- .5 files a bankruptcy petition or has a bankruptcy action commenced against it that is not discharged within 30 days of commencement of same, makes an assignment for the benefit of its creditors, has a receiver appointed to manage the Contractor’s assets or otherwise is becoming insolvent; or
- .6 materially fails to comply with interim or final completion dates as required by the Contract Documents, or materially fails to comply with design requirements of the Contract Documents, or persistently fails to perform the work in accordance with the Contract Documents.

§ 14.2.2 When any of the above reasons exist, the Owner, may , after giving the Contractor and the Contractor’s surety, if any, seven days’ written notice, terminate employment of the Contractor and may, subject to any prior rights of the surety:

- .1 Exclude the Contractor from the site and take possession of all materials, equipment, tools, and construction equipment and machinery thereon owned by the Contractor;
- .2 Accept assignment of subcontracts pursuant to Section 5.4; and
- .3 Finish the Work by whatever reasonable method the Owner may deem expedient. Upon written request of the Contractor, the Owner shall furnish to the Contractor a detailed accounting of the costs incurred by the Owner in finishing the Work.

§ 14.2.3 When the Owner terminates the Contract for one of the reasons stated in Section 14.2.1, the Contractor shall not be entitled to receive further payment until the Work is finished.

§ 14.2.4 If the unpaid balance of the Contract Sum exceeds the direct and indirect consequential costs of completing the Work, including but not limited to fees and charges of Architects, Engineers, Attorneys, other professionals and court costs, and other damages incurred by the Owner, such excess will be paid to the Contractor. If such costs and damages exceed such unpaid balance, the Contractor shall pay the difference to the Owner. Such costs incurred by the Owner will be approved as to reasonableness by the Owner, but when exercising any rights or remedies under this article, the Owner shall not be required to obtain the lowest price for the work performed. This obligation for payment shall survive termination of the Contract, final completion of work and final payment.

Article 14.4 TERMINATION BY THE OWNER FOR CONVENIENCE

§ 14.4 TERMINATION BY THE OWNER FOR CONVENIENCE

§ 14.4.1 The Owner may, at any time, terminate the Contract for the Owner’s convenience and without cause.

§ 14.4.2 Upon receipt of written notice from the Owner of such termination for the Owner’s convenience, the Contractor shall

- .1 cease operations as directed by the Owner in the notice;
- .2 take actions necessary, or that the Owner may direct, for the protection and preservation of the Work; and
- .3 except for Work directed to be performed prior to the effective date of termination stated in the notice, terminate all existing subcontracts and purchase orders and enter into no further subcontracts and purchase orders.

§ 14.4.3 In case of such termination for the Owner’s convenience, the Contractor shall be entitled to receive payment for Work executed, and costs incurred by reason of such termination. The Contractor may not recover Overhead and Profit for Work not performed.

Attachment ‘E’

SURETY TAKEOVER AGREEMENT

SURETY TAKEOVER AGREEMENT

THIS AGREEMENT is made and entered into this _____ day of _____, 20__ by and between [**insert name of SURETY Company**], doing business at [**insert surety address and zip code**] (hereinafter referred to as "Surety") and State of Minnesota (hereinafter referred to as "Obligee").

WITNESSETH:

1. WHEREAS, [**enter original contractor's company name**] (hereafter referred to as "Contractor A"), as prime contractor, entered into a construction contract [**enter contract number**] with Obligee, dated on or about the [**enter date of contract for construction**]; and

2. WHEREAS, said contract between Obligee and Contractor A contained General Conditions, Special Conditions and Technical Specifications (hereinafter collectively referred to as the "Contract"), a copy of the Contract being attached hereto as Exhibit "A" and incorporated herein; and

3. WHEREAS, the Contract called for Contractor A to furnish all materials and labor necessary for [**enter project name as shown on contract and location of project**] (hereinafter referred to as the "Project") for an original contract price of [**enter dollar amount**]; and

4. WHEREAS, the original contract price has been changed with the prior approval of Obligee by Supplemental Agreements 1 through 2, to the sum of [**enter dollar amount**], copies of these Supplemental Agreements being attached hereto collectively as Exhibit "B" and incorporated herein; and

5. WHEREAS, the Contract required, as a condition precedent to commencing work under the Contract, that Contractor A obtain Performance and Payment Bonds; and

6. WHEREAS, Contractor A, as principal, and Surety, as surety, did provide to Obligee Surety's Performance and Payment Bonds No. [**enter bond number**], for an aggregate penal sum of [enter dollar amount], copies of these Bonds being attached hereto as Exhibit "C", respectively, and incorporated herein; and

7. WHEREAS, during the course of the work called for under the Contract, Contractor A, having been paid [**enter dollar amount**] by Obligee, through Payment Requests Nos. 1 through 6, left unfinished certain work called for under the Contract and leaving unpaid bills for labor, equipment, services and/or materials furnished to Contractor A in connection with the Project, copies of said Notices of Default from Obligee to Contractor A dated [**enter date of first letter of notice**] and [**enter date of second letter of notice**], and the Notice of Termination for Cause dated [**enter date of letter of termination**] being attached hereto as Exhibit "D" and incorporated herein, Obligee having warranted that said Notice of Default was made in accordance with the terms of the Contract.

8. WHEREAS, Obligee has made demand upon Surety under the aforesaid Performance Bond to complete the unfinished work under the Contract; and

9. WHEREAS, pursuant to Obligee's demands, Surety and Obligee have agreed upon a method to fully satisfy Obligee's demands, pursuant to which Surety shall enter into an agreement with a new contractor, [**enter name of new contractor**]., (thereinafter referred to as "Contractor B"), to complete the unfinished work under the Contract;

NOW, THEREFORE, in consideration of the premises, the parties hereto agree as follows:

10. Consideration. In consideration of Surety having entered into an agreement with Contractor B to complete the work remaining under the Contract, Obligees shall pay to Surety the balance remaining to be paid under the Contract, including retainage, as and when same would have become due under the Contract but for the default of Contractor A.

11. Payment Bond. The aforesaid Payment Bond No. **[enter bond number]** dated **[enter date of bond]** issued by Surety in connection with the Project shall remain in full force and effect according to its terms, provided, however, that Surety's obligation shall in no event exceed, and is hereby expressly limited to, the expenditure of the aggregate penal sum of said Bond as set out above.

12. Completion. Surety shall enter into an agreement with Contractor B in which Contractor B agrees to the timely completion of the contract in its entirety, without exception. The contract between surety and Contractor B shall incorporate all plans, specifications, General Conditions, Supplementary General Conditions, addenda, modifications, change orders, bid documents, drawings, building permits, and all related documents of any kind. Surety represents and warrants that Contractor B has examined and is familiar with every part of the contract and is fully qualified to complete the contract.

13. Supplemental Agreements. Obligees agree that in the event that there are supplemental agreements (i.e. change orders) proposed to be issued by Obligees on or after the date of the Agreement, Obligees will negotiate for such changes orders directly with Contractor B.

14. Claims. Surety agrees to pay all claims made by subcontractors, laborers and others who have furnished material or performed labor for Obligees in connection with the work previously performed under the aforesaid contract by Obligees subject to and in accordance with the terms and conditions of its Bond.

15. Savings Clause. The parties hereto agree that in the event that any provision contained in this Agreement is deemed void or unenforceable by a court of law, all other provisions shall remain in full force and effect to the extent permitted by applicable law. The terms and conditions of this Agreement shall govern and control if inconsistency or conflicts arise between provisions of this Agreement and any incorporated provisions, document or documents referenced herein.

16. Notice. Any notice required under any paragraph of this Agreement shall be sent or given to the parties herein at the addresses set forth below:

[enter name and address of Surety Company]
[enter name and phone number of contact person]
State of Minnesota
State Architect's Office
Attn: Project Manager **[enter name]**
[enter title of state's representative/project manager]
301 Centennial Office Bldg. 358 Cedar Street
St. Paul, MN 55155

[enter name and address of new contractor]
[enter name and phone number of contact person]

17. Assignment of Claims Against Contractor A. Obligee expressly assigns and transfers to Surety, and subrogates Surety to, all claims demands, causes of action, rights and equities which Obligee has, had or may have against Contractor A arising out of or incident to its Contract with Contractor A.

18. Extent of Liability on Performance Bond. In no event shall Surety's obligation on Surety's Performance Bond No. [enter bond number] exceed, and said obligation is hereby expressly limited to, the aggregate penal sum of said Performance Bond.

19. Extension of Time. Obligee hereby grants an extension of time pursuant to the terms of the Contract making the date for substantial completion of said Contract the 2nd day of January, 2004. "Substantial completion" for purposes of liquidated damages assessments remains the same as defined in the contract documents.

20. Insurance Certificates. Contractor B shall submit a certificate of insurance on an ACORD form which shall include all insurance requirements as described in the Supplementary General Conditions, Article 11. Said certificate shall be submitted to Obligee prior to start of work by Contractor B.

21. Miscellaneous. This Agreement is binding upon the parties hereto and their successors and assigns, provided, however, that no rights shall accrue hereunder to or for the use or benefit of any person or entity other than the parties hereto, their respective successors or assigns. This Agreement represents the entire integrated agreement between the parties hereto by written instrument signed by both Obligee and Surety. The parties hereto have voluntarily executed this Agreement based upon their independent investigation without relying upon any representations of the other party or its agents, attorneys, or representatives. The provisions of this Agreement shall be applied and interpreted in a manner consistent with each other so as to carry out the purposes and intent of the parties, but if for any reason any provision is unenforceable or invalid, such provision shall be deemed severed from this Agreement and the remaining provisions shall be carried out with the same force and effect as if the severed provision had not been a part of this Agreement. The headings of the Paragraphs are included solely for convenience of reference, and if there is any conflict between such headings and the text of Agreement, the Agreement shall control. This Agreement shall be governed by the laws of the State of Minnesota.

IN WITNESS WHEREOF, this Agreement has been executed on the day and year first above written.

SURETY
[enter name]
By: _____

Date: _____

Title: _____

DEPARTMENT OF ADMINISTRATION
Division Of Materials Management

Date: _____

By: _____

OBLIGEE
STATE OF MINNESOTA

Title: Acquisitions Management Specialist

By: _____

Date: _____

Title: _____

ATTORNEY GENERAL'S OFFICE

By: _____

Title: _____

Date: _____

By: _____

Title: Acquisitions Management Specialist

Date: _____

ATTORNEY GENERAL'S OFFICE

By: _____

Title: _____

Date: _____