

CONSTRUCTION PROCEDURES HANDBOOK

SECTION IV	SUBSECTION D	DATE
CONSTRUCTION CHANGES	DEFAULT AND TERMINATION OF CONTRACT	10/06/2025

PRECAUTIONS IN ADVANCE OF A DEFAULT

The Standard Specifications specify when the Department may declare a Contractor to be in default under Subsection 108.14. There are two general circumstances that initiate the Department issuing a declaration of default:

- 1) abandonment of the project due to insolvency
- 2) persistent failure to properly follow the Contract

Insolvency arises when the Contractor is unable to continue to perform the Work because it does not have the financial means to do so. This may occur with or without the Contractor declaring bankruptcy and a filing for bankruptcy alone is not sufficient for issuing a declaration of default. The causes for insolvency are many. Insolvency may be the result of poor bidding practices, poor project planning, or financial difficulties with external contracts. The Department's consideration for issuing a notice for potential default or for issuing a declaration of default should be restricted solely to the Contractor's performance. Default arising from insolvency is usually more straightforward as it is not usually contested by the Contractor or Surety. Default arising from insolvency is typically enacted when the Contractor stops performing work or making any substantive progress of the work. There are often warning signs, such as: complaints of non-payment from subcontractors and suppliers, the Contractor having to pay for material by cash on delivery, and equipment leaving the project site.

It is important to note that the Department has certain duties that it owes the Surety and the public should the Contractor be declared in default. When insolvency is suspected, the Department must proceed with caution. The Department has a duty to ensure that it neither underpays nor overpays for work that has been performed. If there are substantial claims filed against the Contract, the Department should promptly review such claims and make appropriate payments as merited. The Department may consider advancing a Step III claim hearing to prevent causing a Contractor from becoming insolvent due to the Department's failure to recognize its liability even though Step III claims are typically restricted until after the Department has received the Contractor's conditional release as specified in Subsection 107.12.02. In other words, the Department should not withhold money due to a Contractor in a claim that then causes the Contractor to become insolvent. However, the possibility of insolvency should not motivate the Department to improperly assess a claim to avoid a default. The Department should ensure the Contractor is not overpaid or underpaid as Sureties rely on remaining contract balances as collateral security to offset its loss and expense.

When the RE observes warning signs of insolvency, the RE will bring the concerns to the

Field Manager's attention for guidance.

The second general circumstance for the Department issuing a declaration of default arises from the Contractor's persistent failure to follow the Contract. While the Contract gives the Department a broad scope to exercise its decision to issue a declaration of default, the Department's action must be based on very specific deficiencies or acts by the Contractor. The Department may issue declarations of default for reasons listed in Subsection 108.14 such as: failure and refusal to remove and replace non-conforming work; refusal to perform additional work; failure to resume prosecution of the work.

The RE, the Field Manager, and RCE should not issue threats of default to the Contractor or copy the Surety on communications without the expressed consent of the Senior Director of Construction & Materials. Unwarranted threats of default can interfere with the relationship between the Contractor and the Surety and open the Department to lawsuits for tortious interference.

CONTRACTOR'S FAILURE TO ADDRESS SAFETY ISSUES

The procedures for declaration of default and termination of contract take time. When a Contractor has either neglected to maintain the project traffic control devices, or address a safety issue, the condition may require immediate action. In many cases public safety cannot wait for the administrative steps described in this procedure. If the Contractor has failed to address the RE's directions that involve dangers to the public safety, the RE and the Field Manager will discuss the matter with the RCE, and if immediate action is warranted, the RCE will take steps to have action taken by Operations, or another contractor. It is more important to safeguard the public than to extract Contractor compliance.

DEFAULT VS TERMINATION

If the Contractor is unable to complete a project, the Department may decide to terminate the contract after finding the Contractor in default as specified in 108.14. In some circumstances, this may avoid litigation and possibly provide a quicker method to provide the public with a completed roadway. Termination requires the determination of the value of incomplete or unfinished work. Termination may also trigger renegotiation of prices for major decreases of work as specified Subsection in 104.03.03. If the final traffic stage is not in place, termination may also require compensating the Contractor for leaving traffic control devices in place. FHWA would most likely not participate in any additional costs resulting from termination, including costs for rebidding a contract in excess of the remaining balance of the original contract.

INITIATION OF DEFAULT PROCEDURE

The RE will initiate the procedure for Default and Termination of Contract as specified in Subsections 108.14 and 108.15 when directed by the Director of Construction & Materials in consultation with the Assistant Commissioner of Capital Program Management (CPM), the DAG, and the FHWA Area Engineer (when projects involve any federal funding). Federal regulations 23 CFR 635.125 govern termination of contracts on federal projects.

RE Steps

- 1) When the Contractor's actions or failure to take action appear to merit default, the RE and Field Manager will bring the matter to the attention of the RCE. The RCE will further discuss the issue with the DAG and the Senior Director and Director of Construction & Materials.
- 2) Discuss with the Field Manager, Project Manager, and the RCE the reasons for notifying the Contractor of a potential default. Notification of potential default should only be reserved for instances where all other efforts to achieve compliance have been exhausted.
- 3) After receiving concurrence from the FM, the PM, and RCE, prepare the Notice of Potential Default letter (Example A) and have it reviewed and approved by the FM, RCE, and DAG. The notice will detail the reasons for the potential default and provide the necessary actions the Contractor must take to prevent the Department from issuing a declaration of default. Indicate in the letter the specific subsection(s) of the specifications not complied with, which provide(s) the basis for notifying the Contractor of a possible default. The notice must explicitly outline the actions of correction and specify a time period of 10 days for the correction(s) to be made. Once approved, send the letter via certified mail (return receipt requested) with a copy to the Surety Company, also by certified mail (return receipt requested).
 - a. If the Contractor complies with the initial directive, no further action is required.
 - b. If the Contractor does not comply within 10 days, proceed to step 4.
 - c. If the Contractor complies and after a period of time reverts back to a status of non-compliance for the same violation(s), proceed to step 4.
- 4) Prepare a memorandum to the RCE recommending that the Contractor be declared in default giving specific reason(s) for such action. Provide a complete package of all correspondence and information pertaining to the default, including all actions taken to date. Provide a copy to the FM and the PM. For Federally Funded Projects, provide a complete package to the FHWA. Mark the package in bold letters: **ATTN.: DEFAULT AND TERMINATION**. Make arrangements to deliver the package no later than the following day exclusive of Saturdays, Sundays and Holidays.

RCE Steps

- 1) Within three days, review the RE's recommendations for declaring the Contractor in default. If not in concurrence, notify the RE and the PM in writing. Specify what actions the RE should take. If in concurrence, proceed to step 2.
- 2) Seek advice and counsel from the DAG's Office, documenting same. If in concurrence, proceed to step 3.
- 3) For Federally funded PODI Projects, where the Individual Project Plan (IPP) specifies oversight for Default and Termination of Contract, request concurrence from FHWA. Document same and proceed to Step 4.
- 4) Consult with the Director and Senior Director of Construction and Materials and the Assistant Commissioner of CPM for concurrence. If in concurrence, proceed to

step 5.

- 5) Notify the Contractor of the Department's intent to proceed with default action. Indicate in the letter the cause for the intent to default and demand elimination of such cause. Forward a copy to the Surety Company. Use certified mail (return receipt requested).
 - a. If the Contractor corrects the grounds for default, no further action is required.
 - b. If the Contractor does not comply within 10 days, proceed to step 6.
 - c. If the Contractor complies and after a period of time reverts back to a status of non-compliance for the same violation(s), proceed to step 6.
- 6) Consult with the Senior Director of Construction and Materials, the PM and Assistant Commissioner of CPM and if there is concurrence prepare a Department Action (AD-12). Forward the AD-12 with related documentation and recommendation to the Director of Construction and Materials and Procurement's Bureau of Professional and Construction Services and the FHWA if their concurrence was required in step 3. The Director of Construction & Materials will prepare a letter of Declaration of Default letter to the Contractor for the Commissioner's signature (EXAMPLE B) and a Demand to Perform Letter to the Surety for the Commissioner's signature (EXAMPLE C).

Senior Director (Construction and Materials) Steps

Review the Default and Termination with the Director of Project Management and if in concurrence, sign the default request and forward to the Assistant Commissioner of CPM. If there is not concurrence, return the action to the RCE with an explanation or direction on how to proceed.

Assistant Commissioner (CPM) Steps

Review the action. If in concurrence, sign and forward to the Department Secretary.

RCE Steps (Continued)

Upon receipt of the executed AD-12, prepare letters to the Contractor and Surety Company notifying both that the Contractor has been declared in default of contract. Send copies to the RE, FM, PM, Attorney General's Office and the FHWA for Federally Funded Projects. A Notice of Declaration of Default may direct the Contractor to not proceed with any further work. However, it may take months before the Surety will be able to secure a Completion Contractor and proceed with the project. Accordingly, it may be necessary to direct the Contractor to secure the project site for the period of inactivity. The RE and FM will review the project to determine what actions are needed to safely secure the project site for the safety of vehicle traffic and for the safety of pedestrians. The RE and FM must exercise their judgment regarding actions needed in areas that have more public access. Examples of actions that may be needed:

- Secure materials stored on site
- Secure drums and barricades that are not needed for active traffic control, so they do not become a hazard (e.g. don't have them stored in a shoulder or berm area, where storms may cause them to fall into active traffic lanes)

- Close open excavations that may erode or collapse, or otherwise present an unacceptable risk to the public, especially in areas immediately adjacent to active traffic lanes or adjacent areas of significant pedestrian traffic
- Address maintenance of traffic control and erosion control items.

If the Contractor is unresponsive to directions to secure the project site, the RE and FM will discuss the issue with the RCE, and if warranted the RCE will take steps to have action taken by Operations, or another contractor.

Division of Procurement - Bureau of Professional & Construction Services Steps

Upon notification of default, proceed with Policy/Procedure 316 Debarment, Suspension, and Disqualification of a Contractor.

TERMINATION OF CONTRACT

If the contract is terminated for convenience adhere to section 108.15.01.

If the contract is terminated for cause, section 108.15.02 applies. Ensure the Contractor performs only the work required in the order of termination including additional work to secure the project. If the Contractor fails to perform this work, the Department will recover the costs and charges incurred by the Department along with the cost of completing Work from the Contractor or Surety.

Only make payment for the items completed as of the date of termination at the Contract price and for the work in the order of termination that was not in the original Contract.

TAKEOVER AGREEMENT WITH THE SURETY

In response to the Demand to Perform, the Surety will usually begin an investigation to determine if the declaration of default was valid and if they need to act under the obligation of the Performance Bond. That investigation likely begins with interviews with the Contractor (the Principal under the Performance Bond). The RCE will contact the Surety company representative and confirm the point of contact for the Surety. The RCE will schedule a meeting as soon as possible with the Surety's representatives and the RE, FM, DAG (and Director's representative) to:

- introduce the Surety to the Department's staff
- establish contact information for the Surety
- discuss the Surety's process
- answer the Surety's questions (the Surety will likely ask detailed questions about the status of the project, work completed, Change Orders, Contract Amounts, payments made, Contract balance, Contract Time, work remaining, liquidated damages)
- inquire about expected time frames for the Surety to obtain a Completion Contractor, execute a Takeover agreement, and resume the project progress

- discuss additional costs incurred by the Department which will be charged to the Surety (this may include costs for Operations or another Contractor to safely secure the project site)
- discuss the possibility of using of the former Contractor as the Completion Contractor

Often the Surety will balk at an assessment of liquidated damages for the period between the Declaration of Default and the execution of the Takeover Over Agreement. Liquidated damages are a reflection of costs incurred by the Department, and while the Department has the right to assess these costs under the Contract, the Department has in certain circumstances waived these costs to induce a prompt response by the Surety. It is important to remember that the Surety, while responsible for guaranteeing the completion of the project, is not liable for costs in excess of the penal sum of the bond.

At this preliminary meeting, it likely will be too early to have answers regarding the administrative protocols concerning the Surety and Replacement Contractor, such as:

- who has authority to execute change orders for Surety
- the chain of communication for the surety (e.g. will the superintendent for the Completion Contractor be sufficient or must issues go through the Surety's representative)

The Surety must submit the Completion Contractor as a subcontractor in accordance with Subsection 108.01. The Subsection 108.01 limits on the total value of work subcontracted for the Completion Contractor as a subcontractor to the Surety are waived. If the Surety proposes to use the original Contractor as the Completion Contractor, the Department has the right to reject the former Contractor as per Subsection 108.14. In cases of defaults arising from insolvency, the Department would usually accept the former Contractor as the Completion Contractor if the Contractor's performance was otherwise not a problem. Where the Contractor has been defaulted for performance issues, if the Department was to accept the Contractor as the Completion Contractor, it could undermine the Department's reasons for making a declaration of default. Accordingly, in cases where the Contractor has been defaulted for performance issues, the Department should refrain from accepting the former Contractor as the Completion Contractor.

The Director of Construction & Materials will draft a Takeover Agreement for the Surety (EXAMPLE D) and the Department. The sample Takeover Agreement is simply a framework to guide the Director. The final form is negotiated between the DAG and the Surety. After review by the DAG, the Director will transmit the Takeover Agreement to the Surety for its review. It is not unusual for the Takeover Agreement to have multiple revisions based on comments from the Surety and the Department. Any changes in the drafting of the Takeover Agreement must be reviewed by the DAG.

When a mutually acceptable draft of the Takeover Agreement is developed, the Director will have the Surety sign the agreement and prepare a Department Action (AD-12) for the Takeover Agreement (EXAMPLE E) for the Commissioner's signature.

Registering the Surety as a Vendor

In order for the Department's Bureau of Accounting to reassign the Contract and be able to

issue payments to the Surety, the Surety must first register as a vendor with the Department of Treasury [see <https://www.njstart.gov/bso/>]. The Director should discuss this process with the Director of Accounting and solicit a contact within the Bureau of Accounting to answer any questions to the Surety regarding this process.

Performance of Work

The completion Contractor may need to remove and replace work performed by the former Contractor. The RE should only make payment in accordance with the Contract, no additional payment should be made for work performed to correct deficiencies, including the removal and replacement of work.

Completion & Closeout Documents

The reassignment of the Contract from the Contractor to the Surety may present issues regarding closing out the project and receiving certain documents from the Surety or the Contractor, such as: material receipts, material certifications, warranties, Final Certificate of Compliance (Form DC-123). Every effort should be made to secure the closeout documents.

EXAMPLE A

DEPARTMENT OF TRANSPORTATION
P.O. Box 600



State of New Jersey

Trenton, New Jersey 08625-0600

PHIL MURPHY
Governor

JAMES S. BRADDOCK
Commissioner

November 08, 2024

Classic Construction Corporation, Inc.
555 West Syracuse Avenue
Roselle, N.J., 07203-1094

Attention: Mr. John Delanti: Project Superintendent

RE: Route 80 EB, Bridge Street to Grant Street, Contract No. 009234010, Bridge Reconstruction and Pavement Improvements, City of Hackensack, Bergen, DP No.: 25279
Notice of Potential Default

As noted in my previous correspondence of June 21, 2024, July 1, 2024, July 15, 2024, and August 1, 2024, the pavement at the following locations is not in compliance with the requirements of the Contract:

Rt. 80EB Left Lane	Station: 531+00 to 578+25
Rt. 80EB Center Lane	Station: 531+00 to 578+25
Rt. 80EB Right Lane	Station: 531+00 to 578+25
Rt. 80EB Left Shoulder	Station: 531+00 to 578+25
Rt. 80EB Right Shoulder	Station: 531+00 to 578+25

Furthermore, as noted in the above cited correspondence, Classic Construction Corp, Inc. (CCC) has been directed to remove and replace pavement, in accordance with Subsections 105.03 and 401.03.07.H of the Contract.

Furthermore, the Contract, as amended by Change Order No. 2, requires that Completion be achieved by June 11, 2024. As noted in the above cited correspondence, the Work has not reached Completion, and liquidated damages continue to accrue.

Therefore, in accordance with Subsection 108.14 of the Contract, this notice is provided to inform you that if CCC does not remove and replace at least 25% of the noted deficient pavement within ten days of receipt of this letter, the Department may declare you in default of the Contract.

If CCC disputes this directive, CCC may file a contractual notice in accordance with Subsection 104.03.04 to protect its rights, however providing contractual notice does not relieve CCC from the obligation to proceed with the work as directed in this letter.

Sincerely,

Phineas Flynn
RE

c: P. Flynn, RE
W. Miofski, Field Manager
A. Patel, Director of Construction Services & Materials
S. Hewitt, Project Manager
K. Singh, Program Manager
R. Lamb, Director of Project Management
W. Friede, Assistant Commissioner CPM
Surety -
file

“IMPROVING LIVES BY IMPROVING TRANSPORTATION”
New Jersey Is An Equal Opportunity Employer • Printed on Recycled and Recyclable Paper

EXAMPLE B

January 10, 2025

Classic Construction Corporation, Inc.
555 West Syracuse Avenue
Roselle, N.J., 07203-1094

Attention: Mr. John Delanti, Project Supt.

RE: Route 80 EB, Bridge Street to Grant Street, Contract No. 009234010, Bridge Reconstruction and Pavement Improvements, City of Hackensack, Bergen, DP No.: 25279
Declaration of Default

This letter is a Declaration of Default pursuant to Section 108.14 of the Contract.

In accordance with Section 108.14 of the Contract, by letter dated November 28, 2024, the RE for the Department, Phineas Flynn, provided you with a Notice of Potential Default whereby you were instructed to proceed with his direction, and that if you failed to do so within 10 days from receipt of his notice, the Department may declare you in default of the Contract. A copy of this letter was provided to the Surety, Travelers Casualty & Surety Company of America. You received this notice on December 1, 2024, and the necessary action was required by December 11, 2024.

By memorandum dated January 4, 2025, the Resident Engineer recommended that a Declaration of Default be entered and provided the factual circumstances in support of that recommendation. I have reviewed this recommendation and conclude that you have failed to comply with the requirements stated in the notice of November 28, 2024, and that the facts warrant a Declaration of Default.

Therefore, pursuant to Section 108.14 of the Contract, with full power and authority, without violating the Contract, I hereby declare Classic Construction Corporation, Inc. is to be in Default of the above referenced Contract.

Pursuant thereto, it is hereby ordered as follows:

1. Classic Construction Corporation, Inc. is directed to cease performing any further work on the project.
2. The Surety, Travelers Casualty & Surety Company of America, is hereby directed to complete the Contract.
3. Insurance policies shall be maintained and remain in effect.
4. Classic Construction Corporation, Inc., and its Surety are not relieved of liquidated damages as assessed under Section 108.20.
5. All damages incurred by the Department will be deducted from any monies due to the Contractor and its Surety. If such expenses exceed the sum that would be available from such monies, then the Contractor and its Surety shall be liable and shall pay the Department the balance.
6. The Department does not waive any of its rights and remedies provided by the Contract, the Bonds, or under law.
7. No retainage or bonds in lieu of retainage credited to this Contract shall be released prior to Acceptance.

Sincerely,

James S. Braddock
Commissioner
New Jersey Department of Transportation

c: P. Flynn, RE
W. Miofiki, Field Manager
A. Patel, Director of Construction Services & Materials
S. Hewitt, Project Manager
K. Singh, Program Manager
R. Lamb, Director of Project Management
W. Friede, Assistant Commissioner CPM
Classic Construction Corp., Inc.
file

EXAMPLE C

DEPARTMENT OF TRANSPORTATION
P.O. Box 600
Trenton, New Jersey 08625-0600

PHIL MURPHY
Governor

JAMES S. BRADDOCK
Commissioner

First Page Header January 10, 2025

~~Travelers~~ Casualty & Surety Company of America
One Tower Square
Hartford CT 06183

RE: Demand for the Surety to perform in accordance with its Bonds and Complete the Contract
Project: Route 80 EB, Bridge Street to Grant Street, Contract No. 009234010, Bridge Reconstruction and Pavement
Improvements, City of Hackensack, Bergen, DP No.: 25279 Contractor: Classic Construction Corporation, Inc.
Bond No.: 105294498

Please find the attached copy of the letter declaring your insured, Classic Construction Corporation, Inc. to be in default of the above referenced Contract.

The New Jersey Department of Transportation hereby demands that pursuant to your obligations under the Performance Bond (Bond No. 105294498) you complete the work of this Contract according to its terms. Liquidated damages have been and continue to be assessed for failure to complete the Work.

Please contact the Department's Regional Construction Engineer, Charlotte Weber at 609-306-4421, so that a meeting to discuss how to proceed can be arranged.

Sincerely,

James S. Braddock
Commissioner
New Jersey Department of Transportation

c: P. Flynn, RE
W. ~~McDonald~~, Field Manager
A. Patel, Director of Construction Services & Materials
S. Hewitt, Project Manager
K. Singh, Program Manager
R. Lamb, Director of Project Management
W. Friede, Assistant Commissioner CPM
Classic Construction Corp., Inc.
file

First Page Footer

EXAMPLE D

TAKEOVER AGREEMENT

This Takeover Agreement, hereinafter referred to as "the Agreement" is made and entered into this _____ day _____, 2025 between the New Jersey Department of Transportation located at 1035 Parkway Avenue, Trenton NJ 08625, hereinafter referred to as "the Department" and (Surety name) located at (Surety address) herein after referred to as "the Surety". Hereinafter the Department and the Surety will be referred to collectively as "the Parties".

RECITALS

1. WHEREAS, Contractor name herein after referred to as the "Former Contractor," and the Department entered into a contract dated January 21, 2024 hereinafter referred to as the "Contract" to furnish certain labor and material and performed work on a construction project referred to as (Project name) hereinafter referred to as "the Project".

2. WHEREAS, as required under the terms of the Contract, and pursuant to N.J.S.A. 2A:44-143, et seq., the Former Contractor and the Surety made, executed and delivered to the Department a Performance Bond, Bond No. HGNE-NE-10-0860, and a Payment Bond, Bond No. HGNE-NE-10-0860, (collectively, the "Bonds"), each in a penal sum of \$28,88,120.88 said sum being adjusted pursuant to Subsection 151.03.01 of the Contract.

3. WHEREAS, the Department declared the Former Contractor to be in default of the Contract pursuant to Subsection 108.14 of the Contract, said grounds for default being contained in a memorandum by the RE recommending default, dated January 09, 2025, and the Department called upon the Surety to fulfill its obligations under the terms of the Performance Bond.

4. NOW, THEREFORE, subject to the reservation of rights set forth below, the Surety agrees to undertake and arrange for the performance of the work remaining under the Contract pursuant to the terms of the Performance Bond, the Contract and this Agreement. In consideration of the agreements and undertakings set forth below and for other good and valuable consideration, the receipt and adequacy of which is hereby acknowledged, the Parties agree as follows:

AGREEMENTS

Performance of the Work. The Surety agrees to undertake and arrange for the performance of each and every one of the terms, covenants and conditions of the Contract as defined by the New Jersey Department of Transportation Standard Specifications, including any written amendments and change orders thereto. The Department acknowledges that the Surety is acting in its capacity as surety for the Former Contractor in undertaking and arranging for the performance and completion of the Contract, and not as a completing contractor or a design professional. The Department acknowledges that the Surety is neither responsible for nor assuming any obligations or liabilities beyond those set forth in the Performance Bond and this Agreement. The Department acknowledges that the Surety's obligation or loss

shall not, under any circumstances, exceed the penal sum of the Performance Bond. For purposes of completion of the Contract, except as may otherwise be provided in this Agreement, the Surety is entitled to all rights, title, and interest and subject to all of the Former Contractor obligations in and to the Contract in all respects as if the Surety were the original party to the Contract. The term "Contractor" as used in the Contract shall be deemed, after the Effective Date, to refer to the Surety rather than the Former Contractor.

The Department acknowledges that the Surety is not acting as a contractor and is not licensed as a contractor in the State of New Jersey, and fully and forever releases and waives any claims and defenses against Surety on the grounds that Surety is not properly licensed to perform the Work in accordance with this Agreement.

Completion Contractor. The Department acknowledges that the Surety will undertake and arrange for the performance of the Work to a Completion Contractor. The Surety will submit to the Department, the name and qualifications of a proposed Completion Contractor for the Department's review and approval as a subcontractor to the Surety pursuant to Subsection 108.

Alternatively, if using the former Contractor – use the following paragraph:

The Department hereby consents to the Surety's selection of Classic Construction Corporation, Inc. as the Completion Contractor. The Department's approval of the Former Contractor as the Completion Contractor shall not be construed as a rescission or modification of the Department's Declaration of Default pursuant to Section 108.14 nor any limitation on the rights, remedies, or actions which the Department may take regarding the default of the Former Contractor. The Surety may replace the Completion Contractor with a different contractor only with the Department's approval, and reserves the right, in its sole discretion, to terminate or alter its agreement with Completion Contractor, or to engage a new or supplemental Completion Contractor to perform the Work. Insurance obligations under the Contract will be deemed met upon the Surety providing satisfactory evidence of the required insurance coverage carried by Completion Contractor(s), with the Surety and the Department being named as additional insureds under the policy or policies.

Contract Balance. The Department represents and warrants that as of the Effective Date:

The total authorized amount of the Contract, including all additions and deductions through Change Order No. 10, is \$30,283,406.44.

The Former Contractor has been paid the sum of \$24,586,327.58.

The "Contract Balance" shall be hereinafter defined as the sum of \$5,697,078.86 (subsection (a) minus subsection (b)). The Contract Balance shall be adjusted as a result of any change order executed by the Parties after the Effective Date.

Presently there is \$42,371.11, in earned and unpaid contract balances represented by pending Estimate No. 24.

The Department is currently holding the sum of \$485,838.08 in retainage pursuant to the Contract through Estimate No. 13, which sum is included in the Contract Balance.

The Surety reserves the right to dispute the accuracy of the Contract Balance.

To date, the following damages have been assessed by the Department:

- i. *Payment adjustments for HMA **pavement***
- ii. *Liquidated damages for lane occupancy in the amount of \$1,800.00 against the Former Contractor for failure to restore lanes to traffic on November 9, 2014 in accordance with Subsection 108.08.*
- iii. *Costs for repairs performed by the Department on December 26, 2024 and January 22, 2025 to the pavement damaged by the Former Contractor to the eastbound lane on Bridge Structure No. 2116-161, Route 80 over Grant Street, in the amount of \$30,851.78.*
- iv. *Liquidated damages in the amount of \$108,000 for 30 days @ \$3,600/day (\$108,000.00) for failure to meet Substantial Completion by November 10, 2025 in accordance with Subsections 108.10 and 108.20 for the period of November 9, 2024 to December 9, 2024.*

Payment of the Contract Balance and Costs to Complete.

The Department agrees that the Contract Balance is dedicated to and shall be paid to the Surety for completion of the Work in accordance with the Contract and this Agreement. The payment of the Contract Balance to Surety shall be made in accordance with the terms and conditions of the Contract and this Agreement as to the time, amount, and method of payment. Unless specified in the Contract, no payment shall be delayed by reason of any prior breach in the performance of work on the Project by the Former Contractor or by reason of any slow down or cessation of work in connection with the takeover of the Contract by the Surety. Further, unless otherwise required by law, in no event shall the Department withhold, set off, or back charge any of the Contract Balance from the Surety because of or on account of any claims, liens, lawsuits, or demands by any persons or entities furnishing or alleging to have furnished labor and/or materials to the Project or because of any costs or expenses incurred as a result of such claims, including, but not limited to, legal fees, court costs, administrative fees, or other consequential damages.

All of the Surety's payments relating to the completion of the Contract, less amounts that Surety receives from the Department pursuant to this Agreement, shall be credited against the penal sum of the Performance Bond.

In no event shall the Surety be liable under the Performance Bond or this Agreement for any amount in excess of the penal sum of the Performance Bond said sum being adjusted pursuant to Section 151.03.01 of the Contract. Nothing in this Agreement shall be deemed as,

construed, or interpreted to effect or constitute a waiver of the penal sum of the Performance Bond or an increase in the liability of the Surety under the Performance Bond.

Use of Equipment and Materials. The Department agrees that the Surety and Completion Contractor shall have the right to use, without charge by the Department, any of the equipment, materials, and appurtenances furnished or supplied to or fabricated for the Project, wherever located.

Time for Performance. Although the Surety currently estimates that it will reach Substantial Completion on or before 180 calendar days after execution of this Agreement, and will reach Completion 60 calendar days after reaching Substantial Completion, it expressly acknowledges that the Contract requires the Performance of the Work shall be Substantially Complete on or before November 9, 2024 and Complete with all Work on or before March 1, 2025. The Department reserves the right to assess liquidated damages in accordance with the terms of the Contract for failure to meet the November 9, 2024 and/or March 1, 2025 milestones

Surety's Authorized Individual and Payment Procedures. The Surety shall be represented in the performance of the Work on the Project by Michael Cooper of Cashman Kloeblen & Ferretti, LLP hereinafter referred to as the "Authorized Individual" solely for the purpose set forth in this section of the Agreement. The Surety's appointment of the Authorized Individual may be changed upon ten days prior written notification from the Surety to the Department. The Authorized Individual shall represent the Surety in dealing with the Department on day-to-day construction issues with respect to the Project. The Surety hereby designates the Authorized Individual to prepare and process applications for payment under the Contract. Payment for the work on the Project shall be made to the Surety in accordance with the payment procedures set forth in the Contract.

The Authorized Individual shall have the authority to negotiate and sign change orders for extra work (work that is different from, in excess of, or beyond the scope of the work required by the Contract) requested or required by the Department (hereinafter "Change Order") without the Surety's prior written approval, provided the Change Order does not exceed \$50,000.00. If the Change Order exceeds \$50,000.00, and the Change Order requires the Surety's signature under the Contract, then the Surety's prior written approval is required to negotiate the Change Order for Extra Work and any Change Order by Christopher Sagan on behalf of the Surety and not the Authorized Individual. The Authorized Individual shall have no authority to act on behalf of the Surety to negotiate deductive change orders, credits, backcharges, or net deductions of any nature whatsoever from the Contract or the Contract Balance without the Surety's prior written approval. Any agreements with respect to the warranty work of the Former Contractor or corrective work other than that specified by the contract documents, whether latent or patent, in the work performed by the Former Contractor shall require the written approval of the Surety and the Department.

Notices. All notices sent in accordance with the Contract or this Agreement shall be sent to the addresses set forth below or to such other address as either Party may specify in writing, and shall be presumed to have been given three (3) calendar days after mailing, provided mailing was by certified mail, with a copy transmitted by electronic mail, addressed to the intended recipient at its address set forth below:

Surety:

Travelers Casualty and Insurance Company

One Tower Square,

Suite 501

Hartford, CT 06183

Attn: Christopher R. Sagan

The Department:

Phineas Flynn

RE

15 Main Street

River Edge, NJ 07661

With a copy to:

Charlotte Weber
Regional Construction Engineer
New Jersey Department of Transportation
Region North Construction
200 Stierli Court,
Mt. Arlington, NJ 07856-1322

Fyodor Miofsky
Field Manager
New Jersey Department of Transportation
Region North Construction
200 Stierli Court,
Mt. Arlington, NJ 07856-1322

The Payment Bond. The Payment Bond shall remain in full force and effect in accordance with its terms and provisions. The Department acknowledges that the total liability of Surety under the Payment Bond shall not exceed the penal sum of the Payment Bond. All Payment Bond payments properly made by the Surety shall be credited against the penal sum of the Payment Bond. Nothing in this Agreement

constitutes a waiver of such penal sum or an increase in the liability of Surety under the Payment Bond.

The Department acknowledges that claims have been or may be asserted on the Payment Bond by the Former Contractor's unpaid suppliers and subcontractors. Unless required by law, the Department acknowledges that it is not authorized to and agrees not to make any representations or promises regarding payment to such suppliers and subcontractors, and the Department shall refer all inquiries from such suppliers and/or subcontractors with respect to payment to the Surety. The Surety shall have the right to settle, compromise, defend, appeal, pay, or dispute such claims as it, in its sole and complete discretion, may deem appropriate in accordance with the terms of the Payment Bond and applicable law.

Reservation of Rights. This Agreement is solely for the benefit of the Department and the Surety. The Department and the Surety do not intend by any provision of this Agreement to create any rights in or to increase the rights of any third parties, nor to confer any benefit upon or enforceable rights under this Agreement or otherwise upon anyone other than the Department and the Surety. Neither the Completion Contractor nor the Authorized Individual is considered a third party beneficiary of the Contract. The Department and the Surety agree that this Agreement does not create any right for any subcontractor of the Surety directly against the Department to receive payment for Work performed pursuant to the Contract or this Agreement. The Department and the Surety understand that the Completion Contractor, the Authorized Individual, and any subcontractors, do not have any right to bring an action against the Department in the courts of the State of New Jersey by virtue of this lack of standing, and also by virtue of the provisions of the New Jersey Contractual Liability Act, N.J.S.A 59:13-1, et seq. Nothing in this Agreement shall in any way be construed as a rescission or modification of the Declaration of Default issued to the Former Contractor, nor a waiver by any of the parties, including the Former Contractor, to any claims or defenses for additional compensation and/or extension of time that may have arisen under the Contract and pursuant to the law of the State of New Jersey, except to the extent expressly set forth.

Rights against Third Parties. The Parties expressly reserve all claims, rights, remedies, and defenses they may have against any person or legal entity not a signatory hereto, including, but not limited to, the Former Contractor, and any and all suppliers, and subcontractors.

No Third Party Rights. This Agreement is solely for the benefit of the Parties. The Parties do not intend by any provision of this Agreement to create any rights in favor of or increase the rights of any third party, nor confer any benefit or enforceable rights, under this Agreement or otherwise, upon any person or entity other than the Parties. Further, the Parties acknowledge and agree that nothing in this Agreement is intended to or shall be construed to grant or expand any rights of any third-party claimants or the liabilities or obligations of the Surety under the Bonds or waive or alter any available defense or limitation against any third-party claims.

Governing Law. The validity and interpretation of this Agreement, the rights and obligations of the Parties hereunder, and any and all disputes arising out of or relating to this Agreement shall be governed by, enforced, and construed in accordance with the laws of the State of New Jersey, without regard to any otherwise applicable conflict of law rules or requirements.

Venue. Venue shall lie in the Superior Court of New Jersey

Entire Agreement. This Agreement, which expressly incorporates the

Contract, constitutes the whole of the understanding, discussions, and agreement by and between the Department and the Surety. The terms and provisions of this Agreement acknowledge that there have been no oral, written or other agreements of any kind as a condition precedent to or to induce the execution and delivery of this Agreement. Any written or oral communication conducted prior to the effective date of this Agreement shall not in any way vary or alter the terms of this Agreement

Illegality, Unenforceability, or Invalidity. If any term or provision of this Agreement is construed or found to be void, voidable, illegal, unenforceable, or invalid, this will not affect the legality, enforceability, or validity of any of the other terms or provisions of this Agreement. The illegal, unenforceable, or invalid term or provision shall be deemed stricken and deleted, but all other terms and provisions shall nevertheless continue and be given full force and effect as if the illegal, unenforceable, or invalid terms or provisions had never been incorporated.

Additional Actions that May be Required. The Parties shall execute such documents and other papers and take such further actions as may be reasonably required or desirable to carry out the provisions hereof and the transactions contemplated hereby.

Modifications to this Agreement. No modification, amendment, or other alteration of this Agreement shall be effective unless mutually agreed upon in writing and executed by the Parties. Any attempted amendment or modification of this Agreement that does not comply with this Paragraph shall be deemed void.

Construction. The Recitals to this Agreement are incorporated into this Agreement and form a part of the terms and conditions of this Agreement. The provisions of this Agreement are contractual and are not mere recitals. The Parties, together with their respective attorneys if any, participated in the drafting and preparation of this Agreement.

Headings. The headings of the sections and subsections of this Agreement are inserted for convenience only and shall not control or affect the meaning, construction, or effect of this Agreement, or any provisions hereof.

Execution in Counterparts. This Agreement may be executed in multiple counterparts, each of which shall be deemed to be an original, but all of which together shall constitute one and the same instrument.

Authority. This Agreement has been duly executed and delivered by the Parties hereto and constitutes a legal, valid, and binding obligation of the parties. Each person executing this Agreement on behalf of a Party hereto represents and warrants that they have full right and authority to enter into this Agreement. The person or persons signing and executing this Agreement on behalf of the Party, or representing themselves as signing and executing this Agreement on behalf of the Party, do hereby warrant and guarantee that he, she, or they have been duly authorized by the Party to execute this Agreement and to validly and legally bind the Party to all terms, performances, and provisions herein set forth. By their signatures below, the duly authorized representatives of the Parties accept the terms of this Agreement in full. In the event that one or more provisions of this Agreement shall be declared to be invalid, illegal or unenforceable in any respect, unless such invalidity, illegality or unenforceability shall be tantamount to a failure of consideration, the validity, legality and enforceability of the remaining provisions contained in this Agreement shall not in any way be affected or impaired thereby.

Successors and Assigns. This Agreement and the respective rights and obligations of the Parties shall inure to the benefit and be binding upon the successors and assigns of the Parties.

Effective Date. The Effective Date of this Agreement is the date of the last signature below.

[Remainder of page left blank intentionally.]

EXECUTION

In WITNESS WHEREOF, each of the below parties acknowledge warrant and represent that each is authorized to bind the respective party to the terms and conditions herein, for which each has executed this Agreement and each has had an opportunity to consult with an attorney of its choice regarding said terms and conditions.

Attest/Witnessed/Sealed:

TRAVELERS CASUALTY AND
INSURANCE COMPANY

(Seal) By:

Name
Title

Christopher R. Sagan
Senior Vice President

Attest/Witnessed/Affix Seal:

THE STATE OF NEW JERSEY
DEPARTMENT OF
TRANSPORTATION

By:

James Kildea
Department Secretary
New Jersey
Department of Transportation

Warren Friede III, P.E
Assistant Commissioner
New Jersey
Department of Transportation

Approved as to form:

Christopher E. Harcar
Assistant Attorney General

DATE