



THE CITY OF NEW YORK  
OFFICE OF THE MAYOR  
OFFICE OF CONSTRUCTION

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RUDOLPH J. RINALDI, Director

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DIRECTIVE No. 66  
AMENDMENT No. 1

TO: AGENCY HEADS AND GENERAL COUNSEL  
FROM: RUDOLPH J. RINALDI  
DATE: SEPTEMBER 3, 1993  
RE: CONSTRUCTION CONTRACTOR DEFAULTS  
(SURETY PERFORMANCE AND DEFAULT)

=====  
This Amendment supplements Directive No. 66 and adds information on Surety and Surety Defaults including an additional form, "Memorandum to Complete Work" to be used in place of Surety "Take Over Agreements".

CHOOSING A SURETY

When making a responsibility determination of a low bidder, it is important to also check the responsibility of the contractor's proposed Surety. To aid in this determination, a new Vendex field is in the process of being created by a joint effort of ODC and the Comptroller's office. Until a separate Surety listing is created on IQCIS and Vendex, the awarding Agency's ACCO should check the current Vendex listings to ascertain that a Surety has not been listed as a defaulting Surety. If Vendex lists the Surety as having once been defaulted, this should be taken into account when determining if the Surety is responsible to bond the proposed project work.

As part of the responsibility determination of the low bidder and until the City's own Surety Vendex system is completed, the ACCO should check the attached New York State Insurance Department's list of licensed approved sureties or the Department of Treasury list of "Companies Holding Certificates

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of Authority as Acceptable Sureties on federal Bonds and/or acceptable Reinsurance Companies" and determine if the Surety is approved by the New York State Insurance Department and/or the federal government to bond work. The stated limits of the underwriting limitation of the Surety should be adhered to. All Sureties must write their City business through a licensed New York Surety.

If a Surety is not listed in the federal list, or in the New York State Insurance Department approved lists, A.M. Best and Co. publishes a rating of Sureties which can be consulted. If a Surety is not accepted by the federal government or by the New York State Insurance Department or rated A- or better by Best's Guide, the Agency ACCO shall reject the Surety and may find the bidder not responsible. All Agencies shall add the following to the Information for Bidders, Section 22, Rejection of Bids § A:

"(5) The City reserves the right to reject any bid for which the Bonding Company is deemed not acceptable. Bonding Companies acceptable to bond federal work, New York work, or rated "A-" or better by A.M. Best are acceptable as long as they bond within their stated underwriting monetary limits."

Additionally, the City has had problems with counterfeit bonds written on legitimate Surety companies or by bogus firms. The name of the Surety should be carefully checked. Often a bogus Surety or counterfeit Surety will use the name of a legitimate Surety and add a "Ltd." or other designation after the name to distinguish it. It will be too late if an Agency discovers that the Surety is nonexistent to pay the bond when a demand is made after a contractor defaults. Cautious checking at the commencement of the work will prevent problems after a contractor defaults and demand is made upon a Surety to complete the work.

#### NOTICE OF POTENTIAL DEFAULT

When dealing with a contractor, if job related problems occur with regard to payment, performance, or potential default of the contractor, it is important to notify the Surety as soon as the Agency becomes aware of a potential contractor default. This should be done by sending a copy to the Surety of the correspondence sent to the contractor. Caution should be taken by the Agency, however, not to become involved in the contractor/surety relationship, which may be adversarial. If, during the course of the project, the Surety requests a routine

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evaluation of the contractor's performance, no additional work need be done by the Agency, but the Agency may copy the Surety on the Agency's contractor evaluation form if requested by the Surety. Information as to change orders, anticipated completion date, contract price, and any other information which would normally be available to the public under the Freedom of Information Act, should be made available to the Surety.

#### INFORMATION TO BE SUPPLIED TO THE SURETY

It is important that a channel be opened for communication with the Surety as soon as a problem develops on the job. Information should be voluntarily shared, if possible. Open communication may result in the Surety choosing to finance and assist the contractor to complete the work and avoid the default process.

The Surety should also be copied on the Letter Notifying contractor of an "Opportunity to be Heard" meeting (Appendix B attached) to discuss with the contractor why it should not be defaulted. Whether the Surety is present at the informal meeting should be determined by the contractor. The Agency should not make a decision to include the Surety at the "default" discussion over the contractor's objections.

In the event that a bonded contractor will be declared in default, as provided by Directive No. 66, the Surety should be sent a copy of the "Default Notice" (Appendices A and C). The Agency may then issue a demand to the Surety that the Surety complete the work, A "Letter to Surety Demanding Performance" (Appendix D) should be promptly issued to the Surety. The City's current form of bond calls for completion of the work within 20 days. If this is not possible, the Surety should respond to the Agency within fourteen (14) working days of receipt of the "Letter to Surety Demanding Performance".

Certain information should be supplied to the Surety in the "Letter to Surety Demanding Performance":

1. the original contract price;
2. the change orders issued;
3. the amount of payments made to the original contractor to the date of default;
4. the remaining dollar amount of the contract;

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5. a general description of the work remaining to be completed in the project.

The Agency files should be made available to the Surety to obtain whatever information it needs, including: copies of contract documents copies of the bond; a copy of the bid package if available; a set of contract drawings; copies of change orders, those paid, those approved and those pending; any field orders issued; any revised drawings; copies of the last submitted and last paid requisition; copies of any notes on the status of the project and problems anticipated as would be available to the original contractor; copies of any time extensions granted; any information about potential Labor Law Section 220 claims against the contractor, and any other actions pending; the progress report or reports issued by the Agency just before and after the default, describing the status of the project and any special problems leading to or resulting from the default; and a list of the original bidders and their bid amount. These records shall be made available to the Surety to be examined at the Agency original records should not be removed from the Agency. The Agency may charge the Surety for duplication for any of the records the Surety requests. In addition, the Agency should make arrangements for the Surety's representative to visit the work site and to be accompanied by the City project manager and any personnel knowledgeable about the project, promptly after receipt by the Surety of the "Default Notice" of default and immediately following the Surety's receipt or review of the documentation mentioned above. An Agency may define the work to be completed by the Surety, however, there is no guarantee to the Surety that defective work will not be discovered because the City Contract states that there is never an estoppel against the City's right to make such a finding.

If no response is received within fourteen (14) days of the sending of the "Letter to Surety Demanding Performance" and/or if there has not been an attempt by the Surety to view the records, a "Letter Defaulting Surety" (Appendix E) should be sent to the Surety and arrangements made by the Agency to complete the work. A Surety "response" does not mean that the Surety will provide a completion contractor on site within the fourteen (14) day period. If an Agency has demanded that the Surety complete the work, it should be anticipated that the Surety will contact the Agency and review the files to obtain sufficient information so as to enable it to obtain a completion contractor.

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MEMORANDUM TO COMPLETE WORK

If the Surety responds, according to its bond, the Surety is not entitled to a new contract. Furthermore, no "Take Over Agreement" shall be signed. A "Memorandum to Complete Work" (Appendix F) will be the binding document between the Agency and the Surety. The Agency should not permit the Surety to delay the completion of the work or sign any agreement which could be construed as a new contract. If the Surety commences completion of the performance of the contract, it is not able to come back later and invoke the bond penalty as a reason for not performing the contract in its entirety. Under the present language of the City's bond, the Surety may elect to pay to the Agency the penal sum of the bond.

The "Memorandum to Complete Work" (Appendix F) shall provide for the Surety to arrange to complete the work according to all of the terms and conditions of the defaulted contractor's contract and for the City to pay the Surety in the manner provided by the contract. The Surety may designate a completion contractor, after the required approval by the Agency, as its representative for the purposes of completing the work, including signing and submitting requisitions for payment in the Surety's name to the City, and administering change orders and other documentation relating to the contract completion. Such documentation should be executed substantially as follows: "XXX Corp., as Completing Surety", and be signed by an officer of such Completion Contractor. Also, for all delays caused by the Surety's Completion Contractor, once it commences work, liquidated damages shall be assessed.

SECURING THE CONSTRUCTION SITE

Arrangements should be made to secure the construction site upon default of the original contractor. The Agency may back-charge site security costs to the contractor and/or its Surety, until the Surety assumes the responsibility for Site Security.

SURETY RESPONSES TO DEMAND TO COMPLETE THE WORK

There are five typical Surety responses once the demand to complete a defaulted contractor's work has been served:

- (1) Surety responds but delays performance.

In this situation, no more than 45 days should be allowed for the Surety to commence work or pay the penal sum of the bond. If the Surety does not commence work or pay on the bond within the 45 day time period then the Agency should default the Surety by sending the letter, Appendix E. The Agency should make arrangements to complete the work and back-charge the Surety.

- (2) The Surety refuses to perform by taking a position that it has no legal responsibility to complete the work.

The Letter Defaulting Surety (Appendix E) should be sent to the Surety and the Agency should make arrangements to complete the work and back-charge the Surety.

- (3) The Surety will complete the work by providing a completion contractor.

The Surety must review the work and the related documents and provide a Completion Contractor to commence work on site within forty five days of the Notice of the Contractor's Default. The attached signed "Memorandum to Complete Work" (Appendix F) should be used in place of a "Take Over" Agreement, which is not permitted.

- (4) The Surety may offer a financial settlement, limited to the penal sum amount in the bond, to relieve it of its performance obligation under the bond.

The Commissioner shall decide if the financial settlement is acceptable in consultation with the Mayor's Office of Construction and the Law Department. Once the settlement offer is accepted, the Agency should complete the work.

- (5) The Surety supports the original contractor until the work is completed.

The Agency shall involve the Surety's representative in all discussions and copy them on all correspondences.

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#### AGENCY CONTACT PERSON

The name of an Agency contact person should be given to the Surety, to act as the Agency's project manager, to work with the Surety to complete the work.

Upon its receipt of the City's letter "Demanding Performance", the Surety will be expected to designate one or more representatives (such as a claims examiner, consulting engineer, or attorney) to administer the City's claim. If the Surety has not responded in any manner, within the fourteen (14) day period after the "Letter to Surety Demanding Performance" has been sent, the Agency's counsel shall make direct contact with the Surety, ascertain that it has received the demand, and ask the Surety to designate a representative.

#### TIME LIMITS

The Surety is expected to supply to the Agency an answer as to if and when it will commence completion of the work, within 7 working days of review of the Agency's documents but no longer than twenty-one (21) days after sending the "Letter to Surety Demanding Performance". If the Surety does not pay the penal sum or establish a firm commence work date acceptable to the Agency within the established time limit, the Surety shall be defaulted and the Agency should complete the work.

The Surety's Completion Contractor must be acceptable to the Agency. The Completion Contractor may be rejected by the Agency. The Completion Contractor must complete a Vendex review and be approved by the City before the contractor may commence work on the site.

#### ASSUMPTION OF WORK

"A Memorandum to Complete Work" may be signed with the Surety in the form attached hereto as Appendix F. The Surety must assume the original contractor's contract subject to all contractual liabilities and obligations. The "Memorandum to Complete Work" is not a new contract, but a documentation of the work to be completed. The Agency may not waive liquidated damages, although it may agree to assess the liquidated damages up to the date of the Surety's commencement of the work against the original contractor, and not against the Surety.

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DEFAULT

If a Surety is defaultd by an Agency, the Agency shall turn the default information over to the Law Department for suit and list the Surety's default on Vendex.

Additionally, all Surety complaints should be reported to the Mayor's Office of Construction and the State Insurance Department.

If repeated problems occur with the same Surety, the Agency should refer the Surety to the Office of Administrative Trials and Hearings for a debarment proceeding.

surety.jul/4  
RJR:lms

Appendix A  
Sample Letter Declaring Default Without Hearing

Date

\_\_\_\_\_  
Construction Corp.  
(ADDRESS)

RE: Notice of Declaration of  
Default Contract No.  
Project No.

Gentlemen:

Please be advised that pursuant to Articles 45 and 46 of the above referenced contract, I have determined that \_\_\_\_\_ Construction Corp. is in default of said contract. On or about \_\_\_\_\_ 1993, Construction Corp. reduced your working force to a number which is insufficient to complete the work in accordance with the Progress Schedule. On \_\_\_\_\_ 1993, you were directed to increase your work force and you have failed and refused to do so, or to maintain the Progress of the Work.

In accordance with Article 47, you are hereby directed to discontinue any further operations, vacate the worksite, and leave at the work site all plant, materials, equipment, and supplies, effective immediately.

Very truly yours,

Commissioner

cc: Surety

APPENDIX.A/4

Appendix B  
Sample Letter Notifying Contractor  
of "Opportunity To Be Heard Meeting"

\_\_\_\_\_ Construction Corp.  
(ADDRESS)

Re: Opportunity to be Heard  
Contract No.  
Project No.

Gentlemen:

I have been directed by the Commissioner to notify you to appear at a meeting to be held in the Office of the General Counsel at (address) on (date) at (time) to show cause before the Commissioner designee why you should not be held in default of the above referenced contract pursuant to article 45 thereof.

I have been advised that the commencement date of this contract was (date) and at which time you were directed by Commissioner \_\_\_\_\_ to commence work. A copy of said commence work notice is attached hereto. As of this date, the Commissioner has determined that you have not yet commenced work\*.

You are entitled to be represented by counsel, and should bring with you any relevant documentation pertaining to the issues to be discussed. Please contact the undersigned upon receipt of this notice, either personally or by counsel at (telephone number).

Be advised that if you are determined to be in default of your contract, said determination may result in the commencement of further proceedings to declare you debarred for cause from consideration for award of any City contract for a period not to exceed five years, in accordance with Section 335 of the New York City Charter and Section 7-08 of the Rules of the Procurement Policy Board.

Very truly yours,

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\* Make sure the contract file contains a letter from the Commissioner or a designee that an event of default has occurred.

cc: Surety

APPENDIX.B/4

Appendix C  
Sample Letter Declaring Default After  
"Opportunity to be Heard" Meeting

\_\_\_\_\_  
Construction Corp.  
(ADDRESS)

RE: Notice of Declaration of  
Default Contract No.  
Project No.

Gentlemen:

Please be advised that pursuant to Article 45 and 46 of the above referenced contract, I have determined that \_\_\_\_\_ Construction Corp. is in default of said contract. On or about \_\_\_\_\_ 1993, Construction Corp. abandoned all work under the contract and has failed to return to the job site, notwithstanding repeated requests by the Department of \_\_\_\_\_ that it do so.

On \_\_\_\_\_ 1993, Construction Corp. was afforded an opportunity to be heard prior to my exercising this agency's contractual right to declare a default. Construction Corp. was duly notified of said hearing by a letter dated \_\_\_\_\_ 1993, and was heard. In accordance with Article 47, you are hereby directed to discontinue any further operations, vacate the work site and leave at the work site all plant, materials, equipment, and supplies, effective immediately.

This default will be recorded in the City's Contractor Information System (Vendex) and may affect your ability to do future business with the city of New York.

Very truly yours,

Commissioner

cc: Surety

APPENDIX.C/4

Appendix D  
Letter to Surety Demanding Performance

Date

SURETY  
Address

RE: Notice of  
Performance  
Performance Bond No.  
Contract No.  
Project No.  
Construction Corp.

Dear \_\_\_\_\_:

This letter serves as a formal demand by the Department of \_\_\_\_\_  
that \_\_\_\_\_ Surety Company fully perform and complete all work under the  
above referenced contract or tender the amount of the bond.

On \_\_\_\_\_, 1993, Commissioner \_\_\_\_\_ declared Construction  
Corp., your Principal, to be in default of the contract for \_\_\_\_\_  
(give reason). A copy of the Commissioner's notice is enclosed for your reference. Under  
the terms of the performance bond, \_\_\_\_\_ Surety has agreed in its bond, "to fully  
perform and complete the work to be performed under the Contract, pursuant to the terms,  
conditions, and covenants thereof, if for any cause, the principal fails or neglects to so fully  
perform and complete such work." Further, the Surety has agreed "to commence such work  
of completion within twenty (20) days after written notice thereof from the City and to  
complete such work within such time as the City may fix." If the Surety intends to complete  
the work, then the Surety shall complete the project under the following terms:

1. The original contract price was \$ \_\_\_\_\_ subject to the term of the contract  
based on a lump sum bid for labor & material submitted by \_\_\_\_\_ Construction  
Corp.
  2. The change orders issued are as follows: \_\_\_\_\_
  3. The payments made to the original contractor to date are as follows:
  4. The remaining dollar amount of the contract is \$ \_\_\_\_\_.
- \_\_\_\_\_

5. The work remaining to be completed is \_\_\_\_\_.

Therefore, this agency requests that \_\_\_\_\_ Surety, in conformance with its obligation under the previously referenced performance bond, complete all work required by \_\_\_\_\_ 1993 or tender the full amount of the bond. You may contact \_\_\_\_\_ of this office at (telephone number) should you require any assistance in complying with this request.

If you fail to perform you can be defaulted. All defaults are recorded in the City's Contractor Information System (Vendex) and may affect your ability to do future business with the City of New York.

Very truly yours,

Commissioner

APEN2.D/6

Appendix E  
Letter Defaulting Surety

Date

SURETY  
Address

RE: Notice of  
Declaration of  
Default  
Contract No.  
Project No.  
Performance  
Bond No.

Dear President of Surety:

Please be advised that I have determined that \_\_\_\_\_ Surety is in default on the above referenced Performance Bond. On \_\_\_\_\_, 1993, Commissioner noticed \_\_\_\_\_ Surety that it fully perform and complete all work under the above referenced contract or tender payment under the bond, your principal having been declared in default of that contract. A copy of that notice is enclosed for your reference.

In view of your obvious failure to perform or pay on the bond, I have no alternative but to declare you in default. You are hereby put on notice that the agency will immediately contract to complete the work of your principal and will seek indemnification from you for any and all cost incurred to complete the work.

This default will be recorded in the City's Contractor Information System (Vendex) and may affect your ability to do future business with the City of New York.

Very truly yours,

Commissioner

APEN2.E

Appendix F (new)  
MEMORANDUM TO COMPLETE WORK

This Memorandum is made as of the \_\_\_\_\_ day of \_\_\_\_\_, 199\_\_, by and among THE CITY OF NEW YORK, acting by the through \_\_\_\_\_ (the "CITY"); and \_\_\_\_\_, as "SURETY":

WHEREAS, the CITY and \_\_\_\_\_, as contractor (the "ORIGINAL CONTRACTOR"), entered into a contract (Contract # \_\_\_\_\_, Comptroller's # \_\_\_\_\_), for \_\_\_\_\_ work relating to a public improvement known as \_\_\_\_\_, as to which the SURETY issued its performance bond # \_\_\_\_\_, as surety for the ORIGINAL CONTRACTOR;

WHEREAS, the CITY has declared the ORIGINAL CONTRACTOR to be in default under the aforesaid Contract, and has made demand upon the SURETY pursuant to the aforesaid performance bond;

NOW, THEREFORE, this Agreement sets forth the CITY's and the SURETY's mutual understanding as to the circumstances under which the SURETY is completing the work under the Contract, as completing Surety under said performance bond:

1. The SURETY, as completing Surety under its aforesaid performance bond, shall arrange for the completion of the work required of the ORIGINAL CONTRACTOR under the aforesaid Contract (and all duly authorized modifications thereof), as though the SURETY had been the contractor under the terms of the original contract and as though there had been no default by the ORIGINAL CONTRACTOR (except as expressly provided in this Memorandum or as otherwise provided in writing duly executed by the parties hereto).

2. The completion work under the Contract shall be performed by a Completion Contractor (hereinafter "the COMPLETION CONTRACTOR") selected by the SURETY and approved by the CITY. The COMPLETION CONTRACTOR shall prepare and submit on behalf of the SURETY the payment requisitions to the CITY under the Contract, and shall be authorized to take such other acts on behalf of the SURETY as may be necessary for the administration of the Contract and the completion work. The CITY shall have the right to demand the replacement of the COMPLETION CONTRACTOR by the SURETY on the same grounds as would suffice to declare a default of the contractor under the Contract. The SURETY shall have the right at any time to elect to replace the COMPLETION CONTRACTOR, subject to approval by the City. If the COMPLETION CONTRACTOR is to be replaced, the SURETY shall promptly submit in writing to the CITY the name and qualifications of the contractor proposed in replacement, whereupon the CITY shall promptly notify the SURETY in writing of its approval of such replacement, or of its disapproval. All COMPLETION CONTRACTORS must comply with the City's Contractor Information System (Vendex) before any approvals may be granted.

3. The CITY has approved \_\_\_\_\_, designated by the SURETY, as the COMPLETION CONTRACTOR. Such approval, however, shall not relieve SURETY of any responsibility to the CITY pursuant to the original Contract and the performance bond.

4. The CITY represents that the status of the Contract is as follows:

(a) The Original Contract price, subject to the terms of the Contract, was the sum of \$ \_\_\_\_\_.

(b) The following change orders have been issued under the Contract:

\_\_\_\_\_  
\_\_\_\_\_.

The net total of all the change orders to date is an increase of (or a decrease of) \$ \_\_\_\_\_.

(c) The CITY has made payments to or on behalf of the ORIGINAL CONTRACTOR totaling \$ \_\_\_\_\_.

(d) The Contract balance remaining available toward the completion cost is \$ \_\_\_\_\_.

(e) The CITY has asserted the following unresolved claims against the ORIGINAL CONTRACTOR:

\_\_\_\_\_  
\_\_\_\_\_.

5. The CITY reserves the right to direct further additions, deletions, change orders and extensions of time, as provided in the Contract which would reduce the amount remaining to be paid by it under the contract as set forth in paragraph "4" above. Furthermore, while the Agency may define the work to be completed by the Surety, there shall be no guarantees to the Surety that defective work will not be discovered which must be corrected by the Completion Contractor.

6. The City shall pay directly to the Surety all monies due and to become due as they become due under the Contract. The Surety hereby agrees to indemnify and hold harmless the City for any amounts paid by the City to the Surety or its Completion Contractor for all losses, liability, judgments, costs and expenses that may result from any

claim, action or legal proceeding brought by anyone based upon the contention that any sum paid to the Surety under this paragraph should not have been paid to the Surety and should have instead been paid to such claimant, and the Surety will defend the City from any such claim, action or proceeding.

7. All Funds received by the Surety from the City in connection with the Contract shall be held by the Surety to the extent provided in Article 3-A of the Lien Law. The Surety shall pay the Completion Contractor in accordance with General Municipal Law §106-b; and the Completion Contractor shall have no rights directly against the City to receive payment for its work.

8. The acceptable date for completion of the Contract work is \_\_\_\_\_ . If necessary, the City agrees to review a revised progress schedule submitted by the Surety and other contractors on the project in accordance with Contract provisions for the purposes of coordinating the Completion Contractor's work with the rest of the work and with City personnel. Such "acceptable date" shall not relieve Original Contractor and/or Surety from any liability for liquidated damages resulting from its delay of the work. Furthermore, such "acceptable date" shall not relieve the Surety for any liability for liquidated damages resulting from either the Surety or its Completion Contractor's delay of the work from the date of commencement of completion until final completion of the work. Such "acceptable date" shall not be construed as a waiver of any rights the City may have to recover damages, liquidated or otherwise, except as hereinabove set forth.

9. The City reserves its right to seek recovery from the Surety under the aforesaid performance bond for any amount for which the City may claim entitlement from the Original Contractor under the terms of the Contract, including but not limited to any claims for liquidated damages, any claims for indemnity from potential claims by other prime contractors, and any claims arising out of any statutory or regulatory guidelines with which the Original Contractor was required to comply, such as prevailing wage guidelines and equal opportunity guidelines.

10. The parties hereto reserve all rights, remedies and defenses they may have against any such person or legal entity not a signatory hereto, including but not limited to the Original Contractor, suppliers, subcontractors, architects, and other prime contractors. Nothing contained in this Agreement is intended to create any rights in favor of, or otherwise in any manner inure to the benefit of, any person or legal entity not a signatory hereto. This Memorandum shall not be construed to be a novation to the Original Contract.

CITY  
BY: \_\_\_\_\_

SURETY  
BY: \_\_\_\_\_