

**Board Of County Commissioners**  
**County Manager**  
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Thursday, October 3, 2019

VIA FEDERAL EXPRESS OVERNIGHT DELIVERY

HB Construction, Inc.  
Attn.: Mr. Matt Mulligan  
3010 Monte Vista Blvd. NE  
Albuquerque, NM 87106

Federal Insurance Company  
15 Mountain View Road  
Warren, NJ 07059

RE: **Notice of Termination for Default**

**Bond:** 8243-97-40  
**Surety:** Federal Insurance Company, 15 Mountain View Rd., Warren, NJ 07059  
**Contractor as Principal:** HB Construction, Inc., 3010 Monte Vista Blvd NE, Albuquerque, NM 87106  
**Owner:** Lea County, 100 N Main, Suite 11, Lovington, NM 88260  
**Project:** Lea County Judicial Complex, 313 E Central Ave., Lovington, NM 88260

To Whom It May Concern:

Lea County, New Mexico (the "Lea County") entered into a construction contract dated December 7, 2017 (the "Contract") with HB Construction, Inc. ("HB") for all labor, materials, equipment and construction services to build the new Lea County Judicial Complex (the "Project") in Lovington, Lea County, New Mexico.

The Project and Contract Documents were prepared by RMKM Architecture, PC (the "RMKM"). The Contract was on the AIA Form A101-2007 incorporating the AIA A201-2007 as its General Conditions and RMKM's specifications and design documents as well (the "Contract Documents"). A copy of the Contract and its General Conditions are, once again, attached hereto as **Exhibit 1**.

HB provided a Performance Bond, Bond No. 8243-97-40 (the "Bond") on the Project guaranteeing HB's performance in accordance with the Contract Documents.

The Contract required HB to perform in strict accordance with its terms, including the design documents and time for performance. (AIA A201-2001 §3.1.2). Substantial completion was to be achieved within 575 calendar days of HB's commencement of the work. HB commenced construction on or about January 30, 2017 and was, therefore, required to substantially complete its work by August 28, 2018. HB and Lea County executed 14 change orders, the last on or about June 14, 2019, but no additional time was ever added to the Contract.

RMKM has routinely evaluated and advised HB and Lea County of work which fails to conform to the requirements of the Contract Documents through a continuously updated Non-Conformance List. The list has remained robust, but Lea County has given HB ample opportunity to address these deficiencies as well as complete its work. RMKM last published this list to HB on or about October 1, 2019, a copy of which is attached as **Exhibit 2**.

Lea County previously advised HB, RMKM, and Federal Insurance Co. that it was considering declaring HB in default by letter dated February 28, 2019. At a March 20, 2019 meeting at HB's office in Albuquerque, New Mexico, HB and Lea County developed a framework by which HB could complete the Project. HB represented at this time that it would achieve substantial completion in April 2019.

HB did not achieve substantial completion in April. The parties then met on May 13, 2019 with representatives of Federal Insurance Co. to, once again, discuss HB's performance and its strategy to complete the Project. The parties agreed that HB would provide certain corrective action plans for work identified by RMKM as defective. Lea County agreed to review certain work – previously declared by RMKM as non-conforming – to determine if such work could be accepted (with and without conditions) and contract funds could be released. At this time, HB represented that it would achieve substantial completion in July 2019. HB did not achieve substantial completion in July 2019.

HB did submit correspondence addressing remedial work on some, but not all, of the defective work identified by RMKM. However, many communications did not submit a definitive a corrective action plan. RMKM advised HB that it was unable to evaluate whether HB's intended corrective action would satisfy the Contract Documents. As evidenced by RMKM's latest Non-Conformance List in Exhibit 2, HB did correct some non-conforming work on the Project. But many critical elements of the Project remain incomplete or non-conforming. Therefore, as of the date of this letter, HB has not achieved substantial completion.

One area of particular concern is the mechanical penthouse slab and waterproofing. No evidence exists that HB correctly installed the waterproofing application on the mechanical penthouse floor. HB first claimed it did not know of the process and procedure actually used in placing the waterproofing application. For example, the waterproofing application required all existing cracks over 1/16<sup>th</sup> of an inch to be specially prepared, and HB represented that it did not know if any cracks needed to be prepared or were actually prepared. Later, HB claimed it had properly placed the waterproofing application.

All testing of the penthouse floor waterproofing has revealed that the penthouse floor allows significant water leaks. HB then notified Lea County that it believed the waterproofing application was incorrectly specified by RMKM. Lea County did not summarily dismiss HB's claims, but instead, Lea County hired New Mexico Building Envelope Architects, LLC and Joseph Hughes to evaluate the appropriateness of the waterproofing specification and HB's performance.

Mr. Hughes' evaluation (the "Hughes Report") was published to Lea County on September 17, 2019<sup>1</sup>. A copy of the Hughes Report is attached as **Exhibit 3**. As communicated to HB, Lea County would like the report to speak for itself, but the conclusions are unmistakable. The penthouse slab was defectively installed. As a result, the slab has undermined the effectiveness of the specified waterproofing application. Moreover, the

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<sup>1</sup> The Report inadvertently has a date of June 17, 2019. As you will see, the report was completed by Mr. Hughes on September 6, 2019 and was received by Lea County on September 17, 2019.

"quick" fixes that have been informally proposed by HB (since no formal corrective action plans have been submitted and approved) would appear to be insufficient or unsatisfactory.

Lea County notified HB of the conclusions reached by the Hughes Report by letter dated September 23, 2019 and provided HB with ten (10) days to commence and continue correction of the penthouse slab and waterproofing application. To date, HB has not begun correcting the penthouse slab.

Lea County previously advised HB and Federal Insurance Co. that it would not accept any defective or non-conforming work, and it restates that position herein. Nor will Lea County be able to occupy or use the Project for its intended purpose until after HB's defective or non-conforming work has been corrected.

As noted in Lea County's February 28, 2019 notice to Federal Insurance Co. and discussed during the March 20, 2019 pre-default meeting, HB has been on notice for months that its work fails to comply with the Contract Documents, but HB has failed and continues to fail to perform or otherwise comply with the material terms of the Contract. Based upon its recent history with HB, Lea County is gravely concerned that HB is unable to meet its obligations to perform the Contract in a workmanlike manner and in strict conformance with the Contract Documents. Likewise, HB has failed to timely complete the Project, and its date of actual completion remains undeterminable.

Pursuant to the Contract's general conditions, AIA A201-2001 §14.2, Lea County sought certification from RMKM as the Contract's Initial Decision Maker that sufficient cause exists to declare HB to be in default of the Contract and terminate the Contract as a result of HB's dilatory performance and unwillingness to adequately remedy non-conforming work. A copy of RMKM's certification is attached hereto as **Exhibit 4**.

Thus, Lea County hereby notifies Federal Insurance Co. and HB that, effective seven (7) days after receipt of this notice, the Contract between Lea County and HB is being terminated for default. Lea County demands that Federal Insurance Co. perform all obligations under the Bond after the effective date of the termination.

Your prompt attention to this matter is appreciated.

Sincerely,



Michael Gallagher  
Lea County Manager

Att.

cc: Mr. Douglas J. Wills  
Vice President and Surety Claims Manager, Surety Claims  
436 Walnut Street, WA10A  
Philadelphia, PA 19106

LMC Insurance & Risk Management  
4200 University Avenue #200  
West Des Moines, IA 50266