

**TAKEOVER AGREEMENT**

**THIS TAKEOVER AGREEMENT** (“Agreement”) is made and entered into this 10th day of January, 2022 (“Effective Date”), by and between the City of Gainesville, Florida (“Owner”) and Western Surety Company (“Surety”) (collectively the “Parties”).

WITNESSETH:

**WHEREAS**, on January 12, 2018, D.A.B. Constructors, Inc. (“D.A.B.”) contracted with the Owner (the “Contract”) for the SE 4<sup>th</sup> Street Reconstruction (Williston Rd. to Depot Ave.) project, Bid #PWDA-180021-DH (the “Project”), the terms of which are incorporated herein; and

**WHEREAS**, Western Surety furnished Public Construction Bond No. 30021214 (the “Bond”), recorded in the Official Records of Alachua County, Florida at Book 4565, Page 1859, with a penal sum of \$5,010,328.88, with D.A.B. as principal and Owner as obligee for the Project; and

**WHEREAS**, on July 28, 2021, D.A.B. sent to the Owner a Letter Invoking Surety Performance and Directions Regarding Future Payments (“Default Notice”) stating that it was financially unable to perform or complete the performance of the work, authorizing Surety to take over and complete the Project, and directing any and all payments due or to become due of any kind or nature on account of the Project be made payable to Surety; and

**WHEREAS**, Owner acknowledges receipt of such Default Notice and agrees to act consistent with it; and

**WHEREAS**, the remaining Contract Balance is defined herein in para. 4 of this Agreement including withheld retainage, and Owner continues to withhold those sums for the completion of the Contract; and

**WHEREAS**, Surety received a proposal to complete the Project from Anderson Columbia Co., Inc. (“Completion Contractor”); and

**WHEREAS**, Surety and Completion Contractor have entered or will enter into a Completion Agreement to complete the remaining work on the Project; and

**WHEREAS**, Owner and Surety have agreed in good faith to compromise, settle and satisfy any and all claims, demands and disputes between them arising out of or relating to the Contract, Project and the Bond through the date of this Agreement, with the exception of any attorney’s fees and costs that are incurred as a result of any claim or dispute arising from this Agreement or liquidated damages that accrue subsequent to the date of this Agreement.

**NOW, THEREFORE**, in consideration of the mutual covenants, agreements, and undertakings hereinafter set forth, and for other good and valuable consideration, the receipt and sufficiency of which is hereby acknowledged, the Parties agree as follows:

1. Incorporation. Each of the above recitals are true and correct and are incorporated into this Agreement as if fully set forth herein. The Bond and Contract, including all plans, specifications and other Contract Documents, are incorporated by reference and are made a part of this Agreement.

2. Performance of the Work. The Surety agrees to arrange for the performance and completion of the Contract, including any and all agreed written amendments and/or change orders thereto, in accordance with the terms and conditions of this Agreement and the Contract. Owner acknowledges that Surety is acting in its capacity as the Surety for D.A.B. in arranging for the performance and completion of the Contract, and not as a completing contractor, and that the Surety is not assuming any obligations or liabilities beyond those set forth in the Public Construction Bond. As to the performance and completion of the Contract, except as otherwise specifically provided to the contrary in this Agreement, the Surety is entitled to all rights, title and interest of D.A.B. in and to the Contract.

3. Completion Contractor. Owner acknowledges that Surety will arrange for the completion of the Contract pursuant to a completion agreement and that Surety has selected Anderson Columbia Co., Inc. Owner hereby consents to Surety's selection of Anderson Columbia Co., Inc. as Completion Contractor. Surety 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 or complete the Contract. The Completion Contractor shall be subject to the terms and conditions of the Contract as if it had originally executed it, except to the extent otherwise provided in this Agreement. Insurance obligations under the Contract will be deemed met upon Surety or Completion Contractor providing satisfactory evidence of the required insurance coverage under the Contract, with Surety and Owner being named as additional insureds under the policy or policies.

4. Contract Balance. The Owner and Surety agree that as of the Effective Date of this Agreement:

- a. The total authorized amount of the Contract, including all retainage, additions and deductions, is \$4,969,024.91.
- b. D.A.B. has been paid the sum of \$3,152,490.42.
- c. Owner will assess liquidated damages in the amount of \$100,000.00.
- d. The Owner has incurred costs related to corrective or remediation work and site maintenance at the Project in the amount of \$\$25,412.02.
- e. That pending Change Order 8 decreases the amount of the Contract by \$189,805.85, and an additional modification to this change order would further decrease the Contract by \$4,428.00.
- f. That pending Change Order 8 would increase the amount of the Contract by \$22,488.00 due to 8 weather days of delay.

- g. That Plan Revision 4 modifies the scope of work limited to the speed table and would increase the Contract by \$75,000.00.
- h. That Plan Revision 5 modifies the scope of work regarding changes to the outfall structure and would increase the Contract by \$4,200.00.
- i. Owner is currently holding the sum of \$165,920.55 in retainage pursuant to the Contract (“Retainage”).
- j. The “Contract Balance” shall be hereinafter defined as the sum of the foregoing subsections, which equates to \$1,598,576.62, *less* \$50,000.00, which is an amount Owner shall hold back pending the completion of all punch list items as set forth in para. 8 herein. Therefore, the total sum of the Contract Balance is **\$1,548,576.62**, all of which shall be paid to Surety within forty-five (45) days of the Effective Date. The Contract Balance shall be adjusted as a result of any change order executed by the Parties after this Agreement.
- i. Owner represents that to the best of its knowledge and ability based upon the records available to it, the Contract Balance defined herein is accurate. Surety reserves the right to confirm the accuracy of this balance. Surety’s sole remedy against Owner for breach of this representation is payment by Owner to Surety of any additional amount due.

5. Payment of Contract Balance and Cost to Complete. Owner agrees that the Contract Balance is solely dedicated to and shall be paid to Surety for completion of the Contract in accordance with the Contract and this Agreement, subject to future rights of set-off Owner may have under the Contract for, among other things, liquidated damages that accrue subsequent to the Final Completion Date set forth herein. Owner shall pay Surety the Contract Balance as work is completed subject to the terms and conditions of the Contract, except as provided herein. Owner agrees it shall not hold further retainage from the date of this Agreement with the exception of the \$50,000.00 hold back amount described in para. 4(i) above. Payment of the Contract Balance shall not be delayed or withheld for any of the following reasons:

- a) claims, liens, suits or demands by D.A.B., or its legal representatives, creditors, trustees in bankruptcy, successors or assigns; or
- b) claims, liens, suits or demands by any person or entity furnishing labor, equipment or materials to D.A.B. on this or any other project; or
- c) any claims by Owner against D.A.B. and/or Surety, however, if there is a future default of this Agreement, then Owner is entitled to withhold any of the Contract Balance; or
- d) pursuit by Surety of any claim against Owner.

Upon submission of proper payment requests, the Owner shall timely pay Surety the Contract Balance. Owner recognizes that Surety is subrogated to D.A.B.'s rights under the Contract, including the right to receive progress and final payments, and the right to seek additional compensation or damages where appropriate under the Contract and arising after the date of this Agreement.

6. Penal Sum. The Owner agrees that Surety's obligation on the Bond shall not exceed, and said obligation is hereby expressly limited to \$5,010,328.88, the penal sum of the Bond. To the extent the Surety is required to expend its own funds for the performance and completion of the Contract by the Completion Contractor, any such payments by the Surety, less amounts Surety receives from Owner pursuant to this Agreement, shall be credited against the penal sum of the Bond. Nothing in this Agreement constitutes a waiver of the penal sum or an increase in the liability of Surety under the Public Construction Bond.

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

8. Completion. The Contract **shall be substantially completed within** One Hundred and Ten (**110**) **days** from the Effective Date of this Agreement ("Substantial Completion"). The Owner shall prepare and deliver to Surety a punch list for any corrective or repair work ("Owner's Punch List") within seven (7) calendar days of Substantial Completion. Owner's Punch List shall be finally completed within thirty-five (35) days of Substantial Completion ("Final Completion"). Upon Owner's confirmation that Owner's Punch List has been finally completed, the Owner shall disburse the remaining \$50,000.00 hold back amount to Surety. Completion times shall be computed as set forth in the Contract and Surety and Completion Contractor shall be entitled, upon request, to any extensions of time permitted by the Contract. Liquidated damages shall accrue against the Surety if the work is not substantially completed by the date of Substantial Completion in accordance with the Contract unless such completion times are extended by the Owner. After Substantial Completion, liquidated damages shall accrue against the Surety if the work is not finally completed by the date of Final Completion at the rate of \$500 per day unless such completion times are extended by the Owner.

9. Surety's Authorized Representative and Payment Procedures. Surety shall be represented in the performance of the Work by Nicholson Professional Consulting, Inc. ("Authorized Representative"). Owner will work directly with Completion Contractor in the performance and completion of the work. The Surety's Authorized Representative shall represent the Surety in dealing with the Owner on construction problems and/or issues which may arise during construction. Surety hereby designates the Authorized Representative to prepare and process applications for payment under the Contract. However, Surety will sign all applications for payment. Payment for the Work shall be made to the Surety in accord with the time constraints in the Contract. Payments shall be remitted to:

Western Surety Company  
Attention: Michael J. Keating, Senior Claims Counsel

Surety Claims – 17th Floor  
151 N. Franklin Street  
Chicago, IL 60606

10. Changes. All further changes to the Contract and this Agreement must be executed by both Owner and Surety. Completion Contractor shall not have the authority to negotiate change orders for extra work, deductive change orders, credits, back charges or net deductions of any nature without Surety's prior written consent. Any agreements with respect to the warranty work of D.A.B. or corrective work, whether latent or patent, in the work performed by D.A.B. shall require the prior written approval of Surety, which approval shall not be unreasonably withheld or delayed.

11. Notices: Notices required by the Contract or this Agreement must be sent by electronic mail and regular mail to the following:

**To Owner:**

Mr. Brian Singleton ([SingletonBM@cityofgainesville.org](mailto:SingletonBM@cityofgainesville.org))  
City of Gainesville Public Works  
405 NW 39<sup>th</sup> Ave, Box 58  
Gainesville, FL 32627-0490

**With Copy to:**

Mr. Ben Dacheballi ([ben.dacheballi@hwlaw.com](mailto:ben.dacheballi@hwlaw.com))  
Hill Ward Henderson  
101 E. Kennedy Blvd., Suite 3700  
Tampa, Florida 33602

**To Surety:**

Mr. Michael J. Keating ([Michael.Keating@cnasurety.com](mailto:Michael.Keating@cnasurety.com))  
CNA Surety  
Surety Claims – 17th Floor  
151 N. Franklin Street  
Chicago, IL 60606

**With Copy to:**

Ms. Megan M. Warren ([mwarren@mcraemetcalf.com](mailto:mwarren@mcraemetcalf.com))  
McRae & Metcalf, P.A.  
2612 Centennial Place  
Tallahassee, FL 32308

12. Reservation of Rights. Except as otherwise set forth herein, Surety, for itself and for D.A.B., and Owner reserve all of their respective rights, claims and defenses under the Contract, the Bond, at law or equity. Neither this Agreement nor any provision hereof shall be deemed or construed to be an admission or concession of liability of any kind or nature by D.A.B., Surety, or Owner.

13. No Third-Party Rights. This Agreement is solely for the benefit of Surety and Owner. Surety and Owner do not intend by any provision of this Agreement to create any rights in or increase the rights of any third-party or to confer any benefit or enforceable rights under this Agreement or otherwise upon anyone other than Surety and Owner.

14. Entire Agreement. Save and except for the Bond, this Agreement comprises the entire integrated agreement between the Parties and supersedes all prior negotiations, representations or agreements, whether oral or written, and may only be modified or amended in writing signed by the Parties. The terms of this Agreement shall not be construed for or against any party based on draftsmanship.

15. Disputes. This Agreement shall be governed by and construed in accordance with the laws of the State of Florida. Venue for any dispute between the Parties shall lie exclusively in the Circuit Court in and for Alachua County, Florida.

16. Attorneys' Fees. In any litigation or dispute arising out of or in connection with this Agreement, the prevailing party shall be entitled to recover its reasonable attorneys' fees, costs, and expenses, from the non-prevailing party, whether at trial or on appeal.

17. Severability. The provisions of this Agreement shall be applied and interpreted in a manner consistent with each other so as to carry out the purpose and intent of the parties, but if for any reason any provision is deemed 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.

18. Counterparts. This Agreement may be executed in one or more counterparts, each of which shall be deemed an original, but all of which shall constitute one and the same instrument. Facsimile or electronic signatures shall be treated as original signatures for all purposes.

[REMAINDER OF PAGE LEFT INTENTIONALLY LEFT BLANK WITH SIGNATURE PAGE TO FOLLOW.]

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

**Western Surety Company**

By: \_\_\_\_\_  
Print Name: \_\_\_\_\_  
Title: \_\_\_\_\_

**City of Gainesville**

By: \_\_\_\_\_  
Print Name: \_\_\_\_\_  
Title: \_\_\_\_\_