

**TENDER OF COMPLETION CONTRACTOR TO CITY
AND RELEASE AGREEMENT**

This TENDER OF COMPLETION CONTRACTOR TO CITY AND RELEASE AGREEMENT (“Agreement”), dated the 14th day of September, 2016, is entered into by and between Developers Surety and Indemnity Company (“Surety”) and the City of Bell (the “City”). Surety and City may be referenced individually as a “Party” and collectively as “Parties.”

Recitals

WHEREAS, on or about September 23, 2015, Bannaoun Engineers Construction Corporation, a California corporation (“Principal”) entered into a construction contract with City, pursuant to which it agreed to perform certain work as described in the contract for the project identified as Gage Avenue Improvements from Wilcox Avenue to River Drive Federal Aid Project No. DEM09-5272 (012) in the City of Bell (hereinafter referred to as the “Project” or “Original Contract”); and

WHEREAS, as a condition under the Original Contract, Surety executed and delivered to City a Performance Bond, No. 390362P (“Performance Bond”) in favor of the City to secure the performance obligation of Principal pursuant to the Original Contract referred to above and Payment Bond, No. 390362P (“Payment Bond”) issued pursuant to the provisions of Civil Code Sections 9550 through 9556, inclusive; and

WHEREAS, the Performance Bond was issued for the full amount of the Original Contract; and

WHEREAS, by letter April 21, 2016, City formally declared the Original Contract to be in default, proceeded to terminate Principal, and made a demand upon Surety under its Performance Bond to complete the construction contemplated by the Original Contract; and

WHEREAS, Surety invited bids for completion of the work remaining on the Project and in due course received bids from several contractors, the most advantageous bid being that of Sully-Miller Contracting Co. (“Sully-Miller”) for the price of \$671,000.00 as more particularly set forth in Attachment A attached hereto and incorporated herein; and

WHEREAS, to fulfill its Performance Bond obligations, Surety will tender, and the City will agree to accept, Sully-Miller as the completing contractor, a construction contractor ready, willing and able to perform and complete all of the remaining work required to be performed under the Original Contract, and to do so, Surety has arranged for City to enter into a Completion Contract with Sully-Miller; under which, Sully-Miller will complete all of the remaining work to be performed under the Original Contract; will warrant and ensure compliance with the Completion Contract requirements of all remaining work to be performed to complete said Original Contract and will warrant all of the work previously performed by Principal, and under which Sully-Miller will furnish to City its payment and performance bonds guaranteeing said performance; and

WHEREAS, subject to a waiver of claims for liquidated damages against Surety with respect to the Original Contract only (and not to the Completion Contract with Sully-Miller), Surety also agrees to make payment to City in the amount of \$201,744.85 as a cash settlement of City's previous claims asserted against the Faithful Performance Bond furnished by Principal and Surety, which amount shall be paid to City upon the execution of the Completion Contract and attainment of acceptable bonding of the Completion Contract and proof of insurance as required by the Completion Contract; and

WHEREAS, the City holds \$469,255.15 in remaining contract funds from the Original Contract for completion of the Project, which is comprised of \$466,631.00 in contract balances plus \$2,624.15 in retention, and will dedicate said funds for payment of the Completion Contract; and

WHEREAS, the tender proposal and cash settlement offer is acceptable to City, and the Parties desire to document the terms of such agreement as set forth herein below:

NOW, THEREFORE, in consideration of the terms and conditions and mutual promises set forth herein, the City and Surety do hereby covenant and agree to the following:

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1. Sully-Miller is hereby tendered by Surety as the Completion Contractor and the City agrees to enter into the Completion Contract with Sully-Miller to fully perform all work remaining under the Original Contract without further participation and/or involvement of the Surety. The maximum total amount of the Completion Contract shall be \$671,000.00, subject to adjustment in accordance with Attachment A to reflect quantities of materials actually installed or pursuant to the terms of the Completion Contract between City and Sully-Miller, payable to Sully-Miller by the City in accordance with the Completion Contract.
2. For and in consideration of the sum of \$201,744.85 to be paid by Surety to City, and for the other good and valuable consideration described hereinabove, the receipt and sufficiency of which is hereby acknowledged and confessed, the City hereby releases and forever discharges Surety from any and all claims, demands, causes of action, damages, and/or expenses arising out of or in any way related to the Original Contract entered into between the City and Principal and the Surety's statutory Performance Bond, and its Performance Bond is hereby returned to the Surety.
3. For and in consideration of the release in Paragraph 2, Surety does hereby agree to make payment to City in the amount of \$201,744.85, which shall be paid to City upon the execution of the Completion Contract and attainment of acceptable bonding of the Completion Contract and proof of insurance as required by the Completion Contract. Said payment shall serve as a cash settlement of any and all claim(s) previously asserted and which could have been asserted by the City as of this date against said Faithful Performance Bond in full and complete settlement of said claim(s).
4. City agrees to waive any claims for liquidated damages provided under the Original Contract against Surety. This waiver provision shall not be construed as a waiver of

liquidated damages against the Surety or Sully-Miller by the City pursuant to the terms of the Completion Contract between Sully-Miller and the City.

5. City does hereby assign unto Surety, its successors and assigns any and all rights, demands, claims and/or causes of action which City has as against Principal arising out of, as a result of and/or on the basis of the default and breach by Principal of the original contract for the Project, and City gives Surety, its successors and assigns full power and authority for its own use and benefit, but at its own cost, to ask, demand, collect, receive, compound and/or release, and in its name or otherwise, to prosecute and withdraw any claims, suits or proceedings at law or in equity as against Principal in its efforts to obtain recovery upon its rights under said assignment.
6. The Surety hereby releases and forever discharges the City from any and all claims, demands, causes of action, damages, and/or expenses arising out of or in any way related to the Original Contract entered into between the City and Principal and/or the Surety's statutory Performance Bond, whether its own claim, or the subrogated claim(s), or any other claim, if any, of the Principal.
7. The foregoing notwithstanding, the validity of this Agreement is expressly and wholly contingent upon Sully-Miller's timely execution of the Completion Contract and attainment of acceptable bonding of the Completion Contract and proof of insurance as required by the Completion Contract. In the event Sully-Miller refuses or otherwise fails to so timely execute the Completion Contract, or fails to provide City with acceptable performance and payment bonds and proof of insurance, all Parties hereto acknowledge and agree that this Agreement shall be a nullity, and the rights and obligations of the respective Parties shall remain as they were without this Agreement.
8. Surety acknowledges and agrees that its Payment Bond, number 390362P, previously furnished for said Project shall continue to remain in full force and effect in accordance with its original terms, except that it is expressly agreed by and

between Surety and City that the scope and coverage of said payment bond shall be limited to and shall only apply to statutory claims for payment of subcontractors and suppliers of Principal for work performed and materials delivered on behalf of the Principal, and that said payment bond shall not apply to or cover Sully-Miller or any of its subcontractors and suppliers for any work performed and materials delivered after the date hereof.

9. The Parties and their signatories hereto warrant that each has the power and authority to execute this Agreement. The Parties hereto have voluntarily executed this Agreement based upon their independent investigation. The provisions of the Agreement shall be applied and interpreted in a manner consistent with each other so as to carry out the purposes and intent of the Parties, but if for any reason any provision is unenforceable or invalid, such provision shall be deemed severed from this Agreement and the remaining provisions shall be carried out with the same force and effect as if the severed portion had not been a part of this Agreement. This Agreement shall extend to and be binding upon the parties hereto and their respective successors, assigns, principals, and privies
10. The undersigned hereby confirm that this Agreement constitutes the entire terms of their agreement and further acknowledge that they have read and understand this Agreement, have had an opportunity to consult with counsel, and that this Agreement constitutes a full, complete, and final settlement and release of Surety from its Performance Bond obligations.
11. In any dispute related to this Agreement, the prevailing party shall be entitled to recover attorney's fees.
12. The Parties agree that if any facts, claims or circumstances relating to or with respect to the Project are at any time later found, suspected, or claimed to be other than or different from the facts, claims and circumstances now believed by them to be true, then the Parties expressly accept and assume the risk of such possible differences of facts, claims and circumstances and agree that the releases set forth

herein shall be and remain effective notwithstanding any such differences in any facts, claims or circumstances.

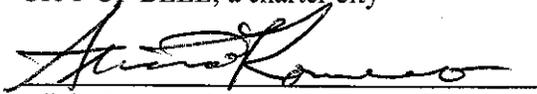
13. The Parties agree to do all acts and things and to make, execute, acknowledge and deliver such written documents and/or instruments in such form as shall from time to time be reasonably required to carry out the terms and provisions of this Agreement. The Parties further agree to give reasonable cooperation and assistance to any other Party or Parties hereto in order to enable such other Party or Parties to secure the intended benefits of this Agreement.
14. This Agreement shall be construed, interpreted and governed by the laws of the State of California, and is entered into and made to be performed and shall be enforced for all purposes within Los Angeles County, State of California.
15. This Agreement may be executed in counterparts, with each counterpart being deemed one and the same original document, and shall become effective when all Parties hereto have executed this Agreement and have delivered an executed signature page to each of the other Parties. Each facsimile and/or electronic signature shall be treated in all respects as having the same effect as an original signature. A copy of this Agreement shall be deemed an original for all purposes, and each Party stipulates and agrees that this Agreement has been made and will be preserved as a business record within the meaning of California Evidence Code section 1550.
16. This Agreement shall extend to and be binding upon the parties hereto and their respective successors, assigns and privies.

[SIGNATURES ON FOLLOWING PAGE]

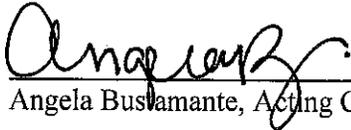
IN WITNESS WHEREOF, the Parties hereto have executed this Agreement on the date and year first-above written.

CITY:

CITY OF BELL, a charter city

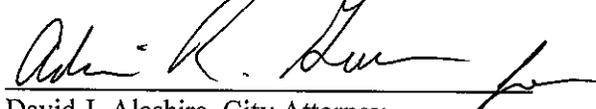

Alicia Romero, Mayor

ATTEST:


Angela Bustamante, Acting City Clerk

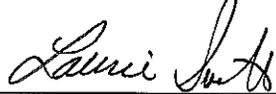
APPROVED AS TO FORM:

ALESHIRE & WYNDR, LLP


David J. Aleshire, City Attorney

SURETY:

DEVELOPERS SURETY AND INDEMNITY COMPANY

By: 
Name: Laurie Svitenko
Title: Vice President, Surety Claims

APPROVED AS TO FORM:

HAUSMAN & SOSA, LLP


Carlos E. Sosa, Esq.