

## **TENDER AND RELEASE AGREEMENT**

This Tender and Release Agreement (the "Agreement") is made and entered as of the Effective Date by and between the City of San Antonio ("COSA" or "Obligee") and Great American Insurance Company ("Surety") (individually, a "Party" and collectively, the "Parties").

### **RECITALS**

A. All In Construction, LLC. ("AIC" or "Principal") entered into a contract dated August 20, 2020 (the "Contract"), with COSA to furnish certain labor and material and perform work on a construction project referred to as Animal Care Services Parking Lot Expansion (the "Project").

B. Surety issued a Performance Bond (the "Performance Bond") and a Payment Bond (the "Payment Bond"), both numbered 3197948 and each in the penal sum of \$256,399.39 in connection with the Project naming AIC as Principal and COSA as Obligee (collectively, the "Bonds").

C. The Original Sum of the Contract totaled \$256,399.39. AIC invoiced \$295,515.29 and was paid \$265,963.76. Pursuant to the Contract, COSA withheld retainage leaving a contract balance of \$29,551.53 currently held by Obligee (the "Contract Balance").

D. COSA has provided Principal with a written notice of default/termination under the Contract, thereby terminating Principal's right to proceed with work under the Contract. COSA has made demand upon Surety to perform its obligations pursuant to the terms of the Performance Bond.

E. COSA obtained a proposal from a completion contractor, LMC Corporation ("Completion Contractor"), with the intention for COSA to enter into a contract with Completion Contractor ("Completion Agreement") to remedy the remaining obligations of AIC under the Contract for \$150,729.09.

F. Surety has agreed to make payment to COSA in the amount of \$138,464.01, which represents the difference between the Contract Balance and Completion Contractor's proposal, plus additional COSA project management fees as a cash settlement of COSA's claims asserted against the Performance Bond associated with the Project ("Surety Payment").

G. The LMC Corporation proposal and Surety Payment are acceptable to COSA and the Parties desire to document the terms of such agreement as set forth herein.

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**

1. COSA represents and acknowledges that the sum of \$29,551.53 is the unpaid Contract Balance as of the Effective Date.

2. Administration and inspection of the Project will remain with COSA and its agents/engineers and inspectors.

3. In consideration of the Surety Payment of \$138,464.01, paid to it by Surety, and the other good and valuable consideration described herein, subject to the exceptions established in this Agreement, COSA does hereby expressly RELEASE, ACQUIT, and FOREVER DISCHARGE Surety and its successors, agents, attorneys, representatives, officers, directors, shareholders and assigns of and from any and all claims, rights, demands, and/or causes of action of whatsoever kind or nature which COSA has or may ever claim to have, now or in the future, against Surety under the Performance Bond, and shall return to Surety its original Performance Bond ("Release of Surety").

4. For and in consideration of the Release of Surety, Surety does hereby agree to make payment to COSA in the amount of \$138,464.01, within 14 days of the Effective Date.

5. Subject the express and implied warranties expressed in the City's General Conditions and recognized under Texas law assumed by Surety and the Completion Contractor, Surety does hereby expressly RELEASE, ACQUIT, and FOREVER DISCHARGE COSA and its successors and assigns of and from any and all claims, rights, demands, and/or causes of action of whatsoever kind or nature which Surety has against COSA under and/or by reason of the Performance Bond and Contract.

6. Surety and Completion Contractor acknowledge and agree to the express warranties made in COSA's General Conditions, as well as warranties to cure any latent defects in the work performed under the contract, which are not waived under the terms of this Agreement.

7. For the aforementioned consideration, COSA does hereby assign unto Surety, its successors, and assigns any and all rights, demands, claims, and/or causes of action which COSA has against Principal under the Contract. COSA grants to Surety, its successors, and assigns full power and authority for its own use and benefit, but at its own cost, to ask, demand, collect, and/or release, and in its name or otherwise, to prosecute, at its discretion, any claims, suits, or proceedings at law or in equity as against Principal.

8. Surety acknowledges and agrees that its Payment Bond shall continue to remain in full force and effect in strict accordance with its terms. Unless required by law, COSA acknowledges that it is not authorized to and agrees not to make any representations or promises regarding payment to suppliers and/or subcontractors, and COSA shall refer all inquiries from suppliers and/or subcontractors with respect to payment to Surety. 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.

9. All notices sent in accordance with the Contract or this Agreement shall be sent to the Party to receive such notice at 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:  
Great American Insurance Company  
301 East Fourth St., 24<sup>th</sup> Floor  
Cincinnati OH 45202  
ATTN: Ryan Dierkers  
Email Address: rdierkers@gaig.com

Obligee:

Desiree Salmon, PLA, SITES AP  
Assistant Capital Programs Manager  
Public Works Department  
Mailing: P.O. Box 839966 | San Antonio, TX 78283-3966  
Work: 100 W. Houston St., Street Level | San Antonio, TX 78205  
O: 210.207.2113 | F: 210.207.4406

10. Except as otherwise expressly set forth herein, the Parties 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, Principal, and any and all suppliers, materialmen, and subcontractors.

11. 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 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 Surety under the Bonds or waive or alter any available defense or limitation against any third-party claims.

12. This Agreement constitutes the entire Agreement and understanding of the Parties hereto relating to the subject matter hereof, and shall supersede all prior or contemporaneous agreements, understandings, representations, and warranties, whether written or oral, relating to the subject matter hereof. Each of the Parties acknowledges that the other Party, or anyone acting on behalf of the other Party has made no representations, inducements, promises, or agreements, orally or otherwise, unless such representations, inducements, promises, or agreements are embodied in this Agreement.

13. The Recitals to this Agreement are incorporated into this Agreement and form a part of the terms and conditions of this Agreement. The Parties, together with their respective attorneys if any, participated in the drafting and preparation of this Agreement. Therefore, this Agreement shall not be construed in favor of or against any Party on the basis that any such Party did or did not participate in the drafting of this Agreement.

14. Each Party hereto expressly warrants that it has the necessary authority to execute this Agreement and that each signatory hereto has authority to execute this Agreement on behalf of the respective named Party. COSA shall provide to Surety all documents that evidence the grant of authority to the individual(s) executing this Agreement on its behalf.

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

16. This Agreement shall be governed by the laws of the State of Texas.

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

**[REMAINDER OF PAGE INTENTIONALLY LEFT BLANK.]**

**City of San Antonio**

By: \_\_\_\_\_  
Its: \_\_\_\_\_

STATE OF TEXAS           §

COUNTY OF BEXAR       §

BEFORE ME, the undersigned authority, on this day personally appeared \_\_\_\_\_, known to me to be the person whose name is subscribed to the foregoing instrument, and acknowledged to me that the same was the act of \_\_\_\_\_, and that he/she executed the same as the act of \_\_\_\_\_ for the purposes and consideration therein expressed and in the capacity therein stated.

GIVEN UNDER MY HAND AND SEAL OF OFFICE this \_\_\_\_\_ day of \_\_\_\_\_, 2022.

\_\_\_\_\_  
Notary Public in and for the State of Texas

My Commission Expires:

**GREAT AMERICAN INSURANCE COMPANY**

By: Ryan Dierkers  
Its: SR. CLAIMS MANAGER

STATE OF OHIO §  
COUNTY OF HAMILTON §  
§

BEFORE ME, the undersigned authority, on this day personally appeared Ryan Dierkers, known to me to be the person whose name is subscribed to the foregoing instrument, and acknowledged to me that the same was the act of Great American Ins., and that he executed the same as the act of Great American Ins. for the purposes and consideration therein expressed and in the capacity therein stated.

GIVEN UNDER MY HAND AND SEAL OF OFFICE this 19<sup>th</sup> day of April, 2023.

Susan A Kohorst  
Notary Public in and for the State of OHIO

My Commission Expires:

5-18-2025



SUSAN A KOHORST  
Notary Public  
State of Ohio  
My Comm. Expires  
May 18, 2025