

**EXAMPLE TAKEOVER AGREEMENT**

**BETWEEN**

**SURETY COMPANY**

**AND**

**THE CITY OF \_\_\_\_\_**

**I. RECITALS**

A. The parties to this Takeover Agreement are Surety Company ("Surety") and the City of \_\_\_\_\_ ("Owner").

B. On or about \_\_\_\_\_, Owner entered into a General Contract (the "General Contract") with \_\_\_\_\_ ("Principal") for the project known as the \_\_\_\_\_ (the "Project").

C. As required by the General Contract, Surety issued Performance and Payment Bonds (the "Performance and Payment Bonds"), naming Principal as Principal and Owner as Oblige, each in the amount of \$\_\_\_\_\_.

D. By letter dated \_\_\_\_\_, the Owner terminated Principal's performance under the General Contract for material default.

E. As of the date of Principal's default and termination, work remained to be performed under the General Contract ("Remaining Work").

F. Surety has agreed to complete the Remaining Work with a Completion Contractor, subject to the terms and conditions of this Agreement.

NOW, THEREFORE, based on the exchange of valuable consideration, the receipt and sufficiency of which is acknowledged, and based on the Recitals set forth above which form a part of this Agreement, Surety and Owner agree on \_\_\_\_\_ ("Effective Date") to the following terms and conditions:

## **II. TERMS AND CONDITIONS**

1. Recitals. The above Recitals and the Terms and Conditions are contractual and not merely recitals and the agreements contained herein and consideration transferred are to satisfy rights and obligations between Owner and Surety.

2. Incorporation of the General Contract. The General Contract includes the Instructions for Bidders, the General Contract Terms and Conditions, the Plans or Drawings, and any Special Conditions and Specifications, and all addenda and modifications to those documents issued in accordance with the General Contract. The General Contract also includes, and is modified by, all approved Change Orders and backcharges, which the Owner represents are identified in Exhibit "A" attached hereto. The General Contract and all included documents are incorporated by reference into this Agreement.

3. Remaining Work. In addition to work remaining to be performed under the General Contract, Remaining Work includes each of the following: (1) patent defects, a preliminary list of which is set forth in Exhibit "B" of this Agreement, (2) any latent defects in the work performed by the Principal, and (3) such extra work as is agreed upon by the City and Surety, or as City may otherwise require Surety to perform pursuant to the General Contract, as more particularly set forth in Exhibit "C" of this Agreement. The Surety reserves the right to challenge whether it is required to perform the work set forth in Exhibit "C", and the cost and time it would be entitled to receive should the work be performed. The parties agree that the list of patent defects in Exhibit "B" is not a final list of such defects. The City reserves the right to add patent defects to the list if it establishes the existence of such patent defects. Conversely, the Surety does not agree that any of the items on Exhibit "B" constitute patent defects and shall have the right to have items removed from the list that it demonstrates are not patent defects.

4. The General Contract Amount. The Owner represents that the initial General Contract amount of \$\_\_\_\_\_ has been increased/decreased by Change Orders totaling \$\_\_\_\_\_ (through C.O. #\_\_\_\_\_) for a current General Contract amount of \$\_\_\_\_\_ (the "General Contract Amount"). Owner represents that: (i) each of the Change Orders is in an amount previously agreed to by

Principal or otherwise calculated in accordance with the General Contract; and (ii) there are presently no other pending or contemplated deductive Change Orders in favor of Owner, or other claims, of which the Owner is aware as of the date of this Agreement that Owner has against Principal related to the General Contract or the Project, which might result in any decrease in, or withholding from, the amount (including retainage) remaining to be paid under the General Contract, except for the following: claims related to liquidated damages; claims related to prevailing wage violations; claims related to stop notices; and a pending change order for [REDACTED] in the amount of approximately \$[REDACTED]. Owner further represents that as of the date of this Agreement, Principal has submitted to the Owner for approval, the proposed Change Orders identified in Exhibit "D", having a total value of (\$[REDACTED]). The General Contract Amount shall be increased by the value of proposed Change Orders subsequently approved by Owner, except that the General Contract Amount shall not be increased by the value of any future Change Orders necessitated by the deficient work of the Principal or Completion Contractor(s) except to the extent the Owner would otherwise be responsible for paying for such work pursuant to the terms of the General Contract. The Owner agrees that the General Contract Amount (including retainage) is dedicated to and will be applied to the completion of the General Contract pursuant to this Agreement.

5. Percentage of Completion and Prior Payments. Owner represents that Principal has earned the total amount of \$[REDACTED] through Payment Requisition No. [REDACTED]. ("Earned General Contract Amount.") Owner further represents that, of the Earned General Contract Amount, it has paid the Principal \$[REDACTED] through Payment Requisition No. [REDACTED] under the General Contract. Owner represents that it is withholding \$[REDACTED] of the Earned General Contract Amount as follows:

a. Retainage. Pursuant to the General Contract, Owner is withholding accrued retainage of \$[REDACTED] under the General Contract. Owner shall release this retainage, and any other additional retainage from future progress payments, in the manner required by the General Contract, provided that Owner may use the retainage to offset any liquidated damages to be paid by Surety under Section 13 of this Agreement.

b. Prevailing Wage Violations. Owner is withholding \$ [REDACTED] to address alleged prevailing wage violations. Owner will release these funds to the Surety upon receiving documentation that the alleged prevailing wage violations have been remedied.

c. Stop Notices. Owner is withholding \$ [REDACTED] as required by California law as a result of stop notices filed on the Project. As of the date of this Agreement, outstanding stop notices filed on the Project amount to \$ [REDACTED], said amount including an additional 25% above the face value of the outstanding stop notices in accordance with State law. Owner will release these funds upon (1) receipt by Owner of a valid, unconditional stop notice release in the form required by California law, or (2) receipt by the City of a valid stop notice release bond from Surety.

6. Gross Contract Balance. The Gross Contract Balance is the General Contract Amount less the Earned General Contract Amount. The City represents that, as of the date of this Agreement, the Gross Contract Balance is \$ [REDACTED]. The City shall pay the Surety for completion of the Project up to a maximum amount equal to the Gross Contract Balance, exclusive of the release of the Earned General Contract Amount currently being withheld by the City. Payments of the Gross Contract Balance shall be made in the manner set forth in Section 13 of this Agreement. Surety shall be responsible for all costs of completing the Project in excess of the Gross Contract Balance.

7. Liens and Assignments Against General Contract Funds. Owner represents that as of June [REDACTED], 2004, the stop notices, other third-party claim notices, mechanic's liens, other third-party liens, assignments or encumbrances against the General Contract Amount identified in Exhibit "E" have been filed with, or served upon Owner in connection with the General Contract. Owner represents that it is not aware of any other third-party claim notices, mechanic's liens, other third party liens, assignments or encumbrances (hereinafter "Contract Fund Creditors") against the General Contract Amount in connection with the General Contract. Surety shall defend (at Surety's expense, using its counsel), indemnify and hold harmless Owner from and against any and all claims of every description made by the Contract Fund Creditors or Principal arising as a consequence of payments made by Owner to Surety under this Agreement. The Surety's defense and indemnity obligations to the Owner for claims by

Contract Fund Creditors and Principal shall be limited to the lesser of: (i) the total amount paid by the Owner pursuant to this Agreement (Gross Contract Amount plus Earned General Contract Amount withheld by City); or (ii) the penal amount of the Payment Bond.

8. Surety to Perform Remaining Work. Surety shall be responsible for completion of the Remaining Work in conformance with the terms and conditions of the General Contract. Surety shall perform the Remaining Work through one or more Completion Contractors (hereinafter “Completion Contractor”) which Surety shall engage. All Completion Contractors shall be subject to the qualification requirements of the Owner imposed by the General Contract for those entities performing the type of work contemplated by the General Contract.

9. Owner’s Obligations Under the General Contract. Except to the extent provided in this Agreement, Owner shall have all rights, obligations and responsibilities under the General Contract with respect to Surety, to the same extent and effect as if Surety had executed the General Contract initially instead of Principal and Principal had not defaulted and been terminated.

10. Owner’s Right With Respect to Changes in the Work. Owner reserves the right, to the extent appropriate under the General Contract, to issue further Change Orders. The terms of these Change Orders, including attendant extensions of time and valuation of Change Order work, shall be determined as provided in the General Contract. Surety reserves the right to refuse to perform any extra or additional work if such work constitutes alone, or in the aggregate with all prior Change Order work, a cardinal change under the General Contract. Further, in the event the Owner seeks the performance of additional work which is not subject to valuation by application of the unit and/or lump sum prices set forth in the General Contract, it shall negotiate the appropriate value for such work with the Surety. Change Orders requested by Owner shall add to the General Contract Amount as set forth in Section 4 of this Agreement.

11. Schedule for Completion of Remaining Work New Completion Date and Liquidated Damages.

- A. Surety, through its Completion Contractor, will coordinate and cooperate with Owner in formulating a schedule for the completion of the Remaining Work. Surety acknowledges that time is of the essence in completing the Remaining Work.
- B. As part of a negotiated settlement, the parties agree as follows with regard to a new Completion Date:
1. In consideration of the Surety's promise in Section 11.B.2, the City agrees to extend the Completion Date to \_\_\_\_\_, 2004 from the current date of \_\_\_\_\_, and expressly waives any rights to liquidated damages through \_\_\_\_\_;
  2. In consideration of the City's promise in Section 11.B.1, the Surety agrees that neither it nor the Principal are entitled to any damages for delay, extended overhead, acceleration, discontinuity, disruption, overtime, rescheduling, interference or change in the sequence of work arising out of any work covered by CCO Nos. \_\_\_\_\_ and expressly waives its rights to any such damages;
  3. The settlement shall be subject to the following express reservations:
    - a. The Surety reserves its right to seek further extensions of the \_\_\_\_\_, Completion Date and other associated relief, including for excusable delays, that are appropriate under the General Contract; and
    - b. The Surety reserves its right to seek further extensions of the \_\_\_\_\_, Completion Date and both time and damages for any work covered by all change orders except as provided in paragraph 11.B.2 above; and

- c. The City reserves all rights and defenses with regard to any attempts by the Surety to seek extensions of the [REDACTED], Completion Date or additional damages; and
- d. The Surety and City respectively reserve all rights and defenses with regard to liquidated damages accruing pursuant to the General Contract after the [REDACTED], Completion Date.

12. Completion Contractor. Each Completion Contractor shall be a subcontractor to the Surety, and no contractual relationship shall exist between Owner and any Completion Contractor pursuant to this Agreement. Each Completion Contractor shall provide all insurances required under the General Contract, as well as furnishing separate payment and performance bonds to Owner and Surety (as dual Obligees) for the full amount of the Completion Contract.

- A. Completion Contractor Control. The Owner acknowledges that, subject to the terms of the General Contract, the Completion Contractor is authorized to make routine day-to-day decisions regarding the operation and manner of performing the Remaining Work, but does not have authority to: (i) agree to any changes in the General Contract or Remaining Work; (ii) agree to any Change Orders; (iii) agree to any backcharges or deductions of any nature; (iv) agree to any schedule changes; (v) agree to any adjustments in the General Contract Amount or Remaining Work; or (vi) agree to perform warranty work of the Principal or corrective work as a result of latent defect(s) in the work performed by the Principal, without the Surety's prior express written consent which shall be delivered to Owner as a condition precedent to the Completion Contractor(s) negotiating items (i) through (vi).
- B. Inspection by the Owner. The Remaining Work shall be subject to inspection and acceptance by the Owner, as provided in the General Contract. If inspection by the Owner reveals work that the Principal or Completion Contractor did not perform in accordance with the General Contract, the Surety shall cause the Completion Contractor

to redo such work so that it complies with the General Contract. The cost of redoing any such work shall not be added to the General Contract Amount or otherwise increase the Gross Contract Balance except to the extent the Owner would otherwise be responsible for paying for such work pursuant to the terms of the General Contract. Surety shall be responsible for any claims, including claims for additional compensation or time, by the Completion Contractor relating to having to redo work except to the extent that the terms of the General Contract make the Owner responsible for such claims.

- C. Communications. The Owner shall forward concurrently to Surety (by facsimile as well as U.S Mail), a copy of all its written communications directed to the Completion Contractor.

13. Payments to Surety/Penal Amount. The Gross Contract Balance shall be paid to Surety as it completes the Remaining Work in accordance with the terms and conditions of the General Contract. Payment of the Gross Contract Balance shall be subject to the withholding by the Owner of any amounts that may be withheld pursuant to the General Contract or California law, including, but not limited to, up to 125% of the amount of any stop notice claims on the Project. Surety's performance obligation hereunder is expressly limited to expenditure of the penal amount of the Performance Bond. For each dollar the Surety so expends pursuant to the Performance Bond (over and above amounts paid by Owner to Surety), the Surety shall receive a corresponding dollar for dollar reduction in the penal amount of the Performance Bond. If, out of its own funds, the Surety either expends, or is committed to expend, the full penal amount of the Performance Bond for any one or more of the following: (i) for work completed under the General Contract; (ii) for work in progress under the General Contract; or (iii) for all damages, settlements and related defense and adjusting costs arising from claims under the Performance Bond (other than any claims of the Principal), then the Surety shall have no further obligation of any description to Owner arising out of, or in connection with, the Performance Bond, and Surety's completion of the work, at the Surety's option, will cease. The Owner will remain obligated to pay Surety all outstanding amounts due under the General Contract, or this Agreement, including retention, notwithstanding the



Surety ceasing work. Surety agrees to use its best efforts to notify Owner of its intention to cease work 30 calendar days before the exhaustion of the Performance Bond's Penal Amount. All payments made by Surety previously, and those made in the future, have been and will be credited against the penal amount of the Performance Bond, less any amounts paid to Surety by Owner under the General Contract. As of the Effective Date, Surety represents that it has expended an amount not exceeding \$\_\_\_\_\_, net of Surety's receipt of Gross Contract funds, which amount is hereby credited against the Performance Bond's penal amount. This amount was expended to support Principal's performance after its default on this project, but before termination, for payroll, materials and equipment required under the General Contract. Nothing in this Agreement constitutes a waiver of such penal amount or an increase in the liability of the Surety under the Performance Bond.

14. Payment Bond and Payment Bond Claims. The Payment Bond shall remain in full force and effect in accordance with its terms and provisions. The total liability of the Surety under the Payment Bond is limited to and shall not exceed the penal amount of the Payment Bond. For each dollar the Surety expends pursuant to the Payment Bond, the Surety shall receive a corresponding dollar-for-dollar reduction in the penal amount of the Payment Bond. In the event the Surety expends, out of its own funds, the full penal amount of the Payment Bond, Surety shall have no further obligation of any description arising out of, or in connection with the Payment Bond. All payments made by the Surety previously, and those made in the future, have been and will be credited against the penal amount of the Payment Bond. The Surety's Payment Bond shall not apply to or cover the Completion Contractor or any of its subcontractors and suppliers for performance of the Remaining Work pursuant to this Agreement.

Surety agrees to investigate all proper Payment Bond claims, but 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. Any amounts held by Owner pursuant to a stop notice on the Project shall be released upon (1) receipt by Owner of a valid, unconditional stop notice release in the form required by California law, or (2) receipt by the City of a valid stop notice release bond from Surety. Any amounts held by City because of prevailing wage violations shall be released once the prevailing wage violations have been

corrected and appropriate restitution made. Except as provided herein, in the General Contract, or as otherwise required by law, in no event shall the Owner otherwise withhold any portion of the General Contract amount, on account of claims, liens, suits or demands by any person or entity furnishing or alleging to have furnished labor and/or materials. The Surety shall defend, indemnify and hold harmless Owner from any loss which may arise by virtue of such claims, liens, suits and demands, subject to the penal amount of the Payment Bond, as reduced by payments made by Surety pursuant thereto. Nothing in this Agreement constitutes a waiver of such penal amount or an increase in the liability of Surety under the Payment Bond.

15. Payment Requisitions. Surety, through its Completion Contractor(s), shall submit to Owner whatever information or documentation is required regarding the work performed under the General Contract, and stored materials, to conform to and support the requisition process and schedule established under the General Contract. Owner recognizes that Surety shall be completing the Remaining Work through the services of one or more Completion Contractors. Accordingly, Owner shall receive the Completion Contractors' representations and certifications with respect to all aspects of the work, progress of the work, quality of the work, conformance of the work to the requirements of the General Contract, payments to others, warranty and maintenance of the work, and all other matters pertinent to the General Contract, wherever such representations are required by the General Contract, as if those representations had been made by Surety, since Surety may have no personal knowledge of such matters. . The Owner shall review, accept or reject, or take such other appropriate action with regard to Completion Contractor representations and certifications as required by the General Contract.

16. Completion Contractor Claims. At the Surety's sole option, the Owner agrees that Completion Contractor may pursue any claims it may have in the future in its own name and for its own benefit directly against the Owner, to seek recovery from the Owner for all costs and damages arising out of any act, action, inaction, direction or order, constructive or otherwise, of the Owner or its agents, including but not limited to, claims for extra work, delays, accelerations or disruptions. Surety shall be responsible for all other claims of the Completion Contractor except those arising out of any act, action,

inaction, direction or order of the Owner. Notwithstanding any other provisions of this Agreement, the Surety shall not be obligated to defend, indemnify or hold harmless the Owner from any claim the Completion Contractor may have in the future against: (i) the Owner arising out of any act, action, inaction, direction or order of the Owner; (ii) the funds due now or in the future to the Surety under this Agreement due to any act, action, inaction, direction or order of the Owner ; or (iii) the real property upon which the Project is located.

17. No Offsets Against Payments to Surety. Except for monies withheld as retention under the General Contract, as retention for prevailing wage violations, as required in response to stop notices, and as otherwise provided for in the General Contract, all monies due, and to become due, pursuant to the General Contract and this Agreement, including, without limitation, progress payments, payments for extra work or additional work orders, retention and final payment, for work on behalf of Surety by its Completion Contractor, shall be made to Surety unconditionally and without offset, including, but not limited to, any offset for claims: (i) made by the Principal's creditors; or (ii) made by parties claiming the monies due, or that become due, pursuant to the General Contract. In addition, except as otherwise provided for in the General Contract, Owner shall not withhold payments to Surety based on a prior failure of Principal to provide Owner with any certificates or representations required under the General Contract, except those related to the payment of prevailing wages. Moreover, except as otherwise provided for in the General Contract, Owner shall not withhold or seek offset against funds which become available for distribution to Surety upon the resolution of Stop Notices or through the issuance of Stop Notice Release Bonds. All payments shall be made directly to Surety by check payable to Surety, at the address stated in paragraph 19 of this Agreement.

18. Satisfaction of Surety's Performance Obligation. Owner's acceptance of the Remaining Work or Surety's expenditure of the Performance Bond Penal Amount, whichever comes first, shall satisfy Surety's performance obligations under the General Contract, its Performance Bond and this Agreement. Owner represents that Principal would have been required to complete all of its obligations under the General Contract had Principal not been in default and that, prior to the Effective Date of this

Agreement, Owner had not made any agreement with Principal that any item of work included in the General Contract would not have to be performed, except to the extent provided in the approved Change Orders identified in Exhibit "A" attached hereto.

19. Notices. All notices and correspondence to Owner shall be mailed certified mail, return receipt requested, with a copy by facsimile transmission, to:

All notices and correspondence to Surety shall be mailed certified mail, return receipt requested, with a copy by facsimile transmission to:

20. No Third-Party Rights. Except as expressly provided herein regarding the Completion Contractor, nothing in this Agreement shall be deemed to create any rights in favor of, or to inure to the benefit of, any third parties, or to waive or release any defense or limitation against third party claims.

21. All Claims Referred to Surety. Owner recognizes that Surety may be liable to unpaid suppliers and subcontractors of Principal. Owner agrees to make no representations or promises of payment to these suppliers and subcontractors and to refer all inquiries to Surety.

22. Surety's Performance Rights Confirmed. Nothing shall limit Surety's rights as a Completing Surety under the General Contract and applicable law. Owner hereby recognizes those rights, including the right of equitable subrogation which affords to Surety all rights and remedies of Owner against the Principal and the General Contract Amount, such as offset, and withholding, among others. The Owner further agrees to exercise its right of offset in favor of Surety, upon Surety's written request. Further, Owner also recognizes Surety's subrogation to the Principal's rights as the Surety is a performing Surety under the General Contract, including the right to additional compensation or damages where allowed or appropriate under the General Contract or applicable law for claims or matters arising after the Effective Date of this Agreement. The Owner expressly agrees and acknowledges: (i) that Surety is entering into this Agreement not as a contractor, but as a means of satisfying the Surety's performance

bond obligations; (ii) that the Surety has provided to Owner the Completing Contractor, a licensed contractor, to finish the project; and (iii) that the Owner hereby forever releases and discharges any and all claims that the Surety is an unlicensed contractor.

23. Agreement Binding on Successors. This Agreement shall be binding upon the successors and assignees of Surety and Owner.

24. No Modification Except in Writing. This Agreement cannot be modified except in a writing signed by both Owner and Surety.

25. This Agreement Controls. In case of conflict between the provisions of this Agreement and the provisions of the General Contract and/or Performance and Payment Bonds, this Agreement shall control. Further, this Agreement, the General Contract and the Performance and Payment Bonds constitute the entire Agreement between Owner and Surety and, together, supersede all prior negotiations, representations, offers, other writings and oral statements of every description.

26. Construction and Application of Law. The parties stipulate that this Agreement and all agreements or documents incorporated herein shall not be subject to the rule of construction that a written agreement is construed against the party preparing or drafting that Agreement. The parties also agree that this Agreement and its performance shall be governed by and construed in accordance with the laws of California.

27. Validity. Invalidity of any portion or provisions of the General Contract or this Agreement by reason of the laws of any State or for any other reason shall not render any other provisions or portions of the General Contract or this Agreement

28. No Waiver. The failure of either party to exercise in any respect a right provided for in this Agreement shall not be deemed to be a subsequent waiver of the same right or of any other right.

29. Reservation of Rights. Other than as expressly waived herein, the Surety and Owner fully reserve all rights and defenses against each other. The Surety and Owner have not independently verified the representations of each other in this Agreement and are relying upon their accuracy. The

Surety and Owner expressly reserve the right to prove that any of the representations of the other is wrong and to seek additional compensation as appropriate.

30. Counterparts/Facsimile. This Agreement may be executed in any number of counterparts each of which, when executed and delivered, shall be deemed to be an original with all the counterparts constituting but one and the same instrument. The execution of this Agreement by any parties hereto will not become effective until counterparts hereof have been executed by all parties. Additionally, facsimile signature shall bind the undersigned.

WHEREFORE, the parties have executed this Agreement by their authorized representatives as of the Effective Date.

DATED:\_\_\_\_\_

CITY

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

DATED:\_\_\_\_\_

SURETY COMPANY

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