

SURETY TAKEOVER AGREEMENT

This Surety Takeover Agreement (“Agreement”) is made and entered into this ___ day of January 2011, by and between HIDALGO COUNTY URBAN COUNTY PROGRAM JOINED BY PRECINCT #2 (“the Obligee”) and FIRST SEALORD SURETY, INC. a Pennsylvania corporation, with its principal place of business at 789 East Lancaster Avenue, Suite 200, Villanova, PA 19085 (“Sealord” or the “Surety”).

WITNESSETH

WHEREAS, on or about February 5, 2010, Garcia & Martinez Paving, Inc. (“Principal”) entered into a construction contract with Obligee (the “Contract”), pursuant to which it agreed to perform flood Drainage Improvements to South Tower Estates subdivision in Hidalgo County, TX (the “Project”). In connection with said contract Principal and Surety executed and delivered to Obligee payment and performance bonds with bond number 10-012322-PP in the amount of Three Hundred Seventy-Eight Thousand Eight Hundred and Sixty-One and 15/100 (\$378,861.15) Dollars;

WHEREAS, Obligee has made a demand upon Surety, pursuant to the Performance Bond to arrange for completion of the Contract work; and

WHEREAS, Surety reserves its rights to assert Principal’s claims, to the extent permitted by law, and to dispute the propriety of the termination and/or Obligee’s demand on the Performance Bond, and Obligee reserves all rights and defenses with respect to Surety’s and/or Principal’s claims, the propriety of the termination, and the propriety of its demand on the Performance Bond;

WHEREAS, Surety is acting in an effort to mitigate the costs to complete the Contract, and Surety enters into this Agreement in response to Obligee’s demand on the Performance Bond and in reliance upon Obligee’s representations regarding the propriety of the termination for default. In the event that Obligee’s termination of Principal for default or demand on the Performance Bond is found to be improper, Surety shall be entitled to seek all costs expended in response to the termination for default and/or Performance Bond demand, as well as any other damages available in law or equity, subject to a reservation of rights by Obligee to challenge the recoverability of any such

costs or damages. Surety's performance in response to Obligee's default termination and demand on the Performance Bond is undertaken to mitigate completion costs and shall not be construed as an admission of liability or as a waiver of Surety's rights or defenses;

WHEREAS, with a complete and full reservation of its rights, claims, and defenses, including the rights, claims and defenses of Principal, Surety has advised Obligee that it will undertake to perform and arrange for the completion of the Contract work. Towards that end, Surety may assume Principal's subcontracts and purchase orders and/or contract with other capable contractors for completing the work in accordance with the terms and conditions of the Contract and the Performance Bond, as modified by this Agreement;

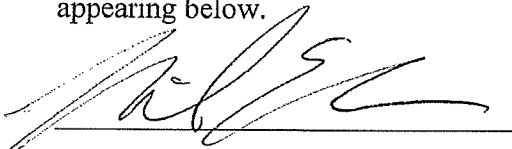
WHEREAS, Obligee has agreed to pay to Surety, at regular intervals upon completion of portions of the Contract work, the consideration remaining due and owing under the Contract, as well as additional consideration as the Surety and Obligee may agree to for additional work, but with a complete and full reservation of its rights and claims under the Performance Bond and the Payment Bond; and

NOW, THEREFORE, in consideration of the mutual promises and agreements contained herein, and based on the Recitals set forth above which form a part of this Agreement, the parties intending to be legally bound hereto agree as follows:

- 1) Obligee confirms that the contract balance has been obligated under the Contract for the completion of the Contract work in accordance with its terms as modified by this Takeover Agreement. Obligee hereby agrees it will pay directly to Surety, as the same shall become payable in accordance with the payment provisions of the Subcontract, as modified by this Takeover Agreement, all sums due and payable under the Contract, including all unearned contract balances as they become earned and any and all other monies contracted to be paid there under, as would have been payable to Principal if there had been no termination, but in no event more than the Contract amount, as modified in accordance with its terms. Obligee agrees that the contract balance shall be paid to Surety without any withholding based upon: i) any assertion of liquidated damages, whether for alleged delays that occurred before the execution of this Agreement or that occur hereafter; ii) any claim that Principal failed

- 21) Nothing in this Agreement shall be construed as creating any rights for third parties arising out of the Bonds, and nothing in this Agreement shall be construed as a waiver of any indemnity rights Surety has against Principal or any individual or corporate indemnitors under any General Agreement of Indemnity.
- 22) This Agreement constitutes the whole of the understanding, discussions, and agreements by and between the parties hereto and shall bind the parties and their successors, and shall not be modified except by a written document duly executed by the parties or their successors.
- 23) The provisions of this 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.
- 24) This Agreement may be executed in one or more counterparts, each of which shall be deemed to be an original and together shall constitute one (1) and the same agreement, which shall be binding upon all parties.

IN WITNESS WHEREOF, the parties have executed this agreement on the date appearing below.



First Sealord Surety, Inc.

By: *Michael E. Carson*

Title: *Surety Counsel*

Date: 1/17/11

Date: _____

Hidalgo County

By:

Title:

to make payment for labor and/or materials; or iii) an assessment that the Contract work cannot be completed for the unpaid contract balance. Obligee acknowledges that its agreement to pay the contract balances to Surety under this paragraph is a material condition of Surety's agreement to perform as reflected in this Agreement.

- 2) Obligee represents to Surety that: Original Contract Amount: \$378,861.15
 - a) Contract Modifications: \$81,129.60
 - b) Final Contract Amount with Principal: \$459,990.75
 - c) Total completed to date thru application #4: \$334,544.46
 - d) Obligee retainage: 10% or \$33,454.45
 - e) Contract Balance at the time of takeover: \$125,446.29 (without retainage)
 - f) Liquidated Damages withheld: \$0.00
 - g) Other Deductions withheld: \$0.00
- 3) Surety reserves the right to challenge the accuracy of the representations provided above and to seek adjustments for any change orders, field orders, or other extra work required by Obligee to be performed under the Subcontract.
- 4) The Surety's date of commencement for completion of the Contract shall be within fourteen (14) days of the execution of this Agreement.
- 5) Obligee will provide Surety with a list of all known noncompliant work items prior to issuing Surety a Notice to Proceed under this Agreement. Obligee has advised of non-compliant curb and gutter work concerning a total of 1457 linear feet and Surety has agreed to remediate said condition while reserving all rights. Obligee is not aware of any other noncompliant conditions and hereby waives same.
- 6) Obligee has represented by way of its engineer the remaining quantities of work to be performed which surety has agreed to complete, and surety shall be compensated should the quantities be greater than those quantities. Said quantities are defined in the attached correspondence from Ramiro Gutierrez attached as Exhibit "A".
- 7) Surety will, as "completing surety," and not as general contractor or completing contractor, perform or procure the performance of all work and other obligations of the Contract not presently completed or fulfilled, including the correction or repair of defective workmanship and nonconforming work. The Contract is hereby incorporated by reference into this Agreement, including all included plans and

specifications. Surety will complete the Contract according to the original Contract plans and specifications, as modified by any addenda or modification issued by Obligee. Without limiting Surety's reservation of rights elsewhere in this Takeover Agreement, Surety specifically reserves the right to make a claim for additional time or money as a result of any changes to the original plans and specifications directed by Obligee.

- 8) Surety will, in connection with its performance under this Agreement, delegate a representative to deal directly with Obligee. Except as limited by this Agreement, the parties acknowledge that Surety and/or its delegated representative shall have authority to process any necessary paperwork and perform any other function required for the prosecution of the work. Surety and Obligee agree that neither any contractor used by Surety to complete the Subcontract work nor Surety's delegated representative will be in privity of contract with Obligee, and that no such contractor or representative will acquire any rights under this Agreement or the underlying Subcontract by acting on Surety's behalf.
- 9) Surety will ensure that the contractors it utilizes to complete the Contract work have qualified personnel in all key positions. For any contractor Surety uses to perform work on site, Surety will identify an individual to serve as a point of contact.
- 10) Any contractor utilized by Surety to perform work at the Project site will maintain insurance of the same type and in the same amounts as required under the Contract, and will cause Obligee and Surety to be named as additional insureds thereon. Surety will not utilize its own employees in completing the work and will not be obligated to furnish or maintain any insurance under the Contract.
- 11) Surety agrees to prepare, certify, and submit its requests for payment in accordance with the terms of the Contract within thirty (30) days from the date of execution of this Takeover Agreement. These requests for payment shall be submitted in Surety's name. Obligee shall review all requests for payment, and, if approved, forward payments to Surety as the sole payee no later than fifteen (15) days following the receipt of the request for payment. Final payment, consisting of the entire unpaid balance of the Contract, shall be sent to the Surety no later than thirty (30) days following the Project engineer or architect's issuance of a final certificate for

payment. Payments from the Owner shall be made payable to the Surety and transmitted to the Surety at the following address, unless and until Owner is notified in writing of any different addresses:

Claims Department
Attn: Michael E. Carson
First Sealord Surety, Inc.
789 E. Lancaster Ave., Suite 200
P.O. Box 900
Villanova, PA 19085

- 12) Obligees shall not be bound to any contractor as a result of this Agreement and shall look only to Surety for completion in accordance with the terms of the Subcontract and the Performance Bond, as modified by this Agreement. In that regard, any change orders issued by or directions given by Obligees which would: i) decrease the contract balance payable to Surety hereunder; or ii) increase the performance obligations of Surety hereunder; or iii) materially change the scope, manner or time of performance hereunder, shall not be binding upon Surety unless communicated in writing by Obligees to Surety. Changes in the scope of work to complete the Project shall be made in accordance with the Contract. Nothing in this paragraph shall be construed to restrict or modify Obligees' or Surety's rights to issue change orders in accordance with the Contract Documents.
- 13) Surety acknowledges and agrees that its Payment Bond and Performance Bond for the Contract remain in full force and effect. Obligees acknowledge that nothing contained in this Agreement shall waive, limit, alter or amend any of Surety's obligations, rights, defenses, or liabilities under the Payment and Performance Bonds issued in connection with the subcontract.
- 14) Surety's liability under this Agreement and in all matters related to the Project is strictly limited to the penal amount of the Performance Bond. In no event will Surety be required to expend, in addition to the balance of contract funds remaining under the Contract, more than the penal amount of the Performance Bond. Nothing in this

Agreement constitutes a waiver of the penal sum or an increase in the liability of Surety under the Performance Bond. Neither does this Agreement amend, revise or alter any of Surety's rights or defenses or the extent of Surety's liability under the Payment Bond.

- 15) Obligee and Surety acknowledge that Surety's covenants and obligations of performance under this Agreement are undertaken pursuant to the Performance Bond, and that all payments made by Surety for performance of the Contract will be credited against and reduced on a dollar for dollar basis the penal sum of the Performance Bond.
- 16) Surety's delegated representative and the contractors used by Surety to complete the Contract work shall have no authority to obligate Surety with respect to change orders, credits, back charges, or deductions from the contract balance without Surety's prior, written approval. Any agreements with Surety's delegated representatives and/or any contractor used by Surety to complete the Subcontract regarding warranty work or correction of latent defects shall likewise require Surety's prior, written approval.
- 17) Surety expressly reserves all rights, equitable liens and subrogation rights under the Contract, at law, or in equity, of Obligee, Principal, Principal's subcontractors, suppliers, material men and laborers, as well as Surety's own rights dating back to the execution of the Bonds, to include those rights and remedies that accrued prior to the default termination of Principal and those rights and remedies that may accrue during the completion of the Contract. Without limiting Surety's reservation of rights, Surety specifically reserves any rights that it may have to assert an overpayment or impairment of suretyship claim. No waiver of such rights is agreed to, implied or intended, regardless of any provisions of this Agreement to the contrary. Nothing contained herein shall be construed to waive or modify any right, claim, defense and/or remedy that Principal has related to the Contract or to Obligee's termination thereof, and all such rights of Principal are hereby expressly reserved. Furthermore, nothing contained in this Agreement shall create or be construed to create any new or additional rights against Principal or Principal's subcontractors, suppliers, material men or laborers.

18) Any notices which are required to be given by the terms of this Agreement or the Performance Bond shall be made as follows:

a) As to the Owner - Via Federal Express or UPS or certified mail, return receipt requested, postage prepaid to:

Hidalgo County

Attn: _____

1615 South Closner, Ste J.

Edinburg, Texas 78539

b) As to the Surety - Via Federal Express or UPS or certified mail, return receipt requested, postage prepaid to:

Claims Department

Attn: Michael E. Carson

First Sealord Surety, Inc.

789 E. Lancaster Ave., Suite 200

P.O. Box 900

Villanova, PA 19085

19) To the extent necessary, if Surety elects to pursue any claims of Principal arising under the Contract in its own name and for its own benefit, Obligees hereby acknowledges and consents to the assignment of all of Principal's claims under or related to the Contract to Surety, to the extent permitted by law, including, but not limited to, Surety's right to assert, in Surety's name and for its own benefit, all of Principal's claims for equitable adjustment to the Contract price or for additional time under the Contract, whether arising prior to or after the default termination.

20) Obligees expressly reserves any and all prior rights under the Contract or at law. No waiver of such rights is agreed to, implied or intended, regardless of any provisions of this Agreement to the contrary. However, Obligees expressly represents that it waives any rights to liquidated damages, actual damages, or delay damages against First Sealord and/or Principal associated with any alleged delay by Principal in completing the Project and Contract. This waiver shall supersede any clauses or language contained in any other part of this agreement.