

TAKEOVER AGREEMENT

County: Hidalgo

**Project: Hidalgo County Precinct #4 – Parks and
Recreation Improvements – Sunflower Park**

This Takeover Agreement (the "Agreement") is made and entered into this _____ day of _____, 2017, by and between Western American Insurance Company (the "Surety") and the Hidalgo County acting by and through its Urban County Program (the "County.")

RECITALS:

WHEREAS, on or about January 28, 2014, CAS Companies, L.P. (the "Former Contractor") and the County entered into a contract (the "Original Contract") for the Former Contractor to furnish all labor and material and perform all work on Hidalgo County Precinct #4 – Parks and Recreation Improvements – Sunflower Park (the "Project") in accordance with the terms and provisions of the Original Contract, including all contract documents forming a part of the Original Contract; and

WHEREAS, on or about February 12, 2014 as required by law and under the terms of the Original Contract, the Former Contractor and the Surety made, executed, and delivered to the County a performance bond and a payment bond, Bond No. 58S201635 (collectively, the "Bonds"), both in the penal sum of \$780,382.50; and

WHEREAS, on or about December 21, 2016, the County declared the Former Contractor in default in the performance of the Original Contract and terminated the Former Contractor's right to proceed thereunder, and the County has called upon the Surety to fulfill its obligations as surety under the terms of the Performance Bond;

WHEREAS, on or about February 9, 2016, the County declared substantial completion and issued a punchlist for the Project; and

WHEREAS, the Surety is willing to undertake the completion of the Original Contract in accordance with the terms of the Performance Bond and this Agreement.

NOW, THEREFORE, in consideration of the agreements and undertakings hereinafter set forth, and for other good and valuable consideration, the receipt and adequacy therefor being hereby acknowledged, the County and Surety agree as follows:

AGREEMENT:

1. The Surety hereby undertakes to cause the performance of the terms, covenants, and conditions of the Original Contract, including all modifications thereto, and agrees to be bound by the Original Contract. The County acknowledges that the Surety, by its execution of this Agreement, is acting in its capacity as the surety for the Former Contractor in making arrangements for the performance and completion of the Original Contract, and not as a completing contractor, and that the Surety is not assuming any

obligations or liabilities beyond those set forth in the Bonds. In no event can the Surety's obligation or loss exceed the penal sum of the Bond. As to the completion of the Original Contract, except as otherwise provided in this Agreement, the Surety is entitled to all rights, title, and interest of the Former Contractor in and to the Original Contract in all respects as if the Surety were the original party to the Original Contract. The term "Contractor" as used in the Original Contract, shall be deemed, after the effective date of this Agreement, to refer to the Surety rather than to the Former Contractor.

2. The County acknowledges that the Surety will subcontract the performance of the work under the Original Contract to a completion contractor ("the Completion Contractor). The Parties agree that the work remaining under the Original Contract are specified in Exhibit A to this Agreement.

3. The Surety shall satisfy the required insurance obligations under the Original Contract by providing evidence of the required insurance coverage carried by the Completion Contractor, with the Surety being named as an additional insured under the policy or policies. Work will not be allowed to commence until the County receives satisfactory insurance.

4. The Surety shall notify the County of its intent to start work in writing.

5. The County and the Surety agree that as of the date of this Agreement:

- (a) The authorized amount of the Original Contract, including all approved change order amounts, is the sum of \$794,349.50;
- (b) The amount paid on the Original Contract is the sum of \$649,132.32;
- (c) The amount held as retainage is the sum of \$75,274.38;
- (d) The estimated remaining contract balance (including retainage and current contract estimate balance) is the sum of \$145,217.18;
- (e) Change Order No. 16 will reduce the scope and available contract balances by the sum of \$56,988.16.
- (f) The revised estimated remaining contract balance is the sum of \$88,229.02.
- (g) As of the date of the execution of this Agreement, the County represents and warrants that, according to the records available to it, the above stated amounts are accurate. The Surety reserves the right to verify the accuracy of the above amounts.

6. The County agrees that the amount of the Original Contract, including all approved change orders, minus the amount paid and any special deductions, is dedicated to the completion of the Original Contract pursuant to this Agreement. The County will make final payment to the Surety in accordance with the terms of the Original Contract and this Agreement. The County agrees that it will not withhold funds earned under this Agreement by the Surety or the Former Contractor under the Original Contract pursuant

to this Agreement for any claims made by subcontractors or suppliers to Former Contractor, or for any claims, issues, or alleged problems with other projects performed by the Former Contractor or Surety.

7. The County and the Surety agree that each party is and shall be responsible for its own costs and expenses not set forth in this Agreement, that have been incurred to date, including legal, professional, survey, inventory preparation, and other fees.

8. Insofar as the County has any right, title, or interest therein, the County agrees that the Surety and its Completion Contractor shall have the right to use, without charge, any of the equipment, materials, and appurtenances furnished or supplied by the Former Contractor that may be stored on or about the premises of the Project site or materials that may have been fabricated for use in connection with the Original Contract, whether or not presently upon the Project site.

9. The Surety shall be represented at the Project by the Completion Contractor. Prior to the issuance of the Notice to Proceed, the Surety shall specifically authorize in writing an individual with the Completion Contractor to be its representative (the "Authorized Individual") solely for the purposes set forth in this paragraph. The Authorized Individual will represent the Surety in dealing with the County on day to day construction issues with respect to the Project. Payments from the County shall be made payable to the Surety and transmitted to the Surety at the following address, unless and until the County is notified in writing of any different addresses:

Rudy Dominquez
Surety Claims Counsel
Liberty Mutual Surety
8350 N. Central Expressway, Suite 850
Dallas, Texas 75206

10. The total liability of the Surety under this Agreement and the Performance Bond for the performance of the work is limited to and shall not exceed the penal sum of the Performance Bond in the amount of \$780,382.50. All payments made by the Surety for the performance of the Original Contract shall be credited against the penal sum of the Performance Bond. Nothing in this Agreement constitutes a waiver of such penal sum or an increase in the liability of the Surety under the Performance Bond.

11. In no event shall the County withhold any payments from the Surety because of or on account of any claims, liens, suits, or demands by and persons or entities furnishing or alleging to have furnished labor and/or materials to the Project. 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 sum of the Payment Bond in the amount of \$780,382.50. All Payment Bond payments made by the Surety shall be credited against the penal sum of the Payment Bond. Nothing in this Agreement constitutes a waiver of such penal sum or an increase in the liability of the Surety under the Payment Bond.

12. This Agreement is solely for the benefit of the County and the Surety. The County and the Surety do not intend by any provision of this Agreement to create any rights in or increase the rights of any third-party beneficiaries, nor to confer any benefit upon or enforceable rights under this Agreement or otherwise upon anyone other than the County and the Surety. Specifically, the County and the Surety acknowledge that nothing in this Agreement shall extend or increase the rights of any third-party claimants or the liabilities or obligations of the Surety under the Bonds.

13. This Agreement constitutes the whole of the understanding, discussions, and agreements by and between the County and the Surety. The terms and provisions of this Agreement are contractual and not mere recitals. The County and the Surety acknowledge that there have been no oral, written, or other agreements of any kind as a condition precedent to or to induce the execution and delivery of this Agreement. Any written or oral discussions conducted prior to the effective date of this Agreement shall not in any way vary or alter the terms of this Agreement.

14. This Agreement shall not be changed, amended, or altered in any way except in writing and executed by both the County and the Surety.

15. This Agreement may be executed in one or more counterparts, each of which shall be deemed to be an original.

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

17. Any notices which are required to be given by the terms of this Agreement or the Bonds shall be made as follows:

As to the County:

Via certified mail, return receipt requested,
postage prepaid to:

Hidalgo County acting by and through its Urban County Program
c/o Stephen L. Crain
Atlas, Hall & Rodriguez, LLP
PO Box 3725
McAllen, Texas 78502-3725

As to the Surety:

Via certified mail, return receipt requested,
postage prepaid to:

Rudy Dominquez
Surety Claims Counsel
Liberty Mutual Surety
8350 N. Central Expressway, Suite 850
Dallas, Texas 75206

18. This Agreement is effective as of the date first written above.
19. This Agreement shall be binding upon the parties and their respective successors and assigns.
20. In the event that one or more provisions of this Agreement shall be declared to be invalid, illegal, or unenforceable in any respect, unless such invalidity, illegality, or unenforceability shall be tantamount to a failure of consideration, the validity, legality, and enforceability of the remaining provisions contained in this Agreement shall not in any way be affected or impaired thereby.
21. It is understood and agreed by the County and the Surety that this Agreement shall be construed without regard to any presumption or other rule requiring construction against the party causing this Agreement to be drafted.

IN WITNESS WHEREOF, the parties have executed this Agreement on the date indicated above, and each of the undersigned personally represent and warrant that they have the full right, power, and authority to execute this Agreement on behalf of the respective parties.

COUNTY

Hidalgo County acting by and through its
Urban County Program

By: _____

SURETY

Western American Insurance Company

By: _____

Rudy Dominquez
Surety Claims Counsel
Liberty Mutual Surety
8350 N. Central Expressway, Suite 850
Dallas, Texas 75206

Exhibit A – Scope of Work

1. Repair water line leak around restrooms
2. Close-Out Documents
 - a. Certificate of Construction Completion (warranties run from dates specified in specifications)
 - b. Contractor's Release and Waiver of Lien (only as to Completion Contractor's subs)
3. Section 01700 – Contract Close-Out
 - a. Final Cleaning
 - b. Record Document - Section 01780 Project Record Documents
 - c. Detailed information for document preparation & turnover
 - d. O&M's (only required for divisions 15 & 16)
 - e. Warranties and Bonds, as specified below
4. Section 02282 – Termite Control
 - a. Provide warranty for period of 2 years from date of treatment, signed by Applicator and Contactor
5. Section 07 41 13 – Metal Roof Panels
 - a. Special Finish Warranty – 25 years from date of Substantial Completion
6. Section 08100 – Hollow Metal Doors and Frames
 - a. Warrant for one year against becoming unserviceable
7. Section 09900 – Painting and Staining
 - a. Two years against becoming unserviceable or objectionable appearance
8. Section 10800 – Toilet Room Accessories
 - a. Three years or provide manufacturer's standard warranty for specified products
9. Section 265633 – Electrical Warranty