

TAKEOVER AGREEMENT

THIS TAKEOVER AGREEMENT (“Agreement”) is made and entered into this 16th day of July 2013 (“Effective Date”) by and between the City of Redlands (“Obligee”) and The Ohio Casualty Insurance Company (“Surety”). The Obligee and the Surety are sometimes individually referred to herein as a “Party” and, together, as the “Parties.”

RECITALS

WHEREAS, Christiansen Pipeline, Inc. ("Principal") heretofore entered into a Contract (“Contract”) awarded on or about October 2, 2012, with the Obligee for the construction of the Obligee’s Brookside Avenue Water Pipeline Replacement Project, Project No. 71234, ("Project"). A true and correct copy of the Contract for the Project is attached hereto as Exhibit “A” and incorporated herein by this reference; and

WHEREAS, the Surety issued a Performance Bond No. 024045047 ("Bond") in connection with the Project; and

WHEREAS, the Obligee certifies to the Surety that the initial Contract amount was Two Hundred Eighty Nine Thousand Six Hundred Sixty Dollars (\$289,660) and that the adjusted Contract amount as of the Effective Date of this Agreement is Three Hundred One Thousand Three Hundred Seventy Seven and Seven One Hundredths Dollars (\$301,377.07) as there was one change order submitted by the Principal and approved by the Obligee in the amount of Eleven Thousand Seven Hundred Seventeen and Seven One-Hundredths Dollars (\$11,717.07). The Obligee further represents to the Surety that One Hundred Sixty Seven Thousand One Hundred Forty Nine and Seventy Two One Hundredths Dollars (\$167,149.72) was paid to the Principal pursuant to the Contract and that the balance of the Contract funds currently held by the Obligee is One Hundred Thirty Four Thousand Two Hundred Twenty Seven and Thirty Five One Hundredths Dollars (\$134,227.35); and

WHEREAS, in entering into this Agreement, the City and the Surety each reserve their respective rights to verify the accuracy of the Contract, change order, and payment amounts identified in this Agreement; and

WHEREAS, although the Principal asserts it performed its last labor on the Contract on or about April 4, 2013, the City asserts the Principal performed its last labor on the Contract on or about March 20, 2013; and

WHEREAS, on or about April 16, 2013 the Obligee terminated the Principal as a result of the Principal’s default under the Contract; and

WHEREAS, the Obligee desires to effect and expedite the completion of the said Contract in order to preserve the work in place and to avoid the delays and inconvenience of reletting; and

WHEREAS, the Surety is willing to exercise its election to complete or to procure the

completion of the Contract as a measure of cooperation with the Obligee provided the Surety can be assured that in doing so, it will receive the Contract payments as hereinafter set forth;

NOW THEREFORE, in consideration of the mutual promises set forth herein, and for such other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, the Parties agree as follows:

AGREEMENT

1. The recitals set forth above are incorporated herein.
2. The work remaining to be completed (“Remaining Work”) on the Project under the Contract, and this Agreement, shall be derived based on the work in place, valued at the unit and/or lump sum prices set under the Contract, and the Surety shall be responsible for all Remaining Work set forth in the Contract not otherwise completed by the Principal, as set forth in the Principal’s percentage of completion provided to the Obligee. The Obligee agrees that Exhibit “B,” which is attached hereto and incorporated herein by this reference, is a complete list of the Remaining Work which must be corrected or completed by Surety to finish and close out the Contract. Except to the extent provided in this Agreement, the Obligee and the Surety shall have all rights, obligations and responsibilities under the Contract with respect to each other, to the same extent and effect as if the Surety had executed the Contract initially instead of the Principal, and the Principal had not defaulted.
3. The Obligee acknowledges that the Surety has a prior equitable right to receive all Contract proceeds upon completion of the Remaining Work covered by the Contract. Accordingly, the Obligee shall pay to the Surety, or its designee, all amounts (if any) to be paid by the Obligee to Principal under the Contract at the times and under the procedures according to terms and conditions of the Contract. The Obligee represents that as of Effective Date of this Agreement the initial Contract amount and the one change order in the amount of Eleven Thousand Seven Hundred Seventeen and Seven One-Hundredths Dollars (\$11,717.07), totaling Three Hundred One Thousand Three Hundred Seventy Seven and Seven One Hundredths Dollars (\$301,377.07), has been decreased by payments totaling One Hundred Sixty Seven Thousand One Hundred Forty Nine and Seventy Two One Hundredths Dollars (\$167,149.72) The Surety agrees to expend such of its own funds as may, from time to time, be necessary to pay for completion of the Remaining Work and to pay appropriate claims; provided, however, that the Surety’s performance and payment obligation, over and above the amount paid by the Obligee and received by the Surety under this Agreement, shall in no event increase the Surety’s legal obligations required under the Bond. Nothing in this Agreement constitutes a waiver or an increase in the liability of the Surety under the Surety’s Bond.
4. The Obligee has and will assert claims for liquidated or delay damages, as well as back charges for improperly completed work by the Principal, which may result in a decrease in, or withholding from, any amount owed under a progress payment or retention that is remaining to be paid under the Contract. The Obligee reserves all rights to pursue its rights and remedies, including back charges and liquidated damages, under the Contract or law. The Remaining Contract Balance shall be increased or decreased by the value of any proposed

change orders subsequently approved by the Obligee. Progress payments, and final payment, including the payment of all accrued retention, under the Contract and this Agreement, shall be subject to the Obligee's quantification and acceptance of the Remaining Work provided under the Contract and satisfaction of all other contractual requirements imposed by the Contract as a condition precedent to such final payment. The Surety disputes the alleged claims, if any, that the Obligee is asserting for liquidated or delay damages, as well as back charges for alleged improperly completed work by the Principal and expressly reserves all rights, whether at law or in equity, that it may have against the Obligee including but not limited to the rights of its Principal against the Obligee.

5. Surety intends to relet the completion of the Remaining Work covered by the Contract (Exhibit "A") for the Project to All American Asphalt, a licensed Contractor ("Completion Contractor"). The Obligee consents to Completion completing said Remaining Work. The Completion Contractor shall be the Surety's representative with regard to completion of the Remaining Work. All documents pertaining to pay estimates, progress and final payments shall be sent to:

The Ohio Casualty Insurance Company c/o Jim Rumpf
Sr. Surety Claims Spec. IV
9450 Seward Road
Fairfield, OH 45014
James.Rumpf@LibertyMutual.com
Phone: (317) 883-1006

6. In the event a dispute arises between the Obligee and the Completion Contractor, or if the Completion Contractor is in default under the terms of the Contract, the Obligee shall give the Surety written notice thereof within fifteen (15) calendar days of such default.

7. The Surety, who will have no employees or representatives on the jobsite, shall have no obligation to furnish any insurance under the Contract. The Completion Contractor shall provide insurance coverage equivalent to that required under the Contract.

8. It is understood and agreed that the Surety, by entering this Agreement, is not acting as a contractor, but instead in its capacity as a performance bond surety.

9. This Takeover Agreement is made without prejudice to either Party's rights to prosecute any claim or claims which arise from performance of the Contract or this Agreement. The Parties reserve the right to prosecute any of said claims for payment of all sums due or to become due for performance under the Contract or this Agreement, except as modified herein.

10. The time of performance shall be fifteen (15) calendar days from issuance of a written notice to proceed from the Obligee to Completion Contractor. Time is of the essence in this Agreement. The Surety acknowledges that liquidated damages are accruing based on the original Project completion date of February 17, 2013. The Obligee agrees that liquidated

damages shall stop accruing upon the issuance of the notice to proceed from the Obligee to the Completion Contractor. If the Completion Contractor fails to complete the Remaining Work within the above stated time, the Parties agree that the Obligee has the right to assert liquidated damages pursuant to the terms of the Contract.

11. The Obligee agrees that it will not acknowledge or honor any claim or charges against the Remaining Contract Balance by any alleged assignees, successors, creditors, or transferees of Principal, or any other person or entity making claim to the Remaining Contract Balance, without the consent of the Surety, except by order of a court of competent jurisdiction after due notice to the Surety.

12. The Obligee agrees that under no circumstances shall the Surety's liability exceed the penal sum of its Bond, and that all payments made by the Surety to any person or entity on account of the work covered by the Contract shall be deemed to be payment under the Surety's Bond and shall reduce the penal sum of the Bond in an equal amount. The Surety shall not indebted the Obligee to any third party to pay for work in excess of the penal sum of the Bond.

13. In consideration of the work contemplated under the Contract and the Project, the Obligee hereby expressly subrogates the Surety to, and assigns, conveys, sets over, and transfers to the Surety, any and all claims, causes of actions, interests, or demands that the Obligee has, had, or may ever be entitled to assert against Principal in connection with the Contract or Project, and expressly agrees that the Surety may pursue such rights, claims, interests, causes of actions, demands, and/or claims in any manner the Surety deems appropriate, including but not limited to matters pending in any bankruptcy proceeding, to the extent that the Surety in its sole discretion deems advisable.

14. The Parties agree to cooperate fully with each other to the end that the Project may be completed as efficiently and quickly as reasonably possible under the circumstances.

15. The parties and their signatories hereto warrant that each has the power and authority to execute this Agreement. The parties agree that if the Surety certifies any claim arising out of or relating to the Contract, the Project, or this Agreement, such certification will be deemed properly certified if made by an officer of the Surety. The Parties have voluntarily this Agreement based on their independent investigations.

16. 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 Takeover 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.

17. This Agreement shall not be construed to waive, limit, alter, or amend any of the Surety's obligations, rights, defenses, or liabilities under the Surety's Bond.

18. This Agreement constitutes the entire agreement between the Parties and supersedes any and all prior agreements, arrangements, and/or understandings by and between the Parties with respect to the subject matter hereof. Except as herein modified, all terms and conditions of

the Contract shall remain unchanged and in full force and effect.

19. This Agreement shall extend to and be binding upon the Parties and their respective successors and assigns. No rights shall accrue hereunder to or for the use of any other person, firm, corporation, or governmental entity other than the Parties and their respective successors, assigns, and reinsurers.

20. The Surety agrees that it is not released from its Labor and Material Bond naming the Obligees and the Principal in the penal sum of \$289,660. Such payment bond shall extend to claimants who perform work and/or supply materials to the Project after on or about March 20, 2013, the last day the Principal was on the Project.

21. The Surety reserves to itself all claims of any kind that Principal could have brought against the Obligees pursuant to the Contract.

22. In the event of any action to enforce or interpret the terms or conditions of this Agreement, the prevailing Party shall, in addition to, its costs, and any other relief, be entitled to recover its reasonable attorneys' fees, including fees for use of in-house counsel by a Party.

23. This Agreement is made, executed and performed in San Bernardino, California and shall be governed by and construed in accordance with the laws of the California.

IN WITNESS WHEREOF, the Parties have executed this Agreement as of the date first written above.

City of Redlands

The Ohio Casualty Insurance Company

BY: _____
Pete Aguilar, Mayor

BY: _____
James Rumpf, Sr. Surety Claims
Specialist IV

ATTEST:

Sam Irwin, City Clerk