

## **TAKEOVER AGREEMENT**

THIS TAKEOVER AGREEMENT ("Agreement") is made and entered into this 16th day of February, 2017, ("Effective Date") by and between the CITY OF RIALTO ("CITY") and OLD REPUBLIC SURETY COMPANY ("SURETY"). CITY and SURETY may hereinafter be singularly referred to as "Party" and collectively as "Parties."

### **RECITALS**

A. WHEREAS, on or about January 12, 2016, the CITY awarded to SMART TECH GROUP, INC. ("Smart Tech"), a contract for the construction of the "Baseline Road and Acacia Avenue Traffic Signal Upgrade Project, City Project No. 140807, Federal Aid Project No. HSIPL-5205 (020)," ("Project"). The term "Contract" as used in this Agreement means the aforementioned contract between the CITY and Smart Tech, including all written contract documents, drawings and plans, general and special conditions and specifications, and all addenda and modifications to those documents, all of which are incorporated herein by this reference; and

B. WHEREAS, SURETY, as surety for Smart Tech, issued a Faithful Performance Bond and a Payment Bond on behalf of Contractor and in favor of the CITY in connection with the Contract, each numbered WCN2158072, each in the penal sum of \$208,000.00 ("Performance Bond," Payment Bond," respectively, or collectively the "Bonds"); behalf of Contractor and in favor of CITY; and

C. WHEREAS, the CITY terminated Smart Tech's right to proceed under the Contract effective December 7, 2016 ("Termination Date"), and made demand upon SURETY under the Performance Bond; and

D. WHEREAS, the CITY desires the SURETY to complete the work required to be performed under the Contract ("Remaining Work"); and

E. WHEREAS, SURETY agrees to complete the Remaining Work through the use of a completion contractor, duly licensed and acceptable to the CITY, at the sole cost of SURETY provided (i) the entire unpaid balance of the contract price ("Contract Price") as defined in the Contract, including retainage, together with any additional amount of money added to the Contract Price on account of extra work or changes, is paid to SURETY, or in accordance with the terms and conditions of this Agreement; (ii) ) the CITY agrees to grant the SURETY an extension of time under the Contract ("Contract Time") within which to complete the Remaining Work in accordance with the terms and conditions of this Agreement; (iii) the CITY waives and releases the SURETY from any and all claims for damages, including, but not limited to, liquidated damages under the Contract ("Liquidated Damages"), actual damages, expenses, attorney fees, and costs arising before the execution of this Agreement; and (iv) the CITY agrees that the SURETY's liability under its Performance Bond shall be limited to, and in no event shall exceed, the penal sum of the Performance Bond; and

F. WHEREAS, the CITY and the SURETY enter into this Agreement in order to set forth the terms and conditions of their agreement for the SURETY's performance of the Contract.

### **AGREEMENT**

NOW, THEREFORE, in consideration of the premises, and the good and valuable considerations and the mutual covenants set forth herein, the receipt and sufficiency of which are hereby acknowledged, the Parties hereto agree as follows:

1. The recitals set forth above are incorporated herein and made a part of this Agreement. All capitalized terms used in this Agreement that are not defined in this Agreement shall have the meanings assigned to them in the Contract.

2. The SURETY, as surety for Smart Tech under the Performance Bond and not as

a volunteer, shall perform and complete, or cause to be performed and completed, all the Remaining Work subject to the SURETY's right, pursuant to the terms of this Agreement or the Performance Bond, to assert any defense thereto.

3. The CITY acknowledges that the SURETY has an equitable right of subrogation under the Performance Bond to receive the balance of all Contract funds owing to Smart Tech as of the Termination Date, and this Agreement is not intended to alter the superiority of the SURETY's rights thereto to the extent such superiority exists under applicable law as of the Termination Date. The SURETY and the CITY agree the payment terms of the Contract shall remain in full force and effect.

4. The SURETY shall enter into a contract with a licensed contractor ("Completion Contractor"). The CITY hereby approves of PTM General Engineering Services, Inc. as Completion Contractor.

5. The contract between The SURETY and Completion Contractor ("Completion Contract") will call for the Completion Contractor to coordinate all Project activities with the CITY (i.e., the CITY's representative) and to otherwise conduct itself as if Completion Contractor had a direct contract with the CITY; however, Completion Contractor shall be a subcontractor to SURETY, and no direct or indirect contractual relationship shall exist between the CITY and Completion Contractor.

6. All insurances required under the Contract shall be provided. Completion Contractor shall not be required to provide payment and/or performance bonds, unless requested to do so by the SURETY; however, the Parties agree that the Payment Bond shall remain in full force and effect in accordance with its terms and provisions.

7. 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. In no event shall the CITY withhold any portion of the Contract Balance on account of claims, liens, suits or demands by any person or entity furnishing or alleging to have furnished labor and/or materials, except as set forth in the Contract as modified by this Agreement or as allowed by law.

8. The SURETY reserves the right to terminate its contract with its Completion Contractor at any time, upon three Days' prior written notice to the CITY and to contract with another Completion Contractor pursuant to this Agreement; provided, however, that the SURETY shall remain responsible to the CITY under the terms of the Contract in the event that as a result of the replacement of the Completion Contractor there occurs a delay in completion of the Remaining Work. In the event of a replacement of the Completion Contractor by the SURETY, the replacement shall be approved in advance by the CITY. The Completion Contractor has the authority of the SURETY to make routine day-to-day operations and decisions as to the manner of performance of the Remaining Work; provided, however, that the Completion Contractor has no authority to: (i) agree to any changes in the Contract or Work other than design changes or clarifications that do not increase the Project's cost nor extend its schedule; (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 Contract amount or Remaining Work other than design changes or clarifications that do not increase the Project's cost nor extend its schedule; or (vi) agree to perform warranty work or corrective work as a result of latent defect(s), if any, in the work performed by Smart Tech, without the SURETY's prior express written consent which shall be delivered to the CITY as a condition precedent to

the Completion Contractor negotiating items (i) through (vi). The Remaining Work shall be subject to inspection and acceptance by the CITY and applicable federal, state, and local agencies with jurisdiction, as provided in the Contract. A copy of all written communications by the CITY directed to Completion Contractor shall be forwarded to the SURETY on a current basis by email and regular mail. All communications concerning matters of contract administration (i.e., contractual or other notices required by the CITY, payments, Change Orders, extensions of time, delays, claims, among other matters) shall be communicated to Completion Contractor only in writing, with a copy forwarded to the SURETY on a current basis by email and regular mail. Adam Matz of Sage Associates will represent the SURETY for CITY to contact regarding the Project, including daily operations and other items as set forth in this paragraph.

9. In the event of a default in performance of the terms of the Contract, the CITY shall give the SURETY written notice thereof within five (5) calendar days of such default.

10. The CITY certifies that the Contract accounting is as follows:

A. The Contract Price, including all approved Change Orders, as of the Termination Date is the sum of \$208,000.00;

B. The amount paid by the CITY to Smart Tech as of the Termination Date is the sum of \$39,520.00;

C. The amount being held by the CITY, including retention, as of the Termination Date ("Contract Balance") is the sum of \$168,480.00;

D. CITY hired Hillcrest Contracting to secure the Project site after Smart Tech was terminated as authorized by the Contract. The invoice for this work has been forwarded to the

SURETY, and any amounts paid by the SURETY to Hillcrest Contracting shall be credited to the Performance Bond in accordance with paragraphs 12 and 13 of this Agreement.

E. The balance of monies payable by the CITY to the SURETY, pursuant to the terms of the Contract, is the sum of \$168,480.00, and the CITY represents and warrants that, according to the records available to it, the sums stated in Parts A through D, above, are accurate. All payments made to SURETY shall be made by check payable to SURETY to the address stated in Section 19 below. The SURETY reserves the right to verify the accuracy of such sums.

11. The sums stated in Paragraph 10, above, shall be increased or decreased, if and as appropriate in accordance with the terms of the Contract, as a result of (i) any Change Orders or other changes to the Contract requested of, or required by, the Completing Contractor, the SURETY, or the CITY after the Effective Date of this Agreement that constitute authorized adjustments to the Contract Price or Contract Time; or (ii) any other Contract provision that allows for increase or decrease in the Contract Price.

12. If the Contract Balance, less any offsets, liens and charges, including any Liquidated Damages accrued under the Contract, shall be entirely expended before the completion of the Remaining Work, SURETY agrees to expend its own funds as necessary, not to exceed the penal sum of the Performance Bond, to pay for completion of the Remaining Work. All payments made by SURETY for the Remaining Work after the Effective Date of this Agreement that are not offset by payment from CITY to SURETY under the Contract and this Agreement will be credited against the penal amount of the Performance Bond. Nothing in this Agreement constitutes a waiver of such penal amount or an increase in the liability of the SURETY under the Performance Bond.

13. CITY acknowledges that SURETY's performance obligation under the Performance Bond is expressly limited to expenditure of the penal amount of the Performance Bond reduced by amounts SURETY pays for the Remaining Work and all loss, costs and expenses of SURETY in connection with the Project, over and above the amount CITY pays to SURETY. For each dollar the SURETY so expends for the Remaining Work and loss, costs and expenses of SURETY in connection with the Project (over and above amounts paid by CITY 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 Contract; or (ii) for work in progress under the Contract, then the SURETY shall have no further obligation of any description to CITY arising out of, or in connection with, the Performance Bond, and SURETY's completion of the work at the SURETY's option, will cease. In such case, the CITY will remain obligated to pay SURETY all outstanding amounts due under the Contract or this Agreement, including retention, notwithstanding the SURETY ceasing work, subject to the CITY's rights to withhold funds per the Contract and applicable law and subject to CITY's reservation of all rights to make claims against the SURETY pursuant to this Agreement.

14. The time for commencement and completion of the Remaining Work shall be:

(a) CITY shall issue two notices to proceed, an administrative notice to proceed ("ANTP") and a physical notice to proceed ("PNTTP").

(b) Within 5 working days after the CITY issues its ANTP, Completion Contractor shall order the long lead-time materials, poles and signal switch gear, and provide to the CITY the vendors' written confirmation of the orders.

(c) Within 5 working days after the vendors' notice that the long lead-time items are ready to ship, Completion Contractor shall notify the CITY of same and provide written confirmation.

(d) The CITY shall issue its PNTP after it receives notice that both the poles and signal switch gear has shipped. Completion Contractor shall commence work within 2 working days after CITY issues its PNTP to Completion Contractor. Time for completion of the Remaining work shall be 25 days from the date Completion Contractor commences work ("Contract Time").

15. The CITY hereby waives and releases the SURETY from any and all claims for damages, including, but not limited to, Liquidated Damages under the Contract, actual damages, expenses, attorney fees, and costs incurred as of the date of this Agreement. The CITY, however, expressly reserves and retains its right to assess Liquidated Damages and to claim any offsets or back charges in accordance with the terms and conditions of the Contract in the event the Remaining Work is not completed within the Contract Time, together with any extensions thereto, or Completion Contractor's failure to complete the Remaining Work in accordance with terms and conditions of the Contract.

16. SURETY agrees to indemnify the CITY from any claim or demand of any contractor (including Completion Contractor), subcontractor, vendor, or material man performing work under the Contract as required under the terms of the Contract and Bonds. SURETY agrees to indemnify the CITY from any secured creditor or judgment creditor for claims to the Contract Balance and shall satisfy any such valid claims without charge to CITY.

17. Except as otherwise expressly provided in this Agreement, it is agreed that: (i) neither Party hereto waives any rights or defenses it or they may have in favor of or against one



another or anyone else; (ii) SURETY does not waive any rights it may have to funds payable under the Contract; (iii) nothing in this Agreement shall prejudice the rights of either Party to seek a judicial or other appropriate determination of its rights, defenses or claims that arise from or relate to the Contract or this Agreement, including, without limitation, the right to prosecute claims for payment of all sums due or to become due for performance under the Contract or this Agreement.

18. It is understood and agreed that SURETY, by entering this Agreement, is not acting as a contractor, but instead in its capacity as a performance bond surety, that SURETY shall engage the Completion Contractor pursuant to the terms of a separate agreement, and that the Completion Contractor will be required to fully and faithfully perform and complete the Remaining Work in accordance with the Contract, including all requirements related to guaranty, warranty, and indemnity.

19. The CITY acknowledges and agrees that the SURETY's liability in all respects shall be expressly limited to, and in no event shall exceed, the penal sum of the Performance Bond.

20. The Bond Penalty shall be reduced by amounts SURETY properly incurs and pays for completion of the Remaining Work.

21. The SURETY agrees that its Payment Bond remains in place pursuant to the terms of the Payment Bond and the statute requiring the Payment Bond.

22. Notices to the Parties that are required under this Agreement or under the Contract shall be sent to:

A. To the SURETY:

Old Republic Surety Company  
Attn: Lisa Frasier, Claims Director  
445 S. Moorland Road, Suite 200  
Brookfield, WI 53005  
Phone: 262-797-2642  
[lfrasier@orsurety.com](mailto:lfrasier@orsurety.com)

With copies to:

Richard E. Tasker  
Adam Matz  
Sage Associates, Inc.  
1301 Dove Street, Suite 820  
Newport Beach, CA 926602  
Phone 949-724-9600  
[rtasker@sage-associates.com](mailto:rtasker@sage-associates.com)  
[amatz@sage-associates.com](mailto:amatz@sage-associates.com)

And

Craig E. Guenther  
BOOTH, MITCHEL & STRANGE LLP  
701 South Parker Street, Ste. 6500  
Orange, CA 92868  
Phone: 714-480-8500, ext. 115  
[ceguenther@boothmitchel.com](mailto:ceguenther@boothmitchel.com)

B. To the CITY:

City of Rialto  
Attn: Robert Eisenbeisz, City Engineer  
150 S. Palm Avenue  
Rialto, CA 92376  
Phone: (909) 820-2602  
[REisenbeisz@rialtoca.gov](mailto:REisenbeisz@rialtoca.gov)  
With copies to:

Fred Galante, Esq.  
ALESHIRE & WYNDER, LLP  
18881 Von Karman Ave., Suite 1700  
Irvine, CA 92612  
Phone: 949-223-1170  
[fgalante@awattorneys.com](mailto:fgalante@awattorneys.com)

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 constitutes the entire agreement between the Parties and supersedes any and all prior agreements, arrangements and/or understandings, written or oral, by and between the Parties. Except as herein modified, all terms and conditions of the Contract shall remain unchanged and in full force and effect. This Agreement shall not be changed, amended or altered in any way except in a writing that is executed by the Parties.

25. This Agreement shall extend to and be binding upon the Parties hereto and their respective successors and assigns. SURETY shall not assign any interest in or claim under this Agreement or the Contract without the consent of the CITY, which consent will not be unreasonably withheld.

26. This Agreement has been fully negotiated by the Parties and their counsel and shall not be construed in favor of or against either Party, regardless of who may have drafted it or any of its terms.

27. This Agreement is made and to be performed in San Bernardino County, California, and shall be governed by the laws of the State of California. Legal actions concerning any dispute, claim, or matter arising out of or in relation to this Agreement shall be instituted in the appropriate court for such county.

28. This Agreement may be executed in several counterparts, each of which shall be deemed an original as against any Party who has signed it and all of which taken together shall

constitute a single instrument. Each Party agrees that signatures transmitted by email in pdf format shall be treated, for all purposes, as original signatures.

29. This Agreement cannot be modified except in a writing signed by both CITY and SURETY.

30. If either Party to this Agreement is required to initiate or defend or made a party to any action or proceeding to enforce the provisions of this Agreement, the prevailing party in such action or proceeding shall be entitled to reasonable attorney's fees.

31. This Agreement is solely for the benefit of the CITY and the SURETY. The CITY 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 or enforceable rights under this Agreement or otherwise upon anyone other than the Parties hereto and their respective successors, assigns and reinsurers. Specifically, and without limitation to the foregoing, the CITY 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 or of the DISTRICT under the Contract.

IN WITNESS WHEREOF, the Parties hereto have hereunder set their hand and seal the  
day and year first hereinafter written.

**CITY OF RIALTO**

BY:  

Mike Story, City Administrator

ATTEST:

  
City Clerk

APPROVED AS TO FORM

ALESHIRE & WYNDER, LLP

  
Fred Galante, City Attorney

OLD REPUBLIC SURETY COMPANY

BY: \_\_\_\_\_  
Name: \_\_\_\_\_  
Title: \_\_\_\_\_