

TAKEOVER AGREEMENT

I. RECITALS

A. The parties to this Takeover Agreement (“Agreement”) are Zurich American Insurance Company and Fidelity and Deposit Company of Maryland (collectively, the “Surety”) and the City of Bountiful, Utah (“Owner”).

B. Ascent Construction, Inc. (“Principal”) entered into a construction contract, with an effective date of April 15, 2019 (“Contract”), with the Owner to complete the Bountiful City Hall Remodel (the “Project”).

C. As required under the Contract, Principal requested, and Surety issued, performance and payment bonds, Bond No. 9323929, dated July 2, 2019, in the penal sum of \$7,184,110 – for the Project (“Performance Bond” and “Payment Bond” or “Bonds” collectively).

D. On or about January 27, 2020, Owner provided notice to Surety and Principal that Owner was considering declaring a Contractor Default pursuant to § 3.1 of the Performance Bond and requesting a conference among the Owner, Principal, and Surety to discuss the Principal’s performance on the Project.

E. On or about February 6, 2020, a conference was held among the Owner, Principal, and Surety to discuss the Principal’s performance on the Project.

F. On or about March 19, 2020, the Owner declared Principal in default and terminated for cause Principal’s right to complete Project work. On or about March 23, 2020, the Owner clarified that the March 19, 2020 declaration triggered the 7-day notice period for termination for default under the Contract.

F. On or about March 19, 2020, pursuant to the Contract, JRCA Architects, acting in its capacity as Initial Decision Maker, certified and agreed that Owner’s claim for termination was sufficient cause and reason for termination.

G. On or about March 24, 2020, the Principal disputed that the Principal was in default and contested the termination.

H. On or about March 26, 2020, the Owner notified the Principal and Surety that the Principal failed or was unable to cure all defaults identified in the March 19, 2020 termination and terminated the Contract.

I. Work remains to be performed under the Contract (“Remaining Work”). The Remaining Work includes the work identified in **Exhibit A – Scope of Remaining Work** and all items of work as required to complete the Project in accordance with the Contract plans and specifications. Owner has demanded that Surety complete the Remaining Work under the terms of the Performance Bond.

J. Under the terms, conditions and considerations of the Contract and as set forth herein, Surety intends to take over completion of the Remaining Work pursuant to the Performance

Bond by contracting with a qualified contractor (“Completion Contractor”) to perform the Remaining Work.

K. Without admitting liability and solely for the purpose of resolving their dispute(s), if any, and facilitating the completion of the Project, the Parties agree to the terms set forth herein.

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, all of which form a part of this Agreement, Surety and the Owner agree as follows:

II. COVENANTS

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

2. Incorporation of the Contract Documents. The Contract documents including, without limitation, each and every one of the terms, covenants, conditions, addenda, exhibits, attachments, plans and specifications, and any modifications thereto are incorporated by reference into this Agreement.

3. Contract Balance. Surety will perform or procure the performance of the Remaining Work relying on, among other things, the Owner’s representation that the “Contract Balance” \$4,367,421.01 will be paid directly to Surety, or Surety’s designee, in accordance with this Agreement. The Contract Balance shall not be backcharged for any delay, claims and/or other costs incurred by Owner prior to the Effective Date of this Agreement. The Contract Balance shall be increased or decreased as appropriate, as a result of change orders for extra, deleted or reduced work requested or required by the Owner after the execution of this Agreement, in accordance with the terms of the Contract. Finally, except as otherwise provided in this Agreement, or as required by any federal, state or local law or regulation, Owner shall not: (1) withhold any funds from the Contract Balance because of any claim, lien, suit or demand of a third party; i.e., persons or entities furnishing or alleging to have furnished labor and/or materials to the Project, banks, other lenders, the United States Internal Revenue Service or any other entity claiming obligations due it from Principal, or (2) set off any claim that Owner may have against Surety or Principal against the Contract Balance, regardless of whether the Contract Balance is composed of earned and unpaid contract funds, unearned contract funds, or retainages. The Surety reserves all rights and claims that the Contract Balance should be increased under the doctrine of overpayment or impairment of collateral; Owner reserves all defenses related to any such rights and claims.

4. Surety to Complete Remaining Work. Surety shall be responsible for completion of the Remaining Work. Surety intends to complete the Remaining Work using the services of Nicholson Management Company, Inc. which Surety shall engage under the terms of a separate agreement (“Completion Agreement”).

5. Owner’s Obligations Under the Contract. Except to the extent provided and/or limited by this Agreement, Owner shall have all rights, obligations and responsibilities under the Contract with respect to Surety, to the same extent and effect as if Surety had executed the Contract initially, instead of Principal. Among other things, Owner reserves the right to issue

change orders, to the extent appropriate under the Contract and this Agreement. The terms of these change orders, including extensions of time and values attributed to the change order work, shall be determined as provided for under the Contract.

6. Schedule for Completion and Revised Completion Date. The Surety, Completion Contractor, and Owner are working to develop a schedule for Project completion. Owner and the Surety will execute and attach an Addendum to this Agreement when revised Substantial and Final Completion Dates are established. Surety is granted a time extension from the original Contract Substantial Completion Date (May 25, 2020) through June 23, 2020. Owner shall not assess any liquidated damages for any alleged delays caused by Principal or Surety prior to June 23, 2020. Owner reserves all rights and claims to assess liquidated damages or other contractual remedies if the Project has not reached Substantial Completion by August 1, 2020 and Final Completion by September 1, 2020; the Surety reserves all defenses related to any such rights and claims. Owner agrees to grant to Surety the full benefit of future extensions of time and other associated relief, including for excusable delays, under the doctrine of force majeure, or which are otherwise appropriate under the Contract and by law during the performance of the Remaining Work.

7. Completion Contractor. The Completion Contractor shall contract directly with Surety, and no contractual relationship shall exist between Owner and Completion Contractor under this Agreement. The Completion Contractor shall provide all insurances required under the Contract. Additionally, Owner acknowledges that, subject to the terms of the 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 Contract or Remaining Work; (ii) agree to any backcharges or deductions of any nature; (iii) agree to any schedule changes; or (iv) agree to any adjustments in the Contract or Remaining Work. Any such agreements regarding the Contract or Remaining Work must be negotiated with and approved by the Surety in writing. The Remaining Work shall be subject to inspection and acceptance by Owner as provided in the Contract. Owner shall forward concurrently to Surety (by electronic mail as well as U.S. Mail) a copy of all its written communications directed to the Completion Contractor.

8. Payments To Surety. The Contract Balance shall be paid to Surety, or Surety's designee as detailed in Paragraph 12, as the Completion Contractor completes the Remaining Work, in accordance with the terms and conditions of the Contract.

9. Preservation of The Penal Sum Of Performance Bond. Owner hereby confirms that Surety's liability and obligation pursuant to the Contract and hereunder shall not extend beyond the penal sum of its Performance Bond. All payments made by Surety previously, and those made in the future, have been and will be credited against the penal sum of the Performance Bond, less the amount paid to Surety under the Contract and this Agreement. Neither this Agreement nor any other Surety act constitutes a waiver of such penal sum or an increase in the liability of Surety under the Performance Bond.

10. Payment Bond Claims. The Payment Bond shall remain in full force and effect in accordance with its terms and provisions for those claimants who supplied labor and/or materials to the Principal on or before the last day that Principal performed work on the Project. The Payment

Bond shall not apply to or protect the Completion Contractor or any of its subcontractors and suppliers for performance of the Remaining Work pursuant to this Agreement. Neither this Agreement nor any other Surety act constitutes a waiver of the penal sum of the Payment Bond or an increase in the liability of Surety under the Payment Bond. All payments made by Surety previously, and those made in the future, have been and will be credited against the penal sum of the Payment Bond.

11. Payment Requisitions. Surety will submit to Owner whatever information or documentation is required regarding the work performed under the Contract and stored materials, to conform to and support the requisition process and schedule established under the Contract and this Agreement. Owner recognizes that Surety intends to complete the Remaining Work using the services of the Completion Contractor. Accordingly, Owner shall accept the Completion Contractor's 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 Contract, payments to others, warranty and maintenance of the work, and all other matters pertinent to the Contract, wherever such representations are required by the Contract, as if those representations had been made by Surety, since Surety may have no personal knowledge of such matters.

12. No Offsets Against Payments to Surety. Except as otherwise set forth herein or as otherwise required by law, all monies due, and to become due, pursuant to the Contract and this Agreement, including, without limitation, progress payments, payments for extra work or additional work orders, retention and final payment for work performed on behalf of Surety by its Completion Contractor, shall be made to Surety unconditionally and without offset for any reason. All payments shall be made to Surety through Nicholson Professional Consulting, Inc., in accordance with the payment instructions provided by Surety.

13. Satisfaction of Surety's Performance Obligation. Except for any applicable warranties or as provided herein, the acceptance of the Remaining Work under the Contract by Owner shall satisfy Surety's performance obligations under the Contract, its Performance Bond, and this Agreement. Owner represents that Principal would have been required to complete all of its obligations under the Contract had Principal not been in default and that, prior to the date of this Agreement, Owner had not made any agreement with Principal that any item of work included in the Contract would not have to be performed. By acceptance of the Remaining Work, Owner does not waive any rights against Surety available under the Contract or applicable construction defect laws.

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

Lloyd N. Cheney
City Engineer | Public Works Director
City of Bountiful
150 N Main St. Suite 103 Bountiful, Utah 84010
lcheney@bountifulutah.gov

With copy to:

Clinton Drake
City Attorney
790 South 100 East
Bountiful, Utah 84010
cdrake@bountifulutah.gov

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

Paul Eaves
Zurich American Insurance Company
Surety and Financial Claims
P.O. Box 968038
Schaumburg, IL 60196
Paul.Eaves@Zurichna.com

With copies to:

Connor L. Cantrell
The Husted Law Firm
Regency Plaza One
4643 S. Ulster Street
Suite 1250
Denver, CO 80237
E-Mail: clc@thlf.com

And

Nicholson Management Company, Inc.
500 Sun Valley Dr
Suite H-4
Roswell, GA 30076
lin@npcius.com

15. No Third-Party Rights. 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.

16. Full Reservation of Rights. The Principal disputes the termination of the Contract by the Owner. Except as otherwise specifically stated herein, the Parties acknowledge and agree that the Surety reserves and does not waive any rights, remedies, and defenses that the Surety or the Principal may have against the Owner with respect to any claims or defenses that the Surety or Principal may have against Owner for wrongful termination or otherwise, including, but not limited to, claims for reimbursement of the Surety's reasonable costs and expenses incurred under this Agreement in excess of the Contract Balance, any damages incurred by Principal as a result of wrongful termination, claims for additional compensation, balances due and owing, time extensions, reduction of or elimination of liquidated damages, and any other damages that may be

claimed by the Surety or Principal under this Agreement, the Contract, or the Bonds. Further, except as otherwise specifically stated in this Agreement, the Surety and Owner acknowledge and agree that the Owner reserves and does not waive any rights, remedies, and defenses it may have against the Surety and/or Principal; except, however, the Owner acknowledges and agrees that the Surety's execution and satisfactory performance, as determined by Owner pursuant to the Contract, under this Agreement constitutes Surety's performance of its obligations under the Performance Bond.

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

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

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

20. 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 the State of Utah.

21. Validity. Invalidity of any portion or provisions of the 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 Contract or this Agreement unenforceable or invalid.

22. 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.

23. 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.

IN WITNESS WHEREOF, the parties have executed this Agreement on the last date indicated below ("Effective Date") and each of the undersigned personally represent and warrant that they have the full power, right and authority to execute this Agreement on behalf of the respective parties.

DATED: _____

CITY OF BOUNTIFUL

By: Lloyd N. Cheney
Its: City Engineer and Designated Representative

DATED: _____

ZURICH AMERICAN INSURANCE COMPANY AND
FIDELITY AND DEPOSIT COMPANY OF MARYLAND

By:
Its:

EXHIBIT A

(Scope of Remaining Work)