

**AGREEMENT RELATING TO DISCHARGE OF  
PERFORMANCE BOND OBLIGATIONS**

THIS AGREEMENT, entered into on the \_\_\_\_ day of \_\_\_\_\_, 2018, by and between City of Broken Arrow ("City") and North American Specialty Insurance Company("NAS"), is as follows:

The Premises of this Agreement are:

1. Hoey Construction Co. ("HCC"), as prime contractor, and City, as owner, entered into a construction contract ("Contract") under which HCC agreed to perform construction work on a project known as "Indian Springs Sports Complex Baseball and Soccer Improvements" ("Project") for City.

2. NAS, as surety, and HCC, as principal, executed in favor of City, as obligee, a "Payment Bond" and a separate "Performance Bond," each in the penal amount of \$824,807.70 and each bearing number 2259837. Those bonds cover the Contract between the City and HCC.

3. City has defaulted HCC and has otherwise terminated its right to further perform the Contract all under HCC's protest and objection. City has called upon NAS, as the performance bond surety, to discharge its performance bond obligations by arranging for completion of the unperformed Contract work.

4. NAS has made arrangements for HCC and its subcontractors, under the supervision of NAS, to complete the unperformed Contract work and remedy any deficiencies in the Contract work all in accordance with the Contract.

5. NAS is willing to undertake the completion of the Contract work in accordance with the terms of the performance bond and this Agreement provided that in doing so it will receive the Contract balance hereinafter set forth below in Paragraph E.

6. The intent and purpose of this Agreement is to set forth the terms and conditions under which NAS will discharge its performance bond obligations.

**NOW, THEREFORE**, for and in consideration of the mutual covenants and conditions set forth herein, City and NAS agree as follows:

A. City acknowledges that NAS has made arrangements for HCC and its subcontractors to complete the Contract work and correct alleged deficiencies in the Contract work in accordance with the contract documents. However, the City also acknowledges and understands that NAS has the right to hire other contractors, as deems necessary and appropriate, at NAS' sole discretion, to complete the Contract work.

B. City and NAS agree that the contract shall be performed beginning on December 1, 2018 and shall be completed by February 13, 2019.

C. All amounts hereafter paid by NAS to complete the contract work shall be credited against the \$824,807.70 penal amount of the performance bond, all to the end that the penal amount of said performance bond will decrease with each payment made by NAS.

D. It is expressly understood that NAS has appointed Dan Dzuiba with Claims Consulting Services, Inc. as its project site representative to coordinate construction activities with HCC, its subcontractors and/or City and/or their designee.

E. As of the date hereof City represents to NAS that HCC and its subcontractors have performed work under the Contract in the approximate total amount of Six Hundred Twenty-Eight Thousand One Hundred Seventy-Seven Dollars and 09/100 (\$628,177.09) after retainage is withheld. City further represents to NAS that it has paid HCC for such work the total amount of Five Hundred Twelve Thousand Eight Hundred Thirty-Five Dollars and 97/100 (\$512,835.97). The City further represents and acknowledges that the remaining contract funds are as follows:

Original Contract	\$824,807.70
Pay App #1 dated 11/30/17	\$202,281.57
Pay App #2 dated 1/22/18	\$159,147.17
Pay App#3 dated 2/19/18	\$151,407.23
Paid to Date	\$512,835.97
Remaining (includes retainage)	\$311,971.73
Change Order (Hoey asserts CO value of \$8,468.88)	\$6,655.00
Liquidated damages:  Assessed 44 days @ \$1,000.00 per day after Substantial completion (disputed by Hoey)	\$10,000.00
Remaining Contract Balance:	\$264,626.73 <sup>1</sup>

F. All further payments due or to become due under the Contract shall be paid by City to NAS, within thirty (30) days of City's receipt of a proper invoice from NAS in accordance with the Contract documents.

G. By entering into this agreement, the parties acknowledge and agree that except to the extent expressly addressed herein, they are not waiving or relinquishing any claims or defenses by and between them or any claims by and between City and HCC. It is further acknowledged that HCC has notified the parties of its intent to seek recovery from City of all disputed amounts noted above (i.e., change order value, liquidated damages, upper barrier netting), additional amounts

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<sup>1</sup> This amount includes credit to City for disputed claims

presently unbilled, including but not limited to, acceleration costs and delay damages, as well as other damages resulting from its alleged wrongful termination. The parties specifically reserve all claims and defenses relating to HCC's claims and allegations.

H. The parties incorporate by reference the dispute resolution procedure included in the Contract.

I. This agreement contains the entire understanding of the Parties and shall be governed by the laws of the State of Oklahoma.

Executed on the day and year above stated.

ATTEST

\_\_\_\_\_  
City Clerk (Seal)

  
\_\_\_\_\_  
Assistant City Attorney

\_\_\_\_\_  
Mayor

\_\_\_\_\_  
Marcelo Virgili, Vice President  
Authorized Representative of North  
American Specialty Insurance