

## **TENDER AGREEMENT**

This Tender Agreement (“Agreement”) is deemed entered into and effective as of this \_\_\_\_ day of \_\_\_\_\_, 2013, by and between Western Surety Company (“Surety”) and City of Sunrise, Florida (“Owner”).

WHEREAS, on or about October 5, 2010 Owner entered into a written contract (“Contract”) with Tenex Enterprises, Inc., (“Contractor”) for the construction of the Oakland Park Boulevard & NW 44<sup>th</sup> Street Passive Parks (“Project”).

WHEREAS, Surety issued a Performance and Payment Bond, No. 929510365, on behalf of Contractor and in favor of Owner for the Project each in the penal sum of \$4,874,600.

WHEREAS, on or about February 18, 2013 Owner declared Contractor in default and terminated Contractor from further work on the Project (“Termination Date”).

WHEREAS, Owner represents to Surety the remaining adjusted Contract balance of \$3,370,034.18 as the available balance on the Contract.

WHEREAS, Owner represents that it has incurred damages totaling \$382,356.47, which leaves an adjusted Contract balance after deducting damages of \$2,987,677.71 as the available balance on the Contract, which sum the Owner commits for use towards the completion of the Project.

WHEREAS, Owner has made demand upon Surety to remedy the alleged default of Contractor on the Project and to complete or procure completion of the work under the Contract for the Project.

WHEREAS, Surety solicited bids for the completion of the Project by a competent and qualified contractor acceptable to the Owner, and MBR Construction (“Completion Contractor”) has responded with the submission of the lowest responsible bid and agrees to complete the Project for the sum of \$3,915,249.

WHEREAS, Surety intends to arrange for completion of the Project by tendering Completion Contractor to Owner to complete the remaining work on the Project and to pay Owner the sum of \$927,571.29 in complete discharge and exoneration of Surety’s Performance Bond subject to the conditions set forth below.

WHEREAS, Owner wishes to accept the Completion Contractor in place of Contractor, and to discharge and exonerate Surety from its further obligations as Surety under the Performance Bond subject to the conditions set forth below.

NOW THEREFORE, in consideration of the terms and conditions of this Agreement, the parties agree as follows:

1. All recitals set forth above are true and are incorporated herein by reference.

2. Surety hereby tenders to Owner, and Owner hereby accepts the bid of Completion Contractor to complete the remaining work under the Contract on the Project.

3. Within twenty (20) days of Owner's execution of this Agreement, Surety shall pay to Owner the sum of \$927,571.29 in full discharge and satisfaction of any and all claims which Owner has or may claim to have against Surety. In consideration of such payment, and effective upon satisfaction of those conditions and outstanding obligations set forth herein, Owner releases, exonerates and discharges Surety, of and from any and all claims, whether known or unknown, demands, causes of action and/or suit of any nature or kind which Owner may now have or in the future have against said company as surety under the Performance Bond and/or Contract and/or under any applicable law, including without limitation, claims for completion of any and all work under the Contract, the performance of any warranty or guaranty work, corrective work, remedial work or any other work of any kind or nature required under the Contract and any and all liquidated damages the Owner has or could have asserted against the Surety.

4. Surety undertakes and agrees to discharge its obligations under its Payment Bond with respect to claims for work performed or materials supplied prior to the Termination Date. The Surety agrees to investigate all payment claims made against it, 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. The Owner agrees to make no representations or promises of payment to these suppliers and subcontractors for such material or work and to refer all inquiries to the Surety. The Surety will defend, indemnify and hold harmless the Owner from any loss, including attorneys' fees, which may arise by virtue of such claims, liens, suits and demands, under and subject to the penal amount of the Payment Bond, as reduced by the payments made by the Surety pursuant thereto. Nothing in this Agreement constitutes a waiver of such penal amount or an increase in the liability of the Surety under the Payment Bond.

5. All claims, rights, defenses and causes of action of the Owner against the Contractor and the Contractor against the Owner, arising prior to the execution of this Agreement are preserved. Nothing herein shall be construed as a waiver of any rights of the Owner or Surety against the Contractor.

6. Surety's actions under this Agreement and its Payment and Performance Bonds shall forever be construed and considered as those of a surety and not a contractor.

7. Preparation of this Agreement has been a joint effort of the parties, and the resulting document shall not be construed more severely against one of the parties than against any other party.

8. This Agreement shall be binding upon and shall inure only to the benefit of the parties hereto and their respective legal representatives, agents, predecessors, successors, and assigns.

9. This Agreement contains and embodies the entire agreement the parties hereto with regard to the matters covered herein and no other representations, inducements, or other agreements, oral or otherwise, not contained and embodied herein shall be of any force or effect.

10. Mere delay in the enforcement of any provision of this Agreement shall not be deemed a waiver of such provision. The waiver by any party hereto of any right or remedy granted herein shall not be deemed to be a waiver of any other or subsequent right or remedy granted herein.

11. The parties hereto acknowledge that each has been fully advised by legal counsel of its own choosing concerning the language and legal effect of this Agreement and each knowingly enters into this Agreement freely and without coercion of any kind.

12. The parties may execute this Agreement in counterparts, each of which shall be considered to be an original. If counterparts are separately signed, all separately signed documents together shall constitute, as a group, the final agreement. Faxed or scanned and emailed copies containing party signatures shall be considered the same as originals for the purpose of evidencing the Agreement.

13. Each party signing this Agreement acknowledges and represents that the person signing on its behalf has the authority to do so and each person signing this Agreement acknowledges and represents that he or she has the authority to sign this Agreement on behalf of the party for whom he or she is signing.

14. This Agreement shall be governed by and construed in accordance with the laws of the State of Florida without regard to its law on conflict of laws. Venue for any legal action undertaken to enforce this agreement shall only be in United States District Court with jurisdiction over Broward County.

15. This Agreement can be modified or amended only by a written agreement signed by all parties.

16. No Admission of Liability. The parties agree that this Agreement is not an admission of liability by any party but is rather a compromise of disputed liability, the express purpose of which is to settle existing claims, preclude any additional claims and avoid the uncertainties and costs of litigation.

17. Notice. Any notice required to be made under the terms of this Agreement must be in writing and may be delivered in person to any party or may be sent by courier or first class mail, postage prepaid, as follows:

To the Owner: Tim Welch  
777 Sawgrass Corporate Parkway  
Sunrise, Florida 33325

With a copy to: Kimberly A. Kisslan, Esq.  
10770 West Oakland Park Boulevard  
Sunrise, Florida 33351

To the Surety: David Mathews  
Senior Claims Counsel  
CNA Surety  
333 S. Wabash Ave., 41<sup>st</sup> Floor  
Chicago, IL 60604

The addresses and persons listed above may be changed at any time by giving written notice in accordance with this provision.

18. The parties agree to undertake such other acts and execute such other documents as may be reasonably necessary to affect the purpose and intent of this Agreement.

19. Invalidity. If any provision of this Agreement is found to be invalid, all the other provisions shall remain in full force and effect.

**WESTERN SURETY COMPANY**

By: \_\_\_\_\_  
Printed Name: \_\_\_\_\_  
Title: \_\_\_\_\_  
Dated: \_\_\_\_\_

**CITY OF SUNRISE, FL**

By: \_\_\_\_\_  
Printed Name: \_\_\_\_\_  
Title: \_\_\_\_\_  
Dated: \_\_\_\_\_