

**Standard form of Mitigation Agreement**

**Headstart Subcontractor Performance Bond**

MITIGATION AGREEMENT

as of this day of , .

BETWEEN:

(hereinafter referred to as the “Obligee”)

- and -

(hereinafter referred to as “Surety”)

]

**WHEREAS** the Obligee entered into an Agreement with (“Principal”) dated (the “Original Contract”) pursuant to which Principal agreed to perform the Work described in the Original Contract as (“Project”).

**AND WHEREAS** the Surety issued to the Obligee, Headstart Performance Bond No. dated (the “Performance Bond”) with respect to the Original Contract;

**AND WHEREAS** the Obligee has notified the Surety of the default by providing to the Surety its prescribed form of Notice of Claim Letter and requisite documents and information dated and has called upon the Surety under the terms of the Performance Bond;

**AND WHEREAS** the Obligee acknowledges and agrees that, to the best of its knowledge, as of the Work performed by Principal to date is acceptable and conforms to the requirements of the Original Contract and that there are no known deficiencies except for the deficiencies listed in Schedule “A”;

**AND WHEREAS** there is insufficient time for the Surety to conduct a full and proper investigation of the Obligee’s claim under the Performance Bond before the Obligee wishes the Work to resume on the Project;

**AND WHEREAS** the Obligee has submitted a proposal to the Surety for the completion of the Work (“Completion Proposal”) and represents and warrants to the Surety, on which the Surety relies, the following:

1. at the date hereof, the financial status under the Original Contract is as set out in the Original Contract Financial Status Summary attached as Schedule “B” hereto;
2. there is urgency to recommencing the work under the Original Contract and the Completion Proposal is intended to mitigate any losses and the cost of completing the work; and
3. the Completion Proposal is an appropriate method of completing the Original Contract to mitigate any claims under the Performance Bond.

**AND WHEREAS** the Surety is prepared to continue its investigation and to enter into this Agreement subject to a full reservation of the Surety’s rights under the Performance Bond and the applicable law;

**AND WHEREAS** the Obligee and the Surety wish to cooperate to achieve, to the extent commercially reasonable, the most cost effective and expeditious completion of the Project on a without prejudice basis and to document their agreement regarding the manner in which the Project is to be completed and any additional agreements necessary to complete the remaining Work under the Original Contract.

NOW THEREFORE IN CONSIDERATION OF THE MUTUAL PROMISES CONTAINED HEREIN AND OTHER GOOD AND VALUABLE CONSIDERATION, THE RECEIPT AND SUFFICIENCY OF WHICH IS HEREBY ACKNOWLEDGED, THIS MEMORANDUM OF AGREEMENT WITNESSETH THAT:

1. The recitals to this Agreement as stated above form an integral part of this Agreement;
2. The Surety agrees with the Obligee proceeding to complete the Original Contract;
3. The Obligee shall pay the Balance of the Funds being the amount of $ (as calculated on Schedule “B” hereto) in accordance with this Agreement to pay for the completion of the Work;
4. In the event that the cumulative value of the actual cost to complete the Work incurred by the Obligee, excluding any Changes, as approved by the Surety, are in excess of the Balance of Contract Funds, the Surety shall, following the payment of the Balance of Contract Funds by the Obligee, place the Obligee in sufficient funds to pay to the Obligee’s actual cost (the “Surety’s Advances”) in accordance with paragraph 5 below. If the Surety at any time denies liability under the Performance Bond, the Surety shall provide the Obligee with written reasons for doing so and the Obligee shall not be entitled to any further Surety Advances. For greater certainty, the aggregate amount of the Surety’s Advances shall not exceed the Bond Amount;
5. On a monthly basis, the Obligee shall cause the Consultant (as defined in the Original Contract) to certify and approve the payment that would have been made under the Original Contract and reflect on the same certificate the actual cost of that Work incurred by the Obligee. If the result of such calculation is a surplus, then there shall be no Surety’s Advances for that month and any surplus amount shall be taken into account and applied to the actual cost of the Work incurred by the Obligee in the following month. The Surety’s Advances shall be advanced by the Surety 30 days after the last day of each relevant month. The Obligee shall also provide the Surety with an updated estimate of the cost to complete the Work and the costs expected to be incurred in connection thereto in the upcoming month;
6. In determining the amount of the Surety’s Advances, the Surety shall have no obligation to pay or fund any of the Obligee’s costs incurred for any additional or extra work or material ordered by Obligee that increases the scope of the Work (the “Changes”);
7. The Obligee shall disclose to the Surety the identity of any subcontractors and suppliers that the Obligee propos- es to engage to complete the Original Contract and any affiliations that the Obligee may have with such sub- contractors and suppliers. In the event the Surety, acting reasonably, objects to any proposed subcontracts and suppliers, the Obligee shall propose an alternate subcontractor or supplier to the Surety for approval;
8. The Obligee shall provide the Surety, or any representative so appointed by the Surety, with reasonable access to the Project to enable the Surety to observe the Work and all of the books and records related to the Original Contract as are reasonably necessary to enable the Surety to verify the cost of completing the Work;
9. The Obligee shall not make any claim under the Performance Bond for extra work or the cost of correcting any alleged deficient work unless the Obligee has first provided the Surety with written notice of any such claim and provided to the Surety or its representative a reasonable opportunity to inspect and investigate the alleged defi- ciency prior to the work commencing, provided that such inspection and investigation shall be conducted by the Surety in a timely manner;
10. The Obligee shall pay to the Surety, or assign to the Surety any right or interest therein, any holdback amounts referred to in Schedule “B” (the “Holdback”). The Surety shall keep title to the Project clear of any claims for lien registered by the subcontractors and suppliers of the Principal related to the Work performed by the Principal under the Original Contract **[Note: Only to be used in circumstances where a Labour**

# and Material Payment Bond exists];

1. The Obligee and the Surety agree to continue to work together to resolve any disputes related to the Original Contract by amicable negotiation provided that neither the Obligee nor the Surety shall be required to compromise any rights that they may otherwise have under the Original Contract or under the Performance Bond;
2. In the event that the Surety is liable to the Obligee under the Performance Bond, the Obligee agrees that any payments hereunder by the Surety related to the completion of the Original Contract are deemed to be payments made by the Surety pursuant to the Performance Bond and shall reduce the Bond Amount to that extent;
3. If for any reason the Surety is not liable to the Obligee for any amounts, in whole or in part, paid by the Surety to complete the Original Contract, the Obligee shall reimburse and indemnify the Surety for any such payments made by the Surety under this Agreement;
4. The Obligee agrees that any payments by the Surety are made without prejudice to the rights of the Surety under the Performance Bond regarding its liability;
5. The Obligee shall cooperate and assist, if necessary, the Surety in settling the claims made against the

Labour and Material Payment Bond. **[Note: Only to be used in circumstances where a Labour and Material Payment Bond exists];**

1. The Obligee agrees to meet with the Surety to resolve the Original Contract accounting, including any unresolved amounts related to the Original Contract price for work performed by the Principal;
2. This Agreement and the performance thereof by the Obligee and the Surety shall be without prejudice to the posi- tions of the Obligee and the Surety with respect to their rights, obligations or liability under the Original Contract or Performance Bond. For greater certainty, nothing in this Agreement shall be deemed to be an admission of liability by the Obligee or the Surety;
3. Nothing contained herein shall expand the liability of the Surety under the Performance Bond, and without limiting the generality of the foregoing; the Surety shall not be required, under the terms of this or any other agreement, to pay in the aggregate more than the maximum amount payable under the Performance Bond (the “Bond Amount”). The Surety shall advise the Obligee monthly as to the amounts accrued and/or expended by the Surety under the Performance Bond, and in the event that the total of such amounts equals or exceeds 80% of the Bond Amount, the Surety shall give notice to the Obligee thereof, and the Surety and the Obligee will make arrangements for the Surety to turn the Project over to the Obligee, should it appear likely that the Bond Amount will be exhausted prior to the completion of the Work;
4. This Agreement may be executed in separate counterparts, each of which shall be deemed to be an original, but such separate counterparts shall together constitute one and the same instrument. Execution of this Agreement may be communicated by facsimile transmission or email of an originally-executed counterpart thereof.

**IN WITNESS WHEREOF**, the Obligee and the Surety have, by their respective authorized employees or officers, executed this Agreement on the date first written above:

[Obligee]

By: I have authority to bind the Obligee

Name of person signing

[Surety]

By: I have authority to bind the Surety

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**SCHEDULE A**

**LIST OF KNOWN DEFICIENCIES**

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**SCHEDULE B**

**ORIGINAL CONTRACT FINANCIAL STATUS SUMMARY**

***ALL AMOUNTS INCLUDE APPLICABLE TAXES***

|  |  |  |
| --- | --- | --- |
|  |  | Total |
| 1 | Original Contract Price |  |
| 2 | Approved Change Orders |  |
| 3 | Amended Contract Price (3 = 1+2) |  |
| 4 | Value Of Work Performed To Date |  |
| 5 | Amount Paid |  |
| 6 | Holdback To Date |  |
| 7 | Balance of Contract Funds (3 – 5) including Holdback (6) (collectively “Balance of Contract Funds”) |  |

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