

RESOLUTION NO. 2014- 179

A RESOLUTION BY THE BOARD OF COUNTY COMMISSIONERS OF ST. JOHNS COUNTY, FLORIDA, AUTHORIZING THE COUNTY ADMINISTRATOR, OR DESIGNEE, TO EXECUTE A TAKEOVER AGREEMENT FOR THE CONSTRUCTION OF MASTERS TRACT REGIONAL STORMWATER TREATMENT FACILITY.

RECITALS

WHEREAS, Sayar Enterprises, Inc. d/b/a Southern Development Corp. ("SDC"), and the County entered into a contract ("Original Contract") to complete construction of the Masters Tract Regional Stormwater Treatment Facility ("Project") (as provided in Bid No.13-15); and

WHEREAS, SDC and the Surety made, executed and delivered to the County both a payment and a performance bond, identified as Bond No. PRF8974857 (collectively, the "Bond") in the penal sum of \$2,052,747.00; and

WHEREAS, following SDC's failure to perform under the terms and conditions of the Original Contract, by letter dated April 1, 2014, the County exercised its option to demand that the Surety complete the work under the terms and conditions of the Bond; and

WHEREAS, in response to the County's demand, the Surety promptly investigated the County's assertions, and through the engagement of a completion contractor (the "Completion Contractor"), will complete the construction of the Project as provided in the Takeover Agreement (a copy is attached hereto).

NOW, THEREFORE BE IT RESOLVED BY THE BOARD OF COUNTY COMMISSIONERS OF ST. JOHNS COUNTY, FLORIDA, as follows:

Section 1. The above Recitals are incorporated by reference into the body of this Resolution and such Recitals are adopted as findings of fact.

Section 2. The County Administrator, or designee, is hereby authorized to execute the an agreement in substantially the same form and format as the Takeover Agreement attached hereto.

Section 3. The Clerk is instructed to have four (4) copies of the original Takeover Agreement executed and mailed to Fidelity and Deposit Company of 1400 American Lane Tower 1 19Th Floor, Schaumburg, IL. 60196.

Section 4. To the extent that there are typographical and/or administrative errors that do not change the tone, tenor, or concept of this Resolution, then this Resolution may be revised without subsequent approval by the Board of County Commissioners.

PASSED AND ADOPTED by the Board of County Commissioners of St. Johns County, Florida, this 17th day of June, 2014.

**BOARD OF COUNTY COMMISSIONERS
OF ST. JOHNS COUNTY, FLORIDA**

By: _____

Chair

RENDITION DATE 6/19/2014

ATTEST: Cheryl Strickland, Clerk

By: _____

Deputy Clerk

TAKEOVER AGREEMENT

This Takeover Agreement ("Takeover Agreement") is entered into between Fidelity and Deposit Company of Maryland ("Surety" or "Completing Surety"), and St. Johns County, Florida ("County").

W I T N E S S E T H:

WHEREAS, Sayar Enterprises, Inc. d/b/a Southern Development Corp. ("SDC"), and the County entered into a contract ("Original Contract") for SDC to furnish all labor, equipment, materials, and perform all work for Bid No.13-15: Masters Tract Regional Stormwater Treatment Facility, St. Johns County, FL ("Project") in accordance with the terms and provisions of the Original Contract, including all contract documents forming a part of the Original Contract; and,

WHEREAS, SDC and the Surety made, executed and delivered to the County both a payment and a performance bond, identified as Bond No. PRF8974857 (collectively, the "Bond") in the penal sum of \$2,052,747.00; and,

WHEREAS, the County, by letter dated April 1, 2014, informed SDC that the County had terminated SDC on the Project, which took the prosecution of the work out of the hands of SDC before full and final completion of the work on the Project. The County has demanded that the Surety complete the Project under the terms and conditions of the Bond; and,

WHEREAS, in response to the County's demand, the Surety promptly investigated the County's assertions; and

WHEREAS, the Surety, through the engagement of a completion contractor (the "Completion Contractor"¹), is willing and able to undertake the completion of the Original Contract, which is one of Surety's options under the Bond, as modified or provided for in this Takeover Agreement, provided (among other things described herein) that the County agrees to pay the unpaid balance of the Original Contract to the Surety (subject to adjustment for change orders or variations of the estimated quantities) as the work progresses (as more fully described herein). However, the County and Surety agree that this Takeover Agreement is conditional and not binding or enforceable unless and until Surety enters into an agreement with a Completion Contractor for the Project.

TERMS OF AGREEMENT

NOW, THEREFORE, in consideration of the mutual covenants, agreements, and undertakings and for other good and valuable consideration, the receipt and sufficiency being hereby acknowledged, the County and the Surety mutually agree as follows:

¹ The definition of "Completion Contractor" includes all subcontractors, laborers, materialman, or rental equipment providers, or persons that any of them shall retain, that Completion Contractor retains to perform the work called for in the Completion Agreement, which the Surety and Completion Contractor have or will enter into with respect to the Project.

1. Each of the above recitations is true and correct, and is incorporated into this Takeover Agreement as if fully set forth herein.

2. The Surety and County represent and warrant to each other that they are authorized and empowered to enter into this Takeover Agreement.

3. The Bond and the Original Contract, including all plans, specifications, and other contract documents as defined therein, are incorporated by reference, and are made a part of this Takeover Agreement, except as otherwise provided for herein. If any provisions of the Takeover Agreement conflict with the provisions of the Original Contract (and all documents that make a part of the Original Contract, including change orders), the provisions of this Takeover Agreement shall control.

4. The Surety agrees to have the Completion Contractor perform and complete the work on the Project required by and in accordance with the terms and conditions of this Takeover Agreement and the Original Contract, including all plans and specifications referred to therein, and all supplemental agreements, work orders, and change orders issued pursuant thereto (the "Completion Work"). The Surety and the Completion Contractor shall enter into an agreement for performance of the Completion Work by no later than ten (10) consecutive calendar days following full execution of this Takeover Agreement ("Completion Agreement").

5. The County acknowledges that the Surety, by its execution of this Takeover Agreement, is acting in its capacity as surety for SDC, and is making arrangements for the performance and completion of the Completion Work through a Completion Contractor, and is not itself acting as a completing contractor, and that the Surety is not assuming any obligations or liabilities beyond those contained in the Bond and this Takeover Agreement.

6. In addition to those timelines, conditions, or requirements of the Original Contract contained herein, in order to expedite the Completion Work, the County may need to modify certain timelines, conditions, or requirements of the Original Contract, including but not limited to those related to deliverables, acceptance, and substantial completion (or otherwise). Such required modification (in addition to those provided herein) can be agreed to in writing between Surety and County as they become known. The Project schedule will need to be modified as a result of such modifications. Accordingly, the County acknowledges that Surety cannot, and will not, guarantee the completion date for the performance of the Completion Work provided in the Original Contract. Likewise, the Completion Contractor will not guarantee the completion date for performance of the Completion Work provided in the Original Contract.

7. Subject to modifications to the Project schedule that may occur after the execution of this Takeover Agreement, Substantial Completion of the Completion Work, as defined in Paragraphs 3.2 and 5.5 of the Original Contract, shall be within one hundred fifty (150) consecutive calendar days of full execution of this Takeover Agreement. Final Completion shall be thirty (30) consecutive calendar days following Substantial Completion. Surety will negotiate with the Completion Contractor a provision in the Completion Agreement that the Completion Contractor shall use its best efforts to complete the Completion Work in accordance with the modified dates of Substantial Completion and Final Completion contained in this provision. However, Surety and Completion Contractor cannot guarantee a completion date for the Project.

8. The County reserves the right to recover liquidated damages as provided in Paragraph 3.1.2 of the Original Contract for each calendar day of unexcused delay in achieving Substantial Completion of the Completion Work beyond the date set forth in this Takeover Agreement. Any such amounts shall be payable, not as a penalty, but as liquidated damages representing an estimate of delay damages likely to be sustained by the County, estimated at or before the time of executing this Takeover Agreement.

9. The Surety reserves all rights, claims, and defenses with respect to the performance of the Completion Work including, but not limited to, a right, claim, or defense that certain items contained within the Completion Work are not part of the Original Contract, or that the County removed certain items from the requirements of the Original Contract. The Surety will ensure that Completion Contractor performs the Completion Work under a full reservation of all of the Surety's rights and defenses. As to such items, the Surety reserves the right to make a claim to the County for the County to reimburse the Surety for the Completion Contractor's performance of out of scope work, or assert the cost of such work as a setoff or backcharge for any liability that the County asserts against SDC or Surety related to the Project.

10. Except as otherwise modified by this Takeover Agreement, the County acknowledges that the Surety will subcontract the performance of each and every one of the terms, covenants, and conditions of the Original Contract and this Takeover Agreement, including all modifications thereto, to the Completion Contractor. The Completion Contractor shall be subject to the terms and conditions of the Original Contract as if it had originally executed the Original Contract, except to the extent otherwise provided in this Takeover Agreement. The Surety may satisfy the required insurance obligations under the Original Contract by providing evidence of the required insurance coverage carried by the Completion Contractor. The Completion Contractor shall be an independent contractor of the Surety, and no contractual relationship pursuant to this Takeover Agreement shall exist between the County and the Completion Contractor. The County shall recognize the Completion Contractor only in the capacity of a subcontractor of the Surety.

11. The Surety shall be represented at the Project by Forcon International Corp. ("Authorized Representative"). Prior to the issuance of the Surety's Notice to Proceed to the Completion Contractor, the Surety shall provide the County with written notice of the individual with the Completion Contractor ("Authorized Individual") authorized to communicate with the County solely for day-to-day construction issues with respect to the Project. The Authorized Individual does not, and shall not, have any authority to bind the Surety to any obligations, and is not an agent or representative of the Surety.

12. The County and the Surety agree that as of the date of this Takeover Agreement:
- (a) The authorized amount of the Original Contract, including all approved Change Orders, is in the sum of \$2,054,487.00.
 - (b) SDC has been paid the sum of \$1,380,602.95.
 - (c) The "Contract Balance" shall be hereinafter defined as the sum of \$673,884.05 [subsection (a) minus subsection (b)].

- (d) The Contract Balance shall be increased or decreased, as appropriate, as a result of any Change Orders / Change Orders for extra work (work that is different from, in excess of, or beyond the scope of the Completion Work) requested or required by the County after the date of the execution of this Takeover Agreement.
- (e) As of the date of the execution of this Takeover Agreement, the County represents and warrants that, to the best of its knowledge and ability based upon the records available to it, that the Contract Balance as defined herein is accurate. The Surety reserves the right to verify and confirm the accuracy of the Contract Balance. The Surety's sole remedy against the County for breach of this representation and warranty is reformation of the Contract Balance to the proper amount.

13. The County agrees that the Contract Balance is dedicated to and will be applied as payment for the completion of the Completion Work pursuant to this Takeover Agreement. The County shall pay directly to the Surety the Contract Balance, plus or minus any additional amounts of money on account of any modifications to the Completion Work requested and authorized by the County, as the work progresses, subject to all of the terms and conditions of the Original Contract, except as provided herein. The County shall not withhold any amount of the Contract Balance from the Surety as retainage (and all amounts that the County previously withheld from SDC as retainage are now part of the Contract Balance). The County agrees that the Completion Contractor shall sign applications for payment as the contractor and that Surety may sign the applications as performing surety. The County will pay the Surety, within 30 days of a receipt of a payment application from the Surety, the full amount requested in the payment application for the cost to perform the Completion Work, plus the cost for all Change Order work (as defined below), through the date listed in the application. Surety agrees to expend its own funds as may be necessary from time to time to pay for the Completion Contractor to perform the Original Contract (except as provided herein), and the Completion Work in the event that the Contract Balance is insufficient, and the County acknowledges that any such payments are credited against the penal sum of the Bond. Notwithstanding any provision in the Original Contract to the contrary, the County agrees to release the Contract Balance, which includes retainage, to the Surety when and as due under this Takeover Agreement. In consideration of the Contract Balance being paid by the County to the Surety, as provided herein, the Surety agrees to comply with the obligations of the Original Contract (except as provided for herein) and this Takeover Agreement.

14. All change orders must be executed and delivered by the Surety and the County. The Surety's Authorized Representative, and the Authorized Individual, shall have, on behalf of the Surety, the authority to negotiate, but not to sign, change orders for extra work (i.e. work that is different from, in excess of, or beyond the scope of the work listed in the Completion Work) requested or required by the County ("Change Orders"). The Surety hereby designates the Authorized Representative to review and negotiate any contract modifications, and assist in the resolution of disputes that may arise during the performance of the Completion Work. The County agrees that Surety need not sign pay requisitions submitted to the County, and that they may be signed on Surety's behalf by the Authorized Representative. Except as expressly provided for in this paragraph, neither Completion Contractor, nor the Authorized Individual, nor

the Authorized Representative shall have any authority to sign Change Orders or modifications to this Takeover Agreement without Surety's prior written approval. However, Surety shall have the option, but not the obligation, to have any Change Order work performed that increases the Contract Price or extends the Contract Time.

15. Payments from the County under this Takeover Agreement or the Original Contract shall be made to the Surety and transmitted to the Surety at the following address, unless and until the County is notified in writing of any different address:

Fidelity and Deposit Company of Maryland
Surety and Financial Claims
Attention: Mr. Jack R. Pociask, Senior Claims Counsel
1400 American Lane
Schaumburg, IL 60196

The County agrees that Surety's total aggregate liability under the Bond, whether for the performance of the Original Contract, performance under the Bond, performance under this Takeover Agreement, or for any claims, liens, suits or demands by any persons or entities furnishing or alleging to have furnished labor and/or materials to the Project, shall not exceed the penal sum of the Bond, plus reasonable attorneys' fees and interest to the extent provided by law. All payments made by the Surety pursuant to the Bond, and all costs and expenses incurred by Surety in connection with the completion of this Project, including but not limited to payments for the Completion Contractor or others to complete the Completion Work, for consultants' fees and attorneys' fees, and to claimants entitled to payment for labor, services, materials, equipment or supplies under the Bond will be credited toward and reduce the penal sum of the Bond.

16. Insofar as the County has any right, title or interest therein, the County agrees that the Surety and the Completion Contractor shall have the right to use, without charge, any of the equipment, materials and appurtenances furnished or supplied by SDC which may be stored on or about the premises of the Project site, or materials which may have been fabricated for the County and/or Project in connection with the Original Contract, whether or not presently upon the Project site.

17. The provisions of the Bond shall remain in full force and effect in accordance with its terms and conditions. Nothing in this Takeover Agreement constitutes a waiver of such penal sum or an increase in the liability of the Surety under the payment and performance provisions of the Bond.

18. This Takeover Agreement is solely for the benefit of the County and the Surety. The County and the Surety do not intend by any provision of this Takeover Agreement to create any rights, nor to confer any benefit upon or confer any enforceable rights under this Takeover Agreement or otherwise, upon anyone other than the County and the Surety. Specifically, the County and Surety acknowledge that nothing in this Takeover Agreement shall extend or increase the rights of any third-party claimants or the liabilities or obligations of Surety under the Bond. Likewise, the Completion Contractor has no contractual rights pursuant to this Takeover Agreement and no contractual relationship shall exist between the County and the Completion Contractor.

19. Save and except for the Bond, this Takeover Agreement constitutes the whole of the understanding, discussions, and agreements by and between the County and the Surety upon the subject matter contained herein. The terms and provisions of this Takeover Agreement are contractual and not mere recitals. The County and the Surety acknowledge that there have been no oral, written or other agreements of any kind as a condition precedent to or to induce the execution and delivery of this Takeover Agreement. Any written or oral discussions conducted prior to the effective date of this Takeover Agreement shall not in any way vary or alter the terms of this Takeover Agreement.

20. This Takeover Agreement shall not be changed, amended, or altered in any way except in writing and executed by both the County and the Surety.

21. This Takeover Agreement may be executed in one or more counterparts, each of which shall be deemed to be an original. Facsimile or electronic signatures shall be treated as original signatures for all purposes.

22. This Takeover Agreement shall be construed and interpreted in accordance with the laws of the State of Florida. Venue for any actions arising under this Takeover Agreement shall be St. Johns County, Florida.

23. Any notices that are required to be given by the terms of this Takeover Agreement, the Original Contract, or the Bond, shall be made as follows:

As to the County:

Via certified mail, return receipt requested,
postage prepaid to:

Greg Caldwell
Project Manager
2740 Industry Center Road
St. Augustine, Florida 32084

With a copy to:

Regina D. Ross, Esq.
Senior Assistant County Attorney
500 San Sebastian View
St. Augustine, Florida 32084

As to the Surety:

Via certified mail, return receipt requested,
postage prepaid to:

Mr. Jack R. Plociask, Senior Claims Counsel
Fidelity and Deposit Company of Maryland

1400 American Lane
Schaumburg, IL 60196

With a copy to:

Ryan J. Weeks, Esq.
Mills Paskert Divers
100 North Tampa Street, Suite 3700
Tampa, FL 33602

24. The failure of any party to exercise in any respect a right provided for in this Takeover Agreement shall not be deemed to be a subsequent waiver of the same right or any other right.

25. This Takeover Agreement shall be binding upon the parties and shall inure to the benefit of themselves and their respective successors and assigns.

26. In the event that one or more of the provisions of this Takeover Agreement shall be declared to be invalid, illegal or unenforceable in any respect, unless such invalidity, illegality or unenforceability shall be tantamount to a failure of consideration, the validity, legality, and enforceability of the remaining provisions contained herein shall not in any way be affected or impaired thereby.

27. It is understood and agreed by the County and the Surety that this Takeover Agreement shall be construed without regard to any presumption or other rule requiring construction against the party causing this Takeover Agreement to be drafted.

28. Neither this Takeover Agreement nor any provision herein shall be deemed or construed to be an admission or concession of liability of any kind or nature by SDC, the Surety or the County, or a waiver or release of any rights, claims or defenses of SDC, the Surety or the County including, but not limited to, claims that the determination that SDC had defaulted was improper and invalid, claims for delay, additional costs, and other claims for additional compensation or time extensions; all of which claims, rights, and defenses of SDC, Surety and County are specifically reserved, it being the understanding and intention of the parties that any rights, claims, or defenses which have been made or which may be made in relation to the Original Contract, including but not limited to alleged breaches thereof by SDC on the one hand, and the County or others on the other, are in no way affected by this Takeover Agreement, and that by entering into this Takeover Agreement and are fully reserved.

29. In no event shall the County withhold any of the Contract Balance from the Surety because of or on account of any claims, liens, suits or demands by any persons or entities furnishing or alleging to have furnished labor and/or materials to the Project, or for any other reason that the County could have withheld any portion of the Contract Balance under the Original Contract. The Bond shall remain in full force and effect in accordance with its terms and provisions. All Bond payments properly made by Surety on account of such claims shall be credited against the penal sum of the Bond.

30. Nothing in this Agreement shall be deemed to waive, alter, limit, modify, alter or abridge any of the parties' applicable rights, claims or remedies, including but not limited to those against the following: (a) SDC, (b) the indemnitors under any agreement of indemnity between the Surety, SDC and such indemnitors, (c) SDC and/or any other persons under any other contract between them, (d) at law, (e) or in equity.

IN WITNESS WHEREOF, the parties have executed this Takeover Agreement on the date indicated above, and each of the undersigned personally represent and warrant that they have the full right, power and authority to execute this Takeover Agreement on behalf of the respective parties.

St. Johns County, Florida

Fidelity and Deposit Company of Maryland

By: _____

By: _____

Its: _____

Its: _____

Date: _____

Date: _____