



**SOLANO COMMUNITY COLLEGE DISTRICT  
GOVERNING BOARD AGENDA ITEM**

**TO: Members of the Governing Board**

**SUBJECT: CONTRACT AWARD (SURETY TAKEOVER AGREEMENT) TO FIDELITY AND DEPOSIT COMPANY OF MARYLAND FOR HORTICULTURE MODULAR RESTROOM BUILDING PROJECT**

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**SUMMARY:**

*CONTINUED FROM THE PREVIOUS PAGE*

On January 22, 2019, the District received correspondence from the Contractor indicating that it was not financially able to perform or complete the Project, leaving only several tasks incomplete including; patching exterior plaster; completing drinking fountain installation; replacing and repairing ceiling tiles and epoxy flooring, sealing door frames; correcting plumbing fixtures and hot water heaters; and installing an HVAC unit.

The District's legal counsel tendered completion of the Project to Contractor's Surety by virtue of Contractor's performance bond. As a result, the District's legal counsel and Surety have negotiated a Takeover Agreement to ensure completion of the Project. Under the terms of the Takeover Agreement, the Surety's completion contractor must complete the Project within 45 days following the execution of the Takeover Agreement.

The Board is asked to approve the Takeover Agreement to the Surety, Fidelity and Deposit Company of Maryland, to complete the outstanding scope remaining for the Project.

The agreement is available online at <http://www.solano.edu/measureq/planning.php>

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## TAKEOVER AGREEMENT

This Takeover Agreement (the “Agreement”) is made and entered as of the Effective Date by and between Solano County Community College District (“Obligee”) and Fidelity and Deposit Company of Maryland (“Surety”) (individually, a “Party” and collectively, the “Parties”).

### RECITALS

A. Impact Construction Services, Inc. (“Principal”) entered into a contract on or around December 20, 2017 (the “Contract”), with Obligee to furnish certain labor and material and perform work on a construction project referred to as the Horticulture Modular Building Foundation and Site Work Project (the “Project”).

B. Surety issued a Performance Bond (the “Performance Bond”) and a Payment Bond (the “Payment Bond”), both numbered PRF9276451 and each in the penal sum of \$215,885.00, in connection with the Project naming Principal as principal and Obligee as obligee (collectively, the “Bonds”).

C. Pursuant to Section 4 of the Contract, Principal was required to complete all the Project on or before April 30, 2018.

D. On or about January 21, 2019, Principal informed Obligee that it was financially unable to complete the performance of its work on the Project and to comply with its contractual obligations and irrevocably and voluntarily abandoned performance of the Contract.

E. On or about January 23, 2019, Surety informed Obligee that it too received Principal’s January 21, 2019 voluntary termination for default letter and that Surety was evaluating the Project to identify Surety’s obligations.

F. On or about February 19, 2019, Obligee disclosed to Surety that the work identified in **Exhibit A** remains uncompleted at the Project (the “Work”).

G. Surety is willing to undertake and arrange for the performance of the Work pursuant to the terms of this Agreement, including the warranty provisions in the Contract.

In consideration of the agreements and undertakings set forth below and for other good and valuable consideration, the receipt and adequacy of which is hereby acknowledged, the Parties agree as follows:

### AGREEMENTS

1. **Performance of the Work.** Surety agrees to undertake and arrange for the performance of the Work identified in **Exhibit A** hereto in satisfaction of its obligations under the Performance Bond. Obligee acknowledges that Surety is acting in its capacity as surety for Principal in undertaking and arranging for the performance and completion of the Contract, and not as a completing contractor or a design professional. For purposes of completion of the

Contract, except as may otherwise be provided in this Agreement, Surety is entitled to all rights, title, and interest of Principal in and to the Contract in all respects as if Surety were the original party to the Contract. The term "Contractor" as used in the Contract shall be deemed, after the Effective Date, to refer to Surety rather than Principal.

2. **Completion Contractor.** Surety shall undertake and arrange for the performance of the Work pursuant to a Completion Agreement with RBH Construction, Inc. ("Completion Contractor"), who currently holds valid Contractor's licenses issued by the State of California, Contractors' State License Board, in accordance with division 3, chapter 9, of the Business and Professions Code and in the classification called for in the Contract Documents. Completion Contractor and all subcontractors of any tier currently are registered as public works contractors with the Department of Industrial Relations, State of California, in accordance with Labor Code section 1771.1. Obligee hereby consents to Surety's selection of Completion Contractor with the aforementioned conditions. Surety reserves the right, in its sole discretion, to terminate or alter its agreement with Completion Contractor, or to engage a new or supplemental Completion Contractor to perform the Work. Insurance obligations under the Contract will be deemed met upon Surety providing satisfactory evidence of the required insurance coverage carried by Completion Contractor(s), with Surety and Obligee being named as additional insureds under the policy or policies.

3. **Contract Balance.** Obligee represents and warrants that as of the Effective Date:

(a) The total authorized amount of the Contract, including all additions and deductions is One Hundred Ninety Five Thousand, One Hundred Twenty-Five and 00/100 Dollars (\$195,125.00).

(b) Principal has been paid the sum of One Hundred Forty Nine Thousand, Eight Hundred Fifteen and 00/100 Dollars (\$149,815.00).

(c) The "Contract Balance" shall be hereinafter defined as the sum of Forty Five Thousand, Three Hundred Ten and 00/100 Dollars (\$45,310.00) (subsection (a) minus subsection (b)). The Contract Balance shall be adjusted as a result of any change order executed by the Parties after the Effective Date.

(d) Within the Contract Balance, Obligee is currently holding the sum of Seven Thousand, Eight Hundred Eighty Five and 00/100 Dollars (\$7,885.00) in retainage pursuant to the Contract, which sum is included in the Contract Balance.

4. **Payment of the Contract Balance and Costs to Complete.** Obligee agrees that the Contract Balance is dedicated to and shall be paid to Surety for completion of the Work in accordance with the Contract and this Agreement. The payment of the Contract Balance to Surety shall be made in accordance with the terms and conditions of the Contract and this Agreement as to the time, amount, and method of payment. No payment shall be delayed by reason of any prior breach in the performance of work on the Project by Principal, unless a stop payment notice or Civil Wage and Penalty Assessment from the Department of Industrial Relations has been served on the Obligee.

All of Surety's payments relating to the completion of the Contract, less amounts that Surety receives from Obligee pursuant to this Agreement, shall be credited against the penal sum of the Performance Bond.

In no event shall Surety be liable for any sums, amounts, claims, liquidated or unliquidated damages, compensations, actual or punitive damages, penalties, assessments, fees, fines whether claimed or imposed for any reason by Obligee or any person, comptroller, entity, or federal, state, county, or municipal governmental agency or political subdivision thereof for any sum in excess of the penal sum of the Performance Bond. Nothing in this Agreement shall be deemed as, construed, or interpreted to effect or constitute a waiver of the penal sum of the Performance Bond or an increase in the liability of Surety under the Performance Bond.

5. **Payment of Prevailing Wages.** The Completion Contractor and all subcontractors shall pay all workers on all Work performed pursuant to this Agreement not less than the general prevailing rate of per diem wages and the general prevailing rate for holiday and overtime work as determined by the Director of the Department of Industrial Relations, State of California, for the type of work performed and the locality in which the work is to be performed within the boundaries of the District, pursuant to sections 1770 et seq. of the California Labor Code. This Project is subject to labor compliance monitoring and enforcement by the Department of Industrial Relations pursuant to Labor Code section 1771.4 and Title 8 of the California Code of Regulations. Contractor specifically acknowledges and understands that it shall perform the Work of this Agreement while complying with all the applicable provisions of Division 2, Part 7, Chapter 1, of the Labor Code, including, without limitation, the requirement that the Contractor and all of its Subcontractors shall timely submit complete and accurate electronic certified payroll records as required by the Contract Documents, or the District may not issue payment.

6. **Use of Equipment and Materials.** Surety and Completion Contractor shall be responsible to furnish all labor, equipment, and materials necessary to complete the Project. Obligee agrees that Surety and Completion Contractor shall have the right to use, without charge, any of the equipment, materials, and appurtenances furnished or supplied to or fabricated for the Project, wherever located. Obligee shall have no affirmative obligation to provide equipment, materials, and appurtenances for the Project not in the possession of Obligee as of the Effective Date of this Agreement.

7. **Time for Performance.** Time is of the essence for all work under this Agreement. Performance of the Work shall be completed pursuant to section 9.11 of the Contract Documents within 45 days of the Effective Date of this Agreement (the "Completion Date"). Obligee hereby grants to Surety a non-compensatory time extension from the original completion date in the Contract until the Completion Date. As consideration for the non-compensatory time extension, Surety, for itself and on behalf of Principal, hereby waives any right to any claim for any additional time extensions and/or damages as a result of any delays that may have been caused by Obligee up to and including the Effective Date. Surety and Completion Contractor shall have the right to preform the Work during holidays or in any manner requiring overtime, provided such Work shall be at Surety's sole election and shall not result in any increase or alternation of the Obligee's payment obligations herein.

8. **Liquidated Damages.** It is hereby understood and agreed that it is and will be difficult and/or impossible to ascertain and determine the actual damage that the Obligee will sustain in the event of and by reason of Surety and Completion Contractor's delay; therefore Surety agrees that it shall pay to the Obligee the sum of Five Hundred Dollars (\$500.00) per day as liquidated damages for each and every day's delay beyond the Completion Date contemplated herein. The assessment of liquidated damages under the Contract and this Agreement may begin on the day after the Completion Date and any such assessment of liquidated damages shall *not* include any alleged delays attributable to Principal that occurred at any time prior to the Effective Date. It is hereby understood and agreed that this amount is not a penalty.

9. **Surety's Authorized Individual and Payment Procedures.** Surety may designate in writing individuals with authority to bind it (the "Authorized Individual"). Payment for the work on the Project shall be made to Surety in accordance with the payment procedures set forth in the Contract. Payments shall be remitted to:

Account Name: Nicholson Professional Consulting Inc. FBO Impact  
Construction Services Inc. Special Account

Account No.: - 026 390 7607

Wire Transfer Instructions:

Bank – Regions Bank

Bank Address – 160 Confederate Ave., Dallas, GA 30132

ABA No.: - 062005690

EFT Instructions

Bank – Regions Bank

Bank Address – 160 Confederate Ave., Dallas, GA 30132

ABA No.: - 061101375

Mailing Instructions

Nicholson Professional Consulting Inc.  
500 Sun Valley Drive, Suite H-4  
Roswell, GA 30076

10. **Notices.** All notices sent in accordance with the Contract or this Agreement shall be sent to the Party to receive such notice at the addresses set forth below or to such other address as either Party may specify in writing, and shall be presumed to have been given three (3) calendar days after mailing, provided mailing was by certified mail, with a copy transmitted by electronic mail, addressed to the intended recipient at its address set forth below:

Surety:  
By Email to:

Lin Heath at [lin@npcius.com](mailto:lin@npcius.com)  
Paul Grego at [paul.greg@zurichna.com](mailto:paul.greg@zurichna.com)  
Jason Fair at [JFair@RobinsKaplan.com](mailto:JFair@RobinsKaplan.com)

Obligee:  
By Email to:

Jason Yi at [Jason.Yi@solano.edu](mailto:Jason.Yi@solano.edu)

11. **The Payment Bond.** The Payment Bond shall remain in full force and effect in accordance with its terms and provisions. Obligee acknowledges that the total liability of Surety under the Payment Bond shall not exceed the penal sum of the Payment Bond. All Payment Bond payments properly made by Surety shall be credited against the penal sum of the Payment Bond. Nothing in this Agreement constitutes a waiver of such penal sum or an increase in the liability of Surety under the Payment Bond.

Obligee acknowledges that claims have been or may be asserted on the Payment Bond by Principal's unpaid suppliers and/or subcontractors. Unless required by law, Obligee acknowledges that it is not authorized to and agrees not to make any representations or promises regarding payment to such suppliers and/or subcontractors, and Obligee shall refer all inquiries from such suppliers and/or subcontractors with respect to payment to Surety. Surety 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 in accordance with the terms of the Payment Bond and applicable law.

12. **Rights Against Third Parties.** The Parties expressly reserve all claims, rights, remedies, and defenses they may have against any person or legal entity not a signatory hereto, including, but not limited to, Principal, and any and all suppliers, materialmen, and subcontractors.

13. **No Third Party Rights.** This Agreement is solely for the benefit of the Parties. The Parties do not intend by any provision of this Agreement to create any rights in favor of or increase the rights of any third party, nor confer any benefit or enforceable rights, under this Agreement or otherwise, upon any person or entity other than the Parties. Further, the Parties acknowledge and agree that nothing in this Agreement is intended to or shall be construed to grant or expand any rights of any third-party claimants or the liabilities or obligations of Surety under the Bonds or waive or alter any available defense or limitation against any third-party claims.

14. **Entire Agreement.** This Agreement, including the original Contract Documents, constitute the entire Agreement and understanding of the Parties hereto relating to the subject matter hereof, and shall supersede all prior or contemporaneous agreements, understandings, representations, and warranties, whether written or oral, relating to the subject matter hereof.

Each of the Parties acknowledges that the other Party, or anyone acting on behalf of the other Party has made no representations, inducements, promises, or agreements, orally or otherwise, unless such representations, inducements, promises, or agreements are expressly embodied in this Agreement.

15. **Illegality, Unenforceability, or Invalidity.** If any term or provision of this Agreement is construed or found to be void, voidable, illegal, unenforceable, or invalid, this will not affect the legality, enforceability, or validity of any of the other terms or provisions of this Agreement. The illegal, unenforceable, or invalid term or provision shall be deemed stricken and deleted, but all other terms and provisions shall nevertheless continue and be given full force and effect as if the illegal, unenforceable, or invalid terms or provisions had never been incorporated.

16. **Costs of Preparation.** Each of the Parties hereto shall be responsible for and shall pay all of its own administrative expenses incurred in connection with the negotiation, preparation, and finalization of this Agreement, including, without limitation, all legal fees and other expenses incident to the negotiation, preparation, and execution of this Agreement.

17. **Additional Actions that May be Required.** The Parties shall execute such documents and other papers and take such further actions as may be reasonably required or desirable to carry out the provisions hereof and the transactions contemplated hereby.

18. **Modifications to this Agreement.** No modification, amendment, or other alteration of this Agreement shall be effective unless mutually agreed upon in writing and executed by the Parties. Any attempted amendment or modification of this Agreement that does not comply with this Paragraph shall be deemed void.

19. **Construction.** The Recitals to this Agreement are incorporated into this Agreement and form a part of the terms and conditions of this Agreement. The provisions of this Agreement are contractual and are not mere recitals. The Parties, together with their respective attorneys if any, participated in the drafting and preparation of this Agreement. Therefore, this Agreement shall not be construed in favor of or against any Party on the basis that any such Party did or did not draft this Agreement or any attachment to it.

20. **Headings.** The headings of the sections and subsections of this Agreement are inserted for convenience only and shall not control or affect the meaning, construction, or effect of this Agreement, or any provisions hereof.

21. **Execution in Counterparts.** This Agreement may be executed in multiple counterparts, each of which shall be deemed to be an original, but all of which together shall constitute one and the same instrument.

22. **Authority.** This Agreement has been duly executed and delivered by the parties hereto and constitutes a legal, valid, and binding obligation of the parties. Each person executing this Agreement on behalf of a Party hereto represents and warrants that they have full right and authority to enter into this Agreement. The person or persons signing and executing this Agreement on behalf of the Party, or representing themselves as signing and executing this

Agreement on behalf of the Party, do hereby warrant and guarantee that he, she, or they have been duly authorized by the Party to execute this Agreement and to validly and legally bind the Party to all terms, performances, and provisions herein set forth. By their signatures below, the duly authorized representatives of the Parties accept the terms of this Agreement in full.

23. **Successors and Assigns.** This Agreement and the respective rights and obligations of the Parties shall inure to the benefit and be binding upon the successors and assigns of the Parties.

24. **Effective Date.** The Effective Date of this Agreement is the date of the last signature below.

***[REMAINDER OF PAGE LEFT BLANK INTENTIONALLY.]***

IN WITNESS HERETO, all parties to this Agreement have caused to be set their hands and seals this day and year first above written.

OBLIGEE-Solano County Community College  
District

Date Signed: \_\_\_\_\_

By: \_\_\_\_\_

Title: \_\_\_\_\_

SURETY-Fidelity and Deposit Company of Maryland

Date Signed: \_\_\_\_\_

By: \_\_\_\_\_

Title: \_\_\_\_\_

## EXHIBIT A

### Scope of work:

- 1) Plumbing:
  - Remove drinking fountain for stucco patch
  - Reinstall drinking fountain
  - Adjust flush valves and inspect plumbing fixtures
- 2) Stucco patch to match existing finish;
- 3) HVAC:
  - Install line set to exterior compressor
  - Vacuum existing lines
  - Charge system and test existing HVAC unit
- 4) Caulk Exterior Doors;
- 5) Adjust Exterior Door Closers;
- 6) Remove and Replace Vinyl Ceiling Tiles;
- 7) Flooring:
  - Remove existing 6" rubber base
  - Prep floor
  - Install commercial vinyl sheet flooring
  - Re-install 6" base and caulk
  - Paint base
- 8) Final clean.