

## **AGREEMENT**

This Agreement (Agreement) is made and entered into effective April \_\_\_, 2014 by and between Allegheny Casualty Company (ACC) and the County of San Bernardino, California (County) (collectively, Parties).

### **RECITALS:**

A. On or about May 8, 2012, STI, Inc. (STI) and the County entered into a construction contract (Contract) in which STI agreed to furnish all labor, material and equipment to perform Construction on Fifth Avenue at Walnut Street, Mentone Area (Project). The Contract, together with all of its incorporated documents including but not limited to: the original bid documents, plans, specifications, modifications, and any executed change orders and amendments, is incorporated into and made a part of this Agreement by reference for all purposes allowed by law.

B. The amount of the Contract was \$1,026,309.64. Per Pay Application 10, with the quantities adjusted, the final contract price is \$939,298.40. The County has previously paid a total of \$609,374.31 to STI. The Remaining Contract Balance after payments to STI and subtraction of the liquidated delay damages is \$325,924.09.

C. As required under the terms of the Original Contract, STI and ACC made, executed and delivered to the County Performance Bond and Payment Bonds, Bond Number 0553870 (collectively, Bonds). The Performance Bond was issued in the penal sum of \$1,026,309.64. The Payment Bond was issued in the penal sum of \$1,026,309.64. Copies of the Performance Bond and Payment Bond are attached hereto as Exhibits A and B, respectively, and incorporated herein by reference.

D. STI defaulted under the Contract by failing to pay when due its subcontractors and suppliers on the Project. Certain subcontractors and suppliers of STI filed Stop Payment Notices with the County and claims under the Payment Bond against ACC. ACC has investigated the Payment Bond claims and, as of the date of this Agreement, ACC has paid a total of \$659,317.03 to resolve the claims and get the related Stop Notices released.

E. All Stop Payment Notices have been released with the exception of the following two (2) Stop Payment Notices: 1) Johnson Rentals Services (Johnson), dated April 12, 2013, in the amount of \$5,545.48, and 2) Diversified Asphalt Products, Inc. (Diversified), dated April 30, 2013, in the amount of \$1,664.00. In accordance with California Civil Code section 9200, a complete work stoppage on a public work of improvement for sixty (60) continuous days constitutes a "cessation" of labor and a "completion" of the Project. Both ACC and County have independently determined that a cessation of work and completion of the Project occurred on or about April 26, 2013. Pursuant to California Civil Code sections 9356 and 9502, both ACC and County have independently determined that the last day Johnson and Diversified could have filed a lawsuit against the County and ACC to enforce their respective Stop Payment Notice was on or about October 23, 2013. As of the execution date of this

Agreement, neither ACC nor County is aware of such a lawsuit having been filed by Johnson or Diversified.

F. The California Department of Industrial Relations, Division of Labor Standards Enforcement, by notice dated February 20, 2013, advised County to hold \$594,551.61 due to the alleged failure of STI to pay proper rates to some employees working on the Project. The County withheld these funds. On or about January 27, 2014, the Division of Labor Standards Enforcement released the subject hold.

G. STI also defaulted under the Contract by failing to provide plant maintenance. In response to demand by the County under the Performance Bond, ACC also arranged for performance of work under the Contract relating to plant maintenance. However, one Palm Tree, which was relocated by STI under the Contract, died and the County has demanded ACC replace the Palm Tree pursuant to its obligations under the Performance Bond and underlying Contract.

H. ACC has notified the County of its priority rights to the Remaining Contract Balance as a partial offset to ACC's losses under the Bonds.

I. ACC has supplied the County with a copy of the Agreement of Indemnity (AI) executed by STI in favor of ACC, dated November 9, 2011, which, inter alia, provides that STI assigned to ACC all rights of STI growing out of the bond projects, including this Project. ACC claims it has a priority right to the Remaining Contract Balance based on its rights under the AI and generally pursuant to the surety's equitable right of subrogation.

NOW, THEREFORE, in consideration of the agreements and undertakings hereinafter set forth, based on the Recitals set forth above which form a part of this Agreement, and for other good and valuable consideration, the receipt and adequacy thereof being hereby acknowledged, the County and the ACC agree as follows:

## **AGREEMENT**

1. Within 30 days of the receipt of the executed Agreement from ACC, the County agrees to make payment to the order of ACC the Remaining Contract Balance in the amount of Three Hundred Twenty Five Thousand, Nine Hundred Twenty Four Dollars and Nine Cents (\$325,924.09). This amount reflects a deduction of Four Thousand Dollars and No Cents (\$4,000.00) to be retained by County to pay for liquidated delay damages incurred by County under the Contract. Upon receipt of the Remaining Contract Balance from County, ACC, with the exception of its rights and defenses under the Payment Bond in response to any future claims under the Bonds, releases all claims that it has against County related to the Project.

2. For and in consideration of the above, County does hereby expressly releases, exonerates and discharges ACC of and from any and all claims, rights, demands and/or causes of

action of whatsoever kind or nature which County has or may ever claim to have, now or in the future, against ACC under and/or by reason of the Performance Bond previously furnished to County, with the sole exceptions of claims that County has asserted or may assert under the Contract and the Performance Bond (Remaining Claims) as follows:

- a) Replacement of the dead Palm Tree. Replacement of the dead Palm Tree shall be at no additional charge to County. Replacement includes the removal of the dead Palm Tree and replanting one healthy Palm Tree (Replacement Palm Tree) in its place, which must be of size (height), type, and location, as called for under the Contract and related specifications, within a reasonable time after the Agreement is executed and the County makes payment to ACC as specified in Paragraph 1 of the Agreement. As the plant establishment/maintenance period under the Contract has expired, the County will take over maintenance and care of the Replacement Palm Tree immediately upon completion of its planting/installation. Any warranty provided by the Completion Contractor (defined later herein) providing the Replacement Palm Tree shall inure to the benefit of the County and ACC will assign any of its rights concerning the warranty on the Replacement Palm Tree to the County. Completion Contractor will provide evidence to the County that it has paid any worker employed in work required in this paragraph prevailing wages as required under California law. Completion Contractor will apply for and obtain from the County any required permit necessary to complete the work called for under this paragraph.
- b) Claims for latent defects and/or warranty work not presently known to the County pursuant to the obligations of ACC under the Performance Bond.
- c) Stop Payment Notice claims, as more fully set forth in paragraph 3.

County expressly reserves all rights to assert the Remaining Claims against the ACC. ACC expressly reserves its defenses to the Remaining Claims by County. Otherwise, this Agreement is a settlement of all of County's claims, including, but not limited to, those for potential, actual, or liquidated delay damages, and administrative expenses asserted or which may be asserted against the Performance Bond furnished by ACC on behalf of STI for the Project.

3. The Payment Bond remains in full force and effect for work performed by STI under the Contract and ACC retains all obligations, rights and defenses pursuant to the Payment Bond and relevant law. ACC agrees to indemnify, defend and hold harmless County from any claim, lien, suit, damage, liability or demand from STI or any other person or entity arising from County's compliance with the terms of this Agreement, including, but not limited to, County's release of the Remaining Contract Balance to ACC, except only to the extent required otherwise by California law. Except for attorney fees and court costs necessary for ACC to defend the County against such claims of STI, this agreement to indemnify, defend and hold harmless is expressly limited to the amount released to ACC per the terms of this Agreement, and is limited by the terms and conditions of the Performance Bond.

4. County acknowledges that ACC, by its execution of this Agreement, is acting in its capacity as Surety for STI in making arrangements for the performance and completion of the Contract's warranty provisions as set forth in Paragraph 2(a) above, and not as a completing

contractor, and that ACC is not assuming any obligations or liabilities beyond those set forth in the Bonds. County acknowledges that ACC will arrange for the performance of this work called for under Paragraph 2(a) of this Agreement through a competent, licensed and qualified contractor approved by County (Completion Contractor). ACC may satisfy the required insurance obligations under the Contract by providing evidence of the required insurance coverage carried by the Completion Contractor. No contractual relationship shall exist between County and the Completion Contractor. Except as otherwise described herein, all communications concerning matters of contract administration shall be communicated to the Completion Contractor, in writing, with a copy forwarded to ACC.

5. The Parties hereby confirm that this Agreement constitutes the entire terms of their agreement and further acknowledge that they have read and understand this Agreement constitutes, with the sole exception of claims detailed under Paragraph 2, subparagraphs (a) through (c), a full, complete and final settlement and release of all claims arising under the Performance Bond.

6. If any provision of this Agreement is found to be invalid, all of the other provisions will remain in full force and effect. The Parties stipulate that this Agreement, and all agreements or documents incorporated herein, shall not be subject to the rule of construction that a written agreement is construed against the Party preparing or drafting that Agreement.

7. Each Party has been represented by experienced and knowledgeable legal counsel of their own choosing. Each Party further acknowledges that they have not been influenced to any extent whatsoever in executing this Agreement by any other Party or by any person representing them, or both.

8. To the extent that the foregoing releases are releases to which Section 1542 of the California Civil Code or similar provisions of other applicable law applies, it is the intention of the Parties that, with the exception of Paragraph 2, subparagraphs (a) through (c), the foregoing releases shall be effective as a bar to any and all actions, fees, damages, losses, claims, liabilities and demands of whatsoever character, nature and kind, known or unknown, suspected or unsuspected specified herein. In furtherance of this intention, the Parties expressly waive any and all rights and benefits conferred upon them by the provisions of Section 1542 of the California Civil Code or similar provisions of applicable law which read as follows: "A GENERAL RELEASE DOES NOT EXTEND TO CLAIMS WHICH THE CREDITOR DOES NOT KNOW OR SUSPECT TO EXIST IN HIS OR HER FAVOR AT THE TIME OF EXECUTING THE RELEASE, WHICH IF KNOWN BY HIM OR HER MUST HAVE MATERIALLY AFFECTED HIS OR HER SETTLEMENT WITH THE DEBTOR." The Parties acknowledge that the foregoing waiver of the provisions of Section 1542 of the California Civil Code was bargained for separately. Thus, notwithstanding the provisions of Section 1542, and for the purpose of implementing a full and complete release and discharge of ACC, the Parties expressly acknowledge that this Agreement is intended to include in its effect without limitation all of the claims, causes of action and liabilities which the Parties, and each of them, do not know or suspect to exist in their favor at the time of execution of this Agreement, and this Agreement contemplates extinguishment of all such claims, causes of action and liabilities.

9. Parties shall bear their own attorneys' fees and costs in connection with this Agreement, except as allowed under Paragraph 14 below.

10. Except as otherwise expressly provided herein, including but not limited to the releases extended to Parties who are not signatories to this Agreement, nothing in this Agreement is intended to confer upon any Party other than the Parties and their respective successors and assigns any rights, remedies, obligations, or liabilities under or by reason of this Agreement.

11. Except as otherwise set forth in this Agreement, the Parties, and each of them, shall not assign or delegate to any other person this Agreement or any rights or obligations under this Agreement. Subject to any restriction on transferability contained in this Agreement, this Agreement shall be binding upon and shall inure to the benefit of the successors-in-interest and assigns of the Parties hereto, and each of them. Nothing in this Paragraph shall create any rights enforceable by any person other than the Parties, except for the rights of the successor-in-interest and assigns of the Parties, unless such rights are expressly granted in this Agreement to other specifically identified persons.

12. The Agreement involves the settlement and compromise of disputed claims and does not constitute an admission of liability by any of the Parties to this Agreement.

13. The Parties acknowledge that they might hereafter discover facts different from or in addition to those they now know or believe to be true with respect to a claim or claims released herein, and they expressly agree to assume the risk of possible discovery of additional or different facts, and agree that this Agreement shall be and remain effective in all respects regardless of such additional or different discovered facts, or any change in circumstances.

14. This Agreement is made and entered into in the State of California and shall in all respects be interpreted, enforced, and governed under the laws of the State of California as if entirely performed within the State of California. California law shall apply without regard to any conflict of laws. The language in all parts of this Agreement shall in all cases be construed as a whole according to its fair meaning and not strictly for or against any of the Parties. Any Party may bring an action or proceeding against another Party to enforce any of the terms of this Agreement, and the prevailing Party shall be entitled to an award of reasonable attorneys' fees and costs.

15. The Parties each represent and warrant that as of the Effective Date of this Agreement, each person(s) executing this Agreement for the Parties is fully competent, and duly authorized to do so, and thereby bind his or her Party, and each of its past, present and future employees, directors, officers, shareholders, partners, principals, subsidiaries, affiliates, agents, representatives, predecessors, successors and assigns.

16. The Parties each warrant and represent to each other that, as of the date of this Agreement, each is the sole and lawful owner of all right, title, and interest in and to all of the respective released matters and that neither has heretofore voluntarily, by operation of law or otherwise, sold, assigned, transferred or otherwise conveyed to any person or entity any released matter or any claims, rights, causes of action, duties, obligations, liabilities or damages that they had, have, or may have in the future, in regards to the Contract.

17. Each Party will cooperate and diligently perform any further acts, deeds and things and execute and deliver any documents that may from time to time be reasonably necessary or otherwise reasonably required to consummate, evidence, confirm and/or carry out the intent and provisions of this Agreement, all without undue delay or expense and without further consideration.

18. This Agreement is the entire agreement among the Parties with respect to the subject matter hereof. This Agreement includes all of the terms, promises, representations and understandings made by the Parties, and supersedes any earlier written or oral understandings or agreements between the Parties. No Party hereto nor its respective attorneys or advisors or agents have made any promise, representation or warranty, whether expressed, implied or statutory, not contained herein concerning the subject matter of such agreements in order to induce the Parties hereto to execute this Agreement. Any and all modifications to this Agreement shall be in writing and signed by each of the Parties.

19. This Agreement may be executed in counterparts by facsimile, electronic or PDF signature by any Party hereto. All such signatures shall be deemed to be valid as original signatures for all purposes.

20. If any clause or provision of this Agreement is held to be illegal, invalid or unenforceable under any law applicable to the terms hereof, then the remainder of this Agreement shall not be affected thereby.

21. The Parties hereby covenant that they have not filed, and shall not cause to be filed, prosecuted, or pursued, and shall not assist others in pursuing, any claim, lawsuit or other proceeding relating to the Project against any other Party on their own behalf or in a representative capacity on behalf of any other person or entity with respect to the claims released herein.

22. Each Party agrees that time is of the essence in its performance under this Agreement, and each Party agrees to use its best efforts to promptly perform all obligations hereunder.

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

Dated: April \_\_, 2014

County of San Bernardino

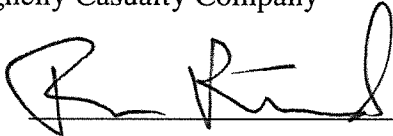
By: \_\_\_\_\_

\_\_\_\_\_

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

Dated: April 4, 2014

Allegheny Casualty Company

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

Ronald Ritland \_\_\_\_\_

Title: Senior Claim Counsel \_\_\_\_\_