

## **TENDER AND RELEASE AGREEMENT**

THIS TENDER AND RELEASE AGREEMENT regarding Henderson County Board of Education, Spottsville, Kentucky Bid Package #16: Electrical/Data/Voice Cabling IBB ("Agreement") is made and entered into this \_\_\_\_ day of February, 2018, by and between the Henderson County Board of Education (the "Board"), and The Hanover Insurance Company ("Hanover") (collectively, the "Parties").

### **RECITALS**

WHEREAS, PPMI Construction Company ("Former Contractor or PPMI") and the Board entered into a contract on or about October 24, 2016 (the "Prime Contract") for PPMI to furnish labor, services and materials to construct the Spottsville Elementary School- Spottsville, Kentucky Bid Package #16: Electrical/Data/Voice Cabling IBB (the "Project") in accordance with the terms and provisions of the Prime Contract, including all documents forming a part of the Prime Contract.

WHEREAS, Hanover, as surety for PPMI, executed Performance and Payment Bonds in favor of the Board, Bond Nos. 1030512 (collectively, the "Bonds"), each in the penal sum of \$226,404.00.

WHEREAS, PPMI has advised that it is unable to complete the Project and has tendered to the Board and to Hanover a Voluntary Letter of Default and Termination, declaring it to be in default of the performance of the Prime Contract.

WHEREAS, on July 28, 2017 by email, U.S. mail and certified mail Hanover provided the Board with a copy of PPMI's Voluntary Letter of Default and Termination. Further, on August 2, 2017, Hanover and Board representatives met on site to inspect the Project and to discuss plans on how best to proceed under the provisions and conditions of the Performance

Bond, to arrange for the completion of all required work that remains to be performed under the Prime Contract.

WHEREAS, the Parties agree that the following is an accounting under the Prime Contract and sets forth the remaining contract balance including for the direct purchase orders (“DPOs”) as set forth:

<b>BP 16 - Electrical/Data/Voice Cabling</b>	
<b>PPMI Contract</b>	
133,445.29	Original Contract Value
-	Approved Change Orders
133,445.29	Current Contract Value
12,115.64	Paid for Work thru 20Feb17 - Pay App 2
<b>121,329.65</b>	<b>Remaining Contract Balance</b>
<b>Direct Purchase Orders</b>	
28,816.00	Wesco DPO
-	Paid thru 31Dec17
<b>28,816.00</b>	<b>Remaining Wesco DPO Balance</b>
64,142.71	SWC DPO
-	Paid thru 31Dec17
<b>64,142.71</b>	<b>Remaining SWC DPO Balance</b>

WHEREAS, PPMI is unable to complete its obligations under the Contract and Hanover has tendered to the Board a completion contractor, State Electric Company, Inc. (“State Electric” or the “Completion Contractor”), and arranged for the Board to enter into an agreement with State Electric (“Completion Agreement”), under which State Electric will: (a) complete the remaining

work to be performed under the Prime Contract for the following pricing:

<b>BP 16 - Electrical/Data/Voice Cabling</b>	
275,558.51	SEC Completion Price as of 16Feb18
64,142.71	Bal of SWC Gym Sound DPO as of 16Feb18
28,816.00	Bal of Wesco DPO as of 16Feb18
89,348.21	Bal of SWC Data Pkg DPO as of 16Feb18

(the “Completion Price”), (b) warrant all of its and PPMI’s work including any work which could be considered latent defective work, and (c) furnish to the Board performance and payment bonds issued by Great American Insurance Company, which bonds will guarantee State Electric’s performance and the payment of all labor, services, materials, equipment or supplies furnished by or through State Electric.

WHEREAS, Hanover has agreed to pay the Board the difference between the Remaining Contract Balance in PPMI’s Contract of \$121,329.65 and State Electric’s Completion Price of \$275,558.51 plus the Balance of the SWC Data Package DPO of \$89,348.21 as a cash settlement of the Board’s claims which have been asserted against Hanover’s Performance Bond associated with the Project.

WHEREAS, the tender proposal and cash settlement offer set forth in this Agreement is acceptable to the Board, and the Parties desire to document the terms of their agreement as set forth in this Agreement.

NOW THEREFORE, in consideration of the agreements and undertakings hereinafter set forth, and for other good and valuable consideration, the receipt and adequacy being hereby acknowledged, the Board and Hanover agree as follows:

## **TERMS OF AGREEMENT**

1.     Recitals. The recitals set forth above are true and correct and are incorporated herein by reference.

2.     Work Performed by Former Contractor. The Board agrees that, as of the date of this Agreement, all work performed on, and materials incorporated into, the Project by PPMI with respect to Bid Package #16: Electrical/Data/Voice Cabling IBB are to the best of the Board's actual knowledge in accordance with the Contract terms and are acceptable to the Board except for such latent conditions resulting from omissions, oversights and errors by PPMI, if any, that ordinarily would not be discoverable by inspection at this stage of the construction, and have not been discovered by or made known to the Board. As of the date of this Agreement, the Board has no actual knowledge of any latent defects in the work performed by PPMI on the Project.

3.     Completion Agreement. Surety hereby tenders the services of State Electric to the Board, a contractor acceptable to the Board and the Board agrees to contract directly with State Electric for completion of the Project.

4.     Entry Into Completion Agreement. The Board will finalize and enter into a Completion Agreement with State Electric for the completion of the Project in compliance with the "Contract Documents", as defined herein, on or about the date of this Agreement for a Completion Price of State Electric's Completion Price of \$275,558.51 (not including the DPOs as set forth above) subject to adjustments as provided in this Agreement. As used in this Agreement, the term "Contract Documents" means: (i) the Completion Agreement, (ii) the bid package and all of the bid documents described in the original bid package and any current or

pending Change Orders; (iii) the Completion Contractor's Bid Proposal dated August 17, 2017; (iv) PPMI's Contract with the Board, including all drawings, specifications, forms, addenda and documents forming a part of the Contract, and any modifications to the Contract, and (v) this Agreement.

5. Accounting of Contract Balance. The Parties agree that the contract accounting resulting in the Balance of the Contract Price is as follows:

<b>BP 16 - Electrical/Data/Voice Cabling</b>	
<b>PPMI Contract</b>	
133,445.29	Original Contract Value
-	Approved Change Orders
133,445.29	Current Contract Value
12,115.64	Paid for Work thru 20Feb17 - Pay App 2
<b>121,329.65</b>	<b>Remaining Contract Balance</b>
<b>Direct Purchase Orders</b>	
28,816.00	Wesco DPO
-	Paid thru 16Oct17
<b>28,816.00</b>	<b>Remaining Wesco DPO Balance</b>
64,142.71	SWC DPO
-	Paid thru 16Oct17
<b>64,142.71</b>	<b>Remaining SWC DPO Balance</b>

The Board shall devote the Remaining Balances as set forth in this paragraph to the completion of the Project.

6. Payment by Surety. In exchange for this Agreement and the Board's release of

Hanover under Hanover's Bond No. 1030512, Hanover shall pay the Board \$243,577.07 (the "Settlement Payment") (which amount represents the difference between the Remaining Contract Balance in PPMI's Contract of \$121,329.65 and State Electric's Completion Price of \$275,558.51 plus the Balance of the SWC Data Package DPO of \$89,348.21) within fourteen (14) days of the execution of this Agreement. The Board shall execute and provide a purchase order to SWC in the amount of \$89,348.21 for the Balance of the SWC Data Package DPO along with a copy of the tax exemption certificate for the Henderson County Board of Education. The Board acknowledges that, upon Hanover's tender of the Settlement Payment to the Board, the present penal amount of Hanover's Performance Bond of \$226,404.00 is reduced to zero (based on original amount of the bond (\$226,404.00) less the Balance of the Contract Price including balance of the remaining DPOs (\$214,288.36) and less the Settlement Payment (\$275,558.51)).

7. Bonds from Completion Contractor. State Electric shall provide payment and performance bonds as required by the Contract Documents, naming the Board and Hanover as dual obligees, in the amount of the Completion Price agreed to by State Electric.

8. Project Administration. After the Board's execution of the Completion Agreement, administration and inspection of the Project will remain with the Board and its construction professionals, agents and inspectors in accordance with the terms of the Contract.

9. The Board's Release of Hanover. In exchange for the agreements set forth herein and the Settlement Payment referenced in paragraph 6 above, the Board hereby releases, acquits and forever discharges Hanover and its officers, directors, shareholders, employees, parent companies, sibling companies, affiliated companies, reinsurers, successors and assigns, agents, consultants and attorneys of and from any and all claims, rights, demands and/or causes of action of whatsoever

kind or nature that the Board has or may ever claim to have, now or in the future, against Hanover under and/or by reason of its Performance Bond 1030512 furnished to the Board. Upon execution of the Completion Agreement by State Electric, the Board agrees that the Board's sole remedy for any breach by State Electric of its performance obligations and/or breach under the Completion Agreement is against State Electric or State Electric's surety. It is acknowledged by the Parties that Hanover will not and does not assume responsibility for the completion contractor, State Electric's work, for payments of any kind under the Completion Agreement, or for previous payments made by the Board to PPMI under the Contract.

10. Continued Effect of Surety's Payment Bond. Hanover acknowledges and agrees that the payment bond it furnished for the Project remains in full force and effect in accordance with its original terms, except that it is expressly agreed by and between Hanover and the Board that the Payment Bond does not apply to or cover the Completion Contractor or any of its subcontractors and suppliers for any work performed and/or materials delivered after the date of this Agreement.

11. The Board's Assignment of Claims Against Former Contractor. In further consideration for Hanover's payment to the Board, the Board hereby transfers, quitclaims and assigns to Hanover, its successors and assigns any and all rights, demands, claims and/or causes of action that the Board now has against PPMI arising out of, as a result of and/or on the basis of the default and breach by PPMI of the original contract for the Project, and the Board gives Hanover, its successors and assigns full power and authority for its own use and benefit, but at its own cost, to ask, demand, collect, receive, compound and/or release, and in its name or otherwise, to prosecute and withdraw any claims, suits or proceedings at law or in equity as against PPMI in its efforts to obtain recovery upon its rights under said assignment. Except as specifically provided in

this paragraph, the Board represents and warrants that it has not sold, assigned, granted, conveyed or transferred to any person, firm, or entity any of the claims, demands or causes of action referred to in this Agreement that it now owns or holds, or has owned or held, or may own or hold against Former Contractor or Hanover.

12. Notices. Any notices required to be given by the terms of this Agreement, the Bonds or the Prime Contract shall be made *via* email and certified mail, return receipt requested, postage prepaid to:

To Hanover: The Hanover Insurance Company  
Attention William Sanford  
Surety Claims Counsel- Bond Claims  
440 Lincoln Street  
Worcester, MA 01653  
(508) 855-2237  
Email: [wsanford@hanover.com](mailto:wsanford@hanover.com)

With a copy to:  
Michael J. Weber  
Grace Winkler Cranley  
Dinsmore & Shohl, LLP  
227 West Monroe St., Suite 3850  
Chicago, IL 60606  
(312) 372-6060  
Email: [michael.weber@dinsmore.com](mailto:michael.weber@dinsmore.com)  
[grace.cranley@dinsmore.com](mailto:grace.cranley@dinsmore.com)

To the Board:  
Marganna Stanley, Superintendent  
Henderson County Board of Education  
1805 Second Street  
Henderson, KY 42420  
[marganna.stanley@hendersonkyschools.us](mailto:marganna.stanley@hendersonkyschools.us)



With a copy to:

Elizabeth Bird  
Stoll Keenon Ogden PLLC  
One Main Street, Suite 201  
Evansville, IN 47708  
(270) 869-6411  
Email: [Elizabeth.Bird@skofirm.com](mailto:Elizabeth.Bird@skofirm.com)

13. No Third Party Beneficiaries. The Parties do not intend by any provision of this Agreement to create any third-party beneficiaries nor to confer any benefit upon or enforceable rights or otherwise upon any person, firm or entity other than the Parties hereto.

14. Reservation of Rights. By this Agreement, Hanover does not waive PPMI's rights, claims or defenses (whether related to the Project or not) that PPMI may have against any person, firm or entity including, without limitation, the Board. The Board likewise reserves all rights, claims and defenses it may have against PPMI. Moreover, nothing in this Agreement shall be deemed to waive, alter, limit, modify or abridge any of Hanover's rights, claims or defenses (whether related to the Project or not) against any person, firm or entity under the Bonds, the law, agreements of indemnity, or otherwise. All of the rights, claims and defenses referenced in this paragraph are expressly reserved.

15. Continued Effect of Agreement of Indemnity. The Agreement of Indemnity between Hanover and PPMI (and certain individuals identified therein), and any amendments or modifications thereto, remain in full force and effect, and nothing in this Agreement shall be deemed to waive, alter, limit, modify, or release any of Hanover's rights, claims, defenses or anything whatsoever under such Agreement of Indemnity.

16. General Provisions.

(a) This Agreement contains contractual obligations and not mere recitals.

- (b) This Agreement may be executed in counterparts, each of which shall be fully effective as an original and all of which together shall constitute one and the same instrument.
- (c) Facsimile and electronic signatures may be treated as originals for all purposes.
- (d) The remedies of the Parties hereto provided herein are cumulative and concurrent, and may be pursued singly, successively or together, at the sole discretion of the aggrieved party, and may be exercised as often as occasion therefor shall arise.
- (e) This Agreement shall be construed and enforced in accordance with the laws of the State of Kentucky. Neither party in any arbitration, mediation, or litigation arising out of this Agreement shall be entitled to recover from the non-prevailing party its attorneys' fees incurred therein and on appeal therefrom.
- (f) This Agreement constitutes the complete and final expression of the agreement of the Parties relating to the subject matter contained herein and supersedes all previous contracts, agreements, and understandings of the Parties, whether oral or written.
- (g) If any provision or term of this Agreement is deemed to be illegal or unenforceable in any respect, such provision or term shall not affect any other provision or term hereof, and this Agreement shall be construed as if the provision or term had never been contained herein.

- (h) The Parties agree to cooperate fully to execute any and all supplementary documents and to take all additional actions that may be necessary or appropriate to give full force and effect to the basic terms, conditions, and intent of this Agreement.
- (i) The Parties agree to bear their own attorneys' fees and costs incurred in all matters that led to the entry of this Agreement.
- (j) This Tender and Release Agreement is binding upon the Parties and their respective successors, assigns and privies.
- (k) This Agreement shall not in any way be amended or modified without the written consent of both Parties.
- (l) The Parties acknowledge that they are and have been represented by counsel in connection with the negotiation of this Agreement, that the provisions of this Agreement and the legal effect thereof have been fully explained to them, and that they have entered into this Agreement freely and voluntarily and without coercion or undue influence.

**THE SIGNATORIES TO THIS AGREEMENT ACKNOWLEDGE THAT THEY HAVE READ THE FOREGOING AGREEMENT, FULLY UNDERSTAND ITS TERMS AND CONDITIONS, AND AGREE TO BE BOUND BY ALL OF ITS TERMS AND CONDITIONS.**

**HENDERSON COUNTY BOARD OF  
EDUCATION**

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

Name: \_\_\_\_\_

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

**HANOVER INSURANCE COMPANY**

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

Name: \_\_\_\_\_

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