

TRIPARTITE TENDER AGREEMENT

THIS TRIPARTITE TENDER AGREEMENT (“Agreement”) is made this day of _____, 2024, between The Ohio Casualty Insurance Company (hereinafter referred to as “Surety”), Indian River County (hereinafter referred to as “Owner”) and Proctor Construction Company, LLC (hereinafter referred to as the “Completing Contractor”). (Surety, the Owner and Completing Contractor are sometimes collectively referred to in this Agreement as the “Parties”).

RECITALS

WHEREAS, the Owner entered into a contract with Intertech Construction Corporation of America (“Original Contractor”) for the project known as Fire Station 11 Remodel, Contract No. 2022061 (the “Project”), which is referred to herein as the “Original Contract;”

WHEREAS, the Original Contract obligated Original Contractor to furnish certain labor, services, materials, and equipment in connection with the performance and completion of the Project;

WHEREAS, in connection with the Project, Surety issued a Public Construction Bond on behalf of Original Contractor, as principal, and in favor of the Owner, as obligee, bearing bond number 964227542 and containing a penal sum (the “Penal Sum”) in the amount of \$260,470.00 (the “Bond”). Surety acknowledges that the Penal Sum has been increased to \$474,941.00 to reflect the corresponding increase to the Contract by changes agreed to between Owner and Original Contractor;

WHEREAS, the Owner claims that Original Contractor defaulted on its obligations on the Project, has asserted delay claims against the Original Contractor, has terminated the Original Contractor’s right to complete the Project, and has made demand on Surety under the Bond;

WHEREAS, the Original Contractor has disputed the termination and has alleged claims against the Owner, and the Parties agree that nothing herein shall waive the rights of the Original Contractor or Surety against the Owner or the Owner’s defenses to any claim by the Original Contractor or Surety;

WHEREAS, without any admission of liability, Surety has elected to produce and tender to the Owner, the Completing Contractor, who is acceptable to Owner; and Completing Contractor warrants that it is ready, willing and able to perform and complete all of the work required to be performed under the aforementioned Original Contract as amended, all in accordance with the plans and specifications for the construction of the Project, as set out and as modified (including modifications as to new agreed completion

dates) in the Completion Contract with the Owner, as defined below, and has procured a Public Construction Bond acceptable to Owner in the full amount of the Completion Contract naming Owner as obligee and Surety as additional obligee.

NOW THEREFORE, in consideration of the promises and the mutual covenants set forth herein, and for other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, the Parties agree as follows:

TERMS OF AGREEMENT AND RELEASE

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

2. **Contract Balance.** The Owner represents and warrants that the current undisputed Contract Balance held by the Owner is \$171,871.68 (the “Undisputed Contract Balance”), calculated as follows:

Original Contract amount:	\$260,470.00
Approved Modifications:	\$255,830.26
Revised Contract Amount:	\$516,300.26
Less Payments:	<u>(\$344,428.58)</u>
Contract Balance:	\$171,871.68

The Owner agrees to dedicate the Undisputed Contract Balance to the completion of the Original Contract.

3. **Completing Contractor.** Surety hereby tenders and Owner hereby accepts the Completing Contractor to perform the remaining work under the Original Contract. The Owner shall directly contract with the Completing Contractor to perform the remaining work under the Original Contract (the “Completion Contract”) for the sum of \$451,512.00 (the “Completion Contract Sum”). The Completing Contractor shall furnish to the Owner a Public Contract Bond for the Completion Contract in the penal sum of \$451,512.00, which represents 100% of the total bid price for the Completion Contract. The Owner agrees that Completing Contractor shall have 90 days from issuance of a notice to proceed by the Owner to complete the work under the Completion Contract. Owner acknowledges that certain items, specifically the air handler and vent hood, may have lead times that would necessitate a longer period than 90 days for final completion. Owner agrees to work with Completing Contractor to ascertain a reasonable finalization time based upon the availability of those items. The notice to proceed will not be delayed based on the delivery schedules. The Completing Contractor warrants and agrees that it will enter into a Completion Contract with the Owner in the form attached as **Exhibit “A”** for completion

of the Original Contract. The Completing Contractor and the Owner agree that the Surety shall have no responsibility for making any payments to the Completing Contractor, for any changes to the Original Contract, or for any claims whatsoever by the Completing Contractor, its subcontractors, laborers, materialmen and suppliers or arising out of or related to the work of the Completing Contractor, who is providing a bond to the Owner.

Surety, Owner and Completing Contractor agree that there shall be an allowance of up to \$60,000.00 for the correction of any latent defects discovered after the date of this Agreement in the work previously performed by Original Contractor (the "Latent Defect Allowance"). Surety shall not be required to fund the Latent Defect Allowance or any part thereof unless or until (1) the Surety is given notice of the latent defect and 5 (five) business days to inspect the alleged latent defect; (2) Completing Contractor provides Surety with the actual cost (materials and labor) with supporting quotations for the work; and (3) Surety approves the work under the Latent Defect Allowance, in writing, which approval shall not be unreasonably withheld and provided within three (3) days of receipt of all information. Completing Contractor agrees that its mark-up of the actual cost of work under the Latent Defect Allowance for fee/overhead/profit and general conditions shall be limited to 15% of the actual cost of the work. Within ten (10) business days of the Surety's approval of work under the Latent Defect Allowance, Surety will tender the approved amount to Owner. Owner shall be solely responsible for paying Completing Contractor for work under the Latent Defect Allowance and nothing herein shall create a direct claim by Completing Contractor against Surety.

4. Payment by Surety. Within ten (10) business days of the Owner providing to the Surety an executed copy of this Agreement, Surety shall pay to the order of the Owner, the sum of \$279,640.00 (the "Surety Payment"), which represents the difference between the Undisputed Contract Balance and the Completion Contract Sum to provide the Owner with funds to complete the Original Contract. The Surety Payment shall reduce the Penal Sum of the Bond, dollar for dollar. In addition, any payments made by the Surety under the Latent Defect Allowance shall reduce the Penal Sum of the Bond, dollar for dollar.

5. No Further Responsibility of Surety. In the event of any default by the Completion Contractor under the terms of the Completion Contract, the Owner agrees to make demand and look solely to the Completion Contractor and the Completion Contractor's Bond surety for performance of its obligations, and the Owner shall make no further demands and assert no further liability related to the Original Contract upon the Surety, except for latent defects in work performed by the Original Contractor discovered after the date of this Agreement (the "Latent Defect Reservation"). The Owner warrants that it is not currently aware of any defects or deficiencies in work performed by the Original Contractor. In no event shall the Surety's combined liability for the Surety Payment, the Latent Defect Allowance and the Latent Defect Reservation (if any) exceed the Penal Sum of the Bond. Surety reserves all defenses to the Latent Defect Reservation.

6. **Release of Surety.** Upon execution of this Agreement by Surety and the Owner, payment by the Surety to the Owner of the Surety Payment, the Owner agrees that Surety shall have no responsibility or obligation for the completion or correction of the work performed or remaining to be performed under the Original Contract and further agrees that Surety shall be and is hereby fully, finally and completely released, discharged and exonerated of and from any and all claims, demands, causes of actions and/or obligation under the Original Contract and the Surety's Bond for the Original Contract other than the Latent Defect Reservation. In the interest of resolving any and all matters relating to the Original Contract, and under the sound policy of law favoring the settlement of disputes, the parties understand and agree that the payment of the Surety Payment by the Surety constitutes and represents full and just consideration for and satisfaction of any and all claims by the Owner against Surety arising out of, related to, or incidental to the Original Contract and the Bonds. The Owner, by acceptance of this Agreement and the Surety Payment irrevocably remises, releases and forever discharges the Surety and the Bond of and from all liabilities, obligations, promises, agreements, controversies, damages, liquidated damages, delay damages, completion costs, actions, causes of actions, suits, rights, demands, losses, debts, expenses, attorneys' fees, costs and claims, from the beginning until the end of time, whether known or unknown, whatsoever in law and/or in equity under and arising out of or related to the Original Contract and the Bond, as well as all claims for statutory or common law "bad faith" against Surety including all claims that relate to the manner and timeliness in which Surety reviewed, handled, investigated, or settled any claim by Owner on the Bond, and any and all claims arising under chapters 624 or 626, *Florida Statutes*, regardless of when such claim(s) arose or accrued, other than the Latent Defect Reservation. The Surety reserves, undiminished, all defenses to any claim under the Latent Defect Reservation.

7. **No release of subcontractor and supplier to Original Contractor claims under Payment Provisions of Bond.** Surety agrees that this Agreement shall not release its obligations to proper and timely claims by subcontractors, sub-subcontractors and/or suppliers of the Original Contractor who are "claimants" pursuant to Section 255.05, Florida Statutes ("Payment Claimants"), in connection with the Original Contract, subject to such limitations and defenses as may exist at law or at equity. Owner agrees that any payments by Surety to Payment Claimants shall reduce the Penal Sum of the Bond, dollar for dollar. Nothing herein shall be construed as a waiver of any rights or defenses that Surety may have as to any claim by any Payment Claimant. Further, nothing herein shall expand coverage of the Bond or extend the Surety's liability to any subcontractor, laborer, materialman or supplier of the Completing Contractor.

8. **Reservation of claims of Original Contractor.** The Parties acknowledge that the Original Contractor has disputed the termination of the Original Contract, and that the Owner and Original Contractor have disputes regarding pending change order requests

and claims. The Owner acknowledges that nothing herein shall be deemed a waiver or release of the claims of the Original Contractor or the Surety (whether in its own capacity or as assignee or subrogee of the Original Contractor) against the Owner, and that all such claims are reserved, unimpaired. The Owner reserves all defenses to claims by the Original Contractor and the Surety. In the event that the termination of the Original Contractor is overturned or found wrongful by any court or in any arbitration proceeding, the Surety shall be entitled to a refund of the Surety Payment from the Owner, but only to extent ordered by court or arbitrator and in no case shall exceed the amount paid by Surety to the Owner in paragraph 4 above .

9. Surety is not Acting as a Contractor. The Owner acknowledges and recognizes that by participating in this Agreement, Surety is not a contractor, is not acting as a surety completing performance for a defaulted contractor and is not undertaking any responsibility for completing or overseeing the completion of the Project.

10. No Admission of Liability. It is understood and agreed that the payments and promises mentioned herein are not to be construed as an admission of liability on the part of Surety or the Owner, all such liability being expressly denied.

11. Reservation of Surety's Claims against the Original Contractor and Indemnitors. Nothing in this Agreement shall reduce, impair or diminish Surety's rights and claims against the Original Contractor or any indemnitor, which are expressly reserved.

12. No Third Party Beneficiaries. Nothing contained in this Agreement shall create any third-party beneficiaries nor confer any benefit or enforceable rights under this Agreement upon any person or entity other than the parties to this Agreement.

13. General Provisions.

a. This Agreement contains the entire agreement between the Parties and supersedes any and all prior agreements, arrangements and/or understandings between the parties.

b. The Parties and their signatories hereto warrant that each has the power and Owner to execute this Agreement.

c. The Parties have voluntarily executed this Agreement based upon their independent investigations. The provisions of the Agreement shall be applied and interpreted in a manner consistent with one another so as to carry out the purpose and intent of the Parties, but if for any reason any provision is unenforceable or invalid, such provision shall be deemed severed from this Agreement and the remaining provisions shall be carried

out with the same force and effect as if the severed portion had not been a part of this Agreement.

d. This Agreement constitutes the entire agreement between and among the Parties regarding the issues that are the subject of this Agreement. Any prior understandings or agreements, and any representations made by either of the Parties to the other not included or specifically addressed in this Agreement, are deemed to be merged herein and not binding as to the Parties as this Agreement constitutes the complete understanding and agreement between the Parties.

e. The Parties acknowledge that they have read, understand and have had the opportunity to be advised by legal counsel as to each and every one the terms, conditions, and restrictions, and as to the effect of all the provisions of this Agreement, and the Parties agree to the enforcement of any and all of these provisions and execute this Agreement with full knowledge of these provisions. Should any provision of this Agreement require judicial interpretation, it is agreed that the court interpreting or constructing the provisions shall not apply the presumption that the terms hereof shall be more strictly construed against one party by reason of the rule of construction that a document is to be construed more strictly against the party who itself or through its agent prepared the document.

f. This Agreement may be executed in one or more counterparts each of which shall be deemed an original and all of which together shall constitute one and the same instrument. The Parties agree and intend that a signature by facsimile machine or scanned PDF shall bind the party so signing with the same effect as though the signature was an original.

g. The headings in this Agreement are intended to be for the convenience of reference only, and shall not define or limit the scope, extent or intent, or otherwise affect the meaning of, any portion hereof.

h. Should either party bring an action to enforce the terms of this agreement, each party agrees that each party shall bear its own costs and attorney's fees incurred in such an action.

i. This Agreement may be executed in one or more counterparts, each of which shall be deemed an original for all purposes but all of which together shall constitute one and the same instrument. Signatures on this Agreement transmitted by electronically shall be deemed to be an original for all purposes.

OWNER:

INDIAN RIVER COUNTY

CONTRACTOR:

Proctor Construction Company, LLC

By: _____
Joseph Flescher, Chairman

By: _____
John A. Titkanich Jr., County Administrator

APPROVED AS TO FORM AND LEGAL SUFFICIENCY:

By: _____
Christopher A. Hicks, Asst. County Attorney

By: _____
Ryan Butler, Clerk of Court and Comptroller

Attest: _____
Deputy Clerk
(SEAL)

Date: _____

SURETY:

The Ohio Casualty Insurance Company

By: _____
Its Designated Representative

Date: _____

By: _____
John Granath, President / COO

Date: _____