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Memo

To Board of Education

From Kyla Johnson-Trammell, Superintendent and Secretary, Board of Education
Timothy White, Deputy Chief, Facilities Planning and Management

Board Meeting Date September 4, 2019

Subject Madison Surety Takeover Agreement

Action Approval by the Board of Education of Resolution No. 1920-0020 - Takeover Agreement negotiated by the District and Liberty Mutual Insurance Company ("Surety"), whereby the Surety agrees to supply a general contractor to complete the work on the delayed Madison Park Academy Expansion Project, following the District's termination of the Vila Tulum Joint Venture ("JV") in June of 2019.

Background/ Discussion The Project here is the construction of four two story classroom buildings, a central courtyard and associated site work at the Madison Park Academy. The Project commenced on or about September 14, 2017, with a scheduled completion date of December 31, 2018. The original Project budget was set at \$28,000,000. The Guaranteed Maximum Price was set at \$26,050,932, with the expectation that this lower amount could be achieved through value engineering ("VE"), a process by which building features would be eliminated or alternative materials supplied.

The Schedule dates were not met, and the value engineering savings targets were mostly not achieved. There are a number of reasons for this shortfall. A substantial cause was the failings of the JV, who mispriced many of the VE items and who failed to ensure that the Project itself was adequately manned. It is our understanding that Vila (one of the two members of the JV) are having difficulties on other projects in California.

After months of Project delay and without a plan by the JV as to how this lost time might be made up, the District was forced to act. On May 24, 2019 the District issued a Notice of Default to the JV demanding that they bring their work into contract compliance. When this was not accomplished, the District terminated the JV on June 6, 2019.

After approximately a month of negotiations, the District and the Surety reached Agreement on a Takeover Agreement. Under the Agreement a general contractor named Vertex will oversee the work. (Vertex has a great deal of experience in project completion where there has been a general contractor default.) A new substantial completion date of December 20, 2019 has been set, with a final completion date of December 31, 2019.

All of the other subcontractors will be retained, and Vertex will perform no direct labor, thereby ensuring District compliance with the District's Local Business Policy and Project Labor Agreement. In order to expedite Project completion and ensure quality expectations, the District will have the perforated screen installation performed by an existing subcontractor under direct contract with the District.

The Takeover Agreement resolves a large number of outstanding claims and change order requests. Their resolution now will allow the Project to proceed without the rancor usually associated with challenged projects. The Takeover Agreement will result in an adjustment of the Guaranteed Maximum Price (GMP) from \$26,050,932 to \$27,534,714, somewhat under the originally estimated amount. (The GMP still has a contingency of \$630,000 for future developments) While the GMP was increased to \$27,534,714, the **actual contract price with Liberty Mutual Insurance Company is Thirteen Million, Six Hundred Ten Thousand, Two Hundred Fifty-Three Dollars and Forty-Eight Cents. (\$13,610,253.48.)** There is no increase in the Board Approved budget for this project as the new GMP is within the Approved Budget.

Competitive bidding is not required for this agreement. A contract for completion of work after termination of a contractor is exempt from the competitive bidding requirement when the original contractor and surety (rather than the owner) are responsible for any excess completion costs. (*Garvey School District v. Paul* (1920) 50 Cal.App. 75; and *Shore v. Central Contra Costa Sanitary District* (1962) 208 Cal.App.2d 465.) Also, there would be no advantage to the District if it were to competitively bid a completion contract when it could (as is the case here) require a surety to complete the work pursuant to a performance bond. (*Graydon v. Pasadena Redevelopment Agency* (1980) 104 Cal.App.3d 631; and *County of Riverside v. Whitlock* (1972) 22 Cal.App.3d 863.)

Recommendation	Approval by the Board of Education of Resolution No. 1920-0020 - Takeover Agreement negotiated by the District and Liberty Mutual Insurance Company ("Surety"), whereby the Surety agrees to supply a general contractor to complete the work on the delayed Madison Park Academy Expansion Project, following the District's termination of the Vila Tulum Joint Venture ("JV") in June of 2019.
Fiscal Impact	The GMP will be increased from \$26,050,932 to \$27,534,714. This funding for this increase is available in the Board Approved Project Budget for the Madison Project.
Attachment	Madison Surety Takeover Agreement



CONTRACT JUSTIFICATION FORM

This Form Shall Be Submitted to the Board Office With Every
Agenda Contract.

Legislative File ID No. 19-1607

Department: **Facilities Planning & Management**

Vendor Name: **Liberty Mutual Insurance Company**

Project Name: **Madison Surety Takeover Agreement** Project No. :13124

Contract Term: Intended Start: **September 5, 2019** Intended End: **December 31, 2019**

Amended End: _____

Annual (if annual contract) or Total (if multi-year agreement) Cost: **\$13,610,253.48**

Approved by: **Tadashi Nakadegawa**

Is Vendor a local Oakland Business or have they meet the requirements of the

Local Business Policy? ☐ Yes (No if Unchecked)

How was this contractor or vendor selected?

This was a direct selection based on experience of expertise.

Summarize the services or supplies this contractor or vendor will be providing.

To provide constructions services, will take over and replace current General Contractor and performance construction work for duration of project.

Was this contract competitively bid? ☐ Check box for "Yes" (If "No," leave box unchecked)

If "No," please answer the following questions:

1) How did you determine the price is competitive?

Competitive bidding is not required for this agreement. A contract for completion of work after termination of a contractor is exempt from the competitive bidding requirement when the original contractor and surety (rather than the owner) are responsible for any excess completion costs. Also, there would be no advantage to the District if it were to competitively bid a completion contract when it could (as is the case here) require a surety to complete the work pursuant to a performance bond.

2) Please check the competitive bidding exception relied upon:

Construction Contract:

- ☐ Price is at or under UPCCAA threshold of \$60,000 (as of 1/1/19)
- ☐ CMAS contract [may only include "incidental work or service"] (Public Contract Code §§10101(a) and 10298(a)) – *contact legal counsel to discuss if applicable*
- ☐ Emergency contract (Public Contract Code §§22035 and 22050) – *contact legal counsel to discuss if applicable*
- ☐ No advantage to bidding – *contact legal counsel to discuss if applicable*
- ☐ Sole source contractor – *contact legal counsel to discuss if applicable*
- ☒ Completion contract – *contact legal counsel to discuss if applicable*
- ☐ Lease-leaseback contract RFP process – *contact legal counsel to discuss if applicable*
- ☐ Design-build contract RFP process – *contact legal counsel to discuss if applicable*
- ☐ Energy service contract – *contact legal counsel to discuss if applicable*
- ☐ Other: _____ – *contact legal counsel to discuss if applicable*

Consultant Contract:

- ☐ Construction project manager, land surveyor, or environmental services – selected based on demonstrated competence and professional qualifications (Government Code §4526)
- ☐ Architect or engineer – use of a fair, competitive RFP selection process (Government Code §§4529.10 et seq.)
- ☐ Architect or engineer when state funds being used – use of competitive process consistent with Government Code §§4526-4528 (Education Code §17070.50)
- ☐ Other professional or specially trained services or advice – no bidding or RFP required (Public Contract Code §20111(d) and Government Code §53060) – *contact legal counsel to discuss if applicable*
- ☐ For services other than above, the cost of services is \$92,600 or less (as of 1/1/19)
- ☐ No advantage to bidding (including sole source) – *contact legal counsel to discuss if applicable*

Purchasing Contract:

- ☐ Price is at or under bid threshold of \$92,600 (as of 1/1/19)
- ☐ Certain instructional materials (Public Contract Code §20118.3)
- ☐ Data processing systems and supporting software – choose one of three lowest bidders (Public Contract Code §20118.1)

- ☐ Electronic equipment – competitive negotiation (Public Contract Code §20118.2) – *contact legal counsel to discuss if applicable*
- ☐ CMAS contract [may only include “incidental work or service”] (Public Contract Code §§10101(a) and 10298(a)) – *contact legal counsel to discuss if applicable*
- ☐ Piggyback contract for purchase of personal property (Public Contract Code §20118) – *contact legal counsel to discuss if applicable*
- ☐ Supplies for emergency construction contract (Public Contract Code §§22035 and 22050) – *contact legal counsel to discuss if applicable*
- ☐ No advantage to bidding (including sole source) – *contact legal counsel to discuss if applicable*
- ☐ Other: _____

Maintenance Contract:

- ☐ Price is at or under bid threshold of \$92,600 (as of 1/1/19)
- ☐ No advantage to bidding (including sole source) – *contact legal counsel to discuss*
- ☐ Other: _____

3) Explain in detail the facts that support the applicability of the exception marked above:

-
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-
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OAKLAND UNIFIED
SCHOOL DISTRICT

**RESOLUTION OF THE
BOARD OF EDUCATION
OAKLAND UNIFIED SCHOOL DISTRICT**

RESOLUTION NO. 1920-0020

**AWARD OF CONTRACT FOR CONSTRUCTION SERVICES FOR
THE MADISON SURETY TAKEOVER AGREEMENT
[Non-Bid Award]**

WHEREAS, the District has selected **Liberty Mutual Insurance Company** ("Contractor") for the **Madison Surety Takeover Project, no. 13124**, consisting of providing Construction Services for completion of project ("Project"); and,

WHEREAS, no competitive bidding was used for the contract for the Project ("Contract") because the competitive bidding is not required for this agreement. A contract for completion of work after termination of a contractor is exempt from the competitive bidding requirement when the original contractor and surety (rather than the owner) are responsible for any excess completion costs. Also, there would be no advantage to the District if it were to competitively bid a completion contract when it could (as is the case here) require a surety to complete the work pursuant to a performance bond; and,

WHEREAS, the selected contractor has met the goals for local business participation, as required by the District's policy for such participation; and,

WHEREAS, the Contract has been approved as to form by General Counsel.

NOW, THEREFORE, BE IT RESOLVED, that the Contract signed by Contractor in the amount of **THIRTEEN MILLION, SIX HUNDRED TEN THOUSAND, TWO HUNDRED FIFTY-THREE DOLLARS AND FORTY-EIGHT CENTS (\$13,610,253.48)** shall be and is hereby accepted and awarded by the Board of Education; and,

BE IT FURTHER RESOLVED, that the President and Secretary of the Board be hereby authorized to sign the Contract on behalf of the District.

Passed by the following vote:

PREFERENTIAL AYES: None

PREFERENTIAL NOES: None

YEA: Jumoke Hinton Hodge, Roseann Torres, Shanthi Gonzales, James Harris,
Vice President Jody London, President Aimee Eng



OAKLAND UNIFIED
SCHOOL DISTRICT

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NOES: None

ABSENT: Gary Yee

ABSTAINED: None

RECUSED: None

I hereby certify that the foregoing is a full, true and correct copy of a Resolution adopted, at a Special Meeting of the Governing Board of the Oakland Unified School District held on September 4, 2019.

Kyla Johnson-Trammell, Secretary,
Board of Education

BOARD MEMORANDUM: MADISON SURETY TAKEOVER AGREEMENT

DECISION NEED BY THE BOARD OF EDUCATION

Should the Board approve a Takeover Agreement negotiated by the District and Liberty Mutual Insurance Company ("Surety"), whereby the Surety agrees to supply a general contractor to complete the work on the delayed Madison Park Academy Expansion Project, following the District's termination of the Vila Tulum Joint Venture ("JV") in June of 2019.

BACKGROUND

The Project here is the construction of four two story classroom buildings and laboratories, a central courtyard and associated site work at the Madison Park Academy. The Project commenced on or about September 14, 2017, with a scheduled completion date of December 31, 2018. The original Project budget was set at \$28,000,000. The Guaranteed Maximum Price was set at \$26,050,932, with the expectation that this lower amount could be achieved through value engineering ("VE"), a process by which building features would be eliminated or alternative materials supplied.

The Schedule dates were met, and the value engineering savings targets were mostly not achieved. There are a number of reasons for this shortfall. A substantial cause was the failings of the JV, who mispriced many of the VE items and who failed to ensure that the Project itself was adequately manned. It is our understanding that Vila (one of the two members of the JV) are having difficulties on other projects in California.

TERMINATION OF THE JV

After months of Project delay and without a plan by the JV as to how this lost time might be made up, the District was forced to act. On May 24, 2019 the District issued a Notice of Default to the JV demanding that they bring their work into contract compliance. When this was not accomplished, the District terminated the JV on June 6, 2019.

The District then began immediate negotiations with the Surety to take over the Project and complete the work, pursuant to the terms of a Performance Bond. The parties had to address four questions:

1. What contractor would complete the work?
2. What would the new completion date be?
3. Could the parties reach agreement on the pricing of the VE items?
4. Could parties reach resolution of a large number of other claims and proposed change orders which would otherwise hand over the Project as "legacy" items?

TERMS OF THE TAKEOVER AGREEMENT

After approximately a month of negotiations, the District and the Surety reached Agreement on a Takeover Agreement. Under the Agreement a general contractor named Vertex will oversee the work. (Vertex has a great deal of experience in project completion where there has been a general contractor default.) A new substantial completion date of December 20, 2019 has been set, with a final completion date of December 31, 2019.

All of the other subcontractors will be retained, and Vertex will perform no direct labor, thereby ensuring District compliance with the District's Local Business Policy and Project Labor Agreement. In order to expedite Project completion and ensure quality expectations, the District will have the perforated screen installation performed by an existing subcontractor under direct contract with the District.

The Takeover Agreement resolves a large number of outstanding claims and change order requests. Their resolution now will allow the Project to proceed without the rancor usually associated with challenged projects. The Takeover Agreement will result in an adjustment of the Project Budget from \$26,050,932 to \$27,534,714, somewhat under the originally budgeted amount. (The District still has a Project reserve of \$630,000 for future developments) The "bottom line" is not an increase to the original budget but a recognition that the VE process did not reap the savings that were anticipated, despite strenuous efforts.

TAKEOVER AGREEMENT
(Version August 1, 2019)

Parties

1. This Takeover Agreement is made and entered into July 23, 2019, by and between Oakland Unified School District ("District") and Liberty Mutual Insurance Company ("Surety"). District and Surety shall sometimes be referred to herein individually as "Party" and collectively as "Parties".

Recitals

2. WHEREAS, on or about August 24, 2017, Vila Tulum Joint Ventures ("Contractor") and District entered into that certain Facilities Lease ("Contract") whereby Contractor to furnish certain labor, services, equipment and materials for the construction of that project commonly known as the Madison Park Expansion Project (the "Project") located in Oakland, California. A true and correct copy of the Contract, without the voluminous exhibits and documents referenced therein, is attached hereto as **Exhibit A**.

3. WHEREAS, on or about November 28, 2017, as required by law and under the terms of the Contract, Contractor and Surety made, executed and delivered to the District a Performance Bond and a Payment Bond, both numbered 070205386, each in the penal sum of \$26,050,932.00 (collectively, the "Bonds"), in connection with the Contract.

4. WHEREAS, by letter dated May 24, 2019, District issued a Notice of Default to Contractor.

5. WHEREAS, by letter dated June 6, 2019, District issued a Notice of Termination to Contractor.

6. WHEREAS, District made a request under the Performance Bond for Surety to complete the Contract.

7. WHEREAS, Surety is willing to undertake the completion of the Contract in accordance with the terms of this Takeover Agreement.

8. NOW, THEREFORE, in consideration of the agreements and undertakings hereinafter set forth, and for other good and valuable consideration, the receipt and adequacy therefore being hereby acknowledged, District and Surety agree as follows.

Agreement

9. **Incorporation of Recitals.** The above Recitals are incorporated and hereby made part of this Takeover Agreement as though fully set forth herein.

10. **Reservation of Rights.** With the exception of the agreements, releases and waivers, and modifications to the Contract expressly set forth in this Takeover Agreement, District and Surety agree that Surety will arrange for the completion of the Contract subject to a full and continuing reservation of all rights, claims, demands, damages and defenses available to Contractor, Surety and District under the Contract, the Bonds, and applicable law.

11. **Payments to Surety.** District acknowledges and agrees that Surety is equitably and contractually entitled to all payments, funds, monies and other consideration due or to become due under the Contract or that certain related Site Lease between District and Contractor, which would otherwise be due or become due to Contractor, as required by law and/or contract. District shall pay all payments, funds, monies and other consideration due or to become due under the Contract or that certain related Site Lease to Surety, as required by law and/or contract.

12. **Contract Balance.** As of the date of this Takeover Agreement, District represents to the Surety that the original Contract amount was \$26,050,932.50. District further represents to Surety that District made payments under the Contract, through Payment Application No. 16 in the amount of \$13,924,462.38 for work performed and accepted up to the period of March 31, 2019, and that there is a remaining unpaid balance (including retention) under the Contract in the amount of \$12,126,469.62 (the "Contract Balance"). This balance includes a Contract Contingency that may be used to resolve outstanding PCOs.

13. **Adjustment for PCO's re AED.** As of the date of this Takeover Agreement, District and Surety agree that Contractor performed, but was not paid, for the Proposed Change Orders and extra work as shown on the attached **Exhibit B – PCO's re AED**. District and Surety agree that the value of that extra work performed but not paid totals \$238,689.57. District and Surety agree that this amount, \$238,689.57, will be added to the Contract Balance. District and Surety will execute the appropriate Change Order(s) to document these adjustments to the amounts due under the Contract. District and Surety agree that this amount, \$238,689.57, will be paid to Surety within thirty (30) calendar days of the approval of this Takeover Agreement by the Governing Board of the District. This amount shall constitute full payment for the amounts sought in the attached **Exhibit B – PCO's re AED**, and any requests for schedule extension are hereby satisfied by such payment and further satisfied by the new completion date fund in Paragraph 23, *infra*.

14. **Adjustment for PCO's re Value Engineering.** As of the date of this Takeover Agreement, District and Surety agree that Contractor performed, but was not paid, for the Proposed Change Orders and extra work as shown on the attached **Exhibit C – PCO's re Value Engineering**. District and Surety agree that the value of that extra work performed but not paid totals \$476,612.78. District and Surety agree that this amount, \$476,612.78, will be added to the Contract Balance. District and Surety will

execute the appropriate Change Order(s) to document these adjustments to the amounts due under the Contract. District and Surety agree that this amount, \$476,612.78, will be paid to Surety within thirty (30) calendar days of the approval of this Takeover Agreement by the Governing Board of the District. This amount shall constitute full payment for the amounts sought in the attached **Exhibit C – PCO's re Value Engineering**, and any requests for schedule extension are hereby satisfied by such payment and further satisfied by the new completion date fund in Paragraph 23, *infra*.

15. Adjustment for PCO's Pertaining to Work Completed. As of the date of this Takeover Agreement, District and Surety agree that Contractor performed, but was not paid, for the Proposed Change Orders and extra work as shown on the attached **Exhibit D – PCO's for Work Completed**. District and Surety agree that the value of that extra work performed but not paid totals \$316,268.51. District and Surety agree that this amount, \$316,268.51, will be added to the Contract Balance. District and Surety will execute the appropriate Change Order(s) to document these adjustments to the amounts due under the Contract. District and Surety agree that this amount, \$316,268.51, will be paid to Surety within thirty (30) calendar days of the approval of this Takeover Agreement by the Governing Board of the District. This amount shall constitute full payment for the amounts sought in the attached **Exhibit D – PCO's re Work Completed**, and any requests for schedule extension are hereby satisfied by such payment and further satisfied by the new completion date fund in Paragraph 23, *infra*.

16. Adjustment for Value Engineering PCO's. As of the date of this Takeover Agreement, District and Surety agree that Contractor performed, but was not paid, for the Proposed Change Orders and extra work as shown on the attached **Exhibit E – Work Performed re Value Engineering**. District and Surety agree that the value of that extra work performed but not paid totals \$1,000,000.00. District and Surety agree that this amount, \$1,000,000.00, will be added to the Contract Balance. District and Surety will execute the appropriate Change Order(s) to document these adjustments to the amounts due under the Contract. District and Surety agree that this amount, \$1,000,000.00, will be paid to Surety within thirty (30) calendar days of the approval of this Takeover Agreement by the Governing Board of the District. This amount shall constitute full payment for the amounts sought in the attached **Exhibit E – Work Performed re Value Engineering**, and any requests for schedule extension are hereby satisfied by such payment and further satisfied by the new completion date fund in Paragraph 23, *infra*.

17. Adjustment for Deducts re Value Engineering. As of the date of this Takeover Agreement, District and Surety agree that the items shown on the attached **Exhibit F – Deducts re Value Engineering** shall be deducted from the Contract Balance. District and Surety agree that the values of these items total \$547,787.00. District and Surety agree that all of the items shown on the attached **Exhibit F – Deducts re Value Engineering** and this amount, \$547,787.00, shall be deducted from the scope of work of the Contract and the Contract Balance. This adjustment shall include the deletion of all aspects of design, coordination and work related to the Perforated Screens from the scope of work for the Contract. District agrees that any and all work associated with the design, coordination, anchoring, procurement and installation of the Perforated

Screens will be performed by a different contractor under a separate agreement. District and Surety will execute the appropriate Change Order(s) to document these adjustments to the items and the amounts deducted under the Contract. District intends to have the Perforated Screen work performed by a separate contractor (i.e., a contractor other than completion contractor; a contractor which is not the responsibility of Liberty and not under the Performance Bond) under a separate contract with District and under a separate schedule (i.e., a schedule which is not related to this Takeover Agreement or the completion schedule to be prepared and submitted by Completion Contractor). Surety and/or Completion Contractor shall not be responsible in any way responsible for the payment or supervision of the labor, services, equipment or materials provided by the separate contractor. Surety and/or Completion Contractor shall not be responsible in any way for coordinating or scheduling the work performed by the separate contractor. In the event that the separate contractor performs some or all of its work at the same time as Completion Contractor, Surety and Completion Contractor will take reasonable steps to coordinate Completion Contractor's work with the separate contractor's work.

18. Board of Education Approval. This Takeover Agreement and the items and amounts identified in the above Paragraphs 13-17 and related Exhibits B-F (collectively, "Contract Adjustments") will require adjustments to the Contract amount. The District hereby recommends to the Board of Education of the District that this Takeover Agreement and the Contract Adjustments be approved and the Contract adjusted accordingly. It is expected that the Board of Education will act and approve this Takeover Agreement and the Contract Adjustments at the Board of Education's regularly scheduled meeting on August 28, 2019. In the event the Board of Education fails to approve this Takeover Agreement and each and every one of the Contract Adjustments, then Surety may cease performance of the work and shall have no further obligation under this Takeover Agreement.

19. Withdrawn Proposed Change Orders. As of the date of this Takeover Agreement, District and Surety agree that that the items shown on the attached **Exhibit G – Withdrawn PCO's** are hereby withdrawn by Surety and will not be added to the Contract Balance. District and Surety agree that the values of these Withdrawn Proposed Change Orders total \$596,145.00.

20. Adjustment for Pending Proposed Change Orders. As of the date of this Takeover Agreement, District and Surety agree that there are Pending Proposed Change Orders as shown on the attached **Exhibit H – Pending Proposed Change Orders**. District and Surety agree to commence a consultative process for the analysis and resolution of the time and money related to the Proposed Change Orders on the attached **Exhibit H – Pending Proposed Change Orders**, and as they arise as the work proceeds on the Project. The process will begin within fifteen (15) days after the Effective Date of this Takeover Agreement. District and Surety agree to an initial meeting to coordinate their efforts and shall meet on a weekly basis, and at the site, to discuss and resolve the Proposed Change Orders. Said meetings shall be separate from the weekly Owner-Architect-Contractor meetings. District and Surety shall bargain in good faith and in accordance with Article 17.3 of Exhibit "D" to the Contract, which pertains to Proposed

Change Orders. It is the expectation of District and Surety that all pending Proposed Change Orders found on **Exhibit H – Pending Proposed Change Orders** shall be addressed within sixty (60) after the effective date of this Takeover Agreement.

21. **Other Changes to the Contract.** District and Surety agree that any Proposed Change Orders, extra work, work directed by District, and/or Value Engineering not expressly set forth on the attached **Exhibits B, C, D, E, F, G and H** will be addressed and processed pursuant to the terms of the Contract, with all resulting changes and adjustments the time (i.e., completion date of the work) and the money due under the Contract.

22. **Adjusted Contract Balance.** As of the date of this Takeover Agreement, District and Surety agree that the Contract Balance shall be adjusted as follows:

Original Contract Amount	\$26,050,932.00
Less Amount Previously Paid	<u>13,924,462.38</u>
Unadjusted Contract Balance	\$12,126,469.62
Exhibit B – PCO's re AED	\$ 238,689.57
Exhibit C – PCO's re Value Engineering	476,612.78
Exhibit D – PCO's re Work Completed	316,268.51
Exhibit E – Work Performed re VE	<u>1,000,000.00</u>
Subtotal	\$14,158,040.48
Exhibit F – Deducts re Value Engineering	<u>< \$547,787.00></u>
Adjusted Contract Amount	\$13,610,253.48

23. **New Contract Completion Date.** District and Surety acknowledge and agree that there were numerous delays, disruptions and impacts to the completion of the Contract caused and contributed by both District and Contractor (collectively, "Pre-Takeover Delays"). Limited to the Pre-Takeover Agreement Delays, District and Surety agree as follows.

- A. **District's Waiver of Liquidated Damages.** District hereby waives and releases any and all claims, demands, damages, rights of action or causes of action of any kind whatsoever for any and all liquidated damages which had, has, or may have accrued prior to the Effective Date of this Takeover Agreement.
- B. **Surety's Waiver of Extended General Conditions.** Surety hereby waives and releases any and all claims, demands, damages, rights of action or causes of action of any kind whatsoever for any and all extended general conditions, loss of productivity or acceleration which had, has, or may have accrued prior to the Effective Date of this Takeover Agreement.
- C. **New Completion Date.** District and Surety agree that the Contract Time / Construction Schedule (as defined by the Contract) for the

substantial completion of the Work (defined by the Contract, and specifically excluding all punch list and commissioning work) is extended up to and including December 20, 2019.

- D. Damages after New Completion Date. District and Surety agree that liquidated damages and/or extended general conditions may accrue after the New Completion Date of December 31, 2019. Liquidated damages will accrue at \$5,000 per calendar day beyond the New Completion Date of December 31, 2019. The parties hereby agree that this Takeover Agreement constitutes sufficient notice to impose liquidated damages in the event completion occurs after December 31, 2019.
- E. The Contractor selected by the Surety will prepare and deliver to the District a new construction schedule showing a **substantial completion date of December 20, 2019 and a final completion date of December 31, 2019**. This new schedule will be delivered to the District for review within ten (10) days after the execution of this Takeover Agreement.

24. Surety's not a Contractor. District acknowledges and agrees to the following:

- A. Surety, by its execution of this Takeover Agreement, is acting in its capacity as the surety for Contractor in making arrangements for the performance and completion of the Contract.
- B. Surety, by its execution of this Takeover Agreement or by its making arrangements for the performance and completion of the Contract, is not a completing contractor.
- C. Surety, by its execution of this Takeover Agreement or by its making arrangements for the performance and completion of the Contract, is not acting as a contractor as that term is defined under the California contractor's licensing laws, the Business & Professions Code, or the Public Contract Code.
- D. Surety, by its execution of this Takeover Agreement or by its making arrangements for the performance and completion of the Contract, is not assuming any obligations or liabilities beyond those set forth in the Bonds.
- E. As to the completion of the Contract, pursuant to this Takeover Agreement and except as otherwise provided in this Takeover Agreement, Surety is entitled to all rights, titles, interests and obligations of Contractor 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 of this Takeover Agreement, to refer to Surety rather than to the Contractor.

25. Completion Contractor. Surety will contract the performance of the Work under the Contract to a completion contractor (hereinafter called the "Completion Contractor"). Surety intends to enter into a Completion Agreement with The Vertex Companies, Inc. dba Vertex Construction Services ("Vertex"), a licensed general contractor (CSLB License No. 965630; DIR No. 100006507), to serve as the Completion Contractor. Notwithstanding, Surety, at its option, may solicit bids from and engage other contractors to complete the remaining work under the Original Contract.

26. Vertex in Contract Compliance. District agrees and accepts Vertex as the Completion Contractor. Given the exigent circumstances of the default of the Contractor, the state of the work in the field, and the need for the Contract to be completed as soon as possible, District agrees that Vertex is an acceptable contractor in the best position to complete the Contract, and waives any requirement of the Contract (e.g., local business or related requirement) as to Vertex only. Surety agrees that Vertex shall have personnel **persons on site** who are knowledgeable about public school construction and familiar with the Division of State Architect. Vertex shall have a project team who are on site on a daily basis and who are knowledgeable about public school construction.

27. Completion Agreement. Surety shall enter into a Completion Agreement with Completion Contractor to complete the Contract. No contractual relationship pursuant to this Takeover Agreement shall exist between District and Completion Contractor. Surety, who will have no employees on the Project (except for occasional visits), shall have no obligation to furnish any insurance under the Contract. Surety will ensure that Completion Contractor shall provide all insurances required under the Contract. Completion Contractor shall not provide any bonds required under the Contract. District and Surety agree that the Bonds shall be applicable to the completion of the Work under the Contract, including any and all Work performed by or on behalf of Completion Contractor.

28. Completion Contractor's Authority. Routine day-to-day operations and decisions as to the manner of performance of the remaining work shall be made by Completion Contractor, subject to the terms and conditions of the Contract; provided, however, except as allowed by Article 33, *infra*, that Completion Contractor will have no authority to: (i) agree to any changes in the Contract or remaining work; (ii) agree to any Change Orders; (iii) agree to any back-charges or deductions of any nature; (iv) agree to any schedule changes; (v) agree to any adjustments in the Contract amount or remaining work over \$5,000; or (vi) agree to perform warranty work of the Contractor or corrective work as a result of latent defect(s) in the work performed by the Contractor without Surety's prior express written consent which shall be delivered to District as a condition precedent to Completion Contractor's negotiating items (i) through (vi). The remaining work shall be subject to inspection and acceptance by District, as provided in the

Contract. All communications concerning matters of contract administration (i.e., contractual or other notices required by law, payments, Change Orders, extensions of time, delays, claims, among other matters) shall be communicated to Completion Contractor only in writing, with a copy forwarded to the Surety on a current basis by e-mail.

29. Termination of Completion Contractor. Surety reserves the right to terminate Completion Contractor at any time; however, Surety must provide District advance written notice of at least three (3) calendar days before such termination, and promptly employ and mobilize another Completion Contractor acceptable to Surety and District, whose acceptance shall not be unreasonably withheld, to complete the remaining work under the Contract.

30. Payment for Completion of Contract. District will dedicate and apply the Contract Balance, as adjusted in this Takeover Agreement, to the completion of the Contract pursuant to this Takeover Agreement. District shall pay directly to Surety the Contract Balance, plus or minus any additional amounts of money on account of any modifications approved in writing by District and Surety, per the terms of the Contract and this Takeover Agreement. District's payment of the Contract Balance to Surety shall be made in accordance with the terms of the Contract as to the time, amount and method of payment, and District's obligation to withhold sums as required by law. As of the date of this Takeover Agreement, the District does not believe there are any Stop Notices or other withholds under the Contract. Subject to the penal sum of the Performance Bond, Surety agrees to spend its own funds as may be necessary from time to time to pay for the performance of the Contract by Completion Contractor in the event that the Contract Balance is insufficient, with any such payments being credited against the penal sum of the Performance Bond. Except for Stop Notices, operation of law, or order of a court of competent jurisdiction after due notice to Surety, District agrees that it will not acknowledge or honor any claim or charges against the Contract Balance by any alleged assignees, successors, creditors, or transferees of the Contractor, or any other party or entity making claim to any of such proceeds or the Contract Balance, without the written consent of Surety. Surety agrees to defend and indemnify District against such claims if Surety requests District to dishonor such claims.

31. Commencement of Completion Work. Upon full execution of this Takeover Agreement, Surety, by and through Completion Contractor, shall commence work within ten (10) calendar days of such execution.

32. Use of Contractor's Equipment and Materials. Insofar as District has any right, title or interest therein, District agrees that Surety and Completion Contractor shall have the right to use, without charge, any and all equipment, tools, materials and appurtenances furnished or supplied by Contractor which may be stored on or about the premises of the Project site or materials which may have been fabricated for use in connection with the Contract, whether or not presently upon the Project site.

33. Authorized Individual. Surety authorizes Mark Degenars, Jack Martin and/or Tyler Newlin of Vertex (collectively, the "Authorized Individual") to be Surety's representative at the Project site solely for the purposes set forth in this paragraph. The Authorized Individual will represent Surety in dealing with District on day-to-day construction issues with respect to the Project. Surety designates the Authorized Individual to prepare and process pay requisitions under the Contract. However, all pay requisitions must be approved by Surety in writing before they are submitted to District. All documents pertaining to pay estimates, progress and final payments shall be transmitted to Surety at the following address, unless and until District is notified in writing by Surety of any different address:

Jason Stonefeld
Liberty Mutual Surety
1001 4th Avenue, 37th Floor
Seattle, WA 98154
Telephone: (206) 473-6390
Email: jason.stonefield@libertymutual.com

The Authorized Individual shall have, on behalf of the Surety, the authority to negotiate Change Orders both additive for extra work beyond the scope of the Contract and deductive (as well as credits and back charges) per the terms of the Contract and this Takeover Agreement. Surety must approve in writing all additive and deductive Change Orders over \$5,000; Change Orders less than \$5,000 may be negotiated and executed by District and Completion Contractor. Any agreements with respect to the warranty work of Contractor or corrective work as a result of latent defects in the work performed by the Contractor shall require the written approval of Surety.

34. Performance Bond. The total liability of Surety under the Contract, this Takeover Agreement and the Performance Bond for the performance of the work, after the expenditure of the Contract Balance, is limited to and shall not exceed the penal sum of the Performance Bond in the amount of \$26,050,932. All payments made by Surety for the performance of the Contract shall be credited against the penal sum of the Performance Bond. Nothing in this Takeover Agreement constitutes a waiver of such penal sum or an increase in the liability of Surety under the Performance Bond. The Performance Bond shall remain in full force and effect and shall be read in conjunction with this Takeover Agreement. District and Surety agree that the satisfactory completion of the Contract shall satisfy and discharge Surety's obligations under the Contract, the Performance Bond and this Takeover Agreement.

35. Payment Bond. The Payment Bond shall remain in full force and effect in accordance with its terms and provisions. The total liability of Surety under the Payment Bond is limited to and shall not exceed the penal sum of the Payment Bond in the amount of \$26,050,932. All Payment Bond payments made by Surety shall be credited against the penal sum of the Payment Bond. Nothing in this Takeover Agreement constitutes a waiver of such penal sum or an increase in the liability of the Surety under the Payment Bond.

36. Notices. Any notices which are required to be given by the terms of this Agreement or the Bonds shall be made as follows:

As to the District: Via email and certified mail, return receipt requested, postage prepaid to:

Timothy White
Deputy Chief of Facilities, Planning and Management
Oakland Unified School District
Facilities Planning & Management
955 High Street
Oakland, CA 94601
Telephone:
Email: Timothy.White@ousd.org

With a copy to:

Mark Williams
Fagen Friedman & Fulfroft, LLP
70 Washington Street, Suite 205
Oakland, CA 94607
Telephone: (510) 550-8228
Email: mwilliams@f3law.com

As to the Surety: Via email and certified mail, return receipt requested, postage prepaid to:

Jason Stonefeld
Liberty Mutual Surety
1001 4th Avenue, 13th Floor
Seattle, WA 98154
Telephone: (206) 473-6390
Email: jason.stonefield@libertymutual.com

With a copy to:

James D. Curran
Wolkin Curran, LLP
111 Maiden Lane, 6th Floor
San Francisco, CA 94108
Telephone: (415) 982-9390
Email: jcurran@wolincurran.com

37. Cooperation. District and Surety agree to cooperate fully with each other and the Completion Contractors to the end that the Contract may be completed as efficiently and quickly as reasonably possible under the circumstances.

38. Authority to Execute. District and Surety each represent and warrant that each individual signing on behalf of District or Surety has the power and authority to execute this Takeover Agreement. District represents that it will recommend to the Governing Board of the District to approve and ratify this Takeover Agreement.

39. Enforceability. This Takeover Agreement shall be enforceable, binding, and admissible in a court of law.

40. No Waiver. The failure of any of any Party at any time or times to require strict performance of any provision of this Takeover Agreement shall not waive, affect or diminish any right of any of the Party thereafter to demand strict compliance with and performance of this Takeover Agreement.

41. Applicable Law. This Takeover Agreement is made and entered into in the State of California and shall in all respects be interpreted, construed, enforced, and governed under the laws of the State of California.

42. Further Assistance. The Parties agree to execute and deliver all documents and instruments and to perform such additional acts as each Party may reasonably request, or as may be necessary or appropriate to effectuate, consummate, or perform any of the terms, provisions or conditions of this Takeover Agreement.

43. Consultation with Counsel. Each Party acknowledges, agrees and represents that the Party was represented by counsel in the negotiations and preparation of this Takeover Agreement by each Party's own choosing, and the Party consulted with counsel regarding the contents and legal effect of this Takeover Agreement.

44. Neutral Construction. This Takeover Agreement is the product of negotiation among the Parties, and represents the jointly conceived, bargained-for and agreed-upon language mutually determined by the Parties to express their intentions in entering into this Takeover Agreement. Any ambiguity or uncertainty in this Takeover Agreement shall equally be deemed to be caused by, or attributable to, all the Parties collectively. In any action or proceeding to enforce or interpret this Takeover Agreement, this Takeover Agreement shall be construed in a neutral manner, without regard to any presumption or rule requiring construction against any of the Parties who drafted or caused the drafting of this Takeover Agreement.

45. Waiver of California Civil Code Section 1654. The Parties hereby agree that the language of this Takeover Agreement shall not be construed or interpreted against the drafter of this agreement. Additionally, the Parties hereby waive the provisions of California Civil Code section 1654, which provides as follows:

“In cases of uncertainty not removed by the preceding rules, the language of a contract should be interpreted most strongly against the party who caused uncertainty to exist.”

46. No Undue Influence. Each of the Parties acknowledges and represents that the Party performed an independent investigation of the underlying facts and entered into this Takeover Agreement without fraud, duress, or undue influence.

47. No Reliance. Each of the Parties acknowledges and represents that the Party freely and voluntarily entered into this Takeover Agreement, and that in doing so the Party did not rely on any inducement, promise, representation, agreement, arrangement, understanding, or warranty other than as expressly set forth in this Takeover Agreement. District and Surety acknowledge and agree 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.

48. Time of the Essence. Time is expressly declared to be of the essence in connection with regards to Parties' obligations as set forth in this Takeover Agreement.

49. Modifications. This Takeover Agreement may not be modified or amended except by a written instrument specifically identifying this Takeover Agreement executed by each of the Parties.

50. Authority to Execute. Each of the Parties represents that the Party reviewed the terms of this Takeover Agreement with the officers, directors, shareholders, members, board of directors, and/or other people or group of people who have the authority over this Takeover Agreement, and after such review was authorized to enter into this Takeover Agreement.

51. Titles and Headings. Titles and headings of sections of this Takeover Agreement are for convenience only and shall not affect the construction of any provision of this Takeover Agreement.

52. Signatures. This Takeover Agreement may be executed in two or more counterparts, each of which together shall be deemed an original, but all of which together shall constitute one and the same instrument. In the event that any signature is delivered by facsimile transmission or by e-mail delivery of a “pdf” format data file, such signature shall create a valid and binding obligation of the party executing (or on whose behalf such signature is executed) with the same force and effect as if such facsimile or “.pdf” signature page were an original thereof.

53. Sole Benefit. This Takeover Agreement is solely for the benefit of District and Surety. District and Surety do not intend any provision of this Takeover Agreement to create any rights in or increase the rights of any third-party beneficiaries,

nor to confer any benefit upon or enforceable rights under this Takeover Agreement or otherwise upon anyone other than District and Surety. District and Surety acknowledge and agree 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 Bonds.

54. Entire Agreement. This Takeover Agreement constitutes the whole of the understanding, discussions, and agreements by and between District and Surety concerning the takeover and completion of the Contract.

55. Successors and Assigns. This Takeover Agreement shall be binding upon the Parties and their respective successors and assigns.

56. Attorney's Fees. In the event of litigation to enforce the terms of this Takeover Agreement, the prevailing party shall be entitled to its costs, including reasonable attorney's fees.

57. Effective Date. This Takeover Agreement shall be deemed effective from and after its execution by Timothy White, Deputy Chief of Facilities, Planning and Management, on behalf of District, and Jason Stonefeld, Senior Surety Claims Counsel, on behalf of Surety.

IN WITNESS HEREOF, this Takeover Agreement is executed as follows:

Date: August 1, 2019

OAKLAND UNIFIED SCHOOL DISTRICT



Timothy White
Deputy Chief of Facilities, Planning and Management

Date: August , 2019

LIBERTY MUTUAL INSURANCE COMPANY

Jason Stonefeld
Senior Surety Claims Counsel

nor to confer any benefit upon or enforceable rights under this Takeover Agreement or otherwise upon anyone other than District and Surety. District and Surety acknowledge and agree 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 Bonds.

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56. Attorney's Fees. In the event of litigation to enforce the terms of this Takeover Agreement, the prevailing party shall be entitled to its costs, including reasonable attorney's fees.

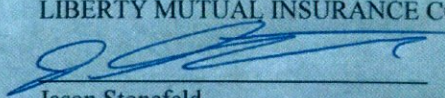
57. Effective Date. This Takeover Agreement shall be deemed effective from and after its execution by Timothy White, Deputy Chief of Facilities, Planning and Management, on behalf of District, and Jason Stonefeld, Senior Surety Claims Counsel, on behalf of Surety.

IN WITNESS HEREOF, this Takeover Agreement is executed as follows:

Date: August __, 2019 OAKLAND UNIFIED SCHOOL DISTRICT

Timothy White
Deputy Chief of Facilities, Planning and Management

Date: August 6, 2019 LIBERTY MUTUAL INSURANCE COMPANY



Jason Stonefeld
Senior Surety Claims Counsel

[SIGNATURES CONTINUED ON THE NEXT PAGE.]

[SIGNATURES CONTINUED ON THE NEXT PAGE.]

**APPROVED AS TO FORM AND SUBSTANCE AND RATIFIED BY THE
BOARD OF EDUCATION FOR THE OAKLAND UNIFIED SCHOOL DISTRICT**

Date: 9/5/2019

OAKLAND UNIFIED SCHOOL DISTRICT

Arne Sandberg

Print Name:

President, Board of Education

Date: 9/5/2019

OAKLAND UNIFIED SCHOOL DISTRICT

Jeff H. Hines

Print Name:

Secretary, Board of Education

APPROVED AS TO FORM AND SUBSTANCE

Aug
Date: July 12, 2019

FAGEN FRIEDMAN FULFROST, LLP

Mark Williams
Mark Williams
Attorneys for
Oakland Unified School District

Date: July 21, 2019

WOLKIN CURRAN, LLP

James D. Curran
James D. Curran
Attorneys for
Liberty Mutual Insurance Company

Approved as to form:

Arne Sandberg

8/15/19

Arne Sandberg
Lozano Smith



DIVISION OF FACILITIES PLANNING & MANAGEMENT ROUTING FORM

Project Information

Project Name	Madison Surety Takeover Project	Site	215
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Basic Directions

Services cannot be provided until the contract is awarded by the Board or is entered by the Superintendent pursuant to authority delegated by the Board.

Attachment Checklist	<input checked="" type="checkbox"/> Proof of general liability insurance, including certificates and endorsements, if contract is over \$15,000 <input checked="" type="checkbox"/> Workers compensation insurance certification, unless vendor is a sole provider
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Contractor Information

Contractor Name	Liberty Mutual Insurance Company	Agency's Contact	Jason Stonefeld				
OUSD Vendor ID #	N/A	Title	Sr. Surety Claims Counsel				
Street Address	1001 4th Avenue, 37th Floor	City	Seattle	State	WA	Zip	98154
Telephone	206-473-6390	Policy Expires					
Contractor History	Previously been an OUSD contractor? <input checked="" type="checkbox"/> Yes <input type="checkbox"/> No		Worked as an OUSD employee? <input type="checkbox"/> Yes <input type="checkbox"/> No				
OUSD Project #	13124						

Term of Original/Amended Contract

Date Work Will Begin (i.e., effective date of contract)	8-29-2019	Date Work Will End By (not more than 5 years from start date; for construction contracts, enter planned completion date)	12-31-2019
		New Date of Contract End (If Any)	

Compensation/Revised Compensation

If New Contract, Total Contract Price (Lump Sum)	\$	If New Contract, Total Contract Price (Not To Exceed)	\$13,610,253.48
Pay Rate Per Hour (If Hourly)	\$	If Amendment, Change in Price	\$
Other Expenses		Requisition Number	

Budget Information

If you are planning to multi-fund a contract using LEP funds, please contact the State and Federal Office before completing requisition.

Resource #	Funding Source	Org Key	Object Code	Amount
9560	Fund 25, Measure J & B	250-0000-0-9560-8500-6271-215-9180-9000-9999-99999	6271	\$13,610,253.48

Approval and Routing (in order of approval steps)

Services cannot be provided before the contract is fully approved and a Purchase Order is issued. Signing this document affirms that to your knowledge services were not provided before a PO was issued.

	Division Head	Phone	510-535-7038	Fax	510-535-7082
1.	Director, Facilities Planning and Management				
	Signature <i>Kenatman</i>	Date Approved	8/15/19		
2.	General Counsel, Department of Facilities Planning and Management				
	Signature <i>[Signature]</i> (as to form only)	Date Approved	8/15/19		
	Deputy Chief, Facilities Planning and Management				
3.	Signature <i>[Signature]</i>	Date Approved	8/15/19		
	Chief Financial Officer				
4.	Signature	Date Approved			
	President, Board of Education				
5.	Signature	Date Approved			