

Santa Barbara Unified School District

Item Title: Approval of Agreement by and Between American Contractors Indemnity Company and Santa Barbara Unified School District, and Contract Award to McGillivray Construction, Inc. in the amount of \$719,000 plus 10% Contingency

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Background:

Recommendation:

Resource Person: David E. Cash, EdD, superintendent

Fiscal Impact:

Funding Source:

ATTACHMENTS:

Name:

 [Tender_Agreement - Final \(2\).DOC](#)

Description:

Tender Agreement re Peabody September 2013

AGREEMENT

This AGREEMENT (the "Agreement") is made and entered into by and between American Contractors Indemnity Company ("Surety") and Santa Barbara Unified School District ("Owner") and is effective as of this ____ day of September, 2013 ("Effective Date").

RECITALS:

WHEREAS, on or about March 12, 2013, Owner and Former Contractor, Western Group, Inc. ("Former Contractor") entered into an Agreement (the "Original Contract") requiring Former Contractor to furnish all labor and material and perform all work for the work of improvement generally described as the Restroom Building and Site Improvement (Part A) and Paving Improvements (Part B) for Peabody Charter School (SBUSD Project #06-12/13) (hereinafter "Project") in accordance with the terms and provisions of the Original Contract, including all contract documents forming a part of the Original Contract;

WHEREAS, on or about March 19, 2013, as required under the terms of the Original Contract, Former Contractor and the Surety made, executed and delivered to the Owner a Performance Bond No. 1000941756 (the "Performance Bond") in the penal sum of \$670,000.00 and a Labor and Material Payment Bond No. 1000941756 (the "Payment Bond"), in the penal sum of \$670,000.00.00 (collectively, the "Bonds");

WHEREAS, on or about July 15, 2013, the Owner issued a written Notice of Termination of Contract for Cause to Former Contractor due to its default and failure to cure the default under the Original Contract for various reasons, including but not limited to, the Former Contractor's failure to supply enough properly skilled workers and proper materials to the Project, improper sequencing of work, inadequate supervision, unauthorized deviation from plans and specifications, and improper handling of submittals. As of the date of Former Contractor's default, a substantial amount of work remains to be performed under the Original Contract;

WHEREAS, the Surety acknowledged its obligation to fulfill its responsibilities under the Performance Bond, and has agreed to tender a completion contractor to complete the work under the Original Contract to the Owner;

WHEREAS, the Surety received a bid from McGillivray Construction, Inc. ("Completion Contractor") in the amount of \$719,000 for completion of the work remaining on the Project under the Original Contract;

WHEREAS, Owner will enter into an agreement with Completion Contractor for the completion of the Project ("Completion Contract");

WHEREAS, Owner has paid Former Contractor the sum of \$35,625.00, leaving a contract balance, including change orders, under the Original Contract in the sum of \$634,375.00 (the "Remaining Contract Balance");

WHEREAS, in connection with determining the Remaining Contract Balance, Owner, at Surety's request, has withheld from Former Contractor, the sum of \$55,000.00 that had been approved for payment (hereafter, the "Withheld Payment");

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

AGREEMENTS

1. The above Recitals are hereby incorporated by reference into the Terms and Conditions of this Agreement.

2. Surety agrees to pay to the Owner the sum of \$84,625.00 in full settlement of the claim of the Owner under the Performance Bond upon execution of this Agreement and delivery of the check in the amount of \$84,625.00, such sum representing the difference between the Remaining Contract Balance of \$634,375.00 and the amount bid by the Completion Contractor of \$719,000.00 to complete the Project pursuant to the terms of the Original Contract.

3. Owner agrees to enter into the Completion Contract with the Completion Contractor to complete the remaining uncompleted portion of the Original Contract. Completion Contractor shall be substituted for Former Contractor in the Original Contract such that Completion Contractor's relationship to the Owner is the same as if Completion Contractor were the original contracting party with the Owner in lieu of Former Contractor. Completion Contractor shall provide all bonds and insurance required pursuant to the terms of the Original Contract.

4. Surety represents and warrants that Former Contractor has assigned to Surety any and all rights to payment, including the Withheld Payment referenced in the Recitals. Surety agrees to defend, indemnify, and hold Owner harmless, up to the amount of the Withheld Payment, from all claims, lawsuits, damages, or judgments arising out of, or related to, demands for payment by Former Contractor.

5. With the exception of the indemnity obligations set forth in Paragraph 4, above, Owner agrees upon execution of this Agreement to release, acquit and forever discharge Surety and its successors and assigns of and from any and all claims, rights, demands and/or causes of action of whatever kind or nature which Owner has or may ever claim to have, now or in the future, against Surety under and/or by reason of its Performance Bond previously furnished to Owner.

6. Surety acknowledges and agrees that its Payment Bond previously furnished for the Project shall continue to remain in full force and effect, except that it is expressly agreed by and between the Owner and Surety that the scope and coverage of said Payment Bond shall be limited to and shall only apply to statutory claims for payment by subcontractors and/or suppliers of Former Contractor for work performed and/or materials delivered prior to its default and its termination from the Project. 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 \$670,000.00.

7. This Agreement constitutes the whole of the understanding, discussions, and agreements by and between Owner and Surety. The terms and provisions of this Agreement are contractual and not mere recitals. Owner and Surety acknowledge 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 Agreement. Any written or oral discussions conducted prior to the effective date of this Agreement shall not in any way vary or alter the terms of this Agreement.

8. This Agreement shall not be changed, amended or altered in any way except in writing and executed by Owner and Surety.

9. This Agreement may be executed in one or more counterparts, each of which shall be deemed to be an original.

10. This Agreement shall be governed by and controlled by the laws of the state of California.

11. This Agreement is effective as of the date first written above.

12. This Agreement shall be binding upon the parties and their respective successors and assigns.

13. In the event that one or more provisions of this Agreement shall be declared to be invalid, illegal or unenforceable in any respect, unless such invalidity, illegality or unenforceability shall be tantamount to a failure of consideration, the validity, legality and enforceability of the remaining provisions contained in this Agreement shall not in any way be affected or impaired thereby.

14. It is understood and agreed by Owner and Surety that this Agreement shall be construed without regard to any presumption or other rule requiring construction against the party causing this Agreement to be drafted.

15. Since Owner is a public entity, this Agreement is subject to approval by the Santa Barbara Unified School District Board of Education.

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

Dated: September ___, 2013

AMERICAN CONTRACTORS INDEMNITY
COMPANY (Surety)

By: _____

Title: _____

Dated: September ___, 2013

SANTA BARBARA UNIFIED SCHOOL
DISTRICT (Owner)

By: _____

Title: _____