

TENDER AGREEMENT

This Tender Agreement ("Agreement") is between North American Specialty Insurance Company ("Surety") and the City of Independence, Missouri ("City of Independence, Missouri" or "Obligee"), and is effective on the _____ day of _____, 2021. Surety and the City of Independence, Missouri are collectively referred to herein as the Parties.

Recitals

WHEREAS, on or about October 9, 2020 Blue Nile Contractors, Inc. ("Blue Nile"), as Contractor, and Obligee, as Owner, entered into a Contract Agreement (the "Contract") in connection with the Walnut Gardens Phase II project located in Independence, Missouri (the "Project"), in the amount of \$338,591.52 ("Contract Sum"); and

WHEREAS, on or about October 9, 2020, as required by the Contract, Blue Nile requested, and Surety agreed and issued Performance Bond No. 2312451 in the penal sum of \$338,591.52 ("Performance Bond"), naming Blue Nile as "Principal" (hereinafter "Principal") and City of Independence, Missouri, as "Owner" (hereinafter "Obligee") in connection with the Project; and

WHEREAS, on February 9, 2021, Principal signed a Voluntary Letter of Default issued to Surety, in which Principal indicated that it was unable to perform the Contract, and thus it was in default of the Contract (the "Default"); and

WHEREAS, Obligee and Surety have discussed and resolved the Default pursuant to which the Obligee agreed to takeover and complete the work of Principal and to release the Performance Bond, pursuant to the terms of this Agreement.

NOW THEREFORE, it is further agreed by and between Surety and Obligee that:

1. The Performance Bond issued for the Contract is attached hereto as EXHIBIT 1.

2. Principal signed the Voluntary Letter of Default ("Letter of Default") which is attached hereto as EXHIBIT 2, which was previously tendered to the Obligee on or about the date of its execution.

3. Surety has tendered to Obligee a completion contractor, Linaweaver Construction, Inc. ("Completing Contractor"), and arranged for Obligee to enter into a contract with the Completing Contractor to complete the work described in the "Project: Walnut Gardens Phase 2 Base Bid" (hereinafter "Contractor Bid"), a copy of which is attached hereto as EXHIBIT 3. Pursuant to the terms of the Contractor Bid, the Completing Contractor will: (1) complete the work described in the Contractor Bid; (2) accept payment of \$353,781.78 ("Total Completion Contract Sum") (calculated as follows: \$338,592.00 plus an additional \$15,189.78 to be paid by the Surety and, which is the

Surety Payment as defined in Paragraph 6, below), in exchange for performing the work described in the Contractor Bid; (3) warrant all of the work at the Project, including any work performed by the Principal and all of the work to be performed by the Completing Contractor pursuant to the Contractor Bid; (4) provide its own general liability insurance and payment and performance bonds for Oblige, the cost of which shall be paid by Completion Contractor and is included in the Total Completion Contract Sum; and (5) comply with all other requirements for the Project, including WBE, MBE and other Oblige contracting requirements.

4. Administration, licensing, insuring, permitting, and inspection of the Project shall be the exclusive responsibility of and shall remain with Oblige upon its execution of this Agreement.

5. Surety shall release any claim or right to the Contract Sum upon the discharge and return of the Performance Bond to Surety as set forth in Paragraph 10 below.

6. Because the Total Completion Contract Sum amount to be charged by the Completing Contractor to complete Principal's work at the Project exceeds the Contract Sum, the Surety will pay \$15,189.78 to Oblige ("Surety Payment"), which funds shall be used by Oblige to complete the Project using the Completing Contractor to perform the work described in the Contractor Bid, including all warranty work for the Project. The Surety Payment is calculated as follows:

Total Completion Contract Sum	\$ <u>353,781.78</u>
Less Total Contract Sum	-\$ <u>338,592.00</u>
Total Surety Payment	\$ <u>15,189.78</u>

7. Oblige shall have the financial responsibility to pay Completing Contractor all that it is owed for its work on the Project, including for any extras, unanticipated expenses and costs, etc. Oblige will use the Contract Sum and the Surety Payment to perform the work of the Project. The Surety shall have no liability whatsoever to either the Completing Contractor or Oblige for the work of the Completing Contractor, including for any unanticipated costs or fees beyond the Total Completion Contract Sum or for any warranty work or repairs not anticipated by the Completing Contractor.

8. In the event Oblige does not engage Completing Contractor or any other contractor to perform the work of the Project, and the Project is otherwise abandoned or cancelled, then Surety shall not be required to tender to Oblige the Surety Payment. The parties agree and acknowledge that the sole basis for Surety's agreement to tender payment of the \$15,189.78 to Oblige, is for the Oblige to use those funds to perform

the work that Blue Nile was otherwise required to perform under its Contract that is the basis for the Surety having issued its Performance Bond.

9. Any payment requests by the Completing Contractor, or change orders issued by Obligee to the Completing Contractor, shall be a matter between Completing Contractor and Obligee and shall not be the liability of, or otherwise affect, Surety, except as may be provided herein.

10. Upon Obligee's receipt of the Surety Payment and clearance of that payment through its banking institution, this Agreement shall be effective to release, acquit and forever discharge the Surety and its parents, successors and assigns of and from any and all claims, demands, causes of action, payments and/or liability to Obligee and/or any other party or entity, which Obligee or such third parties have or may have in the future, including those known and unknown, arising out of or relating in any way to the Project, the Performance Bond or the Contract, except for Surety's obligations pursuant to this Agreement, and the Performance Bond shall be effectively discharged and returned to the Surety within 5 days from the date the Surety Payment clears Obligee's banking channels).

11. For and in consideration of the release of the Surety in Paragraph 9 above, Surety does hereby agree to make the Surety Payment in the amount of \$15,189.78 to the Obligee within 15 days from the full execution of this Agreement.

12. As additional consideration to and for the Surety, and for and in consideration of its receipt of the Surety Payment, Obligee further hereby assigns unto Surety, its successors and assigns, any and all rights, demands, claims and/or causes of action which Obligee has or may have against Principal under the Contract. Obligee further grants to Surety, its successors and assigns, full power and authority for Surety's own use and benefit (but at Surety's own cost), to ask, demand, collect and/or release and, in Obligee's name or otherwise, to prosecute any claims, suits or proceedings at law or in equity, against the Principal.

13. Upon completion of each of the following (a) the full execution of this Agreement and (b) Obligee's return to Surety of the Performance Bond (in the event only a copy of the Performance Bond is available, the copy must be accompanied by an affidavit attesting that the copy being returned is a true and accurate copy of same), Surety agrees to release, acquit and forever discharge Obligee and its parents, affiliates, successors and assigns of and from any and all claims, demands, causes of action, payments, and/or liability to Surety which Surety has or may have in the future, including those known and unknown, arising out of or relating in any way to the Project, the Performance Bond or the Contract.

14. Nothing contained in this Agreement shall be deemed as an admission by the Surety of any fault or obligation to Obligee, or to enlarge Surety's obligations under the Performance Bond which is being discharged and released by Obligee immediately upon its execution of this Agreement. This Agreement shall not create or grant any third-party beneficiary status or rights to Completing Contractor any other third party.

15. The Parties hereby further represent, covenant and warrant that the execution of this Agreement and the full performance of this Agreement shall not result in an admission of liability on the part of either party.

16. Surety acknowledges and agrees that the Payment Bond it issued for Principal at the Project shall continue to remain in full force and effect in accordance with its terms. Unless required by law, Obligee acknowledges that it is not authorized to, and agrees not to, make any representations or promises regarding payment by Surety to suppliers and/or subcontractors of the Principal. Obligee shall refer all inquiries about payment of Principal's subcontractors and suppliers to Surety, and Surety shall have the sole and exclusive right to settle, compromise, defend, appeal, pay or dispute such claims as Surety, in its sole and complete discretion, may deem appropriate in accordance with the terms of the Payment Bond and applicable law.

17. Blue Nile, Aman Construction, Inc., Henok Tekeste and Radiy Hassen (collectively "Indemnitors") each signed a General Indemnity Agreement dated April 18, 2012 in favor of the Surety ("GIA"). Nothing in this Agreement is, nor shall anything in this Agreement be construed to be, a waiver or release of any of Surety's rights against the Indemnitors and/or under the GIA. The Surety continues to preserve all rights, claims and defenses it has or may have as it relates to each and every Indemnitor, the GIA, and any other written agreement between the Surety and Indemnitors.

18. This Agreement is solely for the benefit of the Parties and shall not create any rights, including any third-party beneficiary rights, in or to any person or entity that is not a party hereto. Nor does this Agreement increase the rights of third persons, or increase the obligations of the Parties to any third person or entity, or increase the liability or obligations of Surety to Obligee. Principal and the other Indemnitors are not third-party beneficiaries of this Agreement.

19. Both of the Parties have had the advice of counsel with respect to all matters pertaining to or arising out of this Agreement. It is agreed and understood by the Parties that there have been no oral or other agreements of any kind whatsoever between the Parties as a condition precedent to, or to induce the execution of, this Agreement by either of the Parties or to induce Obligee to enter into a contract with Completing Contractor. It is further agreed that no change, addition or amendment shall be made to any of the terms, covenants or conditions hereto except by writing signed by the Parties.

No waiver of any of Surety's rights, powers and/or remedies shall be effective unless such waiver is in writing and signed by Surety.

20. All notices concerning any dispute over the terms of this Agreement shall be in writing and sent to the receiving party at the address stated below (or to such other address or email as either Party may specify to the other, in writing), and shall be presumed to have been given three (3) calendar days after having been properly addressed to the recipient and mailed, provided mailing was made via certified mail return receipt requested, with a copy to also be provided via email:

To Surety: North American Specialty Insurance Company
c/o Marcelo Virgili, Vice President
1450 American Lane, Suite 1100
Schaumburg, IL 60173

With a copy to: Heather F. Shore, Esq.
Brown & Ruprecht, PC
2323 Grand Blvd, Suite 1100
Kansas City, MO 64108
hshore@brlawkc.com

To Obligee: City of Independence, Missouri
c/o Woodrow Fincher
111 East Maple Avenue
Independence, MO 64050

With a copy to:

21. This Agreement may be executed by the Parties independently in one or more counterparts, all of which together shall constitute and be deemed to be a valid and effective agreement. This Agreement may be executed by facsimile or e-mail signatures which shall be deemed to have the same force and effect as an original signature.

22. No waiver shall be effective unless in writing and executed by the party against whom enforcement of the waiver is sought. No failure or delay on the part of any Party to exercise any right hereunder shall operate as a waiver thereof. Waiver of any one breach shall not be deemed to be a waiver of any other breach of the same or any other provisions hereof.

23. This Agreement shall be construed and governed by the laws of the State of Missouri without regard to Missouri's conflict of law rules.

24. This Agreement shall inure to the benefit of and shall bind the respective representatives, assignees and successors in interests of the Parties.

IN WITNESS WHEREOF, the Parties have subscribed their names as evidence and consent to their agreement with these terms:

**NORTH AMERICAN SPECIALTY
INSURANCE COMPANY**

By:

Its: _____

**NORTH AMERICAN SPECIALTY
INSURANCE COMPANY**

By:

Its: _____

CITY OF INDEPENDENCE, MISSOURI

By:

Its: _____