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TENDER AGREEMENT AND GENERAL RELEASE

Principal: **Vimac USA, Inc.**
Surety: **Developers Surety and Indemnity Company**
Obligee: **Broward County, Florida**
Project: **Construction of Bus Stop Signs Replacement**
Contract No.: V1316220B1
Bond No.: **481109P**

This *Tender Agreement and General Release* (the "*Agreement*") is made this ____ day of March, 2017, by and between Broward County, Florida, a political subdivision organized and existing under the laws of the State of Florida ("County"), and its respective successors and assigns, and Developers Surety and Indemnity Company, a corporation organized and existing under the laws of the State of Iowa which is registered with and authorized to do business in the State of Florida ("DSIC") (County and DSIC shall collectively be referred to herein as the "Parties").

WHEREAS, on or about June 9, 2015, County, as owner, and Vimac USA, Inc. ("Vimac"), as contractor, entered into a written Agreement (the "*Contract*") to perform certain work known as the "Construction of Bus Stop Sign Replacement" (the "Project"); and

WHEREAS, in connection with the *Contract*, DSIC, as surety, issued separate *Performance Bond* and *Labor and Payment Bond*, each bearing bond number 481109P (collectively, the "*Bonds*"), on behalf of Vimac, as principal, and in favor of County, as obligee; and

WHEREAS, pursuant to a reinsurance agreement, AmTrust Europe, Ltd. ("AEL") is the reinsurer of the *Bonds* and provides coverage, where appropriate, to the risk undertaken by DSIC, as fronting company, and any payments contemplated herein will be issued by AEL; and

WHEREAS, Vimac performed a portion of the required work under the *Contract* on the Project, following which issues arose between County and Vimac concerning Vimac's performance; and

WHEREAS, on or about November 18, 2016, County issued a notice of termination of Vimac under the *Contract*, and made demand upon DSIC under the *Performance Bond* for the completion of the *Contract*; and

WHEREAS, in an effort to mitigate damages by expediting the progress and completion of Vimac's obligations under the *Contract*, DSIC has obtained a *Proposal* for the completion of the work from AUM Construction, Inc. (the "Completion Contractor"); and

WHEREAS, DSIC desires to tender the services of Completion Contractor and assign the *Proposal* to the County in full settlement and satisfaction of any and all obligations under its *Performance Bond*, subject to the terms of this *Agreement*; and

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DSIC, Vimac, and their respective members, officers, directors, servants, heirs, administrators, executors, sureties, re-insurers, successors and/or assigns, all parent, subsidiary, or affiliated corporations or entities, predecessors in interest, successors in interests, divisions, consultants, and attorneys, of and from any and all actions, causes of actions, suits, demands, damages and/or claims of every kind or nature, whether at law, under statute or in equity, whether in contract or in tort, presently known or unknown, which County ever had, now has or which it hereinafter can, shall or may have against DSIC and/or Vimac under and/or by reason of the *Contract*, the *Performance Bond* and/or the Project. County specifically represents that this Release shall fully and completely discharge the *Performance Bond*, renders the *Performance Bond* null and void, and declares the *Performance Bond* of no further force or effect.

6. **Discharge and Return of *Performance Bond*.** Upon the execution of this *Agreement* and its receipt of the *Performance Bond* Payment, County shall deliver the original *Performance Bond* to DSIC, bearing the marking "Released / Discharged".

7. **Reservation of Rights as Between DSIC and Vimac**. This *Agreement* shall in no way alter, affect, impair or prejudice any rights, claims, causes of action and/or defenses between DSIC and Vimac (or its corporate and/or individual indemnitors) relating to the *Contract*, *Bonds*, *Indemnity Agreement* and/or any other agreements between such parties, regardless of whether such claims arise under contract, statute or at common law.

8. **DSIC's Continuing Obligations Under *Payment Bond*.** Nothing herein shall alter or affect DSIC's payment obligations to third party claimants, if any, under the *Payment Bond* issued on behalf of Vimac in connection with the Project, provided however that the *Payment Bond* shall not apply to or cover the Completion Contractor or any of its subcontractor(s) and/or suppliers for any work performed and/or materials delivered in connection with the *Completion Contract*.

9. **No Admission of Liability**. This *Agreement* does not constitute an admission of liability on the part of any of the Parties.

10. **Binding Agreement**. This *Agreement* shall only extend to and be binding upon the Parties hereto. Nothing contained in this *Agreement* shall create any third party beneficiaries to other claimants under the *Performance Bond*, nor confer any benefit or enforceable rights under this *Agreement* other than to the Parties hereto.

11. **No Modification Except as in Writing**. This *Agreement* may not be modified unless in writing and executed by the Parties hereto. No waiver of any provisions of this *Agreement* shall be valid unless in writing and signed by the Party against whom it is sought to be enforced.

12. **Interpretation of *Agreement*.** The provisions of this *Agreement* shall be applied and interpreted in a manner consistent with each other so as to carry out the purposes 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*.

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WHEREAS, the Parties wish to memorialize their agreement to ensure a diligent and satisfactory completion of the *Contract*.

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

1. **Recitals**. The recitals are part of this *Agreement* as if fully set forth herein.

2. **Tender and Assignment of Completion Contractor**. In accordance with paragraph 3.b. of the *Performance Bond*, DSIC hereby tenders, and County accepts upon approval by the Board of County Commissioners, the Completion Contractor to perform the remaining work under the original *Contract*. DSIC assigns to County the *Proposal* from the Completion Contractor, who represent that it is ready, willing and able to enter into the *Completion Contract* and to accept payment directly from County in such amount for the performance of the required work. The Completion Contractor shall furnish to County a *Performance Bond* and *Payment Bond* issued in a form and by a surety acceptable to County. A true and correct copy of the Completion Contractor's *Proposal* is attached hereto as **Exhibit "A"**.

3. ***Contract* Accounting.** The original *Contract* contemplated the manufacture and installation of bus stop signage, as more fully memorialized in the *Contract*. Based upon information compiled by County, County has identified the remaining scope required to complete the *Contract* (*see* **Exhibit "B"**). The following represents the *Contract* accounting:

Pending Pay Applications due from County	$92,239.79
Pending Retainage due from County	$82,908.61
Remaining Scope per County	$999,790.46
Subtotal Contract Funds Available	**$1,174,938.86**
Completion Contractor Bid	$1,244,440.00
***Contract* Deficiency**	**$69,501.14**

This contract accounting does not include the remaining *Contract* allowance in the amount of $165,000.00, which shall be a pass-through as between the County and the Completion Contractor.

4. **AEL's Payment to County**. Within twenty (20) days of the final approval and execution of this *Agreement* by the County, AEL shall pay to County the sum of Sixty-Nine Thousand One Five Hundred One and 14/100 Dollars ($69,501.14) (the "*Performance Bond* Payment"), in satisfying DSIC's and Vimac's obligations under the *Performance Bond* and/or *Contract*. Upon receipt of the *Performance Bond* Payment, neither County nor the Completion Contractor shall be entitled to any further payments from DSIC.

5. **General Release as to *Contract* and *Performance Bond***. Upon the clearance of the *Performance Bond* Payment, and in consideration of the Parties' performance as specified herein, County does hereby expressly RELEASE, ACQUIT and FOREVER DISCHARGE

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13. **Incorporation of All Prior Negotiations**. This *Agreement* incorporates, includes, and supersedes all prior negotiations, correspondence, conversations, agreements or understandings applicable to the matters contained herein; and the Parties agree that there are no commitments, agreements or understandings concerning the subject matter of this *Agreement* that are not contained in this *Agreement*. Accordingly, the Parties agree that no deviations from the terms hereof shall be predicated upon any prior representations or agreements, whether oral or written.

14. **Acknowledgment of Release of Rights**. The Parties acknowledge and agree that they are releasing certain rights and assuming certain duties and obligations which, but for this *Agreement*, would not have been released or assumed. Accordingly, the Parties agree that this *Agreement* is fair and reasonable, that each of them has had an opportunity to consult with and have in fact consulted with such experts of their choice as they may have desired, and that they have had the opportunity to discuss and have in fact discussed this matter with counsel of their choice.

15. **Advice of Counsel**. The Parties acknowledge that they have sought and received whatever competent advice and counsel as was necessary for them to form a full and complete understanding of all rights and obligations herein and that the preparation of this *Agreement* has been their joint effort. The language agreed to expresses their mutual intent and the resulting document shall not, solely as a matter of judicial construction, be construed more severely against one of the Parties than the other.

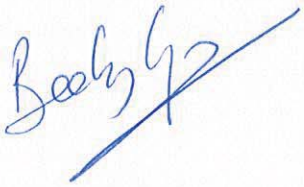
16. **Obligations of Further Execution**. The Parties agree to execute all such further instruments, and to take all such further actions as may be reasonably required by any Party to fully effectuate the terms and provisions of this *Agreement* and the transactions contemplated herein.

17. **Event of Enforcement**. In the event that it is necessary for any of the Parties to seek enforcement of this *Agreement*, the Parties agree that the *Agreement* will be interpreted and construed in accordance with, and governed by the laws of the State of Florida, and such proceedings shall occur in a court of competent jurisdiction servicing Broward County, Florida.

18. **Notices**. Any notices or other formal communications made under this *Agreement* shall be deemed to have been duly given if sent via electronic and United States Mail to the following:

To DSIC/AEL
Beatriz Crespo Cifrián
AmTrust Europe, Ltd.
Carretera de la Coruña km. 23,200
Edificio Las Rozas 23
28290 – Las Rozas (Madrid), Spain
Beatriz.crespo@amtrust.es

With a copy to:
Edward Etcheverry, Esq.
Etcheverry Harrison LLP
150 S. Pine Island Road, Suite 105
Fort Lauderdale, FL 33324
etcheverry@etchlaw.com



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To County:	**With a copy to:**
Broward County Attorneys' Office	Broward County Trans. Dept.
Broward County, Florida	Attn: Director of Transportation
115 South Andrews Avenue	One N. University Drive
Fort Lauderdale, Florida 33301	Plantation, Florida 33324

or at such other address(es) as each of the foregoing may designate in writing by registered or certified mail to the other.

19. **Execution in Counterparts**. This *Agreement* may be executed in one or more counterparts, each of which, when executed and delivered, shall be deemed to be an original, but such counterparts shall together constitute one and the same instrument.

IN WITNESS WHEREOF, the Parties hereto have made and executed this *Agreement* on the respective dates under each signature: Broward County through its BOARD OF COUNTY COMMISSIONERS, signing by and through its Chair or Vice Chair, authorized to execute same by Board action on the 28 day of March, 2017, and DSIC, signing by and through Authorized Representative, duly authorized to execute same.

BROWARD COUNTY by and through its BOARD OF COUNTY COMMISSIONERS

Broward County Administrator, as
Ex-officio Clerk of the Broward
County Board of County Commissioners

28 day of March, 2017

By: Barbara Sharief, Mayor

Insurance Requirements
approved by Broward County
Risk Management Division

By: Tim Keeley

Approved as to form by
Office of County Attorney
Broward County, Florida
115 S. Andrews Avenue, Suite 423
Ft. Lauderdale, FL 33301-1801
Telephone: (954) 523-3404
Telecopier: (954) 523-2613

By: 3/16/17
Michael Kerr
Chief Trial Attorney

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