

## TENDER AND RELEASE AGREEMENT

**THIS TENDER AND RELEASE AGREEMENT** (the "Agreement") is made this \_\_\_\_ day of \_\_\_\_\_, 2024, by and between **Lexon Insurance Company** ("Lexon" or "Surety"), the **City of Green Cove Springs** ("Green Cove" or "Owner"), and **Sawcross Contractors & Engineers, Inc.** ("Sawcross" or "Tender Contractor")(Lexon, Green Cove and Sawcross individually a "Party" or collectively the "Parties").

### RECITALS

**WHEREAS**, Green Cove is the owner of a project commonly known as "DEP SRF Harbor Road WRF Expansion, Ph. 2, SRF Agreement No. WW100420, Green Cove Springs, Florida" (the "Project"); and

**WHEREAS**, the Owner awarded contract number WW100420, dated March 1, 2021, in the amount of \$15,426,644.33 to Williams Industrial Services, LLC ("Williams") for the Project (the "Contract"), which Contract had an original substantial completion date of October 13, 2022 and, through executed contract modifications during the Project, ultimately had a revised contractual substantial completion date of March 1, 2023, with a copy of the Contract and all modifications thereto annexed hereto as Exhibit A; and

**WHEREAS**, Lexon, as surety, issued a payment bond (the "Payment Bond") and a performance bond (the "Performance Bond") (collectively the "Bonds"), each bearing Bond No. LICX1200727 and each in the penal sum of \$15,426,644.33, on behalf of Williams, as principal, and in favor of the Owner, as obligee, in connection with the Project, with a copy of the Bonds annexed hereto as Exhibit B; and

**WHEREAS**, on July 22, 2023, Williams filed a voluntary petition for relief under Chapter 11 of the United States Bankruptcy Code (the "Bankruptcy Petition"); and

**WHEREAS**, after the filing of the Bankruptcy Petition, the Owner declared Williams in default, terminated the Contract (the "Termination") and made a demand against the Performance Bond for the Surety to arrange for the completion of Williams' work under the Contract on account of the Termination; and

**WHEREAS**, the Surety secured relief from the automatic stay applicable to the Williams' contract agreements, including the Contract herein, in the form of an "Order Authorizing the Debtors to Reject Certain Executory Contracts Effective as of the Rejection Date", dated August 18, 2023, with a copy of said Order, along with a companion Order lifting the freeze on debtor's contract assets, annexed hereto as Exhibit C; and

**WHEREAS**, on January 2, 2024, the Owner and Surety entered into a Takeover Agreement for the completion of Phase 1 of the remaining work to be completed under the Contract, a copy of which is annexed hereto as Exhibit D, with Sawcross serving as contractor for the purposes of the January 2, 2024 Agreement ("Phase 1 Work"); and

**WHEREAS**, upon completion of all Phase 1 Work under the Takeover Agreement, Lexon arranged to have the Tender Contractor complete all remaining work under the Contract ("Phase 2 Work"); and

**WHEREAS**, the Tender Contractor agrees to perform all remaining Phase 2 Work under the Contract in accordance with the existing contract documents, which include, but are not limited to all General, Supplementary and Special Conditions, drawings, specifications, plans, field details, approved change orders, addenda, amendments, responses to RFIs, bidding information, submittals, and documents forming a part of the Contract (collectively the "Contract Documents"); and

**WHEREAS**, the Owner has accepted Surety's proposal to tender Sawcross as the Tender Contractor to complete all remaining work under the Contract in accordance with the terms and conditions set forth herein.

**AGREEMENT**

**NOW THEREFORE**, in consideration of these promises and other good and valuable consideration, the receipt and sufficiency of which is hereby acknowledged, the Parties to this Agreement do covenant and agree as follows:

1. Precatory Clauses. The precatory (Whereas) clauses above are made part of this Agreement as if fully set forth herein.

2. Contract Accounting. In accordance with the Project accounting set forth below, the Owner and the Surety agree that the Remaining Contract Balance is **\$2,640,255.19**, which sum shall be made available in full to the Tender Contractor for the completion of the remaining work under the Contract.

Original Contract Amount:	\$ 15,426,644.33
Approved Change Orders:	\$ 126,728.34
Adjusted Contract Amount:	\$ 15,553,372.67
Paid to Date:	\$ 12,890,751.38
Additional Owner Payments	\$ 22,366.10
<b>Remaining Contract Balance:</b>	<b>\$ 2,640,255.19</b>

3. Acknowledgments. The Remaining Contract Balance figure set forth in Paragraph 2 above includes the total amount of retainage held by the Owner in the amount of \$685,898.10. ~~The Owner acknowledges that it has accepted the pre-Termination work performed by Williams as being compliant with the Contract. Nothing set forth in this paragraph shall be deemed a waiver or release of the Owner's potential claims for latent defects as provided for in paragraph 11.4. The below. The~~ Owner further acknowledges that the Contract Accounting set forth in Paragraph 2 and in this Paragraph 3 is true and accurate.

**Commented [AF1]:** Dan, My understanding is that certain work performed by Williams was not compliant with the Contract and that Sawcross is correcting same.

4. Payment in Lieu of Warranties. In consideration for the Surety's additional payment of an agreed-upon sum of \$129,372.42 (the "Payment in Lieu of Warranties"), the Owner agrees to release the Surety from any and all continuing warranty obligations which may exist in respect of Williams' pre-Termination work on the Project. ~~Nothing set forth in this paragraph shall be deemed a waiver or release of the Owner's potential claims for latent defects as provided for in paragraph 11.4 below.~~

5. Tender. Lexon tenders to the Owner and the Owner accepts Sawcross as the Tender Contractor for the purpose of completing all of the remaining obligations under the Contract. The Owner agrees to administer the Contract with the Tender Contractor in the same manner and upon the same terms as set forth in the Contract. The Tender Contractor will replace Williams as contractor of record for the Project for the completion of all remaining work under the Contract and shall be in direct contractual privity with the Owner. ~~by virtue of the execution of a Completion Contract between said Parties.~~

6. Scope of Completion Work. The Tender Contractor hereby agrees to perform all remaining work required under the Contract in accordance with the Contract Documents. The Tender Contractor further agrees to otherwise furnish and pay for all labor, materials, services and equipment and shall do everything necessary to perform and satisfactorily complete the Contract as required by the Contract Documents. The Tender Contractor is to obtain all necessary approvals, permits and inspections as required by the Contract Documents and otherwise comply with all contractual, legal and regulatory requirements.

6.1. Tender Contractor's Assumption of Contract and Warranty Obligations. Except as otherwise provided, the Tender Contractor acknowledges and agrees, that from and after the date of this Agreement, it assumes all of Williams' and Lexon's performance obligations to the Owner under the Contract, and agrees to be firmly bound by and to comply with all terms and conditions of the Contract. In respect of Tender Contractor's warranty obligations, it is understood and agreed that Tender Contractor will warranty all of its work performed as part of the Phase 1 Work and Phase 2 Work on the Project, but will not warranty any pre-Termination work performed by Williams, and The Tender Contractor shall not be

responsible for any debt owed by Williams to any of Williams' subcontractors, suppliers, and/or materialmen.

6.2. Work to be Performed in Accordance with the Contract. Subject to the terms of this Agreement, the Tender Contractor shall be responsible for the performance of the Contract and the Owner shall, in accordance with the Contract, look solely to the Tender Contractor or its Surety for the performance of the Contract.

6.3. Full Inspection. The Tender Contractor has examined all Contract Documents pertaining to the Contract and is fully familiar with the contents thereof. The Tender Contractor has examined and inspected the Project and the nature and status of any and all work performed by Williams and/or Williams' subcontractors, as well as the work to be performed in order to complete the Contract. No representations or warranties with respect to the status and condition of the work performed by Williams and/or Williams' subcontractors and/or the conditions affecting the work to be done by the Tender Contractor have been made to the Tender Contractor by Lexon or any of its representatives. Lexon makes no warranties or representations, express or implied, to the Tender Contractor with respect to the Contract Documents, the Project or the work performed by Williams and/or Williams' subcontractors on the Project.

7. Tender Contractor Price. The Tender Contractor agrees to perform all of the remaining work required under the Contract for the agreed upon price of Four-Million, Eight-Hundred, Seventy-Six Thousand, Seven-Hundred, Fifty-Eight Dollars and no cents **(\$4,876,758.00)** ("Tender Contractor Price"), subject to adjustment for increases or decreases in actual quantities and by any change orders to the Contract executed by the Owner and the Tender Contractor, which Tender Contractor Price has been accepted by the Owner.

8. Tender Contractor Payment. The Owner agrees to pay the Tender Contractor the Tender Contractor Price for the performance of all remaining work and the performance of any other obligations owed to the Owner under the Contract (the "Tender Contractor Payment"). The Tender Contractor Payment shall be made in accordance with terms agreed to by the Owner and the Tender Contractor (the "Payment Schedule"). Any failure of the Owner and the Tender Contractor to agree on a Payment Schedule shall have no effect on the Owner's release of Lexon's performance obligations under the terms of this Agreement, including but not limited to the releases set forth in Paragraphs 4, 11.3 and 11.4 herein.

9. Final Surety Payment to Owner. The final payment to be tendered by the Surety to the Owner ("Final Surety Payment") is calculated as follows:

Tender Contractor Price (TCP):	\$ 4,876,758.00
Remaining Contract Balance (RCB):	\$ 2,640,255.19
Difference between TCP and RCB:	\$ 2,236,502.81
Payment in lieu of Warranties:	\$ 129,372.74
<b>Final Surety Payment to Owner:</b>	<b>\$ 2,365,875.55</b>

The Final Surety Payment shall be paid by the Surety to the Owner in full and final settlement of all claims against the Performance Bond and against the Surety, except as otherwise noted in Articles 11.3 and 11.4.

10. Time. The Parties hereby agree that the Tender Contractor shall commence work on the Contract immediately upon execution of this Agreement, and that the Contract is to be completed on or before **December 31, 2024** ("Completion Date"). The Parties further agree that the Contract shall be amended to reflect the granting of a time extension to the Tender Contractor to finish all remaining work under the Contract to the Completion Date set forth herein. It is understood and agreed that the Owner's claims for liquidated damages through the Completion Date is reserved as to the Surety. Surety reserves all its defenses to Owner's claims for liquidated damages and the parties shall proceed to non-binding mediation as provided in paragraph 11.3 below.

11. Surety Bonds

11.1 Tender Contractor Performance Bond. Simultaneous with the execution of this Agreement, the Tender Contractor shall deliver to the Owner a separate performance bond in the form required by the Contract in the penal sum of \$4,876,758.00, naming the City of Green Cove Springs as obligee on the bond.

11.2 Tender Contractor Payment Bond. Simultaneous with the execution of this Agreement, the Tender Contractor shall deliver to the Owner a separate payment bond in the form required by the Contract in the penal sum of \$4,876,758.00, naming the City of Green Cove Springs as obligee on the bond.

11.3 Release of Performance Bond. In consideration for the terms of this Agreement, including but not limited to the tendering of the Final Surety Payment by Lexon, the Owner agrees to forever discharge and release Lexon, together with its representatives, owners, officers, directors, employees, attorneys, successors, and assigns, from any and all performance obligations, claims, causes of action, costs, expenses, losses, damages or other claims or rights concerning the Contract, the Project and the Performance Bond. It is understood and agreed that the Owner's claim for recovery of liquidated damages is excepted from this Release and that the Parties to this Agreement reserve all claims, rights and defenses possessed by them in respect of the Owner's claim for liquidated damages, which is the sole exception to the list of released claims hereunder. The Parties further agree that they shall proceed to non-binding mediation in respect of the Owner's reserved liquidated damages claim as soon as practical upon final execution of this Agreement, but in no event later than the extended completion date for all remaining Phase 2 Work.

11.4 Release of Claims. Subject to the Owner's acceptance of the Tender Contractor for completion of all remaining work under the Contract and the Surety's compliance with all other terms of this Agreement, including but not limited to the tendering of the Final Surety Payment, the Owner releases any and all claims against the Surety for the imposition of any damages, costs, fees and expenses, which have been applied, or could have been applied, against the Contract and/or the Performance Bond, excepting the Owner's claim for recovery of liquidated damages as set forth in Article 11.3, as well as any potential claims for latent defects which are hereby reserved. Further, the Parties agree that they shall not be entitled to seek any indirect, incidental, extra-contractual, punitive, special or other like damages in any action as a result, directly or indirectly, of any Party's actions or inactions, with respect to this Agreement.

11.5 No Waiver. Nothing contained in this Term Sheet, or the Parties' ultimate Tender and Release Agreement, shall alter, amend, affect, or constitute a waiver of any rights and claims of Surety, whether contractual, at common law, or otherwise, that Surety, or any of its affiliates or reinsurers, may have against any other third-parties not a party to this Agreement.

11.6 Payment Bond to Remain in Effect. The Payment Bond shall remain in full force and effect, subject its terms and conditions.

12 Reduction of Bond Penalty. Upon the execution of this Agreement and the tendering of the Final Surety Payment, the Parties agree that the Bond Penalty associated with the Performance Bond shall be reduced to \$12,258,343.25 as set forth below. The total amount of the Final Surety Payment plus all monies expended by the Surety as part of the January 2, 2024 Takeover Agreement comprise the total amount reduced from the Bond Penalty amount as follows:

Penal Sum of Bond:	\$ 15,426,644.33
Payments for Phase 1 Work:	\$ 346,944.61
Other Reconciled Payments:	\$ 455,480.92
(including Subcontractor Ratification Costs)	
Final Surety Payment:	\$ 2,365,875.55
<b>Reduced Bond Penalty Amount:</b>	<b>\$ 12,258,343.25</b>

13. Insurance Coverage. Prior to commencing any work under this Agreement or the Contract, the Tender Contractor shall procure and thereafter maintain at its sole expense until the final acceptance of all of its work under the ~~Completion~~ Contract, or longer if so provided by the Contract, the insurance

coverages required by the Contract. The Tender Contractor further agrees to deliver all Certificates of Insurance and/or Certifications required by the Contract to the Owner prior to the commencement of any work on the Project.

14. No Modification. This Agreement, and all the documents referenced herein, constitute the entire understanding between the Parties with respect to the subject matter contained herein and cannot be amended or modified except by a writing duly executed by all of the Parties.

15. Choice of Law. This Agreement and any dispute of any nature, any claim or any suit arising out of either this Agreement or the Contract shall be governed by the laws of the State of Florida in every respect. Any action or suit brought with respect to the Tender and Release Agreement, or any breach thereof, shall be commenced and pursued in a single proceeding as set forth in the dispute resolution provisions of the Bonds or the Contract, with the specific provisions of the Bonds controlling in the event of a discrepancy.

16. Construction and Interpretation of Agreement. In the event of an ambiguity in or dispute regarding the interpretation of this Agreement, it shall not be construed strictly for or against any Party. 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.

17. No Third Party Rights. Nothing contained in this Agreement is intended to create any rights in favor of, or otherwise in any manner inure to the benefit of, any person or legal entity not a signatory hereto and the Parties hereto reserve all rights, remedies and defenses they may have against any such person or legal entity not a signatory hereto. This Agreement binds and inures to the benefit of and is enforceable by the successors and assigns of the Parties.

18. Counterparts. This Agreement may be executed in several counterparts, each of which shall be an original and all of which shall constitute but one and the same instrument.

19. Alterations to Agreement. The modification, amendment and/or waiver of the Agreement, or of any of the provisions of the Agreement, shall not become effective unless executed in writing by the Party affected by any such modification, amendment or waiver, in each case by a duly authorized representative.

20. Review of Agreement. All Parties acknowledge that they had an opportunity to review this Agreement with counsel of their choosing prior to executing same.

21. Effective Date. The Effective Date of this Agreement shall be the date on which this Agreement is executed by all Parties.

22. No Joint Venture or Partnership Created. The relationship between the Parties shall be limited to the performance of this Agreement, which shall be construed and be deemed to be a specific arrangement for the tendering of a replacement contractor to perform the remaining work under the Contract and the payment of the Final Surety Payment only. Nothing herein contained shall be construed to constitute the Parties as partners or joint venturers or to constitute any Party as general agent of any other Party. The Surety is entitled to act for its own benefit in this matter and owes no duties, fiduciary or otherwise, except as expressly set forth herein.

23. No Admission of Liability. Nothing contained herein shall be deemed an admission of liability on the part of any Party to this Agreement.

24. Headings. The headings contained in this Agreement are for reference purposes only and shall not affect in any way the meaning or interpretation of this Agreement.

25. Numbers. Words shall take precedence over numerals in the event of a discrepancy.

26. Facsimile and Email Signatures. Signatures transmitted by facsimile or email shall be accepted and deemed to be original signatures and shall be binding on the Parties upon signing.

27. Entire Agreement. The Parties hereto agree that the Agreement constitutes the entire agreement between the Parties relating to the subject matter of the Agreement and that there are no other agreements, understandings, representations or warranties made or given, except as expressly set forth herein. All prior agreements, understandings, letters and/or communications relating to the subject matter of the Agreement shall be null and void and shall be superseded by the Agreement, except as expressly set forth herein.

28. Authorization to Execute. Each of the undersigned individuals represents, warrants and certifies that s/he is authorized to execute this Agreement in the capacity indicated.

**[REMAINDER OF PAGE LEFT INTENTIONALLY BLANK]**

DRAFT

**EXECUTION**

IN WITNESS WHEREOF, the Parties have executed this Agreement on the date(s) appearing below:

**LEXON INSURANCE COMPANY**

By: \_\_\_\_\_

Print Name: \_\_\_\_\_

Title: \_\_\_\_\_

Date: \_\_\_\_\_

**CITY OF GREEN COVE SPRINGS**

By: \_\_\_\_\_

Print Name: \_\_\_\_\_

Title: \_\_\_\_\_

Date: \_\_\_\_\_

**SAWCROSS CONTRACTORS & ENGINEERS, INC.**

By: \_\_\_\_\_

Print Name: \_\_\_\_\_

Title: \_\_\_\_\_

Date: \_\_\_\_\_