

**CITY OF EL PASO, TEXAS  
AGENDA ITEM  
DEPARTMENT HEAD'S SUMMARY FORM**

**DEPARTMENT:** Capital Improvement

**AGENDA DATE:** January 23, 2018

**CONTACT PERSON/PHONE:** Sam Rodriguez, City Engineer (915) 212-0065

**DISTRICT(S) AFFECTED:** 3

**STRATEGIC GOAL: NO.3** Promote the Visual Image of El Paso  
**NO. 8** Nurture and Promote a Healthy, Sustainable Community

**SUBJECT:**

Request that City Manager is authorized to sign the Takeover Agreement between the City and Westchester Fire Insurance Company ("Surety"), for the Surety to complete the Ramos Court, Little Flower and Manning Way Street Improvement project services through the Completion Contractor, Venegas Engineering Management and Construction, Inc., pursuant to the terms of Contract No. 2014-391 and the responsibilities of the Performance Bond for the remaining contract amount of \$257,433.34.

**BACKGROUND / DISCUSSION:**

Contractor abandoned the Project on or about July 15, 2016. Owner subsequently made demand upon the Surety's Performance Bond, requesting Surety to remedy the alleged default of Contractor and to complete or procure completion of the work to include stamped concrete on the parkways and punch list items under the Contract.

Staff will work with the new contract to develop and agree on the schedule.

**SELECTION SUMMARY:**

N/A

**PROTEST** N/A

☐ No protest received for this requirement.

☐ Protest received.

**COUNCIL REPRESENTATIVE BRIEFING:**

Was a briefing provided? ☐ Yes or ☒ No  
If yes, select the applicable districts.

- ☐ District 1
- ☐ District 2
- ☐ District 3
- ☐ District 4
- ☐ District 5
- ☐ District 6

- ☐ District 7  
☐ District 8  
☐ All Districts

**PRIOR COUNCIL ACTION:**

N/A

**AMOUNT AND SOURCE OF FUNDING:**

Amount: \$257,433.34

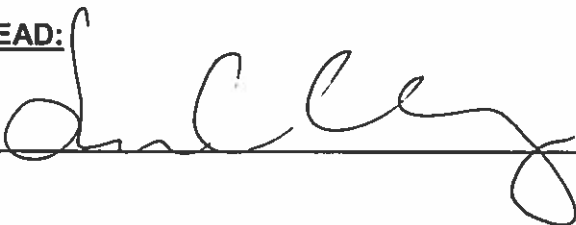
Funding Source: 2013 Street Infrastructure Certificates of Obligation (approved 6/26/12)

**BOARD / COMMISSION ACTION:**

N/A

\*\*\*\*\*REQUIRED AUTHORIZATION\*\*\*\*\*

**DEPARTMENT HEAD:**



## **RESOLUTION**

**WHEREAS**, on July 8, 2014 the City of El Paso ("City") awarded Contract No. 2014-391 Ramos Court, Little Flower and Manning Way Street Improvements ("Contract") to MGB Group, Inc.; and

**WHEREAS**, Contractor provided a Performance Bond through Westchester Fire Insurance Company ("Surety") in favor of the City to secure the performance obligations of Contractor; and

**WHEREAS**, on or about July 15, 2016 Contractor abandoned the City's project; and

**WHEREAS**, the City contacted the Surety to secure the performance of Contract for the completion of the Contract pursuant to the obligations of the Performance Bond; and

**WHEREAS**, the Surety agrees to undertake the completion of Contract No. 2014-391, by subcontracting the performance of the work under the Contract to Venegas Engineering Management and Construction, Inc. ("Completion Contractor"); and

**WHEREAS**, the Surety is willing to undertake the completion of the Contract in accordance with the terms of the Contract, Performance Bond and the proposed Takeover Agreement for the remaining contract balance of \$257,433.34; and

**WHEREAS**, the City and Surety desires to enter into a Takeover Agreement for the Surety to undertake the completion of Contract No. 2014-391 by subcontracting the Completion Contractor which will perform for the remaining term of the contract.

**NOW THEREFORE, BE IT RESOLVED BY THE CITY COUNCIL OF THE CITY OF EL PASO:**

The City Manager is authorized to sign the Takeover Agreement between the City and Westchester Fire Insurance Company ("Surety"), for the Surety to complete the Ramos Court, Little Flower and Manning Way Street Improvement project services through the Completion Contractor, Venegas Engineering Management and Construction, Inc., pursuant to the terms of Contract No. 2014-391 and the responsibilities of the Performance Bond for the remaining contract amount of \$257,433.34.

**ADOPTED THIS \_\_\_\_\_ DAY OF \_\_\_\_\_ 2018.**

(Signatures continue on following page)

**THE CITY OF EL PASO:**

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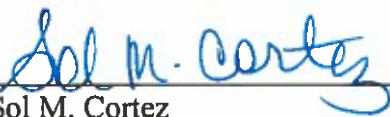
Dee Margo  
Mayor

ATTEST:

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Laura D. Prine  
Interim City Clerk

APPROVED AS TO FORM:

  
Sol M. Cortez  
Assistant City Attorney

APPROVED AS TO CONTENT:

  
Samuel Rodriguez, P.E., City Engineer  
Capital Improvement Department

## **TAKEOVER AGREEMENT**

This Takeover Agreement (the "Agreement") is made and entered into by and between WESTCHESTER FIRE INSURANCE COMPANY (the "Surety") and THE CITY OF EL PASO, TEXAS (the "Owner").

### **RECITALS**

WHEREAS, MGB Group, Inc. ("Contractor") and the Owner entered into a written contract ("Contract") to furnish all labor and materials and perform all work for the project known as Ramos Court, Little Flower and Manning Way Street Improvements, further identified as Contract Number 2014-391 ("Project");

WHEREAS, as required by law and under the terms of the Contract, Surety issued Payment and Performance Bonds ("Bonds"), both identified with Bond Number K08741402, on behalf of Contractor as principal and in favor of the Owner for the Project, each in the penal sum of \$1,270,886.09 ("Penal Sum");

WHEREAS, Owner agreed to pay Contractor the sum of \$1,270,886.09 pursuant to the Contract, subject to increases or decreases in the contract price based on changes in the work;

WHEREAS, Contractor abandoned the Project on or about July 15, 2016;

WHEREAS, Owner subsequently made demand upon the Surety's Performance Bond, requesting Surety to remedy the alleged default of Contractor and to complete or procure completion of the work under the Contract for the Project;

WHEREAS, Owner represents to Surety that the current adjusted Contract price is \$1,610,524.38, it has made payments under the Contract to Contractor in the amount of \$1,242,411.04, and is holding a current Contract balance of \$368,113.34, inclusive of retainage ("Current Contract balance");

WHEREAS, Owner is desirous of further adjustment to the Current Contract Balance to account for desired changes in the work and other matters as further described below, resulting in an updated adjusted contract balance of \$257,433.34 ("Adjusted Contract Balance"); and

WHEREAS, the Surety is willing to undertake the completion of the Contract in accordance with the terms of the Performance Bond and this Agreement provided that in doing so it will receive the Adjusted Contract Balance identified herein below.

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, the Owner and the Surety agree as follows:

## **AGREEMENT**

### **1. Performance of the Work and Close-out.**

The Surety hereby undertakes to cause the performance of the work specified in the Contract, including all Change Orders thereto, and agrees to be bound by the Contract. The Owner acknowledges that the Surety, by its execution of this Agreement, is acting in its capacity as the surety for the Contractor in making arrangements for the performance and completion of the Contract, and not as a completing contractor, and that the Surety is not assuming any obligations or liabilities beyond those set forth in the Performance Bond. As to the performance and completion of the Contract, except as otherwise provided in this Agreement, the Surety is entitled to all of the rights, obligations, title and interest of the Contractor in and to the Contract in all respects as if the 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 Agreement, to refer to the Surety rather than to the Contractor.

### **2. Completion Contractor.**

The Owner acknowledges that the Surety will subcontract the performance of the work under the Contract to a completion contractor. Surety has solicited bids for the completion of the Project, and Venegas Engineering Management and Construction, Inc. ("Completion Contractor") has responded with the submission of the lowest responsible bid and has agreed to complete the Project.

### **3. Payment of the Contract Balance and Costs to Complete.**

Owner represents that after the inclusion of Change Orders #1-6, the Contract value was modified to a total of \$1,610,524.38. Owner represents that it has made payments under the Contract to Contractor in the amount of \$1,242,411.04, and that the Current Contract Balance in the amount of \$368,113.34 is available to complete the Project and is not subject to back charges, set-offs, liquidated damages or other withholdings as of the date of this Agreement. Owner further represents and agrees that it is desirous of further adjustments to the Current Contract Balance to account for desired changes in the work and other matters, resulting in an updated Adjusted Contract Balance of \$257,433.34 calculated as follows:

Current Contract Balance:	\$368,113.34
Deduction for Change Order #7:	(\$164,062.00)
Addition for Manning Way Driveway:	\$15,200.00
Addition for Stamped Concrete Escalation:	\$28,839.00
<u>Addition for prior completed landscape work:</u>	<u>\$9,343.00</u>
<b>Adjusted Contract Balance:</b>	<b>\$257,433.34</b>

The Owner agrees that the "Adjusted Contract Balance" amount identified above is here dedicated to and will be applied to the completion of the Contract. The Owner shall pay to the Surety the Adjusted Contract Balance and the payment of same shall

be made to the Surety in accordance with the terms of the Contract. The Surety agrees to spend its own funds as may be necessary from time to time to pay for the performance of the Contract by the Completion Contractor. In no event shall the Owner withhold any of the Adjusted Contract Balance from the Surety by asserting a future offset or setoff or because of or on account of any claims, liens, suits or demands by any persons or entities furnishing or alleging to have furnished labor and/or materials to the Project. Owner will not offset against or otherwise withhold payment of any amount of the Adjusted Contract Balance as a result of, or charge to Contractor/Surety, any alleged liquidated and/or actual delay damages caused by any action or inaction of the Contractor, Completion Contractor or Surety prior to the Completion Deadline set forth below. After the Completion Deadline set forth below, Owner shall be entitled to assert liquidated damages pursuant to the terms of the Contract. Owner further agrees that, except as provided by order of a court of competent jurisdiction or to the extent otherwise provided by law, it will not acknowledge or honor any claim or charges against the Adjusted Contract Balance by any alleged assignee, successor, creditor, trustee, receiver, or transferee of Contractor or by any other party or governmental entity making claim to the Adjusted Contract Balance or any portion thereof without the written consent of Surety.

Payments from the Owner shall be made payable to Westchester Fire Insurance Company and transmitted to the Surety at the following address, unless and until the Surety notifies the Owner in writing of a change of address:

Melissa M. Rice  
Westchester Fire Insurance Company  
Senior Claims Specialist, North American Claims  
436 Walnut Street WA10A  
Philadelphia, PA 19106-3703

4. **Insurance.**

The Surety may satisfy the required insurance obligations under the Contract by providing evidence of the required insurance coverage carried by the Completion Contractor, with the Owner and the Surety being named as insureds under the policy or policies.

5. **The Surety's Bond Liability.**

The Bonds shall remain in full force and effect in accordance with their terms and provisions. Nothing in this agreement shall be deemed to enlarge or reduce the Surety's obligation under the Bonds or the Statutes under which they are written. The total liability of the Surety under this Agreement and Performance Bond for the performance of the work, after the expenditure of the Adjusted Contract Balance, is limited to and shall not exceed the Penal Sum of the Performance Bond (as may be modified by authorized and approved change orders). Surety agrees that its Payment Bond will remain in effect according to its original tenor, provided that its liability for

such payment will extend only to the Penal Sum of the Payment Bond. Any and all payments made by the Surety for performance and/or payment shall be credited dollar for dollar against the Penal Sum of the respective bond. Nothing in this Agreement constitutes a waiver of such Penal Sum or an increase in the liability of the Surety under the Bonds. In the event Surety should expend funds equal to the Penal Sum (as may be amended by a duly authorized change order) in discharge of its Performance Bond obligation, Owner agrees that Surety shall have no further liability or obligation, if any, under the Performance Bond, this Agreement, the Contract or otherwise to complete the work, if any.

6. **Reservation of Surety's Rights.**

Surety expressly reserves all prior rights, equitable liens and rights to subrogation that would be the laborers', materialmen's, or the Contractor's under the Contract (except as specifically modified by this Agreement) as well as its own rights dating back to the execution of the Bonds, including but not limited to those rights and remedies that may accrue during the completion of the Contract. No waiver of such rights is agreed to or intended regardless of any provisions of this Agreement.

7. **Time for Completion, Cooperation and Best Efforts.**

Owner and Surety agree that Completion Contractor will commence performance of the work within 10 calendar days of its receipt of a Notice to Proceed. The Completion Deadline and the time to complete the Work will be one hundred and fifty (150) calendar days from a written Notice to Proceed to be issued by Surety to Completion Contractor. Owner agrees to promptly provide a Notice to Proceed to Surety after it confirms that that Completion Contractor has provided Owner with suitable proof of insurance as required under the Contract. Any request for extension of time will be governed by the terms of the Contract.

The Owner and the Surety agree to use their best efforts to cooperate under the terms of this Agreement for the prompt completion of the performance of the work. Owner further agrees that, in the event it believes that an event of default has occurred under the terms of the Contract as a result of Completion Contractor's actions or inactions on the Project, Owner will provide written notice of such suspected default to Surety fifteen (15) days in advance of issuing any cure or default notice in accordance with the terms of the Contract so that Surety can investigate. Owner will also furnish a copy of said written notice to the Completion Contractor.

8. **No Third Party Rights.**

This Agreement is solely for the benefit of the Owner and the Surety. The Owner and the Surety do not intend by any provision of this Agreement to create any third-party beneficiaries of this Agreement, nor to confer any benefit upon or enforceable rights under this Agreement or otherwise upon anyone other than the Owner and the Surety. Specifically, the Owner and the Surety acknowledge that nothing in this Agreement



shall extend or increase the rights of any third-party claimants or the liabilities or obligations of the Surety under the Bond.

9. **Whole Agreement.**

This Agreement along with the Contract constitutes the whole of the understanding, discussions, and agreements by and between the Owner and the Surety. The terms and provisions of this Agreement are contractual and not mere recitals. The Owner and the 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.

10. **Changes.**

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

11. **Execution.**

This Agreement may be executed in one or more counterparts, each of which shall be deemed to be an original but all of which together shall constitute one and the same instrument. Facsimile copies will have the same force and effect as originals.

12. **Recitals.**

The Recitals contained in this Agreement are incorporated herein by reference and made a part hereof.

13. **Governing Law and Jurisdiction.**

This Agreement shall be governed by and controlled by the laws of the State of Texas and the parties to this Agreement, in the event of any dispute involving this Agreement, agree that venue shall lie exclusively in El Paso County, Texas.

14. **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 Owner:      City of El Paso, Texas  
                                 Attn: Tomas Gonzalez, City Manager  
                                 300 N. Campbell, 2<sup>nd</sup> Floor  
                                 El Paso, Texas 79901

With a copy to: City of El Paso, Texas  
Attn: Sol M. Cortez, Assistant City Attorney  
P.O. Box 1890  
El Paso, Texas 79950-1890

As to the Surety: Westchester Fire Insurance Company  
Attn: Melissa M. Rice  
Senior Claims Specialist, North American Claims  
436 Walnut Street WA10A  
Philadelphia, PA 19106-3703

With a copy to: James D. Cupples, Esq.  
Cupples & Associates, PLLC  
700 Gemini, Suite, 200  
Houston, TX 77058-2729

15. **Effective Date.**

This Agreement is effective on the last date this Agreement is signed by any party.

16. **Successors and Assigns.**

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

17. **Invalidity, Illegality or Unenforceability.**

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.

18. **Construction of Agreement.**

The Parties agree that each Party and each Party's counsel have reviewed and approved this Agreement, and that each Party has fully understood and voluntarily accepted each and every provision contained in this Agreement. As such, it is understood and agreed by the Owner and the 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.

IN WITNESS WHEREOF, the parties have executed this Agreement on the dates indicated below, 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.

**CITY OF EL PASO, TEXAS**

**WESTCHESTER FIRE INSURANCE CO.**

\_\_\_\_\_  
**Tomas Gonzalez**  
**City Manager**

\_\_\_\_\_  
**Melissa M. Rice**  
**Senior Claims Specialist,**  
**North American Claims**

\_\_\_\_\_  
**Date**

\_\_\_\_\_  
**Date**

Approved as to Form  
del M. Cortez  
Assistant City Attorney



# Ramos, Little Flower, Manning Street Improvements

**Strategic Plan Goal:**

***7) Enhance and Sustain El Paso's Infrastructure Network***



**January 23, 2018**



# Ramos, Little Flower, Manning

## Project Location





# Ramos, Little Flower, Manning

## History

- **Scope of Work**
  - **Full street reconstruction of Ramos from Flicker to dead end, Little Flower from Alameda to dead end, and Manning in it's entirety**
- **Project History**
  - **Contractor abandoned the project mid-July 2016**
  - **City subsequently made demand upon the Surety's Performance Bond**
  - **City requested Surety to complete or procure completion of the work**
    - **Completing the parkway improvements**
    - **Punch list items**



# Ramos, Little Flower, Manning

## Recommendation

- **Authorize the City Manager to sign the Takeover Agreement between the City and Westchester Fire Insurance Company ("Surety"),**
  - **Complete the Improvement through the Completion Contractor, Venegas Engineering Management and Construction, Inc.,**
  - **Pursuant to terms of Contract No. 2014-391**
  - **Performance Bond for the remaining contract amount of \$257,433.34**



# Questions/Comments