

SURETY TAKEOVER AGREEMENT PURSUANT TO PERFORMANCE BOND

This is a Takeover Agreement ("Takeover Agreement") made as of October 17th, 2016, between the City of Hartford, Connecticut, ("City"), the Hartford Stadium Authority ("HSA"), and Arch Insurance Company ("Surety").

RECITALS

A. The City entered into a Development Services Agreement ("DSA") with DoNo Hartford, LLC ("DoNo") dated February 4, 2015, under which, *inter alia*, DoNo agreed to construct a ballpark ("Ballpark") in the City for a minor league baseball team then located in New Britain, Connecticut.

B. DoNo entered into a construction contract ("Bonded Contract" or "Bonded Project") with Centerplan Construction Company LLC ("Bonded Contractor") dated February 6, 2015, under which, *inter alia*, the Bonded Contractor contracted with DoNo to construct the Ballpark.

C. The City, DoNo and Contractor entered into a "Direct Agreement" dated February 4, 2015, under which, *inter alia*, the City may succeed to DoNo's rights and obligations under the Bonded Contract under defined circumstances.

D. The Surety issued payment and performance bonds ("Bonds," "Performance Bond," or "Payment Bond") in connection with the Bonded Contract. Attached to the Bonds is a "Multiple Obligee Rider" under which, *inter alia*, the City and HSA are defined as additional obligees under the Bonds.

E. Through a letter dated May 27, 2016, the City advised the Surety that it claimed that the Bonded Contractor was in default of its obligations under the Bonded Contract.

F. Through a letter dated June 6, 2016, the City and HSA advised DoNo and the Bonded Contractor that the City had terminated the DSA and the Bonded Contract. The Bonded Contractor asserts, *inter alia*, that the termination is wrongful.

G. The City issued a letter to the Surety dated June 9, 2016, making demand on the Surety under the Performance Bond in relation to the Bonded Contract.

H. The Surety is willing to complete and the City is willing to have the Surety complete the Bonded Contract and to pay certain funds remaining in the Ballpark account directly to the Surety in an effort to mitigate damages arising from the completion of the

Ballpark, with the rights, claims and defenses of the City, the Bonded Contractor, DoNo and the Surety fully reserved (except as explicitly indicated below).

I. This Takeover Agreement is intended to facilitate the ability to play Double A baseball in the Stadium on Opening Day, April 13, 2017, while the parties negotiate, mediate or otherwise and/or otherwise adjudicate their disputes arising from or related to the design and construction of the Ballpark. The parties to this Takeover Agreement understand that in order for baseball to be played in the Stadium by Opening Day, the City shall be required to issue Certificate(s) of Occupancy (temporary or otherwise) for certain portions of the Stadium. This Takeover Agreement is not intended and should not be construed as an admission of liability on the part of any of the parties.

COVENANTS

I. SURETY COMPLETION, CONTRACT DOCUMENTS, AND SCOPE OF WORK:

1. The Surety shall arrange for the substantial completion and completion of the work required of the Bonded Contractor under the Bonded Contract (and modifications thereof) in accordance with the terms and conditions of the Bonded Contract. The work items necessary to substantially complete and complete the Bonded Contract are identified in a list attached hereto as **Exhibit 1**. The completion scope set out in "**Exhibit 1**" includes: (1) all defective or noncompliant work items that were known or should reasonably have been known to the City and its agents as of the date of this Takeover Agreement; and (2) all punch list items that were known or should reasonably have been known to the City or its agents as of the date of this Takeover Agreement. For purposes of this Takeover Agreement, the term "latent defect" refers to a defect that was not known and should not reasonably have been known by a construction professional exercising reasonable care as of the date of this Takeover Agreement. Latent defects also include coordination issues and defects related to building code compliance or fire safety issues that may arise during the course of construction, despite the City's good faith attempts to identify such issues prior to construction. Except as to latent defects, the Surety has no obligation to perform and no liability for the costs associated with any work not expressly listed on **Exhibit 1**. As to Furniture, Fixtures and Equipment ("FF&E"), the Surety's scope includes labor costs for installation but does not include the purchase of FF&E items.

2. For the purposes of this Takeover Agreement, the contract documents shall consist of this Agreement and the operative documents comprising the Bonded Contract, including but not limited to the specifications, the general conditions, the supplementary general conditions, drawings, the project plans dated March 23, 2015, as revised by Architect's Supplemental Instructions ("ASI") or "SI" 1-14, all addenda issued thereto, and all approved change orders. The City, however, specifically reserves its right to rescind the Change Order dated December 24, 2015. All documents comprising the Bonded Contract are specifically incorporated into and made a part of this Takeover Agreement.

3. The City agrees that the terms of § A.11.4 of the General Conditions for the Bonded Contract are fully applicable to the work to be performed under this Agreement. The City agrees to maintain property insurance coverage for the Project pursuant to § A.11.4 of the General Conditions for the period of the work to be performed under this Agreement. The City acknowledges that the waiver of subrogation set out in the General Conditions at § A.11.4.7 is fully applicable to the work performed under this Agreement and applies in all respects to the Surety and the Completion Contractor in addition to the other parties explicitly referenced therein.

II. COMPLETION CONTRACTOR:

4. The completion work under the Bonded Contract shall be constructed by a "Completion Contractor" selected and retained by the Surety in its discretion. The Completion Contractor shall prepare and the Surety will sign, submit, and be responsible for payment requisitions to the City in the form and manner required under the Contract, and shall be authorized to take such other acts on behalf of the Surety as may be necessary for the administration of the Contract and the completion work. The City shall have the right to demand the replacement of the Completion Contractor by the Surety on the same grounds as would suffice to declare a default of the Bonded Contractor under the Bonded Contract. The Surety shall have the right at any time to elect to replace the Completion Contractor in its absolute discretion.

5. The Surety shall compensate the Completion Contractor in accordance with the terms of the agreement between those parties. The Completion Contractor shall have no rights directly or indirectly against the City or the City's representatives or agents to receive payment for its work under this Takeover Agreement.

III. BONDED CONTRACT ACCOUNTING:

6. The Surety alleges that the financial status of the Bonded Contract between DoNo and the Bonded Contractor is as follows:

(a)	The original contract price	\$ 53,550,000.00
(b)	Change orders No. 1- 4 and CCD's No. 1-5 result in an increase of	\$ 9,704,905.00
(c)	Revised Bonded Contract Amount	\$ 63,254,905.00
(d)	Payments to or on behalf of the Bonded Contractor	\$ 54,666,069.00
(e)	Post Termination Payments for Fire Protection	\$ 37,725.00
(f)	Adjusted Bonded Contract balance, including retainage.....	\$ 8,551,110.00

The City alleges that because the Bonded Contractor failed to reach substantial completion on the Project by May 17, 2016, the Change Order dated December 24, 2015 for the amount of \$7,573,079 is invalid. The City further alleges that it was required to pay the original guaranteed maximum price of \$56,000,000.00 to DoNo for completion of the Project in accordance with the DSA and that, as of the date of this Agreement, it has paid \$57,116,069.34 to DoNo. Therefore, the adjusted contract balance under the DSA is a credit of \$1,116,069.34.

Both parties reserve their rights to challenge the other party's alleged Bonded Contract Accounting.

IV. CITY'S PAYMENT OF BONDED CONTRACT FUNDS TO THE SURETY:

7. The City claims that it has \$4,401,439.19 remaining in the Ballpark account. The City will withhold: (a) the amounts necessary to pay vendors for FF&E commitments, or \$2,894,195.46; (b) amounts spent for security, leaks and fire protection of the Ballpark post termination, or \$141,203.69; and (c) settlement with Arch in the amount of \$300,000 for itemized and un-itemized, out-of-pocket costs, fees and expenses allegedly incurred as a result of the Bonded Contractor's termination (including but not limited to for attorney's fees, consulting fees, litigation expenses, and architect and designer costs and fees paid or incurred by the City for services provided before or after the Bonded Contractor's termination). The City will pay the remaining amount of \$ 1,066,040.04 to the Surety for completion of the Bonded Project ("Available Contract Funds"). Payment of the Available Contract Funds will be made to the Surety as follows: (1) \$ 408,020.02 within ten (10) days following the execution of this Takeover Agreement; (2) \$ 408,020.02 within ten (10) days following the Surety issuing a notice to proceed to a Completion Contractor; and (3) \$250,000 at substantial completion. The Available Contract Funds may not be reduced or set-off for any liability that the Bonded Contractor may have to the City and which is not or may not be covered by the Performance Bond, other than the amount expressly reserved in this Agreement. The Available Contract Funds are not subject to reduction or set-off for any claims asserted by the City or any expenses incurred by the City (including as to delay or liquidated damages) which arose before the date of this Takeover Agreement and which are not specifically addressed by this Takeover Agreement. The Available Contract Funds are not subject to any reduction or set-off for any claims asserted by third parties to this Agreement. The Surety shall indemnify and hold harmless the City, up to the amount paid by the City to the Surety under this Takeover Agreement, against all losses, liability, judgments, costs and expenses that may result from any claim, action, or legal proceeding brought by any third party to this Agreement (other than DoNo or the Bonded Contractor) based upon the contention that any such sum paid to the Surety under this paragraph should not have been paid to the Surety and should instead have been paid to such claimant, and the Surety will defend the City from any such claim, action or legal proceeding, at the Surety's cost and expense; provided, however, that notice of such claim, action or legal proceeding shall be given to the Surety as soon as practicable and is a prerequisite to the obligations to defend, indemnify and hold harmless. The Available Contract Funds will be used by the Surety solely to complete and pay for the work performed pursuant to or necessary for the

completion of the Bonded Contract. Notwithstanding the terms of the Bonded Contract and the City's timing and evaluation of payment applications submitted to the City by the Surety, the Surety will have complete discretion as to the timing and amounts of disbursements from the Available Contract Funds so long as the funds are applied to facilitate completion of the Bonded Contract scope.

V. SCHEDULING OF WORK:

8. The schedule for the start and completion of the work required to be performed under this Takeover Agreement is set out in **Exhibit 2** (to be provided). The completion schedule has been reviewed and accepted by a representative of the Surety, the City and the Completion Contractor. Under no circumstances is such a schedule intended to modify or extend any schedules previously agreed upon between the City and DoNo and/or the Bonded Contractor. The dates of Takeover Substantial Completion and Takeover Final Completion shall not impact any deadlines agreed upon prior to this Takeover Agreement.

VI. DUTY TO COOPERATE:

9. The City shall cooperate fully with the Surety and the Completion Contractor in the completion of the required work under the Bonded Contract. The City will process pay applications and requests for change orders properly owing to the Surety per the Contract terms. The City shall approve, deny, or request further information for, all submissions seeking approval for the use of materials within seven weekdays from the date of receipt of the submission by the City. The City shall keep the Surety fully apprised of all facets of the completion work, including promptly transmitting copies to the Surety's representative of all written communications to the Completion Contractor. For these purposes, the Surety designates, as its representative: Cashin Spinelli & Ferretti LLC ("CSF"). The Surety shall keep the City fully apprised of all facets of the completion work. For these purposes, the City designates, as its representative: Michael Looney.

10. This subparagraph addresses work performed on the Project site not under the direction of the Completion Contractor by contractors or other entities performing work on the Project site for the City, the Surety, the Team or their agents (referred to collectively as "Third Parties") subsequent to the date of this Agreement. The Surety and City agree that Third Parties will not be afforded access to the site to perform work therein unless they produce a declarations page from a current liability policy and sign an agreement to indemnify and hold harmless the City, the Surety, CSF and the Completion Contractor from liability for property damage or personal injuries arising from their negligent acts or omissions.

VI. PENAL SUM ABSOLUTE LIMIT:

11. All payments made toward completion of the Bonded Contract by the Surety

from its own funds (i.e., other than as paid or reimbursed to it by the City) shall be deemed to be payments under the Performance Bond, and the penal sum limit of liability of the Surety under such Performance Bond shall be deemed to be reduced by the amounts of any such payments made by the Surety. Nothing contained in this Agreement shall be deemed to increase or extend the liability of the Surety beyond the limit of liability set forth in its Performance Bond. The City hereby and forever waives any right it may have against the Surety to recover damages or demand performance to the extent that any such damages or performance is in excess of the penal sum of the Performance Bond.

VII. RESERVATIONS OF RIGHTS:

12. All of the rights, claims and defenses of the City against the Bonded Contractor, DoNo, LLC are fully reserved, including but not limited to claims alleging delays or liquidated damages. Except as specifically referenced in Paragraph 15, *infra*, all of the rights, claims and defenses of the City against the Surety in relation to the Bonded Project are fully reserved. All of the rights, claims and defenses of the Surety, the Bonded Contractor and DoNo against the City are fully reserved, including but not limited to claims and defenses under the Bonded Contract and the Performance Bond. All of the damages claims and all defenses thereto that could be asserted by any party in any dispute process relating to the Bonded Project or the Bonds are fully reserved. This reservation of rights includes but is not limited to claims by the Surety or the Bonded Contractor for recovery from the City of any sums paid by the Surety pursuant to this Takeover Agreement to complete the Bonded Project. Nothing herein is intended nor should be construed to preclude as one measure of damages in any dispute process the losses incurred by the Surety in completing work under this Takeover Agreement or any amounts paid to the Surety by any party to indemnify the Surety for costs incurred by the Surety in completing the work under this Takeover Agreement. Notwithstanding the foregoing and in order to facilitate completion of the Bonded Project, the City waives defenses to payment for alleged extra work performed subsequent to the execution of this Takeover Agreement to the extent based on an alleged failure to seek prior approval for an alleged extra and/or to secure a signed change order or construction change directive in advance of commencing work regarding an alleged extra. This waiver of defenses does not apply to claims by the City, if any, that the Bonded Contractor failed to seek prior approval for an alleged extra and/or to secure a signed change order or construction change directive and/or to otherwise seek extensions of time in accordance with contractual requirements at times prior to its termination from the Project.

13. Except as specifically referenced herein, the parties reserve all rights, remedies and defenses they may have against any person or legal entity not a signatory hereto, including but not limited to DoNo, LLC, the Bonded Contractor, suppliers, subcontractors, engineers, architects and other contractors or subcontractors. Nothing contained in this Takeover Agreement is intended to create any rights or remedies in favor of, or otherwise in any manner to inure to the benefit of, any person or legal entity not a signatory hereto. The parties specifically acknowledge that the question of whether the Surety or any other party has liability for claims that are or may be asserted by other

contractors or other entities which are not parties to this Takeover Agreement is to be determined by the legal rights and remedies that existed prior to the execution of this Takeover Agreement.

14. Nothing herein is intended nor shall be construed as a waiver of any of the Surety's rights, claims or defenses against the Bonded Contractor or its indemnitors. All of the Surety's rights, claims and defenses against the Bonded Contractor and its indemnitors are fully reserved, including but not limited to those rights arising under the common law and any applicable agreements of indemnity executed in favor of the Surety.

VIII. PERFORMANCE BOND- WAIVERS AND CONTINGENT RELEASE :

15. Notwithstanding Paragraph 12, *supra*:

- a. Except as to subpart b of this paragraph, the City and HSA hereby waive and release the Surety for all costs, fees, and expenses incurred by the City or HSA as a result of the Bonded Contractor's termination, including but not limited to for attorney's fees, consulting fees, litigation expenses, and architect and designer costs and fees paid or incurred by the City or HSA for services provided before or after the Bonded Contractor's termination and for all costs, fees and expenses otherwise recoverable under ¶ 7(c) (1) of the DSA and the Terms and Conditions to the Bonded Contract at §§ A.4 and A.14.
- b. In the event that the Bonded Project is substantially complete by no later than (-to be provided-), the City and HSA hereby waive and release the Surety from any further claims they may have against the Surety under the Performance Bond in relation to the Project, including but not limited to, claims for delay or liquidated damages. Such release would become effective as of the date of final acceptance of the Project.
- c. The City and HSA hereby waive all claims against the Completion Contractor for consequential damages or delay damages arising out of the work to be performed by the Completion Contractor.

Notwithstanding the foregoing, to the extent that the Surety asserts any claims against the City and/or HSA based on events on the Bonded Project arising prior to or after the execution of this Takeover Agreement, the City and HSA reserve the right to assert against the Surety as recoupment defenses any and all claims and defenses against the Bonded Contractor or the Surety relating to events occurring prior to or after the execution of this Takeover Agreement. Nothing in the Paragraph shall be interpreted as a release or waiver of any kind of the Bonded Contractor or DoNo, LLC.

IX. PAYMENT BOND:

16. The Surety's Payment Bond remains in full force and effect as to claims asserted for services or materials provided to the Project by the Bonded Subcontractor's

subcontractors, laborers and vendors either prior to or subsequent to the date of this Takeover Agreement. Nothing in this Takeover Agreement is intended nor should be construed to expand or contract the operative effect of the Payment Bond.

X. CHOICE OF LAW:

17. This Takeover Agreement shall be governed by, construed and enforced in accordance with the laws of the State of Connecticut.

XI. NOTICE:

18. Any formal notice which is expressly required by either the Bonded Contract or this Takeover Agreement must be in writing and may be delivered in person to any party or may be sent by a facsimile transmission, telegraph, courier, or registered or certified U.S. mail, with postage prepaid, return receipt requested. E-mail is not an acceptable communication method for formal notices though it is acceptable for the transaction of daily business regarding the Project. Any such formal notice shall be deemed received by the party to whom it is sent (i) in the case of delivery by hand or delivery by reputable national or local courier (such as United Parcel Service or Federal Express), on the date of actual delivery to the party to whom such notice is addressed, (ii) in the case of facsimile transmission or telegram, one working day after the date of successful transmission (provided that an additional copy of such notice is subsequently received within three (3) days of the facsimile transmission using the methods in (i) or (iii)), and (iii) in the case of registered or certified mail, the date receipt is acknowledged on the return receipt for such notice. All such formal notices shall be sent to the persons and addresses listed below:

If to City:

Howard Rifkin, Esq.
City of Hartford Corporation Counsel
550 Main Street, Suite 210
Hartford, CT 06103

If to Surety:

Joel Beach, AVP
Arch Insurance Co.
Three Parkway, Suite 1500
Philadelphia, PA 19102

The addresses and persons listed may be changed at any time by giving written notice in accordance with this Article.

XII. CONTRACT INTERPRETATION:

19. This Takeover Agreement may be independently executed in any number of counterparts each of which when executed and delivered, shall constitute an agreement which shall be binding upon all parties notwithstanding that the signatures of all parties and/or their designated representatives do not appear on the same page. Facsimile signatures shall have the same effect as original signatures.

20. This Takeover Agreement has been drafted equally by all parties and shall not be subject to the rule of construction that a written agreement is construed against the party preparing or drafting the agreement.

21. This Takeover Agreement shall extend to and be binding on the parties, their respective successors, heirs and assigns.

22. This Takeover Agreement is fully integrated and its incorporated documents constitute the complete agreement between the parties regarding the issues addressed herein. No prior statements, oral or written, course of dealing or trade usage shall supplement or alter the terms of this Takeover Agreement. All discussions and prior agreements are merged herein. This Takeover Agreement replaces and supersedes any statements or representations made by the Surety or the City, including statements made by their employees, attorneys, consultants and agents.

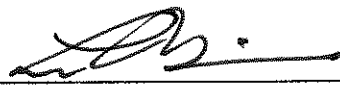
23. This Takeover Agreement is not subject to modification except by a writing signed by both of the parties.

24. The Surety's actions under this Takeover Agreement and its Performance and Payment Bonds shall forever be construed and considered as those of a surety and not a contractor.

25. The parties and their signatories warrant that each has the power and authority to execute this Takeover Agreement. The parties have voluntarily executed this Takeover Agreement based on their own independent investigations. The provisions of this Takeover Agreement shall be interpreted in a manner consistent with each other to carry out the purposes and intentions of the parties. If for any reason any provision of this Takeover Agreement is held unenforceable or invalid, that provision shall be deemed severed from this Takeover Agreement and the remaining provisions shall not be affected.

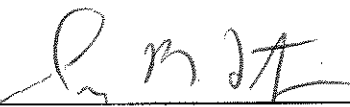
IN WITNESS WHEREOF, the parties have executed this Takeover Agreement as of the day and year first above written.

THE CITY OF HARTFORD

By 

(print) LUKE A. BRONIN
Its duly authorized representative

HARTFORD STADIUM AUTHORITY

By 

(print) Sean M. Fitzpatrick
Its duly authorized representative

ARCH INSURANCE CO.

By _____

(print) _____
Its duly authorized representative

ACKNOWLEDGEMENT

On the ___ day of _____, 2016, personally came _____, to me known, who, being by me duly sworn, did depose and say that s/he is the _____ of Arch Insurance Company ("Surety"), the corporation described in and which executed the above Agreement and that s/he was authorized by the Surety to execute this Agreement on its behalf.

Notary Public

ACKNOWLEDGEMENT

On the 17th day of Oct, 2016, personally came Luke A. Bonio to me known, who, being by me duly sworn, did depose and say that s/he is the Mayor of The City of Hartford ("City"), the municipality described in and which executed the above Agreement and that s/he was authorized by the City to execute this Agreement on its behalf.

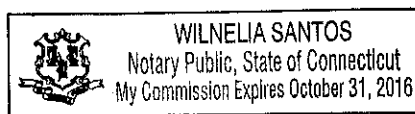
Maritza M. Braithwaite
Notary Public



ACKNOWLEDGEMENT

On the 17 day of October, 2016, personally came Sean M. Fitzpatrick to me known, who, being by me duly sworn, did depose and say that s/he is the Executive Director of Hartford Stadium Authority ("HSA"), the entity described in and which executed the above Agreement and that s/he was authorized by the HSA to execute this Agreement on its behalf.

Wilhelina Santos
Notary Public



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