

**CITY OF SAN ANTONIO  
INTERDEPARTMENTAL MEMORANDUM  
PARKS AND RECREATION DEPARTMENT**

**TO:** Mayor and City Council

**FROM:** Malcolm Matthews, Director, Parks and Recreation Department

**THROUGH:** Terry M. Brechtel, City Manager

**COPIES:** Christopher J. Brady; Finance; Management and Budget; Legal; Public Works; File

**SUBJECT:** Ordinance Authorizing a Take-Over Agreement for Completion of the Pearsall Park Phase One Improvements Project

**DATE:** February 26, 2004

**SUMMARY AND RECOMMENDATIONS**

This ordinance authorizes the execution of a Take-Over Agreement under which Gulf Insurance Corporation (Surety) will complete the Pearsall Park renovation project located at 5150 Pearsall Road in Council District 4, which was originally contracted to Big-Tex Contractors, Inc. through Ordinance 96943 on December 9, 2002. This ordinance will become effective immediately upon eight affirmative votes.

Staff recommends approval of this ordinance.

**BACKGROUND INFORMATION**

Funding from Certificates of Obligation was approved to develop Pearsall Park, located at 5150 Pearsall Road in City Council District 4. The scope of work includes construction of basic park improvements to include an approach and asphalt entry drive, asphalt parking area, screened toilet enclosure, park furnishings, drinking fountains, fenced off-leash dog park area, trail development, landscape planting and irrigation. A contract was approved with Big-Tex Contractors, Inc. through Ordinance 96943 on December 9, 2002. The contractor has failed to meet contract requirements through insufficiencies in work product and extended time delays.

On October 2, 2003, the Parks and Recreation Department sent a notice by certified mail to Big-Tex Contractors, Inc. and Gulf Insurance Corporation (Surety) stating that the contractor should cease operations on the project. Since that time, the Parks and Recreation Department and the City Attorney's Office have worked with a representative of the Surety to negotiate an agreement to complete the remaining project. At the time of the requested cease of operations, the project was approximately 70% complete.

This ordinance will provide for the execution of a Take-Over Agreement with the Surety to complete the project. The Surety engaged Dutch Construction to complete the remaining project construction and has agreed that the work will be completed within 60 working days from the date of notice to proceed. In addition, the Surety has agreed to pay an assessed lump sum of \$10,000.00 to cover liquidated damages incurred due to the time delay. Based on staff's favorable review of the agreement, the Surety began work on February 9, 2004.

### **POLICY ANALYSIS**

Approval of this ordinance will be a continuation of Council policy to complete previously approved Capital Improvement Projects.

### **FISCAL IMPACT**

Unspent City funds of \$111,928.76 approved for the construction project from Certificates of Obligation will be paid to the Surety to hire a contractor to complete the project. Project completion will probably require additional funds that the Surety will collect from Big-Tex. The liquidated damages payment to the City from the Surety will be \$10,000.00.

Operating and maintenance costs of \$46,700.00 per year were previously identified when the construction project was approved. These funds are available within the Parks and Recreation Department budget.

### **COORDINATION**

The Public Works Department and the City Attorney's Office have assisted with this action.

### **SUPPLEMENTARY COMMENTS**

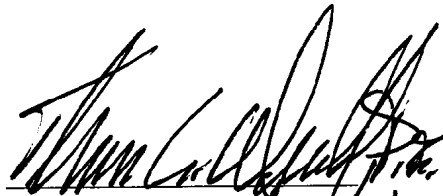
A Discretionary Contracts Disclosure Form is not required.

**ATTACHMENTS**

1. Project Location Map
2. Take-Over Agreement

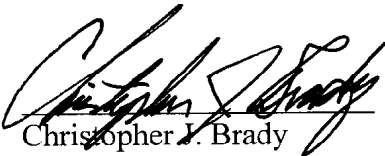


Malcolm Matthews,  
Director of Parks and Recreation



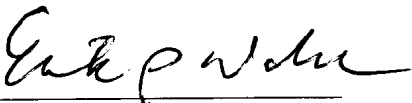
Thomas G. Wendorf, P.E.  
Director of Public Works

2/26/04



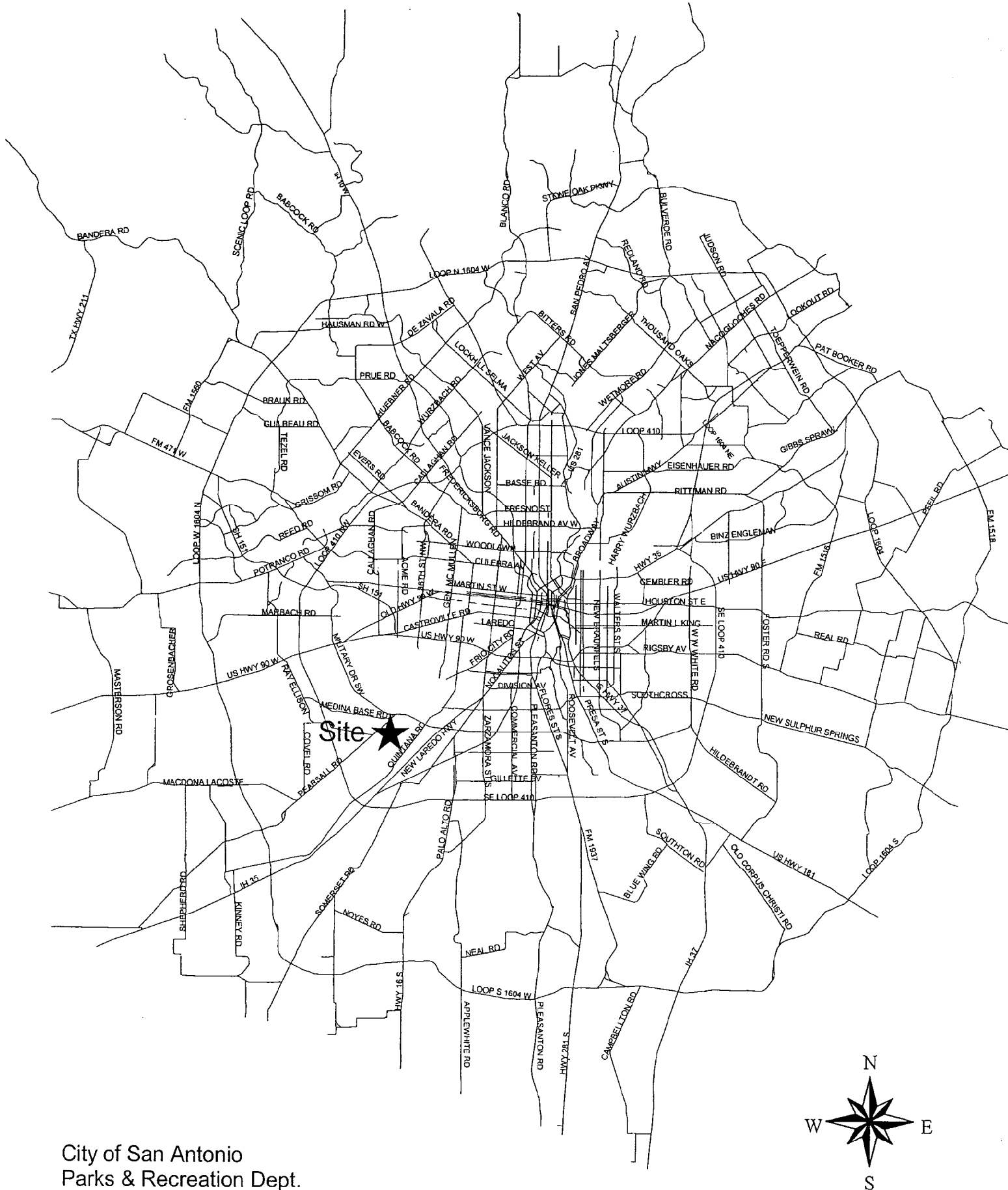
Christopher J. Brady  
Assistant City Manager

Approved:

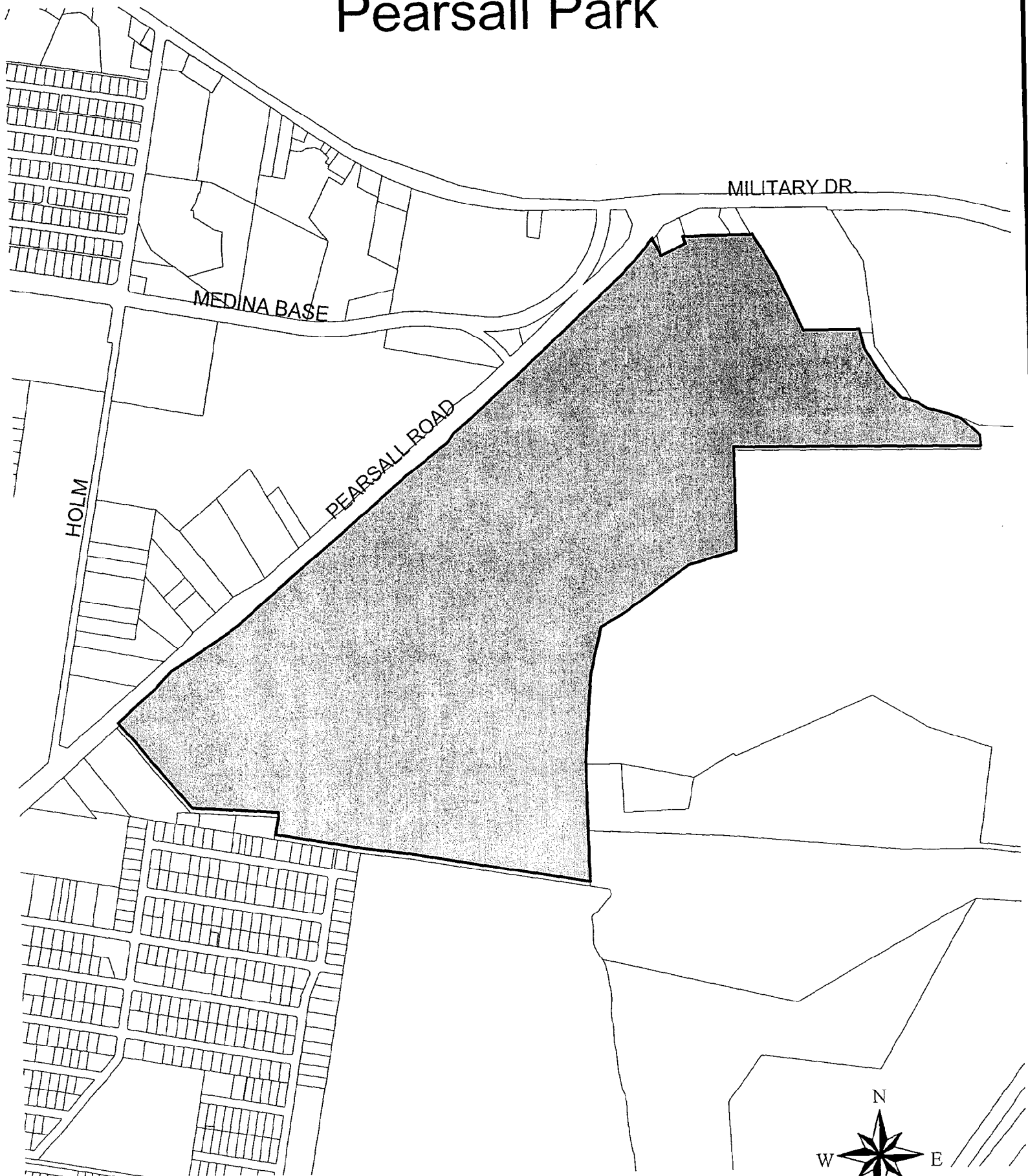


Terry M. Brechtel  
City Manager

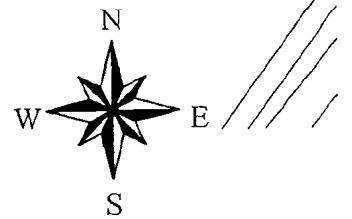
# Site Map Pearsall Park



# Site Map Pearsall Park



City of San Antonio  
Parks & Recreation Dept.



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**AGREEMENT FOR COMPLETION OF  
PEARSALL PARK PHASE 1 IMPROVEMENTS  
FOR CITY OF SAN ANTONIO, TEXAS**

This Agreement is made and entered into this       day of January, 2004, by and between the City of San Antonio, Texas (hereinafter "Obligee") and Indemnity Corporation (hereinafter "Surety").

WHEREAS, Obligee and Big-Tex Contractors, Inc., (hereinafter "Contractor") entered into a construction contract on January 11, 2003, (the "Contract") for the construction of Pearsall Park Phase One Improvements Improvements, all in accordance with the Contract documents prepared by Bender Wells Clark Design, Inc., Engineer. (the "Project"); and

WHEREAS, the original Contract price was \$236,293.50 with Alternates 1 (\$11,447.00), 2 (\$33,259.50), and 5 (\$0.00) for a total of \$281,000 and has been changed by one Field Alteration, Field Alteration Number 1 in the amount of (\$14,906.00), making the revised Contract Amount \$ 295,906.00.

Copies of the Contract and Field Alteration Number 1, being attached hereto as Exhibits "A " and "B" and incorporated herein; and

WHEREAS, the Contract required Contractor, as a condition precedent to commencing work under the Contract, to post with Obligee payment and performance bonds; and

WHEREAS, Surety and Contractor did provide to Obligee Surety's Performance and Payment Bond Nos. AE 6262417, each in a penal sum of \$281,000, copies of these Bonds being attached hereto as Exhibits "C" and "D" respectively, and incorporated herein; and

WHEREAS, during the course of the work called for under the Contract, Contractor, having been paid \$ 186,906.14 by Obligee, through Pay Estimate Number 4, defaulted in the performance of the Contract leaving unfinished certain work called for under the Contract and leaving unpaid bills for labor, equipment, services and/or materials furnished to Contractor in connection with the Project (the "Vendor Claims"); of which claims Surety agrees to pay all claims perfected in accordance with the language of the bond and applicable state statutes, and hold Obligee harmless therefrom; and

WHEREAS, Contractor was terminated by Obligee on or about the 10th day of October, 2003 by notice delivered to Surety and Principal in accordance with the Contract, a copy of said Termination Letter being attached hereto as Exhibit "E"; and

WHEREAS, Surety and Obligee, have agreed on a method to fully complete the work called for in the Contract pursuant to which Surety shall enter into an agreement with a contractor for the completion of the work called for in the Contract (hereinafter the "Completion Contractor"). Subject to the approval of Obligee, Surety reserves the right to utilize the Principal and or the Principal's subcontractors, who have already worked on the project in the completion of the Contract;

NOW, THEREFORE, for and in consideration of the promises, covenants, representations and payments set forth herein, the Obligee and Surety agree as set forth below:

1. Surety shall enter into a contract with Completion Contractor calling for Completion Contractor to fully and finally complete all work and perform all obligations of Contractor called for under the Contract, all in accordance with the terms of the Contract, including insurance and indemnity obligations.
2. Obligee represents to Surety that the initial Contract amount of \$281,000 has been increased by one Field Alteration in the amount of \$14,906.00. There are no change orders pending approval at this time. The Obligee further represents that the Contractor has been paid the sum of \$186,906.14, leaving a Contract balance of \$108,999.86, which includes retainage of \$20,767.35., subject to adjustments for actual quantities of work finally performed under the Contract, and change orders.

Obligee represents that defaulting Principal completed certain work that Obligee has not issued payment for and that Obligee will, upon presentation of the Pay Application currently being prepared disburse said monies to Surety for use by surety in paying subcontractor and perfected payment bond claimants.

3. The Contract completion shall be as follows:

Completion Contractor shall continue the work on the project.

Completion Contractor shall prosecute the work to completion

within 60 working days from the date of notice to proceed, which shall be issued within 7 days from the receipt by surety of a fully executed Take Over Agreement. Surety shall be assessed a lump sum of Ten Thousand Dollars (\$10,000) to cover any liquidated damages incurred to the date of the execution of this Take Over Agreement. Surety agrees to pay further liquidated damages according to the rates set out in the Contract in the event that the work is not completed in accordance with this new completion date provision.

4. Surety agrees to undertake the continued performance of the Contract (in accordance with the Contract Documents, as that term is defined in the Contract) including the correction of any work that does not conform to the Contract requirements and any warranty and maintenance obligations under the Contract, and agrees to expend such of its own funds as may, from time to time, be necessary to pay for the continued performance of the Contract; provided, however, that Surety's performance obligation shall in no event exceed either the performance of work which should have been performed by the Contractor under the terms of the Contract, or the penal sum of the bond, whichever is greater.
5. Oblige shall pay to Surety the balance of funds remaining under the Contract and change orders, including those change orders which are approved and issued, approved and unissued and change orders negotiated in the future, including retainage, as and when the same would have become due under the Contract but for the abandonment of the Project and default under the Contract by Contractor. Such payments shall be mailed to Surety to the attention of Mr. Tim Miracle, Contract Operations Planning, LLC., 10055 Sweet Valley Drive, Valley View, OH 44125. Surety, for itself or through its consultants or Completion Contractor, shall submit pay applications to Oblige in accordance with the terms of the Contract.
6. Surety shall require Completion Contractor to name Oblige, , Surety and Bierhalter & Associates (BA) as additional insureds under Completion Contractor's commercial general liability insurance policies issued for Completion Contractor during Completion Contractor's performance of work on the Project. Surety shall require Completion Contractor to provide evidence of such insurance coverage in favor of Oblige by valid insurance certificates prior to Completion Contractor commencing work on the Project.
7. Surety shall require Completion Contractor to include Oblige, Surety and BA as indemnified parties under any contractual indemnification provision in the contract between Surety and Completion Contractor

for the completion of the Project, and such contractual indemnification provision shall be identical to that in the Contract except for naming Surety as an indemnitee.

8. Surety's Payment Bond shall remain in full force and effect in accordance with its terms.
9. Surety's Performance Bond shall remain in full force and effect in accordance with its terms.
10. Time is of the essence to this Agreement.
11. This Agreement shall be construed and interpreted in accordance with the laws of the State of Texas.
12. Should any one or more provisions contained in this Agreement be held to be invalid, illegal or unenforceable, such invalidity, illegality or unenforceability shall not affect any other provision or part of this Agreement, which remaining provisions shall remain in full force and effect.
13. This is the entire Agreement of the parties hereto. No change to this Agreement or documents to which it refers shall be binding unless in writing and executed by the parties hereto.
14. The parties expressly warrant and represent to each other that as part of the consideration for payment and execution of this Agreement, and before signing same, their duly authorized representatives have fully informed themselves of the terms, contents, conditions and effects, and that no promises or representations of any kind have been made by or to any agent or representative, except as expressly stated in this Agreement.
15. This Agreement is for the benefit of the parties who executed this Agreement and there are to be no third party beneficiaries.
16. Notwithstanding the absence of privity of contract between Obligor and Completion Contractor, Obligor, in order to facilitate the completion of the Project, may communicate either directly with Completion Contractor or through Obligor's architect / engineering consultant, concerning all matters arising under or relating to the Contract, the completion Contract and the Project. A copy of any written/electronic communication between Obligor and Completion

Contractor shall be simultaneously transmitted to Surety in care of Mr. Tim Miracle, Contract Operations Planning, LLC., 10055 Sweet Valley Drive, Valley View, OH 44125 and Gary Bierhalter, Bierhalter & Associates, P O Box 2826, Conroe, Texas 77305. It is, however, understood that all matters affecting the Contract price, including requests for change, change orders, purchase orders and pay estimates shall be first submitted to the Surety & BA for prior written approval and any such change orders shall not be effective until approved in writing by the Surety.

17. This Agreement may be executed in multiple counterparts. Facsimile signatures shall have the same effect as original signatures.
18. Surety shall indemnify, defend and hold harmless Oblige from any and all claims, demands and/or causes of action asserted by third parties relating to or arising out of the payment of the Contract funds to Surety.
19. The parties hereto expressly reserve all prior rights, against all parties not a signatory hereto. No waiver of such rights is agreed to or implied or intended regardless of any provisions of this Completion Agreement to the contrary.
20. Gulf Insurance Corporation acknowledges that The City of San Antonio is a Municipal Corporation, organized and existing under the statutes set out in the Texas Government Code. Gulf Insurance Corporation acknowledges that, although executed below by the director of Parks & Recreation of The City of San Antonio, this agreement will not be legally binding on The City of San Antonio, until such time as it is ratified by the City Council of the City of San Antonio.

Witness our hands the day and year first set forth above.

CITY OF SAN ANTONIO, TEXAS

GULF INSURANCE CORPORATION

By \_\_\_\_\_

By \_\_\_\_\_


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

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

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

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

APPROVED  
PARKS AND RECREATION DEPARTMENT  
OF THE CITY OF SAN ANTONIO

By  2-5-04  
Malcolm Matthews  
Director of Parks and Recreation