

TENDER AGREEMENT

This Tender Agreement (“Agreement”) is made and entered into this _____ day, of _____ 2011 by and between First National Insurance Company of America (“Surety”), the North Dakota Public Service Commission (“Obligee”) and Kern & Tabery, Inc. (“Completion Contractor”).

RECITALS

A. On or about May 3, 2010, Smith Contracting, Inc (“Principal”) entered into a construction contract with Obligee for 2010 Buechler/Velva Phase 1 abandoned mine lands site in Ward County (“Project”). That construction contract, together with all of its incorporated documents including but not limited to: the original bid documents, plans, and specifications, constitutes the “Original Contract.” The Original contract is incorporated into and made a part of this Agreement.

B. The term “Completion Contract” as used in this Agreement is not a separate document but means the construction contract between Obligee and Completion Contractor, which includes this Agreement and the Original Contract all of which are incorporated into and made a part of this Agreement.

C. In connection with the Original Contract between Principal and Obligee, Surety executed and delivered to Obligee its Bonds numbered 6662386 with the Performance Bond in the amount of \$1,225,500.00 and the Payment Bond in the amount of \$1,225,500.00.

D. In September 2010 the Principal ceased work and abandoned the Buechler/Velva project. The Obligee then declared the Principal in default, effectively terminating the Original Contract with Principal on or about September 30, 2010 and called on Surety to complete the Project pursuant to the terms of the Performance Bond.

E. Principal challenges the valid of Obligee’s declaration of default and termination because Principal alleges that it could not perform due a changed condition at the site. Obligee disputes that the Principal encountered a changed condition and has denied Principal’s claim.

F. It is expressly acknowledged and agreed that no Contract Funds of any nature are due or to become due to Principal by virtue of the termination, as those Contract Funds shall be disbursed in accordance with this Agreement. The Summary of Contract Funds as of the date of this Agreement is as follows:

Original Contract Price	\$1,225,500.00
Change Orders Approved	\$0
Total Adjusted Original Contract Price	\$1,225,500.00

Total Payments Approved Through Estimate No. 5	\$398,094.99
Earned Retainage	\$0
Amount Paid to Principal	\$398,094.99
Unbilled Balance	\$827,405.01
Total Available Contract Balance (including retainage)	\$827,405.01
Completion Contractor Price	\$1,099,896.41
Contract Shortfall	\$272,491.40
Supplemented Contract Balance	\$272,491.40

G. To fulfill its Performance Bond obligations, Surety tenders the Completion Contractor to Obligee and arranges for Obligee to enter into the Completion Contract (as defined above) with Completion Contractor pursuant to the terms of this Agreement.

COVENANTS

In consideration of the terms and conditions in this Agreement, the parties agree as follows:

1. The above Recitals are contractual and incorporated into these Covenants.
2. Completion Contractor examined the Original Contract and certifies that it is familiar with all of the terms and conditions of the Original Contract. Completion Contractor diligently investigated and inspected the Project jobsite and is familiar with the jobsite conditions including: the materials available but not yet incorporated into the Project, the nature and status of work previously performed by Principal and the work remaining to be performed on the Original Contract. Completion Contractor hereby confirms that it has investigated and is informed as to the status and conditions affecting the work to be done and that no representations with respect to same have been made by Surety, Obligee, or any of their representatives. Surety has made no warranties or representations, express or implied, to Completion Contractor with respect to the Original Contract or the Project. Surety makes no representation or warranty regarding any future performance of any Subcontractor, if applicable, the availability of any leased equipment or facilities, or the availability of any materials supplied or to be supplied to the Project. Completion Contractor considered all of the Original Contract documents and jobsite conditions and observations in reaching its Completion Contractor price of \$1,099,896.41.

3. Surety shall pay the Contract Shortfall as provided for in Recital F directly to the Completion Contractor as work is performed to the satisfaction of the Obligee. Completion Contractor shall submit requests for payment to the Obligee pursuant to the terms of the Original Contract. Upon approval of a request for payment from the Completion Contractor, Obligee will provide written approval to Surety of the amount approved. Such amount will be paid by Surety to the Completion Contractor within seven (7) calendar days of receipt of written notice of the amount approved by Obligee. Upon exhaustion of the Contract Shortfall amount as provided for in Recital F, payments will be made to Completion Contractor pursuant to the terms and requirements of the Original Contract by Obligee from the Unbilled Balance in Recital F and pursuant to any duly executed change orders pursuant to the terms of the Original Contract. Payments based on unit prices under the Original Contract may be adjusted to take into account any new unit prices that were used in developing the Completion Contractor Price provided for in Recital F. Completion Contractor agrees to provide a unit price list to Obligee prior to Obligee executing this Agreement. The Contract Shortfall amount is a credit against the penal limit of \$1,225,500.00, leaving a remaining Performance bond penal limit of \$953,008.60. Under no circumstances shall the Surety's liability exceed the foregoing amount.
4. Kern & Tabery, Inc. is tendered by Surety to Obligee as Completion Contractor under this Agreement. By this Agreement with Obligee, Completion Contractor promises to fully perform the Original Contract, the Completion Contract and this Agreement. Obligee recognized the Completion Contractor as Principal's successor in interest to the Original Contract. Following the date of this Agreement, Obligee, Completion Contractor, and Surety agree that the term "Contractor" as used in the Original Contract shall refer to Completion Contractor.
5. Completion Contractor shall furnish to Obligee Performance and Payment Bonds in the amount of \$1,099,896.41 issued by a commercial surety with an A.M. Best rating of A- or better and a financial size category of VI or larger approved by the U.S. Treasury to issue a bond to the Federal Government in an amount at least equal to the Completion Contractor's price. The Completion Contractor shall furnish those bonds on forms designed by the Obligee within ten (10) calendar days of executing this Agreement. The Surety shall be named as a dual obligee. The Completion Contractor warrants all work performed under the Completion Contract according to the warranty terms of the Original Contract.
6. Obligee may direct Completion Contractor to perform extra, additional or changed work or to delete work ("change order") pursuant to the terms of the Original Contract. In no event shall change orders issued by the Obligee to the Completion Contractor effect or alter the penal limit of the Surety's Performance Bond, as set by this Agreement's Article 3.

7. To the fullest extent permitted by applicable law, the Completion Contractor shall assume the entire responsibility and liability for all damage (including purely economic loss) or injury of any nature (including death) to persons and property, including intangible property, arising out of or related to the execution or performance of the Completion Contract, and hereby expressly waives any workman's Compensation Immunity, whether granted by statute or otherwise, and agrees to defend (if required by Surety), indemnify and hold harmless Surety and the Obligee and their respective directors, officers, agents, servants, employees, affiliates and subsidiaries (the Indemnitees), from any and all demands, claims, and causes of action, even if devoid of merit, arising out of, or related to, in any manner, the execution or performance of the Completion Contract, or asserted against any of the Indemnitees by reason of the acts or omissions of the Completion Contractor, or any entity directly or indirectly engaged by the Completion Contractor in connection with the Completion Contract, regardless of whether the acts or omissions complained of were caused, in part, by one or more of the Indemnitees. The Completion Contractor's indemnity obligation includes, but is not limited to, all damages of any nature or description, all loss, cost or expense, and any and all claims for payment or otherwise by any of Completion Contractor's Subcontractors, Suppliers, employees and laborers. In jurisdictions in which the indemnification provided for in this Article is broader than that allowed by applicable law, this Article shall be interpreted as providing the broadest indemnification permitted and should be limited only to the extent necessary to comply with that law.
8. The Completion Contractor must comply with all insurance requirements in the Original Contract. The Completion Contractor shall obtain and maintain the insurance required under the Original contract, with the coverages and in the amounts specified in the Original Contract. The Completion Contractor shall provide the evidence of insurance required by this Article within ten (10) calendar days of executing this Agreement. The Obligee and Surety shall be named as additional insureds by endorsement under all policies of insurance required of the Completion Contractor. Further, the Completion Contractor shall ensure that its insurers waive all rights of subrogation against the Obligee and Surety. The Completion Contractor shall deliver certificates of insurance and endorsements confirming that the insurance required under the Original Contract have been obtained and that the Obligee and Surety have been named as additional insureds. Certificates of Insurance alone are not sufficient. Further, the Completion Contractor shall cause its insurer(s) to issue endorsements providing that the policies shall not be canceled without at least a thirty (30) day prior written notice to the Obligee and the Surety. Failure to obtain this insurance, or permitting this insurance to lapse, or failing to provide the endorsements and certificates required by this Article shall constitute a material breach of this Agreement justifying termination. The Completion Contractor shall not proceed with any work

until the insurances, certificates and endorsements have been obtained and provided to the Obligee and Surety. The Completion Contractor will also provide Obligee its tax ID number and contractor's license number within five (5) calendars days of executing this Agreement.

9. The prosecution of the work will commence no later than five (5) calendar days from the Completion Contractor's receipt of the Notice to Proceed from the Obligee, with a copy to the Surety. The completion Contractor's Performance and Payment Bonds and evidence of insurance shall be submitted and approved by the Obligee prior to Completion Contractor being permitted to commence performance. Any delay in procuring these bonds and evidence of insurance shall be the fault of the Completion Contractor. The Completion Contractor agrees to diligently proceed with and to complete the work in accordance with the terms and conditions of the Completion Contract within 100 calendar days from its receipt of the Obligee's Notice to Proceed. Time is of the essence. In the event Completion Contractor fails to complete the work within the time specified in this Agreement, or any extension thereof, the Completion Contractor shall pay to Obligee liquidated damages as specified in the Original Contract.
10. Obligee expressly RELEASES, ACQUITS AND FOREVER DISCHARGES Surety from any and all claims, rights, demands or causes of action of whatever kind or nature whether in law or equity or otherwise which Obligee has or may ever have against Surety under or by reason of Surety's Performance Bond subject to the following limitations:
 - (a) In no event shall Surety be liable to Obligee for any amount in excess of the penal limit of its bond; and
 - (b) Obligee accepts the Performance and Payment Bond furnished by Completion Contractor as the primary bonds for the Completion Contract; and
 - (c) Obligee will not call on Surety's Performance Bond with respect to Completion Contractor's performance except if:
 - (i) Completion Contractor defaults under the Completion Contract; and
 - (ii) Completion Contractor fails to cure such default; and
 - (iii) Obligee calls on the Performance Bond surety of the Completion Contractor; and
 - (iv) The entire penal amount of the Performance Bond of the Completion Contractor and its surety is exhausted; and

- (d) Surety's bond remains in effect only to secure Obligee from a loss in excess of the amount of Completion Contractor's bond and Surety's liability is limited to the reduced penal limit of its Performance Bond; and
 - (e) In the event of any default under the Completion Contract by Completion Contractor, Obligee shall provide written notice of the default to Surety within seven (7) days of the date Obligee becomes aware of the default.
11. The Completion Contractor agrees to make demand and look solely and exclusively to the Obligee in the event of any breach or default by the Obligee of this Agreement
 12. Surety's Payment Bond remains in full force and effect for work performed by Principal under the Original Contract and Surety retains all obligations, right and defenses pursuant to the Payment Bond. Surety's Payment Bond shall not apply to or cover Completion Contractor or any of its Subcontractors and Suppliers for any work performed and/or materials delivered and Surety shall not be a co-surety with Completion Contractor's surety. The Surety's Payment Bond obligations run solely to those claimants who performed work, labor or supplied material or equipment to the Project on or before September 30, 2010. All payments made by Surety relating to claims on its Payment Bond shall be credited against and applied to reduce the penal limit of the Payment Bond. Surety shall not, under any circumstances, be obligated to expend more than the penal limit of its Payment Bond.
 13. This Agreement is expressly contingent on the Completion Contractor's timely execution of this Agreement. If after executing this Agreement the Completion Contractor does not timely furnish the bonds and insurance required by this Agreement's Article 5 and 8, then that failure is a material breach of this Agreement. If after receiving a five (5) calendar day notice to cure, the Completion Contractor does not cure its breach by providing the required bonds and insurance, then this Agreement may be terminated by the Surety or Obligee without prejudice to any rights or remedies of the Surety or Obligee, and the Completion Contractor shall be liable to the Surety and the Obligee for any and all damages, direct or indirect, actual or consequential, including, but not limited to, all costs of re-bidding the Project, any cost or price difference between the Completion Contractor's Price and any new contractor's price to complete the Project, along with any and all damages of the surety and/or the Obligee, related to or arising from the Completion Contractor's termination.
 14. Reservation of Rights Between Surety and Obligee Only. Notwithstanding anything contained herein to the contrary, Surety and Obligee agree to reserve their respective rights and defenses regarding

only the claims set forth below. Namely, the Surety and Obligee expressly reserve the following:

- (a) Surety and Obligee agree that nothing contained in (i) this Agreement, (ii) Surety's tender of Completion Contractor, or (iii) Obligee's acceptance of Surety's tender of Completion Contractor, shall in any way limit, modify, affect, release or waive Surety's and Obligee's respective rights and defenses in law or equity or under the Original Contract, the Performance Bond, and this Agreement related to (x) Principal's assertion that Obligee's declaration of default and termination of Principal was wrongful, (y) Principal's claim for additional costs related to the alleged differing site conditions, or (z) Obligee's assertion that such termination and performance bond claim was indeed proper.
 - (b) Surety's rights and claims against Principal and the other indemnitors to Surety under the indemnity agreement.
 - (c) Obligee's rights, defenses, and claims against Principal in connection with the Original Contract.
15. It is understood and agreed that this Agreement shall be governed by, construed, and enforced in accordance with the laws of the State of North Dakota.
16. This Agreement (and all its Exhibits, if any), the Completion Contract and the Original contract are intended to be complementary and are intended to require all work and services by the Completion Contractor necessary to complete the remaining work in compliance with this Agreement (and all of its Exhibits, if any), the Completion Contract and the Original Contract. In the case of conflict between the terms of the Agreement, the Completion Contract, and the Original Contract:
- (a) This Agreement has priority over the Original Contract, the Surety's Solicitation for Offers, the Completion Contractor's Offer and any other agreement or document;
 - (b) The original Contract has priority over the Surety's Solicitation for Offers, the Completion Contractor's Offer, and any other agreement or document except for this Agreement;
 - (c) The Surety's Solicitation for Offers has priority over the Completion Contractor's Offer and any other agreement or document except for this Agreement or the Original Contract.
17. This 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.

18. This 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.
19. This Agreement shall extend to and be binding on the parties, their respective successors, heirs and assigns.
20. This Agreement is fully integrated and its incorporated documents constitute the complete agreement between the parties. No prior statements, oral or written, course of dealing or trade usage shall supplement or alter the terms of this Agreement. All discussions and prior agreements are merged herein. This Agreement replaces and supersedes any statements or representations the Surety, its consultants, agents, and/or attorneys have made to the Completion Contractor or Obligee.
21. Surety's actions under this Agreement and its Performance and payment Bonds shall forever be construed and considered as those of a surety and not a contractor.
22. This Agreement is strictly for the benefit of the parties to this Agreement and they expressly declare that they do not intend to confer any rights or benefit whatsoever on any third party.
23. Any notice, consent, approval, or other communication which is provided for or required by either the Contract or this 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. Any such notice or other written communication 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 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 notices and other written communication shall be sent to the persons and addresses listed below:

If to Obligee: Darrell Nitschke, Executive Secretary
Public Service Commission
600 E. Boulevard Ave, Dept. 408
Bismarck, ND 58505-0480

If to Surety: Hinshaw & Culbertson, LLP
222 North LaSalle Street, Suite 300
Chicago, Illinois 60601
Attention: Mr. John Sebastian

If to Completion Contractor: Kern & Tabery, Inc.
222 1st Street, SE #3
Wadena, MN 56482-1568

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

24. The parties and their signatories warrant that each has the power and authority to execute this Agreement. The parties voluntarily executed this Agreement based on their own independent investigations. The provisions of this 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 Agreement is held unenforceable or invalid, that provision shall be deemed severed from this Agreement and the remaining provisions shall not be affected.

Executed this _____ day of _____, 2011.

OBLIGEE

SURETY

By: _____

By: _____

Its: _____

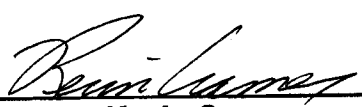
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COMPLETION CONTRACTOR

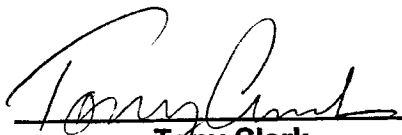
By: _____

Its: _____

OBLIGEE



Kevin Cramer
Commissioner



Tony Clark
Chairman



Brian P. Kalk
Commissioner