

# Excavation Bond Agreement

## (Letter of Credit Form)

**THIS EXCAVATION BOND AGREEMENT** (this “*Agreement*”) is made and entered into effective the date specified below, by and between the city of **COTTONWOOD HEIGHTS**, a municipal corporation of the state of Utah whose address is 2277 East Bengal Boulevard, Cottonwood Heights, UT 84121 (“*City*”), and by the undersigned applicant (“*Applicant*”).

### **RECITALS** :

A. Applicant has filed, or soon will file, an application (the “*Application*”) with City for a permit (the “*Permit*”) to perform excavation and restoration work (the “*Work*”) on City’s public ways or other property (the “*Property*”) as particularly described on Exhibit “A” (“*Exhibit ‘A’*”) annexed hereto.

B. Pursuant to, *inter alia*, Section 14.16.130, COTTONWOOD HEIGHTS CODE OF ORDINANCES (the “*Code*”), before being issued the Permit, Applicant shall provide City with a cash deposit, escrow agreement or an irrevocable letter of credit in the amount determined by the City to guarantee faithful performance of the Work.

C. Consequently, Applicant desires to cause a letter of credit (the “*Bond*” or the “*LC*”) to be issued to City to guaranty faithful performance of the Work in full compliance with Code Chapter 14.16 and all other applicable City ordinances, requirements, regulations, specifications and standards, including, without limitation, the additional requirements specified on Exhibit “A” (collectively, “*City Standards*”), all on the terms and conditions specified in this Agreement.

D. The parties intend to set forth herein their entire agreement regarding the Bond and to supersede hereby and to consolidate herein all of their prior negotiations and agreements, whether oral or written, regarding the same. This Agreement shall be construed in accordance with the requirements of the Code, as currently adopted or as hereafter amended.

### **AGREEMENT** :

**NOW, THEREFORE**, in consideration of the recitals above, the mutual covenants and undertakings of the parties hereto, and for other good and valuable consideration, the receipt and legal sufficiency of which is hereby acknowledged, the parties hereto agree as follows:

Section 1. **Applicant’s Completion and Warranty Obligations**. Applicant irrevocably acknowledges its obligation to perform the Work in a good, workmanlike, lien-free manner in full compliance with City Standards. Applicant further warrants that the Work will be free of defects (normal wear and tear excepted) for a period of two years after the Work has been completed and finally accepted by City.

Section 2. **Applicant’s Covenants**. Applicant irrevocably represents, warrants and covenants to City as follows:

(a) Compliance with City Standards. That Applicant shall fully comply with all City Standards relative to the Work, and fully and promptly indemnify, defend, and hold harmless City, and respond to City in damages, for Applicant's failure to conform with such obligations.

(b) Completion of the Work.

(i) Diligence. That after the Work is commenced, Applicant shall proceed with diligence and expedition and shall promptly complete the Work and restore the Property to City Standards, so as not to obstruct the Property or public use or travel thereon more than is reasonably necessary.

(ii) Restoration. That unless authorized by City on the Permit, all paving, resurfacing or replacement of street facilities on major or collector streets shall be done in conformance with City Standards within three calendar days, and within seven calendar days on all other streets, from the time the Work commences, except for Work in winter or during weather conditions which do not allow paving according to City Standards. In winter, a temporary patch must be provided. In all excavations, restoration or pavement surfaces shall be made immediately after backfilling is completed or concrete is cured. If Work is expected to exceed the above duration, Applicant shall submit a detailed construction schedule for approval with the Application, which shall address means and methods to minimize traffic disruption and complete the Work as soon as reasonably possible.

(iii) Deadline. After taking into account the factors outlined above in this subsection 2(b), that the Work will be properly completed in compliance with City Standards by the deadline (the "Deadline") specified on Exhibit "A."

(c) That Applicant shall guarantee the materials and workmanship of the Work in compliance with City Standards for a period of two years from completion and City's acceptance of the Work, with reasonable wear and tear excepted.

Section 3. Repairs. All responsibility for completion, repair and maintenance of the Work shall remain with Applicant until all of the Work has been completed in full compliance with City Standards and inspected and finally accepted by City (collectively, "Installation/Acceptance") and the warranty in section 2 above (the "Warranty") has expired.

Section 4. Performance Guaranty. To guaranty (a) the satisfactory and timely Installation/Acceptance of the Work, and (b) the Warranty (all as provided in section 2 above), contemporaneously herewith Applicant shall cause to be provided to City, as sole holder and beneficiary, the irrevocable standby letter of credit (the "LC") that is described on Exhibit "A" from the bank ("Issuer"), and in the principal amount (the "Committed Amount"), specified on Exhibit "A." A photocopy of the LC is attached hereto as exhibit "B" and is incorporated herein by this reference. Applicant hereby assigns, transfers and sets over unto City all of Applicant's right, title and interest in and to the full proceeds of the LC and all right and authority to demand and collect from the Issuer up to the full Committed Amount in the event of any default or noncompliance with Applicant's obligations under this Agreement. City agrees to not make

demand for or collect the proceeds of the LC based on Applicant's failure to timely complete the Work until on or after the Deadline. The LC shall remain in continuous, irrevocable effect for a period of at least 30 months after the Deadline.

Section 5. **Release of LC.** If final Installation/Acceptance of the Work occurs by the Deadline, then City thereupon shall release and waive its right to draw and collect 75% of the Committed Amount. The remaining 25% of the Committed Amount shall remain committed and held intact for City's sole benefit until two years after final Installation/Acceptance of the Work, at which time (provided that the Work is then free of defects, normal wear and tear excepted) City shall release and waive its right to draw and collect the remaining 25% of the Committed Amount.

Section 6. **Failure to Properly Complete Work.** If (a) Installation/Acceptance of the Work has not occurred by the Deadline, or (b) the Work is not free of defects (normal wear and tear excepted) for two years after Installation/Acceptance by City, then City shall be deemed fully authorized (without further action or notice whatsoever) to demand, draw, collect and receive from Issuer as much of the Committed Amount (not previously released as provided in section 5 above) as is required (in City's opinion) to satisfactorily complete the Work and/or to repair any defects therein, including (without limitation) the cost of any and all incidental construction, administrative, legal or engineering expenses incurred by City to complete such work.

Section 7. **Limitation on Issuer Liability.** Issuer shall have no duty, responsibility or liability whatsoever for completion of the Work except for the irrevocable duty, liability and responsibility to promptly honor City's drafts or demands for payment under the LC as provided in this Agreement.

Section 8. **No Waiver or Estoppel.** This Agreement is irrevocable unless revoked by the mutual consent of Applicant and City. Neither this Agreement nor the providing of the LC by Applicant and the acceptance of the LC by City shall constitute a waiver or estoppel by or against City concerning the Work, nor shall any such matters in any way relieve Applicant from the obligations to (a) timely achieve satisfactory Installation/Acceptance of the Work in full compliance with City Standards, or (b) fully perform under the Warranty, all as provided in above, regardless of whether or not the Committed Amount is adequate to pay for the satisfactory Installation/Acceptance of the Work or the satisfactory fulfillment of the Warranty.

Section 9. **General Provisions.** The following provisions are also an integral part of this Agreement:

(a) **Binding Agreement.** This Agreement shall be binding upon and shall inure to the benefit of the successors and assigns of the respective parties hereto.

(b) **Captions.** The headings used in this Agreement are inserted for reference purposes only and shall not be deemed to define, limit, extend, describe, or affect in any way the meaning, scope or interpretation of any of the terms or provisions of this Agreement or the intent hereof.

(c) Counterparts. This Agreement may be signed in any number of counterparts with the same effect as if the signatures upon any counterpart were upon the same instrument. All signed counterparts shall be deemed to be one original.

(d) Severability. The provisions of this Agreement are severable, and should any provision hereof be void, voidable, unenforceable or invalid, such void, voidable, unenforceable or invalid provision shall not affect the other provisions of this Agreement.

(e) Waiver of Breach. Any waiver by either party of any breach of any kind or character whatsoever by the other, whether such be direct or implied, shall not be construed as a continuing waiver of, or consent to any subsequent breach of this Agreement.

(f) Cumulative Remedies. The rights and remedies of the parties hereto shall be construed cumulatively, and none of such rights and remedies shall be exclusive of, or in lieu or limitation of any other right, remedy or priority allowed by law.

(g) Amendment. This Agreement may not be modified except by an instrument in writing signed by the parties hereto.

(h) Interpretation. This Agreement shall be interpreted, construed and enforced according to the substantive laws of the state of Utah.

(i) Notice. Any notice or other communication required or permitted to be given hereunder shall be deemed to have been received (a) upon personal delivery or actual receipt thereof or (b) within two (2) days after such notice is deposited in the United States mail, postage prepaid and certified and addressed to the respective addresses set forth herein or to such other address(es) as may be supplied by a party to the other from time to time in writing.

(j) Time of Essence. Time is the essence of this Agreement.

(k) Assignment. Applicant may not assign or otherwise convey its rights or delegate its duties under this Agreement without the express written consent of City.

(l) No Partnership. City and Applicant do not by this Agreement in any way or for any purpose become partners or joint venturers with each other.

(m) Reimbursement of City's Costs. Applicant shall reimburse City's legal fees and costs incurred in connection with this Agreement promptly upon the City's request.

(n) No Surety Bond Implied. Use of the word "bond" or "Bond" in this Agreement does not mean or imply that a surety bond (issued by an insurer or otherwise) is part of the LC, the Committed Amount, or any other assurances to City under this Agreement.

[Signature pages follow.]

DATED effective \_\_\_\_\_ 20\_\_.

**APPLICANT:**

\_\_\_\_\_

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

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

Its: \_\_\_\_\_

Address: \_\_\_\_\_

\_\_\_\_\_

\_\_\_\_\_

STATE OF \_\_\_\_\_ )  
: ss.  
COUNTY OF \_\_\_\_\_ )

The foregoing instrument was acknowledged before me this \_\_\_\_ day of \_\_\_\_\_ 20\_\_  
by \_\_\_\_\_, as the \_\_\_\_\_ of  
\_\_\_\_\_, a \_\_\_\_\_.

\_\_\_\_\_  
Notary Public

**CITY:**

**ATTEST:**

**COTTONWOOD HEIGHTS**, a Utah municipality

By: \_\_\_\_\_  
**Paula Melgar**, Recorder

By: \_\_\_\_\_  
**Kelvyn H. Cullimore, Jr.**, Mayor

563779.2

**Exhibit "A"**  
**to Excavation Bond Agreement**

**Location of Excavation:** \_\_\_\_\_  
\_\_\_\_\_.

**Description of Excavation:** \_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_.

**Start Date and Completion Deadline:** \_\_\_\_\_  
\_\_\_\_\_.

**Special Requirements:** \_\_\_\_\_  
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\_\_\_\_\_  
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\_\_\_\_\_  
\_\_\_\_\_.

**Committed (Bond) Amount of LC:** \_\_\_\_\_.

**Issuer of Letter of Credit:** \_\_\_\_\_.

**Identifying Number of LC:** \_\_\_\_\_.

**Date of LC:** \_\_\_\_\_.

**Exhibit “B”  
to Excavation Bond Agreement**

(Attach copy of Irrevocable Letter of Credit)