

BIXBY CITY CODE

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CHAPTER 7

PRIVATELY FINANCED PUBLIC IMPROVEMENTS (PFPI)

SECTION:

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12-7-1: **DEFINITIONS:** The following words and phrases used in this chapter shall have the following meaning unless a different meaning clearly appears from the context:

APPLICANT: Any person, firm, corporation or "political subdivision", as defined herein, desiring to construct, reconstruct, replace or alter any street, alley, curb, gutter, ditch, drainageway, channel, detention facility, storm sewer or other similar public improvement or appurtenances thereto, except street and sidewalk cuts, sanitary sewers and water mains, located or to be located on real property owned in fee simple by the city of Bixby or upon easements or rights of way owned or otherwise controlled by the city of Bixby.

CONTRACTOR: The person, firm or corporation engaged in any aspect of the construction of public improvements.

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DEVELOPER:	The owner or agent of the owner of the land having the right to order the construction of public improvements.
DEVELOPER'S CONTRACT:	The agreement between the developer and the city of Bixby providing for the developer's assurances that the developer will deposit with the city clerk one of the documents set forth in section 12-7-4 of this chapter, prior to a contractor commencing work on a public improvement.
DIRECTOR OF PUBLIC WORKS:	As defined in the city charter for the city of Bixby, Oklahoma.
ESCROW ACCOUNT:	An irrevocable account opened by the developer with a federally insured financial institution that sets aside the full cost of all public improvements set forth in the applicant's written application. Funds from this account are to be remitted to the contractor for work performed on the public improvement that is set forth in the urban engineering contract.
INDEMNITY AGREEMENT:	A collateral contract or assurance by which a political subdivision engages to secure the city of Bixby from any and all liability for costs associated with any construction contract entered into for construction of, or improvement to, "public improvements", as defined herein.
IRREVOCABLE LETTER OF CREDIT:	A credit agreement whereby a federally insured institution agrees to pay the contractor in the event the developer defaults upon his financial obligation owing the contractor for the construction of public improvements.
POLITICAL SUBDIVISION:	A municipality, school district, county or public trust with a city, town, school district or county as its sole beneficiary or beneficiaries, and all their institutions, instrumentalities or agencies.
PUBLIC IMPROVEMENTS:	The construction, reconstruction, replacement or alteration of any street, alley, curb, gutter, ditch,

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drainageway, channel, detention facility, storm sewer, wastewater systems, water distribution system, or other similar public works thereto, including sedimentation and erosion control measures, located or to be located upon land owned in fee simple by the city of Bixby or upon easements or rights of way owned or controlled by or to be dedicated to the city of Bixby.

URBAN ENGINEERING CONTRACT:

A contract between the city of Bixby and a consulting engineer employed by the developer for the design of privately financed public improvements. It shall contain the project plans, profiles and specifications approved by the director of public works, which are in accordance with the specifications generally applicable to city of Bixby public improvement contracts at the time the permit is issued. (Ord. 854, 9-9-2002)

12-7-2: PERMIT REQUIRED: Any applicant desiring to construct, reconstruct, replace or alter any street, alley, curb, gutter, ditch, drainageway, channel, detention facility, storm sewer, wastewater system, water distribution system, or other similar public improvement or appurtenances thereto, located or to be located upon real property owned in fee simple by the city, or upon easements or rights of way owned or otherwise controlled by or to be dedicated to the city, shall first obtain a permit from the director of public works authorizing such work. (Ord. 854, 9-9-2002)

12-7-3: APPLICATION: Any applicant seeking a permit under this chapter shall make written application to the director of public works, which application shall contain the name and address of the applicant and a description of the nature, location, estimated total cost and the number of calendar days required for completion of the work. In addition, the applicant shall provide the name and address of the developer and a signed and executed developer's contract between the developer and the city. The application shall be signed by the applicant or his agent or officer. (Ord. 854, 9-9-2002)

12-7-4: DEVELOPER'S CONTRACT AND SECURITY: The developer shall sign and execute a developer's contract providing assurances that, prior to the contractor's commencing work on a public improvement, the developer shall deposit with the city clerk one of the following for each contractor commencing work on a public improvement:

- A. **Performance And Payment Bond:** A copy of a performance and payment bond, in the form set forth as exhibit A, attached to ordinance 854 and on file in the city office, naming the contractor as the obligee thereof, executed by a surety acceptable to the city and authorized to do business in the state, in a sum equal to one hundred percent (100%) of the estimated cost of the work to be done by the contractor and any subcontractors to be hired by the contractor, together with a letter from the contractor confirming that the contractor has received the original bond;
- B. **Escrow Account:** A copy of an escrow account, in the form set forth as exhibit B, attached to ordinance 854 and on file in the city office, executed by the developer, contractor and a federally insured financial institution acceptable to the city, providing for the escrow of a sum equal to one hundred percent (100%) of the estimated cost of the work to be done by the contractor and any subcontractors to be hired by the contractor, together with a letter from the financial institution confirming that such sum has actually been placed in escrow; or
- C. **Irrevocable Letter Of Credit:** A copy of an irrevocable letter of credit, in the form set forth as exhibit C, attached to ordinance 854 and on file in the city office, in favor of the contractor in an amount equal to one hundred percent (100%) of the estimated cost of the work to be done by the contractor and any subcontractors to be hired by the contractor, together with a letter from the contractor confirming that the contractor has received the letter of credit; and
- D. **Indemnity Agreement:** When the developer is a "political subdivision", as defined in section 12-7-1 of this chapter, and the public improvement applied for is a fully funded public improvement, the director of the public works department may authorize the developer to provide an indemnity agreement, in the form set forth as exhibit D, attached to ordinance 854 and on file in the city office, executed by the developer, together with a letter from the contractor, confirming that the contractor has received a copy of the indemnity agreement and agrees to hold the city harmless from all payments due for services performed by the contractor for the developer. If the director of the public works department refuses to allow a developer

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which is a political subdivision to provide an indemnity agreement as its financial assurance, the developer may file a written protest with the city clerk within ten (10) days of the date of denial of the indemnity agreement by the public works director. (Ord. 854, 9-9-2002; amd. 2006 Code)

12-7-5: CONTRACTOR'S BOND AND INSURANCE: The contractor shall obtain and maintain during the duration of the permit or extensions thereof, the bonds and insurance coverage of the types and amounts specified herein.

- A. **Performance Bond:** The contractor shall file with the city clerk a performance bond, in form acceptable to the city and executed by a surety acceptable to the city and authorized to do business in the state, in a sum equal to one hundred percent (100%) of the estimated cost of the work and naming the city as the obligee thereof.
- B. **Statutory Labor And Material Payment Bond:** The contractor shall also file with the city clerk a statutory labor and material payment bond, executed by a surety acceptable to the city and authorized to do business in the state, in a sum equal to one hundred percent (100%) of the estimated cost of the work and naming the state and the city of Bixby as the obligee thereof.
- C. **Maintenance Bond:** The contractor shall also file with the city clerk a maintenance bond, in form acceptable to the city and executed by a surety acceptable to the city and authorized to do business in the state, in a sum equal to one hundred percent (100%) of the estimated cost of the work, naming the city as the obligee thereof, and guaranteeing all work and materials incorporated in the improvements by the permittee for a period of two (2) years from and after the final acceptance and approval thereof by the city.
- D. **Worker's Compensation Insurance:** As prescribed by the laws of the state, the contractor shall provide and require the subcontractor to similarly provide worker's compensation insurance for all employees, unless such employees are covered by the protection afforded by the permittee's insurance coverage.
- E. **Public Liability Insurance:** The contractor shall procure and maintain during the duration of the permit or any extension thereof contractor's public liability insurance in an amount not less than one hundred thousand dollars (\$100,000.00) for injuries (including

accidental death) sustained by any one person in a single accident or occurrence, and in an amount not less than one million dollars (\$1,000,000.00) for injuries sustained by two (2) or more persons in a single accident or occurrence, and contractor's property damage insurance in an amount not less than one hundred thousand dollars (\$100,000.00).

- F. **Owner's Protection Liability Insurance:** The contractor shall also furnish an owner's protective liability policy in the amount specified in subsection E of this section, with the city of Bixby as the named insured, issued by the same insurance company as the contractor's liability carrier, protecting the city of Bixby against any and all actions, claims, judgments or demands arising out of or on account of injuries of whatever kind and character sustained by any person or persons on account of the construction of such work as may be performed by the contractor pursuant to the permit issued by the director of public works.
- G. **Insurance Certificates:** The contractor shall furnish the city, prior to issuance of the permit, an original and duplicate certificates of insurance which shall indicate the types of insurance carried and the amounts thereof. The contractor shall also provide the city with two (2) copies of the policy of insurance issued by the contractor's insurance carrier.
- H. **Notice Of Cancellation:** All insurance policies and certificates shall contain clauses stating that the policies cannot be canceled by the insurer without the insurer giving the city ten (10) days' prior written notice of cancellation. Cancellation of a required insurance policy shall automatically revoke the permit, and all work by the permittee shall thereupon immediately terminate. (Ord. 854, 9-9-2002)

12-7-6: CONSTRUCTION OF PUBLIC IMPROVEMENTS:

- A. **Compliance Required:** All public improvements constructed under authority of the permit issued by the city pursuant to the provisions of this chapter shall be constructed in strict accordance with the project plans, profiles and specifications approved by the director of public works, and in accordance with the specifications generally applicable to city public improvement construction contracts at the time the permit is issued. These project plans, profiles and specifications shall be contained in the urban engineering agreement between the city and the consulting engineer to the developer. When work not specified in the urban engineering contract is necessary,

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whether as a result of plan deficiencies or of encountering unforeseen site conditions, the developer or his agent shall submit proposed changes to the urban engineering contract for review by the director of public works; and, if the director of public works approves the changes, they shall be submitted to the city council for their approval. Whereupon, the developer shall instruct the contractor to construct the improvements in accordance with modified urban engineering contract approved by the director of public works and the city council.

- B. **Filing Of Financial Assurances:** In no event shall a contractor commence work until the developer has filed the required financial assurances set forth herein with the city clerk to cover one hundred percent (100%) of the construction costs of public improvements. It is the duty of the contractor, prior to beginning work on a public improvement, to satisfy itself that the necessary financial assurance for payment is in place; otherwise, the contractor performs the work at his own risk. (Ord. 854, 9-9-2002)

12-7-7: ACCEPTANCE: It shall be the duty of the director of public works to determine when the work or any portion of the work on an authorized public improvement is completed and to recommend its acceptance to the city council. No work or any portion of the work shall be considered finally accepted until it is completed and formally accepted by the city council after the final inspection is made by the director of public works. Failure or neglect on the part of the director of public works, or any other agent or employ e of the city, to condemn or reject inferior work or material shall not be construed to imply acceptance of any such work or materials if such inferior work or material may become evident at any time prior to final acceptance of the city or prior to the expiration of the maintenance bond thereon. (Ord. 854, 9-9-2002)

12-7-8: PERMIT PROCEDURE:

- A. **Issuance Conditions:** A permit shall be issued to the applicant authorizing the construction of the proposed public improvements only after:
1. Approval of the application;
 2. Approval, within the preceding two (2) years, by the director of public works and the city council of the plans, profiles and specifications contained in the urban engineering contract;

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3. Approval of the required contractor's bonds, insurance policies and certificates;
 4. Approval of the developer's contract;
 5. The filing of the developer's financial assurance with the city clerk; and
 6. The tendering of the permit fee required herein.
- B. Contents Of Permit: The permit shall state the name of the person, firm or corporation to whom it is issued, the name of the developer for whom the project is being constructed, a description of the improvements authorized, the location of the improvements authorized, the length of time in calendar days the permit shall remain in effect, and that its issuance and validity are conditioned upon the acceptance of and compliance with the provisions of this chapter. At all times during the duration of the permit, a copy of the permit shall be posted in a conspicuous public place on or near the location of the work. (Ord. 854, 9-9-2002)

12-7-9: **PERMIT FEES:** Before any permit shall be issued, the applicant shall pay to the city a fee pursuant to a fee schedule adopted or authorized by the city council for each application permit reviewed and issued. (Ord. 2150, 2-23-2015)

12-7-10: **DURATION, TERMINATION, EXTENSION OF PERMIT:**
Permits shall be issued for a specified number of calendar days and shall automatically terminate at the expiration of the time shown upon the face of the permit, unless the work has been completed and accepted by the city prior to that time. Should the permittee for good cause shown fail to complete the improvement within the time specified, the permittee may apply in writing to the director of public works for an extension of the permit for such additional time as may be reasonably necessary to complete the work. Any application for an extension of time in which to complete the work authorized by the original permit shall be accompanied by properly executed documents issued by the surety and/or financial institution who issued the performance, statutory payment, and maintenance bonds and the developer's payment bond, letter of credit or escrow account required for issuance of the original permit, affirmatively indicating the surety's and/or the financial institution's acceptance of an extension of time for the completion of the work by the permittee. (Ord. 854, 9-9-2002)

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12-7-11: **REMEDIES:** Should the applicant or its surety and/or financial institution fail or refuse to complete the improvements authorized pursuant to a permit or an extension thereof issued under the provisions of this chapter, or fail to repair or replace any defective materials or work incorporated in the improvements during the period of the maintenance bond covering the same, the city may at its election immediately institute legal proceedings against the permittee and its surety and/or financial institution to recover the estimated cost of completing, repairing or replacing such improvements. In the alternative, the city may complete, repair or replace the improvements and then institute legal proceedings to recover the cost thereof from the permittee and its surety and/or financial institution. (Ord. 854, 9-9-2002)

**EXHIBIT A
DEVELOPER PERFORMANCE AND PAYMENT BOND**

KNOW ALL MEN BY THESE PRESENTS:

THAT WE, _____, as Principal, and the undersigned Surety, a corporation organized and existing under and by virtue of the laws of the state of _____, and duly authorized to transact business in the state of Oklahoma as Surety, are held and firmly bound to _____ as Obligee, in the sum of \$ _____ lawful money of the United States of America, for the payment of which sum, well and truly to be made, we bind ourselves, our heirs, administrators, executors, successors and assigns, jointly and severally, by these presents.

THE CONDITION OF THE ABOVE OBLIGATION IS SUCH, That

WHEREAS, the Obligee entered into a certain contract with Principal for the furnishing of labor, plant, materials and equipment and the construction of _____ in accordance with the plans, schedules, drawings, specifications and addenda provided for in said contract; a copy of which may be attached hereto, and which is hereby referred to and made a part hereof;

WHEREAS, the written contract between the Principal and the Obligee permits the parties to make alterations, changes and extensions of the type of work to be performed thereunder;

NOW, THEREFORE, if the Principal shall well and truly perform and fulfill all the undertakings, covenants, terms, conditions and agreements of said contract, and if the Principal shall well and truly pay all indebtedness incurred for all labor, third party services, subcontractor services, materials furnished, rentals of equipment, machinery or tools, repairs to or parts for machinery or equipment used in the performance of the above contract and alterations, changes and extensions thereof that may be granted by the Principal, with or without notice to Surety, and fuels consumed in the operation of such machinery or equipment used in the performance of the above contract; and if said Principal shall hold harmless and indemnify Obligee and its Surety upon its performance and payment bond against all loss, cost and expense by reason of failure of the Principal to faithfully and promptly perform the said contract or to promptly pay all persons furnishing the items set forth above; then this obligation shall be void, otherwise to remain in full force and effect.

PROVIDED, HOWEVER, that this bond is executed on the following conditions and provisions:

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**EXHIBIT A (continued)
DEVELOPER PERFORMANCE AND PAYMENT BOND**

The Principal and Surety hereby jointly agree with the Obligees that any claimant, as hereinafter defined, who has not been paid may sue on this bond for the use of such claimant in the name of the Obligees; provided, however, the claimant shall have given written notice by registered mail to the Principal, Surety and Obligees within ninety (90) days after the completion of the work contracted for between the Obligees and the Principal as described above and the acceptance of such work by the said Principal. A suit or action brought by any claimant, other than the Obligees, must be commenced within one year following the date on which the Principal ceased work on the contract with the Obligees.

For the purpose of this paragraph, a claimant is defined as one having a direct contact with the Obligees or with a subcontractor of the Obligees for labor, third party services, material, rental of equipment, machinery or tools, repairs to or parts for machinery or equipment used in the performance of the above contract or fuel for the operation of machinery or equipment used in the performance of the above contract.

IN WITNESS WHEREOF, the seal and signature of the said Principal is hereto affixed and the corporate seal and name of the said Surety is hereto affixed and attested by its duly authorized attorney-in-fact at

_____, this _____ day of _____, A.D. _____.

PRINCIPAL

By: _____

Its: _____

(SEAL)

ATTEST:

SURETY

By: _____

Its: _____

(SEAL)

ATTEST:

**EXHIBIT B
ESCROW ACCOUNT AGREEMENT**

THE AGREEMENT made and entered into this _____ day of _____, A.D. _____, between _____ hereinafter called "Owner," _____ hereinafter called "Contractor," and _____ hereinafter called "Escrow Agent."

WITNESSETH:

WHEREAS, Owner and Contractor have heretofore entered into a construction contract, pursuant to which Contractor has agreed to perform certain works as more particularly described in said contract dated _____, a copy of which is attached hereto and made a part hereof, and the terms and conditions of which include the obligation of Owner to give adequate assurance of payment for the work to be performed by Contractor as and when due and payable, in accordance with Article _____ of _____ said contract; and

WHEREAS, under applicable ordinances and rules and regulations of the City of Bixby governing the construction of privately financed public improvements, Contractor is obligated to furnish financial assurances guaranteeing completion of the entire work without regard to the source of funds with which to pay the Contractor for said work; and

WHEREAS, the parties desire to execute an escrow agreement in lieu of furnishing a payment bond as permitted in said contract:

NOW, THEREFORE, it is hereby agreed as follows:

1. **Escrow Fund.** The Escrow Agent hereby accepts and acknowledges receipt of the sum of \$ _____, hereinafter referred to as the "Escrow Fund" which shall be held by said Escrow Agent subject to the instructions hereinafter set forth for the period of time not to exceed _____ months from the date of this agreement, or until completion of the construction provided for in the above-described construction contract between Owner and Contractor, whichever first occurs.

2. **Disposition of Escrow Fund.** Said funds shall be held by said Escrow Agent in an account and apart from any other funds of either the Owner or Contractor and with or without interest accruing thereon, at the option of Escrow Agent. Escrow Agent shall, from time to time, disburse from said Escrow Fund to Contractor the amounts of periodic estimates, less any retainage, certified by _____

**EXHIBIT B (continued)
ESCROW ACCOUNT AGREEMENT**

_____, Consulting Engineers, as being due and payable to Contractor, pursuant to the terms of payment provisions of said contract between Owner and Contractor. Upon receipt of a certificate from said Consulting Engineers duly signed by any one of the individuals designated below, and opposite their sample signature, the Escrow Agent shall promptly pay out of said Escrow Fund to Contractor the amount shown in said certificate to be due.

Upon receipt of a verified copy of the acceptance of the construction work under the above-described contract by the City of Bixby, any funds remaining undistributed shall be redelivered and distributed to Owner. If the term of this escrow as above set forth has expired and such certificate of completion has not been received, Escrow Agent shall continue to hold said fund subject to receipt of such certificate of acceptance, and shall be entitled to additional compensation for acting as Escrow Agent. In the event during the term of this Escrow Agreement the funds so deposited are placed at interest, the interest accruing thereon shall be held and become a part of the Escrow Fund.

3. Escrow Agent's Liability. The Escrow Agent shall be liable as a depository only and shall not be responsible for the sufficiency or accuracy of the form, execution or validity of any documents delivered to it hereunder, nor shall it be liable in any respect on account of the identity, authority or rights of the persons executing or delivering or purporting to execute or deliver any such documents. As a further part of the consideration for the acceptance of this Escrow, the Escrow Agent shall not be liable for any acts or omissions made or done in good faith nor for any claims, demands or losses, nor for any damages made or suffered by any party to this Escrow, excepting such as may arise through or be caused by its willful or gross negligence. It may rely upon any paper, document, or any writing believed to be authentic in making any delivery of money hereunder.

4. Escrow Fee. An Escrow Fee has been separately agreed upon by the Owner and the Escrow Agent as compensation for its services hereunder, but it is agreed that a reasonable additional compensation shall be paid to it for any unusual or extraordinary services it may be required to render, or in the event the period of time during which it is obligated as Escrow Agent is extended beyond the term above set forth, and shall have the right to reimburse itself out of any funds in its possession for costs, expenses and its compensation, and shall have a lien on any money or other property held by it under this Escrow Agreement to cover same.

5. Construction of Documents. It is further agreed and understood by the parties hereto that the Escrow Agent will not be called upon to construe any contract or instrument involved herein and shall be required to act in respect to the disposition of the Escrow Fund only in the manner contained in the instructions herein set forth.

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**EXHIBIT B (continued)
ESCROW ACCOUNT AGREEMENT**

6. **Nature of Agreement.** It is further understood and agreed by the parties that these instructions supersede and control over any other contract with reference to this Escrow Deposit insofar as the Escrow Agent is concerned and the said Escrow Agent may rely absolutely hereon to the exclusion of any and all other agreements between the Owner and Contractor.

OWNER

By: _____

Title:

CONTRACTOR

By: _____

Title:

ACCEPTED on this _____ day of _____, A.D. _____.

ESCROW AGENT

By: _____

Title:

**THE FOLLOWING PERSONS ARE AUTHORIZED TO EXECUTE
CERTIFICATES ON BEHALF OF _____,
CONSULTING ENGINEERS:**

(Name) _____ (Signature) _____

(Name) _____ (Signature) _____

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EXHIBIT C
IRREVOCABLE COMMERCIAL LETTER OF CREDIT

DATE _____

TO _____
(Name of Contractor)

(Address)

(City, State and Zip Code)

Gentlemen:

We hereby establish our irrevocable letter of credit in your favor for the account of _____ (name of owner) to an aggregate amount of \$ _____. Said funds are available to you by our draft(s) at sight drawn on us and presented for payment on or before the _____ day of _____, A.D. _____, when accompanied by the following specified documents:

Signed invoice of your Company for the amount due, to which shall be attached periodical, partial, or final estimates of amounts due under the contract between you and the above owner, dated _____, and bearing the approval of _____, Consulting Engineers, to the effect that said sums are due and payable and that the work or materials represented therein and thereon have been furnished by you.

All drafts must be marked: _____

Drawn under _____

issuing Bank Letter of Credit No. _____.

We hereby agree with the drawers, endorsers and bona fide holders of drafts drawn under and in compliance with the terms of this letter of credit that such drafts will be honored upon due presentation to the drawee.

This letter of credit is subject to the Uniform Practice for Documentary Credits (ICC Publication No. 400), 1983 Revision.

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**EXHIBIT C (continued)
IRREVOCABLE COMMERCIAL LETTER OF CREDIT**

(Name of Bank)

By: _____
(Title)

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EXHIBIT D
INDEMNITY AGREEMENT

This Agreement is made this _____ day of _____, A.D. _____, by and between ("Developer") and The City of Bixby, Oklahoma, a municipal corporation ("City").

RECITALS:

A. Developer is currently undertaking a development which development will include certain public improvements to city-owned lands, easements or rights-of-way.

B. Developer and City are parties to a Developer's Contract under PFPI No. _____, requiring Developer to post certain financial assurances with the City Clerk's Office pursuant to City of Bixby Ordinances, ensuring payment to the contractor for services performed in connection with the public improvements.

C. Developer has provided City with a letter from the contractor, with appropriate signatures and acknowledgments, confirming that the contractor has received a copy of the proposed indemnity agreement, accepts the terms and conditions of the same, and agrees to hold the City of Bixby harmless from all payments due for services performed by the contractor for the developer.

NOW, THEREFORE, Developer represents to City that adequate funds have been reserved for the payment of contractors performing construction in connection with PFPI No. _____ as called for under the development plans submitted to the City. Developer hereby agrees to indemnify and hold City harmless from any and all liability for costs associated with any construction contract entered into for construction of or improvement of any public improvement set forth in PFPI No. _____. The City agrees to accept Developer's indemnification in lieu of posting a surety bond, letter of credit or other financial assurance.

Dated this _____ day of _____, A.D. _____.

(Developer)

ATTEST:

_____ By: _____

(Seal) Title _____

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**EXHIBIT D (continued)
INDEMNITY AGREEMENT**

Contractor's Hold Harmless Agreement received: Yes _____ No _____

Developer's Indemnity Agreement is:

APPROVED _____

DENIED _____

on this _____ day of _____, A.D. _____.

Director of Public Works

APPROVED AS TO FORM:

City Attorney