

AGENCY AGREEMENT

by and between

THE TRUSTEES OF HAYWOOD COMMUNITY COLLEGE

and

HAYWOOD COUNTY, NORTH CAROLINA

Dated as of October 1, 2015

AGENCY AGREEMENT

THIS AGENCY AGREEMENT, dated as of October 1, 2015 (this "*Agreement*"), is entered into by and between **THE TRUSTEES OF HAYWOOD COMMUNITY COLLEGE**, a body corporate which has general control and supervision of all matters pertaining to Haywood Community College (the "*College*") and which is duly organized and existing under the laws of the State of North Carolina (the "*Board*"), and the **COUNTY OF HAYWOOD, NORTH CAROLINA**, a political subdivision of the State of North Carolina (the "*County*"),

WITNESSETH:

WHEREAS, the County and the Board have determined to cooperate in a plan to finance all or a portion of the cost of (1) the acquisition, construction and completion of a public services training facility at the Community College, consisting of a 3-story live burn building/multi-disciplinary training tower, a 11,000 square foot multiuse structure used for shelter, hydration, training and showers and an underground storage tank used for testing firefighting apparatus, and (2) related site improvements, including on-site parking and utilities (collectively, the "*Project*"), which each has found to be necessary and desirable to provide for improved higher education in the County;

WHEREAS, as a part of such plan, the Board has executed a General Warranty Deed conveying the site on which the Project will be located, as more particularly described in Exhibit A hereto (the "*Site*"), and the improvements thereon to the County;

WHEREAS, as a part of such plan, the County is authorized to accept a transfer of property from the Board for the purpose of entering into a financial contract for the construction of the Project in accordance with Section 115D-15.1(b) of the General Statutes of North Carolina, as amended, related thereto, and to lease such property to the Board during the term of the financial contract;

WHEREAS, as a part of such plan, the County desires to designate the Board as its agent in connection with the completion of the Project on the terms set forth herein and the Board is willing to accept such an appointment;

WHEREAS, the Board and the County have determined to enter into this Agreement in order to execute such plan; and

WHEREAS, all acts, conditions and things required by law to exist, to have happened and to have been performed precedent to and in connection with the execution and entering into of this Agreement do exist, have happened and have been performed in regular and due time, form and manner as required by law, and the parties hereto are now duly authorized to execute and enter into this Agreement;

NOW, THEREFORE, in consideration of the promises and of the mutual agreements and covenants contained herein and for other valuable consideration, the parties hereto do hereby agree as follows:

Section 1. Sale of Site to County. The Board, in furtherance of such plan, will transfer the Site to the County so that the County may pledge the Site as collateral for the Contract (as defined below) by means of a General Warranty Deed in form and content acceptable to both parties (the "*General Warranty Deed*").

Section 2. Accomplishment of Project. The County, in furtherance of such plan, will

acquire the Site from the Board in accordance with Section 1 above and will provide for the construction and other accomplishment of the Project by the Board as hereinafter provided. The County will also finance the cost of the Project under Section 160A-20 of the General Statutes of North Carolina, as amended, by entering into an Installment Financing Contract dated as of October 1, 2015 (the "*Contract*") between the County and TD Bank, N.A., a national banking association. In addition, the County will execute and deliver to a trustee for the benefit of the Bank a Deed of Trust, Security Agreement and Fixture Filing dated as of October 1, 2015 (the "*Deed of Trust*"), which will encumber the Site, the improvements thereon and other property as security for its obligation to repay the funds advanced to the County pursuant to the Contract.

Section 3. *Lease of Site and the improvements thereon to Board.* On the conveyance of the Site and the improvements thereon to the County by the Board, the County will lease the Site and the improvements thereon to the Board under a Lease dated as of October 1, 2015 (the "*Lease*") between the County and the Board.

Section 4. *Board to Act as Agent of the County; Indemnification.* The County hereby irrevocably appoints the Board as its agent in connection with the construction, installation and other accomplishment of the Project. The Board, as the agent of the County for the foregoing purposes, shall cause the Project to be completed in accordance with the respective construction documents, the Contract and any applicable requirements of governmental authorities and law, specifically including Sections 143-129 and 143-341 of the General Statutes of North Carolina, as amended. The County and the Board agree that all amounts received by either of them as refunds of State of North Carolina sales tax with respect to expenditures made in connection with the Project will be deposited in the Project Fund (as defined in the Contract) and used for capital construction costs, or debt service related thereto, of the Project.

Without limiting the generality of the foregoing and by way of illustration and not limitation:

(a) the Board shall cause the construction agreements to be reviewed and approved as to legal form in accordance with Board policies and practices for legal review of contracts prior to submittal to the County's Board of Commissioners for award;

(b) upon commencement of construction, the Board shall supervise and oversee the construction and the purchase of equipment, acting through its architects and agents; and certify through the architect to the County for direct payment by the County of the contractors' pay requests, fees, and cost of the project; resolve any disputes arising under the construction contract at its expense; and do all things necessary and required to commence and complete the Project;

(c) the Board shall submit all contracts and amendments thereto, including change orders which increase or change the scope of the work to the State Construction Office for approval. If any of said actions call for a use of County funds that exceed those previously allocated and budgeted, including the use of contingency funds, the Board shall first obtain the County's consent for such use in accordance with Section 159-28 of the North Carolina General Statutes, as amended, before submitting the request to the State Construction Office;

(d) the Board shall secure and maintain Builder's Risk insurance on the Project during construction, or require in the construction agreement that the contractor maintain such coverage;

(e) the Board shall require in the construction agreement that the contractor

(i) maintain such types and amounts of insurance coverage as is customarily required by a community college for the construction of community college facilities, to include comprehensive general liability insurance endorsed to include the County, its officers, employees and agents as Additional Insured and (ii) furnish a performance bond and a separate labor and material payment bond with respect to the completion of the Project as required by Article 3, Chapter 44A of the General Statutes of North Carolina, as amended, and the Contract.

To the extent permitted by law, the Board shall indemnify and hold the County harmless against and from all claims by or on behalf of any person, firm, corporation or other legal entity arising from the accomplishment of the Project. The Board shall be notified promptly by the County of any action or proceeding brought in connection with any such claims arising from the accomplishment of the Project.

Section 5. *Description of Project.* With the consent of the County, the Board may make any changes in the description of the Project or of any component or components thereof; but any increase in the cost of the Project resulting from any change shall, to the extent the increased cost exceeds the funds available therefor in the Project Fund, be payable solely from other funds of the Board, which funds shall be deposited to the credit of the such fund.

Section 6. *Right of Board to Enforce Contracts.* The County hereby assigns to the Board all of its rights and powers under all purchase orders and contracts it enters into with respect to the Project, and the Board has the right to enforce in its own name or the name of the County such purchase orders or contracts; but this assignment by the County does not prevent the County from asserting said rights and powers on its own behalf.

Section 7. *Construction Conferences.* The Board hereby agrees that it will, on the request of the County Manager, provide to the County Manager or his designee timely notice of all conferences with representatives of the contractors and vendors with respect to the Project and that the County Manager or his designee has the right to attend all such conferences.

Section 8. *Compliance with Contract.* The Board agrees that, except as otherwise provided in this Agreement, it will faithfully discharge all duties imposed on the County by the Contract with respect to the construction and other accomplishment of the Project and the insuring of the Project.

Section 9. *Disclaimers of the County.* The Board acknowledges and agrees that the design of the Project has not been made by the County, that the County has not supplied any plans or specifications with respect thereto and that the County (a) is not a manufacturer of, or a dealer in, any of the component parts of the Project or similar projects, (b) has not made any recommendation, given any advice or taken any other action with respect to (1) the choice of any supplier, vendor or designer of, or any other contractor with respect to, the Project or any component part thereof or any property or rights relating thereto, or (2) any action taken or to be taken with respect to the Project or any component part thereof or any property or rights relating thereto at any stage of the construction thereof, (c) has not at any time had physical possession of the Project or any component part thereof or made any inspection thereof or any property or rights relating thereto, and (d) has not made any warranty or other representation, express or implied, that the Project or any component part thereof or any property or rights relating thereto (1) will not result in or cause injury or damage to persons or property, (2) has been or will be properly designed or constructed or will accomplish the results which the Board intends therefor, or (3) is safe in any manner or respect.

The County makes no express or implied warranty or representation of any kind whatsoever with respect to the Project or any component part thereof to the Board or any other circumstance whatsoever

with respect thereto, including but not limited to any warranty or representation with respect to: the merchantability or the fitness or suitability thereof for any purpose; the design or condition thereof; the safety, workmanship, quality or capacity thereof; compliance thereof with the requirements of any law, rule, specification or contract pertaining thereto; any latent defect; the ability thereof to perform any function, and the benefits of any and all implied warranties and representations of the County are hereby waived by the Board.

Section 11. *Amendments and Further Instruments.* The County and the Board may, from time to time, execute and deliver such amendments to this Agreement and such further instruments as may be required or desired for carrying out the expressed intention of this Agreement.

Section 12. *Agency Agreement to Survive Termination of Contract.* Notwithstanding anything to the contrary contained herein, the obligations undertaken by the Board hereunder survive the termination of the Contract.

[Signatures Begin on Following Page]

IN WITNESS WHEREOF, the parties hereto have executed and attested this Agreement by their officers thereunto duly authorized as of the day and year first written above.

THE TRUSTEES OF HAYWOOD COMMUNITY COLLEGE

By: _____
Chairman

[SEAL]

Attest:

Secretary

[COUNTERPART SIGNATURE PAGE TO THE AGENCY AGREEMENT]

COUNTY OF HAYWOOD, NORTH CAROLINA

By: _____
Mark S. Swanger
Chairman of the Board of Commissioners

[SEAL]

Attest:

Ira Dove
Clerk to the Board of Commissioners