

IN THE SUPERIOR COURT OF COWETA COUNTY

STATE OF GEORGIA

| | | |
|--------------------------------|---|-----------------|
| STATE OF GEORGIA, |) | |
| |) | |
| Plaintiff, |) | CIVIL ACTION |
| |) | FILE NO. _____ |
| v. |) | |
| |) | BOND VALIDATION |
| COWETA COUNTY DEVELOPMENT |) | |
| AUTHORITY and |) | |
| HITACHI CONSTRUCTION MACHINERY |) | |
| AMERICAS INC. |) | |
| |) | |
| Defendants. |) | |

PETITION AND COMPLAINT FOR BOND VALIDATION

TO THE SUPERIOR COURT OF SAID COUNTY:

The STATE OF GEORGIA, by and through the Honorable John Herbert Cranford, Jr., District Attorney of the Coweta Judicial Circuit, files this petition and complaint for bond validation (the “Petition and Complaint”) against the Coweta County Development Authority and Hitachi Construction Machinery Americas Inc., as defendants, and respectfully shows:

1.

Defendant Coweta County Development Authority (the “Issuer”) is a public body corporate and politic created pursuant to local constitutional amendment (Ga. Laws 1966, p. 1101 *et seq.* continued by G. Laws 1985, p. 4173) (the “Act”). The Issuer has been duly created, its members have been duly appointed, and the Issuer is operating and existing as a public corporation. The Issuer has been created for the purpose of promoting and expanding for the public good and welfare of Coweta County, Georgia (the “County”) and its citizens, industry, agriculture, trade,

commerce and recreation within the County. The Act empowers the Issuer to issue its revenue bonds for the purpose of paying all or any part of the cost of any “project” (as defined in the Act). The Issuer is subject to the venue and jurisdiction of this Court.

2.

Defendant Hitachi Construction Machinery Americas Inc. (the “Company”) is (a) a corporation duly incorporated, validly existing and in good standing under the laws of the State of Georgia and (b) subject to the venue and jurisdiction of this Court.

3.

Defendant Issuer, in furtherance of the public purpose for which it was created, proposes to issue its Coweta County Development Authority Taxable Revenue Bond (Hitachi Construction Machinery Americas Inc. Project), Series 2023 in the principal amount of \$33,000,000 (the “Bond”). The issuance of the Bond is authorized by the Constitution and laws of the State of Georgia, including the Act and the Revenue Bond Law, and under and by virtue of the authority of a resolution of the Issuer adopted on August 3, 2023 (the “Resolution”). A certified copy of the Resolution (embodying an unexecuted form of the Lease (as hereinafter defined)) is attached as Exhibit 1 to the Notice to the District Attorney (the “Notice”) attached hereto as Exhibit A, and such Notice and the Resolution are, by this reference thereto, incorporated herein and made a part hereof.

4.

The Bond shall be dated its date of issuance and shall be issued in fully registered form. The interest on the Bond shall be payable on the 1st days of June and December, commencing upon the issuance of the Bond. The Bond shall bear interest at the rate of 8% per annum and shall mature on December 1, 2034. The prepayment provisions of the Bond and all other pertinent facts pertaining to the Bond are set forth in detail in the Resolution.

5.

The Bond shall be issued for the purpose of (a) financing the acquisition and construction of the Project Site and the Improvements (each as defined in the Lease defined herein) in the County (the “Project”) and (b) paying the costs of issuing the Bond. The Project is more fully described in the Lease.

6.

The Project will be leased by the Issuer to the Company pursuant to a Lease, dated as of the first day of the month in which the Bond is issued (the “Lease”). Under the terms of the Lease, the Issuer will agree to, among other things, issue the Bond and lease the Project to the Company, and the Company will agree to, among other things, cause the acquisition and construction of the Project and lease the Project from the Issuer. Under the terms of the Lease, the Company will pay the Issuer amounts sufficient to enable the Issuer to pay debt service on the Bond as the same become due (the “Lease Payments”). The Company will be able to make the Lease Payments because it has been operating profitably. An unexecuted form of the Lease is attached as Exhibit B to the Resolution and is, by this reference thereto, incorporated herein and made a part hereof.

7.

The Issuer has created a lien on the Lease and the Lease Payments and the moneys and securities on deposit in the Sinking Fund and the Construction Fund created in the Resolution (collectively the “Pledged Revenues”) as security for the Bond. The pledge of and lien on the Lease and the Pledged Revenues shall be valid and binding against the Issuer and against all parties having claims against the Issuer whether such claims arise in contract, tort or otherwise and irrespective of whether such parties have notice thereof.

8.

In order to induce the Company to enter into the Lease, the Issuer, the County, the Company, the Coweta County Board of Tax Assessors (the “Board of Assessors”), the Coweta County Tax Commissioner, and the Coweta County School District, entered into a Memorandum of Understanding, dated as of May 4, 2023 (the “Memorandum of Understanding”). The County, the Board of Assessors, the Coweta County Tax Commissioner, and the Coweta County School District are not indispensable parties to this proceeding. The Memorandum of Understanding provides that the Company will only be taxed on its leasehold interest in the Project as more fully set forth in the Memorandum of Understanding (the “Leasehold Valuation Methodology”). The Leasehold Valuation Methodology is not unreasonable and is not arbitrary and does not create an unconstitutional tax exemption. The Company has advised the Issuer that its willingness to acquire and construct the Project and the feasibility of the Project are based in part on the Leasehold Valuation Methodology. An executed form of the Memorandum of Understanding is attached as Exhibit 2 to the Notice and is, by this reference thereto, incorporated herein and made a part hereof.

9.

As security for the Bond, the Company will execute and deliver a Guaranty Agreement, dated as of the first day of the month in which the Bond is issued (the “Guaranty”) in favor of the purchaser of the Bond (the “Purchaser”). Under the terms of the Guaranty, the Company absolutely and unconditionally guarantees to the Purchaser the payment of the principal of and the interest on the Bond. An unexecuted form of the Guaranty is attached as Exhibit 3 to the Notice and is, by this reference thereto, incorporated herein and made a part hereof.

10.

The principal of and interest on the Bond shall be payable solely from the Pledged Revenues. The Bond shall not be deemed to constitute a general obligation of the State of Georgia

or the County within the meaning of any Constitutional or statutory limitation upon indebtedness. The Bond shall not directly, indirectly or contingently obligate the State of Georgia or the County to levy or to pledge any form of taxation whatever therefor or to make any appropriation for its payment.

11.

When the Lease and the Guaranty are executed and delivered, the Lease and the Guaranty will be the legal, valid, binding and enforceable obligations of the parties thereto. The Memorandum of Understanding is the legal, valid, binding and enforceable obligation of the parties thereto.

12.

The undertaking for which the Bond will be issued, the use of the proceeds of the Bond for the purposes set forth herein and in the Resolution, and the issuance of the Bond and the security therefor are sound, feasible and reasonable because the Lease Payments are sufficient to pay debt service on the Bond, because the Company has historically operated profitably and because of the Guaranty.

13.

Defendant Issuer has found in the Resolution that the financing of the Project by the issuance of the Bond is within the public purposes intended to be served by the Issuer. Specifically, defendant Issuer found in the Resolution that the financing of the Project by the issuance of the Bond will promote and expand for the public good and welfare of the County and its citizens, industry, trade and commerce within the County. The Issuer based this finding on its own study and analysis.

14.

Defendant Issuer has also found in the Resolution that the Project is a “project” within the meaning of the Act and will be located in the County.

15.

Defendant Issuer has also found in the Resolution that the economic benefits that will inure to the County from the Project and the operation thereof and the payments to be made under the Lease and the Memorandum of Understanding will be equal to or greater than the benefits to be derived from the Company under the Lease and the purchase option granted to the Company in the Lease; therefore, the use of the proceeds of the Bond to acquire and construct the Project, the leasing of the Project under the Lease and the granting of the purchase option contained in the Lease do not violate the prohibition in the Georgia Constitution on the payment by public bodies of gratuities to private sector persons.

16.

Defendant Issuer has also found in the Resolution that (a) the adoption of the Resolution and the subsequent issuance of the Bond to acquire and construct the Project does not constitute a “business loan” or confer any other “public benefit” within the meaning of O.C.G.A. § 50-36-1, (b) neither the Company nor any other participant in the transaction involving the Bond or the Project and their respective counsel constitute an “applicant for public benefits” within the meaning of O.C.G.A. § 50-36-1 in connection with the issuance of the Bond; therefore, such persons are not subject to Systematic Alien Verification of Entitlement pursuant to such code section in connection with the issuance of the Bond and (c) the transaction described in the Resolution is not a public project and is therefore not subject to the Georgia Local Government Public Works Construction Law (O.C.G.A. § 36-91-1 et seq.).

17.

Defendant Issuer is taking all necessary and proper steps to authorize the issuance of the Bond and pursuant to the provisions of the Resolution, will set aside, allocate, pledge and assign the Pledged Revenues to pay the principal of and the interest on, the Bond as the same become due, and such revenues are fully sufficient for such purpose.

18.

Defendant Issuer desires to issue the Bond as aforesaid, and desires that the same may be confirmed and validated according to law, and to this end has notified the District Attorney of the Coweta Judicial Circuit in writing, which said Notice was personally served upon said District Attorney.

19.

The Issuer, pursuant to the laws of the State of Georgia, particularly O.C.G.A. Section 36-82-100 (the "Audit Statute"), has elected to waive the independent performance audit or performance review requirement (the "Independent Audit") with respect to the Bond.

WHEREFORE, within 20 days from the date of service of said Notice, your District Attorney, pursuant to the laws of the State of Georgia, files this petition and complaint in the name of the State of Georgia against the above-named defendants, and prays:

(a) that an order be issued requiring the defendants to appear and to show cause, if any exists, at such time and place, whether in term or at Chambers, within 20 days from the filing of this petition and complaint, as the Judge of this Court may direct, why the Bond should not be confirmed and validated, as well as to pass upon all questions of law and fact pertaining to the right to issue the Bond and the security therefor;

(b) that this petition and complaint and such order as shall be issued be served upon the defendants in the manner provided by law, and that the order so issued be served as process;

(c) that all actions of the Issuer in connection with the issuance of the Bond and the security therefor be confirmed and validated in all respects;

(d) that this Court make such other adjudications with respect to the Bond and the security therefor as may be proper or necessary in connection with the matters before it; and

(e) that this Court adjudicate that the notice of validation containing the waiver provisions set forth in the Audit Statute is sufficient to exempt the Issuer from the Independent Audit.

District Attorney
Coweta Judicial Circuit

EXHIBIT A

GEORGIA, COWETA COUNTY

TO THE HONORABLE JOHN HERBERT CRANFORD, JR.,
DISTRICT ATTORNEY OF THE COWETA JUDICIAL CIRCUIT:

YOU ARE HEREBY NOTIFIED that under and by virtue of the Constitution and laws of the State of Georgia granting to the Coweta County Development Authority (the “Issuer”) the power and authority to issue interest-bearing revenue bonds, the Issuer, in open meeting duly called and assembled on August 3, 2023, adopted a resolution (the “Resolution”) authorizing the issuance of its Taxable Revenue Bond (Hitachi Construction Machinery Americas Inc. Project), Series 2023 in the principal amount of \$33,000,000 (the “Bond”). The Bond shall be issued for the purpose of (a) financing the financing the acquisition and construction of the Project Site and the Improvements (each as defined in the Lease defined herein) in Coweta County, Georgia (the “Project”) and (b) paying the costs of issuing the Bond.

The Project will be leased by the Issuer to Hitachi Construction Machinery Americas Inc. (the “Company”) pursuant to a Lease, dated as of the first day of the month in which the Bond is issued (the “Lease”). Under the terms of the Lease, the Issuer will agree to, among other things, issue the Bond and lease the Project to the Company, and the Company will agree to, among other things, acquire and construct the Project and pay the Issuer amounts sufficient to enable the Issuer to pay the principal of and interest on the Bond as the same become due (the “Lease Payments”). As security for the Bond, the Company will execute a Guaranty Agreement, dated as of the first day of the month in which the Bond is issued (the “Guaranty”) in favor of the purchaser of the Bond. In order to induce the Company to enter into the Lease, Issuer, the County, the Company, the Board of Assessors, the Coweta County Tax Commissioner, and the Coweta County School District entered

into a Memorandum of Understanding, dated as of May 4, 2023 (the “Memorandum of Understanding”). The Lease, the Lease Payments and certain other moneys will be pledged and assigned by the Issuer for the benefit of the Purchaser pursuant to the Resolution. The date, interest rate, maturity date, redemption provisions and all other pertinent facts pertaining to the Bond are set forth in detail in the Resolution. The Resolution, embodying an unexecuted form of the Lease is attached hereto as Exhibit 1 and made a part hereof. The Memorandum of Understanding is attached hereto as Exhibit 2 and made a part hereof. The unexecuted form of the Guaranty is attached hereto as Exhibit 3 and made a part hereof.

YOU ARE HEREBY NOTIFIED that the Issuer intends to issue the Bond and YOU ARE FURTHER HEREBY NOTIFIED of the action of the Issuer in accordance with the law pertaining to confirmation and validation of said proposed issue of Bond and the security therefor, and request is hereby made that you take immediate and proper steps for the confirmation and validation of the Bond as provided by law.

This 3rd day of August, 2023.

COWETA COUNTY DEVELOPMENT
AUTHORITY

(SEAL)

Chairman

Attest:

Secretary

EXHIBIT 1
RESOLUTION

EXHIBIT 2

MEMORANDUM OF UNDERSTANDING

EXHIBIT 3
GUARANTY

ACKNOWLEDGEMENT OF DISTRICT ATTORNEY

STATE OF GEORGIA

COUNTY OF COWETA

I hereby acknowledge personal service of the foregoing Notice; copy received; any
and all other notice and service are hereby waived, this _____ day of August, 2023.

District Attorney
Coweta Judicial Circuit

IN THE SUPERIOR COURT OF COWETA COUNTY

STATE OF GEORGIA

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| STATE OF GEORGIA, |) | |
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| |) | |
| Defendants. |) | |

ORDER

The within and foregoing petition and complaint for bond validation on behalf of the State of Georgia against the Coweta County Development Authority and Hitachi Construction Machinery Americas Inc. by the District Attorney of the Coweta Judicial Circuit (the “Petition and Complaint”), having been read and considered, IT IS ORDERED that the Petition and Complaint be served on the defendants as provided by law.

IT IS FURTHER OREDERED that the defendants appear before the Judge assigned to this cause on the _____ day of August, 2023, at the Coweta County Courthouse in Newnan, Georgia, at _____ .M., and then and there make answer under oath touching upon all matters contained in the Petition and Complaint and show cause, if any exists, why the Coweta County Development Authority Taxable Revenue Bond (Hitachi Construction Machinery Americas Inc. Project), Series 2023, in the principal amount of \$33,000,000 (the “Bond”), described in the Petition and Complaint and the security therefor should not be confirmed and validated as provided by law.

In the meantime the Clerk of this Court is hereby directed to publish in the official newspaper in which sheriff's advertisements appear for Coweta County, Georgia in each of the two successive weeks immediately preceding the week of said hearing, a notice to the public that on the date hereinbefore specified in this order, the above stated cause will be heard and determined, and any citizen of the State of Georgia residing in Coweta County, or any person wherever residing who may have a right to object, may become a party to this proceeding. Such notice shall be in substantially the form attached hereto as Exhibit A.

Let a copy of this order be served upon the defendants as provided by law.

This _____ day of August, 2023.

Judge, Superior Court
Coweta County, Georgia

NOTICE TO THE PUBLIC

YOU ARE HEREBY NOTIFIED that on the _____ day of August, 2023, at _____
_M., at the Coweta County Courthouse in Newnan, Georgia, the Judge of the Superior Court of
Coweta County, Georgia will hear the case of the STATE OF GEORGIA, Plaintiff, v. COWETA
COUNTY DEVELOPMENT AUTHORITY and HITACHI CONSTRUCTION MACHINERY
AMERICAS INC., Defendants, Civil Action File No. _____, in the Superior Court of
Coweta County, Georgia, the same being a proceeding to confirm and validate the Coweta County
Development Authority Taxable Revenue Bond (Hitachi Construction Machinery Americas Inc.
Project), Series 2023, in the principal amount of \$33,000,000 (the “Bond”). The Bond shall be
issued for the purpose of (a) financing the financing the acquisition and construction of the Project
Site and the Improvements (each as defined in the Lease) in Coweta County, Georgia (the “Project”) and
(b) paying the costs of issuing the Bond. The Project will be leased by the Issuer to Hitachi
Construction Machinery Americas Inc. pursuant to a Lease. In said proceeding, the Court will also
pass upon the validity of (a) a Guaranty Agreement guaranteeing the payment of the principal of and
interest on the Bond and (b) a Memorandum of Understanding providing for, among other things, the
valuation of the Company’s leasehold interest for ad valorem tax purposes.

Pursuant to O.C.G.A. Section 36-82-100, the Issuer hereby notifies all interested parties that no independent performance audit or performance review will be conducted with respect to the bond issue.

Any citizen of the State of Georgia residing in Coweta County, Georgia, or any other person wherever residing who has a right to object, may intervene and become a party to this proceeding.

This _____ day of August, 2023.

Clerk, Superior Court
Coweta County, Georgia