

CITY OF UNALASKA
UNALASKA, ALASKA

RESOLUTION 2020-13

A RESOLUTION OF THE UNALASKA CITY COUNCIL AUTHORIZING THE CITY MANAGER TO SIGN A SETTLEMENT AGREEMENT WITH ALASKA MECHANICAL, INC. TO RESOLVE ALASKA MECHANICAL, INC. V. CITY OF UNALASKA, CASE NO. 3AN-15-8280 CI

WHEREAS, on or about May 31, 2013, AMI and the City entered into a Construction Contract (the "Contract") for construction of upgrades to the City's Wastewater Treatment Plant (the "Project"), which was to provide chemically-enhanced primary treatment of domestic wastewater and landfill leachate at the Wastewater Treatment Plant; and

WHEREAS, disputes have arisen between the City and AMI resulting in AMI suing the City in the Superior Court of the State of Alaska, Third Judicial District at Anchorage, Case No. 3AN-15-8280 CI (the "Suit"); and

WHEREAS, AMI submitted claims with 14 separate elements including design conflicts, inconsistent drawings, changed site conditions from over-excavation of the subgrade, and delay costs attributed to 1) additional excavation and fill work; 2) a job site search for explosives; and 3) additions and deletions in concrete work, and sought a judgment of four million three hundred ninety-nine thousand, seven hundred forty three dollars and ten cents (\$4,399,743.10) plus costs and attorney's fees; and

WHEREAS, the City submitted a claim for liquidated damages in the amount of two million twenty-five thousand dollars (\$2,025,000) alleging AMI failed to meet mutually agreed deadlines for completion of three phases of the Project; and

WHEREAS, the City and AMI negotiated in good faith resulting in a proposed Settlement Agreement whereby the City agrees to pay AMI one million eight hundred eighty-two thousand five hundred dollars (\$1,882,500) and both AMI and the City release each other from other claims under the Contract but reserve rights should the United States Environmental Protection Administration seek to recover fines from the City as a result of delayed completion of the Project and dismiss the Suit with prejudice; and

WHEREAS, the City Attorney and City Manager recommend the City Council approve the Settlement Agreement.


NOW, THEREFORE, IT IS HEREBY RESOLVED THAT THE UNALASKA CITY COUNCIL authorizes the City Manager to sign the Settlement Agreement between the City of Unalaska and Alaska Mechanical Inc.

PASSED AND ADOPTED by a duly constituted quorum of the Unalaska City Council on February 25, 2020.



Vincent Tutiakoff
Mayor

ATTEST:



Marjie Veeder, CMC
City Clerk



BOYD, CHANDLER, FALCONER & MUNSON, LLP

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MEMORANDUM

TO: Unalaska City Council



FROM: Brooks W. Chandler, City Attorney

RE: AMI v. Unalaska Settlement Agreement

DATE: February 21, 2020

AMI has agreed to settle the WWTP litigation for \$1,882,500. This amount is halfway between the last offer made by each side (\$1,775,000 by the City and \$1,990,000 by AMI) and is consistent with the direction previously provided to our office. I recommend approval of the Resolution authorizing the city manager to sign the settlement agreement.

AMI claims in the case total \$4,758,992.66. The City has a claim against AMI for 2,025,000 in liquidated damages for late completion. The offers mentioned above had been considered the "final" offer of each side. These offers followed a very long period of negotiations first between Nancy Peterson and the majority owner of AMI for about 6 months in the latter part of 2017 and the first part of 2018. Then between the attorneys beginning last June and ending at the end of December. During this final period of negotiations AMI gradually reduced its settlement offers by \$648,500. The settlement is an additional \$107,500 reduction.

Concluding negotiations had not resulted in a settlement the lawyers began preparing for a trial scheduled in December. Each attorney realized the expense to their clients associated with a twelve day trial would dwarf the \$215,000 difference between the two final offers. As a matter of practical economics this agreement makes sense for both AMI and the City.

One issue reserved out of the settlement agreement is the potential for future EPA penalties for later completion of the Project. The settlement agreement expressly reserves the City's right to seek reimbursement from AMI and AMI's right to defend against such a claim. Although we are optimistic such fines will not be assessed (none have been assessed to date) this

cannot be determined for sure until the summer of 2021 when the City seeks to terminate the consent decree. Warranty claims and claims for latent defects are also reserved. The warranty period will run for a period of one year after the settlement payment is made.

The settlement agreement requires payment in 30 days. A budget amendment will be required. I will be present either in person or by phone to answer any questions.

SETTLEMENT AGREEMENT

THIS SETTLEMENT AGREEMENT (“Agreement”) is entered into and effective as of the 25th day of February, 2020, by and between Alaska Mechanical, Inc. (“AMI”), and The City of Unalaska (“City”). Both are collectively referred to herein as the “Parties,” or individually as a “Party.”

RECITALS

A. On or about May 31, 2013, AMI and the City entered into a Construction Contract (the “Contract”) for construction of upgrades to the City’s Wastewater Treatment Plant (the “Project”), which was to provide chemically-enhanced primary treatment of domestic wastewater and landfill leachate at the Treatment Plant.

B. Disputes have arisen between the Parties, and the Parties are presently in litigation with each other in the Superior Court of the State of Alaska, Third Judicial District at Anchorage, Case No. 3AN-15-8280 CI (the “Suit”). AMI submitted claims with 14 separate elements including design conflicts, inconsistent drawings, changed site conditions from over-excavation of the subgrade, and delay costs attributed to; 1) additional excavation and fill work; 2) a job site search for explosives and; 3) additions and deletions in concrete work. The City submitted a claim for liquidated damages alleging AMI failed to meet mutually agreed deadlines for completion of three phases of the Project.

C. Except as set forth herein, it is the intent of the Parties to fully and finally resolve any and all disputes between them concerning the Contract and the Project.

AGREEMENT

In consideration of the mutual promises contained herein, and other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, the Parties agree as follows:

1. Payment. The City shall pay AMI the sum of \$1,882,500.00 via wire transfer within thirty (30) days of the effective date of this Agreement (the “Settlement Payment”).

2. Mutual Release. Other than the obligations contained in this Agreement, the Parties agree to release and discharge each other and their respective employees, officers elected officials, engineers, sureties, insurers, attorneys, and agents from all known and unknown charges, complaints, claims, liabilities, controversies, damages, causes of action, debts, and expenses of any nature whatsoever, known or unknown, which they have, or may have had, against the other, whether or not apparent or yet to be discovered, for any acts, omissions, or conduct relating to or arising from the Contract or the Project. Expressly excepted from this release are any warranty claims, which shall neither be enlarged nor diminished, latent defect claims, and should the EPA level fines against the City related to AMI’s work on the Project, AMI and the City reserve all rights and defenses against each other to defend against and address those fines.

3. Project Closeout. AMI shall within thirty (30) days of the effective date of this Agreement provide City; 1) the Consent of Surety to Final Payment, 2) Affidavit of Payment of Debts and Claims; and 3) a copy of the notice of completion filed with the State of Alaska Department of Labor and Workforce Development. AMI shall preserve project records for a period of three (3) years from the effective date of this Agreement.

4. Unknown Claims and Liabilities. The Parties represent that they are familiar with and that their attorneys have explained the meaning of decisions of the Alaska Supreme Court applicable to this Agreement, including but not limited to *Alaska Airlines, Inc. v. Sweat*, 568 P.2d 916 (Alaska 1977) and *Witt v. Watkins*, 579 P.2d 1065 (Alaska 1978), that protection of these holdings is waived, and, with the exceptions of paragraph 2 of this Agreement, that the Parties intend this Agreement to discharge each other and to release each other from any liability for damages or costs caused, enhanced, aggravated, or contributed to with respect to acts and claims within the scope of this Agreement, whether such damages and costs are subsequently discovered or are different in degree or kind than is now alleged, known, anticipated, or expected.

5. Dismissal of Suit. Within ten (10) days after receipt of the Settlement Payment by AMI, the Parties will stipulate to dismissal of the Suit with prejudice and without costs or fees assessed to either Party.

6. No Admission of Liability. The Parties understand and acknowledge that this settlement is the compromise of disputed claims. Neither the transfer of any consideration, the doing of any of the acts referred to in this Agreement, nor anything else contained in this Agreement shall be taken or construed to be an admission on the part of the Parties of any claims, demands, causes of action, obligations, damages or liability asserted by the other Party. The Parties expressly deny any and all such claims, demands, causes of action, obligations, damages and liabilities.

7. Attorneys' Fees and Costs. Except as specified below, all attorneys' fees, costs, and expenses incurred by the Parties shall be borne by the Party incurring them.

8. Complete Agreement. This Agreement contains all the promises and covenants made by the Parties. This Agreement supersedes any and all prior documents, discussions, communications, representations, understandings, negotiations, agreements, or contracts by and between the Parties. It is intended that the only obligations which remain between the Parties are expressed in this Agreement.

9. Binding Agreement. This Agreement shall bind the heirs, successors, representatives, and assigns of each Party.

10. Non-Reliance. In executing this Agreement, each Party warrants that it is relying solely on its own judgment and knowledge, and that it is not relying on any statement or representation made by the other Party or its agents.

11. Representation. The Parties acknowledge that they have been represented by counsel in the preparation of this Agreement, have been fully advised as to the legal effect of this Agreement, and have executed this Agreement freely and voluntarily. The Parties acknowledge that both have had the opportunity to participate in the drafting of this Agreement. Thus the

principle that ambiguities are to be construed against the drafter shall not be applicable in any litigation concerning this Agreement.

12. Governing Law. All questions with respect to the construction of this Agreement and the rights and liabilities incurred hereto shall be governed by the laws of the State of Alaska without regard to its choice-of-law provisions.

13. Authority. The individuals executing this Agreement on behalf of a corporation or other entity represent and warrant to the other Party; 1) that they have the authority to bind the Party on whose behalf they execute this Agreement, 2) the execution of this Agreement has been duly and properly authorized by the Party on whose behalf this Agreement is executed; and 3) the consent of all persons or entities necessary to the execution of this Agreement has been obtained.


14. Prevailing Party Attorneys' Fees. In the event of a dispute arising under this Agreement, the prevailing Party shall be entitled to its reasonable attorneys' fees and costs.

15. Counterparts. This Agreement may be executed in one or more counterparts, and each counterpart is deemed to be an original. Signature pages may be transmitted by Portable Document Format via email or by facsimile, which shall be admissible in evidence.

By signing below, each Party knowingly and voluntarily executes this Agreement and binds such Party to this Agreement.

ALASKA MECHANICAL, INC.

CITY OF UNALASKA

By: 
Name: Darren Buss
Its: Vice President
Date: February 21, 2020

By: _____
Name: _____
Its: _____
Date: February _____, 2020