

PUBLIC WORKS AND UTILITIES COMMITTEE

13-0389R

RESOLUTION APPROVING SETTLEMENT AGREEMENT BETWEEN THE CITY OF DULUTH AND WAGNER CONSTRUCTION, INC. RELATED TO THE RECONSTRUCTION OF GLENWOOD STREET.

CITY PROPOSAL:

RESOLVED, that the city council hereby approves settlement with Wagner Construction, Inc. related to the reconstruction of Glenwood Street under city of Duluth Project No. 0647TR, S.P. No. 118-162-13, and Minn. Project No. STPX 6910(212) and further authorizes the proper city officials to execute a settlement agreement and mutual release, substantially the same as that on file in the office of the city clerk as Public Document No. _____, and to take all actions necessary to conclude this matter on a full, final and complete basis.

Approved:



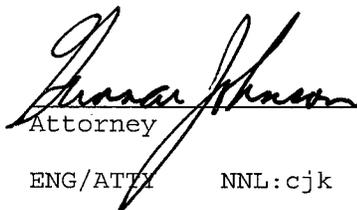
Department Director

Approved for presentation to council:



Chief Administrative Officer

Approved as to form:



Attorney

Approved:



Auditor

ENG/ATTN NNL:cjk 6/26/2013

STATEMENT OF PURPOSE: This resolution authorizes settlement in a dispute between the City and Wagner Construction, Inc. related to the reconstruction of Glenwood Street.

The City and Wagner Construction, Inc. ("Wagner"), on or about July 11, 2010, entered into a contract for the reconstruction of Glenwood Street in Duluth, Minnesota, from 43rd to 60th Avenues East, City of Duluth Project No. 0647TR, S.P. No. 118-162-13, and Minn. Project No. STPX 6910(212) ("Contract"). The Contract was approved by Duluth City Council Resolution 10-0298R passed on June 14, 2010.

Disputes have arisen between the parties regarding liability under the Contract for spalled concrete curb and gutter, dead trees, liquidated damages related to extra completion days, and entitlement to the remaining retainage held by the City in the amount of \$222,014.99.

The parties have now reached a settlement on all issues. Terms of the settlement include a reduction of \$75,000 of the amount owed Wagner under the Contract, which amount shall be deducted from the remaining \$222,014.99 held in retainage under the Contract, and the City agrees to pay Wagner the remaining \$147,014.99 upon completion of certain work as set forth in the settlement agreement.

SETTLEMENT AGREEMENT AND MUTUAL RELEASE

This Settlement Agreement and Mutual Release ("Agreement") is entered into by and between the City of Duluth ("the City") and Wagner Construction, Inc. ("Wagner"), collectively referred to as the "Parties," with reference to the following facts.

RECITALS

WHEREAS, on or about July 11, 2010, the Parties entered into a contract for the reconstruction of Glenwood Street in Duluth, Minnesota, from 43rd to 60th Avenues East, City of Duluth Project No. 0647TR, S.P. No. 118-162-13, and Minn. Project No. STPX 6910(212) ("Project"), all in accordance with plans and specifications as prepared by the City of Duluth Engineering Division and Salo Engineering, Inc., Wagner's bid in the amount of \$4,145,880.12, and Duluth City Council Resolution 10-0298R passed on June 14, 2010 ("Contract");

WHEREAS, disputes have arisen between the parties regarding liability under the Contract for spalled concrete curb and gutter, dead trees, liquidated damages related to extra completion days, and entitlement to the remaining retainage held by the City in the amount of \$222,014.99 ("Dispute");

WHEREAS, the Parties have now reached a settlement on all issues involved in the Dispute; and

WHEREAS, the Parties to this Agreement have defended the claims against them and deny any wrongdoing or liability on their part, expressly agree that this settlement is not and shall not be construed as an admission of fault or liability for any claim, and now wish to settle all issues involved in this Dispute on the terms set forth herein.

AGREEMENT

NOW, THEREFORE, in consideration of the foregoing recitals, of the conditions, covenants and agreements set forth below, and for other valuable consideration, the amount and sufficiency of which are hereby acknowledged, the Parties agree as follows:

1. Release and Final Payment of Retainage. In consideration for a full, final and complete compromise of the issues involved in the Dispute, Wagner agrees to a reduction of \$75,000 of the amount owed Wagner and to which it is entitled under the Contract, which amount shall be deducted from the remaining \$222,014.99 held in retainage under the Contract, and the City agrees to pay Wagner \$147,014.99 upon completion of the following:

- a. placement by Wagner (or its subcontractor or duly authorized agent or employee) of TK-590-100 Tri-Silane concrete sealant, in accordance with the manufacturer's instructions for the application thereof, on all concrete curbs and gutters within the Project area from 52nd to 60th Avenues East;
- b. mutual completion and execution by the City and Wagner of all final paperwork required for closure of this State-aid Contract; and

c. City Council approval of this Agreement.

2. Mutual Releases. In consideration of the conditions, covenants, and agreements referred to herein, each Party, on behalf of themselves and their affiliates, stockholders, officers, directors, employees, agents, predecessors, successors and assigns, or their owners, shareholders, attorneys, heirs, executors, administrators, representatives, insurers, or assigns, releases and forever discharges the other Party from all claims, demands, costs, expenses, fees and causes of action, of whatever character, nature or kind, known or unknown, which the Parties may now have or may have ever had arising out of or relating in any way to the subject matter of this Dispute, including but not limited to any contractual warranties of past or future performance of the concrete work (sidewalk, curb and gutter, driveways, and driveway aprons) and landscaping (trees and sod); and the City further releases Wagner's performance bond surety, Travelers Casualty and Surety Company of America, from those same claims.

3. General Provisions:

a. Binding Effect. This Agreement shall be binding upon and for the benefit of the Parties and their respective affiliates, stockholders, officers, directors, employees, agents, predecessors, successors and assigns, or their owners, shareholders, attorneys, heirs, executors, administrators, representatives, insurers, or assigns.

b. No Admission of Liability/Wrongdoing. Nothing contained or incorporated herein shall be deemed to be, nor shall the negotiation, execution and performance of this Agreement constitute any admission or concession of liability or wrongdoing on the part of any Party, or any other form of admission with respect to any matter, thing or dispute whatsoever. Any such liability or wrongdoing is expressly denied by the Parties.

c. Representation by Counsel. Each Party warrants that it is and has been represented by independent counsel with respect to this Agreement and all matters covered by it. Each Party has been fully advised by said counsel with respect to its rights and obligations and with respect to the execution of this Agreement. Each Party authorizes and directs its respective attorneys or duly authorized employees or agents to execute such papers and take such other action as is necessary and appropriate to effectuate the terms of this Agreement.

d. Complete Agreement. Each Party warrants that no promise, inducement or agreement not expressed herein has been made in connection with this Agreement. This Agreement constitutes the entire agreement between the Parties and supersedes and replaces all prior negotiations or proposed agreements, written or oral.

e. Written Modification. This Agreement may not be altered, amended, modified or otherwise changed in any respect whatsoever except by a writing duly executed by an authorized representative of each of the Parties.

f. Titles and Captions. Titles, captions, or headings in this Settlement Agreement are inserted as a matter of convenience and for reference, and in no way define, limit, extend, describe, alter, or affect the meaning of this Agreement.

g. Construction of Settlement Agreement. The language of this Agreement shall be construed as a whole according to its fair meaning and intent and not strictly for or against any Party regardless of who drafted or was principally responsible for drafting the Agreement or any specific term or condition herein. This Agreement shall be deemed to have been drafted by all parties, and no Party shall urge otherwise. This Agreement shall be deemed to have been made in the State of Minnesota and shall be governed by, construed, and interpreted in accordance with the laws of the State of Minnesota. The parties consent to personal jurisdiction in the State of Minnesota, and the State District Court for the Sixth Judicial District venued in Duluth, MN, shall be the exclusive forum for resolution of the same.

h. Multiple Originals. This Agreement may be executed in multiple originals, each of which is equally admissible in evidence and shall be deemed to be one and the same instrument. Telefax or email signatures shall be binding and have the same effect as an original counterpart executed to the other Party.

i. Authority to Bind and Execute. Each Party represents and warrants that it has the full authority and power to enter into this Agreement and to perform all transactions, duties and obligations herein set forth. Each signatory to this Agreement who signs on behalf of a party represents and warrants that he or she has the authority to sign on behalf of that party.

j. Severability. The Parties agree that if, for any reason, a provision of this Agreement is held unenforceable by any court of competent jurisdiction, this Agreement shall be automatically conformed to the law, and otherwise this Agreement shall continue in full force and effect.

k. Costs, Expenses and Attorneys' Fees. Each of the parties will bear its own costs, expenses, and attorneys' fees incurred in connection with the resolution of this Dispute.

I HAVE CAREFULLY READ THE FOREGOING AND KNOW THE CONTENTS THEREOF AND SIGN THIS SETTLEMENT AGREEMENT AND THE RELEASE, FREELY AND VOLUNTARILY.

Dated this _____ day of June, 2013.

WAGNER CONSTRUCTION, INC.

By: _____

Its: _____

CITY OF DULUTH

By: _____

Don Ness
Its Mayor

Attest:

Its City Clerk