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PUBLIC SERVICES BUILDING
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January 9, 2020

Board of County Commissioners
Clackamas County

Members of the Board:

Approval of Settlement with OTAK, Inc.

Purpose/Outcomes	Authorize settlement of claim between the Clackamas County Development Agency and OTAK engineers
Dollar Amount and Fiscal Impact	\$150,000
Funding Source	Settlement of disputed claim
Duration	Full and final settlement
Previous Board Action	The Board has been apprised of the developments in these negotiations during executive sessions.
Strategic Plan Alignment	1. Build public trust through good government; 2. Build a strong infrastructure
Contact Person	Stephen L. Madkour, County Counsel at 503/742-5391
Contract No.	Development Agency Contract # 962-146-12

BACKGROUND:

In 2013, the Development Agency hired OTAK Inc., to design the Bell Avenue road improvement project. The contract and its 6 amendments totaled approximately \$440,000. The stretch of Bell Avenue is close to a half-mile long between King Road and Johnson Creek Boulevard. It runs north-south parallel to 82nd Avenue and is within the North Clackamas Revitalization Area Urban Renewal District. The County and the Agency have engaged OTAK for various projects at least 20 times over the last 10 years and have enjoyed a good working relationship.

The project is completed and the end product is a significant improvement to the area. However, during the course of construction some quantities, design details, and sequencing of events had to be revisited. As a result, the Agency made a claim against OTAK. No formal legal action was initiated against OTAK. The matter was mediated and the parties agreed to a settlement payment by OTAK to the Agency in the amount of \$150,000.

RECOMMENDATION:

Staff respectfully recommends that the Board approve the terms of the settlement with OTAK as set forth in the attached Release and Settlement Agreement.

Respectfully submitted,



Stephen Madkour
County Counsel

Attachment:
Release and Settlement Agreement

MUTUAL RELEASE AND SETTLEMENT AGREEMENT

This mutual release and settlement agreement (the "Agreement") is entered into between OTAK, Inc., ("OTAK") an Oregon corporation, and the Clackamas County Development Agency (the "Agency") (OTAK and the Agency are collectively referred to as the "Parties"), related to issues in connection with improvements to the Bell Avenue Improvement Project (the "Project").

1. Settlement and Payment. As consideration for the promises contained in this Agreement, OTAK shall pay to the Agency the total amount of One Hundred and Fifty Thousand dollars (\$150,000.00), within 30 days of the execution of the Agreement.

2. Mutual Full and Final Release. Except for the obligations contained in this Agreement, the Parties and each of their respective successors, subsidiaries, affiliated entities, affiliated agencies, assigns, insurers, employees, elected officials, officers, directors, and agents release, waive, and forever discharge each other from all claims, demands, actions, suits, losses, and damages, whether known or unknown, that were asserted, could have been asserted, or may arise in the future in connection with the Project.

3. Exception to Release for Contribution. In the event that (1) a third party files a lawsuit or arbitration action against the Agency alleging design defects in the Project, (2) the third party initiates the lawsuit or arbitration action within the applicable statutes of limitation and ultimate repose; and (3) the third party alleges that the deficient design of components of the Project caused that third party personal injury or property damage, the Agency retains any claims that it may have against OTAK for contribution. The Parties acknowledge and agree that OTAK preserves all rights, defenses, and related cross claims that it may have against the Agency in any such action.

4. Covenant Not to Sue. The Parties covenant not to sue, institute, cause to be instituted, permit to be instituted, or assist in instituting or prosecuting on their behalf any proceeding, or otherwise assert any Claim against each other or any other entity that is covered by the release contained in paragraph 2 of this Agreement.

5. Unknown Claims. The Parties acknowledge that there is a risk that subsequent to the execution of this Agreement they may discover facts, or suffer or incur claims, which are unknown or are unanticipated at the time this Agreement is executed, which, if known prior to the execution of this Agreement may have materially affected their respective decisions to execute this Agreement and give the releases contained in it. Despite this knowledge and understanding, each of the Parties agrees that it is assuming the risk of such unknown and unanticipated facts and claims, and that each Party is expressly, voluntarily, and knowingly waiving any and all rights under common law and statute related to such unknown facts, damages, and claims.

6. No Reliance. The Parties execute this Agreement without reliance upon any statement or representation by the other party or their representatives. The Parties understand that the facts relating to this Agreement may be different from the facts

known or believed by them to be true. The Parties respectively accept and assume the risk of the facts being different than agreed. The Parties agree that this Agreement shall be and remain in all respects effective and not subject to termination, rescission, or reformation by virtue of any such difference in facts.

7. No Admission of Liability. Nothing in this Agreement shall be construed to be or used as an admission of liability or fault by any party. No part of this Agreement shall be admissible in any court or alternative dispute resolution proceeding for the purpose of proving liability, causation, or fault.

8. Defense, Indemnity, and Hold Harmless. The Agency agrees to defend, indemnify, and hold harmless OTAK, its successors, subsidiaries, affiliated entities, insurers, employees, officers, directors, and agents for any and all claims, actions, liabilities, losses, damages, penalties, and equitable relief that were asserted, that could have been asserted, or that may later be asserted against Otak by Tapani, Inc. (or its respective successors, subsidiaries, affiliated entities, affiliated agencies, assigns, insurers, employees, elected officials, officers, directors, and agents) related in any way to the Project.

9. Knowing Release. Both OTAK and the Agency declare that they fully understand the terms and provisions of this Agreement, and voluntarily accept the above terms and conditions for the purpose of making a full compromise and settlement of the disputed claims at issue in the above-referenced dispute.

10. Cooperation. OTAK agrees to reasonably cooperate with the Agency in any subsequent disputes, claims or litigation concerning the Project. This includes but is not limited to any claim against the Agency that may be initiated by Tapani, the general contractor on the Project, or any other contractor on the Project. OTAK agrees that it will reasonably cooperate and make its staff reasonably accessible to aid the Agency in defending against any such future claims. In the event of a dispute between OTAK and the Agency concerning the reasonableness of OTAK's cooperation, the parties agree to submit the dispute to final and binding arbitration before Martha Hodgkinson. The arbitration shall be limited to the submission of written briefing and exhibits to Ms. Hodgkinson and, upon Ms. Hodgkinson's request, oral argument concerning the dispute. The remedy for any breach of this paragraph shall be limited to OTAK's compliance with specific requirements for OTAK's further cooperation, as set forth in an arbitration decision by Ms. Hodgkinson.

11. Severability. Should any part, term, or provision of this Agreement be declared or determined to be illegal, invalid, or unenforceable, any illegal, invalid, or unenforceable part, term, or provision shall be deemed stricken from this Agreement and all of the other parts, terms, and conditions of this Agreement shall remain in full force and effect to the fullest extent permitted by law.

12. No Assignment. Each Party warrants and represents that it has not made, nor caused to be made, any assignment or hypothecation of any claim, right, or cause of

action that the Party has, or in the future may have, against the other Party to any person or entity that is not a signatory to this Agreement.

13. Entire Agreement. This Agreement contains the entire agreement between the parties hereto and the terms and provisions of this Release and Settlement Agreement are contractual and not a mere recital. This Agreement supersedes any prior or contemporaneous Agreements and understandings between the Parties relating to the Project, whether written or oral.

14. Arbitration. Any controversy, claim, or dispute arising out of or relating to the Agreement shall be resolved exclusively by arbitration and the parties stipulate to Martha Hodgkinson serving as the sole arbiter.

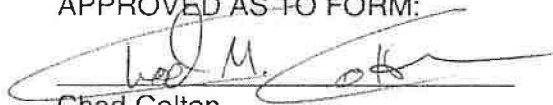
15. Attorney Fees and Costs. Each party to this Agreement shall bear its own attorney fees and costs incurred before and through the date of this Agreement, and for any resultant dispute arising from this Agreement.

16. Execution of this Agreement. This Agreement may be executed in one or more identical counterparts, including facsimile and scanned and electronically transmitted counterparts, each of which shall be deemed an original. All counterparts shall constitute one Agreement, binding on all the Parties, notwithstanding that all of the Parties have not signed the same counterpart.

17. Review by Counsel. Counsel for the Parties have reviewed these terms with their respective clients and have advised their clients accordingly.

18. Competence and Authority. The undersigned warrant that they are legally competent and authorized to execute this Agreement.

APPROVED AS TO FORM:



Chad Colton
Attorney for OTAK

OTAK

By: 

Dated: 12/13/19

APPROVED AS TO FORM:

Stephen L. Madkour
Attorney for Agency

CLACKAMAS COUNTY DEVELOPMENT
AGENCY

By: _____

Dated: _____