



OFFICE OF COUNTY COUNSEL

PUBLIC SERVICES BUILDING
 2051 KAEN ROAD | OREGON CITY, OR 97045

Stephen L. Madkour
 County Counsel

Kathleen Rastetter
Scott C. Ciecko
Amanda Keller
Nathan K. Boderman
Shawn Lillegren
Jeffrey D. Munns
Andrew R. Naylor
Andrew Narus
Sarah Foreman
 Assistants

September 22, 2022

Board of County Commissioners
 Clackamas County

Members of the Board:

Approval of a Settlement Agreement and Mutual Release of All Claims

Purpose/Outcome	Approval of settlement agreement by the Board of County Commissioners sitting as the governing body of WES
Dollar Amount and Fiscal Impact	Settlement payable to WES in the amount of \$385,000.00
Funding Source	Payment comes from participating parties.
Duration	One-time settlement
Previous Board Action/Review	The Board of County Commissioners sitting as the governing body of WES was briefed on this matter at prior executive session.
Strategic Plan Alignment	<ol style="list-style-type: none"> 1. How does this item align with your department's Strategic Business Plan goals? Matters resolved through early resolution. 2. How does this item align with the County's Performance Clackamas goals? Building public trust through good government
Counsel Review	Reviewed and approved by County Counsel
Procurement Review	(Please check yes or no for procurement review. If the answer is "no," please provide an explanation.) <ol style="list-style-type: none"> 1. Was the item processed through Procurement? yes <input type="checkbox"/> no <input type="checkbox"/> 2. If no, provide brief explanation: Acceptable explanations are: item is an IGA, item is a lease, item is a non-binding MOU, item is a grant. Unacceptable responses are leaving the section blank, providing N/A or similar statement with no explanation.
Contact Person	Stephen L. Madkour, County Counsel
Contract No.	N/A

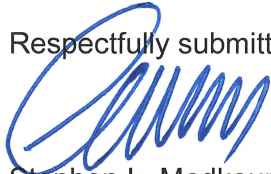
BACKGROUND:

Water Environment Services (WES) operates the Kellogg Creek Water Resource Recovery Facility in Milwaukie. WES contracted for design and construction services for the expansion and improvement of the plant's operations. One of those improvements concerned replacement

of the influent pump stations. Over the course of the project, WES incurred additional costs associated with delays attributed to the specifications and capabilities of the selected pumps. Through a mediated session, WES and its contractors and consultants came to an agreement to settle all matters associated with the project and claims. The proposed settlement terms set forth in the agreement are consistent with the settlement proposal recommended by the mediator.

RECOMMENDATION: Staff respectfully recommends that the Board of County Commissioners serving as the governing body of WES accept the settlement and authorize the Chair to sign the agreement on behalf of WES.

Respectfully submitted,



Stephen L. Madkour
County Counsel

Attachment

SETTLEMENT AGREEMENT AND MUTUAL RELEASES OF ALL CLAIMS

This Settlement Agreement and Release of Claims (the “**Agreement**”) is entered into by and between Water Environment Services (“**WES**”) a public entity formed under ORS Chapter 190, Brown and Caldwell, Inc. (“**BC**”), Slayden Constructors, Inc. (“**Slayden**”), and APSCO, LLC (“**APSCO**”), and shall effectuate a settlement and release of claims between these parties in exchange for the mutual consideration described herein. WES, BC, Slayden, and APSCO are collectively referred to as the “**Parties**” or individually as a “**Party**.” This Agreement shall be effective upon execution by all Parties.

RECITALS

- A.** WES contracted with BC for the design and engineering of improvements to the Kellogg Creek Water Resource Recovery Facility (Influent Pump Station, Pumps 1 & 3) located in Milwaukie, Oregon (the “**Project**”) on April 23, 2015.
- B.** WES contracted with Slayden for preconstruction and construction services on December 1, 2016 for the Project (the “**Construction Contract**”). Slayden contracted with APSCO to be the pump supplier for the Project.
- C.** After receiving authorization to proceed, BC and Slayden commenced work on the Project. In July 2019, Slayden installed two Flowserve pumps in the influent pump station that allegedly were unable to satisfy the performance specifications required by its contract with WES.
- D.** WES claims that BC’s design and engineering services related to the Project fell below the standard of care in the industry, and that Slayden and APSCO failed to meet Project requirements, that the Flowserve pumps failed to perform in accordance with the required specifications, and that it incurred delay and had to institute remedial measures, allegedly resulting in WES incurring monetary damages (the “**Claims**”).
- E.** BC, Slayden, and APSCO deny WES’s allegations in their entirety, deny any liability for any claims related to the Project, and deny that WES is entitled to recover monetary damages.
- F.** WES, Slayden, BC, and APSCO (the “**Parties**”) agreed to submit the matter to mediation. The settlement terms set forth in this Agreement are consistent with the settlement proposal recommended by the mediator.
- G.** The Parties desire to avoid the expense and uncertainty of litigation over responsibility for the Claims and have agreed to fully and finally resolve the issues based on the terms and conditions of this Agreement.

AGREEMENT

1. **Payment.** In consideration for the release of claims in Paragraph 2 below, the Parties agree to the following payment of funds:
 - a. BC shall pay WES one hundred sixty thousand and 00/100 dollars (\$160,000.00) (the “**BC Settlement Amount**”), by check payable to WES at 150 Beavercreek Road, 4th Floor, Oregon City, Oregon 97045, within thirty (30) days after mutual execution of this Agreement.
 - b. Slayden shall pay WES two hundred and twenty-five thousand and 00/100 dollars (\$225,000.00) (the “**Slayden Settlement Amount**”), payable through a reduction in retainage owed to Slayden by WES. WES agrees to pay the remaining retainage amount, minus the Slayden Settlement Amount, to Slayden within seven (7) days after mutual execution of this Agreement. This payment shall constitute Final Payment under the Construction Contract and the Parties acknowledge that Slayden has achieved Substantial Completion and satisfied all requirements, including the completion of the Punchlist, for Final Completion. The Parties will execute any Project documents necessary to close out the Project including, but not limited to, an amendment to the Contract Documents reflecting WES’ acceptance of an extended warranty from Flygt on pump #3.
 - c. APSCO shall pay Slayden a sum of one hundred thousand and 00/100 dollars (\$100,000.00) (the “**APSCO Settlement Amount**”), payable by check in three monthly installments, with the first payment occurring upon execution of this Agreement.
 - d. WES agrees to retain the two Flowserve pumps remaining at the Project site.
2. **Mutual Releases.** WES acknowledges and agrees that the BC Settlement Amount, the Slayden Settlement Amount, and the APSCO Settlement Amount are all tendered in full satisfaction of any and all alleged claims or damages, known or unknown, arising out of or in any way related to the Project, except any existing warranty claims owed by Slayden or any unknown latent defects that may be discovered within the applicable statutes of limitation and/or repose or any claim for defense or indemnity of third party claims for injury to person or damage to property, and BC, Slayden, and APSCO reserve any and all affirmative or other defenses to such excepted claims. WES represents and warrants that it has no actual knowledge of any claims or defects in the work performed on the Project by Slayden as of the date of the execution of this Agreement.

Except as expressly reserved above, in consideration of the covenants and conditions contained herein, all Parties, on their own behalf and on behalf of their owners, partners, divisions, affiliates, subsidiaries (wholly owned or otherwise), political subdivisions, predecessors, and successors in interest, agree to waive any existing claims that they may have against each other, and to release each other Party, and their agents, employees, members, elected officials, successors, agents, assigns, affiliates, insurers, attorneys, trustees, heirs and executors of and from any and all liability and past, present or future

claims, demands, claims for relief or causes of action whatsoever, which they may have or had against each other, whether known or unknown, suspected or unsuspected, liquidated or unliquidated, including all expenses, costs and attorney fees for damages of every kind or nature, arising out of or related to the Project.

The Parties affirm and represent that they have no knowledge of any other Claims or circumstances which may lead to future Claims related to the Project.

3. **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.
4. **Non-Disclosure.** The Parties agree that they shall maintain best efforts to not further disclose or publicize, or cause or permit to be further disclosed or publicized, the existence of the Claims, this Agreement or its specific terms, except to the extent they are required to do so by law. Instead, if asked, the Parties may disclose that the matter has been resolved. This Agreement will require formal approval of the Board of County Commissioners sitting as the governing body of WES and such approval will occur at a duly noticed public meeting and will be presented by County Counsel in a manner consistent with the spirit and intent of this section.
5. **Disputes.** In the event a dispute occurs between the Parties arising under this Agreement, the dispute shall be submitted to Mediator Dick Alexander, who shall act as sole arbitrator. Any decision rendered by Mr. Alexander shall be final and binding. In the event Mr. Alexander is not available to arbitrate a dispute, then the Parties involved in the dispute shall stipulate to a different arbitrator.
6. **No Attorneys' Fees.** Each Party shall be responsible for paying its own attorney fees and any costs related to prosecution or defense of claims related to the Claims.
7. **Further Assurances.** The Parties agree to take such action and execute such further documents, including modifications to this Agreement, as may be reasonably necessary to effectuate the intent of this Agreement.
8. **Governing Law.** This Agreement, and any disputes arising out of the language contained herein, shall be governed by the law of the State of Oregon.
9. **Amendments.** This Agreement may be amended or modified only by written agreement of the Settling Parties executed in the same manner as this Agreement.
10. **Severability.** If a court of competent jurisdiction holds any provision of this Agreement, or any portion thereof, to be invalid under any applicable statute or rule of law, such invalidity will not affect the validity of the other provisions of this Agreement. The Parties will substitute the invalid provision with a valid provision that most closely approximates the intent of the invalid provision.

- 11. **Signatures of Counterparts.** The Parties may execute this Agreement in multiple counterparts, each of which will comprise an original Agreement. Signatures on faxed or electronically scanned copies will be deemed the same as original signatures.
- 12. **Authority to Execute.** Each person who signs this Agreement represents and warrants that they have the right and authority to execute this Agreement on behalf of the Party for whom they sign. The Parties each represent and warrant that no consent of any person or entity who is not a party to this Agreement is necessary in order for this Agreement to be fully and completely binding on the Parties and their successors and assigns.
- 13. **Knowing Release.** The parties 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 any and all claims arising from, and related to, the Claims.

IN WITNESS WHEREOF, the undersigned Parties hereby execute this Agreement as a free and voluntary act and deed.

BROWN AND CALDWELL, INC.

WATER ENVIRONMENT SERVICES

Title: _____

Title: _____

SLAYDEN CONSTRUCTORS, INC.

APSCO, LLC

Title: _____

Title: _____