

SETTLEMENT AGREEMENT AND RELEASE

This Settlement Agreement and Release (“Agreement”) is made and entered into as of _____, 2020 by and between CITY OF SAN JOSE, a municipal corporation of the State of California (“City”) and BROWN AND CALDWELL, a California corporation (“Consultant”). City and Consultant are collectively referred to as the “Parties”.

RECITALS

A. On October 8, 2013, City entered into a contract with Consultant to provide professional engineering and design services for the Digester and Thickener Facilities Upgrade Project (“Project”) at the San José/Santa Clara Regional Wastewater Facility (“RWF”). The project involves modifying four existing digesters as part of an overall project that also includes modifications to six dissolved air flotation thickener (DAFT) units, associated sludge processing equipment, and biogas collection system. The contract, the amendment on February 26, 2015, and further authorizations issued for additional services, are collectively referred to herein as the “Contract” for reference purposes only.

B. The first phase of the project with the contractor for the Project, Walsh Construction Company (“Contractor”) began in around July 2016.

C. In or around July 2017, Consultant notified City and confirmed the existence of a “seismic uplift issue” that would require additional elements to resist potential seismic forces exerted by the existing digesters, as structurally modified through construction and including their liquid contents when operational (“Seismic Uplift Issue”). Consultant immediately initiated efforts to investigate, research, discuss, and ultimately design alternatives that could address those seismic forces, working collaboratively with City, its construction management staff and consultants, its program management staff and consultants, and Contractor, to agree upon appropriate alternatives to implement.

D. On July 31, 2017, City notified Contractor to stop structural work related to the Seismic Uplift Issue only, but to continue with all other work as set forth in the construction agreement between City and Contractor. City wrote to Consultant on August 1, 2017 to put Consultant on notice of a potential that Consultant could be responsible for costs and/or delay associated with the Seismic Uplift Issue.

E. In or around April 2018, and based on discussions between City and Consultant as described in Paragraph C. and directions received through this collaborative effort, City approved the final revised design to address the Seismic Uplift Issue. This design was comprised of the addition of continuous reinforced concrete ring beams around each of the 4 Digesters being retrofitted (Digesters No. 5 to 8) to resist the seismic uplift forces omitted in the original design. These additional buried reinforced concrete ring beams are 8’-3” wide by 11’-9” deep

around the entire perimeter of each digester. The large mass concrete ring beams provide the dead weight to resist potential seismic overturning uplift forces. The ring beams are connected to the digester walls by vertical seismic cables. (The final revised design, which address the above and associated other matters, are collectively referred to as the “Final Revised Design” for reference purposes only.)

F. Contractor has implemented the changes included in the Final Revised Design as reflected in change orders issued by City to Contractor.

G. Consultant has not billed City for any of the efforts involved in reaching the Final Revised Design, including different fully completed designs and repeated and overlapping reviews, which Consultant claims amount to approximately \$750,000.00. To the extent some or all of those efforts would otherwise be compensable those costs are referred to as “Consultant’s Seismic Uplift Costs.”

H. City denies Consultant is or should be entitled to compensation for any of “Consultant’s Seismic Uplift Costs”. It is City’s position that the design work or “efforts” as described above in Paragraph G., is not for new and/or additional work. Rather, City claims that to the extent Consultant’s Seismic Uplift Costs are accurate and verifiable, Consultant’s Seismic Uplift Costs were incurred by Consultant for work that should have been performed by Consultant had Consultant met its professional standard of care and designed the Project in accordance with all applicable laws including without limitation, compliance with all seismic building code requirements.

I. City claims that Consultant’s original design failed to account for certain forces that would act on the facility under a seismic event, and therefore, failed to comply with applicable seismic building codes. City claims that it has incurred additional costs or may incur additional costs in the future because of the Seismic Uplift Issue and claims those costs were caused by Consultant including, but not limited to, those characterized as Contractor change order costs, delays and extra work, hard costs to correct the Seismic Uplift Issue, contractor time related overhead and escalation costs related to delay, cost of an “over-engineered” system, price premium for work performed as a change order and obtaining a waiver from contractor as part of a change order covering the work, rework and additional work required during design and implementation of Seismic Uplift Issue work, costs incurred to mitigate City’s damages and perform rework, City and its third party consultant’s time related overhead and delay related expenses, city soft costs (extended overhead costs to manage and perform technical review of the revised seismic design and construction of the Project). City claims the Seismic Uplift Issue also has exposed the City to potential future costs, including but not limited to, the extent to which the Final Revised Design could result in digester tanks with excess, unusable capacity that might increase the City’s future maintenance costs for the Project. All of the City claimed current or future costs referred to in this Paragraph I. are collectively referred to as “City Seismic Uplift Costs.”

J. Consultant denies City claims and the nature and amount of damages claimed. Consultant asserts among other things, that the need for additional seismic support is as a result of the digester properties and are a project cost. As to schedule and delay claims, Consultant asserts that the overall Project has encountered other unrelated significant issues that have impacted Project cost and schedule, including during almost the same time period the discovery of polychlorinated biphenyls (PCBs) in caulk, concrete, and soils in construction expansion joints inside and adjacent to the digester structures being rehabilitated and, earlier leading up to the seismic uplift issue regulatory issues with BAAQMD related to severe corrosion of 78 inch piping that was discovered and required a 100 MGD reroute system and multiple changes in underground utility conditions on site. As a result, Consultant claims that there was no, or very little, schedule impact. Consultant asserts that Consultant's and City's collaborative efforts minimized project impacts, if any.

K. As to those other delays, City and Consultant have identified additional Consultant services both provided over the entire span of the Project and expected to be required in the future that are incurred as a result of other Project issues, such as PCBs and/or the severe corrosion of 78 inch piping, unrelated to seismic uplift issues, which City and Consultant have addressed separately in City's June 6, 2019 Notice to Proceed for Additional Services and documents referred to therein, as extended by City letter of August 8, 2019 and documents referred to therein (which two NTPs and attachments are referred to herein as the "Amendment for Unrelated Additional Project Efforts").

L. City and Consultant have negotiated in good faith regarding City Seismic Uplift Costs, Consultant's Seismic Uplift Costs, and related information, perspectives, and positions. As a result of those discussions, the Parties now each desire and believe it is in their best interest to fully resolve all of those issues.

NOW, THEREFORE, for good and valuable consideration, the receipt and sufficiency of which is hereby acknowledged by the Parties hereto, the Parties hereby agree as follows:

AGREEMENT

1. The total consideration to be paid to City by Consultant to fully resolve and settle City Seismic Uplift Costs, subject to the terms and conditions contained herein, is Two Million Seven Hundred and Fifty Thousand Dollars (\$2,750,000.00) ("Settlement Amount") consisting of the following:

a. Payment to the City of TWO MILLION FIVE HUNDRED THOUSAND DOLLARS (\$2,500,000) ("Settlement Payment"). City will provide tax identification documents and other information reasonably required by Consultant in order to issue the payment. Settlement Payment will be issued within thirty (30) days of this agreement being fully executed and tax identification information being provided to Consultant. The check shall be delivered to

City within thirty (30) business days from the date of San Jose City Council's approval of the Agreement.

b. Future professional engineering and/or design services as specified by City which have a value of TWO HUNDRED AND FIFTY THOUSAND DOLLARS (\$250,000) ("Future Work").

The scope of services for the Future Work shall include the services described in the Contract and/or in the Contract as it may be further amended. The value of Future Work shall be as described in the Contract and/or in the Contract as it may be further amended. All Future Work shall be performed in accordance with the terms of the Contract.

Consultant shall memorialize and account for the value of the Future Work performed through invoices to City in accordance with the terms of the Contract. Consultant's monthly invoice(s) shall reflect credit(s) against the Future Work performed by Consultant up to the amount of \$250,000. The Future Work may be performed over a period of time to be mutually agreed upon by the Parties and the \$250,000 credit(s) may be reflected in one or more monthly invoices.

2. In consideration of the Settlement Amount hereunder and other terms and conditions, City on behalf of its past and present employees, partners, agents, predecessors, successors, consultants, attorneys, insurers, assigns, executors, administrators, and elected officials, releases and forever discharges Consultant, any of its sub-consultants, and each of their respective insurers, past and present employees, partners, agents, predecessors, successors, consultants, attorneys, assigns, heirs, executors, and administrators, all of whom expressly deny any liability, from any and all claims, demands, damages, actions, or suits, known and unknown, past, present or future, relating to, arising out of, or in any way connected with the City Seismic Uplift Costs. City represents and agrees that its release shall also govern and bind others with a potential interest in the Project, including City of Santa Clara, the Treatment Plant Advisor Committee (TPAC), and the Technical Advisory Committee (TAC).

3. Consultant on behalf of its past and present employees, partners, agents, predecessors, successors, consultants, attorneys, assigns, executors, administrators, and heirs, hereby release and forever discharge City, its insurers, and its past and present employees, partners, agents, predecessors, successors, consultants, attorneys, elected officials, and assigns, all of whom expressly deny any liability, from any and all claims, demands, damages, actions, or suits, known and unknown, relating to, arising out of, or in any way connected with Consultant's Seismic Uplift Costs.

4. Section 1542 of the Civil Code of the State of California provides as follows:

A general release does not extend to claims that the creditor or releasing party does not know or suspect to exist in his or her favor at the time of executing the release and that, if known by him or her, would have materially affected his or her settlement with the debtor or released party.

The Parties represent that Civil Code section 1542 has been read and reviewed with counsel and understood, and that they hereby waive any and all present and future rights and benefits under Section 1542 to the extent it would permit claims relating to, arising out of, or any way connected to the claims released herein based on facts found to be different from the facts believed to be true at the time this Agreement was executed.

5. The Parties' respective releases set forth in this Agreement shall not affect the Parties' other rights under the Contract. Except as to matters released herein, the City's release shall not relieve the Consultant from any other obligations or professional duties it has under the Contract including, but not limited to, those pertaining to the Final Revised Design, and is intended only to settle the City's claims for City Seismic Uplift Costs. Except as to matters released herein, the Consultant's release shall not relieve City from any other obligations or duties it has under the Contract, and is intended only to settle the Consultant's claims for Consultant's Seismic Uplift Costs. In that regard, the Parties agree that such releases do not release or otherwise impact the Amendment for Unrelated Additional Project Efforts, and City agrees to separately approve and authorize those amendments and payment for services rendered in accordance with the Contract, as thereafter amended, which shall proceed separately.

6. The Parties understand and acknowledge that this Agreement constitutes a compromise and settlement of disputed claims released herein. The terms and conditions of this Agreement are not to be construed as an admission of liability or wrongdoing by either party, or as a concession by either Party as to the correctness or incorrectness of any Party's position concerning City Seismic Uplift Costs or Consultant Seismic Uplift Costs. Neither the Settlement Amount nor the negotiations of this settlement (including all statements and communications) by the Parties, their representatives, or their attorneys shall be considered admissions, and no past or present wrongdoing shall be implied by such payment of the Settlement Amount or negotiations. No act taken by the Parties, either previously or in connection with this Agreement, shall be deemed or construed to be an admission of the truth or falsity of any claims heretofore made or an acknowledgment or admission by any party of any fault or liability whatsoever to the other party.

7. Each of the Parties has cooperated in the drafting and preparation of this Agreement. Hence, any rule of construction to the effect that ambiguities are to be resolved against the drafting party shall not apply to the interpretation of this Agreement. This Agreement shall not be admissible in any action, suit, or other proceeding, whatsoever, as evidence or as an

admission of any claim or liability, provided, however, that any Party hereto may use all or part of this Release to the extent necessary to enforce any right conferred upon such Party by this Release or in connection with any suite alleging breach of this Release.

8. The Parties shall bear their own costs, expert and consultant expenses, including attorneys' fees, and any other fees incurred in connection with the claims released herein and this Agreement.

9. The Parties represent that they have not relied upon any representation, written or oral, in executing this Agreement, other than those statements contained in the Agreement, and instead have independently evaluated the matter with their own legal counsel, consultants, and others in deciding to enter into this Agreement. The Parties represent that they have had the opportunity to consult with legal counsel and have carefully read and understand the terms of this Agreement. The terms of this Agreement are voluntarily accepted for the express purpose of making a full and final compromise and settlement of the claims released herein.

10. This Agreement represents the entire agreement and understanding between the Parties regarding settlement of the City Seismic Uplift Costs and Consultant Seismic Uplift Costs and supersedes any and all prior and contemporaneous agreements, representations, and negotiations. This Agreement may be modified or amended only by a written instrument signed by all Parties hereto.

11. Each person executing this Agreement hereby warrants that they have full authority to do so. City represents that it is the sole holder of the claims relating to City Seismic Uplift Costs and is authorized to release those claims as provided herein. Consultant represents that it is the sole holder of the claims relating to Consultant's Seismic Uplift Costs and is authorized to release those claims as provided herein.

12. This Agreement shall become effective upon execution by all Parties and approval of the San Jose City Council.

13. This Agreement is intended to bind and benefit the parties, their heirs, agents, legal representatives, assigns, and successors in interest.

14. This Agreement may be executed in counterparts, each of which shall be deemed to be an original instrument, and all, when taken together, shall constitute the Agreement.

15. If any term or provision of this Agreement is determined to be illegal or invalid for any reason whatsoever, such illegality or invalidity shall not affect the validity of the remainder of this Agreement.

16. This Agreement, its validity, the construction of its terms and the interpretation of rights and duties of the parties hereto, shall be governed and construed under the laws of the State of California.

17. This Agreement is not intended to, nor shall it be construed to create or confer any rights or benefits in anyone not a party hereto except as expressly provided herein.

18. The Parties hereby acknowledge that they may hereafter discover facts different from and in addition to those, which they now know or believe to be true with respect to the Claims herein released, and agree that this Agreement shall be and remain in full force and effect in all respects, notwithstanding such different or additional facts.

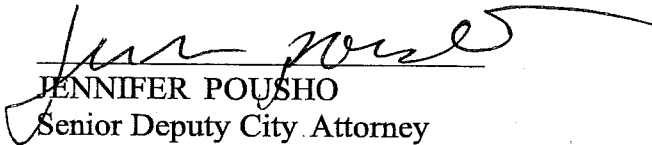
“CITY”

CITY OF SAN JOSE, a municipal corporation of the State of California

Date: _____

By: _____
RICHARD DOYLE
City Attorney


APPROVED AS TO FORM:


JENNIFER POUSHO
Senior Deputy City Attorney

“CONSULTANT”

BROWN AND CALDWELL, a California corporation

Date: FEBRUARY 07, 2020

By: 
Marc Damikolas, PE
Director of Operations