

6. Consideration of a Release and Settlement Agreement with Community Asphalt Corp.



## LEGISLATIVE MEMORANDUM

**TO:** Honorable Mayor and Members of the City Council

**FROM:** Patricia Smith, City Attorney

**THRU:** Patricia D. Smith, City Attorney

**DATE:** June 25, 2024

**RE:** Consideration of a Release and Settlement Agreement with Community Asphalt Corp.

### SUMMARY:

The City and Community Asphalt entered into a design-build contract to construct the St. Johns Heritage Parkway off the I-95 interchange. The contract was a Cost Plus a fee arrangement in which Community Asphalt was responsible for the design of the road and would receive a lump fee payment of \$752, 850. When the design services were complete, Community Asphalt would construct the roadway and would be compensated on a Cost Plus Fee, which was not to exceed their proposal amount for the construction services. There was a dispute between the City and Community Asphalt regarding whether some line-item costs were correct and Community Asphalt failed to achieve substantial completion by the contracted time. As a result, the City assessed liquidated damages.

There were three change orders changing the scope of work and providing time extensions for weather delays and other delays that Community Asphalt was not responsible for. Despite the City extending the substantial completion date to December 8, 2019, Community Asphalt failed to achieve substantial completion until January 16, 2020- 39 days late. The City assessed 39 calendar days of liquidated damages @ \$3,645.00 for a total of \$142,155.00. The City disputed \$331, 994.20 in credits that the City considered savings for underruns on certain line items. Initially the total disputed amount was \$474, 149.20. Community Asphalt made some concessions on the credits and alleged in their lawsuit they were owed \$412,576.60.

The City has approximately \$508, 766.01 remaining in funds set aside for Community Asphalt/SJHP Funding project:

\$176,771.81 – remaining project budget (unencumbered)

\$331,994.20 – remaining balance on existing PO 181056 to Community Asphalt

\$508,766.01 = give or take less than a dollar due to rounding.

Key provisions of the proposed settlement agreement:

The City pays Community Asphalt \$325,000.

Community Asphalt accepts the \$325,000 as the full settlement amount for any and all claims between Community Asphalt and the City related to any claims raised or that could have been raised in the lawsuit.

Community Asphalt dismisses the lawsuit with prejudice.

Each party bears their own attorney fees and costs.

**REQUESTING DEPARTMENTS:**

City Attorney's Office

City Manager's Office

**FISCAL IMPACT:**

Payment of \$325,000 from account

**STAFF RECOMMENDATION:**

Motion to approve settlement agreement and authorize the City Manager to execute the agreement.

**ATTACHMENTS:**

1. Release and Settlement Agreement

## **RELEASE AND SETTLEMENT AGREEMENT**

This **Settlement Agreement and Release** (hereinafter referred to as “**Agreement**”) is executed by:

### **I. PARTIES**

1. **THE CITY OF PALM BAY, FLORIDA**, a Florida municipality.

2. **COMMUNITY ASPHALT CORP., a Florida corporation** and its past, present and future principals, agents, employees, members, partners, representatives, officers, directors, managers, shareholders, parent and affiliated entities, subsidiaries, divisions, joint ventures, predecessors, transferees, successors, assigns and insurers (hereinafter collectively “Community”);

All of the foregoing parties to this Agreement are collectively referred to herein as “Settling Parties” or “parties”.

### **II. RECITALS**

**WHEREAS**, the City and Community entered into a design-build contract for the design and construction of the St. John’s Heritage Parkway in Brevard County, Florida (“the Project”);

**WHEREAS**, Community filed a lawsuit against the City for alleged non-payment related to the Project;

**WHEREAS**, the lawsuit is pending in the action styled *Community Asphalt Corp. v. The City of Palm Bay, Florida*, Case No.: 2023-CA-036384, filed in the Eighteenth Judicial Circuit in and for Brevard County, Florida (the “Litigation”);

**WHEREAS**, Nothing stated in this Agreement shall be deemed to be or construed as an admission by any party of any liability or obligation of one party to another;

**WHEREAS**, Settling Parties have had the assistance and advice of counsel or have had the opportunity to do so and are fully aware of the terms, conditions, and consequences of the settlement;

**WHEREAS**, the Settling Parties desire to resolve their differences without the cost of further Litigation;

**NOW, THEREFORE**, it is hereby agreed, by and between the Settling Parties, for and in consideration of the mutual promises contained herein, to enter into this Release and Settlement Agreement, as follows:

### **AGREEMENT**

1. Recitals. The Settling Parties agree that the foregoing recitals are true and correct and are incorporated herein by reference.

2. Payment of Settlement Amount. The City shall pay Community the amount of \$325,000.00 ("Settlement Amount") as follows:

Upon ratification of this Agreement by the elected council of CITY at a public hearing, this Agreement shall be executed by the City Manager and shall be binding upon all parties and shall inure to the benefit of each of their respective agents, attorneys, officers, directors, shareholders, employees, partners, successors and assigns. The City shall deliver the Settlement Amount to Community's counsel, Timothy Taylor, Esq., Taylor Corwin & Van Cleaf, PLLC, 255 Alhambra Circle, Suite 1170, Coral Gables, Florida 33134, by check made payable to Taylor Corwin Van Cleaf PLLC Trust Account no later 30 days following City Council's approval of the Settlement Amount.

3. Dismissal with Prejudice. Within ten (10) days of clearance of the full Settlement Amount, counsel for Community shall file a joint stipulation for dismissal with prejudice of all claims and shall submit an agreed order dismissing all claims with prejudice to the presiding judge in the Litigation.

5. 4. Settlement, Accord and Satisfaction as to any and all claims between the Settling Parties. Effective upon receipt and clearance of the full Settlement Amount, each Settling Party, on its individual behalf, and on behalf of its respective current and former officers, agents, representatives, employees, servants, assigns, administrators, parent corporations, subsidiaries, affiliated corporations, successors, predecessors, insurers and reinsurers, do hereby completely and fully release, remise, acquit, satisfy, and forever discharge each other, including such parties' respective current or former officers, agents, representatives, employees, servants, members, assigns, administrators, parent corporations, subsidiaries, affiliated corporations, successors, predecessors, insurers and reinsurers, from any and all claims, actions, causes of action, demands, debts, contracts, obligations, warranties, contractual indemnity rights, additional insured claims, attorneys' fees, rights, damages, costs, expenses, and compensation of any type or form, whether based on contract, tort, or other theory of recovery (including, but not limited to statutory causes of action), including but not limited to claims for property damage, including loss of use and personal property, medical expenses, personal injury, bodily injury, loss of income, mental anguish, pain and suffering, unfair claims handling or any other insurer misconduct, bad faith (statutory and common law), breach of contract and, without limiting the foregoing, any other losses or damages, whether compensatory (general and special), punitive or exemplary, or for attorneys' fees and costs, whether past or future, whether claimed to be due and owing under any statute, the common law, contract or insurance policy, past or presently existing, accrued or not yet accrued, known or unknown, latent or patent, foreseen or unforeseen, arising from or related in any way to the Project or which were or could have been raised in the Litigation.

6. Binding Effect. This Agreement shall be binding upon and inure to the benefit of each party hereto, its successors and assigns.

7. Litigation Costs. Each of the Settling Parties shall be responsible for its own attorneys' fees, costs and expenses incurred in connection with, or related to the Litigation.

8. Miscellaneous. The Settling Parties further agree as follows:

a. The parties acknowledge and agree that this Agreement is fully and adequately supported by consideration and is fair and reasonable. The parties further acknowledge and agree that: (i) each party has had the opportunity to consult with, and has in fact consulted with, such professionals, experts and legal counsel of its choice as such party may have desired with respect to all matters settled and resolved herein; (ii) each party has participated fully in the negotiation and preparation of this Agreement; and (iii) each party has carefully reviewed this Agreement and is entering into same freely. Accordingly, this Agreement shall not be more strictly construed against either party.

b. This Agreement shall be governed and construed in accordance with the laws of the State of Florida, shall be subject to Chapter 119, Florida Statutes, and jurisdiction is proper in Brevard County, Florida. In the event that any term or provision of this Agreement is determined by an appropriate judicial authority to be illegal, invalid or otherwise unenforceable, such provision shall have no force and effect upon the remainder of the Agreement, and all other provisions of this Agreement shall remain in full force and effect

c. It is understood and agreed that this Agreement constitutes a compromise of disputed claims and said compromise is made solely to prevent further involvement in what is anticipated to be expensive and time-consuming litigation, is made without regard to the merits or lack of merit of any of the claims asserted in the Litigation and that the Settling Parties deny any liability. Neither this document nor any consideration given hereunder is to be construed as an admission of any liability, express or implied, on the part of the Settling Parties. Each party hereto shall cooperate, shall take such further action and shall execute and deliver said release and dismissal documents as may be reasonably requested by any other party in order to carry out the provisions and purposes of this Agreement.

d. This Agreement may be executed in one or more counterparts, all of which taken together shall be deemed one original. Facsimile or electronic copies shall have the same force and effect as an original.

e. Any controversy or claim arising out of or relating to this Agreement or the breach or validity thereof shall be settled by a court of competent jurisdiction in Brevard County, Florida and the Parties consent to venue for this purpose.

f. The undersigned warrant that they are fully authorized to execute this Release.

g. The "Effective Date" of this Agreement shall be the date on which this Agreement is last signed by one of the parties hereto.

9. Entire Agreement. This Agreement constitutes the full and entire agreement and understanding between the Settling Parties with respect to the subject matter hereof and there are no agreements, representations, or warranties, except as specifically set forth herein. All prior discussions, negotiations, letters, demands and writings of any kind are fully merged into this Agreement and are to be construed to be of no further force or effect, it being the intention of the Parties that this Agreement shall serve as the sole and entire expression of their agreement and understanding. This Agreement may not be amended or modified except by an instrument in writing signed by the Settling Parties hereto.

10. Attorneys' Fees and Costs. In the event that any of the Settling Parties take action to enforce the terms of this Agreement, the prevailing party shall recover from the non-prevailing party all reasonable attorneys' fees and costs associated with such enforcement, including, but not limited to, reasonable attorneys' fees and costs at the trial and appellate levels.

11. Amendment. No amendment, modification, termination or waiver of any provision of this Agreement or consent to any departure from the terms hereof, shall be effective unless same shall be in writing and signed by the party against whom enforcement of the amendment, modification, termination or waiver is sought.

12. No Admissions. This Agreement is not to be considered a confession of judgment, admission of liability and/or admission of coverage by any of the Settling Parties or their insurers.

13. Headings. The headings in this Agreement are inserted for convenience, reference, and identification only and are in no way intended to define or limit or otherwise affect in any way the scope, meaning, or interpretation of the Agreement.

14. Severability. The invalidity or unenforceability of any provisions of this Agreement shall not affect the validity or enforceability of any other provision of this Agreement, which shall remain in full force and effects.

15. No Transfer of Claims. The Settling Parties represent and warrant that each are the owners of all claims that are being released and in fact are released and have not previously assigned any substantive right (*e.g.*, rights, claims, or defenses) at issue under this Agreement. The Settling Parties agree that this no transfer of claims provision is an essential condition of this Agreement.

16. No Presumption Against any Party as Drafter. Each party participated in the review, revision and finalization of the terms of this Agreement. Accordingly, the Parties hereto therefore acknowledge and agree that in interpreting this Agreement, any uncertain or ambiguous provisions shall not be construed against any party solely on the basis that that party selected the uncertain or ambiguous language.

17. Authority. The signatories hereto, and each of them, represent and warrant that they have the sole right and exclusive authority to execute this Agreement and that they are not restricted in doing so.

18. Good Faith. Each party expressly covenants to deal with the other parties in good faith in the performance of this Agreement. The parties further agree and authorize their respective attorneys to execute any and all documents and to undertake any and all actions reasonably necessary to effectuate the terms of this Agreement.

19. Waiver of Jury Trial. **Any claim or dispute arising in connection with this Agreement will be resolved by a judge, not a jury, in a court of law, and the Parties hereby expressly waive their right to a jury trial in connection with any such claim or dispute.**

THE CITY OF PALM BAY, FLORIDA

By: \_\_\_\_\_

Its: \_\_\_\_\_

Date: \_\_\_\_\_

COMMUNITY ASPHALT CORP.

By: **Donald** Digitally signed  
Its: **Hickey** by Donald  
Date: **Hickey** Hickey  
Date: 2024.05.22  
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