

**RESOLUTION NO. 2018-013**

**A RESOLUTION OF THE CITY COUNCIL OF THE CITY OF CALISTOGA, COUNTY OF NAPA, STATE OF CALIFORNIA, AUTHORIZING THE CITY MANAGER TO SIGN A SETTLEMENT AGREEMENT AGAINST WMB CONTRACTORS FOR LIQUIDATED DAMAGES REGARDING THE MONHOFF CENTER RESTORATION PROJECT**

**WHEREAS**, the Monhoff Center Restoration Project ("Project") was awarded to WMB General Contractors on August 2, 2016, and a Notice to Proceed was issued on August 30, 2016. Pursuant to the Notice to Proceed, the Project was to be substantially completed within 90 calendar days of August 30, 2016; and

**WHEREAS**, the Contract completion date was November 29, 2016; and

**WHEREAS**, portions of the Project's scope of work changed during the course of construction due to termite and mold damage, new service panels and electrical and perimeter wall repairs, resulting in a total of 10 change orders; and

**WHEREAS**, due to these change orders, WMB requested an additional 72 days to complete the work; and

**WHEREAS**, the Project was 141 days beyond the approved time of construction; and

**WHEREAS**, the City has \$46,409.80 in retention, and \$10,079.80 is currently unpaid on the Contract, for a total of \$56,489.60 (collectively the "Retained Funds"); and

**WHEREAS**, within 30 days of the effective date of the Settlement Agreement, the City shall issue and deliver a check to WMB from the Retained Funds for \$16,489.60; and

**WHEREAS**, the City shall withhold and keep \$40,000 of the Retained Funds, which shall constitute the Settlement Payment; and

**NOW, THEREFORE, BE IT HEREBY RESOLVED** that the City Council does hereby authorize the City Manager to sign the Settlement Agreement on behalf of the City.

**PASSED AND ADOPTED** by the City Council of the City of Calistoga on this **20<sup>th</sup>** of **February, 2018** by the following vote:

**AYES:** Councilmember Barnes and Vice Mayor Dunsford, Councilmembers Lopez-Ortega and Kraus and Mayor Canning  
**NOES:** None  
**ABSENT:** None  
**ABSTAIN:** None



**CHRIS CANNING, MAYOR**

**ATTEST:**

  
\_\_\_\_\_  
**Kathy Flamson, City Clerk**

## SETTLEMENT AGREEMENT AND RELEASES

The parties to this Settlement Agreement and Releases (“Agreement”) are the **City of Calistoga (“City”)** and **WMB General Contractors (“WMB”)**. City and WMB are referred to collectively as the “Parties.”

1. **OVERVIEW:** This Agreement is made with reference to the following facts:

1.1 The City engaged WMB to provide construction services for the project known as the City of Calistoga Monhoff Building Alteration Project (“Project”), located in the City of Calistoga, California, pursuant to an August 2, 2016, contract between the Parties (“Construction Contract”).

1.2 Pursuant to the Construction Contract, the Project was to be completed within 90 days, or by November 29, 2016.

1.3 The City approved a total of ten (10) change orders on the Project, and WMB requested and received approval for an additional 72 days to complete the work. The final change order approved by the City (Change Order #10) listed the total time for completion of the Project as 162 days.

1.4 The City Building Official issued a Temporary Certificate of Occupancy on June 29, 2017, which put the time of substantial completion of the Project at 303 days, 141 days beyond the approved time for construction. Per the Construction Contract, liquidated damages are set at \$800 for every calendar days’ delay beyond the time prescribed to complete the work.

1.5 In a letter to WMB dated July 27, 2017, the City assessed \$112,800 in liquidated damages against WMB. Currently, the City has \$46,409.80 in retention, and \$10,079.80 is currently unpaid on the Contract, for a total of \$56,489.60 (collectively the “Retained Funds”).

1.6 By this Agreement, the Parties wish to settle, resolve, and fully dispose of the City’s claim for liquidated damages and WMB’s claims for any additional payment for work related or incidental to the Construction Contract and/or Project (collectively, the “Claims”).

2. **CONSIDERATION:**

2.1 For a final resolution of the Claims, the WMB shall pay the City a total of Forty Thousand Dollars (\$40,000) in the form of the Settlement Payment, defined below.

2.1.1 Within thirty (30) days of the Effective Date of this Agreement, the City shall issue and deliver a check to WMB from the Retained Funds for \$16,489.60. The City shall withhold and keep \$40,000 of the Retained Funds, which shall constitute the Settlement Payment.

3. **MUTUAL RELEASES:**

In consideration of the fulfillment of the terms and conditions contained herein, and for other good and valuable consideration, the receipt of which is acknowledged by each party hereto, the Parties promise, agree, and release as follows:

3.1 **City Release.** Except as to such rights or claims as may be created by this Agreement, the City hereby releases and discharges WMB and its respective agents, brokers, employees, representatives, predecessors, successors, assigns, parents, subsidiaries, related entities, sureties, consultants, advisors, officers, directors, board members, administrators, executors, shareholders, attorneys, and insurers, and each of them from, and relinquishes, extinguishes and waives as to such parties, any and all claims, counterclaims, disputes, demands, liabilities, controversies, causes of action, damages, costs, expenses and attorneys' fees of any kind or nature, whether legal or equitable, in tort or contract, actual or contingent, patent, known or unknown, asserted or unasserted, that it ever had, now has, or may have that in any way arise out of or relate, directly or indirectly, to the Claims.

3.2 **WMB Release.** Except as to such rights of claims as may be created by this Agreement, WMB hereby releases and discharges the City and its respective agents, brokers, employees, representatives, predecessors, successors, assigns, parents, subsidiaries, related entities, sureties, consultants, advisors, officers, directors, council members, board members, administrators, executors, shareholders, attorneys, and insurers, and each of them from, and relinquishes, extinguishes and waives as to such parties, any and all claims, disputes, demands, liabilities, controversies, causes of action, damages, costs, expenses and attorneys' fees of any kind or nature, whether legal or equitable, in tort or contract, actual or contingent, known or unknown, asserted or unasserted, that it ever had, now has, or may have that in any way arise out of or relate, directly or indirectly, to the Claims.

3.3 **Reservation of Rights.**

3.3.1 The City's waiver and release in Paragraph 3.1 shall not extend to, and shall not include, any claims arising out of or relating to patent or latent deficiencies that may exist with respect to the Project.

3.3.2 The City represents and warrants that as of the Effective Date of the Agreement, the City is not aware of any patent or latent deficiency within the Project, and is not aware of any facts or circumstances that reasonably indicate that a patent or latent deficiency may exist.

3.4 WMB specifically and expressly waive the benefit of the provisions of Section 1542 of the Civil Code of the State of California as follows:

“A GENERAL RELEASE DOES NOT EXTEND TO CLAIMS WHICH THE CREDITOR DOES NOT KNOW OR SUSPECT TO EXIST IN HIS OR HER FAVOR AT THE TIME OF EXECUTING THE RELEASE, WHICH IF KNOWN BY HIM OR HER MUST HAVE MATERIALLY AFFECTED HIS OR HER SETTLEMENT WITH THE DEBTOR.”

3.5 WMB understands and acknowledges the significance and consequence of this specific waiver of the provisions of Section 1542 and hereby assume

full responsibility for any damage, loss, or liability that they may hereafter incur by reason of such waiver.

4. **REPRESENTATIONS AND WARRANTIES:** Each of the Parties to this Agreement represents and warrants to, and agrees with, each other party hereto, as follows:

4.1 Each party has been represented by legal counsel of its choosing, has received independent legal advice from its legal counsel with respect to the advisability of making the settlement provided for in this Agreement, with respect to the advisability of executing this Agreement, and with respect to the meaning of California Civil Code, Section 1542.

4.2 Each of the Parties represents that it has the authority to enter into this Agreement.

4.3 This Agreement is integrated and contains the entire agreement and understanding concerning the subject matter between the Parties, and supersedes and replaces all prior negotiations, proposed agreements, and agreements, written or oral. No party (nor any officer, agent, employee, representative, or attorney of or for any party) has made any statement or representation to any other party regarding any fact relied upon in entering into this Agreement. Each party expressly does not rely upon any statement, representation or promise of any other party (or of any officer, agent, employee, representative, or attorney for any other party) in executing this Agreement, or in making the settlement provided for in this Agreement, except as expressly stated in this Agreement.

4.4 Each of the Parties to this Agreement has made an extensive independent investigation of the facts pertaining to the provisions of this Agreement, and of all the matters pertaining thereto, as it deems necessary.

4.5 No party has assigned, transferred, hypothecated, or granted, or purported to assign, transfer, hypothecate, or grant, any of the claims, demands, causes of action or rights of appeal disposed of or assigned by this Agreement or its exhibits except as provided herein.

4.6 Each term of this Agreement is contractual and not merely a recital.

4.7 Each party is aware that it may hereafter discover claims, defenses, or facts in addition to or different from those it now knows or believes to be true with respect to the matters related to the Claims or this Agreement. By executing this Agreement, the Parties intend to fully, finally, and forever settle such matters, and all claims, disputes, demands, liabilities, controversies, causes of action, damages, costs, expenses and attorneys' fees of any kind or nature relative to the Claims, which do exist, may exist, or heretofore have existed between them; *except* as described in Section 3.3 above. In furtherance of the Parties' intent, the releases given herein will be, and remain, in effect as full and complete releases of all such matters, notwithstanding the discovery or existence of any additional or different claims, defenses, or facts relative to the Claims; *except* as described in Section 3.3 above.

5. **MISCELLANEOUS:**

5.1 **Voluntarily Executed.** This Agreement is being entered into and executed by the Parties voluntarily.

5.2 **No Waiver.** The waiver of any term, condition or covenant by any party, or breach thereof, shall not constitute a waiver with respect to that term at any future time or with respect to any other term, condition or covenant, or breach thereof, except as otherwise provided in this Agreement.

5.3 **Severability.** Should any part, term, or provision of this Agreement be decided or declared by the Courts to be, or otherwise found to be, illegal or in conflict with any laws of the State of California or the United States, or otherwise be rendered unenforceable, or ineffectual, the validity of the remaining parts, terms, portions, or provisions shall be deemed severable and will not be effected thereby, providing such remaining parts, terms, portions or provisions can be construed in substance to constitute the agreement that the Parties hereto intended to enter into in the first instance.

5.4 **No Adverse Construction of Agreement.** This Agreement is the product of negotiation and preparation by and among each party and their respective attorneys. The Parties acknowledge and agree that this Agreement shall not be deemed prepared or drafted by one party or the other and should be construed accordingly.

5.5 **Governing Law.** In the event of litigation relating to this Agreement, California law shall govern this Agreement.


5.6 **Effective Date of Agreement.** This Agreement is made and entered into on and as of the last date executed herein, which will be the Agreement's Effective Date.

5.7 **Counterparts.** This Agreement may be signed in counterparts, which together shall constitute the entire Agreement. Each party may sign this document and transmit its signature by means of facsimile or .pdf sent by electronic mail, which signature shall be binding for all purposes.

*(Signatures on following page)*

DATED: Feb 21, 2018

**CITY OF CALISTOGA**

By   
(Signature)

Dylan Feik  
(Print Name)

Title: City Manager

DATED: February 14, 2018

**WMB GENERAL CONTRACTORS**

By   
(Signature)

Gina Tonelli  
(Print Name)

Title: CFO