

SETTLEMENT AGREEMENT AND RELEASE OF CLAIMS

This SETTLEMENT AGREEMENT AND RELEASE OF CLAIMS ("Agreement") is made and entered into by and between S.J. AMOROSO CONSTRUCTION INC., a California Corporation ("Contractor") and the TOWN OF ATHERTON, a municipal corporation ("Town") referred to herein collectively as the ("Parties") and at times individually referred to as a ("Party").

RECITALS

The parties enter into this Agreement for the following purposes and under the following terms and conditions:

WHEREAS, Contractor and Town entered into a written agreement for certain construction services to be performed at the Atherton Town Center Project in March of 2019.

WHEREAS, as part of this written agreement, the parties have agreed to certain processes wherein new change proposal estimates (CPEs) are reviewed, processed and at times agreed upon.

WHEREAS, the Parties have negotiated and resolved CPEs for the Project from time to time. However, a number of new CPEs have been submitted to the Town by Contractor, which resolution, will close out the Project.

WHEREAS, the Contractor and Town now wish to set forth in full the terms and conditions governing a settlement agreement between the parties for the remaining CPEs.

NOW, THEREFORE, in consideration of the agreements and releases herein, the parties agree as follows:

SETTLEMENT TERMS

1. **Resolution of CPEs.** CPE Nos. 33.1, 42.2, 50.1, 53.1, 57.1, 137.1, 166.4, 206 and 282 comprise the remaining cost proposal estimates for the Project (the "Remaining Change Orders"), described more full in Exhibit A, attached and incorporated herein by reference. The Remaining Change Orders shall be resolved between the Parties as follows:

(a) **Additional Compensation.** The Town shall pay Contractor nine hundred and twenty-five thousand dollars (\$925,000.00) for the completion and closing out of the Remaining Change Orders, which Contractor shall complete to the Town's satisfaction. This payment will include any and all CPEs for the Project and include any payment for delays, supplies, materials, and payment to subcontractors or other third parties, as applicable and will be paid to Contractor in December 2022.

(b) **No Additional Compensation or Remedies.** The Parties agree that the following constitutes the final Project accounting upon which this Agreement and the CPEs are based. Contractor acknowledges and agrees that the Town's payment, as set forth in Section 1(A) shall constitute the final and only remaining payment to it for the Project. Contractor further acknowledges and agrees that it will not seek any additional CPE, compensation, or remedies from the Town. Contractor will use the funds set forth in Section 1(A) to pay third parties and subcontractors, as appropriate, and in its discretion.

(c) **Notice of Completion.** Upon completion of all outstanding work associated with CPE 263, and upon full execution of this Agreement, the Town will issue Contractor with a Notice of Completion.

2. **Escrow Account for CPE No. 263.** Separate and in addition to the obligations and commitments set forth in Section 1, above, Contractor shall deposit twenty thousand two-hundred and seventy six thousand (\$20,276) dollars to the established escrow account for CPE No. 263 that would be held in escrow until completion of the work. Contractor shall deposit these funds not later than January 6, 2023, which would total the escrow fund to thirty one thousand and eight hundred and seventy-six (\$31,876) dollars. Upon completion of the work associated with CPE No. 263 (Town Hall doors) to the Town's satisfaction, which is expected to occur in Spring 2023, Contractor will issue a request to the City Manager for release of these funds to it. The City Manager or his/her designee will inspect the work and release these funds to Contractor.

3. **Each Party to Bear Own Fees and Costs.** Each party shall bear their own fees and costs for preparing and/or responding to CPE No. 263, the Remaining Change Orders, and this Agreement.

4. **Release and Waiver by Contractor.**

(a) **Release.** This Release is a compromise and settlement of disputed claims. Nothing in this Release shall be interpreted, used, or construed as an admission of fault or wrongful conduct of any kind by any of the Parties. In consideration for the agreements as set forth herein, Contractor, on behalf of itself and its owners, heirs, successors, assigns, insurers, lenders, lien holders, attorneys, agents, and other representatives does hereby release the Town, and its councilmembers, mayors, officials, boards, commissions, managers, employees, attorneys, insurance companies, agents, and other representatives, from any and all claims, actions and causes of action, obligations, liabilities, indebtedness, breaches of duty, claims for injunctive and other equitable relief, suits, liens, losses, costs or expenses, including attorneys' fees, of any nature whatsoever, known or unknown, fixed or contingent, arising out of the claims made in this Agreement, or arising from the Project, including but not limited to any future CPE requests or requests for additional monies due for work on the Project.

(b) **Waiver of Civil Code Section 1542:** By releasing and forever discharging claims both known and unknown as above provided, Contractor expressly waives any rights under California Civil Code section 1542, which provides:

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

Contractor waives and relinquishes any rights and benefits which it has or may have under section 1542 of the Civil Code of the State of California. Contractor has performed a full and complete investigation of the facts pertaining to the settlement. Nevertheless, Contractor acknowledges that it is aware that it may hereafter discover facts in addition to or different from those which it now knows or believes to be true with respect to the subject matter of this Release, but it is Contractor's intention hereby to fully and finally forever settle and release any and all matters, disputes and differences, known or unknown, suspected and unsuspected, which now exist, may exist or heretofore have existed, as against the Town, arising out of the claims made in the Action and, in furtherance of this intention, the release herein given shall be and remain in

effect as a full and complete general release notwithstanding discovery or existence of any such additional or different facts. This Release sets forth the entire agreement of the Parties and supersedes any and all prior agreements or understandings, if any, between them pertaining to the subject matter hereof, and shall not be modified or altered except by a subsequent written agreement signed by the parties. This Release shall be binding upon and inure to the benefit of the Parties, their respective representatives, shareholders, officers, directors, employees, affiliates, successors, heirs and assigns

5. **No Admissions and Non-Precedential Nature Of Settlement.** Nothing contained in this Agreement shall be deemed as an admission of any kind by or to any other party to this Agreement. This Agreement will have no precedence over the calculation or methodology of any future claims or disputes by the Town.

6. **Governing Law.** The rights and obligations of the parties, and the interpretation and performance of this Agreement, shall be governed by the laws of the State of California. To the maximum extent permitted by law, the Parties agree that all actions or proceedings arising in connection with this Agreement shall be tried and determined in the Superior Court of the State of California, in and for the County of San Mateo.

7. **Warranty of Non-Assignment.** The parties to this Agreement, and each of them, warrant that they have not assigned to any other person or entity the claims which are the subject of this Agreement.

8. **Severability.** The parties hereto further agree that if, for any reason, any provision hereof is unenforceable, the remainder of this Agreement shall nonetheless remain binding and in effect.

9. **Modifications, Amendment and Waiver.** No amendments or modifications to this Agreement shall be of any force or effect unless contained in a writing signed by each party affected by such modification. No waiver of any of the provisions hereof shall constitute a waiver of any other provision, nor shall any waiver constitute a continuing waiver. No waiver shall be binding unless executed in writing by the party making such waiver.

10. **Representation by Counsel.** This Agreement has been carefully read by the parties and the contents hereof are known and understood by all parties. The parties have had the opportunity to receive independent legal advice from attorneys of their choice with respect to the preparation, review and advisability of executing this Agreement. The parties acknowledge that they have executed this Agreement voluntarily after independent investigation and without fraud, duress or undue influence.

11. **Captions.** All paragraph captions are for reference only and should not be considered in construing this Agreement.

12. **Integration of Agreement.** This Agreement sets forth the entire agreement between the parties relating to the Project, and fully supersedes other oral and written understandings or agreements between the parties.

13. **Counterparts.** This Agreement may be executed in counterparts, each of which shall constitute an original and all of which shall be considered one and the same instrument.

IN WITNESS WHEREOF, the parties hereto have executed this Settlement

Agreement and Release of Claims as of the last date set forth below, which shall be the effective date of this Agreement.

TOWN OF ATHERTON:

By: _____ /
George Rodericks, City Manager/(Date)

ATTEST:

City Clerk

APPROVED AS TO FORM:

Mona G. Ebrahimi, City Attorney

S.J. AMOROSO CONSTRUCTION, INC.:

By:  _____
Name: Robert Erskine / (Date) 1/9/23
Title: President

APPROVED AS TO FORM:

Attorney