

**City of Carson City
Agenda Report**

Date Submitted: 04-19-13

Agenda Date Requested: 05-02-13

Time Requested: 5 Minutes

To: Mayor and Supervisors

From: Department of Public Works

Subject Title: Action to approve "CONTINGENT SETTLEMENT AGREEMENT" which would dispose of the lawsuit in *Peek Construction Company v. City and County of Carson City*, Case Number 11-OC-00325-1B (the "Litigation"), pending in Nevada's First Judicial District Court in and for Carson City. (Joe Ward/Andrew Burnham)

Staff Summary: Approval of the subject "CONTINGENT SETTLEMENT AGREEMENT" will provide a favorable resolution to the lawsuit brought by the contractor for the N/S Waterline Project - Phase 1 against the City. The settlement is for \$550,000. The original claim was in excess of \$1,700,000 and two years ago an offer to settle the suit for \$300,000 was made. The original bid by Peek was \$1,991,106 approximately \$500,000 below the average of the next three bids.

Type of Action Requested: (check one)
 Resolution Ordinance
 Formal Action/Motion Other (Specify)

Does This Action Require A Business Impact Statement: Yes No

Recommended Board Action: I move to approve "CONTINGENT SETTLEMENT AGREEMENT" which would dispose of the lawsuit in *Peek Construction Company v. City and County of Carson City*, Case Number 11-OC-00325-1B (the "Litigation"), pending in Nevada's First Judicial District Court in and for Carson City.

Explanation for Recommended Board Action: In February of 2010 Carson City and El Camino Construction acting as Peek Construction ("Peek") entered into a \$1,991,106.00 contract for the North-South Water Transmission Main Project-Phase 1, Project No. 0910-124 ("Project"). The aforementioned Litigation stems from a project construction claim dispute. Peek's surety, Travelers Casualty and Surety Company of America ("Travelers") now stands in the shoes of Peek. On April 9, 2013 the parties, Carson City and Travelers participated in a mediation of their dispute. Contingent upon Board of Supervisor approval of an agreement to pay Travelers \$550,000.00 Travelers will voluntarily dismiss the aforementioned lawsuit and indemnify and hold Carson City harmless from and against any and all claims from any subcontractor and/or vendor made in relation to the Project. The original claim was in excess of \$1,700,000 and two years ago an offer to settle the suit for \$300,000 was made. The original bid by Peek was \$1,991,106 approximately \$ 500,000 below the average of the next three bids.

Applicable Statute, Code, Policy, Rule or Regulation: NA

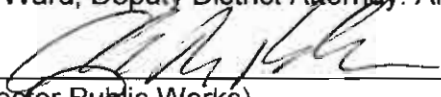
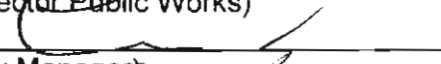

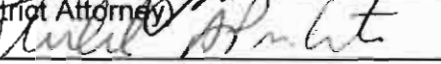
Fiscal Impact: \$550,000.00

Explanation of Impact: Will reduce available capital funding.

Funding Source: Water Capital 520-3505-435-78-10.

Supporting Material: "CONTINGENT SETTLEMENT AGREEMENT".

Prepared By: Joe Ward, Deputy District Attorney. Andrew Burnham, Public Works Director

Reviewed By:  Date: 4-18-13
(Director Public Works)
 Date: 4/23/13
(City Manager)
 Date: 4/23/13
(District Attorney)
 Date: 4/23/13
(Finance Director)

Board Action Taken:

Motion: _____ 1) _____ Aye/Nay
2) _____ _____

(Vote Recorded By)

CONTINGENT SETTLEMENT AGREEMENT

This SETTLEMENT AGREEMENT (hereinafter the "Agreement"), when approved by The City and County of Carson City ("Carson City") as provided below, is made and entered into between Carson City, a political subdivision of the State of Nevada, through its Public Works Director Andrew Burnham, and Travelers Casualty and Surety Company of America ("Travelers") on April 9, 2013. Carson City and Travelers shall be referred to as the "Parties."

I.

RECITALS

1. In December 2009, Carson City began soliciting bids for the North-South Water Transmission Main Project-Phase I ("Project").
2. El Camino Construction ("ECC") submitted its bid for said Project. Upon the opening bids, ECC was deemed the lowest responsible bidder; therefore, in February 2010, Carson City and ECC entered into a One Million Nine Hundred Ninety One Thousand One Hundred and Six Dollar (\$1,991,106.00) contract. The subject contract has been referred to as Project Number 0910-125.
3. ECC, acting as Peek Construction, filed suit in *Peek Construction Company v City and County of Carson City, First Judicial District Court Nevada Case Number 11-OC-00325-1B* (the "Litigation") alleging certain damages that arose from the Project.
4. Travelers received an Order from the United States District Court for the District of Nevada in the matter of *Travelers Casualty and Surety Company of America v Williams Brother, Inc., et al., USDC Case Number 2:12-cv-0058-LDG-*

RJJ, declaring Travelers the owner of the claims made by ECC (Peek Construction) in the Litigation (the "Order").

5. Travelers, in accordance with the Order, substituted as plaintiff in the Litigation in place of ECC (Peek Construction) and enters into this contingent Agreement with full and legal right to do so.

II.

SETTLEMENT TERMS

NOW, THEREFORE, IN CONSIDERATION OF THE MUTUAL COVENANTS AND PROMISES HEREINAFTER SET FORTH, AND IN ORDER TO AVOID THE UNCERTAINTIES AND EXPENSE OF LITIGATION, IT IS AGREED BY AND AMONG THE PARTIES AS FOLLOWS:

6. The Parties agree that upon satisfaction of the contingency set forth in paragraph 11, below, they shall stipulate to dismissal of the Litigation, with prejudice, each party to bear its own costs and fees, including attorney fees.

7. Carson City agrees to pay Travelers Five Hundred Fifty Thousand Dollars (\$550,000.00), upon the approval of this Agreement by the Carson City Board of Supervisors, as full and final payment under the contract.

8. The settlement check, draft or warrant may be made payable to Travelers and this sum is inclusive of any and all costs and attorneys' fees.

9. Each party shall be responsible for its own costs, expenses and attorneys' fees in connection with this matter.

10. By way of this Agreement, neither party makes an admission.

11. The settlement reflected in this Agreement is contingent upon approval by the Carson City Board of Supervisors and becomes effective upon its execution by the Mayor of Carson City as Chairman of the Carson City Board of Supervisors.

12. Each party mutually releases, acquits, and discharges the other from any and all claims, actions, cause of actions, demands, costs and expenses, existing either directly or indirectly, known and unknown, on account of or in any way growing out of or connected the Project or the work performed or agreed to be performed thereunder.

13. Travelers agrees to indemnify and hold Carson City harmless from and against any and all claims for payment made by or on behalf of any subcontractor and/or vendor providing or purporting to provide labor, equipment, materials and supplies to the Project. Any such claim shall be tendered by Carson City to Travelers for Travelers defense and control.

14. If any party is required to institute legal action to enforce their rights and privileges under this Agreement or to have the meaning of any terms, provisions and conditions over which there is a dispute, declared and determined by a court of law, the prevailing party or parties in any final judgment, shall be entitled to all court costs and reasonable attorney fees as determined by the court.

15. Except as set forth herein, this is the entire Agreement between the parties hereto and no promise, inducement or representation other than herein set forth has been made, offered or agreed upon. The terms of this Agreement and the release are contractual and not a mere recital. This is a compromise

settlement of disputed claims and not an admission by any party. The parties agree that each has had their respective counsel review this Agreement and further agree that it shall be construed as if it was jointly drafted.

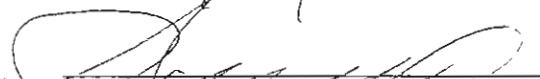
16. This Agreement shall be governed by the laws of the State of Nevada.

17. This Agreement may be executed simultaneously in one or more counterparts, each of which shall be deemed an original, but all of which together shall constitute one and the same instrument.

18. The persons signing this Agreement in a representative capacity acknowledge and warrant that they have full authority to do so.


IN WITNESS WHEREOF, the Parties have caused this Agreement to be executed by their duly authorized representatives.

Dated: 4/9/13



Steve Pand on behalf of
Travelers Casualty and Surety
Company of America

Dated: 4-9-13



The City and County of Carson City
Public Works Director Andrew Burnham

Dated: _____

Mayor Robert Crowell as Chairman
of the Carson City Board of Supervisors